

CANADA / JUDGMENT

Paquette v. Wesolowski

2022 BCSC 2217

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Supreme Court of British Columbia

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2022 BCSC 2217 Paquette v. Wesolowski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Paquette v. Wesolowski,

2022 BCSC 2217

Date: 20221220

Docket: S132280

Registry: Kelowna

Between:

Brian James Paquette

Plaintiff

And:

Clara Jean Wesolowski

Defendant

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. D. Keeley

Counsel for the Defendant:

M.P. Larsen

Place and Date of Hearing:

Kelowna, B.C.

August 31, 2022

September 1-2, 2022

November 4, 2022

Place and Date of Judgment:

Kelowna, B.C.

December 20, 2022

Introduction

- [1] This case arises out of a dispute over the respective interests of the parties in a property at Lighthouse Landing in Summerland, British Columbia. By way of background, the parties acquired the Lighthouse Landing property as a vacant lot during the currency of their common law relationship. Their intention was to build a house on the lot, although there is a dispute as to the ultimate purpose in doing so, and the relationship ended before construction of the house was complete. Eventually, the house was sold with the net proceeds held in trust.
- [2] The defendant Ms. Wesolowski applies for determination of her claims by way of a summary trial. The plaintiff Mr. Paquette, in his cross-application, seeks determination of the claims in his favour.
- [3] Mr. Paquette claims that the parties entered into a formal business partnership to develop and sell real estate, and that the Lighthouse Landing property was acquired in this context. He says that Ms. Wesolowski breached her fiduciary duties by misappropriating partnership property and failing to account for partnership funds. He also says the parties entered into binding agreements regarding their joint acquisition of a fifth wheel trailer, and a vehicle registered in Ms. Wesolowski's name, and that Ms. Wesolowski failed to honour the terms of these agreements. Among other things, Mr. Paquette says Ms. Wesolowski failed to account for mortgage proceeds and substantial amounts of rent collected prior to the sale of the Lighthouse Landing property. In the result, Mr. Paquette says he is entitled to all of the net proceeds from the sale of the Lighthouse Landing property.
- [4] Ms. Wesolowski claims that the acquisition of the Lighthouse Landing property was governed by a written cohabitation agreement, and after separation Mr. Paquette basically walked away from the property and left her entirely responsible for completing the house construction and ultimately selling the property to pay off the outstanding debts. In these circumstances, Ms. Wesolowski says the entire net proceeds from the sale of the Lighthouse

Landing property should be distributed to her based on the combined operation of the cohabitation agreement, the rules governing division of co-owned property in the Law of Property Act, R.S.A. 2000, c. L-7, and principles of equity.

The Facts

Background

- [5] The plaintiff Mr. Paquette is a journeyman plumber who now resides in Summerland, British Columbia. The defendant Ms. Wesolowski is a realtor who now resides in Calgary, Alberta.

The Relationship

- [6] The parties met and started dating in Calgary in 2011. Both were mature individuals with adult children from prior relationships. Both were living on their own when their relationship began.
- [7] In the summer of 2011, Ms. Wesolowski moved to Fort MacMurray. In the fall of 2011, Mr. Paquette followed, and they started living together. Thereafter, the parties were in a seven-year relationship that ended with their separation in September of 2017, although as explained in more detail below they continued to live together until early 2018.

Financial Arrangements

- [8] During their relationship, the parties generally maintained separate finances. They had separate bank accounts and paid each other for joint expenses. Ms. Wesolowski owned a house in Chestermere, Alberta, which she purchased in 2006, and which she used for rental income throughout the relationship with Mr. Paquette. She also earned income as a real estate agent, initially in Alberta, and also later in British Columbia. For his part, Mr. Paquette earned a substantial annual income as a gas fitter in Fort MacMurray, but had no significant assets.

The Cohabitation Agreement

- [9] On 1 April 2013, the parties signed a written Cohabitation Agreement. It is common ground that the agreement was Ms. Wesolowski's idea, and that her principal concern was to protect her interest in the Chestermere property as the two-year anniversary of her relationship with Mr. Paquette approached. However, beyond these basic facts, the circumstances under which the parties signed the Cohabitation Agreement, and what was said about it at the time, are in dispute between the parties.

The Plan to Relocate and Build a House in Kelowna

[10] In late 2014, the parties decided to relocate to Kelowna, purchase a vacant lot, and build a house. Looking back on the events, the parties have different characterizations of their plan and its objectives. Ms. Wesolowski says they intended to build their "dream home" together. Mr. Paquette says they entered into a business partnership to purchase a property and develop it for profit, as a commercial venture. For reasons explained more fully below, I am not satisfied that the parties ever really had a clear mutual agreement as to the ultimate objective. The most that can be said is that the parties formed a plan to relocate to Kelowna, purchase a vacant lot, and build a house on it.

Purchase of the Lighthouse Landing Property

- [11] On 9 May 2015, Ms. Wesolowski submitted a written offer to purchase a vacant lot in a subdivision called Lighthouse Landing, in Summerland, B.C. The purchase price for the lot was \$398,000. The offer was accepted and, on 13 May 2015, Ms. Wesolowski made a \$5,000 deposit on the purchase.
- [12] The closing date for the purchase of the Lighthouse Landing property was 1 February 2016. The purchase price was \$398,000 plus taxes and other fees, for a grand total of \$427,000. The purchase funds came from the \$5,000 deposit paid by Ms. Wesolowski, a further \$110,000 down payment, and a mortgage in the amount of some \$312,000. Mr. Paquette contributed \$20,000 toward the down payment, and Ms. Wesolowski contributed the balance of the funds, which, after accounting for the initial deposit, totalled some \$95,000. Ms. Wesolowski obtained a large proportion of these funds by refinancing her Chestermere property.
- [13] One can see from this that of the \$115,000 that the parties paid up front for the Lighthouse Landing property, Ms. Wesolowski contributed some 81%, and Mr. Paquette contributed some 19%. The title to the property reflected Ms. Wesolowski's greater financial investment, although not in exact proportion to the respective contributions of the parties. In particular, the Form A freehold transfer provided that Ms. Wesolowski was the owner of an undivided 70% interest in the property, and Mr. Paquette was the owner of the remaining 30%.

"Notarization" of the Cohabitation Agreement

- [14] On 12 January 2016 - a matter of weeks before the closing date on the purchase of the undeveloped lot at Lighthouse Landing - the parties went to see a Notary Public in Fort MacMurray, where they had the Cohabitation Agreement "notarized". Both parties initialled each page of the agreement, and then signed and dated the last page, in the presence of the notary.

Development of the Lighthouse Landing Property

- [15] On 1 December 2015, Ms. Wesolowski and Mr. Paquette retained a design company to prepare blueprints for the construction of the house on the Lighthouse Landing property.

- [16] On 3 December 2015, Ms. Wesolowski registered a general partnership with the British Columbia Registrar of Companies. The partnership was registered under the name "Éclair Design and Construction". The registration form listed the two partners as Ms. Wesolowski and Mr. Paquette and described the nature of the business as "new home construction and renovation". In her first affidavit, Ms. Wesolowski averred that the immediate purposes of registering the business partnership were to obtain preferential pricing from subcontractors and tradespeople, and to enable the parties to apply for a new home warranty without having to complete an "owner-builder" education course. In his affidavit, Mr. Paquette does not deny that these were the immediate purposes of registering the partnership, although he says the registration is evidence of their overall intention to enter into a legally binding business partnership.
- [17] On 2 February 2016, Ms. Wesolowski made a \$10,000 deposit to secure the new home warranty coverage for the Lighthouse Landing project.
- [18] On 18 April 2016, Ms. Wesolowski obtained a building permit for the property and construction got underway shortly thereafter.
- [19] It is common ground that both parties contributed time and effort toward the construction of the house, although in retrospect each of them now disputes the significance of the other's contribution. Ms. Wesolowski's role was to handle the finances and operate as the general contractor by arranging and overseeing the subtrades. Mr. Paquette is a fully trained and certified plumber and gas fitter, and his contribution came largely in the form of skilled labour in the construction of the house. Ms. Wesolowski points out that she lived in Summerland for more or less the entire duration of the construction, while Mr. Paquette continued to work in Fort MacMurray for several weeks at a time and was only in Summerland for his weeks off. Ms. Wesolowski estimates that she devoted some 4,000 hours of labour to the project, while Mr. Paquette's contribution was somewhere in the neighborhood of 800 hours. Mr. Paquette disputes these estimates, and points to various inconsistencies and over-statements in Ms. Wesolowski's affidavit evidence and supporting records.
- [20] In around April of 2017, the live-in suite above the garage became habitable and Ms. Wesolowski and Mr. Paquette moved into it.
- [21] In around August of 2017, the main house became habitable and Ms. Wesolowski and Mr. Paquette moved into it.
- [22] By December of 2017, construction of the home was substantially complete, although some fixtures and appliances still needed to be installed, the interior décor was not finished, and the landscaping had yet to be done. The balance of this work was finished by the summer of 2018.

