
CANADA / JUDGMENT

Skillen v. Tomlin

2007 BCSC 424

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Supreme Court of British Columbia

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2007 BCSC 424 Skillen v. Tomlin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skillen v. Tomlin,

2007 BCSC 424

Date: 20070330

Docket: 45655

Registry: Nanaimo

Between:

Wallace Heward Skillen

Plaintiff

And

Penny Tallyn Tomlin

Defendant

Before: The Honourable A.F. Wilson

Reasons for Judgment

Counsel for the Plaintiff

S.L. Dick

Counsel for the Defendant

T.L. Brown, Q.C.

Date and Place of Hearing:

March 13, 2007

Nanaimo, B.C.

I Introduction

- [1] This is a trial pursuant to Rule 18A. Each party has filed a Notice of Motion, that of the defendant seeking dismissal of the claims in their entirety, and that of the plaintiff seeking:
1. a declaration that the defendant holds an undivided half-interest in the property located on Pender Island, or the sale proceeds of that property, in trust for the plaintiff pursuant to a resulting, or in the alternative, a constructive trust;
 2. a declaration that the defendant holds a one-half interest in the proceeds from the sale of a time share in Mexico in trust for the plaintiff pursuant to a resulting or, in the alternative, a constructive trust;
 3. alternatively, restitution for the plaintiff's interest in the property on the basis of quantum meruit;
 4. damages for unjust enrichment.
- [2] The claims arise from the parties' cohabitation from 1985 to 2005, and services provided by the plaintiff to property owned by the defendant on Pender Island, and to a bed and breakfast business was carried on there. The main difficulty for the plaintiff is that in 1987 he entered into a cohabitation agreement which appears to establish a system of separate property.
- [3] Both parties agree that this matter should be dealt with pursuant to Rule 18A, but there are difficulties with that. One is that Ms. Tomlin has now been diagnosed with dementia, and is considered by her doctor to be unable to manage her affairs. She was thus not able to provide an affidavit. Her position is set out in the affidavit of her daughter, Robyn Tomlin. The difficulty is that Robyn Tomlin does not have as extensive direct knowledge of the parties' history as her mother would have had, and thus has to rely on documents and other hearsay means of proof. Counsel for Mr. Skillen takes no objection to the use of hearsay, submitting that it is the best available evidence in the circumstances. Apart from the hearsay issue, however, the difficulty is that Ms. Robyn Tomlin is not in a position to respond to a number of the allegations made by, or on behalf of, Mr. Skillen. An example of that is the allegation by Mr. Skillen, supported in the affidavit of his daughter, Ms. Brown, that Ms. Tomlin said she was going to give Mr. Skillen \$25,000 from the sale proceeds of the property in Mexico. That is the basis of the claim for a resulting trust with respect to those funds. Ms. Robyn Tomlin is not in a position to respond to that allegation.

- [4] Notwithstanding those difficulties with a hearing under Rule 18A, I am satisfied that it is the appropriate way to deal with the matter. If the matter was referred to the trial list, there is no likelihood that Ms. Tomlin would be able to give evidence. The evidence available, and the opportunity to assess the credibility of the parties, would thus be no better at trial than it is on a Rule 18A hearing. I am satisfied that I can make the necessary findings of fact in order to deal with the matter, to do the "rough justice" which both parties say they wish to achieve as a result of this hearing.

II Background

- [5] The plaintiff, Wallace Skillen, was born on February 24, 1926, and so is 81 years of age. The defendant, Penny Tomlin, was born on May 22, 1944, and is 62 years old. In 1984, both Mr. Skillen and Ms. Tomlin were divorced. He had three children, and she had one. Ms. Tomlin went to Kelowna where Mr. Skillen was living with his two sons. She lived in his apartment while she sought employment. However, she was unable to find employment and thus returned to her former home on Pender Island, where she was living with her parents.
- [6] In 1985, Mr. Skillen moved to Pender Island to be with Ms. Tomlin. At that time, she was living in a double-wide mobile home on her parents' property on Pender Island, called "Cliffside". Mr. Skillen moved in with her. At that time, he was employed on a full-time basis by Stonebridge Construction. Ms. Tomlin was not employed. He thus alleges that he paid the bills and expenses in the first year, including the mortgage payments on Ms. Tomlin's mobile home.
- [7] A bed and breakfast business was established in the mobile home. A loan was taken out in order to expand the mobile home for the business. Mr. Skillen alleges that he used a bobcat, which was available through his employer, after hours and on the weekends to assist in building a glassed-in breakfast area, and that he also built a living space under the dining room, put in a septic field, installed cedar siding and provided landscaping.
- [8] Despite his contributions, both financial and by labour, to the Cliffside bed and breakfast business, Mr. Skillen entered into a cohabitation agreement ("the cohabitation agreement") in which he acknowledged that Ms. Tomlin was the owner of Cliffside. The applicability of that cohabitation agreement to the present circumstances of the parties is the major issue in this proceeding.
- [9] The validity of the cohabitation agreement, at the time it was entered into, is not in issue. None of the common-law defences, such as fraud, duress, or unconscionability, is raised. In fact, in paragraph 19 of his affidavit sworn February 16, 2007, Mr. Skillen stated "It is true that on January 28, 1987, I signed the cohabitation agreement. I did agree that the value Penny had in Cliffside would remain hers. My assets would remain mine. I am not detracting from that even though I am a significant part of the success of Cliffside."

