
CANADA / JUDGMENT

Oppermann v. Andersen

2009 BCSC 992

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 992 Oppermann v. Andersen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Oppermann v. Andersen,

2009 BCSC 992

Date: 20090722

Docket: E052904

Registry: Vancouver

Between:

Anita Oppermann

Plaintiff

And

Timothy Gordon Andersen

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for Ms. Oppermann:

J. Dubas

Defendant, appearing on his own behalf:

T.G. Andersen

Dates and Place of Trial/Hearing:

January 5-9, 2009

March 30-April 2, 2009

Place and date of judgment:

Vancouver, B.C.

July 22, 2009

J. Dubas

INTRODUCTION

- [1] The plaintiff, Ms. Oppermann, has brought this action to resolve outstanding property and debt issues between her and the defendant, Mr. Tim Andersen, with whom she lived for five years from about February 2000. The main dispute is with respect to the proceeds of sale of the home which they bought but put in the sole name of Ms. Oppermann. The question is whether all of the proceeds should go to her or whether some portion should go to Mr. Andersen.

FACTS

- [2] Ms. Oppermann is 43 and Mr. Andersen is 44 years of age. They met in December 1999 at the Fairview Pub in Vancouver.
- [3] Ms. Oppermann was working as a sous chef at O'Douls earning about \$41,000 per year. She rented a house on West 23rd Avenue and Oak Street in Vancouver. Mr. Andersen worked as an independent contractor, living on a boat that he owned at that time. Mr. Andersen had had a prior relationship, which had ended seven years before. He had two children, to whom he had access every other weekend. Neither party had significant assets at the time.
- [4] In March 2000, Mr. Andersen moved into Ms. Oppermann's rental accommodation. The couple pooled their resources from the time they moved in together, living very much as a family unit. Mr. Andersen contributed financially by way of revenue from his contracting business. Ms. Oppermann contributed her wages, and both of them shared the domestic chores.
- [5] The evidence is unclear concerning how they planned and operated their financial affairs. Mr. Andersen incorporated his business and used it to some extent to split income for tax purposes. He had a poor credit rating as a result of many unpaid loans and credit card debts. Because Ms. Oppermann had a good credit rating, she opened credit card accounts in her own name and let Mr. Andersen use them not only for domestic purchases, but for purchases of material for his contracting business. Mr. Andersen also transferred his boat into the name of Ms. Oppermann. However, the boat apparently ran aground and was taken by a bailiff, presumably to pay a creditor.

- [6] In late 2002, the couple received a notice from their landlord to vacate because the owner was going to sell the unit. They decided to buy a home rather than continue to rent. Neither of them had the funds to finance the purchase of a home in Vancouver and so they discussed with Mr. Andersen's father, Mr. Carl Andersen, a retired clergyman, whether he would assist them by providing funds for the down payment.
- [7] The couple found a house at 866 West 59th Avenue, Vancouver, B.C. Arrangements were made with Mr. Carl Andersen for him to contribute \$65,000. With Ms. Oppermann's consent, Mr. Tim Andersen placed an offer on the home, and negotiated a price of \$382,000. The interim agreement provided for an initial deposit of \$15,000 which Mr. Carl Andersen paid to Ms. Oppermann and Ms. Oppermann in turn paid to the real estate broker in trust. There is no document confirming Mr. Tim Andersen's assigning of the interim agreement to Ms. Oppermann, although this was done at least by implication. Then, in return for the mortgage approval, Mr. Tim Andersen's parents executed a document (a "gift letter") required by the mortgage company GMAC Residential Funding of Canada Ltd., which provided:

This letter confirms that the undersigned is making a financial gift of \$65,000 to Anita Oppermann for use towards the purchase of this property located at 866 W 59th Avenue, Vancouver, BC. We the undersigned recipients and the donors hereby certify that

- These funds are a genuine gift from the donor and don't ever have to be repaid and
- No part of the financial gift is being provided by any third party having an interest (direct or indirect) for the sale of the subject property, and
- The donor is an immediate family member.

