

CANADA / JUDGMENT

Pinsonneault v. Courtney

2022 BCSC 120

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Supreme Court of British Columbia

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2022 BCSC 120 Pinsonneault v. Courtney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pinsonneault v. Courtney,

2022 BCSC 120

Date: 20220126

Docket: S28372

Registry: Cranbrook

Between:

Marie Reine Denise Pinsonneault

Plaintiff

And

Terry Edward Lynn Courtney and

Charlene Anne Courtney

Defendants

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Plaintiff:

D. Collins

Counsel for the Defendants:

R. Miles

Place and Dates of Trial:

Cranbrook, B.C.

November 27, 30,

November 30 to December 4, 2020

and March 31, 2021

Written Submissions Dated:

May 7 and 31, 2021; and

June 16, 2021

Place and Date of Judgment:

Cranbrook, B.C.

January 26, 2022

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- [1] In this lawsuit, the plaintiff seeks an order of the Court declaring that the defendants hold title to a property in trust for her. She also seeks a reconveyance of that property to her and other associated damages.
- [2] The defendants dispute the plaintiff's claim and also advance a counterclaim.

The Background Facts

- [3] The basic facts underlying the action are relatively straightforward. However, while the essential events are not complicated, the difficulty in getting to the root of the dispute is sorting through the details of the dealings between the parties and understanding the true context in order to know what was said, what was intended, and what was agreed upon. There is considerable controversy in that regard.
- [4] The principal evidence consists of the trial testimony of the plaintiff and of the two defendants, together with a body of documentary evidence.
- [5] In order to set the scene, I propose to set out some basic information together with a description of some of the trial testimony. In the course of my analysis, I will assess credibility issues and make reference to non-testimonial evidence, particularly the documents which have been filed at trial.

The Properties

- [6] There are three pieces of property that are relevant to this case. They are the following:

1. Freeman Creek - a property legally described as Lot 1, District Lot 3888, Plan 5597, located near Crawford Bay, B.C. This parcel is not the subject of dispute in the present matter, but has a peripheral relationship.

A relative of the defendant Mr. Courtney had apparently expressed an interest in buying property on Kootenay Lake and the Freeman Creek property was identified as appropriate for that purpose. Based on that expression of interest in purchasing the property, Mr. Courtney entered into an agreement to purchase the property on April 7, 2016. He paid a deposit of \$1,000. The relative then declined to proceed with the purchase. After a discussion between the plaintiff and Mr. Courtney, the plaintiff agreed to purchase the property for a price of \$50,000. The total price paid, including transfer tax, was \$51,040.19. Of that, the plaintiff paid \$50,040.19 and Mr. Courtney the balance of \$1000.00. The sale completed on April 22, 2016. For reasons explained below, title was registered in the name of Mr. Courtney.

2. Lot 3 - Lot 3 is a lakefront property located at 14811 Highway 3A, Gray Creek, B.C. It is located between a highway (3A) and the lakeshore of Kootenay Lake, with some noticeable drop in elevation as one moves away from the roadway. There is no established access road from the highway onto the property. The property is not especially large; it is some 60 feet in width. There was a cabin situated on the property at the time Ms. Pinsonneault initially viewed it. She purchased this property on December 21, 2015 for \$150,000. This property is the subject of the present dispute.
3. Lot 4 - This is a lakefront property located at 14813 Highway 3A, Gray Creek, B.C. It is adjacent to Lot 3 - next door - and is similarly situated, with lakeshore and a cabin. It was purchased by the defendants on November 8, 2016 for the sum of \$140,000. This property is not the subject of dispute in this action.

History of Legal Proceedings

- [7] Initially, Ms. Pinsonneault commenced claims against the defendants in respect of two properties, that is Lot 3 and Freeman Creek. She subsequently brought a summary trial application in respect of her claim to the Freeman Creek property. That application was heard in February 2019 and judgment in her favour was rendered on April 4, 2019 (2019 BCSC 495).
- [8] The issue for determination in the summary proceeding was the proper characterization of the funds paid by the plaintiff for the purchase of the Freeman Creek property and whether that characterization gave rise to a trust in favour of the plaintiff.
- [9] The court found that the plaintiff had established that there was a resulting trust in her favour when she advanced the purchase money but did not take legal title. Specifically, with respect to the issue of trust, the court found as follows:

- [23] In the result, I find that Mr. Courtney was a purchase price resulting trustee of the Property for the plaintiff. In the alternative, I find that Mr. Courtney was unjustly enriched at the plaintiff's expense and that he holds the plaintiff's interest in the Property as constructive trustee. Mr. Courtney was enriched by taking title to the Property; the plaintiff was correspondingly deprived by paying nearly all of the purchase price; and, as I found above, there was no juristic reason for the enrichment and corresponding deprivation, such as a contract or donative intent.
- [10] That application involved the same parties as the matter before this Court; it essentially "hived off" a component of the dispute. That dispute has now been finally adjudicated and is not a matter for this Court to decide.
- [11] In terms of what effect that judgment has upon the matter at bar, it is my view that the outcome is one which must be recognized but no more. For the purposes of the action to be decided by this Court, it has no further significance. The finding from the summary trial concerns the Freeman Creek property and not Lot 3. It is based on the evidence that was filed in that proceeding. Any findings made there (other than the ultimate disposition) should stand alone and are not binding on this Court in the present trial. To be clear, I will make findings of fact and credibility based only upon the evidence as it was developed in this trial.

The Plaintiff

- [12] The plaintiff Marie Pinsonneault was 87 years of age when she testified at trial. She was born in Québec, lived for a time in Alberta, and came to British Columbia in 2010. Initially she lived in the Cranbrook area with a daughter. She later relocated to Yahk, a small community approximately 40 kilometers south of Cranbrook. She purchased property there, comprising a number of buildings, including a residence and a commercial site, and commenced operation of a small business. As at the time of trial, she no longer owned that property but had moved to a house in a nearby small town to the south, Kingsgate.
- [13] The plaintiff was married and had six children. Her marriage ended, unhappily, some substantial time prior to the events at bar.
- [14] I will take a moment to describe the background of the plaintiff's family situation and particularly as it informs the disputes that underpin this litigation.
- [15] Ms. Pinsonneault was formerly married to an individual named Gabor Hayjus. They were together for 38 years and there were six children of the union. Evidently Ms. Pinsonneault and Mr. Hayjus parted on acrimonious terms, and it was subsequent to their parting of the ways that she came to British Columbia.
- [16] The evidence satisfies me that Ms. Pinsonneault does not and did not enjoy especially happy relations with her children. With respect to some of them at least, it would appear that there are tensions and ill will. She is not close to any of them. As regards the youngest of the six, a

son named Rene, it is apparent that there is considerable hostility. From Ms. Pinsonneault's perspective, she appears to see Rene as having been closely aligned with Mr. Hayjus and is of the view that those two persons harboured great animosity to her. As part of that, the plaintiff believes, whether it is actually so or not, that her son Rene is determined to take whatever he can from her. Her concern on that front most certainly includes a fear that Rene will attempt to take any property she owns, if not now, then later when she passes. Accordingly, she came to be very concerned with structuring her affairs in a way that would avoid coming to the attention of family members and would best shelter her holdings from Rene.

- [17] Prior to moving to British Columbia, Ms. Pinsonneault operated an auction business in Alberta with Mr. Hayjus.
- [18] At the time of trial, it is not unfair to say that the plaintiff was somewhat frail. Her eyesight is significantly diminished, although the extent of her sight impairment was an issue of controversy at trial. She no longer holds a driver's license and is not physically robust. At the same time, it is evident that, by nature, she is and was a feisty, active individual.
- [19] The plaintiff first made the acquaintance of the defendant Terry Courtney in 2013. At that time, Ms. Pinsonneault was living in her property at Yahk. As indicated, her holdings there consisted of a number of buildings, some of which were rented and out of which she operated some type of mercantile business.

The Defendants Terry Courtney and Charlene Courtney

- [20] Mr. Courtney was 63 years old at the time of trial. He resides in Creston, a town approximately 40 kilometers east of Yahk. He describes himself as a semi-retired general contractor. Prior to moving to British Columbia fifteen years ago, he operated his own construction company in Calgary, Alberta. He is married to the other defendant, Charlene Courtney.
- [21] Ms. Courtney is an accountant by profession. She is employed in that capacity in Cranbrook. To accommodate that situation, she has a home in Cranbrook and stays there during the week, then returning to Creston each Friday after work and spending her weekends there.
- [22] The Courtneys have an adult daughter, Andrea, who lives on their property in Creston. She testified at trial.

The Circumstances

- [23] I propose to set out an overall narrative of the events that give rise to this lawsuit. I will begin that by making quite extensive reference to the trial testimony of the plaintiff. That is not to say that her version of events is preferred or of dominant value, but simply a practical way of laying out a comprehensive description of what took place, given that the onus of proving the case lies with her. I will ensure that the positions of both the plaintiff as well as that of the defendants are spelled out and considered.
- [24] In 2013, Ms. Pinsonneault needed some renovation services for her properties in Yahk. She was referred to Mr. Courtney. Initially, he provided a bid to do a project for her, but that was not accepted. However, not too much later, he was hired by her to perform renovations to her house. Those renovations were fairly extensive, and Mr. Courtney was paid for his services. The plaintiff was seemingly satisfied with the work he did.
- [25] Evidently a friendly relationship began to develop between these two persons.
- [26] In 2015, the plaintiff became interested in purchasing a cabin on Kootenay Lake, and so she contacted a realtor. With the realtor's assistance, she looked at two or three different properties. The last one she looked at was Lot 3.
- [27] Ms. Pinsonneault had obviously been discussing her interest in buying a property with Mr. Courtney and he had some involvement in looking at the sites she was shown. Not surprisingly, she sought his view on the matter. In fact, it seems likely that she asked him to speak to the realtor on her behalf.
- [28] Lot 3 was listed for sale with a price of \$164,000. Ms. Pinsonneault liked it. After having viewed it, she and Mr. Courtney went to a restaurant where they discussed the property. Ms. Pinsonneault decided that she was prepared to purchase the property. She made an offer of \$150,000 through the realtor; that was accepted.
- [29] The purchase completed on December 21, 2015. The plaintiff funded the purchase with money she had received from the sale of property in Alberta. There is no dispute that she bought the Lot 3 property and that title was registered in her name.
- [30] In 2016, Ms. Pinsonneault became aware of another property. This was located on Freeman Creek near Crawford Bay. She testified that she learned of the property through a discussion with Mr. Courtney. Evidently Mr. Courtney was aware of the property being for sale and the indication is that his father-in-law had at some point expressed an interest in it but then decided he did not want it. The property was approximately an acre in size and had a creek on it. It was listed for sale for \$50,000.
- [31] In April 2016, the plaintiff purchased that property. She paid for the purchase with funds she had received from the sale of her Alberta property.