Purchase of the Fifth Wheel Trailer

[23] Meanwhile, on 12 May 2016, the parties purchased a fifth wheel trailer, referred to in their pleadings as an "RV". The total purchase price was \$50,000, plus taxes and warranty fees, for a grand total of some \$61,987, all of which was financed. Both parties agree that the final cost of the RV was somewhere around \$70,000 and the insurance reflects a replacement value of \$80,000. Although the purchase agreement lists Ms. Wesolowski and Mr. Paquette as joint purchasers, it appears that over time Mr. Paquette has assumed primary responsibility for the RV, as explained in more detail below. After the RV was acquired, the parties lived in it, at a campground near the Lighthouse Landing property, while the construction of the home progressed.

The Status of the Relationship

[24] Over the course of the construction project the relationship between the parties deteriorated and ultimately broke down. Although the parties have never agreed as to the exact date of separation, there is no real controversy between them on this score.

[25] Ms. Wesolowski deposes she and Mr. Paquette separated in mid-September of 2017. Her affidavit includes considerable detail about the status of the relationship at various points in time. The upshot is that by mid-September of 2017, the parties were no longer romantically involved, slept in separate rooms, generally did not socialize together or accommodate each other's future plans, and for the most part only communicated about the status of the construction project.

[26] Mr. Paquette disputes Ms. Wesolowski's characterization of his conduct and actions during the relationship, but clearly there is no dispute that the relationship ended. Nor does he identify a specific end date for the relationship. Although Mr. Paquette's counsel suggested in argument that the separation date identified by Ms. Wesolowski is arbitrary and chosen tactically to suit her legal position, counsel did not seriously argue any alternate date.

[27] On or about 18 February 2018, Mr. Paquette left the Lighthouse Landing property and relocated to Calgary, to live with his son.

[28] Ms. Wesolowski asserts in her affidavit that after Mr. Paquette moved away from the property, he withdrew entirely from the project and left her to complete it on her own. Mr. Paquette disputes this. He acknowledges that he relocated to Calgary to stay with his son for a period of time in 2018, but maintains that he continued to make financial contributions when he was asked and able to do so. There is some admissible affidavit evidence in which Mr. Paquette told third parties that the Lighthouse Landing was Ms. Wesolowski's problem, or words to that effect, although given the context in which these statements were made they could be regarded as merely rhetorical or contrarian comments, not necessarily statements of Mr. Paquette's legal interest in the property, or his commensurate responsibilities.

[29] In or around May of 2018, Mr. Paquette returned to Summerland to stay in the RV, which he has been using as his primary residence ever since. He has assumed responsibility for the loan payments and lot rental fees. In his affidavit, Mr. Paquette asserts that he has contributed approximately \$91,000 toward the purchase and maintenance of the RV, although a fair proportion of his expenditures effectively represent his housing costs. For her part, Ms. Wesolowski asserts that she covered approximately \$8,000 to \$10,000 in "RV-related expenses" at various points in time, although some of this can be classified as living costs while she and Mr. Paquette were living in the RV during their common law relationship. It also appears that Ms. Wesolowski's estimate fails to account for the fact that an initial deposit of some \$5,000 was later refunded to her. As noted, Mr. Paquette continues to reside in the RV and has assumed responsibility for payments on the outstanding loan, the balance of which was some \$53,572 as of June of 2021.

Financing for the Lighthouse Landing Property

- [30] Over the duration of their ownership of the Lighthouse Landing property, the parties obtained a number of mortgages. In particular:
- (a) Valley First Mortgage #1. The parties obtained initial mortgage financing from Valley First. This mortgage was finalized on 11 March 2016. The total amount of indebtedness was \$567,700. Of this, \$313,425 went to the purchase of the lot, and the balance of \$254,275 was used to fund the first phase of the house construction.
 - (b) Valley First Mortgage #2. On 6 October 2016, the parties obtained a further mortgage from Valley First, in the amount of \$200,475. All of these funds were used in the construction of the home.
 - (c) Versatile Mortgage. On 23 June 2017, the parties obtained a third mortgage from Versatile Mortgage Corporation, in the amount of \$126,048. The funds were used for construction of the home, and to cover personal and living expenses of the parties during their relationship.
 - (d) CIBC Mortgage. On 22 December 2017, the parties refinanced the property, consolidating all of the outstanding debt in a single mortgage in the principal amount of \$1,013,500. The parties were unable to secure this mortgage without the assistance of Ms. Wesolowski's adult son and daughter, who also became signatories. Title to the property was transferred from Ms. Wesolowski and Mr. Paquette to Ms. Wesolowski (68%), Mr. Paquette (30%), Ms. Wesolowski's son Lance Wesolowski (1%), and her daughter Vanessa Wesolowski (1%). A small portion of the refinancing was used to pay off Mr. Paquette and Ms. Wesolowski's outstanding credit card debt and personal debts. The net mortgage proceeds, in the amount of \$33,089, were paid out to Ms. Wesolowski, who avers in her affidavit that she used the funds to cover outstanding invoices for the home construction, and to make subsequent mortgage payments.

- (e) Holmberg Mortgage. By the fall of 2019, the CIBC mortgage was in arrears and the bank had commenced foreclosure proceedings. On 1 November 2019, the parties obtained a second mortgage from a private lender, Ms. Holmberg, in the principal amount of \$90,000. The net proceeds of \$83,410 were paid out to Ms. Wesolowski, who used them to pay off outstanding construction bills, arrears on the CIBC mortgage, and her personal credit card debts.
- [31] In the result of all of this, by the beginning of 2020, the total debt secured against the Lighthouse Landing property was in the neighborhood of \$1,100,000.

Efforts to Sell the Lighthouse Landing Property

- [32] The parties first listed the property for sale in July of 2016. Mr. Paquette says this was because they always intended to sell the property as part of a joint venture for profit. Ms. Wesolowski denies this. She says that although they initially purchased the property with the intent of building a "dream home" together, they decided to list the property for sale in July of 2016 because construction costs were proving to be much higher than they originally anticipated, and they ran out of financing funds sooner than expected. The details of the July 2016 listing are not contained within the record, and in any event, the property did not sell because no one was prepared to pay the amount the parties were seeking.
- [33] The Lighthouse Landing property was listed for sale on a number of occasions thereafter, in 2017, 2018, and 2019. Eventually, on 20 December 2020, the parties accepted an offer to sell the property for \$1,530,000, with a closing date of 18 February 2021. After paying off the first and second mortgages, the net proceeds of sale were \$357,922. The funds have been held in trust since that date.

Rental Income from the Lighthouse Landing Property and the RV

- [34] At various points in time over the course of the Lighthouse Landing property development project, Ms. Wesolowski rented out the RV, the suite above the garage, and the main house. More specifically:
- (a) Some time in 2017, once the suite above the garage was available for the parties, Ms. Wesolowski started renting out the RV. With some interruption between tenants, Ms. Wesolowski continued to rent out the RV until 1 July 2018, when Mr. Paquette moved back into it.
- (b) In August of 2017, the main house became available to the parties. Thereafter, commencing in September of 2017, Ms. Wesolowski rented out the suite above the garage.
- (c) In July of 2018, Ms. Wesolowski moved out of the main house and relocated to Calgary. Thereafter, commencing in mid-July 2018, Ms. Wesolowski rented out the main house.

[35] It appears from the evidence as a whole that none of these spaces were rented continuously. At some points in time Ms. Wesolowski had month to month or long-term tenants, and at other times she arranged short-term rentals on AirBnB.

Ms. Wesolowski's Jeep

[36] In 2015, Ms. Wesolowski purchased a new Jeep. Mr. Paquette co-signed a loan for the vehicle. At a certain point, Ms. Wesolowski stopped making payments on the loan, and Mr. Paquette says his credit rating has been affected as a result.

