
CANADA / JUDGMENT

Wiest v. Middelkamp

2008 BCSC 1774

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1774 Wiest v. Middelkamp

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wiest v. Middelkamp,

2008 BCSC 1774

Date: 20081223

Docket: E033161

Registry: Vancouver

Between:

Susan Wiest

Plaintiff

And

James Douglas Middelkamp, Gold Star Realty Ltd.

doing business as Consumer Realty, Consumer Realty Corporation

and ABC Corporation

Defendants

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

The Plaintiff:

In Person

Appearing on his own behalf and on behalf of the Corporate Defendants:

J.D. Middelkamp

Date and Place of Trial:

June 30, July 2-4,

July 7-11, 14-18, 2008

Vancouver, B.C.

- [1] Susan Wiest and James Middelkamp lived together in a common law relationship for 14 years from September 1985 until 1999. Ms. Wiest is seeking a share of the assets held by the defendants on the basis that she contributed to the acquisition and enhancement of those assets during the relationship. Ms. Wiest's claim is based, in part, on contributions she made by acting as a legal counsel for the defendants in various actions during the course of her relationship with Mr. Middelkamp.
- [2] Mr. Middelkamp takes the position that he and Ms. Wiest entered into a cohabitation agreement on August 23, 1988 (the "Agreement") which governs the division of assets between them, and that Ms. Wiest is not entitled to any of the assets in the names of the defendants. Mr. Middelkamp says that the Agreement provides that during their relationship they would perform professional or other services for one another, including the legal services provided by Ms. Wiest to the defendants, free of charge. As well, the defendants assert that when legal services were provided, Ms. Wiest and the defendants were in a solicitor-client relationship and the defendants rely on Ms. Wiest's fiduciary obligations, the provisions of the Legal Profession Act, S.B.C. 1998, c. 9 and the Law Society Rules.
- [3] In the alternative, the defendants say that Ms. Wiest and Mr. Middelkamp entered into an agreement in December 1992, whereby Mr. Middelkamp, on behalf of the defendants and his own behalf, agreed to pay Ms. Wiest \$20,000 in full and final settlement of Ms. Wiest's legal fees in connection with a lawsuit Middelkamp, Gold Star Realty v. Fraser Valley Real Estate Board and others (the "Conspiracy Action").
- [4] The issues are:
1. Have Mr. Middelkamp and/or the corporate defendants been unjustly enriched by services provided by Ms. Wiest? and
 2. If so, what remedy is Ms. Wiest entitled to?

BACKGROUND

- [5] At the time their relationship commenced, Ms. Wiest was an articling student with the law firm of Davis & Co. Mr. Middelkamp was a client of Davis & Co.

- [6] Mr. Middelkamp owned a 75 acre property on Ross Road. Ms. Wiest started living on the property in 1985, but the property remained registered in Mr. Middelkamp's name throughout their cohabitation. Shortly after moving in with Mr. Middelkamp, Ms. Wiest opened a law practice and office in Abbotsford which she operated from 1985 until 1994. In 1985, Mr. Middelkamp was operating a real estate business through various corporate entities. From 1986 to 1994, Mr. Middelkamp and his companies used the office space Ms. Wiest had rented for her law practice. In 1994, both parties moved their respective offices to the Ross Road property.
- [7] During the time they were living together, Ms. Wiest's law firm acted as the registered office for Consumer Realty Corp. and Gold Star Realty. As well, Ms. Wiest acted as counsel for Mr. Middelkamp and his companies in various matters.
- [8] When the parties commenced cohabitation there was a small farm house on the Ross Road property. Extensions had been built on both sides, but the interior was unfinished. As well, the property had not been landscaped. The evidence is that during their cohabitation, an extensive renovation of the house was undertaken in 1995 and 1996. As well, the front of the house was landscaped and a patio was built at the rear of the house. Ms. Wiest's evidence is that she assisted in both the renovations to the house and the landscaping.
- [9] During some of the years the parties cohabited, Mr. Middelkamp purchased cattle in the spring and sold them in the fall. Ms. Wiest's evidence is that she assisted in caring for the livestock, and in doing other upkeep and maintenance around the farm.
- [10] On August 23, 1988, approximately three years after they started living together, the parties entered into the Agreement. The Agreement was drafted by Ms. Wiest and provided the following:

WHEREAS:

A. James was previously married and is not divorced.

B. James and Susan may lawfully be married.

C. James and Susan and each of them own certain property which is set forth pursuant to Schedule "A" and "B" hereto.

D. Susan has full knowledge of the extent and approximate value of the estate of James which is annexed hereto as Schedule "A".

E. Susan has disclosed to James the extent and approximate value of the estate of Susan annexed hereto as Schedule "B".

F. The parties hereto wish to provide for the management of property acquired by each of them jointly and severally prior to their marriage and during cohabitation as well as during the coverture of their marriage, and specifically, to define their rights and obligations during their cohabitation and during their marriage with respect to such property and the settlement of their affairs and property in the event of separation or divorce.

G. This agreement is made as a marriage agreement pursuant to the provisions of Section 48 of the Family Relations Act, R.S.B.C. 1979, Chapter 121 and amending acts thereto (hereafter called "the Act").

