
CANADA / JUDGMENT

Siemens v. Munroe

2020 BCSC 1862

COURT

Supreme Court of British Columbia

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2020 BCSC 1862 Siemens v. Munroe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siemens v. Munroe,

2020 BCSC 1862

Date: 20201201

Docket: S36721

Registry: Chilliwack

Between:

Jordon Michael Siemens

Plaintiff

And

Jeanne Marie Munroe

Defendant

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial/Hearing:

Chilliwack, B.C.

October 13-16, 2020

Place and Date of Judgment:

Chilliwack, B.C.

December 1, 2020

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Introduction

- [1] Jordan Siemens is Jeanne Munroe's 31-year-old son. He alleges that Ms. Munroe breached an agreement under which he was to obtain an ownership interest in property registered in Ms. Munroe's name at 34986 Exbury Avenue, Abbotsford, BC (the "Residence"). In the alternative, Mr. Siemens alleges that he is entitled to an equitable claim based on unjust enrichment. He seeks a constructive trust remedy or damages.
- [2] This is an emotional case for the parties involved. With the best of intentions, they entered into an arrangement that they thought would benefit each of them. The terms of their arrangement were not reduced to writing. Although they still live together in the Residence, their relationship has deteriorated to the point where they no longer communicate. Mr. Siemens believes that his mother broke a promise she made to him, and he has reacted with anger. This case cried out for a creative solution, but the parties were unable to reach such a solution, and the matter went to trial over four days.
- [3] Although the parties disagree about some of the facts giving rise to this dispute, many of them are not controversial.

The Issues

- [4] The issues before me are:
- (a) was there an enforceable agreement between Mr. Siemens and Ms. Munroe?
 - (b) if not, is Mr. Siemens entitled to a remedy based on unjust enrichment?
 - (c) if Mr. Siemens is entitled to a remedy based on unjust enrichment, what should it be?

The Uncontested Facts

- [5] For 23 years, Ms. Munroe has worked for Sutton West Coast Realty. She is currently an independent contractor as the manager of Sutton's business centre, which provides realtors assistance with contracts, social media, and marketing.
- [6] For about ten years, Mr. Siemens has been in a common-law relationship with Rebecca Labounty. Together, they have two children. Ms. Labounty's son from a previous relationship also lives with them on a part-time basis. Mr. Siemens has been employed by Abbotsford Chrysler for the last 13 years. After he finished high school, he apprenticed for four years to become an automobile technician. In about 2015, when the arrangement that is the subject of this dispute was discussed, he earned approximately \$55,000 per year; he currently earns about \$100,000 per year.
- [7] The Residence was built by Ms. Munroe and her first husband, Mr. Siemens' father. Ms. Munroe has lived there for more than 30 years. It has two floors: a ground level entry floor that was previously rented as a one-bedroom suite and an upstairs main living area with three bedrooms. There is no basement.
- [8] Mr. Siemens and his younger sister grew up in the Residence. Ms. Munroe separated from Mr. Siemens' father in 1992. After the separation, Ms. Munroe retained the Residence and continued to reside there with her two children. To cover her expenses, and maintain the Residence, she built and rented out a ground floor one-bedroom suite.
- [9] Mr. Siemens lived in the Residence until 2010, with the exception of a short period of time. He left when he moved into a condominium owned by Ms. Labounty, her ex-partner, and her parents. While living there, Mr. Siemens and Ms. Labounty had a daughter who is five years younger than Ms. Labounty's son.
- [10] In 2001, Ms. Munroe began a common-law relationship with Danial Munroe. They married in 2009. Mr. Munroe was registered as a joint owner on title to the Residence. In September 2014, they remortgaged the Residence for a five-year term (the "2014 Mortgage"). A spreadsheet prepared by Ms. Munroe on about March 14, 2015, indicated that the 2014 Mortgage matured on September 8, 2019.

- [11] In the spring of 2014, the Residence was raided by the RCMP who were investigating Mr. Munroe in connection with child pornography offences. In October 2014, Mr. Munroe was arrested and charged. He was removed from the Residence and never returned. In December 2015, he was convicted and sentenced to a nine-month jail term. He died in 2017.
- [12] Ms. Munroe testified that Mr. Munroe's arrest, and the charges involved, came as a complete shock to her. She described the emotional impact of the arrest and trial on her and her daughter, who was living in the Residence at the time. They both received counselling.
- [13] In the late fall of 2014, likely after Mr. Munroe had been arrested, Mr. Siemens and his mother discussed her options for the Residence. Mr. Siemens testified that he was concerned about Ms. Munroe's ability to continue to live in the Residence. They discussed various possibilities, including Mr. Siemens buying the Residence from his mother, or Ms. Munroe living in Ms. Labounty's condominium and Mr. Siemens' family moving into the Residence.
- [14] Ms. Munroe testified that she considered her own options for remaining in the Residence. The ground level suite had not been rented for some time. It had been integrated into the house as Mr. Siemens and his sister grew up. She had several options: she could have rebuilt and rented out the ground floor suite, and lived upstairs as she had done after her separation from Mr. Siemens; she could have moved into the downstairs suite and rented out the main floor of the Residence; or she could have sold the Residence.
- [15] Instead, Ms. Munroe saw what she described as a possible "silver lining" for all of them in her unfortunate circumstances. Mr. Siemens and Ms. Labounty were living in Ms. Labounty's two-bedroom condominium, with Ms. Labounty's son, and her daughter with Mr. Siemens. The children were five years apart in age, shared a bedroom and, as they were growing, the family needed more space. Ms. Munroe testified that Ms. Labounty's condominium had been bought at the peak of the market and she owed more on it than she could sell it for. Ms. Munroe saw a way to help her son and his family.
- [16] Sometime in late 2014, possibly in early December, Ms. Munroe approached Mr. Siemens and suggested the option of her recreating and moving into the downstairs suite of the Residence, and Mr. Siemens and his family moving into the main floor. She said that Mr. Siemens "lit up" at the opportunity to get his family into a house with a backyard for the children to play in. She proposed that she would keep the equity she had built up in the Residence and they would share the costs of the mortgage and the utilities going forward. Subject to Ms. Munroe's equity, Mr. Siemens would become a 50% owner of the Residence. Their discussions were preliminary, and Mr. Siemens said that he needed to discuss it with Ms. Labounty.