Analysis

(1) No Family Law Proceedings

[37] At first blush one might ask why the proceedings in this case have been brought by way of Notice of Civil Claim under the Supreme Court Civil Rules, as opposed to a Notice of Family Claim under the Supreme Court Family Rules. Rule 1-1 of the Family Rules defines a "family law case" to include a claim to an interest in property based on an alleged trust or alleged unjust enrichment where the claim "arises out of a marriage-like relationship". The answer to this question is twofold.

[38] First, it is common ground that the parties separated in 2017, and no claim for property division was commenced within the two-year limitation period provided for in s. 198 of the Family Law Act, S.B.C. 2011, c. 25.

[39] Second, after separation, the parties continued to hold title to the Lighthouse Landing property together. Both of them now basically seek reapportionment of their interests in that property. Mr. Paquette alleges that he and Ms. Wesolowski were in a business partnership, and Ms. Wesolowski breached her fiduciary obligations and failed to account for partnership property and funds. Ms. Wesolowski seeks reapportionment under the Law of Property Act, R.S.A. 2000, c. L-7 and equitable principles of unjust enrichment.

[40] Accordingly, when the Court enquired at the outset of the summary trial whether this case is properly dealt with under the Civil Rules, both parties responded in the affirmative.

(2) Suitability for Summary Trial

[41] Both parties take the position that all of the claims in issue in this matter are suitable for summary trial under Rule 9-7. The parties frankly admit that in taking this position, they are motivated to a large extent by their mutual desire to avoid a full trial and the associated cost and delay. Of course, the law is clear that even where the parties seek a disposition by way of summary trial, the Court can only do so where it is possible to find the facts necessary to decide the issues, and where it would be just to do so: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89.

- [42] In this case, there are conflicts in the evidence on key points. However, with one exception, I am able to find the facts necessary to decide the issues based on the whole of the evidence in the application record, including the affidavits, the supporting documents, and extracts from examination for discovery in which certain concessions were made. In particular, although there are head-on conflicts in the affidavit evidence of the parties on various points, I find that this is not a bar to deciding the matter by way of a summary trial for several reasons.
- [43] First, some of the disputes between the parties are on peripheral matters that need not be resolved to decide the live issues in the case. For example, there are factual disputes about the conduct of the parties during their relationship, but these disputes relate to collateral matters that are not relevant to the legal issues the Court must resolve in order to grant judgment.
- [44] Second, some of the factual disputes between the parties are more in the nature of characterization of the facts, rather than disputes as to the underlying facts themselves.
- [45] Third, where there are factual disputes on matters that must be resolved in order to decide the relevant legal questions, the necessary findings can be made by resort to contemporaneous records and written correspondence between the parties. Thus, the Court is not left in a position of having to make factual findings based solely or even partly on a preference of one party's affidavit evidence over the other party's affidavit evidence.
- [46] The one exception to everything addressed in the preceding four paragraphs has to do with the enforceability of the Cohabitation Agreement. On that issue, Mr. Paquette raises an estoppel argument based on an alleged oral representation by Ms. Wesolowski, who in turn denies Mr. Paquette's version of events. Thus, there is a direct conflict in the evidence as to what happened, and I am not able to resolve the conflict based on the application record. Recognizing this, I ordered cross-examination of each of the parties on the relevant portions of their affidavit evidence, pursuant to Rule 9-7(12)(b). With the benefit of that additional evidence, I am able to make the necessary findings on the factual issues surrounding the enforceability of the Cohabitation Agreement.
- (3) Challenges to the Admissibility of Affidavits Tendered by Ms. Wesolowski
- [47] Mr. Paquette took issue with the admissibility of a number of the affidavits relied upon by Ms. Wesolowski, and in particular the affidavits of (i) Diana Rensler, (ii) Lance Wesolowski, (iii) Less Loef, (iv) Lynda Pettit, and (v) Michael Jansa. Mr. Paquette points out that under Rule 22-2(12), an affidavit tendered on a chambers application can only include statements that the affiant would be permitted to give in testimony at trial. Mr. Paquette says the affidavits cited above contain statements made by Ms. Wesolowski, which are hearsay and contrary to the rule against oath-helping. It is clear from the combined operation of Rules 22-2(12) and (13) that where a final order is sought, hearsay evidence is presumptively inadmissible.

- [48] Ms. Wesolowski responds by saying that the impugned averments are admissible to rebut Mr. Paquette's allegation of "recent fabrication". To explain, Ms. Wesolowski claims that the parties initially intended the Lighthouse Landing property to be their family home or dream home. Mr. Paquette says this is untrue, and that from the outset the parties acquired the property as part of a business venture. In this context, Ms. Wesolowski says that statements she made to third parties about her contemporaneous intentions regarding the property are admissible to rebut Mr. Paquette's allegation that Ms. Wesolowski's evidence is a made up, after-the-fact effort to recharacterize the nature of their arrangement.
- [49] The rule against oath-helping holds that "evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible": *R. v. Burns*, [1994] 1 S.C.R. 656 at p. 667. Prior consistent statements are generally inadmissible because they "lack probative value, are often self-serving, and are hearsay": *R. v. Vukaj*, 2016 BCCA 356 at para. 30, citing *R. v. Rhayel*, 2015 ONCA 377 at para. 77; *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. Dinardo*, 2008 SCC 24 at para. 8. However, such statements "may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance": *R. v. Vukaj* at para. 31, citing *R. v. Evans*, [1993] 2 S.C.R. 629 at 643.
- [50] Applying those principles to the impugned affidavit evidence in the case at bar, my conclusions are as follows:
- (a) With respect to the affidavit of Diana Rensler, I find that the averment at paragraph 6 is admissible as an exception to the rules against hearsay and oath helping, to rebut Mr. Paquette's allegation of recent fabrication. The averment at paragraph 8 is not admissible because it recounts a hearsay statement of Ms. Wesolowski on a separate topic, in respect of which there is no allegation of recent fabrication. This statement is hearsay and also offends the rule against oath helping.
 - (b) With respect to the affidavit of Lance Wesolowski, I find that the averment at paragraph 4 is inadmissible because it is unsourced, conclusory evidence about the intentions of the parties. I find that the averment at paragraph 11 is inadmissible because it recounts a hearsay statement of Ms. Wesolowski on a separate topic, in respect of which there is no allegation of recent fabrication. This statement is hearsay and offends the rule against oath helping.
 - (c) With respect to the affidavit of Les Loef, I find that the averments at paragraphs 7, 10, 12, and 16, recounting assertions made by Ms. Wesolowski, are inadmissible. None of them are in relation to a subject matter in respect of which there is an allegation of recent fabrication. These statements are hearsay and offend the rule against oath helping.

- (d) With respect to the affidavit of Lynda Pettit, I find that the averment at paragraph 8, recounting a statement attributable to Mr. Paquette, is admissible as an exception to the hearsay rule, namely an admission against interest tendered by the opposing party. I find that the averments at paragraphs 9 and 10, recounting out-of-court statements by Ms. Wesolowski, are inadmissible. They are contrary to the rules against hearsay and oath helping, and none of the statements in issue pertain to any alleged recent fabrication.
- (e) With respect to the affidavit of Michael Jansa, I find that paragraph 4 contains an unsourced averment of Mr. Jansa's belief or opinion that is inadmissible. I find that paragraphs 5 and 9, referencing out-of-court statements by Ms. Wesolowski, are inadmissible under the rules against hearsay and oath helping, and do not relate to any subject matter in respect of which there is an allegation of recent fabrication. I find that paragraph 14, containing an averment by Mr. Paquette, is admissible as an exception to the hearsay rule, namely an admission against interest tendered by the opposing party.
- (4) Validity and Enforceability of the Cohabitation Agreement
- [51] Ms. Wesolowski says that the property interests of the parties during the currency of their relationship and thereafter are governed by the Cohabitation Agreement. The Cohabitation Agreement is important because it specifies how the parties were to treat property acquired during the relationship, and what law applies to the determination of any subsequent claims to that property.
- [52] Mr. Paquette says the Cohabitation Agreement does not apply or is not binding on him because Ms. Wesolowski made a representation to him about its nature and purpose, and she subsequently presented the agreement for his signature in circumstances where he did not appreciate its full effect. In particular, Mr. Paquette's evidence is that Ms. Wesolowski told him the purpose of the agreement was to protect her interest in the Chestermere property, that they never discussed the actual terms of the agreement before it was presented to him for signature, and that it was then presented to him in haste, immediately before he was asked to sign it in front of witnesses he did not know. To be clear, Mr. Paquette does not plead non est factum. Rather, he invokes the doctrine of promissory estoppel. He says Ms. Wesolowski made an oral representation that the purpose of the agreement was to protect her interest in the Chestermere property, and that he relied on that representation in signing the agreement, such that Ms. Wesolowski is now estopped from seeking to use the agreement for any broader purpose.
- [53] In response, Ms. Wesolowski flatly denies Mr. Paquette's version of events. She says that they discussed the terms well in advance of the Cohabitation Agreement being signed, that they basically prepared the agreement together in Fort MacMurray, and that it was simply taken to her daughter's house in Calgary to be signed and witnessed in front of third parties.
- [54] Mr. Paquette and Ms. Wesolowski were both thoroughly cross-examined on the averments in their affidavits on this particular issue. With the benefit of the cross-examination, assessed in conjunction with all the evidence in the record, I accept Mr. Paquette's account of the

