
CANADA / JUDGMENT

Lindquist v. Waring

2007 BCSC 205

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 205 Lindquist v. Waring

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lindquist v. Waring,

2007 BCSC 205

Date: 20070212

Docket: E07011

Registry: Courtney

Between:

Daniel Ivan Roy Lindquist

Plaintiff

And

Elizabeth Ann Waring

Defendant

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for Plaintiff:

P. Field

Counsel for Defendant

C. Sinclair

Date and Place of Trial/Hearing:

January 15, 16, & 17, 2007

Campbell River, B.C.

INTRODUCTION

- [1] This is an action by the plaintiff that forms part of two parallel proceedings arising out of the parties' co-ownership of certain property referred to as the "Kilpatrick Property". The Kilpatrick Property was purchased at a time when the parties were living together in a common law relationship and it was registered in both parties' names as joint tenants. The parties are now estranged and seek a determination as to their respective entitlements to share in the equity of the Kilpatrick Property.
- [2] The Kilpatrick Property was sold pursuant to an order of Mr. Justice Taylor dated November 16, 2005 under Action No. 06905; \$124,000, representing the net proceeds of sale, was placed in trust pending a determination of the respective entitlements of the parties. By a subsequent order of the court, a total of \$62,000 was released from trust and paid to the parties in equal shares.
- [3] While the plaintiff admits the defendant is entitled to a share of the sale proceeds, he argues that an equal division would be inequitable given his far larger financial contribution to the acquisition of the Kilpatrick Property. The defendant argues it was the mutual intention of the parties that the equity in the Kilpatrick Property would be shared equally and that the statutory presumption of equal beneficial ownership found in s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 has not been rebutted.
- [4] In addition, the defendant counterclaims for: an accounting of the monies received by the plaintiff for renting part of the Kilpatrick Property during the period January 1, 2005 until the sale of the property on June 9, 2006; the taxes payable in respect of the Kilpatrick House that were deducted from the sale proceeds; and the delinquent mortgage payments deducted from the sale proceeds. The plaintiff acknowledges the validity of an accounting in regard to the taxes owing and the delinquent mortgage payments. He denies an accounting of the rental monies is warranted as these funds were used to pay the mortgage until May 2006.

FACTS

- [5] The parties met in or about May 2000 in Courtney, B.C., where they both resided at the time. They were in their late thirties at the time. The parties became acquainted through a mutual friend and business associate, Mark Nichol. Mr. Nichol had hired the defendant as a secretary to help with his work as a financial planner and investment counsellor for Dundee Securities Corporation. The plaintiff was enrolled at Excel College and taking courses to become certified as a financial planner. He had been engaged by Mr. Nichol to do a morning

stock report on the internet from his home.

- [6] The plaintiff had worked at a variety of labour intensive jobs since completing high school and had purchased a house (the "Urquhart House") in 1995. The plaintiff resided at the Urquhart House with his sister who paid him rent. Both the plaintiff's sister and mother had contributed to the down payment for the home. There was also a substantial mortgage registered against the property for which the plaintiff was solely responsible.
- [7] In late 1995, the plaintiff was involved in a motor vehicle accident that left him disabled and unable to work for several years. He took some courses at Selkirk College in an effort to retrain and obtained a settlement from ICBC in 1998 in the amount of \$106,000. He also suffered from Hepatitis C caused by a blood transfusion administered in 1984 and eventually received a settlement from the Red Cross in 2001 in the amount of \$70,000.
- [8] The plaintiff used the ICBC settlement funds to pay off the mortgage against the Urquhart House and then borrowed \$50,000 on a line of credit to use for investing in the stock market. He also had about \$36,000 in an RRSP. Thus, when he met the defendant, the plaintiff estimated his net worth was about \$217,000, which included his equity in the Urquhart House, RRSP monies, and about \$42,000 in non-registered investments. Although his line of credit had increased to \$69,000 by this time, when the plaintiff received his Red Cross settlement in 2001, he paid \$56,000 on the line of credit.
- [9] Although the plaintiff obtained a certificate in financial planning from Excel College, he did not seek work as a financial planner. Instead, the plaintiff stayed on with the college as a part time instructor. The defendant's tax return for 2000 is not in evidence, but it is apparent that his employment income for this year was nominal. Most of his income was derived from his investment profits and interest earned on his savings.
- [10] The plaintiff did not become a regular instructor for the college; at most he taught two or three courses during 2000 and 2001. In subsequent years his employment was irregular; he spent time and money investing in the stock market, attempting to start his own businesses, and searching out investment opportunities. In 2002, he spent six months working on the defendant's brother's fish boat and in late 2004 he obtained a job as an in-home care worker for a disabled adult. Excluding monies withdrawn from his RRSP, the plaintiff's income for 2001 was \$19,101, for 2002 it was \$5,663, for 2003 he reported a loss of \$9,674, and in 2004 his income was \$1,711. These income amounts are somewhat misleading because the plaintiff's rental income from the Urquhart House was sometimes claimed on the defendant's income tax returns.
- [11] The defendant was married in 1980 at age 19; she had two children, Scott, who is now 26 years old and Sonya, who is now 22 years old. The defendant's husband committed suicide in 1997. This devastating event led to a number of changes in the defendant's life. Scott went to live with the defendant's brother while Sonya remained with the defendant. The defendant sought counselling to help her deal with the loss of her husband and the new life she faced without him. Apart from a widow's pension, the defendant had no other source of income