- [17] At a date which Mr. Siemens and Ms. Labounty said was in late December 2014 or early January 2015, and Ms. Munroe said was in late December, the three of them met upstairs at the Residence to discuss her proposal for sharing the Residence. On the whole of the evidence, I find that the meeting was in late December (the "Meeting").
- [18] There is no dispute that, at the Meeting, the parties discussed the terms of an agreement pursuant to which Mr. Siemens and his family would move into the upstairs of the Residence and Ms. Munroe would arrange and pay for the necessary renovations to the downstairs suite and then move into it. The Siemens family was to have access to the back yard, and the parties would share the garage.
- [19] They also discussed some outstanding maintenance issues which Ms. Munroe agreed to be responsible for. Those included replacing the water heater and repairing a deck on the main floor. The parties disagree about whether these maintenance issues were to be addressed before the Siemens family moved in or after. They discussed that Ms. Munroe would move the stove from the upstairs to the downstairs suite, and Mr. Siemens would replace the upstairs stove.
- [20] Ms. Munroe and Mr. Siemens would each pay 50% of the mortgage. Subject to the equity that she had built up in the Residence, Ms. Munroe would transfer half of the title to the Residence to Mr. Siemens, and they would hold title as tenants in common. Once the parties were living together, Mr. Siemens would pay 60% of the utilities, and Ms. Munroe the remaining 40%.
- [21] In cross-examination, Mr. Siemens acknowledged that he understood that the transfer of title to him could not be accomplished without dealing with the 2014 Mortgage. The plan was for him to either be added to the 2014 Mortgage, or for Ms. Munroe and Mr. Siemens to obtain a new mortgage.
- [22] In their evidence, the parties disagreed about what was to happen at the end of the term of the 2014 Mortgage or of a new mortgage. Mr. Siemens testified that, at the Meeting, the parties agreed that if, at the end of the mortgage term, either party did not wish to continue in the arrangement, they could buy the other out of their interest in the Residence or it would be sold.
- [23] Ms. Labounty gave slightly different evidence. She confirmed the arrangement that she and Mr. Siemens would pay 50% of the mortgage and 60% of the utilities. She testified that the arrangement would continue until the 2014 Mortgage (which she described as the current mortgage) was up, and then they would sit down and discuss what they wanted to do. If either party wanted out of the arrangement, the Residence would be sold or they would buy one another out.

- [24] The slight difference in their evidence is with respect to what event would trigger the option of getting out of the arrangement. Mr. Siemens' recollection allowed for the possibility that a new mortgage might have a different term and, as a result, the potential end of the arrangement could be on a date later than the expiry of the 2014 Mortgage.
- [25] Ms. Munroe was adamant that she never agreed to the Residence being sold at the end of the term of the 2014 Mortgage or at the end of the term of a replacement mortgage. She said they never discussed it.
- [26] I accept Ms. Munroe's evidence on this point. At the date of the Meeting, she had lived in the Residence for more than 25 years. It is improbable that she would have agreed to what would, in effect, have been a shotgun provision allowing Mr. Siemens to trigger a sale of the Residence, at his choice, at the expiry of a mortgage. There was no guarantee that, even if one party wished to buy the other out, they could afford to do so, raising the real possibility of a sale. Having held onto the Residence after the separation from her first husband, through the teenage years with her children, and from October 2014--when Mr. Munroe was arrested--until late March or early April 2015, when the Siemens family moved in, it is not likely that Ms. Munroe would have agreed to losing control of the sale of the Residence.
- [27] I find that, at the Meeting, the parties discussed that, at the end of the term of either the 2014 Mortgage or a new mortgage, they would discuss whether they wanted to continue with their arrangement and, if not, what the next steps would be. There was no agreement that one of the parties had the option of buying the other's interest, failing which the Residence would be sold.
- [28] Ms. Labounty testified that, on the date of the Meeting, she understood that Mr. and Ms. Munroe had signed a separation agreement pursuant to which Mr. Munroe waived his interest in the Residence. Mr. Siemens said that he understood that a separation agreement was being discussed but had not been finalized. Ms. Munroe testified that she had retained counsel and a separation agreement was being prepared. Ms. Labounty's evidence was clearly incorrect.
- [29] By January 14, 2015, Ms. Munroe and Mr. Munroe signed the separation agreement. Pursuant to para. 4.1 of the agreement, Mr. Munroe was to transfer his interest in the Residence to Ms. Munroe and waive any interest he had in it. Ms. Munroe was to take all necessary steps to have Mr. Munroe's name removed from the 2014 Mortgage and would, otherwise, indemnify him from any claims arising under it. Apart from signing the separation agreement, no specific steps appear to have been taken to try to remove Mr. Munroe from title to the Residence.