- [8] The couple instructed the broker that title was to be transferred to Ms. Oppermann rather than Mr. Tim Andersen or both of them, and that Ms. Oppermann would be the sole borrower under the mortgage.
- [9] On or about March 10, 2003, Mr. Tim Andersen and Ms. Oppermann attended at a notary's office where the notary took Ms. Oppermann aside and went through the transfer and mortgage documentation, witnessed her signing and then saw that the transfer was completed and the mortgage registered appropriately. At that meeting Ms. Oppermann provided a further cheque for \$50,000, which she had received from Mr. Carl Andersen.
- [10] In the months that followed, Mr. Tim Andersen and his father practically rebuilt the house. They replaced the chimney, gutted the main floor, replaced the electrical, hot water and plumbing systems, furnished two new washrooms and three new bedrooms in the basement, patched the roof, ceilings and floors, and removed the existing kitchen, replacing it with new tiles, cabinets and countertops. The evidence was that the value of that work, had it been charged for, would have been around \$92,000.

- [11] Ms. Oppermann helped in this project and on other projects, testifying that she gave up her job at O'Douls to work full-time for Mr. Andersen.
- [12] In 2003, Ms. Oppermann and Mr. Andersen undertook another money-making project providing room and board for foreign "home-stay students". Ms. Oppermann cooked meals for the students and provided other assistance. Mr. Andersen contributed by constructing the rooms and doing manual labour around the home. Over the next two-year period, students stayed with them, paying between approximately \$1,400 and \$2,100 per month.
- [13] In about 2004 the couple began to have relationship difficulties, and by March of 2005 the relationship was beyond repair and Ms. Oppermann moved out. Mr. Andersen, who by then had his children living with him, made the mortgage payments for about a year. The total payments were apparently \$29,808.96. After that, Mr. Andersen ceased making payments and paid no occupational rent in lieu. Ms. Oppermann claims that she paid \$5,876.55 toward the mortgage payments plus \$800 for insurance on the property.
- [14] Eventually both parties ceased making mortgage payments and GMAC commenced foreclosure proceedings on September 12, 2006. It obtained an order nisi for foreclosure on November 6, 2006, with a declared balance on the mortgage of \$329,324.60.
- [15] On March 7, 2007, Master Tokarek granted GMAC an order for sale of the property for \$675,000, with a further order that the balance of proceeds after pay-off of the GMAC mortgage be paid to Ms. Oppermann. The contract for purchase and sale, dated February 23, 2007, was between Ms. Oppermann and a purchaser named Wayne Koch. On March 7, 2007, Ms. Oppermann issued Mr. Koch a letter acknowledging receipt of \$195,000. It was fortuitous that Mr. Tim Andersen found out about the sale, as he happened to be in court on the day of the hearing on approval of the sale to Mr. Koch. Mr. Andersen refused to vacate the premises when the transfer was completed, at which time he learned that approximately \$195,000 had been paid out to Ms. Oppermann and approximately \$135,000 remained in trust. The court decided to hold it until the question of ownership was resolved.
- [16] On July 19, 2007, Ms. Oppermann received a letter from the Canada Revenue Agency (CRA) informing her of her liability for Mr. Andersen's tax arrears under s. 160(1) of the Income Tax Act. The amount of the arrears was \$82,233.07 plus interest.

POSITIONS OF THE PARTIES

- [17] Ms. Oppermann's position is that the 866 West 59th Avenue property was purchased by her, and belonged to her. Ms. Oppermann submits that there is no document at all that records any alleged agreement other than her transfer of the property to Mr. Koch in March 2007. Alternatively, she submits that if the court sees fit to hear an argument from Mr. Andersen on the basis of unjust enrichment, there was no enrichment on her part.
- [18] Ms. Oppermann asks the court for the following orders:

- a. A declaration that Mr. Andersen has no interest in the equity received from the proceeds of sale of the West 59th Avenue property;
 - b. A declaration that Ms. Oppermann is entitled to keep all of the net proceeds from the sale of the West 59th Avenue property;
 - c. That Ms. Oppermann receive occupational rent for the period from May 2005 to July 2007 when Mr. Andersen occupied the property;
 - d. In the alternative, that any proceeds of the sale to which Mr. Andersen is entitled be paid against Ms. Oppermann's tax debt under s. 160; or, in the further alternative, that Ms. Oppermann receive a judgment against Mr. Andersen on account of her liability for that tax debt;
 - e. In the alternative, that any proceeds of the sale to which Mr. Andersen is entitled be paid against Ms. Oppermann's tax debt under s. 160 and that Ms. Oppermann receives compensation for occupational rent, and credit card debts in the amount of \$35,409.82 plus interest;
 - f. That the claims of Mr. Andersen be dismissed.
- [19] Mr. Andersen was unrepresented at the trial, and was apparently unrepresented when he drafted his statement of defence and counterclaim. In his pleadings he disputes the claims of Ms. Oppermann, but his position and the steps that he took were not well-articulated. His intention, however, was clear. He wished the \$65,000 advanced by his father to be protected, to declare and explain his share in the ownership of the property at 866 West 59th Avenue, and to compel payment of his share of the sale proceeds, as well as resolve other outstanding issues.

DISCUSSION

- [20] Ms. Oppermann submits that there is no evidence of any agreement between her and Mr. Tim Andersen, either express or implied, that they would each hold a half-interest in the property. I have some difficulty accepting this.
- [21] There was evidence that Mr. Tim Andersen, his father and Ms. Oppermann discussed the arrangement. Mr. Tim Andersen testified that the three of them had several meetings to discuss the terms of the transaction to buy the new home. On the other hand, Mr. Carl Andersen stated that he could not remember meetings with Ms. Oppermann. I do not regard that as strong evidence against Mr. Tim Andersen on the point. It appeared to me that Mr. Carl Andersen, who is now elderly, had difficulty remembering many things about the transaction. Even if the conversations were not conducted with all three of them together, I find on a balance of probabilities that these issues were discussed at some point by Ms. Oppermann and Mr. Tim Andersen, and that Ms. Oppermann understood and agreed that she would receive the down payment, complete the purchase of the property with the mortgage, and take title to the property, as trustee for herself and Mr. Andersen.

- [22] Ms. Oppermann argued that if the intention of the transaction was to avoid the claims of Mr. Andersen's creditors, then it was essential that Mr. Andersen have no ownership of the property, otherwise the purpose of the transaction would be defeated. She argues that this intention puts Mr. Andersen in the position of coming before the court with "unclean hands". This issue is discussed below.
- [23] Ms. Oppermann was not, as she was portrayed by her counsel, poorly educated and unfamiliar with commercial matters. It is not credible that a person in the position of Ms. Oppermann would either have no idea of what the transaction was about, or, for lack of information and consultation, assume that the transfer would result in her taking the entire legal and beneficial ownership of the property and a complete renovation of it, for nothing other than her signature on a statement of adjustments, primary liability on the mortgage and acceptance of the potential for fraudulent conveyance litigation with creditors. I do not accept the claims of Ms. Oppermann that she was so unsophisticated as to believe that the home was not to be for both of them, that the loan was to be for her benefit only, or that she was entitled to keep the money that Mr. Carl Andersen advanced in the event of a breakdown of the relationship.
- [24] I note that the terms of the transaction for the purpose of this decision have only to do with the understanding of it as between Ms. Oppermann and Mr. Tim Andersen. Mr. Carl Andersen is not a party to the action, and therefore the court is not in a position to offer any judgment to him. He will have to pursue return of his contribution in other proceedings.
- [25] The issue, therefore, is the legal characterization of the Ms. Oppermann's and Mr. Tim Andersen's arrangement. I must consider whether the arrangement had the effect of creating a trust, either express, resulting or constructive.