- [10] The assets and the liabilities of the parties are set out as Schedules "A" and "B" to the cohabitation agreement. Ms. Tomlin's only asset of significant value is the Cliffside property, which she anticipated inheriting, and the income derived from the bed and breakfast business. Included as a liability is a debt to West Coast Savings Credit Union on which Mr. Skillen is shown as a co-signer, presumably the loan to develop the bed and breakfast business (although it is not included in Mr. Skillen's list of liabilities). Mr. Skillen's most substantial asset was his pension from Finning Tractor. No value was given for it at that time. However, it is not in issue that he is now retired, and receives pension income of \$2,238 per month, from Finning and other sources, while Ms. Tomlin receives pension income of \$600 per month, from Canada Pension Plan, including a disability allowance. In paragraph 40 of her affidavit, Robyn Tomlin alleges that Mr. Skillen often said that he was happy having the cohabitation agreement as it made him feel secure about keeping his pension, part of which he had had to give up as a result of his previous divorce.
- [11] As set out in paragraph I of the preamble to the cohabitation agreement, the intent of it was "to confirm the ownership of their separate property", to provide for the management of it during their cohabitation, and division of it, "and the property to be acquired by them", upon termination of their cohabitation. Section 2 of the agreement set out that each held his or her own property, including that "hereafter obtained" as his or her separate property. In Section 3, Mr. Skillen specifically acknowledged that Cliffside, both the property and the bed and breakfast business, were Ms. Tomlin's separate property, and that Mr. Skillen had no claim to them. Section 4 of the cohabitation agreement does provide for use of their separate property "for joint purposes for a limited period of time", in which case the parties were to share equally in the management and control of that joint property. Section 10 of the cohabitation agreement dealt with the separation of the parties, in which case all separate property was to remain with the person in whose name it was held, with each to hold an undivided one-half interest in joint property.
- [12] The cohabitation agreement also provided, in paragraph 8.3, for a sharing of the costs of the household. Mr. Skillen was to pay \$700 per month from his Finning Tractor pension, plus one half of his net pay from employment or unemployment insurance benefits. Ms. Tomlin was to pay the mortgage, property insurance, motor vehicle insurance, property taxes and expenses relating to the running of Cliffside as a business. Each was to pay their own entertainment costs.
- [13] From the time of entering into the Cohabitation Agreement until 2000, according to the records reviewed by Ms. Robyn Tomlin, that arrangement for payment of expenses was carried out. Mr. Skillen paid approximately \$1,000 per month, which was deposited into an account held by Ms. Tomlin from which she paid all the household expenses and the loan payments with respect to the Cliffside debt. In 2000 Mr. Skillen stopped making the regular monthly payments, and made only sporadic payments. That is not explained by Mr. Skillen, except that in paragraph 11 of his affidavit he says that he made those payments "for the whole of the time I was working full-time". It may thus be that he was no longer working on

a full-time basis. The bed and breakfast business was also becoming more successful and he may have felt that his contribution was not required. However, there is no evidence of any agreement that he would stop making contributions towards the household expenses, and he was still receiving his pension.