- [30] At the Meeting, the parties discussed that Ms. Munroe had approximately \$100,000 of equity in the Residence. An appraisal had been done for the CIBC for the purposes of the 2014 Mortgage. The appraisal set the market value of the Residence at \$450,000. Although the appraisal was not available at the Meeting, Ms. Munroe referred to it and used the value of \$450,000, and her estimate of the outstanding balance on the 2014 Mortgage, to arrive at the estimate of her equity in the Residence.
- [31] During his evidence, Mr. Siemens agreed that the \$100,000 in equity was a ballpark figure. Ms. Munroe's actual equity was to be resolved once the mortgage issue was resolved and Mr. Siemens began paying half of the mortgage.
- [32] At the end of the Meeting, Mr. Siemens and Ms. Labounty said they were interested in moving forward but needed to discuss it between themselves. After their private discussions, Mr. Siemens texted or emailed his mother and told her that they were "on board" and interested in setting up a meeting with a mortgage broker to discuss options.
- [33] As I have said, the arrangements between Ms. Munroe and Ms. Labounty were never reduced to writing.
- [34] Ms. Munroe and Mr. Siemens met with Michelle McKenzie, the CIBC mortgage advisor who had been involved in arranging the 2014 Mortgage. Ms. McKenzie told them that it would not be possible to add Mr. Siemens to the 2014 Mortgage and they would have to apply for a new mortgage.
- [35] Ms. Munroe and Mr. Siemens agree that they filed a mortgage application and provided the necessary authorizations for credit checking. Although neither party could recall the date of their meeting with Ms. McKenzie, the CIBC mortgage application file was included in Ms. Munroe's trial documents, and it shows that the application was signed on January 15, 2015.
- [36] On January 28, 2015, Ms. McKenzie emailed Ms. Munroe and Mr. Siemens, indicating that she had spoken to the underwriter who was "good with the file" but was going through the documents. If there were no issues, Ms. McKenzie expected to have the approval the following morning. Ms. McKenzie wrote, "The documents are pretty squeaky clean, the only issue I could see would be questions regarding your pay stubs, but fingers crossed we get the approval tomorrow."
- [37] It is not clear from Ms. McKenzie's email which of the parties' pay stubs might raise concerns, but I conclude, based on the parties' evidence, that she was referring to Ms. Munroe's pay stubs as she was an independent contractor.
- [38] Ms. Munroe was advised that the CIBC had not approved a new mortgage.

- [39] Mr. Siemens testified that Ms. Munroe told him that the CIBC was concerned that because she worked as an independent contractor, and had not filed income tax returns for three years, they could not apply for a mortgage together. He said that his mother assured him that she would file her income tax returns "in a timely fashion" and it would not impact the agreement they had reached.
- [40] Ms. Munroe agreed that her failure to file income tax returns was of concern to the CIBC, but she said that Ms. McKenzie also raised an issue with respect to Mr. Siemens' debt ratio. That was an issue Mr. Siemens and Ms. Munroe discussed at their meeting with Ms. McKenzie, and Mr. Siemens told Ms. McKenzie that he thought he would be able to pay off what he owed. There is no evidence that he did so.
- [41] Ms. Munroe agreed in cross-examination that she was solely responsible for filing her tax returns. However, she said that she did not know that her lack of tax returns was the sole reason for the CIBC's denial of the mortgage. She agreed that she promised Mr. Siemens that she would file the returns and that they would reapply for a mortgage.
- [42] Ms. Munroe testified that, throughout 2015, she was overwhelmed with issues involving her husband's arrest, trial, and sentencing. She said she "did not have it in her" to go through documents and file taxes. She did not file her income tax returns until February 2016.
- [43] Ms. McKenzie was not called as a witness at the trial. The CIBC mortgage file shows that credit checks were run on both Ms. Munroe and Mr. Siemens for the purposes of the new application. The file suggests a concern that Mr. Siemens, who was not the intended primary borrower, was the higher income earner. The file also suggests a concern about his debt ratio. Absent an explanation from the CIBC about why the mortgage was declined, and whether approval would have been granted if Ms. Munroe had filed tax returns, I am unable to make a finding in that regard. The parties did not agree that the CIBC mortgage file could go into evidence without proof. The fact is, the parties were not eligible for a new mortgage.
- [44] Ms. Munroe and Mr. Siemens did not reapply after Ms. Munroe filed her tax returns.
- [45] The 2014 Mortgage matured in September 2019. It was not renegotiated. Ms. Munroe testified that she has continued to make mortgage payments towards the 2014 Mortgage and that it appears to have rolled over.
- [46] Based on the fact that the CIBC appears to have allowed the 2014 Mortgage to roll over, apparently, based solely on Ms. Munroe's income, Mr. Siemens submits that I can infer that had the parties reapplied after Ms. Munroe filed her tax returns, a new mortgage would have been granted. In the absence of evidence from the CIBC, I cannot draw that inference on the proven evidence. I have no information from the CIBC about the decision to allow the 2014 Mortgage to roll over.

