
CANADA / JUDGMENT

Suen v. Suen

2012 BCSC 153

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 153 Suen v. Suen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Suen v. Suen,

2012 BCSC 153

Date: 20120131

Docket: S100712

Registry: Vancouver

Between:

Yuk Chun Suen

Plaintiff

And

Hung Shun Suen

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

P.R. Lundrie

Counsel for the Defendant:

R.D. Lee

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 31, November 1-6, 2011

Place and Date of Judgment:

Vancouver B.C.

January 31, 2012

Introduction

- [1] This is a dispute between Yuk Chun Suen (Albert) and his son Hung Shun Suen (Andy) over ownership of the Suen family home. Title to the home is registered jointly to Albert and Andy. Albert says that he registered title jointly with Andy so that when Albert passes away, Andy will receive the house free of estate taxes and administration fees. Albert maintains that until he dies, the house remains his property to do with as he pleases.
- [2] Andy says that in return for bailing Albert out of a financial mess, Albert gave him Albert's beneficial interest in a previous family home, that the proceeds of sale of that home were used to purchase the house in dispute, and that Albert therefore holds his half interest in the present house in trust for Andy. Alternatively, Andy says that he paid all of the expenses, including the mortgage on the house and on that earlier house, and that he paid numerous debts and other obligations incurred by Albert, thereby unjustly enriching Albert. Andy seeks an order that a constructive trust exists such that Albert holds his one-half interest in the house in trust for Andy.

The Facts

- [3] Albert was born in 1944 on mainland China. He has an older brother and a younger sister. In 1949, the Suen family moved from mainland China to Hong Kong. Albert's father was a sailor: he worked as an engineer on a merchant ship. Albert's mother devoted herself to the family. She did not work outside the home. She looked after the children and the household. Albert's father sent his paycheques to his wife, and she looked after all of the family's expenses. In short, Albert's mother managed all of the family's finances.
- [4] Albert's brother followed his father to the sea. He eventually became a captain in Hong Kong's merchant marine.
- [5] When Albert was 16 or 17 years old he, too, went to sea. Albert started out as an ordinary seaman. He took some training and became a radio and telegraph officer. He worked on ships as a communications officer from 1965 to 1970. Albert then learned navigation and was promoted to navigation deck officer. Finally, in 1985, Albert obtained a licence as a ship's master. He was then qualified to captain commercial vessels of any size.

- [6] In all the time that Albert and his brother lived at home with their parents, they and their father followed a tradition of sending their pay to Albert's mother. As noted, she looked after the money. She invested some of the money on behalf of her two sons. Albert's mother bought houses for each of her sons. Albert's house was on Bonham Road in one of Hong Kong's upper-middle class residential neighbourhoods.
- [7] In 1973, Albert married Ko Fung Yuk. Albert and his wife lived in the Bonham Road house. They had three children: Erica, who was born in 1975; Andy, who was born in 1976; and Vivian, who was born in 1982.
- [8] In the late 1980s, Albert left the sea and took a shore job in Hong Kong. He worked for a shipping concern owned and operated by the Chinese government. Albert did not like the politics of his new employer. He decided to take his family to Canada.
- [9] In 1990, Albert sold the Bonham Road residence. He received \$850,000 HK for the house. Albert gave \$200,000 HK from the sale proceeds to his mother and father. The balance of \$650,000 HK converted to approximately \$105,000 CDN. Albert also had about \$6,000 CDN in cash.
- [10] The Suen family landed in Canada in June 1990. They decided to settle in Vancouver. The family rented a basement suite. Albert worked in various labouring jobs. He worked as a janitor and in a laundry. His wife worked as a dishwasher in a Chinese restaurant. The three children attended school. There was little money in the household. Despite their lack of income, the Suen family nevertheless managed to acquire real estate. In 1990, Albert bought a house on Fleming Street in Vancouver. Albert acquired the property with the money he had brought from Hong Kong and a \$45,000 mortgage that he granted to the CIBC.
- [11] In or around 1991, Albert decided to start his own painting and renovation business.
- [12] In August 1992, Albert sold the Fleming Street house. He netted about \$105,000 from that sale. Albert used that equity and the proceeds of a \$125,000 mortgage he granted to the CIBC to buy a house at 3720 Pender Street in Burnaby. Albert and his wife were registered as joint tenants on the title of that property. The Pender Street property became the Suen family's home.
- [13] In 1995, Albert's wife became ill with cancer. Also in 1995, Albert returned to Hong Kong. He took a job there with a shipping company. The children and their mother remained in Canada. Albert remitted money to an account he had created at a Vancouver branch of the CIBC. The children and their mother accessed that money for their everyday expenses. Albert did not like working in Hong Kong, and after about six months, he left Hong Kong and returned to Canada. He resumed self-employment in his painting and renovation business.
- [14] After graduating from high school, Andy enrolled as a student at Simon Fraser University. Andy graduated from SFU in 1998 with a degree in computer science. Andy had worked for the HSBC Bank on a co-op program when he was a student, and after he graduated, the