- [14] It is the position of Mr. Skillen that the circumstances have changed so drastically since the cohabitation agreement was entered into in 1987 that it is no longer applicable.
- [15] In 1993, Ms. Tomlin did inherit the Cliffside property and about \$60,000 when her mother passed away. In the same year, she purchased a lot in Cabo St Lucas, Mexico, and had a cabin built on it. It is not disputed that there was a requirement to use Mexican workers for the construction of the cabin, and that the cost of the lot and the construction were paid by Ms. Tomlin. However, Mr. Skillen alleges that he did some of the work, including some interior construction and all of the landscaping.
- [16] In 1994, Ms. Tomlin purchased a lot on Pirates Road on Pender Island for \$175,000. In submissions, counsel for Mr. Tomlin suggested that the funds to purchase the property on Pirates Road were obtained from a mortgage on Cliffside. However, both Mr. Skillen, in paragraph 22 of his affidavit, and Ms. Robyn Tomlin, in paragraph 28, say that Ms. Tomlin's inheritance was used. As Ms. Tomlin's inheritance was only approximately \$60,000 according to Ms. Robyn Tomlin, it may well be that both the inheritance and a mortgage on Cliffside were used. In any event, the property on Pirates Road was bought by Ms. Tomlin, in her own name, using either her inheritance or her equity in Cliffside, or both.
- [17] Mr. Skillen had a serious problem with the consumption of alcohol. That resulted in a liver failure in June, 1996, for which he was hospitalized for 43 days at Victoria General Hospital. Later that year he was hospitalized again, for nine days, as a result of gastrointestinal problems. Mr. Skillen alleges that he did not drink again after that time until the relationship started to break down in 2005.
- [18] Following his release from hospital, Ms. Tomlin and Mr. Skillen went on a trip to Mexico where they remained for several months. In the course of travel, they were involved in a motor vehicle accident. Their claims arising from that were apparently settled for \$27,000 for both of them. Mr. Skillen says those funds were "put in the bed and breakfast account and spent". Presumably that was done with his consent, as the settlement proceeds would have been payable jointly.
- [19] The Cliffside property was sold in 1998 for \$549,000. No documents have been produced with respect to any amounts due on a mortgage on Cliffside, or to show the net amount available. However, it appears the funds went into the development of another bed and breakfast business on the property on Pirates Road which was called "Sahhali Bed & Breakfast" (which I will refer to as "Sahhali").

[20] There is significant conflict in the evidence with respect to the extent of Mr. Skillen's involvement in the development of Sahhali, and the subsequent operation of it. In the affidavit of Ms. Robyn Tomlin, she states, in paragraph 53:

Wally has done some work around the property, for example, he would occasionally fix things, chop wood, garden and mow the lawn with the riding lawn mower. When my mother was preparing the Sahhali to open in 1999, Wally worked for approximately 5 days solid days helping out.

However, her affidavit goes on to state that, as indicated by the records, all of the large jobs were done by contractors, and Mr. Skillen was compensated for his work around the property. I do not accept that. I accept his evidence that payments made to him were to reimburse him for the cost of materials purchased by him, not for his labour. I also accept his evidence, supported by that of Mr. Stevenson, the contractor who built the guest cottage; Martin White, a labourer who was employed at Sahhali while it was being constructed, and Jacqueline Hull, who worked at Sahhali for over three years, that he did a significant amount of work on the property and for the business. However, I do not accept the evidence of all of the work that Mr. Skillen alleges he did on the property, so that, in paragraph 36 of his affidavit, he alleges he put in an average of 30 hours a week on maintenance, building and ongoing upkeep of the property. As noted in the affidavit of Ms. Kinney, the records indicate substantial payments to others for work Mr. Skillen says he did, such as construction of the gazebo and yard work. I also accept that he did take over the bookkeeping for Sahhali, and continued that until the relationship broke down in 2005. In her affidavit, in paragraph 66, Ms. Robyn Tomlin estimates that saved her mother approximately \$1,500 per year, the amount the accounting bill has increased since Mr. Skillen left. However, apart from that, she indicates, in paragraph 84, that her mother did not need to hire anyone to replace Mr. Skillen when he left. She also noted that he was hospitalized again for knee surgery, which presumably would have restricted his ability to do physical work.

[21] Sahhali did become a very successful business, generating revenues of almost \$200,000 in 2003 and 2004. The living expenses of the parties were paid from those revenues, without contribution by Mr. Skillen in the latter years. However, in the fall of 2004, Ms. Tomlin had a stroke. She has since had another stroke and been diagnosed with diabetes. That appears to have caused a significant change in her personality, and, in particular, her ability to manage the business. That change also apparently caused the breakdown of the relationship between Ms. Tomlin and Mr. Skillen, causing him to leave in October, 2005.