circumstances in which the Cohabitation Agreement was initially signed and witnessed on 1 April 2013. Mr. Paquette was not shaken in cross-examination on his account of the incident. Bearing in mind that the incident happened almost ten years ago, Mr. Paquette nevertheless had a relatively clear recollection of how the incident unfolded, and no material inconsistencies were elicited in cross-examination. The gist of Mr. Paquette's account was that he was told the agreement was to protect Ms. Wesolowski's interest in her Chestermere property, that he was presented with the agreement during a car ride to Ms. Wesolowski's daughter's house, that he was given little or no time to meaningfully review the agreement, and that he was then ushered into the daughter's house and asked to sign in front of a witness whom he had never met before.

- [55] Mr. Paquette's account fits with the surrounding circumstances. Among other things, while the parties were living together in Fort MacMurray at the time, the agreement itself was signed and witnessed in Calgary, in front of two witnesses who Ms. Wesolowski admits were friends of her daughter. Moreover, Mr. Paquette's account fits with Ms. Wesolowski's admission that her primary concern at the time that she got Mr. Paquette to sign the agreement was to protect her interest in the Chestermere property. Indeed, the only property (or debt) of either party that is listed in the schedule to the agreement is Ms. Wesolowski's Chestermere property.
- [56] I have considered the evidence of Ms. Wesolowski on this point, but I do not find it convincing when placed up against Mr. Paquette's evidence and the other evidence in the record. I find that Ms. Wesolowski downloaded the agreement from the internet, printed it out, and presented it to Mr. Paquette for signature in the circumstances that he described. I do not accept Ms. Wesolowski's position that the two of them drafted the agreement together at their residence in Fort MacMurray, and then took it with them to Calgary where they then signed it in front of Ms. Wesolowski's daughter and her roommates. I find it much more likely that Ms. Wesolowski told Mr. Paquette that she wanted him to sign an agreement so she could protect her interest in the Chestermere property and then presented it to him on the way to a visit with her daughter in circumstances where Mr. Paquette had little opportunity to read it.
- [57] On these facts, I accept Mr. Paquette's argument that promissory estoppel as set out in *DeWolfe v. Jones*, 2016 BCSC 2008 at para. 19 (citing *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50) applies to bar Ms. Wesolowski from relying on the Cohabitation Agreement as originally executed on 1 April 2013 for any purpose other than to protect her interest in the Chestermere property.
- [58] However, that is not the end of the matter, because almost three years later, on 12 January 2016, the parties signed the agreement a second time, before a notary, in Fort MacMurray. On this occasion, the parties signed the agreement in a formal, professional setting, namely the notary's office. Each page of the agreement bears the initials of both Mr. Paquette and Ms. Wesolowski. The last page is signed by each of them, and "sworn" before the notary.

- [59] Ms. Wesolowski deposes that the notary asked each of them whether they had read the agreement before signing it, and both parties responded that they had. This averment is consistent with my understanding of the professional obligations of a notary who "notarizes" a document by having the party "swear" to its authenticity before witnessing the party's signature on it.
- [60] In cross-examination, Mr. Paquette testified that he did not recall the notary asking him whether he had read the agreement before he signed it. When pressed, he said, "as far as I recall I don't remember her ever asking me that question". I find that in falling back on his lack of recollection, Mr. Paquette was avoiding answering the question more directly. In any event, Mr. Paquette is clearly not in a position to affirmatively deny the suggestion that the notary asked him if he had read the agreement before signing it. I find that at the very least Mr. Paquette represented to the notary that he had read the agreement. Indeed, he had initialed every page of it before the notary.
- [61] I also reject Mr. Paquette's evidence that prior to having the Cohabitation Agreement notarized on 12 January 2016, Ms. Wesolowski repeated her earlier representation that the only purpose of the agreement was to protect her interest in the Chestermere property. Mr. Paquette's testimony on this point does not fit with the evidence as a whole. It is noteworthy that the Cohabitation Agreement was "notarized" a mere two weeks before the closing date on the purchase of the Lighthouse Landing property. The parties were about to undertake a significant joint financial commitment. In these circumstances, I find it implausible that Ms. Wesolowski would have made any representation to Mr. Paquette that the sole purpose of the written agreement was to protect her interest in the Chestermere property. I find it much more likely that two weeks or so before the parties were to acquire title to the Lighthouse Landing property, Ms. Wesolowski's objective was not merely to protect her pre-existing interest in the Chestermere property, but also to protect her interests in relation to the acquisition of the Lighthouse Landing property. Indeed, the fact is that she was borrowing money on her Chestermere property to fund her investment on the Lighthouse Landing property. Further, when the parties acquired the Lighthouse Landing property, Ms. Wesolowski was listed on the title as the owner of a 70% share, and Mr. Paquette was listed as a 30% share. This is consistent, at least in broad strokes, with the terms of the Cohabitation Agreement providing that any property acquired by them during the relationship would be held in proportion to their respective investment in that property. For all of these reasons, I do not accept Mr. Paquette's assertion that Ms. Wesolowski re-iterated the assertion that the purpose of the Cohabitation Agreement was only to protect her interest in the Chestermere property.
- [62] In the result, while there was a prior representation (some three years earlier) that the purpose of the Cohabitation Agreement was solely to protect Ms. Wesolowski's interest in the Chestermere property, that of itself is not sufficient to limit the legal effect of the Cohabitation Agreement signed by both parties before a notary public on 12 January 2016. Promissory estoppel is an equitable remedy and it would not be fair to apply it in

circumstances where the party claiming the benefit of the alleged "promise" has himself made a representation that would be contrary to the one relied upon. Having represented to the notary that he had in fact read the agreement, Mr. Paquette cannot now rely on an assertion that is inconsistent with the written terms of the agreement. The terms of the written agreement make it clear that it applies not just to all existing or pre-owned property, but also to property acquired by either party during the relationship. Further, the terms could only be varied by further agreement in writing. Thus, the agreement could not stand together with the oral representation made three years earlier that its only purpose was to protect Ms. Wesolowski's interest in the Chestermere property.

- [63] In all of these circumstances, I would not apply the doctrine of promissory estoppel to bar Ms. Wesolowski's reliance on the Cohabitation Agreement signed before the notary on 12 January 2016. My conclusion is that as of that date, both parties were bound by the terms of the Cohabitation Agreement.
- [64] Mr. Paquette urges the Court to be skeptical of Ms. Wesolowski's position based on the timing of her reliance on the Cohabitation Agreement. Mr. Paquette's counsel points out that nowhere in the many hundreds of pages of text messages between the parties during their relationship or thereafter did Ms. Wesolowski ever reference the Cohabitation Agreement. Counsel further points out that Ms. Wesolowski did not plead or rely upon the terms of the Cohabitation Agreement as a basis for determining the respective interests in the Lighthouse Landing property until the summer of 2022, a matter of weeks before the summary trial application was set to be heard.
- [65] I have considered Mr. Paquette's argument about timing, but I do not find it convincing. The Cohabitation Agreement was disclosed by Ms. Wesolowski in her list of documents early on in the proceedings. It clearly existed and was signed by the parties twice, once in 2013 and again in 2016. Its existence is not in dispute. The fact that Ms. Wesolowski or her counsel did not come to appreciate its legal significance until later in the proceedings does not alter the legal character or effect of the agreement itself. As noted, Ms. Wesolowski saw fit to have the agreement notarized on 12 January 2016, a matter of several weeks before the parties acquired the Lighthouse Landing property. In the end, the legal effect of the agreement is to affirm in broad strokes the overall structure of the investment as reflected in the title to the property itself, in which Ms. Wesolowski is a 70% owner and Mr. Paquette a 30% owner of the Lighthouse Landing property, allowing for the fact that in reality the proportion of each party's investment was somewhat different at the time of separation.