EXPRESS TRUST

- [26] From the evidence of Mr. Tim Andersen as to the discussions between himself, his father and Ms. Oppermann, I find there was some evidence of an express trust.

a. RESULTING TRUST

- [27] If the discussions were not sufficiently clear to establish an express trust, there are enough to establish the parties' mutual rights under a resulting trust.
- [28] The test to establish a resulting trust was summarized in *Brundage v. Campbell* (1992), 73 B.C.L.R. (2d) 362 (C.A.), where it was held that "[a] resulting trust exists where there is an agreement or a common intention expressed or implied to share an asset": at para. 29.
- [29] This test was reaffirmed in *Jones v. McDaniel*, 2006 BCCA 165, 53 B.C.L.R. (4th) 285. In *Jones*, the Court of Appeal noted, citing *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, that it can be difficult to establish a common intention or agreement to share an asset, as there is often no clear evidence expressing such an intention or agreement: at para. 25. The court is not entitled otherwise to presume or infer the necessary common intention, but

where there is no clear evidence, then resort may be had to a constructive trust: *Becker v. Pettkus*, at 844.

[30] As Dickson J. (as he then was) observed in *Becker v. Pettkus*, the common intention is rarely expressly stated, but must be gleaned from the conduct of the parties: at 843. In determining whether the necessary common intention existed, the court must take into account all the circumstances concerning the acquisition, preservation and improvement of the property: see *Frederkind v. Frederkind*, [1999] B.C.J. No. 2476, at para. 9.

[31] In this case, Ms. Oppermann also obtains the benefit of s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250, which provides that the person named on title is indefeasibly entitled to an estate in fee simple:

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...

[32] However, s. 23(2) operates as a presumption which can be displaced. The burden is on the party seeking to challenge the state of title. In *Skender v. Skender*, 2005 BCSC 418, Dorgan J. held that the presumption of indefeasibility may be displaced by two equitable principles: the presumption of advancement; and the enforcement of an agreement between the parties in order to prevent an unjust enrichment if the face of the title is upheld: at para. 13. In *Skender* the plaintiff and defendant, who were mother and son, were on title as tenants in common. The son's parents had bought the property for \$229,000 as an investment property. The son then paid \$15,000 to his parents and moved into the house with his girlfriend, paying \$1,000 every month to his mother. The house was eventually damaged by fire. The insurer paid the insurance proceeds to both the son and the mother. The son brought an action for partition and sale. The parents counterclaimed, seeking a declaration that the son's interest be limited to 1/15 of its value and a declaration that the son held the property on trust for them. At the time the son had moved out of the property, he had paid his mother approximately \$115,000.

[33] Dorgan J. found that the son had contributed one-half of the purchase price of the house and that there was no basis for the parents' claim in trust. The parents could not show that the son was enriched or that the parents had suffered a deprivation. There was also no evidence to rebut the presumption of advancement which applied between mother and son.

[34] On appeal, reported at 2006 BCCA 162, Hall J.A., for the Court, dismissed the appeal, finding that the arrangement was a family arrangement entered into for the general financial benefit of the family, with advantages to all the parties.

[35] In this case, I am of the view that the presumption of indefeasibility of title is rebutted by sufficient evidence that the parties intended the property to be held on trust.

- [36] Neither Mr. Tim Andersen nor Ms. Oppermann made a financial contribution to the purchase of the property - it was all provided by Mr. Carl Andersen. However, although the evidence is not abundant on this point, it appears that both Ms. Oppermann and Mr. Tim Andersen contributed approximately equally to the mortgage payments. Mr. Tim Andersen and his father made substantial improvements to the property, in which they were assisted by Ms. Oppermann. Both Mr. Tim Andersen and Ms. Oppermann contributed to the project of having live-in students. In essence, as in *Skender*, this was a family arrangement for the general financial benefit of both Mr. Tim Andersen and Ms. Oppermann. In my view, there is sufficient evidence to find that there was an intention as between Ms. Oppermann and Mr. Tim Andersen that each would hold a one-half interest in the property which was the extent of their respective contributions.
- [37] Ms. Oppermann submitted that if a resulting trust arises in this case, it should be in favour of Mr. Carl Andersen, who contributed the down payment, and not Mr. Tim Andersen. However, Mr. Carl Andersen is not a party to this lawsuit and unfortunately the court is not in a position to determine the extent of his entitlement. The issue must be resolved only as between Mr. Tim Andersen and Ms. Oppermann.