[22] In 2005, the property in Mexico was sold by Ms. Tomlin for \$132,000. In paragraph 39 of his affidavit, Mr. Skillen states,

We put it up for sale and agreed what would happen to the sale proceeds. We agreed to give her daughter, Robyn, monies to buy a car (about \$13,000 I recall) and to pay something to my daughter's car (about \$5,000) pay off debts and give me \$25,000 so I could purchase a new boat or truck.

- [23] Mr. Skillen's daughter, in paragraph 45 of her affidavit, says that after Ms. Tomlin went on a trip to New York in February, 2005, she gave her \$5,000 "as a gift from the sale of the Mexico property". She also alleges that Ms. Tomlin told her that she was going to give her father \$25,000 from the proceeds. She states further, "When I asked her about the money, she told me that she would buy him anything he wanted, a new boat, truck or whatever to a maximum of \$25,000". There is no evidence that was done. However, there is evidence that a recreational vehicle was purchased by Ms. Tomlin in 2002 for approximately \$18,000. Ms. Robyn Tomlin, in her affidavit, alleges that was sold by Mr. Skillen in 2003 or 2004 for approximately \$5,000, none of which was received by Ms. Tomlin. In his affidavit, Mr. Skillen says the money from it went into the boat, shown on his Financial Statement as having a value of \$4,000. In addition, a van was purchased in 2002 for approximately \$30,000. Counsel for Ms. Tomlin suggested that the van was the only asset held jointly by the parties. However, the purchaser on the vehicle purchase agreement is shown as "Sahhali Serenity (Penny Tomlin)". However, there apparently was a loan in both names on which each paid \$250 a month. Since the separation, the van has been transferred to Mr. Skillen and the loan paid off by him. On his Financial Statement, Mr. Skillen shows the van as having a value of \$20,000 and does not show any debt related to it.
- [24] Mr. Skillen commenced this action and registered a Certificate of Pending Litigation against the Pender property. On November 8, 2006, the parties entered into an order, by consent, to enable the sale of that property, and the release of the Certificate of Pending Litigation. The property was sold for \$1.4 million. After payment of the balance due on the mortgage, real estate commission and conveyancing costs, there was a balance of approximately \$800,000. From that, by agreement, Mr. Skillen received \$100,000. Ms. Tomlin received \$430,000 to enable her to purchase a new home on Pender Island. Two hundred thousand dollars is held in trust, and the balance was paid to Ms. Tomlin. That order also provided for Ms. Tomlin to execute the documents to transfer ownership of the van to Mr. Skillen, and for him to pay the loan outstanding on the van. Mr. Skillen has recently used \$35,000 of the money received by him to purchase a mobile home in a mobile home park.

III Discussion

- [25] In her Written Submissions, counsel for Mr. Skillen expressed the issues as follows:
- (a) Is the Plaintiff entitled to a share of the sales proceeds from the Mexican property pursuant to a resulting trust or constructive trust?
 - (b) Is the Plaintiff entitled to a share of the sales proceeds from Sahhali pursuant to his claim for constructive trust?
 - (c) Is the plaintiff entitled to a monetary award for his claim in unjust enrichment?
 - (d) Costs

[26] I conclude that the answer to each of those claims is that Mr. Skillen is not entitled to any more than the \$100,000 and van which he has received, and his claims must thus be dismissed.

A. Cohabitation agreement

[27] Counsel for Ms. Tomlin submits that the cohabitation agreement is a complete answer to Mr. Skillen's claims, that he voluntarily entered into it, giving up any claims he might have had to the Cliffside property, and subsequently acquired separate property of Ms. Tomlin, in order to protect his pension, and any other assets he might subsequently obtain. She submits the cohabitation agreement was fair when it was entered into, is fair now, and should be upheld. Counsel for Mr. Skillen concedes that it was fair when it was entered into, and would have been fair had the parties continued to reside at Cliffside and operate the business there. However, she submits the agreement did not contemplate the events which occurred, in particular the sale of Cliffside, the commencement of Sahhali, and Mr. Skillen's full-time involvement in that business. She submits that the cohabitation agreement was mutually rescinded by the conduct of the parties in jointly operating Sahhali.