and her earning potential was marginal. She had very little work experience having been a homemaker throughout the marriage.

- [12] As a result of her dire financial situation, the defendant had to seek work for the first time in many years. In August 1999, she began to work for Mr. Nichol as a secretary. She had previously exchanged riding lessons for tax advice from Mr. Nichol. In 1994, the defendant became certified as a horse riding instructor and acquired three horses of her own.
- [13] The defendant and her husband owned a home with acreage which was used for the defendant's horses. To make extra money the defendant gave riding lessons. Unfortunately, this property had to be sold to pay for the family's living expenses. In January 1999, the defendant sold this property and realized about \$145,000 from the sale. She immediately purchased a condominium on Hawk Drive in Courtney for \$99,250 and the balance of \$44,485 was taken in cash. The defendant placed \$37,000 in a trust account for Sonya and used a portion of the balance for the family's living expenses. She also retained her horses and paid about \$750 per month to board them at a nearby stable.
- [14] Some time after the sale of her house, the defendant was enticed into commodities trading by Mr. Nichol who invested Sonya's trust monies in high risk stocks. Mr. Nichol also convinced the defendant to take out a \$40,000 mortgage against the Hawk Drive property to invest in the stock market. Although the evidence on this point is contradictory, it appears the defendant may have lost about half of her initial investment. Sonya's trust fund seems to have been saved and reinvested in more secure stocks. The defendant was laid off from her job with Dundee Securities in June 2000 and thereafter had part time work at a Subway, at the Bar None, and at her brother's café. Her income for 2001 was \$10,616, for 2002 it was \$14,119, for 2003 it was \$14,501, and for 2004 it was \$12,656.
- [15] While working for Mr. Nichol, the defendant took a mutual fund course which would allow her to give telephone information to clients concerning their accounts with Dundee Securities. The plaintiff was teaching this course and this is how they met. Although the parties disagree as to when they began to live together, it is apparent their relationship progressed quickly. They met in or about May 2000 and spent most of their time together after that date. The parties may not have formally lived together until early 2001; however, in many respects they carried on as if they were in fact common law spouses.
- [16] In August 2000 they set up a joint investment account with TD Waterhouse and each contributed \$15,000. At the time of the application the defendant indicated an annual income of \$21,000 and the plaintiff stated he had an annual income of \$30,000. The defendant indicated a net worth of \$53,000 which represented the equity in her home and the plaintiff disclosed a net worth of \$217,000. The plaintiff later claimed some of the defendant's losses in this account on his own income tax return.
- [17] The parties also started looking for acreage to allow the defendant to pursue her interest in horses without incurring the high cost of boarding them at outside stables. When it became apparent that acreage was not readily available to them, the parties decided to purchase a

building lot on the South Island Highway in Courtney, (the "Royston Property"), with a view to building a spec home and selling it for a profit. The purchase was completed in October 2000 for the sum of \$59,500 and the parties were registered on title as joint tenants. The defendant paid the \$5,000 deposit, the vendor took a mortgage back in the amount of \$35,000, and the plaintiff paid the balance of \$19,500. The parties each paid half of the mortgage payments between November 2000 and March 2001 for a total of \$1,226.