H. This agreement is to take effect upon execution of this agreement.

NOW THEREFORE in consideration of the promise of marriage by each of the parties to the other and mutual love and affection and of the premises of these presents and mutual covenants herein contained, the parties hereto enter into this agreement:

1. That, unless otherwise specifically provided in this Agreement, the terminology used herein will be given the same meaning as the terms have in the Act.
3. The parties agree that any and all property, real or personal, SAVE AND EXCEPT property specifically dealt with by this Agreement, which property was owned by either of them as of the date of these presents, or was brought into the marriage, shall remain the sole property of the person in whose name such property was registered.
5. Notwithstanding this is a marriage agreement pursuant to the provisions of Section 48 of the Act, it is expressly understood and agreed that should there be a separation or divorce as contemplated by Section 43 of the Act, then each of James and Susan covenant and agree that they will support themselves to the best of their ability, the intent being that each of them severally will endeavour to remain financially and economically independent of the other and such independence would include not claiming maintenance against the other, should and event contemplated by Section 43 of the Act occur.
6. SUSAN by her signature hereto, acknowledges that all property set forth in Schedule "A" hereto attributed to be owned by JAMES, and any profits, moneys realized by liquidation, or future investments as a result of the Base as set forth in the property herein, is and shall be solely the property of JAMES in the event that there should be a separation as contemplated by Section 43 of the Act.
7. JAMES by his signature hereto, acknowledges that all property set forth in Schedule "B" hereto attributed to be owned by Susan is and shall be solely
8. JAMES and SUSAN each agree with the other that any asset, as defined by Part 3 of the Act, and brought into the marriage, shall remain the sole property of such person bringing the asset into the marriage.

10. The parties agree that hereafter any property acquired shall be the property of the person in whose name the property shall be registered and should any property be intended to be a family asset within the meaning of the Act, such property shall be registered in the joint names of the parties.
11. The parties agree that neither of them shall have the right to compensation for any contribution, whether by work, money, or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of any property other than family assets in which the other has or had an interest, save and except where the party holding the asset specifically agrees to compensate the other party with respect to such contribution, in writing.
12. Except as otherwise provided herein, the parties agree that any and all assets, property either real or personal, businesses, companies, capital funds, stocks, bonds, bank accounts, pensions, registered retirement savings plans, annuities, or insurance policies, which may be owned by either of them, as of the date of these presents, shall remain and continue to be the sole property of the person bringing such property into the cohabitation/marriage or of the person having acquired the same.
14. In the event the parties hereto should separate irreconcilably or divorce, it is understood and agreed that any businesses, companies, capital funds, stocks bonds, bank accounts, registered retirement savings plans, pension, annuity or life insurance policy owned by either of them shall not be considered a family asset within the meaning of the Act.
15. The parties acknowledge that each of them have had independent legal advice and understands fully his or her respective rights and obligations under this agreement and enters into this agreement voluntarily.
19. The parties covenant and agree to do and execute all further assurances and other instruments which may be required or necessary by either of them to give full effect to the terms contained in this agreement.
20. JAMES and SUSAN agree each with the other that any variation with respect to this agreement shall be in writing as contemplated by Sections 48 of the Act.
- [11] Schedule A to the Agreement sets out the assets of Mr. Middelkamp and lists the property in which the couple resided at 4471 Ross Road, Mt. Lehman, B.C. It also lists all stocks and bonds, a bank account in Mr. Middelkamp's name, a joint bank account, personal property, and five vehicles. Schedule B sets out the assets of Ms. Wiest and includes her personal property, a bank account in her name and a joint bank account. Schedule B includes the following: "I, Susan Wiest hereby acknowledge that James Middelkamp does not owe me any money for legal fees for legal services rendered now or in the future." Schedule B is signed by Ms. Wiest.

- [12] At the time the Agreement was entered into, Ms. Wiest owned and operated a viable law practice, while Mr. Middelkamp owned the property on Ross Road and was a realtor. Although Mr. Middelkamp was a realtor, he was not working much in that area but was spending the majority of his time working on the Conspiracy Action.
- [13] When the Agreement was entered into, Mr. Middelkamp and the other defendants were being represented by Davis & Co. in the Conspiracy Action. According to Ms. Wiest, she was supporting Mr. Middelkamp by paying him management fees through her law firm. Her evidence is that she paid Mr. Middelkamp over \$70,000 in management fees by paying them to his corporate entities. As well, Ms. Wiest paid for Mr. Middelkamp to be a beneficiary on her B.C. Medical Plan.
- [14] Ms. Wiest testified that after signing the Agreement, Mr. Middelkamp took charge of it and she never saw it again until this litigation was commenced.
- [15] Mr. Middelkamp's evidence is that he did not receive the benefit of the management fees paid through his corporate entity, and that any management fees paid to his corporate entities by Ms. Wiest's law firm were used by Ms. Wiest to her benefit.
- [16] As well, Mr. Middelkamp testified that Ms. Wiest was well aware of the Agreement during their relationship and that she referred to the Agreement in two legal proceedings between August 1988 and the time of separation.
- [17] The first instance was when Ms. Wiest was representing Mr. Middelkamp in an action involving the McMaths, who lived adjacent to the Ross Road property. The action alleged unlawful trespass and nuisance as a result of unlawful drainage by the McMaths onto Mr. Middelkamp's property. Mr. Middelkamp testified that during the trial counsel for the McMaths raised the issue of Ms. Wiest residing on the property and alleged that she had a personal interest in the property. Ms. Wiest took the position that the parties had a cohabitation agreement that included a term that she did not have an interest in Mr. Middelkamp's property. Although Mr. Middelkamp was successful in the lawsuit, the trial judge denied his costs on the basis that Ms. Wiest had an interest in the litigation. One of the grounds of appeal set out in the Notice of Appeal drafted by Ms. Wiest was that the trial judge "erred in fact and in law by finding that the plaintiff's counsel had an interest in the litigation."
- [18] The second instance Mr. Middelkamp testified about was during a residential tenancy dispute over the tenancy of the mobile home on the Ross Road property. Ms. Wiest was named as a respondent by the tenants. According to Mr. Middelkamp, the arbitration was dismissed against Ms. Wiest as a result of submissions made by Ms. Wiest that she and Mr. Middelkamp had a cohabitation agreement which provided that she did not have an interest in Mr. Middelkamp's property.
- [19] In 1990, differences arose between Mr. Middelkamp and Davis & Co. and in January 1991 Davis & Co. ceased representing the defendants. Ms. Wiest agreed to represent them.