(5) The Alleged Partnership Agreement

- [66] A "partnership" is defined in s. 2 of the Partnership Act, R.S.B.C. 1996 c. 348 as "the relation which subsists between persons carrying on business in common with a view of profit". A non-exhaustive list of considerations for determining whether a partnership exists is set out in s. 4 of the Act. Among these is the proposition in s. 4(a) that joint ownership of property "does not of itself create a partnership".

- [67] The case law instructs that partnership is a relationship that arises out of contract. A partnership will only exist where there is cogent evidence establishing the essential elements of such a legal arrangement, namely (a) a valid contract of partnership, (b) between members who are (i) carrying on business, (ii) in common, (iii) with a view to profit: *Rockwell v. Fay*, 2009 BCSC 935 at para. 84-85.
- [68] Mr. Paquette's primary position is that prior to acquiring the Lighthouse Landing property, the parties entered into a partnership to acquire, develop, and sell real estate with a view to profit. He says the original agreement was that the parties would be equal partners and would share equally in the profits. He further says that when he could not come up with his share of the down payment for the Lighthouse Landing property, the agreement was amended to the effect that Ms. Wesolowski would make a greater financial contribution to the purchase, and Mr. Paquette would subsequently make greater contributions of labour and additional funds to equalize the beneficial interests in the project.
- [69] I do not accept Mr. Paquette's position that the parties ever formed a legally binding partnership. I reach that conclusion for two reasons.
- [70] First, there is no written documentation of the alleged partnership agreement, as would be required to alter the clear terms of the Cohabitation Agreement. Although a partnership can be established by evidence of oral agreement, or even in some cases inferred from conduct, in this particular case the terms of the Cohabitation Agreement do not leave any room for any such oral agreement or arrangement. Clause 5 of the Cohabitation Agreement states that in the event of the parties separating, any jointly held or jointly acquired property would be deemed to be owned "in accordance with the proportion of each party's investment", "unless the parties otherwise agree in writing". Since the alleged partnership agreement was not in writing, it could not vary the terms of the written Cohabitation Agreement.
- [71] Second, I find that there was in fact no meeting of the minds with respect to the essential elements a partnership.
- [72] There was no express or implied agreement for the parties to enter into a legally binding arrangement in which they would buy a property, construct a house, sell it for profit, and equally divide the profits. The arrangement was much more fluid than this. The parties agreed to relocate from Fort MacMurray to the Kelowna area, to acquire a property, and to build a house on it. Beyond that, there was never any meeting of the minds between the parties.
- [73] Nowhere in Mr. Paquette's pleadings or affidavit evidence is there any clear identification of a specific date on which a partnership agreement was agreed upon or formed. In his amended notice of claim, Mr. Paquette alleges that the partnership was formed "[o]n or around December 2015". This is some six to seven months after the offer to purchase the Lighthouse Landing property as a bare lot for some \$398,000 had been accepted by the seller. Further, Mr. Paquette's affidavit evidence does not specify any date when the alleged partnership agreement was reached, or the date when the terms of the alleged agreement

were modified to provide that the initial investment in the Lighthouse Landing property would not be equal, but that Mr. Paquette would later contribute "labour and additional funds" to equalize the beneficial interests in the project. Nor has Mr. Paquette given any evidence that the parties ever discussed much less agreed upon any terms or mechanism on which Mr. Paquette's contribution of labour would be assessed and valued, so as to represent a proportionately greater contribution than Ms. Wesolowski's labour in order to equalize their respective contributions, although clearly their skills and assigned responsibilities were qualitatively different.

- [74] I am not satisfied that the parties ever had a meeting of the minds and an intention to create a legally binding or enforceable agreement regarding their efforts to develop the Lighthouse Landing property. Nor am I satisfied that the parties had a firm intention, from the outset, to carry on business for profit. Rather, I find that the acquisition of the Lighthouse Landing property was part of a joint family venture in making a life together. The parties clearly intended to develop and live in the property for a time. That proved not to be feasible, so they looked for opportunities to sell it. Further, aside from the terms of the Cohabitation Agreement, the parties had no firm agreement or meeting of the minds as to their respective investments and contributions, or the manner in which any profits would be divided.
- [75] I have considered the evidence that Ms. Wesolowski registered a partnership called "Éclair Design and Construction" that was said to be in the business of new home renovation and construction. However, both parties acknowledge that the immediate purposes or aims of registering the business were to obtain more competitive pricing of materials and subtrades, and to avoid the obligation to complete an owner-builder course before qualifying for the new home warranty program. The law is clear that "the mere act of registration" does not create a partnership: *Backman v. R.* (1997), 97 D.T.C. 1468 (T.C.C.) at para. 74, *aff'd* (1999), 99 D.T.C. 5602 (F.C.A.), *aff'd* 2001 SCC 10.
- [76] I have also considered the evidence that the parties referred to each other from time to time as "partners" or even "business partners". However, evidence that parties have referred to themselves as "partners" is not conclusive proof of a legally recognizable partnership. The term "partner" is often used in common parlance to describe joint efforts toward some common goal, however loosely conceived of or ill-defined: *Rockwell* at para. 91.
- [77] For all of these reasons, the evidence does not establish the existence of a legally binding partnership. I stress that this finding is not based on an assessment of Mr. Paquette's credibility, but rather a conclusion based on the totality of the evidence. I consider Mr. Paquette's assertion that the parties entered into a partnership agreement to be an effort by him to characterize the terms of his financial dealings with Ms. Wesolowski, rather than a factual assertion that the parties reached any kind of mutual agreement on those terms. I note once again the lack of precision in Mr. Paquette's evidence as to exactly when the parties formed the initial partnership agreement, and exactly when and on what terms it was later amended as he asserts in his affidavit.

- [78] I have also considered the passage at paragraph 6 of Ms. Rensler's affidavit, recounting Ms. Wesolowski's assertion that the Lighthouse Landing property "was intended to be her and Brian's residence and a vacation home for their families". Although admissible on the basis I have described above, I do not find this statement particularly helpful, much less dispositive, because it is merely reflective of Ms. Wesolowski's asserted position or state of mind at the time. This is not direct evidence that Ms. Wesolowski and Mr. Paquette actually agreed between themselves on precisely what they intended to do with the Lighthouse Landing property. It may well be that Ms. Wesolowski's "dream" was to build and live in a home with Mr. Paquette, but the evidence as a whole does not convince me that the parties had a mutually agreed upon plan to that effect. For the reasons given above, the evidence also does not convince me that the parties had entered into a formal business partnership with a clear purpose of purchasing, developing, and selling the Lighthouse Landing property for profit. I find that the parties never really reached a clear understanding as to their ultimate goals or objectives.
- [79] The parties were, I find, working together in a joint family venture for the mutual benefit of the two of them. They were trying to build a life together. This included building a house where they could live, and selling the house if and when it suited their financial interests to do so. The evidence does not establish that their intentions and plans were any no more specific than that.
- (6) The Alleged RV Agreement and Alleged Jeep Agreement
- [80] Mr. Paquette also claims that the parties made additional agreements with respect to the RV and Ms. Wesolowski's Jeep.
- [81] I will deal firstly with the RV. Recall that it was purchased by Ms. Wesolowski and Mr. Paquette together and insured in both of their names. The parties lived in it for certain periods of time during the construction of the house at Lighthouse Landing, and Ms. Wesolowski rented it out for other periods of time. Since July of 2018, Mr. Paquette has been living in it on his own, and has been making the loan payments and covering all of the expenses.
- [82] In his affidavit, Mr. Paquette claims that he and Ms. Wesolowski bought the RV because they needed somewhere to live in Summerland during the construction at Lighthouse Landing. He further claims that while Ms. Wesolowski eventually arranged to rent it out for periods of time when it was vacant, this was not the original intention of the parties.
- [83] It follows that on Mr. Paquette's own evidence, the parties did not have any kind of legally binding business partnership in relation to the RV. Among other things, the parties did not form an intention to acquire the RV with a view to earning profit, which is a basic element of a partnership. Nor is there sufficient certainty of terms as to the parties' respective contributions, responsibility for the debt, or sharing of any net proceeds from the rental. Thus, none of the essential elements of a legal partnership were present.