[28] Counsel for Mr. Skillen concedes that the provisions for a judicial reapportionment on the basis of fairness set out in s.65 of the Family Relations Act, R.S.B.C. 1996, Chapter 128 do not apply. Section 120.1 makes those provisions applicable to a cohabitation agreement. However, that section came into force after the Cohabitation Agreement was entered into, and does not have retrospective effect: *Wiest v. Middelkamp*, 2003 BCCA 437. Nevertheless, she relies on statements in *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, at paragraphs 43 - 45, for the principle that regard must be had to the parties' perspectives, that . . .

. . . If the parties' lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties' notice of fairness with the court's notice of fairness, providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and comprehensive way.

However, the converse does not necessarily apply, that if the parties' lives do not unfold in the manner as contemplated at the time of the contract, that the contract will necessarily be unfair.

[29] The approach to be taken was set out by Bastarache J. at paragraph 47:

The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s.65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the

contemplation of the parties at the time the agreement was formed, and where their agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s.65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.

[30] Generally, the Supreme Court of Canada has given considerable deference to the intentions of the parties' as expressed in agreements, in *Miglin v. Miglin*, [2003] 1 S.C.R. 303 with respect to separation agreements, and in *Hartshorne*, with respect to marriage agreements. In both cases the agreement was upheld. Further, not any change in circumstances will result in the agreement being vitiated. As stated in *Miglin*, at paragraphs 88 and 89:

88 We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

89 We stress that a certain degree of change is foreseeable most of the time. . . . The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

[31] Further, as noted, in this case the factors which can result in reapportionment under s.65 of the Family Relations Act do not apply. It is thus necessary to establish some ground upon which an agreement, considered to be valid when it was made, is no longer enforceable. In that regard, counsel for Mr. Skillen relied on the statements of Owen Flood J. in *Sigvardsen v. Stanley*, [1996] B.C.J. No.1429, that conduct inconsistent with the terms of the agreement can result in the rescission of the agreement. However, that case was an extreme one. Following separation, the defendant ended up with assets with a value in excess \$320,000, while the plaintiff ended up with an R.R.S.P. worth \$12,000 and a company pension which had not been valued. Further, Owen Flood J. held that the agreement was entered into on false premises, and signed by the plaintiff without benefit of legal advice, and that "both parties expected that the defendant would complete his education and embark on a career, instead of living off the plaintiff's income" (at paragraph 67). He found that the conduct after the signing of the agreement was totally inconsistent with its terms, such that it was in violation of the agreement. He noted that, "Not only did they intermingle their assets and

acquire joint property, they also acquired joint debts" (at paragraph 68).

- [32] That is not at all the situation in this case. In fact, apart from the sale of Cliffside and the development of Sahhali, I conclude that the events did unfold in much the manner the parties had contemplated at the time they entered into the cohabitation agreement. At the time, although Mr. Skillen was employed full time, he was 61 years of age. It is unlikely to have been contemplated that he would have continued to work in the labour force on a full-time basis for a further 20 years. It is much more likely to have been contemplated that, at some point, he would have left the work force, and been available to do more work in the bed and breakfast business. Further, the work that he did at Sahhali appears to have been much the same in nature as the work that he alleges he did when the Cliffside bed and breakfast business was set up and operating.
- [33] When the property on Pirate's Road was purchased, and the Sahhali business set up, at the very least, Mr. Skillen acquiesced in it being put in the name of Ms. Tomlin alone. If, as he alleges, there was an agreement to own and operate the business jointly, one would have expected that the property and the business would be in joint names, so that the provisions in the cohabitation agreement dealing with joint property would apply. If there was conduct inconsistent with the cohabitation agreement, further, it appears to have been unilateral, on the part of Mr. Skillen. He was the one who ceased working in the labour force, and also terminated the payments to help support the household. Both before and after the cohabitation agreement, Ms. Tomlin operated a bed and breakfast business in her own name. The fact that Cliffside was sold, and Sahhali established (using Ms. Tomlin's equity from Cliffside and her inheritance) is not a basis for rescission of the contract.
- [34] For those reasons, I am not satisfied that there is any basis upon which to hold that the cohabitation agreement is not enforceable, and applicable to the circumstances at the time of separation. I find that it was intended to deal with circumstances such as those which arose, including maintaining after-acquired property as the separate property of the person who owned it.
- [35] Further, even if the factors in s.65 of the Family Relations Act were to be taken into account, I would not find the division of property which has occurred to be unfair. Ms. Tomlin used the equity from Cliffside and her inheritance to purchase the Sahhali property. Her efforts, together with those of Mr. Skillen, made it a successful enterprise. In addition, the property increased in value due to general increases in property values, which was not caused by either Ms. Tomlin or Mr. Skillen. Mr. Skillen undoubtedly put a considerable amount of time into the development and operation of the Sahhali property and business. However, he obtained the benefit of that business paying all of his household expenses, notwithstanding the fact that he did not make the contribution to those expenses as required in paragraph 8.3 of the cohabitation agreement. Further, he retained his pensions without any claim by Ms. Tomlin, resulting in him having a significantly higher monthly income than she does.