- [20] Both parties agree that the Conspiracy Action was very contentious and consumed much of their time from 1991, when Ms. Wiest started representing the defendants, until it was settled in 1994. There were 86 days of examination for discovery, 13 case management conferences and 69 days of trial. As well, there were 29 days of chambers applications and four appeals during the course of the action. The disclosed documents numbered in the thousands, and there were 12 law firms representing the defendants as well as several self-represented parties.
- [21] Ms. Wiest's evidence is that her law practice was completely dedicated to the Conspiracy Action from 1991 to 1993. The trial started in February 1993 and in June 1993, William Berardino, Q.C. of Russell and DuMoulin became involved in the lawsuit for the plaintiffs and handled the settlement negotiations. The matter was settled for \$850,000 in February 1994. Mr. Middelkamp received \$775,000 after payment to Davis & Co., Carey Linde and Russell and DuMoulin.
- [22] Ms. Wiest's evidence is that she was not paid anything by the defendants for her work on the Conspiracy Action.
- [23] Following the settlement of the Conspiracy Action, the parties continued to cohabit in the Ross Road property. Ms. Wiest took some time off the practice of law and spent time around the home. There were extensive renovations to the property in 1995 and 1996. Ms. Wiest's evidence is that she assisted with the renovations in a number of ways, including picking up supplies that were needed, helping with the demolition and doing the banking.
- [24] In 1997, the couple became involved in owning and riding horses and Ms. Wiest worked part-time practicing law.
- [25] In 1998, their relationship began to deteriorate and they separated in early 1999. Ms. Wiest moved to Calgary and started to live and work there. Ms. Wiest's evidence is that when she moved out of the Ross Road property she had less than \$40,000 in RRSPs, no law practice and no vehicle. Mr. Middelkamp complained to the Law Society of British Columbia about Ms. Wiest which made it difficult for her to obtain the certificate of standing which she required in order to become a member of the Alberta bar. The complaint was eventually dismissed by the Law Society.

ANALYSIS

Positions of the Parties

- [26] Ms. Wiest argues that the Agreement is of no force and effect because it was premised on the fact that the parties would marry and they never did. Alternatively, she says that the Agreement was modified orally in 1994 when she agreed to represent Mr. Middelkamp in the Conspiracy Action. According to Ms. Wiest, Mr. Middelkamp agreed that if the litigation was successful, he would share the award with Ms. Wiest. She submits that based on the equitable doctrines of unjust enrichment and constructive trust, she has an interest in all

property held in Mr. Middelkamp's name because she made a substantial contribution to the property and did not receive any compensation for her efforts.

- [27] Mr. Middelkamp denies that any verbal agreement was entered into in 1994, and says that the terms of the Agreement govern the division of assets. He takes the position that Ms. Wiest is not entitled to any award based on unjust enrichment or constructive trust because both the Agreement and the solicitor-client relationship between the parties provide juristic reasons militating against such an award.

Is Ms. Wiest's claim for unjust enrichment made out?

- [28] In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court of Canada reiterated that an action for unjust enrichment arises when three elements are satisfied:

1. an enrichment;
2. a corresponding deprivation; and
3. the absence of a juristic reason for the enrichment.

Did Ms. Wiest's activities enrich or benefit Mr. Middelkamp?

- [29] It is clear on the evidence that Ms. Wiest's actions, both around the property and as a lawyer, enriched and benefited Mr. Middelkamp.
- [30] Mr. Middelkamp downplays the fact that Ms. Wiest made any contribution around the property. He says that her involvement in the landscaping was minimal, and that the bulk of the renovations was completed by trades people hired by him. However, I accept Ms. Wiest's evidence that while the parties lived together she assisted around the property with the landscaping, the livestock and the renovations.
- [31] I also accept that Ms. Wiest paid management fees to a corporate entity owned by Mr. Middelkamp. Mr. Middelkamp and his accountant, Philip Worthington-White admitted that Consumer Realty Corporation received management fees. Mr. Worthington-White, testified that Consumer Realty Corporation was transferred over to, and used by, Ms. Wiest. However, there is no documentary evidence supporting that statement.
- [32] Mr. Middelkamp did not produce his income tax returns, or the corporate income tax returns and the documents for Consumer Realty Corporation for the relevant time period. Much of Mr. Worthington-White's evidence was hearsay, based on what Mr. Middelkamp told him. The documentary evidence that has been produced supports Ms. Wiest's evidence that she paid management fees to Mr. Middelkamp through his corporate entity Consumer Realty Corporation. I find that Mr. Middelkamp benefited from the payment of management fees to him by Ms. Wiest's law firm.
- [33] Mr. Middelkamp asserts that Ms. Wiest did not contribute to the advancement of the Conspiracy Action but actually detracted from the value of the action.