- [18] In December 2000, the defendant sold her condominium on Hawk Drive and rented property on Butchers Road while the house on Royston was being built. The net sale proceeds of \$35,446 were deposited into the defendant's CIBC bank account. The plaintiff also moved into the Butchers Road house and paid the rent for the premises. Throughout this period the parties spent their money freely without keeping records as to how much each contributed to their living expenses. It appears that the defendant continued to pay large sums to board her horses, but she also paid for hydro, cable, and telephone charges. Sonya lived with the parties until they moved into the Royston Property or shortly thereafter.
- [19] In April 2001 the parties jointly obtained a builder's mortgage for \$93,000 to facilitate the construction of the home on the Royston Property. The plaintiff and the defendant then paid various monies on account of the construction. The defendant paid \$921 for the Home Warranty program while the plaintiff paid \$21,866 for contractor's draws and property taxes. In September 2001, the parties consolidated their mortgages on the Royston Property with the Maple Trust mortgage in the amount of \$120,000. The parties were jointly responsible for this mortgage and opened a joint account for the mortgage payments. Finally, in October and November 2001 the plaintiff was refunded \$10,477 in respect of his payments for the construction of the house. Thus, his contribution to the Royston Property up until September 2001, and excluding mortgage payments, was \$11,389 ($\$21,866 - \$10,477 = \$11,389$).
- [20] In November 2001, the parties left the Butchers Road house and moved into the Royston Property because the real estate market was not yet optimum for selling it. While a number of deposits to the mortgage account for the Royston Property cannot be attributed to either party, it is apparent that the plaintiff paid a larger share of the payments as well as the taxes owing on the property. Between November 2001 and October 2003, when the Royston Property was sold, the plaintiff contributed \$16,498 toward the mortgage payments and taxes. The defendant contributed \$1,028 during the same period. The parties never discussed their respective financial contributions to the Royston Property. Nor was there any discussion of how the profits would be divided if the house was sold.
- [21] To finance the mortgage payments the plaintiff used his line of credit, which was about \$72,000 by the end of October 2003. He also used the rental income from the Urquhart House. The defendant had exhausted her investment funds and her equity from the sale of the Hawk Drive residence by early 2002. The defendant used her savings and her widow's pension to pay for living expenses and for the care of her horses. She also stopped working to attend classes at the North Island College between September 2002 and September 2003.

These courses were funded in part by E.I. The plaintiff also paid for some of the defendant's courses at the college.

- [22] In 2002, the plaintiff traveled to the Queen Charlotte Islands with the defendant's brother to work on his fish boat. During the six months he was away, the plaintiff sent money to the defendant for the mortgage account and for the expenses associated with the Urquhart House. The defendant collected the rent from the Urquhart House for the plaintiff and paid all the bills for both residences.
- [23] When the plaintiff returned to Courtney, he discovered that the defendant had changed the locks on their house and put his possessions into storage. The defendant had become involved with another man and was ambivalent about continuing her relationship with the plaintiff. The parties went to a counsellor for several months and by the end of 2002 had resumed their relationship.
- [24] It appears from the evidence that the plaintiff was committed to his relationship with the defendant and clearly wanted to provide her with financial security. In July 2003, he signed a codicil to his will bequeathing to the defendant a share in the Urquhart House, an undivided one half interest in the Royston Property, the proceeds of his life insurance policy in the amount of \$50,000, and the balance of any monies left in his estate after paying debts. The plaintiff testified that at the time he did not understand that the defendant's rights as a joint tenant included the right of survivorship.
- [25] At the beginning of October 2003, the plaintiff sold the Urquhart House. After paying the amounts owing to his mother and to his sister for their contributions to the property, the plaintiff retained \$22,000 net profits.
- [26] At the end of October 2003 the parties sold the Royston Property for \$193,844. After paying out the mortgage, taxes, and legal costs, as well as various debts, the parties had net sale proceeds of about \$76,000. At this time, the parties' relationship was once again strained. The defendant wanted to leave the relationship and asked the plaintiff to give her half of the monies from the Royston Property to purchase her own home. The plaintiff refused and threatened a law suit if the defendant left the relationship. The plaintiff testified that he felt that he was being blackmailed by the defendant's demands for an equal share in the Royston property, as well as part of the sale proceeds from the Urquhart House, because it came at a time when he was close to purchasing another residence known as the Kilpatrick Property. The Kilpatrick Property consisted of a commercial space on the main floor, combined with a suite on the upper floor.
- [27] Notwithstanding the defendant's demands, and her desire to separate, it is apparent that the plaintiff wanted to salvage the relationship. After much discussion, the defendant reluctantly agreed to buy the Kilpatrick Property with the plaintiff and to work on their relationship. Before the purchase, the plaintiff divided the Royston Property sale proceeds equally with the defendant. In addition, the plaintiff agreed to deposit \$10,000 from the sale of the Urquhart House into an investment account and designated the defendant as a joint owner

of the account. Although the plaintiff testified that his agreement to credit the defendant with \$5,000 in an investment account was to compensate her for the Royston Property, their written agreement, dated October 31, 2003, indicates that this money came from the sale of the Urquhart House and contains no reference to the defendant's share in the Royston Property. In particular, the parties' agreement says:

This money is to show good faith, and fairness, and is from the proceeds of the sale of 2378 Urquhart Ave.

Reasonable and fair portions of any surplus income will be divided equally. Both Ann and Dan should be making reasonable effort to be employed and contributing to income.

- [28] To obtain a mortgage on the Kilpatrick Property, the parties jointly applied to the Evergreen Savings and Credit Union on October 23, 2003. They needed a mortgage of \$97,500 and to qualify the credit union insisted that their credit card debts be paid off. The plaintiff testified that he paid approximately \$6,350 to discharge the defendant's credit card debts. The defendant does not dispute this payment; however, she maintained the debts were jointly incurred for living expenses. The plaintiff testified that he had his own credit cards and did not use the defendant's credit. Because of the need to retire this debt, the plaintiff failed to follow through with his agreement to deposit money in a joint investment account in the defendant's name.
- [29] At the end of October, the parties purchased the Kilpatrick Property as joint tenants; both parties were signatories to the mortgage. The plaintiff paid the deposit, the GST, and the appraisal and inspection costs totalling \$6,478. Each party paid half of the down payment which came from their share of the proceeds of sale from the Royston Property (\$35,000 in total). The parties opened a joint account to pay the mortgage.
- [30] When the parties took possession of the property there were tenants occupying the commercial space. Their rent essentially paid the mortgage each month. These tenants left in May or June 2004 and from this date until November 2005 the plaintiff paid the mortgage. The bank records for the months of February, March, April, and December 2004 indicate that each party paid one half of the mortgage. The defendant paid the entire mortgage payment in January 2005. The plaintiff paid \$260 for the mortgage in December 2003.
- [31] While living together at the Kilpatrick Property, the defendant paid the hydro, water, sewer, cable and telephone bills. The plaintiff paid the strata fees. The parties shared their other living expenses equally. Their expense sharing ended in February 2004 when the defendant's student loan was exhausted. Thereafter the plaintiff paid the expenses for the home.
- [32] After the tenants left in May or June 2004, the parties did not rent out the commercial space because the plaintiff was using it to launch a new company called Primera. Unfortunately, this company was never successful. The defendant testified that she worked for the company and supported the plaintiff's efforts at his insistence. In the fall of 2004, the defendant obtained work as an in-home caregiver for a disabled adult. Soon after obtaining this

employment, she began to share the job with the plaintiff. Eventually, the plaintiff took over the entire work load because he was better suited for the job.

- [33] When the defendant left the Kilpatrick Property in January 2005, she secured a tenant for the commercial space and these tenants remained in the residence until it was sold in June 2006. Their rent, \$550 per month, was assigned directly to the Credit Union to pay the mortgage. In July 2005, the plaintiff's brother moved into his suite and paid \$350 per month for rent and utilities until May 2006. Neither party paid the taxes owing for 2004, 2005 or 2006.
- [34] The plaintiff testified that, prior to the purchase of the Kilpatrick Property, he advised the defendant that he was not going to purchase any property jointly unless they got married. The defendant denied that the plaintiff mentioned marriage until after they had been living in the Kilpatrick Property for some time. The plaintiff acknowledged that he did not purchase the rings or formally propose to the defendant until January 2004, some three or four months after the Kilpatrick Property was purchased. The defendant declined the proposal because by this time their relationship was again in trouble.
- [35] The plaintiff acknowledged that he was at all times aware of the defendant's limited financial resources. In addition, the plaintiff agreed that he had purchased the various properties with the defendant in joint tenancy to protect her interest in these assets. While each party blamed the other for their losses in the stock market, it is apparent that the plaintiff and the defendant were very unsuccessful in their joint and individual forays into the investment market. Both experienced substantial losses in every year of their relationship.
- [36] The parties opened joint accounts to pay the mortgages on their jointly owned properties. The parties also maintained separate bank accounts, but do not appear to have kept an accurate accounting of how much each contributed to their combined living expenses.