- [32] Because of the plaintiff's ongoing concerns about her family and what she saw as a need to protect her property from them, and particularly Rene, she decided that a prudent course of action was to register the Freeman Creek property in the name of Mr. Courtney. That was done when the purchase was finalized through the office of a notary public in Cranbrook.
- [33] The plaintiff testified as to there having been some discussion of a plan, rough in nature, between herself and Mr. Courtney, with respect to the two property holdings just described. The essential thrust of the plan as the plaintiff says she understood it was that Mr. Courtney would build a house on the Freeman Creek property, at his own expense. He would then turn that property over to Ms. Pinsonneault. In turn, she would transfer title in the Lot 3 property to Mr. Courtney. I do not understand from his evidence that Mr. Courtney accepts that there was such an agreement or that any such details had been discussed or settled. As best I can discern, he recalled there having been some discussion that he would build a cabin for the plaintiff on the property and that he would have a shop there as well; from what he said, he seems to have expected that any such project would only start once Ms. Pinsonneault had provided funding for it.
- [34] I pause to make clear, there is no evidence of any formal agreement of that nature ever having been documented or finalized, and whatever might have been believed about that site is not a matter of relevance in the dispute at bar.
- [35] Ms. Pinsonneault says that around the time these property transactions were occurring, and I gather even before, in her many conversations with Mr. Courtney, she had disclosed to him the problems with her family, specifically her concern that Rene was going to attempt to take what she had. Indeed, as noted, that was very much a factor in the decision to register the Freeman Creek property as they did.
- [36] Meanwhile, relations between the plaintiff and Mr. Courtney continued, seemingly uneventfully and quite congenial. Mr. Courtney often visited the plaintiff at her home in Yahk. It is evident that the two of them socialized a fair amount. They drank coffee, chatted and played cards. They also went to the Lot 3 cabin from time to time where they worked together, cleaning up the property.
- [37] At some point, while they were out at Lot 3, the matter of the adjacent property, Lot 4, came to be discussed. There was a structure on the property, a cabin. It was empty and there was garbage strewn around. Ms. Pinsonneault testified that she told Mr. Courtney that she would like to buy that property as well. Her rationale, as she explained it in her evidence, is that if she were to buy it, she would be able to amalgamate the two lake properties if she wished and have a property of a significantly increased value. She also was aware that the Lot 4 property had septic and electrical service on it.
- [38] Ms. Pinsonneault testified that her intention was to buy Lot 4 and to that end, she asked Mr. Courtney to make inquiries, which he did.

- [39] A complication for the plaintiff that became apparent was that she did not have enough money to fund the purchase, and so she explored the possibility of borrowing funds from a bank. Initially, she applied at the Scotiabank in Cranbrook but the bank declined to authorize a loan. At the same time, she continued her discussions with Mr. Courtney with respect to purchasing Lot 4. The owner of the property had been located and had indicated that he was prepared to sell. Ms. Pinsonneault evidently realized that she would not be able to find the money to complete the purchase. Her testimony is that at some point, a plan was devised whereby the defendants would buy the property, not her. Charlene Courtney would make arrangements to fund the purchase of Lot 4. As noted earlier, the Courtneys own a property in Cranbrook and another in Creston. There was some discussion of Ms. Courtney refinancing the Cranbrook property.
- [40] Arrangements of that type were made but, even then, the Courtneys did not have sufficient funds to complete the purchase. They were short \$25,000. Ms. Pinsonneault then found sufficient funds to cover that shortfall, through withdrawal from an account she had at the Royal Bank and a MasterCard cash advance. Ms. Pinsonneault gave that sum to the Courtneys in order that the purchase could be completed. As well, Ms. Pinsonneault had paid the initial \$5,000 deposit from her own resources.
- [41] My understanding is that, although it was initially intended that Ms. Pinsonneault would be the purchaser of Lot 4, Mr. Courtney was negotiating and making inquiries on her behalf. Mr. Courtney paid an initial deposit of \$1,000 to secure the deal with the owner and then the further \$5,000 was paid by Ms. Pinsonneault to fully fund the deposit.
- [42] The deposit for the Lot 4 purchase was paid on October 1, 2016, and the transaction completed on October 30, 2016.
- [43] The Courtneys subsequently paid the sum of \$30,000 to Ms. Pinsonneault in November 2016, in repayment of the funds she had advanced.
- [44] As I understand the Lot 4 situation, the agreement as it developed was that the defendants would buy that property; there is no suggestion that the purchase was for Ms. Pinsonneault and, as noted above, Lot 4 is not part of the dispute at bar.
- [45] On December 28, 2016, Mr. Courtney took Ms. Pinsonneault to the Royal Bank in Creston where Ms. Pinsonneault met with the manager. She testified that she had not arranged any appointment at the bank, but that Mr. Courtney was present. The thrust of her evidence is that Mr. Courtney had initiated that meeting. The purpose of the meeting with the manager, it seems, was to arrange that Mr. Courtney would be authorized to access the plaintiff's Royal Bank account, and so would be able to pay her bills as he picked up her mail. She agreed and a general authorization was executed.
- [46] The pivotal issue in this action is the attendance of the parties at the office of a notary public in Cranbrook and what flowed from that. That occurred on February 20, 2017.

- [47] Ms. Pinsonneault testified that at some point in time, likely in early 2017, Mr. Courtney told her that his wife Charlene had found a way to protect the cabin, Lot 3, (that is, from the risk that members of her family, particularly Rene, would try and take it from her): it was called a power of attorney. Ms. Pinsonneault said that one day Mr. Courtney told her that she should come with him the following day and that there was a paper to sign. She said her understanding of the arrangement was that the paper would give Mr. Courtney permission to protect the cabin, presumably from the predations of Rene.
- [48] The following day, February 20, 2017, Mr. Courtney picked up Ms. Pinsonneault and took her to Cranbrook where they went to the office of the notary public. Papers were signed. Charlene Courtney was present there as well at some point in the signing process.
- [49] Four documents of consequence were executed that day:
1. A document entitled "To Whom it May Concern". The document states that the plaintiff wishes to add her "Step Son, TERRY EDWARD LYNN COURTNEY and His Wife CHARLENE ANNE COURTNEY to the title of my property as Joint Tenants with myself and no monies are exchanging hands between myself and my Step Son, TERRY EDWARD LYNN COURTNEY and His Wife, CHARLENE ANNE COURTNEY and that no adjustments are being made for the transfer of the property or for taxes or any other items."
 2. A document entitled "Deed of Gift". By it, the plaintiff states that she is the owner in fee simple of the Lot 3 property, with a designated value of \$193,600, and that she wishes to give this property to her "Step Son, Terry Edward Lynn Courtney and his wife Charlene Ann Courtney, both of 507 Placsko Road, Creston BC." The deed further states this is "an inter vivos gift and shall not be deducted from my stepson's or his wife's share of my estate." By the deed, Ms. Pinsonneault also accepted responsibility for all expenses, taxes and fees relating to the gift. The document bears the signature of Ms. Pinsonneault and the signature of Tarralin D. Hanson, Notary Public.
 3. The third document is a Land Title Act, R.S.B.C. 1996, c. 250 [LTA], Form A freehold transfer, whereby Ms. Pinsonneault transfers fee simple in the Lot 3 property to the defendants as joint tenants.
 4. The fourth document executed on that date is entitled an enduring power of attorney. By it, Ms. Pinsonneault revokes all previous powers of attorney and appoints the defendant Terry Edward Lynn Courtney as her attorney, in accordance with the Power of Attorney Act, R.S.B.C. 1996, c. 370, to make decisions on her behalf and to do anything that she may lawfully do by an agent. The power of attorney is granted without condition or restriction. Again, the document is signed by the plaintiff and bears the signature as well of Tarralin D. Hanson, Notary Public. There is also appended to the document a declaration, signed by the defendant Mr. Courtney, wherein he states that he is the attorney appointed and that he has read the relevant provision of the Power of Attorney Act. That document was also declared before Ms. Hanson.