- [34] Geoff Plant, Q.C. testified that he was retained as co-counsel for the plaintiffs with Mr. Berardino in the Conspiracy Action in 1993. When Mr. Plant became involved, the trial had been adjourned, and he was involved in preparing for the resumption of the trial in the event a settlement could not be achieved.
- [35] Mr. Plant's evidence is that the Conspiracy Action was an enormously complicated case with approximately four dozen defendants. The cause of action included a claim of civil conspiracy that struck at the heart of the defendants' business integrity and ability to do business and, as a result, the defendants were resisting the case strenuously. Mr. Plant testified that he was involved in the case for five months, and from what he observed, in terms of examination for discovery transcripts and the level of organization, the level of preparation was appropriate, competent and professional. In his view, the case was well marshalled and well assembled. There was no need for additional experts or examinations for discovery. Nor were any new witnesses or documents necessary.
- [36] Mr. Berardino testified that he thought the settlement obtained for the plaintiffs in the Conspiracy Action, i.e. Mr. Middelkamp and the corporate defendants in this action, was a very good settlement.
- [37] In the circumstances, I find that the defendants benefited from Ms. Wiest's legal services. Was there a corresponding deprivation to Ms. Wiest?
- [38] It is apparent that Ms. Wiest's contribution of management fees and work around the home was a benefit to Mr. Middelkamp in that it enhanced his ability to pay off his mortgage and increase the value of his assets. There was a corresponding deprivation to her in that she provided those services and monies without compensation.
- [39] As well, it is apparent from the evidence that Ms. Wiest's contribution of legal services to the Conspiracy Action resulted in a deprivation to Ms. Wiest. Ms. Wiest's evidence is that her law practice, including her staff, was dedicated to the Conspiracy Action between 1991 and 1993 to the exclusion of other clients. The defendants do not take issue with the fact that Ms. Wiest worked on the Conspiracy Action exclusively during that time period.
- [40] However, the defendants say that Ms. Wiest was paid \$20,000 for those services. Ms. Wiest denies receiving any compensation. I did not find Mr. Middelkamp's evidence credible on this point. The defendants have not produced any documentary evidence supporting their contention that Ms. Wiest was paid monies for her legal services in the Conspiracy Action. The defendants did not produce many financial documents despite requests for records of bank accounts, corporate financial statements and income tax returns for both the personal and corporate defendants.

[41] Mr. Middelkamp gave his evidence in an argumentative and evasive manner. His evidence in a number of aspects made no sense. For example, Mr. Middelkamp testified that when he met Ms. Wiest they had no romantic relationship, and that Ms. Wiest simply wanted to do his legal work for free. That evidence does not make sense in a commercial context.

[42] I accept Ms. Wiest's evidence that she did not receive any payment from the defendants. Accordingly, I find that Ms. Wiest suffered a corresponding deprivation, in that she was not compensated for her legal services.

Is there an absence of juristic reasons for the enrichment?

[43] In *Peter v. Beblow*, at 990-91, McLachlin J. stated that the test to be applied in determining whether there is an absence of juristic reason for the enrichment is flexible, and that the factors to be considered may vary, stating:

In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, *supra*. In family cases, this concern may raise the following subsidiary questions:

- (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?
- (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?
- (iii) Does public policy support the enrichment?

[44] As stated earlier, Mr. Middelkamp asserts that there are two juristic reasons why Ms. Wiest's claim for unjust enrichment should not succeed: 1) the Agreement governed the parties' property rights and specifically provided that Ms. Wiest would not seek payment from Mr. Middelkamp for legal services; and 2) the parties were in an ongoing solicitor-client relationship throughout their cohabitation, and that Ms. Wiest never advised him that her provision of legal services might result in a claim for unjust enrichment.

[45] Ms. Wiest takes the position that the Agreement is unenforceable because it was predicated on the promise of marriage and the parties never married. She submits that there was no expectation by either party at the time the Agreement was entered into that she would give up two years, or more, of her law practice for Mr. Middelkamp without anything in return. Rather, the expectation was that she would continue to have a viable law practice. At the time the Agreement was entered into the defendants were represented by Davis & Co. in the Conspiracy Action and there was no plan that she would become counsel.

[46] As well, Ms. Wiest asserts that she is not claiming a fee in respect of the legal services she provided for the Conspiracy Action. Ms. Wiest says that she agreed to assist Mr. Middelkamp on the basis that he would be fair to her, and that she was contributing as a common law spouse to the economic well-being of the couple.

What is the effect of the Agreement?

- [47] The Agreement states that it is made pursuant to s. 48 of the Family Relations Act, R.S.B.C. 1979, c. 121 (the "1979 FRA"). Section 48 is now s. 61 of the Family Relations Act, R.S.B.C. 1996, c. 128. Section 61 is substantially the same as s. 48.
- [48] The relevant portions of s. 48 of the 1979 FRA provided:
- (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.
 - (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
 - (a) management of family assets or other property during marriage; or
 - (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
 - (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.
 - (4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.
 - (8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.
- [49] This section provides some support for Ms. Wiest's position that the Agreement is of no force and effect because the parties never married. It raises the issue of whether the Agreement falls within the definition of "marriage agreement" in the FRA: *Williams v. Friesen* [1994] B.C.J. No. 345 (S.C.) and *Trautmann v. Baker* (1996), 27 B.C.L.R. (3d) 263 (S.C.).
- [50] In *Trautmann v. Baker* (1996), 27 B.C.L.R. (3d) 263 (B.C.S.C.), Harvey J. considered a "marriage agreement" that purported to be an agreement under s. 48 (now s. 61), and which was made in contemplation of marriage. However, the parties never married. After concluding that the parties did not meet the definition of "spouses" as contained in s. 61, he held at para. 10 that "[t]his section contemplates a situation where a marriage agreement is entered into before marriage but states that in this situation, the agreement takes effect on the date of the marriage. Where the parties never marry, it appears that the agreement does not take effect." He concludes at para.16 that: "In my view, the force and effect of the agreement is derived entirely from the provisions of s. 48 of the Family Relations Act. I agree with the submissions of counsel for the defendant, the parties not being spouses and not having married, the said agreement is of no force and effect."