- [84] Nor, in my view, can the acquisition of the RV be characterized as part of a broader partnership to acquire, develop, and sell real property. I should note that Mr. Paquette did not specifically allege that the purchase of the RV was part of the property development partnership. Rather, his pleadings appear to allege a separate "agreement" in relation to the RV. In any event, having found that no such broader property development partnership existed, there is no basis for concluding that the acquisition of the RV was a component of such a partnership arrangement.
- [85] In my view, the respective interests of the parties in the RV are governed by the Cohabitation Agreement. The RV was property acquired during the course of the relationship.
- [86] I turn next to Ms. Wesolowski's Jeep. The underlying facts are that during the currency of the relationship, Ms. Wesolowski purchased a Jeep, financed through a vehicle loan, and Mr. Paquette agreed to co-sign the loan. After separation, Ms. Wesolowski stopped making payments on the loan, and Mr. Paquette says this has adversely affected his credit rating. In this context, Mr. Paquette's claim includes "damages" for breach of some kind of agreement or contract in relation to the Jeep.
- [87] On the facts just outlined I am unable to find that the parties ever had a legally enforceable agreement in relation to the Jeep. The fact that Mr. Paquette agreed to co-sign a loan, during a period of time when he and Ms. Wesolowski were in a relationship together, does not establish a business partnership, or any other kind of enforceable contract between the parties in relation to the Jeep.
- (7) Interpretation and Application of the Cohabitation Agreement
- [88] For current purposes, the essential elements of the Cohabitation Agreement can be summarized as follows.
- (a) Recital B stated that the parties wished to enter into an agreement to provide for the status, ownership, and division of property between them, including future property owned or to be acquired by either or both of them.
 - (b) Clause 5 stated that in the event of the parties separating, any jointly-held or jointly-acquired property would be deemed to be owned in proportion to each party's investment, unless the parties otherwise agreed in writing.
 - (c) Clause 12 stated that in the event of separation, the parties would be jointly responsible for any jointly-acquired or jointly-held debts in accordance with the initial or ongoing proportion of each party's borrowed amount, unless the parties otherwise agreed in writing.
 - (d) Clause 17 provided that the investment of time or labour with respect to personal service in the property of each of them will be deemed to be made gratuitously, and without expectation or right of compensation unless agreed to in writing.

- (e) Clause 29 stated that the laws of the Province of Alberta were to govern the interpretation of the agreement, and the status, ownership, and division of property between the parties wherever either or both of them may from time to time reside.
- [89] In my view, three fundamental points arise from the combined operation of these terms in the Cohabitation Agreement. First, the interests of the parties in both the Lighthouse Landing property and the RV fall to be determined under the agreement, as property acquired during the currency of the relationship. Second, the respective interests in those properties are crystallized on the date of separation, based on each party's proportionate investment at the time of separation. Third, interests of the parties in both the Lighthouse Landing property and the RV are to be determined under Alberta law.
- [90] The title to the Lighthouse Landing property stated that Ms. Wesolowski had a 70% ownership interest and Mr. Paquette had a 30% ownership interest in the property. However, this is not determinative of the interests of the parties, for the reasons that follow.
- [91] Under s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 50, a certificate of indefeasible title is "conclusive evidence at law and in equity 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". This provision establishes a statutory presumption under which the registered owner's interest in the property is presumed to be as stated on the title: *Freeland v. Farrell*, 2022 BCCA 99 at para. 25, 42. The presumption may be rebutted by: (i) the operation of a resulting trust, (ii) the operation of a legal agreement which is contrary to the interests reflected in the title, or (iii) principles of unjust enrichment: *Suen v. Suen*, 2013 BCCA 313 at para. 34.
- [92] In the case at bar, the Cohabitation Agreement is a legal agreement reflecting ownership interests that are, or could be, inconsistent with the legal ownership as reflected on title. I say this because under Clause 5 of the agreement, jointly-held or jointly-acquired property is deemed to be owned in proportion to each party's investment at the time of separation. Accordingly, the presumption of ownership interests as stated in the title to the property has been rebutted. In this analysis, the key issue is the determination of each party's proportionate investment in the property at the date of separation, which may well be different from the ownership as reflected on the title to the property.
- [93] I acknowledge as well that under Clause 29 of the Cohabitation Agreement, the interests of the parties are to be determined under Alberta law, not British Columbia law. This raises a question about whether s. 23(1) of the Land Title Act has any bearing whatsoever in this particular case. Nevertheless, because s. 23(1) establishes a rebuttable presumption, and because the Cohabitation Agreement effectively rebuts the presumption, the net result is the same, whether one considers s. 23(1) of the Land Title Act or not. All roads lead back to the Cohabitation Agreement as the basis for determining the interests of the parties in the Lighthouse Landing property.

- [94] However, while the determination of each party's proportionate investment in the property at the date of separation is a necessary step, it is not the end of the analysis. This is because each party argues that determining their respective interests in the net proceeds from the sale of the Lighthouse Landing property based on their proportionate investment in the property at the date of separation would be inequitable or would result in unjust enrichment of the other.
- [95] As a mechanism for addressing these competing equitable claims, Ms. Wesolowski cites and relies upon ss. 15 and 17 of the Law of Property Act, R.S.A. 2000, c. L-7 [LPA]. Under s. 15 of the LPA, the Court can "terminate" co-ownership of land, and in doing so can make directions for the sale of co-owned property, and "the distribution of the proceeds". Under s. 17(1), the Court - in making an order for sale and distribution of proceeds - may direct an "accounting", "contribution", or "adjustment", or may order compensation for an unequal division of the land. In considering these remedies, the Court must take into account the non-exhaustive list of statutory factors set out in s. 17(2)(a) through (h) of the LPA. The case law also recognizes that any agreement between the parties regarding their interests in the real property in issue is a "highly relevant" factor in the analysis: *Scherf v. Nesbitt*, 2009 ABQB 445 at para. 24-25.
- [96] In the particular circumstances of this case, the legal principles discussed above auger for a two-step approach. The first step is to determine the proportionate investment of each party in the property as of the date of separation on 15 September 2017. This will determine their proportionate interest in the property as of that date per Clause 5 of the Cohabitation Agreement. The second step is to consider the equitable claims of the parties as regards the post-separation handling of the property, having regard to the statutory factors in s. 17(2) of the LPA. This will allow the Court to consider whether it would be equitable to make any adjustment to the disposition of the net proceeds based on the respective ownership interests of the parties per the Cohabitation Agreement.
- [97] I should note that the broad discretion given to the Court under the LPA, under which the Court must consider not just the listed statutory factors, but also any other relevant factors, does away with the need to conduct a rigorous analysis of the competing unjust enrichment claims. The Court has the power to order an accounting, contribution, or adjustment under the LPA, without proof of the three essential elements of an unjust enrichment claim, namely (i) proof of an enrichment, (ii) a corresponding deprivation, and (iii) an absence of a juristic reason for the enrichment.
- [98] What has happened in this case is that the co-owned property has already been sold with the net proceeds now held in trust. The question for the Court is how the net proceeds ought to be divided. In my view, the proper way to do so is under the two-step analysis I have described above. This will allow for a consideration of the property interests of the parties as set out in the Cohabitation Agreement, and the arguments of the parties for equitable relief based on the manner in which the property was dealt with after their separation.