- [50] What actually occurred and what was said and understood on that occasion is an issue of fundamental dispute in this action. There is considerable controversy in the evidence. The Court has heard the testimony of the plaintiff, each of the defendants and the notary public in this regard.
- [51] I will deal with the issue later in these reasons.
- [52] Following the transaction at the notary's office, Ms. Pinsonneault said that the time she spent with Mr. Courtney became less, although I did not understand her evidence to be that there was an immediate or precipitous decline in the contact.
- [53] Ms. Pinsonneault testified that later in the spring, she and Mr. Courtney spent a fair amount of time at the Lot 3 property; she said they worked together there to do some cleaning up and to remove some debris from the Lot 4 site.
- [54] The plaintiff said that later, in January 2018, a dispute arose between her and Mr. Courtney with respect to Lot 3. Ms. Pinsonneault testified that she and Mr. Courtney were at the property. He told her that he wanted to cut down a large tree in order to allow the building of an access road. She was adamantly opposed to that happening; her evidence is that Mr. Courtney said to her words to the effect that he had a right to do what he wanted on Lot 3; I note that he denies having said that to her. The two of them argued and he drove her home. Ms. Pinsonneault said that when she got home, she was upset and she went to examine the papers that had been signed at the notary's office. She testified that, upon looking carefully at the documents, she realized that she had transferred Lot 3 to Mr. Courtney for the sum of \$1. She also noted that the transfer document referred to him as her stepson. She testified that, upon making that realization she was "very hurt, very bad".
- [55] Two days later, Ms. Pinsonneault travelled to Cranbrook by way of the Handydart service. She there met with the notary public and asked to change the paper that she had signed. She testified that the notary said it was not that simple, but rather instructed her to come back on Friday and advised her that she should see a lawyer. Ms. Pinsonneault testified that she then went to the Royal Bank in Cranbrook where she removed the funds she had in her Royal Bank account (that is, the account to which Mr. Courtney had access) and moved it to the Scotiabank.
- [56] Ms. Pinsonneault subsequently met with a lawyer, Mr. Colgur, who had been contacted by the notary public. Ms. Pinsonneault said that Mr. Colgur told her that he could remove Charlene (Courtney) from the title and put her (Ms. Pinsonneault) on title, but Ms. Pinsonneault said that she did not want that. She wanted the property in her name only.
- [57] Ms. Pinsonneault said that there was one further meeting with that lawyer. On that occasion, in addition to the lawyer, the notary was there, together with the defendants and plaintiff's daughter. As I understand, the purpose of the meeting was to attempt to resolve this problem. Those efforts were not successful.

- [58] Following that meeting, which evidently became quite acrimonious, Ms. Pinsonneault attended on a doctor, Dr. Van Rensburg, for the purpose of getting a medical certification. She also testified that, shortly after that meeting, when she attended at Scotiabank, she found her account had been "frozen".
- [59] Also, after having learned the true nature of the notarized document, Ms. Pinsonneault testified that she closed her joint RBC account.
- [60] That is a general outline of the events that underlie this dispute.

Positions of the Parties

The Plaintiff

- [61] The plaintiff asks this Court to declare that the defendants hold Lot 3 in trust for her, and seeks an order for the reconveyance of Lot 3 to her. In addition, the plaintiff seeks general damages for the defendant's excavations and tree removal, as well as damages for the defendants' fraudulent, or, alternatively, negligent misrepresentations and conversion of the plaintiff's property to the defendants' own use.
- [62] Specifically, with regard to the trust claim, the plaintiff bases that on an allegation of the defendants' breach of fiduciary duty, wrongful procurement of the transfer to the benefit of the defendants, and the undue influence of the defendants on the plaintiff, which she says entitles her to a declaration of a remedial constructive trust in her favour against Lot 3.
- [63] The plaintiff says that the appropriate and most straightforward path to the remedy she seeks is a declaration of a resulting trust against Lot 3 in her favour based on the gratuitous transfer of the property.

The Defendants

- [64] The defendants say that the evidence does not support the relief sought by the plaintiff for the transfer of the Lot 3 title to her. In their submission, the transfer of Lot 3 was an intentional outright gift from the plaintiff to the defendants, consistent with the plaintiff's express wishes that she had repeatedly made to both the defendants and others. They say that her claim is simply a result of a change of mind, well after the fact.
- [65] The defendants deny any inappropriate action on their part that would justify setting aside the transfer.
- [66] With respect to the other aspects of the plaintiff's claim, the defendants deny that any work was done on Lot 3 such as would warrant the imposition of general damages. They deny that there were any fraudulent or negligent misrepresentations made by them to the plaintiff. Further, they say there was no fiduciary duty owed by either of them to the plaintiff and so there was no breach of a fiduciary duty or wrongful procurement as claimed by the plaintiff. They say there was no undue influence on the part of the defendants directed toward the plaintiff and they say the evidence does not support the imposition of a trust, resulting or

constructive. They have also made a counterclaim in quantum meruit and in conversion.

Discussion and Analysis

- [67] In my view, the critical determination to be made is a factual one: when Ms. Pinsonneault signed the documents in the notary's office, what was her intention? Did she realize that the document she executed would have the effect of transferring title to the defendants, or was she unaware of the consequences that would follow? Did she intend to give title to the property to the defendants without receiving any monetary compensation for it? Put more simply, did she intend the transfer to be an outright gift to the defendants?
- [68] Determining the answers to those questions - determining what has been proven and what has not - provides a very significant basis for the analysis of legal issues that must be decided.
- [69] Depending on this Court's finding on that key issue and the plaintiff's trust claim, there are other matters to consider, but the starting point of my analysis must be an examination of the events surrounding the transfer.
- [70] I propose to proceed in the following way: First, I will assess the evidence in order to make findings of fact as to the critical factual issues. Second, I will set out the legal principles, particularly concerning applicable trust concepts, as raised by counsel in submissions and as arise from the facts. I will then apply those principles to the facts I have found. In addition, there are other arguments raised by the parties, other than trust based, and I will deal with those.

Findings of Fact and Credibility

- [71] As the parties well recognize, a central issue in this case is credibility. I concur in that view wholeheartedly, and I say that applies in respect of all of the principals.
- [72] The matter of assessing credibility is a notoriously challenging task for a trier of fact. Much commentary has been offered about the difficulty that poses for a trial judge. A useful and oft-quoted observation is found in *Bradshaw v. Stenner*, 2010 BCSC 1398, a decision of Justice Dillon:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya*

v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [73] In reaching my conclusions and findings of fact, I have given careful consideration to the substance of the testimony of each of the witnesses and have examined it critically in the context of the other evidence in the case, including the documentary evidence. These findings, which I have limited to matters that are necessary for a proper adjudication of the dispute at bar, reflect my evaluation of the evidence and that necessarily incorporates, both explicitly and implicitly, credibility assessments of the testimony of the witnesses, particularly the three principals.
- [74] In my deliberations, I have considered all of the evidence together with the submissions of counsel. Obviously, some parts of the evidence are more important and more central to the issues in the case than other parts. In my discussion, I have not set out a detailed reference to every single element of evidence. The focus of the discussion and the analysis is informed by the main issues as I have understood them.

The Plaintiff

- [75] I begin with certain observations about the plaintiff. Ms. Pinsonneault is quite advanced in years, but reasonably dynamic. In the time period at issue, she appears to have been fairly entrepreneurial - she moved to Yahk on her own, purchased a commercial/residential property and set about establishing and operating a business, although limited by her eyesight and mobility.
- [76] With respect to her eyesight, the plaintiff insists that condition constituted a very substantial handicap for her. She said that she is functionally blind and can only read or conduct fine tasks with the help of a specific computer magnification device.
- [77] The plaintiff's ability to see (her visual acuity) is of considerable importance in this case because of her position that she could not see or read the documents that she signed at the notary public office, and thus did not know what she had signed until many months later.
- [78] The defendants urged the Court to find that her ability to see, read and do fine tasks was in fact not as seriously limited as she claims, but rather that she is exaggerating her situation quite substantially.
- [79] There is of course evidence on the matter from the parties. The plaintiff has testified on one side of the issue; the defendants and their daughter on the other. Not surprisingly, the evidence they offer, what they say they observed and experienced, supports their position.

[80] In terms of objective evidence, the plaintiff has filed an affidavit of Dr. Demarchi, an optometrist who examined her on different occasions. The principal points of his evidence are as follows:

- He first saw Ms. Pinsonneault on April 4, 2011; he found her to be suffering from macular degeneration in both eyes. On the Snellen visual acuity chart, she rated 20/100 on her right eye and 20/240 on her left eye. He notes those are corrected visual acuity values, that is, as corrected with glasses.
- The simple interpretation of the test is that 20/20 is normal visual acuity; for the plaintiff's right eye, she would have to sit 20 feet from an object to see it with the same visual acuity as a person with normal vision would from 100 feet. For her left eye, she would need to sit 20 feet away from an object to see it with the same visual acuity as a person with normal vision sitting 240 feet away from the object.
- The definition of legally blind for the purpose of applying for disability pension through the Government of Canada is 20/200 or worse in the patient's best eye.
- Dr. Demarchi conducted a further examination of Ms. Pinsonneault on February 27, 2015. At that time, he found the vision in her left eye had maintained at 20/240. Her vision in her right eye had deteriorated slightly. He still rated it as 20/100, minus one letter on the applicable scale.
- Dr. Demarchi further examined Ms. Pinsonneault on January 3, 2019. At that time, he found that her visual acuity in her left eye had deteriorated to approximately 20/1500 and then in her right eye to 20/1200. Those are approximations because, for a subject of a certain degree of visual impairment, the test becomes not applicable.
- Dr. Demarchi states that in his opinion, as at February 20, 2017, Ms. Pinsonneault would not have been able to see any document with ordinary typeface, even with her glasses.

[81] I note that the plaintiff's driver's license had been cancelled sometime prior to the events at bar, in 2013, because of her visual deficiencies.

[82] The Court also heard the evidence of Tim Zebert. He is a friend and acquaintance of the plaintiff and has been since 2014. He testified that he sometimes took Ms. Pinsonneault to shop, and that in the course of that process, he would find the articles she wanted and tell her what prices were marked on them. As well, when it came time to pay, he did so, using her card. All of this was made necessary by her inability to see.

[83] For the defendants, Mr. Courtney testified that he and the plaintiff often played cards and that she was able to do that without great problem. He also said that she was able to make repairs to small fine figurines. He told, as well, that he had often taken her to shop, but denied that she needed help as Mr. Zebert had described. Generally, Mr. Courtney, as well as his spouse and daughter, downplayed the suggestion that the plaintiff's ability to see was of the severity she claimed.