- [47] Despite the mortgage situation not having been worked out, and without Mr. Siemens going on title to the Residence, the parties continued with their plans to live together in the Residence.
- [48] Ms. Munroe took steps to recreate the downstairs suite. She removed the stove from the kitchen on the upper floor and moved it into the downstairs suite. She arranged for a door to be installed into the downstairs living room, walls and kitchen cabinets to be painted, and new carpet and flooring to be installed. With Mr. Siemen's assistance, a door was created into a downstairs crafts room/office that was to be part of Ms. Munroe's exclusive space. Ms. Munroe began moving her belongings into the downstairs suite.
- [49] Mr. Siemens bought a replacement used stove for the upstairs. The Siemens family moved into the Residence in late March or early April 2015. They leased Ms. Labounty's condominium to her grandmother.
- [50] On a date that is not clear, Ms. Munroe prepared and gave Mr. Siemens and Ms. Labounty a spreadsheet which set out the balance owing on the 2014 Mortgage. It appears to have been prepared prior to the March 27, 2015 mortgage payment, which Ms. Munroe said she would be responsible for. The then mortgage balance was \$355,542.04. The spreadsheet set out that the bi-weekly mortgage payment was \$744.92, including property taxes. The spreadsheet also set out the expected utility expenses including hydro, natural gas, water, and insurance from April 1-December 31, 2015. Telus was listed as a utility, but the amount was unknown. Based on Ms. Munroe's spreadsheet, Mr. Siemens was to pay Ms. Munroe \$1,055.66 for his monthly share of the mortgage and the utilities.
- [51] On March 27, 2015, Ms. Munroe emailed Mr. Siemens and Ms. Labounty, indicating that she would print off the mortgage statement the following day, after she made the March 27 payment, and said, "we will start calculating your ownership from tomorrow forward."
- [52] Mr. Siemens has paid his share of the mortgage and utilities since the date his family moved in. Some of his payments were late, and his mother had to remind him. At some point, the Siemens family stopped paying for their share of some of the household expenses, and Ms. Munroe did not insist on it. In this dispute, Ms. Munroe does not rely on the late mortgage payments or seek to recover the expenses. Mr. Siemens has recreated a list of expenses that he says he incurred, and Ms. Munroe did not contribute to. Many of his expenses were for his family's use, including a washer and a dryer that Ms. Munroe does not use.
- [53] Ms. Munroe installed a new water heater and made repairs to the deck on the upstairs suite. According to Mr. Siemens, Ms. Munroe was to have taken care of these maintenance items before his family moved in. Ms. Munroe testified that she looked after them when she was able to. The fact that there was a delay caused Mr. Siemens to send angry texts to his mother. I find that there was no agreement as to the timing of these repairs.

- [54] In mid-July 2015, the parties had a minor disagreement about whether household expenses, apart from utilities, were to be split 60/40 or 50/50. Ms. Labounty suggested that it made more sense to share those expenses equally and Ms. Munroe agreed. This was not discussed at the Meeting.
- [55] Also in July 2015, an issue arose about whether the Siemens' personal property would be covered under Ms. Munroe's household insurance. Ms. Munroe contacted her insurance provider and was told that the coverage did not extend to the Siemens' personal property. Ms. Munroe emailed Mr. Siemens and Ms. Labounty advising them that, until they were on title, the insurance coverage would treat them like tenants. In August 2015, Ms. Labounty arranged for separate coverage and emailed Ms. Munroe that she had done so. Ms. Munroe responded, "That is great - my insurance lady said that the liability would fall on me as I'm the "on paper" owner." She also advised that the mortgage payments had gone up to reflect a property tax increase.
- [56] In August 2015, Mr. Siemens spoke to his mother about difficulties in his relationship with Ms. Labounty. In his evidence, he described it as "venting about the frustrations" between the couple. Ms. Munroe testified that on hearing about the difficulties, she went into what she described as "mother protective mode". Although she did not tell him, she concluded that she would not put anything in writing because she did not want him to have to share his portion of the equity on a separation. She told Mr. Siemens of her concern in March 2016.
- [57] Mr. Siemens testified that he repeatedly asked his mother about filing her income tax returns and it became a source of conflict between them.
- [58] There was no progress with respect to Mr. Siemens being added to the title of the Residence, and the relationship deteriorated. Mr. Siemens got increasingly frustrated, and he sent a series of unfortunate and hurtful text messages to his mother. He described himself as a tenant in the Residence. It is to Ms. Munroe's credit that she did not seek to rely on Mr. Siemens' emails referring to himself as only being a renter at the Residence. She accepts that he was frustrated and angry. Ms. Munroe described her son as a "hothead" who said things he did not mean. I accept that Mr. Siemens spoke in frustration and that his statements do not change his legal position. I have not repeated the text exchanges in this decision, as doing so would serve no useful purpose.
- [59] On April 29, 2019, Mr. Siemens sent a text to his mother, asking whether there was a time when he and Ms. Labounty could meet with her to talk about the Residence. Ms. Munroe suggested a date the following week. They met on May 7, 2019, and, unbeknownst to Ms. Munroe, Mr. Siemens and Ms. Labounty surreptitiously recorded the conversation. Mr. Siemens introduced the recording at trial.
- [60] I expressed my concern about the weight that could be given to the recording. Two of the attendees were aware they were being recorded and the third did not. As is so often the case in such recordings, Mr. Siemens, and more particularly Ms. Labounty, used the recorded conversation to make speeches about why they had entered into the arrangement and to set

out their view of the arrangement. A review of the recording demonstrates that the conversation was one-sided, and I did not find it persuasive. It did not affect my assessment of the credibility of Ms. Munroe's evidence and did not assist Mr. Siemens. Later in these reasons, I will return to the recording with respect to the issue of Ms. Munroe's equity.