B. Trust Claims

1. Resulting Trust

- [36] Mr. Skillen claims a resulting trust in the amount of \$25,000, as part of the proceeds of the sale of the property in Mexico. That is based on an alleged statement by Ms. Tomlin that she would give him that amount from the proceeds of sale. Counsel for Mr. Skillen relied on the decision of the British Columbia Court of Appeal in *Brundage v. Campbell*, [1992] B.C.J. No.2483 for the proposition that there is a resulting trust where there is an agreement or a common intention expressed or implied to share an asset. In *Brundage*, the asset in question was the former residence of the parties. Mr. Campbell conceded that he had told Ms. Brundage that she would share equally in the assets, and she had made a significant contribution to the home.
- [37] In this case, I am not satisfied that there was "an agreement or a common intention expressed or implied to share an asset". Rather this appears to be a situation in which Ms. Tomlin indicated she would make "gifts" to her daughter and Mr. Skillen's daughter, as well as to Mr. Skillen. For a gift to be valid, there must be both an intention to make the gift, and delivery. In this case, there was, apparently, no delivery. Further, Mr. Skillen did receive other "gifts" of comparable value, in the proceeds of sale of the recreational vehicle and the equity in the van. Taking a "rough justice" approach, I am satisfied that compensates him for loss of any share in the proceeds of the Mexican property.

2. Constructive Trust

- [38] Mr. Skillen makes a claim of constructive trust with respect to both an interest in Sahhali and the proceeds of sale of the Mexican property.
- [39] In order to establish a constructive trust, there are three requirements:
1. an enrichment;
 2. a corresponding deprivation;
 3. the absence of a juristic reason for the enrichment:

Peter v. Beblow, [1993] 1 S.C.R. 980 at paragraph 3.

- [40] With respect to the Mexican property, I am not satisfied that there was any enrichment or corresponding deprivation. The property was purchased, and the cost of construction paid, from Ms. Tomlin's separate assets. Mr. Skillen did do work on the property, but in compensation received use of the property without payment of any rent. Further, there is a juristic reason for any unjust enrichment, the cohabitation agreement, under which Ms. Tomlin is entitled to retain her separate property.
- [41] Similarly, with respect to Sahhali, I am not satisfied that there is any unjust enrichment. Again, I accept that Mr. Skillen did a substantial amount of work in the development and operation of the property and business. However, in return he received a place to live and payment of his household expenses, without payment of even the share of those expenses as

set out in paragraph 8.3 of the cohabitation agreement since about 2000. Again, there is a juristic reason for any unjust enrichment in the provisions of the cohabitation agreement providing for separate property.

[42] Finally, even if I did find that there was a constructive trust, I would find that Mr. Skillen has been adequately compensated for it by the \$100,000 received by him. That would take into account, in particular, that all of the capital costs relating to Sahhali came from Ms. Tomlin's equity or the business itself, and that Mr. Skillen lived there without payment of any of the household expenses, retaining his own separate income for himself.

3. Quantum Meruit Claim

[43] For the same reasons, I hold that any claim for restitution on the basis of quantum meruit must fail.

IV Conclusion

[44] In summary, I find that the cohabitation agreement is valid and enforceable, and applies to the circumstances of the parties at the time of separation. For that reason, as well as my finding that there was not any unjust enrichment, the claims of constructive trust are dismissed.

[45] I am also not satisfied that a resulting trust has been established with respect to the proceeds of sale of the Mexican property. In any event, I find that Mr. Skillen has been adequately compensated for his claims by the money and equity in the van received by him following separation.

[46] In those circumstances, the relief sought in the defendant's Notice of Motion, that the plaintiff's claims be dismissed in their entirety, is granted. Those in the plaintiff's Notice of Motion are dismissed.

[47] As the defendant has been successful in this application and the action, she will be entitled to her costs of the action, unless there are factors of which I am unaware. If that is the case, counsel have liberty to apply.

"A.F. Wilson, J."

The Honourable Mr. Justice A.F. Wilson

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