- [84] It is, in my view, not entirely without relevance that Mr. Courtney, sometime in the early stages of the relationship, purchased a device for the plaintiff. As I understand, it is a magnifying device that works with the assistance of a mouse and television screen. Ms. Pinsonneault says that she needs that help to be able to read.
- [85] My conclusion is that Ms. Pinsonneault's visual capability is very substantially limited and was so at the relevant time. I conclude the defendants have skewed their evidence to suggest that she was much more able to see than she contends, and I decline to accept what they say on that issue.
- [86] It is certainly possible that the plaintiff has, to some degree, "played up" her inability to see; I accept there may be a germ of merit to that suggestion. However, I noted that, in the course of trial, in the courtroom and while testifying, she certainly appeared to have a very striking difficulty reading documents. Even allowing latitude for some minor degree of exaggeration, I am not in any serious doubt about the issue.
- [87] On a clear balance of probabilities, I find that the visual acuity of the plaintiff is very substantially impaired. I conclude that her ability to see and read the documents at the time of the events of the attendance at the notary public office was functionally ineffective.

The Relationship Between the Plaintiff and the Defendants

- [88] Another issue of considerable importance in this trial is the relationship between the plaintiff and the defendants.
- [89] On a fair consideration of all of the evidence, there is no doubt that the plaintiff and Mr. Courtney developed a close friendship after they met; they spent considerable time together and did many things together. To the best of my ability to discern, they were genuinely fond of one another. Each enjoyed the company of the other.
- [90] When the two originally met, it was in something of a work context. Mr. Courtney had contracted to perform certain renovations for the plaintiff. After that, as noted, they were together quite a substantial amount of time. It would appear to me, with no disrespect intended, that Mr. Courtney was generally not enormously busy; he evidently had time to spare and he spent a considerable amount of that time with the plaintiff. They often were together, drinking coffee, chatting and playing cards.
- [91] Mr. Courtney claims that the relationship was significant and important to him: he says his own youth was an unhappy time; it had been abusive and he never had a relationship with his mother. To him, the plaintiff filled that void and he came to care deeply for her.
- [92] Objectively, there seems no real reason to doubt his claim that he found fulfilment in his relationship, notwithstanding that it probably seems somewhat unconventional. They enjoyed each other's company; he helped her in many various ways.

- [93] The evidence satisfies me that they did many things together: he took her shopping; he let her ride on the back of his motorcycle; he took her for many outings, including to see movies and various tourist attractions. They went to restaurants for meals. She was invited to have time with his family.
- [94] Seemingly, there was some kindred feeling between the plaintiff and the defendant's daughter. On occasion, the plaintiff overnighted at the defendant's residence in Creston.
- [95] The relationship between the plaintiff and Charlene Courtney was not as deep or extensive, but there was certainly some friendship. Ms. Courtney had a full-time job in Cranbrook and did not have the time to spend with the plaintiff that her husband did.
- [96] From the perspective of the plaintiff, the relationship with Mr. Courtney was significant and important too.
- [97] Her personal background resulted in her being somewhat wary of men and her fractious relationship with her own family was something of a tender spot.
- [98] Although she would not necessarily be described as a prickly person, she had her own personality quirks. I do not think the first description that would leap to mind about her would be that she is especially warm and gregarious. She appears to have been at least a little bit driven. However, it is apparent that she quite readily came to like Mr. Courtney and to accept him as a friend.
- [99] The defendants have filed in evidence a number of cards and some correspondence between the plaintiff and Mr. Courtney. There are also cards and notes and other correspondence between the plaintiff's daughter Norma and Mr. Courtney. The tone is striking.
- there is a birthday card, apparently for Mr. Courtney, which is handwritten by the plaintiff. The script is to the effect of "happy birthday for my special son from a special mom";
 - there is another birthday card, wherein the message in the card "I am glad you are my friend" is followed by the inscription "and my son", in the plaintiff's hand. The card is signed from "mom" Marie;
 - there is another birthday card to Mr. Courtney from the plaintiff inscribed "my special friend";
 - there is a Christmas card from the plaintiff to Mr. Courtney, inscribed "to my best friend, love Marie"; and
 - as well, there are cards from the plaintiff's daughter Norma to the Mr. Courtney in which they refer to one another as "bro" and "sis". In her communications with Mr. Courtney, she expresses her considerable pleasure and gratitude in knowing that her mother has established such a bond of friendship with him.

- [100] Part of the defendants' position is that what developed between Mr. Courtney and the plaintiff was essentially a mother/son bond, and that should inform a proper understanding of the property transfer and associated events.
- [101] The plaintiff, for her part, accepts that her relationship with Mr. Courtney was close, although she resists some of the details that he asserts: for example, that the two carried on and interacted with one another as son and mother, and sometimes used those terms. She also rejects his contention that she sometimes spoke to him to the effect that he would be the beneficiary of her estate and that her property (particularly the Lot 3 cabin) was "theirs" or that she intended him to have it.
- [102] I accept that these two persons were close until relations soured in January 2018, after the argument at the cabin and then the plaintiff's discovery of the true state of affairs with respect to title of the Lot 3 property.
- [103] Precisely why the relationship was so close is not entirely clear. My inclination is to conclude that each found it comfortable and enjoyable.
- [104] For Mr. Courtney, I accept that the "mother I never had" factor was reasonably heartfelt and that his dealings with the plaintiff were, for the most part, genuine.
- [105] As for the plaintiff, I tend to the view that she became quite enamored of Mr. Courtney and the attention he gave her. He helped her with a great number of tasks and chores; they had fun together and she felt that he valued her as a friend. For a person such as this plaintiff, someone who had experienced her share of difficulty in relationships with others, notably including her own family, that was comforting.
- [106] The matter of referring to one another as mom and son, I conclude, did occur at least to some extent. To my mind, it is best understood as part of their "schtick", their routine. It was part of the friendly relationship and banter that they had.
- [107] The way the two conducted themselves with respect to the cabin and Lot 3 (after she purchased it) is to my mind consistent with that relationship. It was a place to visit, to do things, such as cleaning it up and enjoying time there. She liked being there with him and she liked that Mr. Courtney seemed to enjoy it and was able to bring his family there, which she accepted and supported.
- [108] However, with all that said, there are two more pointed issues to be considered:
- [109] First, did the plaintiff really see her relationship as being so much like mother and son that she intended that Mr. Courtney would be the beneficiary (or substantial beneficiary) of her estate when she passed or that she would, in effect, give him her Lot 3 property and cabin?

- [110] I do not believe she ever moved to that point. There was an element of fun and jocularity they enjoyed with each other. The frisson of the time they spent together and the things they did gave rise to a certain way they spoke and interacted with each other - the mom/son talk and how happy they were with the time they enjoyed. Possibly, in time, affections could have developed to that deeper and more significant state; however, I simply do not accept that this relationship ever actually reached that place.
- [111] More to the point, I am quite convinced that the plaintiff never intended to give full beneficial ownership of the Lot 3 property to either Mr. Courtney or he and his spouse when she executed the documents at the notary public office.
- [112] Second, it is important to understand what the true nature of the relationship between the plaintiff and the defendants or, more specifically, Mr. Courtney was in terms of dependence and influence.
- [113] Structurally, there were meaningful differences between Ms. Pinsonneault and Mr. Courtney. She was quite elderly and at least somewhat limited by her sight deficiency. She had no driver's license and so depended on others to get her around. Her hearing was not good; she has something of a minor linguistic disadvantage in that she is a French speaker and, I believe it is fair to say, has some difficulties with the English language.
- [114] In other words, she was somewhat reliant on others; she was not unlimited in her independence. As her relationship with Mr. Courtney grew, he played a significant role for her, one that opened her world up to having more fun.
- [115] At the same time, she did not see herself as weak or vulnerable or as a dependent person. In fact, she appears to have taken some pride in thinking of herself as competent and able. For example, she ran her own business and appears to have made her own decisions.
- [116] In the result, I would say that this was a situation where she was meaningfully dependent on others, certainly including Mr. Courtney, to get around and to be able to do enjoyable things. However, she did not think of herself as being especially so.
- [117] Often in circumstances where undue influence is alleged in terms of persons having made significant decisions, such as giving money or property or naming certain parties in a will and excluding others, the notion is that the donor/testator has made specific deliberate decisions because others have unduly influenced them to do those things and have overborne the will of the donor/testator - have caused them to think that a particular course of action is the right and prudent one such that they deliberately decide to act in furtherance.
- [118] I do not see that as being the case in the facts at hand.
- [119] As I will explain, because I do not accept that when the plaintiff executed the transfer documents at the notary public office, she understood that she was transferring her interest in and title to the Lot 3 property to the defendants, this is not a situation where it can be

said that a party (the plaintiff) made the decision to transfer ownership of her property because she was under the influence of or in thrall of some third party so as to have unfairly or improperly caused her to act to her own detriment, albeit with intention and knowledge of what she did.

[120] This is not that case.

[121] To be clear, I find that the defendants (and Mr. Courtney particularly) had considerable influence over the plaintiff at the relevant time and that impacted upon some of the things the plaintiff did. She trusted him and had faith in him, and that colored the relationship. Specifically, it was a factor in Ms. Pinsonneault's decision to take some legal step to provide security for the property she owned and to better safeguard her things from members of her family that she thought were out to take them from her. However, for reasons I have adverted to and will elaborate upon later, this case is not one where the plaintiff has proven the defendants exerted undue influence to bring about a particular result, an intentional transfer of title with understanding of the consequences of her actions.

[122] A related concept arises from the submissions of counsel: do the facts at bar support a finding of a breach of a fiduciary duty by the defendants?

[123] I will examine that in a subsequent section of these reasons for judgment, including a more detailed consideration of the law relating to fiduciaries.

[124] For now, I will leave the matter on the basis that this portion of my judgment has set out in reasonable detail my observations and conclusions, with respect to the relations between the plaintiff and the defendants.

Events at the Notary's Office

[125] Next, I turn to what I consider to be the central event in the narrative: the execution of documents before the notary public on February 20, 2017. The specifics of those documents are set out at para. 49, above.