HSBC hired him to work in its information technology department. Immediately after Andy started working, Albert demanded that Andy contribute \$1,000 per month toward the Suen family expenses. Andy complied. By mutual agreement between Albert and Andy, Andy's contribution was to be in the same amount as the monthly mortgage payment on the Pender Street property. In 1998, that mortgage payment was \$1,000 (rounded) per month.

- [15] From 1995 on, Albert's wife's disease worsened. She passed away in August 2001. Her interest in the Pender Street house passed to Albert. By then, Albert's renovation and painting business was faltering. For some years, Albert had not made enough money to meet the family's expenses. As Albert's income decreased, his demand and reliance on Andy's income increased. By the early 2000s, Andy, who was still living at home, was paying the mortgage and many of the Suen family household expenses.
- [16] Notwithstanding his poor financial circumstances and his inability to earn enough to live on, Albert did not curb his spending. He accumulated significant debts on his credit cards. In addition to credit card debt, Albert borrowed \$5,000 from his daughter, Erica, and he took responsibility for \$18,000 HK (approximately \$2,000 CDN) that his wife had borrowed from her younger sister, Ko Fung Luen, in Hong Kong. He had borrowed a further \$20,000 HK (approximately \$3,300 CDN) from Mrs. Ko in 1997 but had not repaid it. In the result, Albert was mired in debt.
- [17] In 2002, Albert refinanced the Pender Street house. Albert increased the mortgage debt from approximately \$115,000 to \$135,000. Albert used part of the \$20,000 from the refinancing to pay off some of the debts that he accumulated to that point, and he used about \$7,000 to pay the principal and interest of his debt to Erica.
- [18] Andy learned of the refinancing and of the increased debt on the house. He became upset with Albert, and he voiced his unhappiness to him. Andy's complaint was that Albert was not being financially responsible - Andy told Albert that Albert was spending more money than he could hope to earn. Andy also told Albert that he was no longer prepared to pay Albert's debts for him. Albert said words to the effect that the Pender Street house was his and that he could take money out of the house (i.e.: extract equity) if he wanted to. Andy pointed out that he had been paying the mortgage for years and that according to his understanding of his late mother's wish, her interest in the house was supposed to go to him. The discussion deteriorated into an argument. Albert lost his temper and struck Andy.
- [19] When this argument took place in 2002, Vivian, Andy and Erica were all living in the Pender Street house with their father. The argument and the blow that Albert delivered to Andy caused the three children to immediately move out. Andy and his girlfriend, Angela, moved in with Vivian and her then boyfriend (now her husband).