ARGUMENT

- [37] The plaintiff argues the evidence shows that he supported the defendant throughout their relationship, that she had a habit of spending well over her own income, and that her direct contribution to the acquisition of the Royston and the Kilpatrick properties was substantially less than his contribution. Further, the plaintiff maintains that responsibility for the losses incurred by the defendant in the stock market during their relationship cannot be attributed to him. The defendant was an adult and made her own decisions. She had knowledge of the stock market and had worked for a commodities trader.
- [38] The plaintiff also argues that the sole reason for placing the Kilpatrick property in their joint names was a promise made by the defendant to a marriage commitment. It was because of that commitment that the parties did not separate and litigate their respective claims after the Royston property was sold.

- [39] The plaintiff argues it was never the intention of the parties to share equally in the assets acquired jointly notwithstanding the far larger contribution made by the plaintiff. The presumption of advancement, says the plaintiff, only applies to married persons: *McDonald v. Eckert* (2004) A.C.W.S. (3d) 613, 2004 BCSC 323; *Fumich v. Babic* (2005), 143 A.C.W.S. (3d) 612, 2005 BCCA 552. The plaintiff also contends the presumption of equal co-owners found in s. 23(2) of the Land Title Act is easily rebutted by evidence of a greater contribution by one party and is subject to the equitable principles of constructive trust and unjust enrichment.
- [40] Moreover, the plaintiff argues that even if the presumption of advancement applies to common law couples, an unequal division of the asset based on their respective contributions is the fair way to do equity between the parties: *Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240, [1995] W.W.R. 268 (C.A.) and *Bajwa v. Pannu* (2006), 57 B.C.L.R. (4th) 161, 2006 BCSC 921.
- [41] Because the plaintiff's contribution to the acquisition and maintenance of the Royston and Kilpatrick properties exceeded the defendant's by \$30,000 to \$40,000, it is argued that, of the balance of the sale proceeds remaining in trust, the plaintiff should receive that amount and the remainder should be divided equally.
- [42] The defendant argues that it is the underlying intention of the parties at the time of the Kilpatrick purchase that determines whether the presumption of equal shares found in s. 23(2) of the Land Title Act is rebutted: *Farrar v. Walker*, [1982] B.C.J. No. 965 (QL) (S.C.), *Aleksich*, and *Owen v. Somogyi* (1995), 58 A.C.W.S. (3d) 445, [1995] B.C.J. No. 2095 (QL) (S.C.). In this regard, the defendant maintains that the evidence establishes that the parties intended the Kilpatrick Property would be shared equally. In particular, the defendant points to the plaintiff's codicil, which bequeathed to the defendant an interest in the Urquhart House, the plaintiff's half of the Royston Property, the plaintiff's life insurance policy, and the balance of his estate. In addition, the defendant says the equal division of the Royston Property sale proceeds evidences an intention to share assets equally without regard to their respective contribution. Finally, the defendant relies on the plaintiff's agreement to use part of the sale proceeds from the Urquhart House to fund investments in the defendant's name.
- [43] The defendant also argues that her contribution to the properties was not substantially less than the plaintiff's. For each year of their relationship she had a greater annual income, which was used entirely to support the family unit. In addition, the defendant maintains her share in the Royston Property paid for half of the down payment for the Kilpatrick Property and, for the most part, the rent received from the tenants paid the mortgage. The defendant also argues that she paid for the utilities and other living expenses while residing at the Kilpatrick Property. Thus, the defendant says there is no evidence of unjust enrichment.

- [44] In the alternative to an equal division of the sale proceeds, the defendant says only a modest readjustment is necessary in all of the circumstances: *Mayer v. Noel* (2006), 152 A.C.W.S. (3d) 287, 2006 BCSC 1136.
- [45] Finally, the defendant counterclaims for an accounting of the rent received by the plaintiff from the period of January 1, 2005 to May 31, 2006, for a total of \$9,350 (17 months at \$550 per month). In addition, the defendant seeks an accounting of the rent received by the plaintiff from his brother, Bruce Lindquist, from July 1, 2005 until May 31, 2006, for a total of \$3,850 (11 months at \$350 per month). Finally, the defendant also seeks an accounting for the property tax arrears for 2005 (\$2,750), for January to June 2006 (\$978), interest on arrears (\$19.86), and the unpaid mortgage for May 2006 (\$508.16).
- [46] In reply, the plaintiff argues the defendant's claim for occupational rent cannot be maintained because she was not ousted from the premises.