[126] Attempting to find a comprehensive and reliable narrative of what happened on that date has proved enormously elusive. The Court has before it the testimony of four persons: the plaintiff, each of the defendants and the notary public, Tarralin Hanson.

[127] Some brief description and commentary is a useful point at which to start.

[128] I have described the plaintiff's persistent concern that members of her family might attempt to take her property from her. There is no question that she had discussed that with Mr. Courtney many times. With that background, she testified that she had a conversation with Mr. Courtney in February 2017, and that he told her that his wife (Charlene Courtney) had found a way to "protect her cabin" and he specifically made mention of the power of attorney document. Ms. Pinsonneault testified that it was her understanding that such a document would give Mr. Courtney permission to, in her words, "protect my cabin." Mr.

Courtney also told her that she would be required to accompany him to sign such a paper. On February 20, Mr. Courtney picked her up at her residence and drove her to the office of the notary public in Cranbrook.

- [129] The plaintiff testified that when they arrived, initially Mr. Courtney went and spoke privately with the notary, that is, not in Ms. Pinsonneault's presence. She said that she then met privately with the notary. There were papers present, evidently already prepared. Her recollection is that the notary asked her if she had read the "paper I sign"; she replied that she "cannot read". "The notary then asked "do you know what you are signing?" and she answered to the effect yes, that "Terry had explained it to her". Ms. Pinsonneault said she then signed the papers that were presented to her; she paid the bill and left with Mr. Courtney. When they left the notary's office, she said she had the papers in her hand. Mr. Courtney told her to give them to him, saying "I will put them in your file at my place", but she refused to do so. She said she took them home and put them in her desk. She did not examine them at that time or until some considerable time later.
- [130] Ms. Pinsonneault recalls that, as she finished her meeting with the notary, the notary said to her, apparently with respect to the paper that had been signed, words to the effect that "you can change that anytime you want."
- [131] Ms. Pinsonneault denied having any role in arranging the meeting or in providing any instructions to the notary public.
- [132] The testimony of Mr. Courtney with respect to this meeting was notably vague. He agrees there was an appointment and that he took Ms. Pinsonneault. With respect to the power of attorney, he considered that would be something that could be used in the event Ms. Pinsonneault became incapacitated. As for Lot 3, he testified that he believed the original plan had been that Ms. Pinsonneault wanted himself and her on the title, and then changed her mind. At some point, he says there was some discussion of all three parties being on the title, but as the document makes clear, the title ended up in the name of Mr. Courtney and his wife Ms. Courtney.
- [133] The defendant Charlene Courtney also testified. She said that she was not present at the office of the notary when the documents were signed, but came later to sign a tax form. She also made reference to discussions that she said had taken place with Mr. Courtney and the plaintiff about her being added to the Lot 3 title. Ultimately, as I understand her evidence, she says that she was added because she had taken on "all this debt". I would note parenthetically that seems quite at odds with the reality or common sense of the matter. There was no debt associated with Lot 3, mortgage or otherwise, although it could be with reference to Lot 4.
- [134] Ms. Courtney denies that she was any part of the process whereby the power of attorney was created appointing her husband.
- [135] And finally, there is the testimony of the notary public, Ms. Hanson.

- [136] Without making my assessment of her evidence a centrepiece of this ruling, it is fair to say that her testimony was disappointing and inadequate. Her responses were a litany of claims that she did not remember any details or specifics of the transaction, sometimes falling back on her "general practice".
- [137] The conclusion I take from her testimony is that she has no meaningful recollection of what occurred in this transaction and her notes and file are of no value to her in providing clear and reliable answers. For example, with respect to the matter of whether or not the plaintiff was aware of what she was signing or what steps were taken to make her aware, Ms. Hanson was quite unable to provide satisfactory answers.
- [138] In fact, it seems that Ms. Hanson does not even understand who her client was in this transaction.
- [139] A point urged upon this Court by the defendants concerns the very thorny issue of what is to be made of Ms. Hanson's evidence. Essentially, counsel suggests that, when a court is examining transactions that were conducted in the presence of and by a notary, and the notary does not have a clear recollection of what actually transpired but testifies as to his or her standard practice, and asserts that the transaction at issue was conducted in accordance with that practice, there should be a strong presumption that the transaction was done in a way that complies with such standard practice, and was regular and proper. In support of that, reference is made to the decision of Justice Harvey in *Beam v. Mills Estate*, 2015 BCSC 1269.
- [140] I have had the opportunity to consider the proposition and the discussion in that case. I accept that the principle is sound and should be accorded substantial weight, in the absence of reason to do otherwise. Certainly, in the facts of *Beam*, that approach seems to have made eminent good sense.
- [141] In the particular circumstances of the present case, I am not persuaded that applying such a presumption would be correct. I say so because here, this Court finds there is real evidence to support grave concerns that there were significant irregularities in this transaction. There is the sworn testimony of the plaintiff that events did not proceed in a manner that accords with what would be expected in a usual transaction of this type, where property was being transferred to a third party for no consideration. There is the factor of the plaintiff's limitations that I have described; nothing was seemingly done in recognition of those. The notary has, as noted, virtually no actual recollection of the events and does not even appear to know who her client was. The paperwork that was prepared wrongly states that there was a stepmother/stepson relationship between the parties. In short, there is much about this transaction that is quite out of the ordinary. To dismiss those very real concerns by concluding that the transaction should be assumed to be regular and proper simply because the notary said the words "usual practice" would not, in my view, be a proper exercise of this Court's duty to try the case on its merits.

- [142] Just in passing, I note that there was nothing in the circumstances of the Beam case that would have suggested any meaningful irregularity, and so the manner in which the court gave effect to the presumption of regularity appears entirely warranted.
- [143] I do not intend to belabour my discussion of Ms. Hanson's testimony. Suffice to say, it did nothing to displace any concerns that this transaction was badly conducted. None of her evidence was of such force or value as to provide a basis for understanding the specifics of what occurred and, where it purports to describe her interactions with the plaintiff, I accept the evidence of Ms. Pinsonneault over that of Ms. Hanson. For example, when Ms. Pinsonneault testified as to the exchange she had with Ms. Hanson at the time of the signing, I find nothing in the evidence of Ms. Hanson that would cause me to doubt the truth of what the plaintiff described.
- [144] In terms of findings of fact, I am satisfied that Ms. Pinsonneault attended the notary's office on February 20 and was taken there by Mr. Courtney. That was done at his instigation, not hers. It is obvious that a number of documents were drawn by the notary's office for execution by the persons who would attend. It is reasonably clear that the appointment for the notary meeting was made by Ms. Courtney. I am satisfied that the plaintiff had no role in that being done, and I am satisfied that the arrangements for the appointment were done by the defendants.
- [145] With respect to the substance of the transactions that were conducted there that day, it is clear that the notary's office was provided specific information: that there was to be a transfer of title by deed of gift; that Mr. Courtney was the stepson of Ms. Pinsonneault; that the transaction was taken in some contemplation to a further intended disposition of some part of her estate by Ms. Pinsonneault to the Courtneys; and all the other specific transaction information required for the documents.
- [146] I am confident that none of that information was provided by Ms. Pinsonneault. In fact, I am satisfied that she did not know the nature and effect of the documents she signed at the notary that day and I find that this direction and information came from the defendants.
- [147] That the transaction was to the benefit of the Courtneys is beyond any question.

Other Points

- [148] There are certain other matters of relevance that I wish to make mention of in this portion of the judgment.
- [149] The first concerns the property taxes that were paid with respect to Lot 3 at the beginning of the 2018 calendar year.
- [150] The evidence discloses that when the tax bill for that property was received, and this was at a time that Mr. Courtney was apparently looking after the plaintiff's mail, he told Ms. Pinsonneault about it and there was some discussion. The upshot is that she authorized Mr. Courtney to pay the taxes on that property from her bank account.

- [151] To my mind, this is a circumstance of note. The first and obvious question would be that, if the property was now owned by the Courtneys, why would they not be responsible for the tax? A logical answer, it seems to me, is that Mr. Courtney was quite content to allow Ms. Pinsonneault to continue to believe that she owned the Lot 3 property. It was also of course in his financial interest to have her pay the tax, as it alleviated the need for the defendants to spend their own money to make payment. I recognize that the Deed of Gift described at para. 49 refers to taxes relating to the gift and acknowledge that may arguably have application to this particular issue, although I do not consider that fully answers my concern.
- [152] From the Court's perspective, it is consistent with a conclusion that Ms. Pinsonneault did not realize that her property had been transferred to the Courtneys but rather continued to believe she owned it. In that way, the Courtneys did not have to account to Ms. Pinsonneault for the fact that her title had now been transferred to them.
- [153] I note that that issue was raised with each of the defendants in their cross-examination. Neither provided any answer that seemed reasonable or sensible. Neither made reference to the Deed of Gift provision.
- [154] Also of considerable interest is that the defendants took a number of steps against the plaintiff's interests after events came to a head between the plaintiff and Mr. Courtney in January 2018, and after it became apparent to the defendants that the plaintiff refused to accept the transfer and was not going to acquiesce in what had been done. I find that the thrust of those steps to have been in the nature of a pre-emptive strike against Ms. Pinsonneault and her obvious concern that her property had been, in her words, "stolen from her". Ms. Courtney sent a fairly lengthy email to the notary public. I am wary of delving into all of the details of that message or what followed between the parties, since counsel have agreed that any process related to settlement discussion is not to be considered by this Court. Nevertheless, that email is in evidence and can be considered. The essence of it is that Ms. Courtney advised the notary that the plaintiff was upset and had accused Mr. Courtney of stealing her cabin. Generally, my clear sense of this document is that it is self-serving and an attempt to have the notary onside with the defendants in the looming dispute. It is part of a number of steps the defendants took to lay down a narrative to suggest that the plaintiff was confused and mistaken, and possibly suffering from some cognitive health issue. I conclude that the defendants endeavoured to advance a story to the effect that the plaintiff had suffered some health problem, such as a stroke, that would account for her memory being unreliable or allow for the possibility that she had done the transfer quite knowingly, but was now acting irrationally. That included Mr. Courtney contacting the plaintiff's daughter in Atlantic Canada and having her come to Cranbrook and attempting to bring her into alignment with the defendants' preferred version of events.