- [20] About a month after moving out of the Pender Street house, Albert and Albert's younger sister - who spoke to Andy by telephone from her home in Australia - managed to convince Andy to consider returning to the family home. Albert and his sister appealed to Andy's sense of filial duty and responsibility. His aunt, in particular, argued that Albert was incapable of managing his own affairs and that Andy should return home to look after his father.
- [21] After hearing these pleas, Andy decided to have a meeting with his father about what should happen next. That meeting took place between Albert, Andy and Vivian at the Pender Street house. Albert on one side and Andy and Vivian on the other have different views of what was said and agreed to at that meeting.
- [22] According to Andy and Vivian, upon returning to Pender Street, Andy told his father that he would live there and that he would agree to pay the mortgage and other household expenses on the condition that Albert controlled his spending such that he would not fall into debt again. Albert agreed to that condition. Andy also told Albert that he would manage Albert's finances. This included arranging to pay off Albert's remaining debts and cancelling or reducing the borrowing limits on Albert's credit cards. Albert agreed to those conditions as well. As to ownership of the Pender Street house, Andy and Vivian testified that Albert told them that he had taken out of the house all of the money he was entitled to and that in light of Andy having paid the mortgage for years and undertaking to continue to pay it along with the household expenses, Albert would transfer his interest in the Pender Street house to Andy. From that point forward, then, according to Andy and Vivian's evidence, the agreement was that Andy would own the Pender Street house and would pay all the expenses related to it.
- [23] Albert, on the other hand, testified that he agreed to Andy managing all of the finances of the house (including Albert's own spending) and to Andy paying the mortgage and household expenses, but that he never agreed to transfer his interest in the Pender Street property to Andy. Albert testified that he felt that eventually the Pender Street house would go to Andy, but only after Albert's death by way of his estate.
- [24] Following the 2002 meeting, Andy in fact paid all of the expenses related to the Pender Street house and he paid off Albert's debts. Andy had no savings of his own. To raise the money he needed to pay Albert's creditors, Andy borrowed money on his own credit cards and bank facilities. His personal debt increased. In effect, the burden of Albert's debts was transferred to Andy.
- [25] Andy testified that he did not immediately press to have the Pender Street title registered in his name because a real estate developer had expressed an interest in buying the house. He said that he knew that taxes and fees would be levied on a change of title; he asked himself why he should incur a set of charges to put the title in his name and then another set in the event that he sold the house to a developer? Andy testified that he was not anxious to pay unnecessary fees and that he was therefore content for title to remain in Albert's name. He

testified that he trusted his father to live by the agreement they had made at their meeting in 2002.

- [26] In 2003, the developer noted above crystallized his plans and indicated serious interest in buying the Pender Street house. Andy and Albert rejected the developer's first offer on the Pender Street house. In late 2003, the Suens and the developer came to terms and they struck a deal: the Pender Street house would be sold to the developer for \$412,000. In January 2004, the sale completed. The net proceeds from the sale were \$260,199.
- [27] Between the making of the agreement to sell Pender Street and the closing of that transaction, Andy and Angela spent time looking to buy another house. Andy's plan was for him, Angela and Albert to live in the new house. Albert agreed with that plan. Andy and Angela settled on a house on Capstan Way in Richmond. The Capstan Way house was suitable for the three Suens. Albert agreed with its selection. Andy negotiated to buy the Capstan Way property for a price of \$433,000.
- [28] Andy suspected that the credit card and bank loans that he was carrying in the fall of 2003 would preclude his qualifying for the mortgage loan that he would need in order to complete the purchase of Capstan Way. Andy knew that his father could not qualify for a mortgage loan. Andy turned to his sister Vivian, who by then had married into a well-to-do family, for a loan. Vivian agreed to loan Andy \$30,000 CDN. Andy took the loan and applied it to those debts.
- [29] In order to complete the purchase of Capstan Way, Andy provided a \$10,000 deposit, and Albert directed that the net proceeds of the Pender Street sale be paid to the Capstan Way vendors. After clearing off his credit cards and bank loans with the money he borrowed from Vivian, Andy was able to qualify for the mortgage on his own - he did not need his father as a co-signer. Albert, on the other hand, could not have obtained the mortgage on his own - his income was too low and his credit history was too poor. In the result, Andy arranged a mortgage with the Royal Bank of Canada for \$190,000.
- [30] The title to the Capstan Way property was jointly registered to Albert and Andy in equal shares. At this point, Andy and Albert's evidence diverges once again. Albert maintains that he arranged for Andy to be a joint owner so that when Albert passed away, Andy would automatically receive the house outside of his estate. That is how Albert's wife's interest in the Pender Street house passed to him when she died; Albert says that he wanted ownership of the Capstan Way house to pass to Andy in the same way. Albert testified that so long as he was alive, however, the house was his to do with as he wished. Albert testified that Andy was to pay the mortgage in return for being allowed to live there and because doing so was part of a son's duty to provide for his elderly parent.
- [31] Andy, on the other hand, testified that so far as he was concerned the equity in the Pender Street was actually his money; i.e., according to the 2002 agreement, Albert had transferred his interest in Pender Street to Andy and so, when Pender Street sold, the net proceeds of that sale belonged to Andy, not Albert. According to Andy, then, 100 percent of the money

that went into Capstan Way was his money: i.e., the down payment from Pender Street and the mortgage payments that he has made since. As for putting Albert on title as a joint tenant, Andy testified that he did so for two reasons: first, to encourage his father to take some responsibility for his own finances; and second, because he wanted his father to feel that he was part of the Suen family. Andy testified that he did not have any thoughts about the consequences, legal, equitable or otherwise, of registering his father as a joint tenant in the new house. He said that he continued to trust that his father would act in accordance with the agreement that they had made in 2002.