ISSUES

[47] There are two issues to be decided:

1. Has the plaintiff rebutted the presumption of indefeasible title found in s. 23(2) of the Land Title Act by proving that the defendant, as a registered owner, held her interest in the Kilpatrick Property in trust for the plaintiff?
2. If the statutory presumption of indefeasible title is not rebutted, and both parties are found to have a beneficial ownership in the Kilpatrick Property, what is the fair and equitable division of the proceeds of sale in light of their respective contributions to its acquisition and maintenance?

DISCUSSION

A. The Presumption of Indefeasible Title

- [48] Addressing the first issue, the parties were registered owners as joint tenants in the Kilpatrick Property. The Torrens land registration system in this province creates a statutory presumption of indefeasible title in a registered owner of property and places the onus on the party seeking to rebut this presumption to provide evidence that the registered owner holds their interest in trust for that party or another. This presumption is codified in s. 23(2) of the Land Title Act as follows:
- s. 23(2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title

- [49] The presumption of indefeasible title may be displaced by evidence that it is contrary to the parties' agreement, or to the intention of the parties, and that to uphold the title will result in an unjust enrichment: *Bajwa* at paras. 13 and 14.
- [50] The defendant also relies upon the presumption of advancement. When one person transfers title to property to another without consideration, the law of equity presumes a resulting trust or, in other words, that a gift was not intended. Where, however, the parties are husband and wife, it is presumed that a gift was intended: *McDonald* at para. 33. This is the presumption of advancement.
- [51] The plaintiff argues this presumption does not apply to common law spouses and relies upon the comments of Mr. Justice Halfyard in *McDonald*. In my view, the application of the presumption of advancement to common law spouses is an undecided issue, as articulated by the Court of Appeal in the *Fumich* case. I am also satisfied, however, that this question does not need to be resolved in this case.
- [52] Application of the presumption of advancement and the equitable principles of unjust enrichment in this particular context both depend upon the intention of the parties at the time the property was purchased: *Skender v. Skender* (2005), 138 A.C.W.S. (3d) 959, 2005 BCSC 418, *aff'd* (2006), 52 B.C.L.R. (4th) 6, 2006 BCCA 162. Thus, regardless of whether it is the statutory presumption or the common law presumption that applies, the test is the same.
- [53] Turning to the case at hand, I find there is no evidence that it was the parties' intention that the defendant was to hold her interest in the Kilpatrick Property in trust for the plaintiff or that her title as joint tenant would be without any beneficial ownership in that property. The defendant made a direct financial contribution to the acquisition of the Kilpatrick Property. Regardless of how the plaintiff justifies his decision in hindsight, it is apparent that half of the down payment for the Kilpatrick Property came from funds that he agreed should be credited to the defendant after the sale of the Royston Property.
- [54] The plaintiff testified that he disagreed with the defendant's demand for an equal share in the proceeds from the Royston sale and felt that he had been "blackmailed" into the decision because to delay matters might have jeopardised his plan to purchase the Kilpatrick property. Nevertheless, the plaintiff agreed to the defendant's request and failed to take any formal steps to contest her demand for an equal division of the sale proceeds based upon his greater financial contribution.
- [55] There is also no evidence of an agreement between the parties that the defendant's beneficial ownership in the Kilpatrick Property would be subject to certain preconditions. Although the plaintiff testified that he agreed to purchase the Kilpatrick Property with the defendant as joint tenants based on a mutual expectation that the defendant would marry him, I am unable to accept this evidence as credible. Immediately prior to the purchase of the Kilpatrick Property, the defendant advised the plaintiff that she wished to separate and take her share of the Royston Property proceeds and buy her own residence. In addition, the

plaintiff acknowledged that he did not purchase rings or propose to the defendant until January 2004, some three months after the purchase of the property. Finally, the history of the parties' relationship suggests they had never contemplated marriage in the past. Instead, it appears the parties spent many hours in counselling simply to hold their relationship together.

- [56] Thus, based upon the defendant's direct financial contribution to the acquisition of the Kilpatrick Property, and absent any credible evidence of an agreement that she would hold her share in the property in trust for the plaintiff, or otherwise on certain conditions, I find the presumption of indefeasible title has not been rebutted.