- [155] I am satisfied that these steps were taken by the defendants as a means of getting a handle on this problem before it became worse, and in the course of doing what they did, they attempted to put Ms. Pinsonneault into a disadvantaged position whereby her complaints might well seem to be of doubtful merit. Their actions in that regard were devious and reflect adversely on them and their position in this rather sorry sequence of events.
- [156] A dominant theme in the position of the defendants has been that Ms. Pinsonneault wanted the defendants to have the cabin and the Lot 3 property: that she effectively considered it to be "theirs" - that is, either belonging to the defendants or the defendants and Ms. Pinsonneault together - and that she frequently spoke in ways that expressed that intention. She denies that to be so, and I prefer her evidence on the issue over that of the defendants.
- [157] At one point in the plaintiff's testimony, she said that she wanted her son Marcel, someone whom apparently suffers from medical conditions, to have it. There was no other evidence consistent with that: it stood alone, and the defendants say it is not especially credible.
- [158] Notwithstanding what other plans she may have had, whether that was a serious intention or not, that should not derogate from the basic proposition that it is her right, as a property owner, to deal with her property as she sees fit. The fact there may not be clear and convincing evidence that she had a plan cannot, it seems to me, provide support for the defendants' claim that it should become theirs.

Credibility Findings

- [159] As is clear from this portion of these reasons, with respect to credibility of the principals, I find the plaintiff to be an essentially truthful witness. She is not a perfect historian; her ability to express herself was occasionally a challenge; she was, in her presentation, sometimes a bit indignant and defensive. However, I have examined her testimony carefully and conclude that she is a witness whose evidence is entitled to be given considerable weight.
- [160] The defendants' submissions concerning the plaintiff's credibility are, not surprisingly, very thorough and extensive. Reference is made to a number of points that the defendants say should cause this Court to have grave concerns. Some are inference driven: that the Court should conclude that Ms. Pinsonneault is far more business-savvy than she represented herself to be. Some are based on allegations of implausibility: for example, the contention that her description of events at the notary's office does not make sense. Some are based on the manner in which she gave her testimony: that her reference to a date "sounded rehearsed". Some are based on allegations of inconsistencies in her evidence. Some are based on the defendants' view that she was apparently confused at points in her testimony.

- [161] I have given consideration to these submissions. They are not entirely without any merit. As observed, Ms. Pinsonneault is not a model witness: there were concerns with her evidence. However, in the final analysis, I have found her to be essentially credible with respect to the central issues in this case.
- [162] I cannot say the same for the defendants. On critical issues, their evidence simply does not withstand careful scrutiny in light of the totality of the evidence. It does not make sense. Given my findings of fact, in certain respects, there are aspects of the evidence - such as the circumstances of the events at the notary's office and the content of the documents that had been prepared and were executed, the property tax issue, and the efforts I have described to undermine and discredit the plaintiff after she learned the true state of affairs- that smack of dishonesty, plain and simple.
- [163] In the result, with respect to core issues raised by this litigation, I do not accept their evidence as truthful.
- [164] I wish to make comment on the final witness for the defendants, Rochelle Roy. She testified as to observations she had made of the plaintiff - observations that very pointedly supported the defendants and disparaged the plaintiff. She has had business dealings with the plaintiff that have quite evidently left her with a distinctly negative view of her.
- [165] As I listened to this witness's evidence, I was struck by how eager she seemed to be to cast aspersions upon the plaintiff and her inclination to be combative in cross-examination by plaintiff's counsel.
- [166] After hearing and considering her testimony, I find myself unable to assign it any meaningful weight in deciding the issues this case presents. The sense of aggressive bias that colors it simply renders it of dubious value.

Legal Principles - Trust Claims

Resulting Trust

- [167] In *Pecore v. Pecore*, 2007 SCC 17 at para. 20, the Supreme Court of Canada provided:
- [20] A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362.
- [168] Where a transferee has received property for no consideration, the law presumes that they hold that property in a resulting trust in favour of the transferor. "Equity presumes bargains, not gifts" or gratuitous transfers: *Pecore* at para. 24. In addition a "formulaic phrase" such as "\$1 and love and affection" in conveyancing documents is not determinative of whether a transferee provided consideration: *Fleming v. Kwakseestahla*, 2010 BCSC 1006 at para. 19.

- [169] In *Snelling v. Snelling*, 2019 BCSC 730, the plaintiff claimed a resulting trust over a property interest he had transferred to his sons. The court found that although the plaintiff had indicated at various times that he wanted his sons to have the property before they married, he transferred the property to protect it from business losses. At para. 17, the court cautioned that,
- [17] cases such as the present one are not a contest between weighing evidence of an intention to make a gift, against contrary evidence of an intention to create a trust arrangement. That is not the law. Instead, a resulting trust is presumed, by operation of law, when there is insufficient evidence of an intention to make a gift.
- [41] there is no onus on [the plaintiff] to demonstrate that he had an intention throughout to maintain an equitable interest; rather, his equitable interest will arise by operation of law, if there is insufficient evidence, on a balance of probabilities, that he intended a gift.
- [170] The presumption of a resulting trust also displaces the presumption set out in s. 23(2) of the LTA that the registered owner of property holds indefeasible title at law and in equity: *Brown v. Manuck*, 2015 BCSC 1966 at para. 160; LTA, s. 23(2).
- [171] As provided in *Pecore* at para.24, the presumption of a resulting trust is rebuttable:
- [24] A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see *Sopinka et al.*, at pp. 105-6.
- [172] To rebut the presumption of a resulting trust, the transferee must show on a balance of probabilities that the transferor intended to make a gift: *Pecore* at para. 43.
- [173] The intention of the transferor at the time of the transfer is determinative: *Rascal Trucking*, 2013 SCC 33 at para. 41. However, in ascertaining the transferor's actual intention the court will consider all evidence, including evidence of intention subsequent to the transfer: *Pecore* at para. 59.
- [174] No single type of evidence is determinative: *Pecore* at para. 55. In regards to evidence of intention subsequent to the transfer the Court in *Pecore* noted at para. 59:
- [59] The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.
- [175] In *Mawdsley v. Meshen*, 2010 BCSC 1099 at para. 289, the court referenced *Pecore* in summarizing a non-exhaustive list of types of evidence that may be relevant to determining the transferor's intent:
- a) evidence of the transferor's intent arising subsequent to the transfer;

- b) the documents used for the transfer;
- c) the control and use of the relevant funds;
- d) whether a power of attorney had been granted to the transferee; and
- e) the manner in which the transferor treated the transferred asset for tax purposes.

- [176] In *Fleming*, the court noted that documents generated by a solicitor and signed by a transferor did not prove donative intent. In *Fleming*, the court awarded the plaintiff a resulting trust or, in the alternative, a constructive trust over land he intended to transfer in trust to the defendant for a youth treatment centre. The court found that the plaintiff had always thought his interest in the property would be protected, which was confirmed by various representations the defendant made to the plaintiff. However, when the plaintiff attended the lawyer's office, the prepared agreements amounted to a simple conveyance of title to the defendant. At para. 41, the court stated:
- [41] It should be noted that there are various other documents that form part of the record, principally from the solicitor's file. They include an agreement that the solicitor could act for all parties, an indenture, a Form A Freehold Transfer. While those documents take the form of a freehold transfer of title, in my view, in these circumstances while on their face suggest a simple transfer they do not prove a donative intent, and in these circumstances, do not rebut the presumption of a resulting trust.
- [177] Further, both the sufficiency of legal advice and a finding of undue influence will qualify a transferor's intention: *Bostrom v. Bigford*, 2019 BCSC 79 at para. 98. In *Fleming* at para. 42, the court noted that it was "inappropriate for the solicitor to be acting for both parties to the transaction as they had "completely differing interests."
- [178] In addition, the transferor's intent to provide a gift must be qualified if undue influence is found: *Bostrom* at para. 99. Undue influence arises where the relationship between the parties gives rise to the transferor being dominated by the transferee: *Brown* at para. 152. The requirements for a successful claim of undue influence are provided later in these reasons.

Remedial Constructive Trust

- [179] A remedial constructive trust may be imposed by the court after finding that one party has been unjustly enriched by another. In *Brown* at para. 163, the court provided that "a person has been unjustly enriched when they were provided with a benefit that justice does not allow him or her to retain."
- [180] As set out in *Kerr v. Baranow*, 2011 SCC 10 at paras. 32-41, the plaintiff must establish the following three elements to prove unjust enrichment:
- a) "an enrichment or benefit to the defendant";

- b) the enrichment or benefit caused a "corresponding deprivation of the plaintiff"; and
- c) "the absence of a juristic reason for the enrichment".

[181] The third element, "absence of a juristic reason", means that "there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances of the case": Kerr at para. 40. A juristic reason for enrichment includes donative intent: Kerr at para. 41.

[182] While a monetary award is generally sufficient to remedy an unjust enrichment, the court may impose a remedial constructive trust over real property if the plaintiff can demonstrate a "substantial and direct" link between the unjust enrichment and the property, and that a monetary remedy is insufficient in the circumstances: Brown at para. 166; Kerr at paras. 47, 50-53.

Fiduciary Duty

[183] The nature of certain relationships between individuals results in one individual owing a fiduciary duty to the other. Some of these relationships are recognized as fiduciary by law such as that between a lawyer and their client. Beyond these traditionally recognized relationships, "ad hoc" fiduciary relationship may be found if the relationship consists of certain characteristics: Sledin Estate v. Rusin, 2011 BCSC 1207 at para. 65.