- [51] Where an agreement is in conflict with a statute it may be illegal and unenforceable at common law. However, s. 48(8), now s. 61(8), specifically states that a provision that is void or voidable is severable from other provisions. This seems to suggest that the legislature has intended that no marriage agreements ought to be found to be void ab initio.
- [52] It is therefore an open question in cases where the statute does not expressly declare a contract - or certain conduct governed by the contract - illegal, as to whether the inconsistency with the statute renders the contract illegal and therefore void. As noted by Professor McCamus in *The Law of Contracts* (Toronto: Irwin Law, 2005) at 459:

The analytical method applied by the courts in resolving such questions has evolved over time. Under the earlier or traditional doctrine, courts were inclined to assume that a contract that was in conflict with a statutory scheme in some fashion was necessarily illegal and void. A more modern approach has emerged in recent decades in which the courts take a more flexible approach and consider whether enforcement of the contract would be consistent with, or on the other hand, subvert the policies underlying the statutory enactment .

- [53] If it is found that the Agreement ought to be enforced despite the requirements of the Act, then the parties could be said to have effectively 'contracted out' of those requirements.
- [54] In my view, the modern approach is preferable as it is a more principled approach. It allows the agreement to be interpreted in the context of the underlying policy of a given statute. In this case, although the Agreement deals with the respective property rights of the parties, it arises not in a commercial law context but in a family law context, where the legislature has already created significant departures from traditional property law concepts. Any interpretation of the Agreement that failed to take this particular context into account may risk unfairness to the parties in exchange for the certainty of contract - so desirable in the commercial world - that the traditional approach provides. Fairness in the commercial law context is different from that in the family law context which "contains considerable aspects of contemporary social policy": *S.M.J. v. R.H.C.W.*, 2002 BCCA 406 at ¶ 73.
- [55] As well, the modern approach tends to place a higher value on the concept of freedom of contract, since it acknowledges that parties may be bound by their arrangement despite its inconsistency with a statute. This would seem to be more in keeping with one of the purposes of the FRA, which expressly allows parties to contract out of the rights and obligations that it creates.
- [56] In *Hartshorne v. Hartshorne*, 2004 SCC 22 it was noted at para. 9 that: "[t]he authorities generally agree that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship."
- [57] Adopting a more modern, "plain and ordinary" interpretation of the FRA, it is doubtful that any intention that a marriage agreement that is inconsistent with the FRA automatically be declared illegal and void can be inferred. This is particularly so, given that s. 61(8) expressly states that void provisions of a marriage agreement are severable.

- [58] It seems somewhat anomalous, therefore, that if it were found that the Agreement is not a marriage agreement, it would be declared void and unenforceable in the context of this relationship between these parties.
- [59] The evidence is that Ms. Wiest used a precedent in drafting the Agreement. The Agreement is entitled "Cohabitation Agreement", and apparently reflected the state of finances at the time the parties entered into it. Mr. Middelkamp's evidence is that the Agreement reflected the verbal agreement the parties entered into when they commenced cohabitating in 1985, and which the parties had been acting in accordance with during their cohabitation.
- [60] There is no evidence that Ms. Wiest deliberately drafted the Agreement so as to render it void or to facilitate any unlawful act or deception. Presumably both parties were bona fide in entering into the Agreement.
- [61] In this case, it is clear that the intention of the parties was to keep their assets separate. Ms. Wiest drafted the clause in the Agreement which provides that: "This agreement is to take effect upon execution of this agreement." The Agreement was entitled "Cohabitation Agreement." There was no such wording in the Agreement the Court was dealing with in Trautmann.
- [62] As stated earlier, Mr. Middelkamp seeks to rely on the Agreement. Given that Ms. Wiest was practising in the area of family law at the time she drafted the Agreement it would, in my view, be contrary to public policy to allow her to rely on the clause that the Agreement was made pursuant to s. 48 of the FRA to have the Agreement declared illegal and therefore unenforceable when it also contained the clause that it would take effect upon execution. Accordingly, I find that the Agreement is enforceable.
- [63] Having found that the Agreement is enforceable, does it follow that it bars Ms. Wiest from making a claim for unjust enrichment?
- [64] In Hartshorne the Court stated the following at ¶ 67:

Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or

unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.