Legal Analysis

- [61] As I have explained, the parties did not enter into a written agreement and title to the Residence remains solely in Ms. Munroe's name.
- [62] Mr. Siemens argues that as a result of an agreement he reached with his mother, or taking into account his equitable claims for unjust enrichment, the registered title does not reflect the actual ownership of the Residence. As a result, he says that there is evidence to rebut the statutory presumption of indefeasible title set out in s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 which provides that:

23(2) An indefeasible title, , is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title

- [63] This provision sets out a rebuttable presumption. In the circumstances of this case, the presumption may be rebutted either by an agreement between the parties that is contrary to the registered legal title or by taking into account the underlying equitable interests between the parties, that is considerations arising from Mr. Siemens' claim of unjust enrichment.
- [64] Although, in his submissions, Mr. Siemens first argued his equitable claim and, as an alternative, his contractual one, I have considered his arguments in the reverse order as that is how Mr. Siemens originally pled his claim, how he led his evidence, and cross-examined Ms. Munroe.

Did the Parties Enter into a Contract?

- [65] The Law and Equity Act, R.S.B.C. 1996, c. 253 sets out the formalities for contracts respecting land. Specifically, contracts respecting land are not enforceable unless they are in writing or an exception applies. Sections 59(3)-(5) provide:
- (3) A contract respecting land or a disposition of land is not enforceable unless
- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
- (4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.
- (5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of
 - (a) restitution of a benefit received, and
 - (b) compensation for money spent in reliance on the gift or contract.

[66] In this case, Mr. Siemens relies on the existence of a contract as an exception to the general rule. As explained by the Court of Appeal in *Suen v. Suen*, 2013 BCCA 313 [Suen #1] at paras. 40-41, a case that has some factual similarities to this one:

[40] A contract is promissory in nature, that is, it is an undertaking by the promisor to do something for the promisee in exchange for something. The exchange of promises is enforceable only if there is an agreement or consensus on the "existence, nature and scope of their [respective] rights and duties" (G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 6).

[41] Professor Fridman discusses the development of the doctrine of consideration, or the concept of a bargain, as an essential feature of the common law of contract at 8:

... what is an essential ingredient of a valid, enforceable, legally acceptable contract, is an agreement that can be called "serious," that is, made with the kind of serious, binding intent that demarcates the casual promise, undeserving of legal recognition, from a promise which should be effective in law and should be obligatory on the future action, as well as the conscience of the promisor.

[67] At para. 43 of *Suen*, the Court of Appeal described communications, in the family context, as often not being more than statements of intent or wishes. To rise to the level of a binding enforceable contract, in the family context, there must be strict proof of the terms of the bargain including the parties, the property, and the consideration. In order for a contract to be enforceable, the terms such as the parties, the property, the price, the completion date, and the terms for payment must be clear. At trial in *Suen*, the son successfully argued that an agreement, defined as the "2002 Agreement", was reached between him and his father under which his father would transfer legal title of a property to the son in return for the son's agreement to live with his father, pay his father's debts, manage his father's affairs, and pay the property expenses (para. 66).

- [68] In overturning the trial decision and concluding that there was no contract between father and son, the Court of Appeal said:
- [69] At the very least, the 2002 Agreement does not appear to meet the requirement for certainty of objects. There was no consensus between the parties on the specific terms of the agreement or trust. For example, there was no specified duration for the services that [son] had to provide in return for the legal title to Pender, or the exact nature and value of the services he had to provide (e.g., did it extend to future debts and expenses of [father's] at any limit), or whether [father] had any obligation to stay out of debt for a specified period, to earn any income to support himself, or, in the absence of an actual transfer, whether the agreement extended to the replacement property of Capstan Way. Furthermore, it remains unclear why, if [son] received the whole beneficial interest in Pender pursuant to this agreement, he registered the legal title to Capstan Way in their joint names.
- [70] In *Ratner v. L.H. Ratner Construction Ltd.*, 2010 BCCA 593, the Court declined to find that a gratuitous transfer of shares of a company, which was revoked before it was completed, resulted in a trust or transfer of beneficial ownership in the shares. Madam Justice Newbury, writing for the Court at para. 24, relied on the following comments of Turner L.J. in *Milroy v. Lord* (1862), 45 E.R. 1185:
- [It is] well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; ... but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. ... [Emphasis added by Newbury J.A.]
- [71] There is no evidence that either party took any steps to perfect the 2002 Agreement. Their respective reasons for not transferring the legal title to [son] are unclear especially in light of the title to Capstan Way being registered in their joint names. If there was a time to give effect to the 2002 Agreement, surely it would have been upon the sale of Pender by registering the subsequent purchase of Capstan Way in the sole name of [son].
- [72] I am not satisfied that the 2002 Agreement to give [son] title to Pender rose to the level of a binding and enforceable contract or express trust, for the reasons I have given. At its best, it was a promise that included no certainty of terms. Nor did it comply with s. 59(3) of the Law and Equity Act. In my view, the trial judge erred in law and in fact in finding that the parties entered into a binding and enforceable agreement or express trust at the 2002 Meeting.