[184] In the dissenting reasons of Frame v. Smith, [1987] 2 S.C.R. 99, endorsed in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 at 588-599, Justice Wilson set out the general characteristics of a fiduciary relationship:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[185] Further, in Galambos v. Perez, 2009 SCC 48 at para. 66, the Supreme Court of Canada provides that in order to find an ad hoc fiduciary relationship, the court must be satisfied that one party undertook to act for the benefit and best interest of another party, either expressly or by implication.

[186] Once a fiduciary relationship is established, the fiduciary must act in the best interests of the beneficiary.

Wrongful Procurement

- [187] The doctrine of wrongful (or unconscionable) procurement is derived from the principle that where a donee obtains a benefit from a donor that in turn disadvantages that donor, the donee must prove that the donor had the "necessary level of understanding to make a transaction conscionable": John E.S. Poyser, *Capacity and Undue Influence* 2nd ed (Toronto: Carswell, 2019) at 629 in *Gefen v. Gaertner*, 2019 ONSC 6015 at para.158. It is an equitable principle: Poyser at 628. A finding of wrongful procurement renders a transfer voidable by the court: *Gefen* at para. 158.
- [188] The Court in *Gefen* provided that the onus is on the party attacking the transaction to prove on a balance of probabilities that: (1) a significant benefit was provided; and (2) active involvement by the person obtaining the benefit of the procurement: at para. 159. Once these two elements are established, it is presumed that the donor "did not truly understand what they were doing when they made the transaction." *Gefen* at para. 159.
- [189] Once the presumption is established, the transaction is voidable and the Court must determine whether it would be unconscionable to let the transaction stand. As stated in *Gefen* at para. 161, at this stage,
- [161] Both parties must adduce evidence about the donor's actual understanding of what she was doing. If the evidence does not come down on either side, the attacker will have failed to meet the onus and the transaction will stand: Poyser, at p. 570.
- [162] The attacker must ensure that there is enough evidence before the court in the final weighing to allow the court to conclude, as a finding of fact, that the donor failed to have a conscionable understanding of what she was doing when completing the transaction. This issue turns on whether the donor appreciated the effect, nature, and consequence of the transaction in a manner sufficient to render it fair, just, and reasonable: Poyser, at p. 574.
- [190] The question the court must ask is whether the donor "fully appreciate[d] [the] effect, nature and, and consequence" of providing gift: *Kinsella v. Pask*, 28 O.L.R. 393 at 400, 12 D.L.R. 522.

Undue Influence

- [191] Two classes of transactions may be set aside on the ground of undue influence:
- a) a gift that resulted from influence expressly used by the donee on the donor (direct undue influence); and
 - b) the relations between the donor and the donee have or at or shortly before the execution of the gift raised the presumption that the donee had influence over the donor (undue influence by relationship or presumed undue influence):

Allcard v. Skinner (1887), 36 Ch. D. 145 (Eng. C.A.), at 171; 56 L.J. Ch. 1052; *Mondonse* at para. 97.

[192] In the present case, it is the second class which is arguably at issue.

[193] In *Geffen v. Goodman Estate*, [1991] 2, S.C.R. 353 at 378, the Supreme Court of Canada set out the test to trigger the presumption of undue influence under the second class:

- a) Examine the relationship between the parties. "[Is] the potential for domination inher[ent] in the nature of the relationship"?
- b) In situations where consideration is not an issue, such as gifts, if no consideration was provided in the transaction, the second class of undue influence applies.

[194] Further, the second class does not require malicious intent or reprehensible actions by the influencing party: *Modonese v. Delac Estate*, 2011 BCSC 82 at para. 99.

[195] Once the plaintiff establishes that the second class of undue influence applies, the evidentiary onus falls on the defendant to rebut the presumption: *Geffen* at para. 379. At 379, the Court provides:

[Citation omitted] the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on.

[196] Types of evidence that may be used to rebut the presumption of undue influence were summarized in *Stewart v. McLean*, 2010 BCSC 64 at para. 97 (adopted in *Cowper-Smith v. Morgan*, 2016 BCCA 200, rev'd 2017 SCC 61 on other grounds):

- a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
- b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
- c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
- d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
- e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

Another relevant factor may be the magnitude of the benefit or disadvantage (*Geffen* at 379; *Longmuir* at para. 121).

[197] The court in *Cowper-Smith* at para. 51 provides a number of considerations relevant to assessing whether the legal advice provided to the donor will rebut the presumption:

1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed;
2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor;
4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place; and
5. Whether the solicitor discussed other options whereby she could achieve her objective with less risk to her.

[198] In addition, the court in *Modonese* at para. 153, found that in circumstances the transferor's independence of mind can be vitiated where the transferee arranges the transfer of the property in question, pays for the notary who is overseeing the transfer and is physically present during the transfer.

Application of the Legal Principles to the Facts - Trust Claims

[199] In this case, the plaintiff's principal submission is that this the Court should impose a remedial constructive trust against Lot 3 in favour of the plaintiff on the basis of the defendants' breach of fiduciary duty, wrongful procurement of transfer, and the defendants' undue influence on the plaintiff.

[200] The defendants contend that for a number of reasons, based on their submissions with respect to the evidence and how they say this Court should assess that evidence, that there should be a finding of intentional outright gift, and that a finding of trust should not be made.

[201] In my view, and following from the findings that I have set out above, the plaintiff has quite soundly made out a proper basis for a declaration of resulting trust, in accordance with the requirements provided in the authorities.

[202] The transferees (that is, the defendants) received title to Lot 3 for no consideration. No monetary payment was made. The assertion on the Form A of "natural love and affection" cannot in the circumstances assist the defendants. That assertion must be considered in the context of the Deed of Gift, where Terry Courtney is described as the plaintiff's "Step Son".

[203] That is manifestly untrue.

- [204] As I have described, I reject the defendants' contention that the plaintiff intended to gift title to this property to them. There was no donative intent.
- [205] As the authorities make clear, where property is transferred but there is no value provided, there is a presumption of resulting trust.
- [206] I note that presumption also displaces the presumption provided by s. 23(2) of the LTA, that the registered owner of property holds indefeasible title at law and in equity.
- [207] That said, the presumption to which I make reference is rebuttable: it is open to the defendants to adduce evidence to displace the presumption. To do so, they must show on a balance of probabilities that the transferor (the plaintiff) intended to make a gift.
- [208] In the matter at hand, as I have explained in my discussion of the evidence, I find that, at the time of the transfer, there is no viable basis to believe that the plaintiff had the intention to gift title to Lot 3 to the defendants. In fact, the evidence provides a strong reason to conclude that the plaintiff did not know that by signing the documents, she had in fact transferred title.
- [209] This is not a situation where it can be argued that, when the plaintiff executed the documents, she understood the consequences of doing so.
- [210] Furthermore, I am satisfied that the plaintiff was unaware that title had been transferred until many months later and, when she realized, she immediately set up a hue and cry, expressing that. In the time that followed, she steadfastly persisted in that position.
- [211] In short, there is no evidence before this Court that can assist the defendants in rebutting the presumption of resulting trust.
- [212] The suggestion that the plaintiff's position now is the result of the change of mind or a "donor's remorse" is without any evidentiary support and I reject it.
- [213] I note that the plaintiff did not have independent legal advice when she executed the documents at the office of the notary public. I have concluded to a high level of certainty that she did not know the import of the documents she signed and, as I have also observed, at the time she was, to some reasonable extent at least, acting on the basis of her confidence and trust in the defendants, and particularly Mr. Courtney.
- [214] An additional consideration is this Court's conclusion that, because of her eyesight condition, she was, entirely unsurprisingly, unable to appreciate the significance and effect of the documents she executed.
- [215] In all the circumstances, I find that the plaintiff has established her right to the remedy of an order for return of the title of Lot 3 to her, forthwith.

- [216] The concept of a remedial constructive trust has also been raised in submissions and discussed above. Given my conclusion with respect to the resulting trust, I do not see a need or purpose to subject the matter at hand to an analysis under this head. However, I would observe that the evidence satisfies me that the defendants were unjustly enriched by the plaintiff; that is, the three required elements are quite clearly made out. That too entitles the plaintiff to the remedy of the restoration of the title to her.
- [217] Similarly, the doctrine of wrongful procurement is, to my mind, met by the circumstances at hand.
- [218] Finally, in the discussion of legal principles set out above, I have made mention of the concept of undue influence.
- [219] Without having to definitively decide the matter, it is my view that the second class of such transactions is satisfied: that is, that relations between the plaintiff and the defendants, at or shortly before the execution of the transfer (the gift) support a presumption that the defendants, and particularly Mr. Courtney, had influence over the plaintiff on the basis of their friendship and the other considerations which I have discussed. However, as I have discussed, the facts here do not fall fully within the usual undue influence model. While I am satisfied that Mr. Courtney had a significant level of influence over the plaintiff, the evidence does not support a finding that she was influenced such that she made a deliberate decision to transfer her interest to the defendants, without meaningful consideration. That is based on my conclusion the Ms. Pinsonneault was not aware that she was transferring her interest when she signed the documents.
- [220] I am not suggesting that the requirements for proof of undue influence must be established, and that is particularly so in light of my conclusions with respect to resulting trust, discussed above.
- [221] To be clear, I find the plaintiff has established a resulting trust in respect of the transfer of the title of Lot 3 to the defendants and that the defendants are obliged to return title to the plaintiff forthwith.

The Other Non-Trust Claims

- [222] Apart from the central trust claim, both the plaintiff and the defendants advance other claims.
- [223] The defendants say that if this Court does not dismiss the plaintiff's claim in trust but rather orders that Lot 3 be transferred to the plaintiff, then they are entitled to an award of damages in quantum meruit in the amount of \$50,000 to compensate them for labour and material that they supplied to the Lot 3 site and the cabin or, alternatively, an order referring the assessment of damages to the Registrar of the Court. Specifically, they rely in the testimony of Mr. Courtney and a list of items, Exhibit 42. Failing acceptance of that quantum of damages, they ask for a reference to the Registrar for an assessment.