b. CONSTRUCTIVE TRUST

- [38] In the event that I am wrong that the property is subject to a resulting trust, then I find that Mr. Andersen is nevertheless entitled to a share of the house based on a constructive trust.
- [39] A constructive trust will be found to exist regardless of intention if there would otherwise be an unjust enrichment of one party and a corresponding deprivation of the other, and if there is an absence of any juristic reason for the enrichment: *Becker v. Pettkus*, at 848. In addition, a party claiming a constructive trust must establish a link between the contribution and the property over which the trust is claimed. The plaintiff must have made a substantial contribution to the property in question: *Peter v. Beblow*, [1993] 1 S.C.R. 980, at 997. In this case, there is no issue that both parties contributed substantially to the maintenance and improvement of the property.
- [40] The court must also consider whether a money award would be inadequate in the case: *Peter v. Beblow*, at 997. Given that the property in question has already been sold, and the funds are presently being held in trust, this issue does not arise on the facts of this case.
- [41] If Ms. Oppermann were solely entitled to the proceeds of sale she would be unjustly enriched. She had the benefit of the property during the parties' relationship, and the improvements made to it by Mr. Andersen and his father. She also took the benefit of Mr. Carl Andersen's down payment, without which the parties would have been unable to own a home.
- [42] Mr. Andersen would be correspondingly deprived. He invested considerable time and money in upgrading the property. He contributed to at least half of the mortgage payments.

[43] The third factor is whether there is a juristic reason for the enrichment. In *Peter v. Beblow*, McLachlin J. stated, at 990-991:

What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

- (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?
- (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?
- (iii) Does public policy support the enrichment?

[44] Additional considerations arise in a family law setting. As noted by the Court of Appeal in *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44, at para. 15:

...In a marriage-like relationship where each contributes equally to the partnership, in the absence of any agreement to the contrary or any understanding that either of them intended to make a gift to the other, or that he or she should be compensated on a fee-for-service basis, it is reasonable to presume...that each expected to share in whatever wealth they created during their relationship.

[45] In this case, it is my view that there is no juristic reason for the enrichment. The legitimate expectations of the parties support the finding of a constructive trust. The parties were a common law couple who jointly decided to buy and renovate a house. That house was the matrimonial home for the duration of the relationship. Both contributed to the mortgage payments. On the ending of their relationship, both parties acquired a legitimate expectation that they would share in the wealth created during the relationship.

[46] I also note that public policy in this case does not support the enrichment of Ms. Oppermann. There are numerous reasons why family members might choose that title to a property be held by one party. That party should not be permitted to insist that the face of the title be upheld if to do so would run contrary to equitable principles.

VALUATION OF A CONSTRUCTIVE TRUST

[47] Once a constructive trust is declared, the question is one of quantum. In general, the court employs one of two methods for valuing the trust: the "value survived" method and the "value received" method.

- [48] In the value survived method, the court assesses what portion of the value of the property is attributable to the non-owning spouse's services. In the value received method, the court looks to the value of the services themselves. In *Peter v. Beblow*, McLachlin J. (as she then was), for the majority, stated that the value survived method is appropriate for constructive trust claims, and the value received method is appropriate for monetary claims. The Court of Appeal in *Pickelein*, at para. 42, endorsed the value survived approach for constructive trust claims arising out of marriage-like relationships.
- [49] In my view, the value survived method is appropriate in this case primarily because of the way in which the parties pooled their assets during the relationship. Each party made significant contributions to the property by paying the mortgage, and renovating and improving the property.
- [50] The main contribution of Mr. Tim Andersen in addition to the payments on the mortgage was the considerable effort expended with his father in renovations of the home, which they have valued at \$92,000. Ms. Oppermann submitted that Mr. Tim Andersen's contribution would be subject to depreciation, bringing the amount to approximately \$73,600. Taking the lower of those figures into consideration and viewing their shared effort, it is very difficult to find that either of them did an appreciable amount more than the other in improving and preserving the property. I would therefore value each of their contributions at 50% of the whole.