- [69] In this case, there was no written contract to comply with s. 59(3) of the Law and Equity Act. A number of other terms necessary to establish an enforceable agreement were uncertain or never discussed.
- [70] First, Mr. Siemens did not give any consideration for the opportunity to obtain a potential equity interest in the Residence, a valuable property with the possibility of increasing value. He was offered that opportunity without a down payment and at no financial risk to him. No money changed hands between Ms. Munroe and Mr. Siemens for the opportunity to move in to the Residence.
- [71] In their evidence, both parties suggested that they were entering into the arrangement to assist the other but, looked at objectively, Mr. Siemens benefitted more from the arrangement. The Siemens family moved into a larger home, with a backyard for their children and their dog, for less than the monthly cost they were paying for Ms. Labounty's smaller condominium. In addition, they were able to first rent, and eventually sell, the condominium.
- [72] As explained at para. 42 of *Suen #1*, moral consideration for a promise is generally not enforceable at common law. The Court of Appeal quote from *Fridman* at 9 for this proposition:
- The idea that moral justification could be the basis of a contract, for example, where a promise was made because of the familial relation of the parties, or out of "natural love and affection," has long since been rejected by the common law.
- [73] Ms. Munroe had other options with respect to the Residence. She could have lived in either the downstairs suite or the main floor of the Residence and rented out the other floor at market rental rates. She testified that she could have rented either suite for more than Mr. Siemens paid to live there. She was not seriously challenged on her evidence in cross-examination, and Mr. Siemens did not call contradictory evidence.
- [74] Unlike the situation in *Suen #1*, there was no evidence that Ms. Munroe was facing a credit crisis, risked losing the Residence to foreclosure, or that Mr. Siemens' moving in was her only option. I accept her evidence that the arrangement was mutually beneficial--a silver lining for both of them.
- [75] Second, there was no certainty as to the date on which Mr. Siemens would go on title to the Residence. He agreed in cross-examination that he and his mother had not agreed on a date. He also acknowledged that registering him on title was contingent on a resolution of the mortgage situation.
- [76] Third, there was no agreement about what would happen if the parties were unable to add Mr. Siemens to the 2014 Mortgage and were unable to qualify for a new mortgage. After their first application was declined, Mr. Siemens took no steps to contact the CIBC, or another mortgage provider, to see what could be done. While it is true that Ms. Munroe did not immediately file her outstanding income tax returns, as I have said, I cannot find on the

evidentiary record, or draw an inference, that had she done so, the CIBC would have granted her and Mr. Siemens a new mortgage.

[77] Fourth, after it was clear that Mr. Siemens could not be added to the 2014 Mortgage, there was no agreement about the term of a new mortgage. Mr. Siemens' counsel suggested that the new mortgage would expire on the same date as the 2014 Mortgage, but the parties did not testify to that effect. Presumably, if the parties were seeking a mortgage with a five-year term, to take effect at the beginning of April 2015, it would expire at the end of March 2020. The CIBC's mortgage file suggests that the application was for a five-year term, not for the term remaining on the 2014 Mortgage. According to Ms. Labounty, the discussions at the Meeting were about a term expiring in September 2019. On the evidence, the parties did not reach an agreement with respect to this essential term.

[78] Fifth, there was no discussion or agreement at the Meeting about who would be responsible for a potential discharge fee with respect to the 2014 Mortgage, or that the parties would seek a waiver of the fee. Ms. Munroe and Mr. Siemens did not say that this was discussed with Ms. McKenzie.

[79] Sixth, as I have said, the parties did not agree at the Meeting about what the parties' respective shares of household expenses would be, apart from the utilities. After the Siemens family moved into the Residence, in an email exchange of July 14, 2015, Ms. Labounty said:

Utilities we are splitting 60/40 but I didn't think we would split receipts 60/40. Makes more sense to me to split 50/50. I don't think either of uses the yard or hot tub more or less than each other but that's just my opinion so we could all talk about it after work one day this week?

Ms. Munroe responded:

Sounds good. Attached is a copy of the receipts - I brought them to the office today to scan for you. I've revised the expenses - water at 60/40 Balance at 50/50 as you suggest.

[80] In his pleadings, Mr. Siemens does not rely on this exchange as a separate agreement or contract between the parties.

[81] Seventh, even if there had been an agreement about what was to happen if either party wanted out of the arrangement in September 2019, when the 2014 Mortgage expired, or in March 2020, when a new five-year term mortgage would expire, the parties did not discuss what would happen if both parties wished to get out of the arrangement by buying out the other's interest.

[82] Finally, there was no certainty as to the financial arrangements. The parties discussed that Ms. Munroe would be entitled to retain her accrued equity in the Residence up until the Siemens moved in. During the Meeting, they discussed an estimate of Ms. Munroe's equity, but her equity was never confirmed. There was no agreement on how it was to be calculated. As Ms. Munroe said in cross-examination, it was possible that the CIBC would

have required another appraisal of the Residence for the purposes of a new mortgage. Ms. Munroe's estimate that she had \$100,000 in equity was based on an appraisal that was more than seven months old when the Siemens family moved into the Residence, and the market value may have changed by the beginning of April 2015. There was no discussion about whether the parties would obtain an updated appraisal and, if so, who would pay for it.

- [83] I also note that in the surreptitiously recorded meeting of May 7, Mr. Siemens referred to Ms. Munroe's equity as being \$120,000. He said he arrived at that number based on calculations he had done before the meeting. The fact that Mr. Siemens was doing such calculations confirms that the \$100,000 that was discussed was only an estimate. Although his counsel argues that privilege attached to Mr. Siemens' revised estimate, I conclude that if there was privilege, it was waived when Mr. Siemens put the recording in evidence.
- [84] For all these reasons, I conclude that there was no enforceable agreement or contract entered into between the parties at the Meeting in December 2014 as alleged in the notice of civil claim. The pleadings only rely on the December 2014 agreement. The arrangement was a promise made between family members that was uncertain as to some of its essential terms.
- [85] Despite there being no enforceable agreement or contract, Ms. Munroe consistently, in the surreptitiously recorded meeting, at her examination for discovery, and at trial, acknowledges that, subject to her equity, she still considers Mr. Siemens to have a 50% interest in the Residence. Her statement that she is morally bound by the arrangements she made with Mr. Siemens does not create a new, enforceable, contract between the parties.