(8) Accounting Analysis

- [99] Both parties have submitted detailed accountings. As a starting point, I propose to use Ms. Wesolowski's accounting, because its structure accords with the two-step analysis described above, and because it is for the most part easy to rationalize.
- [100] I agree with Ms. Wesolowski's counsel that Mr. Paquette's accounting appears to be based on certain assumptions. It assumes that transfers or cash disbursements by Ms. Wesolowski that cannot be tracked to a particular receipt or construction expenditure are not valid, an assumption which I do not accept. Mr. Paquette's approach also assumes that transfers between accounts were for the benefit of Ms. Wesolowski, when in reality they may have just been movements of money from one account to another to facilitate payments. I agree with counsel for Ms. Wesolowski that his client's accounting reflects a bona fide effort to distinguish between funds directed to her personal use and funds devoted to the construction project.
- [101] Having said that, in my view Ms. Wesolowski's pre-separation accounting includes certain expenditures that are not sufficiently linked to the property to justify her receiving credit for them. Ms. Wesolowski's pre-separation accounting indicates that she made a net contribution of \$90,539.06 to acquisition and development of the Lighthouse Landing property. From this, I would deduct her claims for: (i) fuel expenses of \$7,840.67, (ii) "scouting" expenses of \$4,968.00, (iii) a further \$4,588.51 in expenditures that either pre-date the commencement of the project or clearly relate to personal items, and (iv) a total of \$3,600 in pre-paid Visa cards. Thus, I would reduce Ms. Wesolowski's pre-separation contribution by \$20,998.18. The net amount of \$69,540.88 represents Ms. Wesolowski's adjusted pre-separation investment in the Lighthouse Landing property.
- [102] Ms. Wesolowski's pre-separation accounting indicates that Mr. Paquette made a contribution of \$49,456.06 to the acquisition and development of the Lighthouse Landing property. I have considered Mr. Paquette's claim that Ms. Wesolowski failed to credit him with certain construction expenditures made in relation to the property, but I do not agree that this is so. I note that the difference between the pre-separation construction expenses claimed by Mr. Paquette and those allowed by Ms. Wesolowski is some \$1,020.89, approximately although not exactly equal to the payments for internet service at the RV, which in my view is not an expense related to the Lighthouse Landing development. In the end, I accept Ms. Wesolowski's conclusion that Mr. Paquette's pre-separation contribution was \$49,456.06.
- [103] Putting these figures together, Ms. Wesolowski's pre-separation investment of \$69,540.88 plus Mr. Paquette's pre-separation investment of \$49,456.06 produces a total pre-separation investment of \$118,996.94. Ms. Wesolowski's investment represented 58.4% of the total, and Mr. Paquette's investment represented 41.6%.

- [104] That brings me to the post-separation accounting. Again, I will use Ms. Wesolowski's figures as a starting point, for the same reasons that I did so with respect to the pre-separation accounting.
- [105] Ms. Wesolowski claims post-separation expenditures of \$214,460.84. From this, I would disallow her claim for \$7,984.15 in fuel costs. However, I would also give Ms. Wesolowski credit for an additional \$10,100 in mortgage payments not included in her most recent accounting summary. In the result, the final tally of Ms. Wesolowski's post-separation expenditures is \$216,577.
- [106] Ms. Wesolowski credits Mr. Paquette with post-separation expenditures of \$33,028. By contrast, Mr. Paquette claims that he made total post-separation expenditures of \$39,052. The entire difference of \$6,024 is made up of two amounts, namely Mr. Paquette's claim for \$5,032 in e-transfers to "Gord", which I conclude are actually expenses in relation to the RV, and a payment of \$991 for the Summerland Campground, which is also an RV expense. These two figures together total \$6,023, which is a mere one dollar off the difference in positions of the parties with respect to Mr. Paquette's post-separation expenditures. I accept Ms. Wesolowski's figure, namely \$33,028.
- [107] Adding together Ms. Wesolowski's post-separation expenditures of \$216,577 and Mr. Paquette's post-separation expenditures of \$33,028 yields a total of \$249,605. Based on each party's ownership interest at the date of separation, Ms. Wesolowski's 58.4% share of the total comes out to \$145,769, and Mr. Paquette's 41.6% share comes out to \$103,836. To balance the post-separation expenditures in accordance with each party's proportionate ownership in the Lighthouse Landing property, Mr. Paquette would have had to contribute a further \$70,808.
- [108] Ms. Wesolowski's post-separation accounting shows that she received net proceeds from all sources, including mortgage financing and rents, totalling \$272,292.52. I would adjust this figure in two ways.
- [109] First, I would increase Ms. Wesolowski's net proceeds from the Holmberg mortgage by \$6,637.45, as I accept Mr. Paquette's argument that Ms. Wesolowski's accounting overlooked this amount, which was transferred directly to her.
- [110] Second, I would adjust Ms. Wesolowski's receipts for rental proceeds considerably. Ms. Wesolowski claims rental receipts from the suite above the garage, the main house, and AirBnB totalling \$132,650.90. However, I find that based on the affidavit evidence, admissions made during examination for discovery, and the actual AirBnB records, in fact Ms. Wesolowski received the following rental proceeds:
- (a) With respect to the suite above the garage, I find that Ms. Wesolowski received a total of \$47,355 in rental proceeds;
 - (b) With respect to the main house, I find that Ms. Wesolowski received a total of \$51,300;

- (c) With respect to AirBnB, the records indicate that the total receipts were \$61,355. Although Ms. Wesolowski claimed a net amount that is some \$5,000 less than this, I see no basis for using the net amount, since Ms. Wesolowski has already claimed credit for the underlying property management fees and materials as part of her property-related expenditures; and
- (d) With respect to the RV, Ms. Wesolowski received a further \$11,400, for renting it out during periods of time when Mr. Paquette was not occupying it. Although these funds were not derived from the Lighthouse Landing property, Ms. Wesolowski clearly used the funds to offset expenditures from the development and in my view it would be inequitable to ignore this fact.
- [111] Tallying all of the rental receipts together, the rental proceeds collected by Ms. Wesolowski in the post-separation period add up to \$171,410.
- [112] The total of Ms. Wesolowski's receipts from all sources in the post-separation period is \$317,689. It is common ground that Mr. Paquette received a payout of \$19,979 from the CIBC mortgage in the post-separation period. Taken together, after their separation the parties collectively received a total of \$337,668 from all sources related to the property. Based on each party's ownership interest at the date of separation, Ms. Wesolowski's 58.4% share comes out to \$197,198, and Mr. Paquette's 41.6% share comes out to \$140,470. To balance out the post-separation proceeds in accordance with each party's proportionate ownership in the Lighthouse Landing property, Mr. Paquette would be entitled to a further \$120,491.
- [113] To balance out the post-separation contributions and receipts in accordance with each party's proportionate ownership interest as of the date of separation, Mr. Paquette would have had to make a further \$70,808 in contributions, and he would have been entitled to a further \$120,491 in proceeds. The net difference is an adjustment of \$49,683 in his favour.
- [114] Recall that the net proceeds from the sale of the Lighthouse Landing property were \$357,922. Based on the proportionate ownership interests as determined under the Cohabitation Agreement, Ms. Wesolowski's 58.4% interest would entitle her to \$209,026 and Mr. Paquette's 41.6% interest would entitle him to \$148,896. After the post-separation accounting, Mr. Paquette is entitled to a \$49,683 adjustment in his favour. Dividing the net proceeds of sale in accordance with each party's proportionate interest in the property, and after making the necessary post-separation adjustments, Mr. Paquette's share of the net proceeds is \$198,579 and Ms. Wesolowski's share is \$159,343.
- (9) Ms. Wesolowski's Claim for Further Adjustment under the Law of Property Act
- [115] Ms. Wesolowski relies on the factors listed in s. 17(2) of the LPA to say that she should be entitled to the entire balance of the net proceeds of sale. She says, among other things, that she put substantially more time and effort into the development than Mr. Paquette did, that she had to take on personal loans to keep the project going, and that after the separation Mr. Paquette effectively walked away from the Lighthouse Landing property and left her to complete the project on her own. In the circumstances, Ms. Wesolowski says that allowing

Mr. Paquette to receive a proportionate share of the net proceeds of sale would amount to a form of unjust enrichment.