- [32] The proceeds of the RBC mortgage were sufficient to provide the balance of the purchase price for Capstan Way, plus an extra \$19,000. Andy used the \$19,000 to pay for some renovations and to purchase home furnishings and electronics for the new house. At the same time as arranging the mortgage, Andy and Albert arranged for a \$90,000 line of credit to be secured by Capstan Way. The documents that established the line of credit were formalized some months after the Capstan Way purchase was closed.
- [33] Andy, his wife Angela and Albert moved into the Capstan Way house in January 2004. At the outset, Andy asked his father to contribute \$500 per month to the household expenses. Albert agreed and complied, but that lasted for only for a few months. By the summer of 2004, Albert's renovation business was still not productive and Albert stopped giving his son \$500 per month.
- [34] Unfortunately, Albert slipped back into debt. In the summer of 2004, he approached Andy with a request that Andy pay off his debts. Andy told Albert that they would have to access the line of credit to pay off those debts. According to Andy, Albert agreed to this proposal, and he promised to pay back the line of credit loan with money he earned from his renovation business. Money was taken out of the line of credit and paid to Albert's creditors. Andy paid the monthly charges on the line of credit advance.
- [35] Albert's evidence is that he had no knowledge of this draw on the line of credit, that he never knew to what use the money was put and that he never realized any benefit from those funds. Albert gave identical evidence with respect to all of the subsequent draws on the line of credit. He says that he was completely unaware of money being advanced on the line of credit and that he received no benefit from any of those advances.
- [36] By 2004, Vivian had married and was living in Hong Kong. In February 2004, Albert visited Vivian in Hong Kong. While he was there, he committed to provide his own elderly and Hong Kong resident father with \$3,000 HK (approximately \$500 CDN) per month. Albert had no capacity to actually give that much money to his father, so he instructed Vivian to make the payments. She complied for a few months, but she found that to be too great a burden. She knew that Albert could not and would not actually honour the commitment he had made to give money to his father, so Vivian turned to Andy for help. Andy agreed to send Vivian lump sums of money from time to time. She agreed to dole that money out to her grandfather in accordance with Albert's commitment. Andy decided to also send Vivian

money to repay her the \$30,000 that he had borrowed from her ahead of the Capstan Way purchase. Consequently, between October 2004 and August 2009, Andy sent a total of \$60,199 CDN to Vivian. Those payments were: October 2004, \$6,999; November 2004, \$15,000; December 2005, \$4474; March 2008, \$20,018; January 2007, \$4,500; and, finally, August 2009, \$10,000. Andy obtained those funds by drawing on the RBC line of credit secured against title to the Capstan Way house.

- [37] In 2008, Andy arranged to refinance the Capstan Way mortgage. His purpose was to increase the line of credit so that he could pay some income tax that he owed on his 2007 income and also to access funds for investment purposes. Andy's plan was to deduct the interest charged on money he borrowed on the line of credit against the income earned by his investments. Albert executed the refinance documents. At trial, he first denied having seen those documents ahead of examinations for discovery in this litigation. He swore that he had no idea that the line of credit existed. Under cross-examination, Albert admitted that he did, in fact, sign the refinancing documents and told a story of his remembering that he initially put his signature in the wrong place on the document and of having to sign it again. Albert also admitted that in August 2009 (i.e., well before this litigation started), he spoke to the RBC loan officer Maria Wong, that he discussed the line of credit with her, and that he had actually withdrawn the last \$4,000 from the credit line.
- [38] In June 2009, Andy and Albert's relationship began to be very strained. Albert had been receiving Canada Pension benefits of about \$1,200 per month since March of that year, but he was still living beyond his means. He was \$20,000 to \$30,000 in debt. He told Andy about his debts and he demanded that Andy pay his debts yet again. Andy refused. Albert took to taking Andy's cash from the house without first asking Andy for permission. Andy took exception to this. Albert then went to the RBC looking for money, and it was then that he had his discussion with Ms. Wong about the line of credit. In or around September 2009, Albert's counsel put Andy on notice that Albert intended to claim that Albert owned 100 percent of the interest in Capstan Way. In February 2010, Albert commenced this proceeding. Despite the strained relationship between the parties, Albert continued to live at Capstan Way until October 2011 when, of his own volition, he moved out.
- [39] Currently, both parties are liable on the mortgage and line of credit. Those debts total just under \$500,000. Neither party adduced evidence to show how much Capstan Way is worth. The 2010 municipal property tax assessment put the value at \$628,000. I accept that figure as accurate. Albert has no savings or other capital. His only income derives from the Canada Pension Plan and Old Age Security. His total income is on the order of \$1,200 per month. Andy has investments and RRSPs with a total value of approximately \$300,000. He was laid off from his job in the fall of 2011 and is currently looking for other work. Andy's wife Angela has steady full-time employment at a bank. No party adduced evidence of her income.