Unjust Enrichment

- [86] Mr. Siemens claims that he has unjustly enriched Ms. Munroe and seeks a constructive trust remedy or, in the alternative, a monetary award.
- [87] The law of unjust enrichment, in support of a remedial constructive trust, or a monetary award, was explained by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10. Although *Kerr* involved an unjust enrichment claim arising between common-law spouses, the legal analysis and the remedies have broader application. At para. 31 of *Kerr*, Justice Cromwell set out the legal framework for the unjust enrichment analysis:

31 At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. ...

32 Canadian law ... permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment: *Pettkus* [*Pettkus v. Becker*, [1980] 2 S.C.R. 834]; *Peel*, at p. 784.

[88] Thus, to make out a claim for unjust enrichment, Mr. Siemens must establish the following three elements:

- 1) Ms. Munroe has been enriched by Mr. Siemens.
- 2) Mr. Siemens has suffered a corresponding deprivation.
- 3) There is no juristic reason for Ms. Munroe's enrichment and Mr. Siemens' deprivation.

[89] The courts have applied a straightforward economic approach to assessing whether a defendant has been enriched and a plaintiff has been correspondingly deprived: Kerr at paras. 37-39. Moral and policy questions are dealt with at the juristic stage of the analysis.

[90] In this case, I am satisfied that the first two elements of an unjust enrichment claim are met. Ms. Munroe has been enriched, and there is a corresponding deprivation to Mr. Siemens. Ms. Munroe has been enriched by the payment of 50% of her mortgage payments commencing in April 2015, and Mr. Siemens has been correspondingly deprived by those payments which, had they not been made to Ms. Munroe, could have been used to accumulate equity in another property. Of course, not all of Mr. Siemens' contributions to the mortgage were exclusively for Ms. Munroe's benefit. Mr. Siemens would have had to pay for his family's accommodation in any event.

[91] While the relationship between Mr. Siemens and Ms. Munroe is not a domestic relationship, it has some of the same features in that the parties entered into a joint enterprise and, in effect, pooled their resources.

[92] In the context of this complex family dynamic, unravelling unjust enrichment claims in respect of ordinary living expenses, maintenance, and upkeep of the Residence is complicated. Expenditures for utilities and insurance were made to ensure the comfort of the occupants of the Residence, to protect their belongings, and to preserve the Residence.

[93] The 60% of the utility payments made by Mr. Siemens related to the parties' respective consumption of utilities. It is likely that Mr. Siemens' family of five--he has had a son since moving into the Residence--consumed more utilities than Ms. Munroe. Thus, a 60/40 split of the utilities likely works to Mr. Siemens' advantage.

[94] I have also considered whether the parties' respective contributions to other expenses for the Residence should be considered as part of Mr. Siemens' unjust enrichment claim and have concluded that they should not. Mr. Siemens prepared a list of what he said his contributions were. Some of the contributions were prior to the parties' joint occupation of the Residence and were never intended to be shared expenses. For example, Mr. Siemens says that he assisted Ms. Munroe with labour in creating the downstairs suite. As Ms. Munroe paid all the costs of the renovations to her suite to facilitate the Siemens family moving in upstairs, these items are not appropriately claimed as unjust enrichment. Other contributions were for the exclusive benefit of the Siemens family. For example, Mr. Siemens purchased a washer and dryer for his family's use, installed curtains and curtain

rods in the upstairs suite, and replaced a shower head in the bathroom. Both parties contributed their labour to maintaining their respective parts of the Residence, and both benefited from that labour. It cannot be said that there was an enrichment to Ms. Munroe and a deprivation to Mr. Siemens from those contributions.

[95] Having found that the mortgage payments unjustly enriched Ms. Munroe and correspondingly deprived Mr. Siemens, I will now consider the third element of an unjust enrichment claim--the absence of a juristic reason for the enrichment and corresponding deprivation.

[96] In *Kerr*, the Supreme Court of Canada said that the list of possible juristic reasons is not closed (para. 41). Citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25, Justice Cromwell went on to discuss the two-step analysis required for determining the absence of a juristic reason:

43 In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract ([*Pettkus v. Becker*, [1980] 2 S.C.R. 834], *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent ([*Peter v. Beblow*, [1993] 1 S.C.R. 980], *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

44 Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable

claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (Peter, at p. 990).

- [97] As explained in Kerr, the recognized categories of a juristic reason include a contract, a disposition according to law, an intention to make a gift, or another valid common law, equitable, or statutory obligation. The flexible test for juristic reason will depend on the circumstances of any given case.
- [98] In light of my finding that there was no binding agreement between Ms. Munroe and Mr. Siemens, there is no contract providing a juristic reason. This was also not a disposition by law.
- [99] There was no evidence that Mr. Siemens intended to gift the payments he made to Ms. Munroe. The evidence is clear that Mr. Siemens, in paying half of the mortgage payments, believed that he was acquiring an interest in the Residence. Ms. Munroe does not dispute that.
- [100] Finally, on the evidence, there is no common law, equitable, or statutory obligation that could amount to a juristic reason for Ms. Munroe to freely retain the benefit of Mr. Siemens' contributions to a mortgage for which he was not responsible.
- [101] The burden then shifts to considering whether there is some other reason to deny a remedy to Mr. Siemens. Ms. Munroe has the burden of proof of establishing another reason for denying a remedy to Mr. Siemens. It is at this last stage of the analysis that the parties' reasonable expectations and public policy considerations must be considered.
- [102] I conclude that there are no public policy considerations which should deny Mr. Siemens a remedy. Although there was no binding contract between the parties, both saw this as a win-win arrangement in which each benefitted the other. Ms. Munroe saw it as an opportunity to help out her son and his family while at the same time obtaining assistance with paying the 2014 Mortgage. She also had her family close to her. The fact that she had other options with respect to the Residence does not change the fact that she chose the option which she saw as benefitting her son, his family, and her.
- [103] Neither party led any evidence or addressed in their submissions whether there is an applicable public policy militating against a remedy for unjust enrichment in this case.
- [104] It is of particular importance in this case that, unlike the arrangements between the father and son in Suen, Ms. Munroe acknowledges that she still considers herself bound by her promise to her son. She has repeatedly confirmed that position. As a result, it is appropriate to affirm the parties' reasonable expectations.
- [105] I conclude that Mr. Siemens has proven that he has an equitable interest in the Residence and that there is no juristic reason to justify Ms. Munroe's retention of the benefit of the contributions Mr. Siemens made to the 2014 Mortgage.