B. Division of the Sale Proceeds

- [57] Addressing the second issue, even though the parties both have a beneficial ownership in the Kilpatrick Property, the division of any sale proceeds may still be based upon their respective contributions towards the property: *Bajwa* at para. 21, *Farrar* at para. 14 and *Mayer* at paras. 16-20. The fact that the parties hold the property in joint tenancy, and thus are presumed to have equal interests, does not change the nature of the court's inquiry. Partition and sale is an equitable remedy which contemplates that the presumption of equal interests may be displaced if necessary to prevent an unjust enrichment.
- [58] In *Aleksich*, the Court of Appeal held that on an application for partition and sale arising out of the breakdown of a common law relationship, the principles of unjust enrichment apply to the valuation of a joint tenant's share in real property. As Madam Justice Prowse says at para. 27:

The question remains as to whether principles of unjust enrichment set forth in such cases as *Becker v. Pettkus*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 have any application to the valuation of a joint tenant's share in property under s. 8 of the [Partition of Property] Act in circumstances such as these. In my view, they do. According to those principles, if there is an enrichment of one party, a corresponding detriment to the party providing the benefit, and no juristic reason for the enrichment, then a remedy is available in equity. As stated by Mr. Justice Dickson in *Rathwell* [p.306]: "As a matter of principle, the Court will not allow any man unjustly to appropriate to himself the value earned by the labours of another."

- [59] Unjust enrichment will not be found, however, where the underlying intention of the parties was to accord each a one half interest in the property, notwithstanding their unequal financial contributions. For example, in *Owen*, Mr. Justice Hunter addressed the division and sale of real property held jointly by common law spouses after the breakdown of their marriage and separation. In that case, even though the common law husband had made a greater financial contribution towards the acquisition of the matrimonial home, Hunter J. held that it had always been his intention to share beneficial ownership equally with his common law wife. As a consequence, the proceeds of sale were divided equally.

- [60] Finally, it is the parties' monetary as well as non-monetary contributions towards the acquisition, maintenance, and improvement of the property during their relationship that must be assessed to determine the appropriate division of sale proceeds: Mayer at para. 20.
- [61] In the case at hand, the parties were involved in a romantic relationship that persisted for about four and half years and for at least four of those years they lived together as common law spouses. Each party brought to the relationship a past history of unresolved, serious personal troubles that made it very difficult for them to enjoy a stable, happy life together.
- [62] The defendant was still trying to recover from her husband's suicide and the plaintiff's physical health was poor. For the first time in her life the defendant had to be concerned about proper money management because her income from the widow's pension was quite nominal. Moreover, her husband had been responsible for the family finances during their marriage. It is apparent that the defendant was not a good money manager and overspent her income regularly. She also lost substantial sums in the stock market because of her inexperience and her naïve trust in Mr. Nichol as a financial advisor.
- [63] The plaintiff faced similar challenges. He had never been wealthy, but at least the work he did before being severely injured in a motor vehicle accident allowed him to finance the purchase of a home and to save money in an RRSP. After the accident, the defendant's physical health rendered him unsuitable for labour intensive jobs and he had to make drastic career changes somewhat late in life. The plaintiff chose to invest in the stock market as a career because he had done well as an instructor in this field. Unfortunately, the plaintiff was not as successful in the stock market as he was as a teacher and lost substantial amounts of money investing in high risk securities. He also lost money promoting various business ventures that never realized any profits.
- [64] The only successful ventures the parties had during their relationship involved the purchase and sale of real estate. While living together their first purchase was the Royston Property. They borrowed money to construct a house on the property and ultimately sold it for a substantial profit. They used the profits from the Royston Property to purchase the Kilpatrick Property. This property was also sold at a substantial profit.
- [65] There is very little credible oral evidence surrounding the parties' intentions concerning their ownership of the Kilpatrick Property and how the sale proceeds would be shared if it was sold. I have rejected the plaintiff's evidence, as outlined above, that he agreed to ownership in joint tenancy based upon the defendant's promise to marry him. It appears that the parties never discussed what would happen if the property had to be sold or what it meant to be joint tenants.
- [66] The conduct of the parties during their relationship, particularly while they lived at the Royston and the Kilpatrick properties, supports the defendant's position as well as the plaintiff's. The parties maintained separate bank accounts for their own expenses and only shared a joint account for their mortgage payments. They made loose arrangements with each other concerning the sharing of living expenses and mortgage payments, but the

plaintiff appears to have taken over most of these expenses after the first few months that they lived in each of the Royston and the Kilpatrick properties. He did this without complaint, however, until this lawsuit.