Parties' Positions

Plaintiff

- [40] In his pleadings, Albert took the position that Andy holds his interest in Capstan Way in trust for Albert. Albert sought an order that Capstan Way be sold and the proceeds of sale be paid to him. Alternatively, he sought an order vesting title to Capstan Way in his name alone. Albert further sought an order that Andy pay to Albert all of the debt secured against the Capstan Way property, that is, payment of the outstanding balances of the mortgage and the line of credit. In the alternative, Albert sought an order that Andy holds any property and investments that he has acquired with funds drawn on the line of credit in trust for Albert. Finally, Albert sought an order for market rent for the entire period that Andy occupied the Capstan Way house.
- [41] At the conclusion of the trial, Albert's position was different. He argued that the court should order that parties have joint conduct of sale of Capstan Way. Albert submitted that upon sale of the property and after payment of the mortgage and the line of credit, agent's commissions, and normal real estate adjustments, Albert should receive \$260,199 from the net proceeds of sale and that the balance of the proceeds should be divided equally between the parties. Albert sought no relief with respect to assets Andy has acquired by use of funds drawn on the line of credit. Albert did not advance an argument for occupation rent.
- [42] By taking this stance, Albert has partially capitulated to Andy's position that Andy has an interest in the Capstan Way property.

Defendant

- [43] Andy's pleadings were consistent with his position at the end of the trial. He sought an order that Capstan Way be sold and the proceeds of sale be distributed after an accounting. He asked for an order that the accounting be directed to provide that the net sale proceeds be paid to him. Alternatively, Andy sought an order stipulating that Albert holds his interest in Capstan Way in trust for Andy and vesting that interest in Andy's name. Alternatively, Andy sought an order compensating him by way of a constructive or resulting trust for unjust enrichment Albert has enjoyed as a consequence of Andy's contribution to the acquisition of Capstan Way.

Discussion

Credibility and Reliability

- [44] The credibility of witnesses and the reliability of their testimony will heavily influence the outcome of this litigation. More specifically, determining who said what during, firstly, the family meeting in 2002 and, secondly, when Capstan Way was registered to the parties is crucial to deciding on what legal and equitable basis the parties moved forward after those discussions.

- [45] I find that I can rely on the evidence of Andy, his wife Angela, his sisters Vivian and Erica, their aunt Ko Fung Luen, and Ms. Wong of the RBC. The evidence they gave was logical, internally consistent and reasonably congruent with the documentary evidence. None of these witnesses were significantly shaken on cross-examination; neither was their evidence impaired by earlier inconsistent statements.
- [46] I regret to say that Albert's evidence was not of the same calibre as the other witnesses. At times, Albert's evidence was internally inconsistent, as for example when he denied having seen or been aware of the Capstan Way refinancing documents before his examination for discovery, but then acknowledged that he had signed the documents and even remembered having put his signature in the wrong place. At times, Albert's evidence was contrary to the story told by certain documents, the authenticity and accuracy of which Albert could not deny. So, for example, Albert testified with great certainty that never after moving into the Capstan Way house did he run his credit cards up to their maximum limits. Unfortunately for Albert, his credit card invoices clearly show that during that time, he consistently borrowed the maximum on his cards. At times, Albert's evidence was simply unbelievable, as for example when he testified that he would put up to \$1,000 in \$100 bills in a drawer and that the Suen children were welcome to help themselves to that money whenever they wished. Given Albert's spending habits, his poor record of income earnings in Canada, and his inability to manage his finances, it is simply unbelievable that at any time while they were in Canada Albert would have that much cash on hand or that he would have a relaxed attitude toward the children helping themselves to it.
- [47] In the end, I find that I can give little weight to Albert's testimony. Where his testimony conflicts with the testimony of other witnesses, I prefer the latter over the former.
- [48] Having come to that conclusion, I will now turn to the three major issues that require determination. Those issues are: first, who was entitled to legal and beneficial ownership of Pender Street when it was sold to the developer in early 2004; second, do the parties own Capstan Way in some way other than equal shares; and third, was Albert unjustly enriched by Andy, and if so, what remedy should flow from that enrichment?