UNCLEAN HANDS

- [51] Both Mr. Tim Andersen and Ms. Oppermann testified that when Mr. Tim Andersen instructed the third party vendor to transfer the property to Ms. Oppermann, his intention in doing so was to protect the property from claims by his creditors. Ms. Oppermann argued that because the property was placed in her hands for the purpose of defeating the claims of creditors, Mr. Tim Andersen is in the position of coming to the court with "unclean hands". She argues that Mr. Tim Andersen intended a gift and that he had a good reason for shedding his interest in the property in order to avoid his creditors.
- [52] I note that Ms. Oppermann is likely not aided in this argument by the presumption of advancement that applies between married couples. The British Columbia Court of Appeal stated in *Fumich v. Babic*, 2005 BCCA 552, at para. 27:

The presumption of advancement has been recognized in law to arise in certain relationships, such as the relationship of husband and wife or father and child, where it is to be presumed that an advance of money from one party in such a relationship to the other is a gift. But the presumption has not been broadly recognized where the relationship in question is a common law relationship and it has been held that it does not arise in respect of a relationship of that kind: *McDonald v. Eckert* (2004), 7 E.T.R. (3d) 67 (B.C. S.C.), para. 33. [emphasis added]

[53] Generally speaking, a person may not transfer property into the name of another person for the purpose of defeating creditors and later seek to introduce evidence of intention that the property was to be held on trust by the other person: see *Waters' Law of Trusts in Canada*, 3rd ed. (Thomson Carswell, 2005) at 386.

[54] In *Smith v. Ahone* (1975), 56 D.L.R. (3d) 454 (B.C.S.C.), a common law couple had an alleged agreement that the man would hold the property in his own name on trust as to a part interest for the woman. The court stated, at 458:

There can be no doubt that Ahone declared that she was owner of half the property, and though he retained it in his name he did so only to avoid the claims of income tax authorities at the time when the property was first purchased. The plaintiff seeks equity here, and it is a well-established principle that equity will refuse aid to a plaintiff who has to rely on illegality to prove her title: see *Hanbury's Modern Equity*, 9th ed., p. 217. But here it was the action of the defendant, not that of the plaintiff, which may have been tinged with illegality. He secured title in his own name, and he cannot rely on a result motivated by his own possible wrongdoing. The defendant does not rely on this issue and in any event there is no evidence that the transaction deceived anyone and in such circumstances, as *Hanbury* says, a plaintiff may not be refused equity's aid.

[55] The emphasis in *Ahone* was on the fact that the woman had no part in the illegality and that no creditors were in fact deceived by the transfer.

[56] In *Reddin v. Mills*, [1995] B.C.J. No. 352 (S.C.), the court carefully considered the law on transactions to defeat creditors, relying on *Gorog v. Kiss* (1977), 78 D.L.R. (3d) 690 (Ont. C.A.) and *Tinsley v. Milligan*, [1993] 3 All E.R. 65 (H.L.), noting that the law remains uncertain. Hood J. concluded that even where the transaction was made for an illegal purpose, the court will nonetheless permit the transferor to recover the property, provided he or she does not have to rely on the illegal purpose to demonstrate an intention that the property was to be held on trust.

[57] In this case, there is sufficient evidence, without relying on the fact that the transfer was intended to defeat creditors, that the property was intended to be held on trust for both of them. I note also that Ms. Oppermann was not innocent in this transaction, as she was aware that it was intended to defeat creditors. It is therefore no bar to Mr. Andersen's claim that he did not come to the court with clean hands.