- [224] The basis upon which the quantum meruit claim is founded is particularized by the defendants in their submissions as follows:
266. If this court determines Lot 3 is to be transferred to the Plaintiff, the Defendants say they have suffered financial losses/damages arising from the false representation by the Plaintiff that the Defendant, Terry Courtney, would be entitled to Lot 3 upon the Plaintiff's death ("the false representation").
267. In reliance upon the actions and representations of the Plaintiff to the Defendants that the Defendant, Terry Courtney, would receive title to Lot 3 from the Plaintiff, the Defendants incurred considerable time and expense making improvements to Lot 3, expending material costs and labour, and also incurred expense purchasing Lot 4 because the Defendants say they would never have acquired that property but for the false representation made to them by the Plaintiff.
- [225] That claim was made in an amended pleading filed during the trial.
- [226] The plaintiff opposes such an order on the basis that the claim was made after the limitation period had expired. She also advances a claim for occupation rent, seeking a setoff against any quantum meruit damages that this Court might order her to pay. However, if the quantum meruit claim is not allowed, she does not pursue that remedy.
- [227] In addition, both the plaintiff and the defendants seek damages for the tort of conversion.
- [228] The plaintiff argues that the defendants are liable under this head because they "wrongfully converted the plaintiff's personal and business assets to their own use, including items removed by the defendants from the plaintiff's property, the destruction and removal of trees and excavations by the defendants on Lot 3." She says that she is unable to accurately know the scope and value of the damage done because she has not been able to access the property, but, at the very least, there is evidence of destruction of trees which has been established at \$10,000.
- [229] The defendants also claim in conversion on the basis that they have led evidence that the plaintiff, despite several demands, refused to return the defendants' personal and business property, specifically some gold testing equipment, marine radios, fish finders, GPS and a converted outhouse.

Legal Principles -Non-Trust Claims

- [230] Quantum meruit (meaning "as much as deserved") is an equitable remedy whereby a party who has bestowed a benefit on another, in the absence of an enforceable contract that would require payment to be made for that benefit, can be compensated. Because of the equitable nature of the remedy, its application attracts the clean hands doctrine: Those who base their claim on quantum meruit must come to the court with clean hands.

[231] Section 6 of the Limitation Act, S.B.C. 2012, c. 13 provides a basic limitation period of two years after the date of discovery to commence an action:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

[232] Section 8 of the Limitation Act sets out when a claim is considered "discovered":

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[233] Section 22 of the Limitations Act provides additional rules for counterclaims or other claims related to the initial claim:

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
 - (b) third party proceedings may be brought;
 - (c) claims by way of set off may be advanced;
 - (d) new parties may be added or substituted as plaintiffs or defendants.
- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution or indemnity after the expiry of a limitation period applicable to that claim.
- (3) Subsection (1) does not enable a person to make a claim against another person if a claim by the other person
- (a) against the first mentioned person, and
 - (b) relating to or connected with the subject matter of the proceeding,

is or will be defeated by the first mentioned person pleading a provision of this Act as a defence.

- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.
- (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

[234] In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, the Court of Appeal discussed the application of the court's discretion under s. 4(4) of the former Limitation Act, now s. 22(5) of the current Limitation Act. The Court's reasoning has continued to be applied to the current Limitation Act: see *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at paras. 36-37.

[235] Section 22(5) provides unfettered discretion to the court to allow or disallow an amendment that raises a new claim, brought after the expiry of the basic limitation period: *Teal Cedar* at para. 45. The Court in *Teal Cedar* at para. 67 provided five factors for consideration when exercising this discretion:

- the length of delay;
- the reasons for the delay;
- any explanation put forward to account for the delay, which is not required to exculpate the party from fault or culpability;
- the degree of prejudice caused by the delay; and
- "the extent of the connection, if any, between the existing claims and the proposed new cause of action".

[236] The Court also noted that "none of [these] factors should be considered in isolation", and the overall consideration is whether such a decision would be "just and convenient": *Teal Cedar* at para. 74; see also *Swiss Reinsurance Company* at paras. 21, 38.

[237] In a subsequent case applying the *Teal Cedar* factors, the Court of Appeal stated, "mere inconvenience or annoyance will not necessarily amount to prejudice": *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 23. However, factors that do not necessarily amount to prejudice may still be considered by the court. For example, the Court in *Chouinard* at para. 26 provided:

[26] Where a defendant has expended considerable effort to advance the litigation, and has taken steps to ensure that a trial will go ahead, it would be unfair to ignore hardship that the defendant would face as a result of additional delays and as a result of the addition of new causes of action after the expiry of the limitation period.

[238] With respect to the conversion claims, that tort has been described thusly by Justice Major in 373409 Alberta Ltd. (Receiver of) v. Bank of Montreal, 2002 SCC 81 at para. 8:

8 The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996] 3 S.C.R. 727, per Iacobucci J., at para. 31. It has long been recognized that an action in conversion may be brought by the rightful holder of a cheque against a wrongful dispossessor: Crawford and Falconbridge: Banking and Bills of Exchange (8th ed. 1986), vol. 2, at p. 1386 ("Crawford and Falconbridge"). The tort is one of strict liability, and although the dispossession must arise as a result of the defendant's intentional act, "it is no defence that the wrongful act was committed in all innocence": Boma, supra, at para. 31.

[239] The requisite elements to be proven to establish such a claim are summarized in Ast v. Mikolas, 2010 BCSC 127 at para. 126:

- (a) a wrongful act by the defendant involving the goods of the plaintiff;
- (b) the act must consist of handling, disposing, or destroying the goods; and
- (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

Application of the Legal Principles to the Facts - Non-Trust Claims

[240] I will begin with the quantum meruit claim of the defendants.

[241] In my respectful view, it cannot succeed. Leaving aside the limitation issue for now, the principal reason for my conclusion is substantive. A critical aspect of the claim as articulated is that the defendants base it upon the premise that they did the things they did, that is, put goods and services into the Lot 3 property, in reliance on the plaintiff's false representation to them that they would receive title to that property. As my findings of fact make clear, I have rejected the contention that there was such a representation made by Ms. Pinsonneault to the defendants. Accordingly, their claim as they have advanced it fails.

[242] Additionally, there are other problems. The evidence seems to support the view that some of the work that the defendants claim was done at a time that they were getting along with the plaintiff and were enjoying use of the property for their own family pleasure and benefit and the plaintiff was also part of the work that was being done: it was gratuitous and in the context of their use of the property. I am not clear, but it also appears to me that some of the work was done at a time after the defendants had improperly taken title to the property, that is, after February 20, 2017, and so they cannot be said to have "clean hands" for any such time, thereby disentitling themselves from the equitable benefit of the quantum meruit remedy. Finally, I am not persuaded that the evidence offered in support of the claim, as detailed in Exhibit 42, with a value of \$25,238.40, is an accurate and reliable statement of work done.

- [243] Generally, the entire state of the evidence as to what was done and when is notably lacking in clarity. I make that observation with respect to both the plaintiff's evidence and that of the defendants - particularly the photos that have been entered as exhibits 37 and 49.
- [244] For all those substantive reasons, the quantum meruit claim is dismissed. In light of that determination, the limitation defence need not be considered.
- [245] As an aside, I note the defendants' submission suggests that they have incurred loss because of their purchase of Lot 4, loss they would not have sustained but for the actions of the plaintiff. To my mind, that assertion rings hollow. The evidence at trial indicates that the purchase has been a very significant financial benefit to them, with the property having increased in value quite substantially since being acquired.
- [246] As the quantum meruit claim stands dismissed, there is no need to address the plaintiff's occupation rent claim.
- [247] The remaining matters to be dealt with are the two conversion claims.
- [248] Again, the state of the evidence is less than clear.
- [249] As for the defendants' claim, there was some evidence that the goods at issue were returned to them, but the specifics were not clear to me. In the circumstances, there will be an order that the defendants, through counsel, provide the plaintiff with a letter, to her counsel, setting out in detail the items at issue in the claim. The plaintiff will have fifteen days to make her response to the claims, meaningfully addressing each item. Hopefully the issues will be resolved in that way. If that is not successful, the matter will be referred to a Registrar of the Court for an Inquiry, with a report to be made to this Court.
- [250] As for the plaintiff's claim in conversion, arising from actions that she says the defendants took on the property, including damage and destruction to the site and trees, the evidence in that regard of extent and value is of sub-optimal value as well.
- [251] In the interest of bringing closure to that aspect of the dispute, I will make an order for damages to be paid by the defendants to the plaintiff in the amount of \$12,000 as full compensation for any and all damage and destruction done to Lot 3. That sum very much represents a rough justice approach, but it is to my mind reasonably reflective of what the evidence allows.
- [252] With respect to costs, given the outcome of this action, the ordinary result would be an order in the plaintiff's favour. I propose to make that order here. Hopefully counsel will be able to deal with that. If further direction is required, arrangements can be made to appear before this Court to address that.

Summary of Conclusions

1. The plaintiff's action in trust is allowed. This Court makes a declaration of a resulting trust with respect to Lot 3. The defendants are ordered to return title for Lot 3 to the plaintiff forthwith, which obligation includes taking all necessary steps to facilitate registration of the title in the name of the plaintiff.
2. The defendant's claim in quantum meruit is dismissed.
3. The defendant's claim in conversion is to be dealt with by defendant's counsel directing a letter to plaintiff's counsel setting out the specifics of the items to be accounted for; plaintiff's counsel will make meaningful response to that letter within 15 days. Failing resolution, the matter will be referred to this Court as provided in para. 249.
4. The plaintiff's claim in conversion is allowed; the defendants are ordered to pay damages to the plaintiff in the amount of \$12,000.
5. The plaintiff is entitled to her costs of this action.

"Williams J."

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