The Appropriate Remedy

- [106] The concept of unjust enrichment is a flexible one, and remedies may include constructive trusts over proprietary interests or monetary damages (see *Ibbotson v. Fung*, 2013 BCCA 171 at paras. 59-60).
- [107] A monetary award must be considered before a determination that a constructive trust should apply. In most cases, a monetary award will be sufficient to remedy an unjust enrichment (Kerr, citing other cases, at para. 47). For a proprietary award of a constructive trust to apply, Mr. Siemens must establish that a monetary award would be insufficient, and that there is a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between his contributions and the property which is the subject matter of the trust (Kerr, citing other cases, at paras. 51-52).
- [108] In this case, a suitable monetary award is difficult to determine. That is because Mr. Siemens and his family have received the benefit of living in the Residence for more than five years at a cost that is less than they would have paid to remain in Ms. Labounty's condominium. They have also had the benefit of the rent they earned on the condominium and its sale proceeds, although I have not heard evidence about the amount of the rent or the sale price.
- [109] While Ms. Munroe and Mr. Siemens did not make a legally binding agreement in December 2014, they proceeded as if a binding agreement was in place. They both expected that Mr. Siemens was earning, through his 50% contribution to the mortgage payment, an equity position in the Residence. Further, Ms. Munroe has repeatedly said, both on her discovery and at trial, that, after accounting for her equity, she considers Mr. Siemens to have a 50% interest in the Residence. She made a promise and continues to wish to live up to that promise. In this regard, this case is more akin to cases in which the parties enter a joint enterprise or pool their resources for their mutual benefit.
- [110] Had Mr. Siemens not contributed to the 2014 Mortgage, he could have paid down the mortgage on Ms. Labounty's condominium, earning equity there. He might have purchased another residence. Denying him an equity interest in those circumstances would be unfair. Of course, not every dollar that Mr. Siemens contributed to the 2014 Mortgage went solely to Ms. Munroe's benefit. He would have had to pay for accommodation elsewhere.
- [111] In this case, the arrangements between the parties, and the intentions expressed by both parties in respect of their interest in the Residence, point to a remedy in the nature of a constructive trust.
- [112] Earlier in these reasons, I referred to the Court of Appeal's reasons in *Suen #1*. After overturning the trial judge's finding that the father and son had entered into a contract, the court referred the case back for a determination of the son's unjust enrichment and constructive trust claim. The trial judge's reasons, on the issues referred back, are indexed as *Suen v. Suen*, 2013 BCSC 1615. In those reasons, the judge had evidence of the total

mortgage payments paid for by the son, the amount paid for taxes, utilities, a security service, cable TV, groceries, and household expense. The judge did not accept that half of them accounted to the father's benefit. He counted the household related claims and assessed the household related enrichment, using a rough and ready approach because of difficulties in the evidence. The judge ordered that the home be sold in order to justify the son's unjust enrichment claim.

[113] The trial judge's second decision was appealed and in reasons indexed as *Suen v. Suen*, 2016 BCCA 107, the Court of Appeal varied the amount of the father's equitable interest in the home, but agreed with the order that house be sold.

Conclusion

[114] I therefore declare that Ms. Munroe's registered ownership in the Residence is held on a constructive trust in favour of Mr. Siemens. He is entitled to 50% of the net equity in the property after deducting Ms. Munroe's accrued equity as of April 1, 2015. Ms. Munroe's accrued equity is to be calculated based on an appraisal of the value of the Residence on April 1, 2015, from which is to be deducted the outstanding balance on the mortgage on the same date (the "Accrued Equity"). The cost of this appraisal is to be shared.

[115] The parties are also to arrange for, and share the cost of, a current appraisal of the market value of the Residence. Based on the current appraisal, and the current mortgage balance, the current net equity of the property is to be calculated. After deducting Ms. Munroe's Accrued Equity, she is to have the option of buying out Mr. Siemens' equity interest.

[116] If Ms. Munroe does not buy out Mr. Siemens' interest, the Residence is to be listed for sale. From the sale proceeds, the parties are to discharge the mortgage, including any discharge fee, and pay the usual closing adjustments including commissions, fees, and taxes. From the net proceeds, Ms. Munroe is to receive her Accrued Equity, and the remaining net proceeds are to be divided equally between Ms. Munroe and Mr. Siemens.

[117] Until Ms. Munroe's buyout of Mr. Siemens' interest as described above, or the sale of the Residence, the parties are to continue making the mortgage payments and paying the utilities in accordance with their arrangement.

[118] The parties are to have joint conduct of sale and may apply to the court if they are unable to agree on any aspect of the sale. I will remain seized with respect to issues arising from the implementation of my order.

[119] If after reviewing these reasons and the result herein, the parties are unable to agree on costs, they may seek to appear to speak to them.

"MacNaughton J."

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