[116] My analysis with respect to the statutory factors in s. 17(2) of the LPA, and the other points raised by Ms. Wesolowski, is as follows:

- (a) Whether one co-owner excluded the other from the property, per s. 17(2)(a): I agree with Ms. Wesolowski's counsel that this factor is not relevant in the present case. At a certain point, Mr. Paquette left the property, but there is no evidence that he was excluded or compelled to do so.
- (b) Whether the occupying co-owner was a tenant, bailiff, or agent of the other co-owner, per s. 17(2)(b): I do not agree with Ms. Wesolowski's counsel that this factor is entirely irrelevant. In fact, Ms. Wesolowski handled the finances and also arranged the rentals. Because of this, Ms. Wesolowski has had access to all of the rental proceeds collected from 2017 through to 2021, up until the date of the summary trial application.
- (c) Whether one co-owner has received more than his or her "just share" of rental proceeds, per s. 17(2)(c): In my view, this factor has already been addressed in the two-step accounting analysis carried out above. While Ms. Wesolowski initially retained all of the rental proceeds, that has been ameliorated by way of an adjustment at the second stage of the accounting. Ms. Wesolowski says a purely arithmetical accounting of the proceeds based each party's proportionate ownership interest would not be "just" for several reasons. First, Ms. Wesolowski says she performed the vast majority of the rental work, and paid the vast majority of the carrying costs for the property after separation. With regard to the rental work, I should note that for at least some period of time Ms. Wesolowski used a rental management service and included the associated expense in her share of the financial contributions toward the property. I also do not agree that Ms. Wesolowski paid the vast majority of the carrying costs. She paid the carrying costs for her share, or her investment in the property, which is reflected in the ownership structure at the date of separation. The balance of the costs were covered by refinancing, under mortgages to which both parties were equal signatories, and for which there has now been a full accounting of the mortgage payments. Ms. Wesolowski also says she had had to pay tax on the rental proceeds whereas Mr. Paquette did not. However, Ms. Wesolowski did not aver in her affidavits that she paid tax on the rental income, and I am unable to discern from the records attached to Mr. Paquette's affidavit whether Ms. Wesolowski in fact did so. Finally, Ms. Wesolowski asserts that she was responsible for furnishing the rental spaces to make them suitable for rental. However, as far as I can tell, Ms. Wesolowski in fact claimed back all of the expenses related to decorating and furnishing the property as part of her post-separation contributions. In the final analysis, I conclude that the second stage of the accounting analysis undertaken above fully addresses the concern about allocation of the rental proceeds, by crediting Mr. Paquette with a share of the proceeds based on his proportionate interest in the property at the date of separation. I do not agree with Ms. Wesolowski that such an approach gives Mr. Paquette more than his "just share" of the rents.

- (d) Whether a co-owner has committed waste by unreasonable use of the land, per s. 17(2)(d): I agree with Ms. Wesolowski's counsel that this factor is not relevant.
- (e) Whether a co-owner has made improvements or capital payments that have increased the realizable value of the property, per s. 17(2)(e): Ms. Wesolowski asserts that she put more labour and effort into the project than Mr. Paquette did. I should note that in the pre-separation period, Clause 17 of the Cohabitation Agreement was in effect such that the investment of time or labour with respect to personal service in the property of each party was deemed to be made gratuitously. In any event, the evidence indicates that while Ms. Wesolowski put a great many hours into the project, Mr. Paquette also made significant contributions to the construction effort, in the form of skilled labour, during the pre-separation period. I accept that in the post-separation period, Ms. Wesolowski played a much larger role and put considerably more time and effort into the project than Mr. Paquette did. I should note however that at that point Ms. Wesolowski was the majority owner and her financial resources were tied up in the project. In the result, she was motivated to see it through. Perhaps most importantly, insofar as financial investment into the property is concerned, each party's capital contributions have been fully addressed in the two-stage accounting analysis. The pre-separation financial contributions were factored into the proportionate ownership interest of each party as of the date of separation at the first stage of the accounting. The post-separation contributions were assessed and ultimately dealt with by way of equalization credits at the second stage.
- (f) Whether a co-owner should be compensated for non-capital expenses in the land, per s. 17(2)(f): Once again, I find that the two-stage accounting process has fully taken the respective financial contributions of each party into consideration.
- (g) Whether an occupying co-owner should be required to pay occupational rent, per s. 17(2)(g): I accept Ms. Wesolowski's assertion that after the separation, she only resided in the property alone for a period of some four months after Mr. Paquette left. Thereafter, Ms. Wesolowski lived elsewhere at her own expense, and took steps to rent out the Lighthouse Landing property. In view of the entire history of the development project, I find that this factor has little bearing.
- (h) Alleged unjust enrichment: As indicated above, the Court's broad discretion under ss. 15 and 17 of the Law of Property Act obviates the need to conduct a thorough unjust enrichment analysis. Certainly the Cohabitation Agreement provides a lawful basis - effectively a juridical reason - for each party's interest in the Lighthouse Landing property based on their proportionate investment as of the date of separation. After the separation, the second stage of the accounting analysis has effectively equalized each party's interest through adjustments designed to recalibrate each party's post-separation contribution based on their proportionate ownership. In the result, neither party has been enriched to the detriment of the other.

[117] My conclusion is that the two-stage accounting analysis, conducted under the Law of Property Act pursuant to Alberta law as provided for in Clause 29 of the Cohabitation Agreement, results in an equitable determination of each party's interest in the Lighthouse Landing property. None of the factors in s. 17(2), nor any other points raised by Ms. Wesolowski, considered both individually and cumulatively, mandate any further adjustment to the result. Indeed, Ms. Wesolowski's position that she should receive the entirety of the net proceeds would leave Mr. Paquette with nothing, despite his contributions in terms of both labour and financial resources, and despite the fact that up to this point Ms. Wesolowski has collected and retained over \$170,000 in rental proceeds without sharing them, even on a proportionate basis. The result argued for by Ms. Wesolowski would not amount to an equitable division of the interests in the Lighthouse Landing property. This conclusion is subject to one further point, relating to Mr. Paquette's retention of the RV, addressed under the next heading.

(10) Resolving the Ownership Interests in the RV

[118] Earlier in these reasons I rejected Mr. Paquette's argument that the RV was the subject of any business partnership or any other form of binding contractual agreement between the parties. Nevertheless, there remains an outstanding question as to how to properly address each party's ownership interest in the RV.

[119] Recall that the RV was jointly acquired and insured in the names of both parties during the currency of the relationship. It continues to be registered in the name of both parties to this day, but Mr. Paquette has basically occupied it and assumed all responsibility for it since July of 2018.

[120] The initial purchase price for the RV was slightly less than \$70,000. In their insurance contract, the parties set the replacement value at \$80,000. Allowing for at least some depreciation in value over the past seven years, I would adopt the lower of these two figures as a representation of the RV's current value. On the most recent available evidence, the outstanding balance on the RV loan is some \$53,572. This means the net value of the RV is \$16,428.

[121] As the parties are joint owners, I would divide the value equally between them. Mr. Paquette may argue that he has assumed the bulk of the financial responsibility for the RV, but the fact is that he has had the use of it since July of 2018, and many of his RV expenditures have been for its use rather than paying down its ownership. I accept that some portion of the loan payments has gone toward the principal, but that is offset by the fact that he has had exclusive use of the RV, and has been able to live in it. Accordingly, I would reduce Mr. Paquette's entitlement to the net process from the sale of the Lighthouse Landing property by \$8,214, to account for his retention of Ms. Wesolowski's one-half interest in the RV.

Conclusion

[122] In the result, I find that Mr. Paquette's share of the net proceeds from the sale of the Lighthouse Landing property is \$190,365, and Ms. Wesolowski's share is \$167,557. I would make a declaration to that effect, and I would order that the funds held in trust be distributed accordingly. I would also make a declaration that from the date of the judgment Mr. Paquette is the beneficial owner of 100% of the RV. I would dismiss all other claims in the amended notice of civil claim and in the amended counterclaim.

Costs

[123] Each party seeks special costs against the other. I would not accede to either party's position for the reasons that follow.

[124] Mr. Paquette's claim for special costs is based on allegations that Ms. Wesolowski breached her fiduciary obligations as a partner by failing to account for and misappropriating partnership funds. Having dismissed Mr. Paquette's claim that there was a business partnership leading to a breach of fiduciary duty, I am also bound to dismiss his claim for special costs.

[125] Ms. Wesolowski's claim for special costs is based on the assertion that Mr. Paquette made malicious, unsubstantiated, or reckless allegations of dishonest conduct against her. However, Mr. Paquette's claim failed on the basis of a failure to prove a business partnership. Had he proven a partnership, there would have been a valid argument that Ms. Wesolowski breached her fiduciary obligations by failing to account for mortgage proceeds, transfers of funds, and rental proceeds. In this context, I am not satisfied that Mr. Paquette's allegations were malicious or reckless.

[126] In my view, success was substantially divided. Accordingly, subject to any further evidence and submissions with respect to offers to settle, I would hold that the parties should each bear their own costs.

"Riley J."

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