Pender Street

- [49] Albert and his wife owned legal and beneficial title to the Pender Street property until his wife's death in August 2001. Upon his wife's death, Albert became the sole owner of Pender Street.
- [50] When Erica, Andy and Vivian moved out of Pender Street in 2002, Albert's financial circumstances were grim. He was \$20,000 to \$30,000 in debt. He was unable to earn enough money to support him much less pay his debts. More particularly, Albert could not have kept the mortgage payments on Pender Street current. Albert knew that he was in serious jeopardy of having no place to live if the Pender Street property was lost to the bank. Albert also knew that he was unable to support himself; that is to say, he knew that he was in

jeopardy of falling into poverty. I find that when Albert's children moved out of the house, Albert found himself in a place where he had to do something to entice Andy, at least, to continue to supply him with a place to live and food to eat.

- [51] The only thing that Albert had to bargain with was his interest in the Pender Street house. I find that ownership of the house was the only inducement that Albert could offer to Andy and that during the meeting between Andy, Vivian and Albert in 2002, Albert in fact put his ownership of the Pender Street house on the table. During that meeting, Albert said to Andy words to the effect of "the house is yours if you agree to come back to live here, pay my debts and provide me with a place to live and food to eat". I find that Andy agreed to that proposition.
- [52] The deal that Albert and Andy made in 2002 was entirely congruent with the facts and the parties' history. Andy had been paying the mortgage since 1998 and had been paying most if not all of the household expenses since 2000. It was entirely reasonable for him to believe that he had already acquired an interest in the house. It was not unreasonable for him to have believed that whatever interest his father had in the house had been seriously eroded thereby. It was equally reasonable for Albert to have believed that without Andy's help, he would lose the house through foreclosure. Albert therefore had little to lose and much to gain if he traded his interest in the house for Andy's commitment to support him. The bargain that the parties reached during their meeting in 2002 was, therefore, reasonable and fair.
- [53] I find that Andy lived up to his end of the bargain. He paid Albert's debts, he paid all of the household expenses, and he paid the mortgage. It follows that from 2002 on, Andy was entitled to the legal and beneficial title to the Pender Street property and that from that point forward, Albert held title to the house in trust for Andy.
- [54] When Pender Street was sold in 2004, Albert received the proceeds of sale in trust for Andy. Albert performed his duty as trustee by directing that the proceeds be paid to complete the purchase of the house that Andy had selected. As would be expected under these circumstances, Albert played no other meaningful role in any aspect of the selection or purchase of Capstan Way.

Capstan Way

- [55] The issue raised by the state of title of Capstan Way is whether the presumption of equal ownership arising from s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250, can be displaced by evidence relating to the parties' intentions when that property was purchased. Albert says that the presumption must apply; Andy says it must not. If Albert is correct, then he is entitled to a one-half interest in the property. If Andy is correct, then he is entitled to an order that Albert holds his interest in trust for Andy and for a further order vesting Albert's interest in Andy's name.