- [65] Hartshorne was dealing with a marriage agreement and the effect of the factors in s. 65 of Part 5 of the FRA.
- [66] In an earlier application in this proceeding, the Court of Appeal found that s. 120.1 of the FRA has no retrospective effect. However, it left open the question of whether the wording of the Agreement is such that the parties intended Part 5 of the FRA to be incorporated: *Wiest v. Middelkamp*, 2003 BCCA 437.
- [67] Whether or not Part 5 applies, it is my view that in determining what the legitimate expectations of the parties were fairness, taking into account what was within the realistic contemplation of the parties at the time they entered into the Agreement, what attention they gave to changes in circumstances or unrealized implications and what their circumstances were at the time of separation, should be considered.
- [68] Ms. Wiest is claiming unjust enrichment based on work she did around the property both before and after entering into the Agreement. It is apparent from the evidence of both parties that while living together as a couple, they worked together and helped each other. Ms. Wiest assisted around the property and paid management fees to Mr. Middelkamp, and Mr. Middelkamp assisted in the law practice from time to time.
- [69] Although the evidence does not disclose that there were any significant changes in the parties' circumstances in relation to the work that Ms. Wiest provided around the home or the management fees Ms. Wiest was paying to Mr. Middelkamp from the time they entered into the Agreement, there was a significant change in the parties' circumstances vis-à-vis the legal services that Ms. Wiest provided from what could reasonably be anticipated at the time of negotiation. At the time the Agreement was entered into, Ms. Wiest had acted for Mr. Middelkamp in a few matters that were relatively minor in comparison with the Conspiracy Action, and Mr. Middelkamp was represented by counsel the Conspiracy Action.
- [70] I accept Ms. Wiest's evidence that it was anticipated that she would continue to run a viable law practice and that there was no expectation that Ms. Wiest would give up all her clients, and devote her practice to the Conspiracy Action for two or more years for no compensation. Mr. Middelkamp concedes by his pleadings and arguments that he agreed to pay Ms. Wiest \$20,000 for her legal services in the Conspiracy Action. In other words, he concedes that there was variation to the Agreement which is not evidenced in writing.
- [71] In the circumstances, I have concluded, that the Agreement does not present a juristic reason why Ms. Wiest can not advance a claim based on unjust enrichment.

Does the fact that a portion of Ms. Wiest's contribution was providing legal services to the defendants provide a juristic reason?

- [72] Mr. Middelkamp submits that at all times during their relationship he and Ms. Wiest were in a solicitor-client relationship and that she never advised him that her services could result in a claim for unjust enrichment against him. He argues that the solicitor-client relationship between them created a fiduciary relationship that required her to advise him that the provision of services might result in a claim for unjust enrichment.
- [73] Ms. Wiest admits that she never advised Mr. Middelkamp that the legal services she provided to the defendants could or would result in a claim being made against the defendants, including a claim for unjust enrichment.
- [74] The circumstances of this case are unusual in that the relationship between the parties encompasses aspects of both a spousal relationship and a solicitor-client relationship. As stated in *Perez v. Galambos*, 2008 BCCA 91, 78 B.C.L.R. (4th) 268, relationships cannot be compartmentalized, and each aspect should be used to inform the analysis and provide a contextual background for a proper understanding of the circumstances in which, in this case, legal services were provided.
- [75] Mr. Middelkamp argues that he was in vulnerable position in terms of his relationship with Ms. Wiest, that he trusted her, and that the fiduciary relationship between them required that Ms. Wiest advise him of the fact that her services could found a claim in unjust enrichment.
- [76] As well, Mr. Middelkamp submits that Ms. Wiest contravened the Professional Conduct Handbook of the Law Society and that it is against public policy for the Courts to fail to assist in the enforcement of the Code. As stated in *Fraresso v. Vanczyk*, 1995 CanLII 1127 (B.C.S.C.): "An expression of a professional standard in a code of ethics relating to a matter before the courts should be considered an important statement of public policy."
- [77] Mr. Middelkamp relies on the following provisions in the Conduct Handbook of the Law Society of British Columbia:

Chapter 1 - Canons of Legal Ethics

3. To the client

- (7) A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for client in a matter, a lawyer must not act against the client in the same or any related matter.
- (8) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property only as authorized by the client, and not co-mingle it with that of the lawyer.

Chapter 2 - Integrity

FOOTNOTES:

1. A lawyer must not exploit the relationship between solicitor and client to the lawyer's own advantage. An intimate relationship between a lawyer and a client, such as a sexual one, may constitute exploitation.

An intimate relationship with a client is also likely to affect a lawyer's professional judgment, which could cast doubt on a lawyer's ability to represent the client competently. A lawyer owes each client a duty to provide objective legal advice and perform services in a professional manner. The lawyer must not permit any personal interest to interfere with that objectivity.

Chapter 7 - Conflicts of Interest between Lawyer and Client

Direct or indirect financial interest

1. Except as otherwise permitted by the Handbook, a lawyer must not perform any legal services for a client if:
 - (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
 - (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.

Financial or membership interest in the client

2. A lawyer must not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest that would reasonably be expected to affect the lawyer's professional judgment.

Transaction with a client

3. A lawyer must not purchase anything from or sell anything to a client of the lawyer's firm unless the transaction is clearly severable from any legal work performed by the lawyer or by another lawyer for the client, and either:
 - (a) the transaction is of a routine nature to and in the ordinary course of business of the client, or
 - (b) the client is independently represented in all aspects of the transaction.

[78] Mr. Middelkamp stressed throughout his testimony that he relied on Ms. Wiest for advice regarding all aspects of his business and personal life. Mr. Middelkamp purported to be very naive about law and business in his evidence. For example, he testified that he was unable to obtain his bank accounts records from the bank, and that he was unaware that he could obtain copies of his tax returns from either his accountant or the Canada Revenue Agency. I

note that Mr. Middelkamp did not produce any documents evidencing any attempts to obtain his or the corporate defendants bank records.