CREDIT CARDS

[58] Ms. Oppermann determined that the balance outstanding on the total credit cards is \$35,409.82 plus interest of \$18,255.85. She submitted further that on certain of the credit card debts Ms. Oppermann should be entitled to receive a 70% share. Mr. Andersen rejected that position, and I agree with him that insufficient evidence was adduced to show that either one of them was more responsible than the other for any of the credit card accounts while they lived together. Practically all of the accounts were used, whether directly or indirectly, for the benefit of the family unit and not unilaterally for personal expenses.

There was no specific understanding that one would pay more than the other. I find that they are responsibly equally for the unpaid credit card debts of Ms. Oppermann.

- [59] I would set the total credit card debt at \$35,409.82 plus interest at \$18,255.85 as at the date of trial. Half of that amount plus interest pursuant to the Court Order Interest Act is hereby declared owing by Mr. Andersen to Ms. Oppermann. Ms. Oppermann may pay off or settle that debt by deducting Mr. Tim Andersen's share from what she owes to him on over-payment from the sale of the home.

PERSONAL PROPERTY

- [60] Mr. Tim Andersen allowed Ms. Oppermann access to the property while he was still in occupation for the purpose of removing her personal property. I order that the parties may keep the assets from the family home that they have now in their possession.

OCCUPATIONAL RENT

- [61] Ms. Oppermann submits that there was a period of approximately 26 months in which Mr. Tim Andersen had exclusive occupancy of the premises. She submits that \$2,200 per month is due for occupational rent. Ms. Oppermann concedes that Mr. Andersen continued to improve the property and paid the mortgage payments up until about a year before the property was sold. In addition, Mr. Andersen had a tenant paying \$400 per month which Ms. Oppermann submits ought to be added to the rent.
- [62] Mr. Andersen says that the fair amount of rent would be \$1,000 because of the unfinished state of construction in the premises and other factors.
- [63] Neither side presented me with satisfactory evidence to support their estimate of the appropriate rent. However, I believe from the evidence that an appropriate figure would be approximately \$1,800 per month. I am therefore declaring that Mr. Andersen must pay occupational rent for the last year of his occupation of the premises in the amount of \$1,800 per month.

INCOME TAXES

- [64] Ms. Oppermann received a letter from the Canada Revenue Agency informing her of her liability for Mr. Andersen's tax arrears under s. 160(1) of the Income Tax Act. The amount of the alleged arrears is \$82,233.07 plus interest.
- [65] Ms. Oppermann submits that this is a debt for which Mr. Andersen is responsible and should reimburse Ms. Oppermann. Mr. Andersen disputes the claim of the CRA and is defending the claim in other proceedings. He submits that nothing in the notice referred to by Mr. Oppermann makes him liable either to pay her or CRA on her behalf. I was informed of no authority to the contrary. It may well be that CRA is entitled to be paid as and when the taxpayer is assessed, but that is a separate issue and not one that Mr. Oppermann may demand in this action.

CONCLUSION

- [66] Mr. Andersen is entitled to one-half of the net proceeds on the sale of the property located at 866 West 59th Avenue, Vancouver, B.C. Mr. Andersen will have judgment against Ms. Oppermann for the amount that she took in excess of her half of the proceeds of sale.
- [67] It is common ground that the remaining funds of approximately \$135,000, representing the balance of the proceeds of sale, were received and continue to be held by Palkowski and Company. Mr. Andersen is entitled to the entirety of these proceeds, subject to a deduction of one-half of \$21,600, or \$10,800, for occupational rent of the premises to be paid to Ms. Oppermann, and subject to a deduction of \$26,833 for one-half of the debts payable on Ms. Oppermann's credit card. If the credit card company in each case chooses to accept a settlement from Ms. Oppermann, then Mr. Andersen is entitled to credit for half of the settlement.
- [68] As success has been divided, the parties must each bear their own costs, subject to further application.

"The Honourable Mr. Justice Rice"

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