- [56] Section 23(2) of the Land Title Act provides that indefeasible title "is conclusive evidence at law and in equity that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title " That provision applies to the present case. The courts have determined that it is possible for a person to displace the presumption of equal ownership by joint tenants. *Bajwa v. Pannu*, 2007 BCCA 260, contains a discussion of the factors relevant to rebuttal of the presumption of equal ownership.
- [57] In *Bajwa*, the property in issue was registered to three individuals: Baljit Virk, Balwant Virk and Rupinder Pannu. The Virks took the position that because Mr. Pannu had not contributed any money to the down payment for the property and had made no contribution to the mortgage payments, he had acquired his interest gratuitously and that he therefore held his interest in the property in trust for them. Mr. Pannu took the position that without his help the property would never have been purchased. He asserted that he found the mortgage the parties needed to buy the property and that the mortgage loan would never have been made had he not signed as principal borrower. The trial judge found that Mr. Pannu's assertions were true. She held that so far as acquisition of the property was concerned, he had provided value equal to the Virks and that he was therefore entitled to an undivided one-third interest in the property. On appeal, Low J.A. spoke for the court. He observed that the onus of proof lay on the Virks to displace the statutory presumption imposed by s. 23(2) of the Land Title Act. He also observed that it is the moment that the parties acquired title to which the evidence displacing the presumption must be directed. That is to say: it is the parties' circumstances and intentions when they obtained title that are relevant; what occurred between them later may have consequences relating to, among other things, unjust enrichment but will not be relevant to their ownership shares. Finally, Low J.A. referred to the doctrine of resulting trust. A resulting trust would have dispelled the presumption of equal ownership of the subject property. Low J.A. noted the Virks' reliance on Professor Waters' text, *Law of Trusts in Canada*, 2d. ed. (Toronto: Carswell, 1984) at 299. Referring to that text, Low J.A. said:
- [16] ...The passage on that page of the text says that for a resulting trust to be inferred the person said to be a trustee must have given no value for his legal interest. It follows that if it is found as a fact that the person whose equitable interest is challenged did give value, there can be no resulting trust...
- [58] Upon applying these principles to the case at hand, Low J.A. held that the Virks had not established that the trial judge erred in finding that Mr. Pannu had made a significant contribution to the property when the parties acquired it. The fact that he had made that contribution negated the Virks' argument that Mr. Pannu held his interest in trust for the Virks. In the result, the Court of Appeal affirmed the trial court's decision that the parties held the property in equal shares.

- [59] In May 2007, the Supreme Court of Canada handed down its decision in *Pecore v. Pecore*, 2007 SCC 17. *Pecore* discusses, among other things, the principle of resulting trust and the presumption of advancement in the context of gratuitous transfers of property between family members. *Pecore* bears on the present case because in it, the Supreme Court clearly states that the presumption of advancement should not be assumed to apply to gratuitous transfers of property between independent adult family members. Rather, in such cases, the court should presume that the transferor intended to retain his or her beneficial interest in the property, thus giving rise to a resulting trust. *Pecore* does not, therefore, say anything different than *Bajwa* about what might negate a resulting trust, but it does provide useful instruction on the circumstances under which a resulting trust is presumed to exist.
- [60] The question in this case is whether a resulting trust existed when title to Capstan Way was registered to the parties. The background circumstances are that Andy owned all of the proceeds of the sale of Pender Street and those proceeds, plus another \$10,000 of Andy's money, provided the down payment for Capstan Way. Albert did not contribute any cash to the purchase. Andy arranged the mortgage necessary to complete the purchase of Capstan Way. Albert had nothing to do with securing that mortgage. Albert, on his own, could not have obtained that financing. Neither of the parties anticipated or expected that Albert would actually participate in paying for Capstan Way; the burden of the mortgage and all property related costs were mutually agreed to be on Andy's account alone.
- [61] Given these facts, I find that Albert did not contribute to the purchase of Capstan Way. Andy's decision to have Albert registered as joint owner was, therefore, gratuitous. According to *Pecore*, the presumption of advancement does not apply to gratuitous transfers between independent adult family members. The principle of resulting trust does apply. I am therefore driven to conclude that a resulting trust arose between Andy and Albert, such that Andy retains beneficial ownership of Capstan Way and Albert holds his interest to the property for Andy pursuant to a resulting trust. The relationship between Albert and Andy has broken down - it follows that Albert ought not to continue in his position as trustee of Andy's beneficial interest. An order must therefore go vesting legal and beneficial ownership of Capstan Way in Andy's name alone. A corollary order must go requiring Andy to indemnify Albert for any liability that may be imposed upon Albert with respect to charges registered against the title to Capstan Way.
- [62] In August 2009, Albert drew \$4,000 out of the line of credit that is secured against title to Capstan Way. Albert had no entitlement to those funds. Andy is entitled to judgment against Albert for \$4,000, plus whatever interest has accrued on that sum since Albert obtained it. In the event that the parties cannot agree upon the amount of interest that has accrued, that issue will be referred to a registrar of the court for an assessment and certification of findings.

Unjust Enrichment

[63] Given my findings and conclusions concerning the Pender Street and Capstan Way properties, it is not necessary for me to address Andy's alternative submission that he should receive the Capstan Way pursuant to the principles of unjust enrichment.

Costs

[64] Andy has been entirely successful in this matter. He is entitled to costs on Scale B.

"P.J. Rogers, J."

The Honourable Mr. Justice Rogers

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