- [79] However, I do not accept that Mr. Middelkamp is either naïve or unaware of law or business. He is well educated and an experienced businessman and litigant. While on the one hand purporting to be totally reliant on Ms. Wiest in both business and legal matters, Mr. Middelkamp testified about his background and described himself as a very successful realtor and experienced businessman. Mr. Middelkamp's evidence is that he has an undergraduate degree in economics, and attended law school briefly before obtaining a teaching certificate. He taught for three years and in 1974 became a licensed realtor. Mr. Middelkamp then took an agent's course that allowed him to open up his own real estate company. In 1981, he changed his method of operating and started a discount real estate company. As well, Mr. Middelkamp testified that as part of his contributions to Ms. Wiest he worked in Ms. Wiest's law office, organizing documents and assisting her in other aspects of the practice, including attending court with her and taking notes.
- [80] Mr. Middelkamp was involved in a number of law suits which pre-dated the Conspiracy Action, including three different law suits involving his neighbours and one involving the City of Abbotsford. Prior to Ms. Wiest representing him in the Conspiracy Action, he was represented by Davis & Co. and Mr. Linde. Mr. Middelkamp agrees that he did a great deal of the work on the Conspiracy Action.
- [81] It is apparent from the evidence of both Mr. Plant and Mr. Berardino that Mr. Middelkamp was completely engaged in every aspect of the Conspiracy Action. Mr. Plant testified that Mr. Middelkamp was wholly engaged in the case and understood the issues. As well, Mr. Middelkamp had a good working knowledge of the documents, where they were, and how they were organized. Mr. Plant's impression was that Ms. Wiest and Mr. Middelkamp were working together closely to organize the preparation of the case. Mr. Plant's evidence is that Mr. Middelkamp had lots of questions about why things needed to be done and had more questions than the usual litigant. Mr. Berardino testified that Mr. Middelkamp was involved in all aspects of the settlement negotiations.
- [82] While it was not advisable for Ms. Wiest to act for Mr. Middelkamp in the Conspiracy Action given their spousal relationship, he has not provided any evidence or argument that the intimate relationship between them affected her professional judgment.
- [83] Mr. Middelkamp's main argument is that Ms. Wiest should either not have charged anything for legal services, or alternatively that she accepted \$20,000 in full and final payment of her legal services in respect of the Conspiracy Action.

- [84] It is clear from the case law that the relationship must be viewed in its full context. I do not accept Mr. Middelkamp's assertion that his relationship with Ms. Wiest was primarily a solicitor-client relationship. It is apparent from the evidence that they had a spousal relationship, and that from time to time each would provide professional services to the other.
- [85] Ms. Wiest and the defendants did not enter into a written agreement when Ms. Wiest agreed to represent the defendants in the Conspiracy Action. The defendants assert that Ms. Wiest is not entitled to compensation for the legal services she provided because she waived any right to be paid for legal services by Mr. Middelkamp in the Agreement. The defendants argue that the Agreement was drafted and executed by Ms. Wiest and that in the Agreement she expressly agreed that she would receive no compensation for legal services.
- [86] Alternatively, the defendants assert that Ms. Wiest was paid \$20,000 which she accepted as full and final payment for the legal services she rendered in connection with the Conspiracy Action. The defendants say that Ms. Wiest's denial that she agreed her fees for the Conspiracy Action would be \$20,000 is contradicted by Mr. Middelkamp, and in the absence of a written agreement that supports her position, the evidence of the client, Mr. Middelkamp, must be accepted.
- [87] The defendants say that where there is a conflict in the evidence that the client's evidence is to be favoured: *Re Dickie* (1916), 23 B.C.R. 538 (C.A.).
- [88] However, as I stated earlier, the whole of the relationship must be considered. Ms. Wiest testified that Mr. Middelkamp became very concerned in 1990 about the fact that Davis & Co. was not advancing the Conspiracy Action. Mr. Middelkamp had not paid Davis & Co. a retainer, nor had he paid for any disbursements.
- [89] In 1991 Mr. Middelkamp asked Ms. Wiest to represent the defendants because otherwise he would not have been able to continue with the lawsuit. He did not want to financially encumber the farm. Ms. Wiest testified that when they discussed the potential of her representing the defendants, Mr. Middelkamp told her he would be fair to her, and that they were building a life together and would share everything. I accept Ms. Wiest's evidence in this regard.
- [90] Mr. Middelkamp denies any such conversation took place. His evidence is that the only condition on which he would undertake the Conspiracy Action was if he was not required to pay legal fees and that was reflected in the Agreement.
- [91] Mr. Middelkamp's evidence that Ms. Wiest agreed to dedicate her entire law practice for two or more years to a very complex case with no prospect of remuneration does not make sense from a commercial perspective. I did not find his evidence credible. Ms. Wiest's evidence that she agreed to represent the defendants on the basis that she and Mr. Middelkamp would work together for their common good is believable, particularly when looking at their relationship as a whole. Both Mr. Middelkamp and Ms. Wiest testified that they lived and

worked closely together, with each one assisting the other.