- [67] Notwithstanding the defendant's infidelity, and her repeated attempts to end the relationship, the plaintiff never wavered in his affection for her and in his desire to salvage their relationship. To this end, the plaintiff participated in marriage counselling. He also demonstrated his desire to protect the plaintiff financially by signing a codicil to his will that left the plaintiff most of his estate.
- [68] While the plaintiff only reluctantly agreed to share the Royston Property sale proceeds with the defendant on an equal basis, he willingly agreed to give her an additional \$5,000 from the sale of the Urquhart House to invest in the stock market. Although this agreement was never carried out, the defendant actually received a significantly greater amount from the plaintiff when he paid off her credit card debts as a pre-condition to obtaining a mortgage for the purchase of the Kilpatrick Property. None of these gifts were accompanied by an oral or a written promise from the defendant that she would repay the plaintiff at any time or that her share in the Kilpatrick Property would be reduced by any amounts not repaid.
- [69] It is also important to consider that the parties were always jointly liable on the mortgages registered against their properties. Each of them would have been liable for the full amount of the debt had there been a shortfall upon a foreclosure and sale.
- [70] This was a relatively short relationship and on balance the plaintiff contributed substantially more towards the acquisition of the two homes as well as their maintenance. While the parties' non-financial contribution should also be considered, there is very little evidence that either the plaintiff or the defendant took on a proportionately greater share of household chores or other tasks related to the home.
- [71] A comparison of the parties' financial contributions towards the Kilpatrick Property must also take into account the fact that the rent received from the tenants in the commercial premises paid the mortgage on the property for a substantial portion of the time that they lived in the residence. In addition, the plaintiff had the benefit of this rent after the defendant moved out and until the Kilpatrick Property was sold in June 2006.
- [72] Weighing all the relevant factors, I find an equitable division of the sale proceeds is achieved by returning to each party an approximate amount for their direct financial contributions toward the acquisition of the Kilpatrick Property during the period they both occupied the residence. Thereafter the profits from the sale should be shared equally. From January 31, 2005 until the property was sold, the plaintiff's contributions toward the maintenance of the property will not be credited because he essentially lived in the premises rent free. The rent received from the tenants in the commercial space paid the mortgage and any maintenance fees charged by the strata council should be the plaintiff's responsibility because he had the exclusive benefit of the premises during this period.

- [73] In addition, I find the plaintiff is responsible for the taxes owing on the property for 2005 and 2006 because he was the sole occupant for these years. The plaintiff must also account to the defendant for the final unpaid mortgage payment as he was the sole occupant at the time.
- [74] Finally, I dismiss the defendant's claim for occupational rent and for an accounting of rent received by the plaintiff after January 31, 2005. The rent received from the tenants occupying the commercial space paid the mortgage on the property and this was a joint responsibility of the parties. The claim for rent received by the plaintiff from his brother is essentially a claim for occupational rent. Because the defendant was not forced to leave the premises she is not entitled to claim a share in these monies. Moreover, I find the plaintiff's decision to take on a roommate does not give rise to a claim in favour of the defendant for occupational rent.
- [75] The down payment for the Kilpatrick Property was \$35,000 and each party paid one half and thus should be credited with \$17,500. The plaintiff should receive credit for payment of the deposit, the GST, the appraisal and the building inspection. The plaintiff shall also be credited for the mortgage payments for the period between May 2004 and January 2005 when the plaintiff paid the entire mortgage and there were no tenants in the suite. Including his portion of the down payment (\$17,500), it is fair and equitable to credit the plaintiff with a total contribution of \$28,000.
- [76] The defendant should receive a credit for the taxes owing from 2005 and 2006, and for the May 2006 mortgage payment because these were deducted from the gross sale proceeds. She should also receive some credit for the January 2005 mortgage payment. In total it is fair and equitable to credit the defendant with a contribution of \$22,000, which includes her share of the down payment (\$17,500).
- [77] Deducting these credits from the total net sale proceeds, and sharing the balance equally, I find that from the \$62,000 held in trust the defendant shall be entitled to \$28,000 and the plaintiff shall be entitled to \$34,000.
- [78] In light of the parties' divided success in this matter, each party shall bear their own costs.

"C.A. Bruce, J."

The Honourable Madam Justice C.A. Bruce

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