- [92] The defendants say that whether or not they owe legal fees to Ms. Wiest is a moot point because Ms. Wiest cannot claim compensation for the legal services she rendered to the defendants when she did not provide them with a bill. The defendants assert that legal proceedings to recover legal fees - whether a contingent fee agreement or a quantum meruit claim - cannot be brought until a bill has been delivered, and that it is well beyond the six year limitation period to commence proceedings to recover the bill. The defendants say that any action to recover fees is statute barred.
- [93] Finally, the defendants argue that the 50% contingency fee Ms. Wiest is claiming, based on an alleged agreement that the parties would share equally in any recovery from the Conspiracy Action, would be illegal if it existed.
- [94] Ms. Wiest agrees that she did not render a bill for her services, and says that is because she made all of her contributions to Mr. Middelkamp in the context of a spousal relationship. There was an expectation that the parties would share in the proceeds from the lawsuit. Ms. Wiest submits that she is not asking for a legal fee but rather for an award based on unjust enrichment for the contributions she made to the acquisition and enhancement of the value of the assets in Mr. Middelkamp's name.
- [95] Ms. Wiest points to the fact that at the time of separation, after a 14 year common law relationship, she had no income and approximately \$30,000, while Mr. Middelkamp had assets in excess of \$2 million and the ability to live off the investments and rental income.
- [96] Ms. Wiest submits that if Mr. Middelkamp's argument is accepted spouses who are lawyers are placed in a unique position different from other professionals or trades people.
- [97] The defendants' argument that some type of services in some type of relationships should not be recognized as supporting legal claims for policy reasons is similar to the argument advanced in *Peter v. Beblow*. In this case the argument is that legal services should not, in a marital or quasi-marital relationship, be viewed as giving rise issue to equitable claims against the other spouse.
- [98] Ms. Wiest had no general duty to perform work and services for her partner, Mr. Middelkamp, or the corporate defendants, nor was there any obligation on her to do so arising from the circumstances of the parties.
- [99] As stated earlier, Mr. Middelkamp is a sophisticated businessman and litigant. I do not accept his evidence that he had an expectation that Ms. Wiest would not receive any benefit from dedicating all of her legal time and her practice for two years or more to Mr. Middelkamp and the corporate defendants. There is no doubt that Mr. Middelkamp and the corporate defendants benefited from the services provided by Ms. Wiest, with a corresponding deprivation to Ms. Wiest. In my view, it would be unjust to allow Mr. Middelkamp to be enriched at Ms. Wiest's expense in the circumstances of this case.

[100] As stated in *Peter v. Beblow*, "it is precisely where an injustice arises without a legal remedy that equity finds a role."

[101] Based on the circumstances of this case, and balancing the equitable principles and the public policy arguments, I have concluded that the defendants were enriched to the detriment of Ms. Wiest, and the fact that Ms. Wiest was providing legal services is not a juristic reason why Ms. Wiest can not advance a claim for unjust enrichment. Accordingly, Ms. Wiest's claim for unjust enrichment is made out.

What remedy is Ms. Wiest entitled to?

[102] Ms. Wiest is seeking a constructive trust remedy and asserts that she is entitled to an interest in Mr. Middelkamp's property. As stated in *Peter v. Beblow*, when a claim for unjust enrichment is made out there are two possible remedies: either an award of money on the basis of the value of the services rendered, i.e. quantum meruit, or an interest in property based on a constructive trust.

[103] In this case, Ms. Wiest asserts that a constructive trust is an appropriate remedy because the money from the award in the Conspiracy Action was used by Mr. Middelkamp to improve the property on Ross Road.

[104] In *Peter v. Beblow*, the Court cautioned against assuming that, once unjust enrichment is made out, a constructive trust is appropriate and noted at 997:

Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him or her a special link to the property, in which case a constructive trust arises.

[105] McLachlin J. did not disagree with Cory J.'s statement that a flexible approach "based on common sense and a desire to achieve a fair result for both parties" is appropriate, but noted that must be tempered with the principle that the extent of any award must reflect the extent of the contribution.

[106] In my view, a monetary award is sufficient in the circumstances of this case. As outlined above, the parties entered into the Agreement which precluded either party from obtaining an interest in the assets enumerated in the Agreement. The assets that Ms. Wiest seeks a proprietary interest in are listed as a property belonging to Mr. Middelkamp. In this case, matters unfolded as was anticipated by the parties when they signed the Agreement, except for the fact that Ms. Wiest dedicated her law practice to Mr. Middelkamp and the corporate defendants for two years. It is that contribution which founds her claim in unjust enrichment, and that contribution for which the award should be made.

[107] The evidence is that in the four years prior to 1991, Ms. Wiest was making approximately \$70,000 a year from her practice. Accordingly, it is my view that a monetary award of \$200,000 is appropriate, taking into account that Mr. Middelkamp has had the sole benefit of the contributions since the separation in 1998.

Restraining Order

[108] Ms. Wiest seeks a restraining order to stop Mr. Middelkamp from harassing her in her professional and personal capacity. The evidence is that Mr. Middelkamp has interfered with Ms. Wiest's ability to earn income. He complained to the Law Society of British Columbia after they separated. In 2005, he sent letters to counsel in Calgary for the purposes of retaining them to enforce an order for costs against Ms. Wiest. Although Mr. Middelkamp denied that he accused Ms. Wiest of fraud in those letters, the letters contain a number of unnecessary derogatory comments regarding Ms. Wiest's professional conduct and truthfulness which could potentially have a very detrimental effect on her ability to practise law.

[109] In the circumstances, it is appropriate to make a permanent restraining order, restraining Mr. Middelkamp from harassing, molesting, interfering with or attempting to harass, molest or interfere with Ms. Wiest.

COSTS

[110] Ms. Wiest seeks special costs on the basis that Mr. Middelkamp has protracted the litigation by failing to produce documents, producing relevant documents late, claiming privilege over relevant documents, and bringing unnecessary applications. There is no doubt that this litigation has been extremely protracted and complicated, but that is as a result of the actions of both Ms. Wiest and the defendants. Ms. Wiest has been successful in her claim and is entitled to her costs. However, taking into account the behaviour of both parties in advancing this case, it is my view that she is not entitled to special costs, but to costs at Scale B.

"Madam Justice Gerow"

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