

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** DiFrancesco & Sons Mushrooms v. Annapolis Valley Peat Moss  
Company , 2005 NSCA 57

**Date:** 20050405

**Docket:** CA 235355

**Registry:** Halifax

**Between:** Anthony DiFrancesco, carrying on business as  
DiFrancesco & Sons Mushrooms

Appellant

v.

Annapolis Valley Peat Moss Company Limited

Respondent

**Judge(s):** Bateman, Oland and Fichaud, JJ.A.

**Appeal Heard:** April 1, 2005, in Halifax, Nova Scotia

**Revised Decision:** The text of the original judgement has been corrected  
incorporating the text of the erratum (released April 5,  
2005).

**Held:** Leave to appeal is granted, but the appeal is dismissed with costs of  
\$1,000 inclusive of disbursements per reasons for judgment of  
Fichaud, J.A.; Bateman and Oland, JJ.A. concurring.

**Counsel:** Gary Richard, for the appellant  
Ronald Richter, for the respondent

Reasons for judgment:

[1] The appellant Anthony DiFrancesco provided funds for the purchase of equipment by another party. Mr. DiFrancesco says he is the beneficiary of a resulting trust, and the equipment is not executable by a judgment creditor of the nominal purchaser. After the hearing, the court dismissed the appeal with reasons to follow. These are the reasons.

***Background***

- [2] Clare Organics Products Limited (“COP”) operated a peat and organic compost business in Digby County. One of COP’s creditors caused COP’s equipment to be auctioned on July 10, 2003. The auctioneer was Woody’s Auction Limited (“Woody’s”), whose principals are Daniel and Beverley Woodfield.
- [3] DiFrancesco & Sons Mushrooms is a Pennsylvania business which grows and sells mushrooms. Mr. DiFrancesco of Landenberg, Pennsylvania is the proprietor.
- [4] Barone Monti Trading Inc. is an Ontario company which buys and sells peat moss. Mr. DiFrancesco is an officer and director of Barone Monti.
- [5] Mr. DiFrancesco learned of the auction of the COP equipment to be conducted by Woody’s. He was interested in bidding on the equipment. One of the litigated issues was whether he wished to purchase the equipment for the use of Mr. DiFrancesco’s mushroom business or Barone Monti’s peat moss business. I will discuss that point later.
- [6] Mr. DiFrancesco spoke to Ms. Woodfield. He authorized a down payment of \$15,000 on his credit card for any purchase, and said that he would wire the remaining purchase funds from the United States. Ms. Woodfield said that this would be unacceptable, and that the remaining funds had to be sent from a Canadian source. Mr. DiFrancesco told Ms. Woodfield that he would make arrangements for this.
- [7] Mr. DiFrancesco employed Mr. Jaceslavs Golods to attend at Woody’s auction and bid on the equipment. Woody’s required each bidder to complete a registration form. Mr. Golods completed a registration form which stated that the invoice for any purchase should be in the name of “Company: Barone Monti Trading”.
- [8] Mr. Golods was the successful bidder for the COP equipment. The down payment was made on Mr. DiFrancesco’s credit card. Woody’s made out an invoice to “Barone Monti Trading” and gave the invoice to Mr. Golods, who

- signed the invoice. Mr. DiFrancesco advanced the remainder of the purchase price to Barone Monti, who then paid the amount by a bank draft to Woody's.
- [9] In October 2003 Annapolis Valley Peat Moss Limited ("AVPM") sued Barone Monti for a debt. AVPM entered default judgment on April 13, 2004 for \$138,063.93. A sheriff, under execution, then seized the equipment which had been purchased at the Woody's auction.
- [10] Mr. DiFrancesco sought an order under **Rules** 53.08, 50.03 and 48.13 for a declaration that Mr. DiFrancesco, not Barone Monti, owned the seized equipment. So the equipment would not be executable toward AVPM's judgment against Barone Monti.
- [11] Justice Warner of the Supreme Court heard the application, with cross examination on affidavits, and dismissed Mr. DiFrancesco's application. Justice Warner ruled that Barone Monti, not Mr. DiFrancesco, owned the equipment.
- [12] The chambers justice stated:

[24] The onus is on Mr. DiFrancesco, on a balance of probabilities, to satisfy the court that the equipment purchased in the name of the defendant was purchased by the defendant solely as an agent for Mr. DiFrancesco; if Mr. DiFrancesco meets this burden, the parties acknowledge that the defendant had no interest in the equipment that could be sold under the execution order to satisfy the judgment of the plaintiff against the defendant.

- [13] The chambers justice ruled that Mr. DiFrancesco did not satisfy the onus. He reviewed the evidence and concluded:

[26] The evidence of the auctioneer leads me to believe that, while Mr. DiFrancesco was financing the purchase of the equipment, it was not for himself but rather for the defendant [Barone Monti].

- [14] Accordingly, the equipment was purchased for Barone Monti, not for Mr. DiFrancesco. The equipment was subject to execution by AVPM as a judgment creditor of Barone Monti.
- [15] Mr. DiFrancesco applies for leave and, if granted, appeals.

### *Issue*

- [16] The only issue is whether, after the auction, the owner of the equipment was Mr. DiFrancesco or Barone Monti. If the owner was DiFrancesco, the equipment is not subject to execution by AVPM.

- [17] Mr. DiFrancesco says that, though nominal title may have been taken in the name of Barone Monti, this was held in a resulting trust for the benefit of Mr. DiFrancesco.

### *Standard of Review*

- [18] A suggested error of law, including one which is extractable from a mixed question of law or fact, is reviewed for correctness. Factual matters, including inferences, and mixed questions of fact and law from which no error of law is extractable, are reviewed for palpable and overriding error. *Housen v. Nickolaisen*, [2002] 2 S.C.R. 253, at ¶ 8, 10, 19-25, 31-36.

### *Resulting Trust*

- [19] Mr. DiFrancesco's submission is summarized in the following passages from his factum:

37. This was an error on His Lordship's part. The onus on the Appellant was to show that he supplied the purchase money. At that point, the rebuttable presumption arises; he is the beneficiary of a resulting trust in the asset for which he supplied the purchase money subject to evidence being adduced sufficient to displace that presumption.

38. It is uncontested that the Appellant provided the purchase money for the auction equipment.

39. The invoice for the equipment was made out in the name of Barone Monti. There can be no doubt that Barone Monti benefited from this transaction: equipment it did not pay for was used to satisfy a debt it owed.

40. There was no evidence adduced upon which the trier of fact could conclude that there was any intention on the part of the Appellant to make a gift.

Accordingly, Mr. DiFrancesco's payment of the purchase price would create a presumption of a resulting trust, which was not rebutted by evidence to show that Mr. DiFrancesco intended to benefit Barone Monti. So Mr. DiFrancesco would be the beneficial owner of the equipment.

- [20] In my view, this submission fails because it ignores a pre-condition to the presumption of this category of resulting trust.

[21] In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at pp. 449-50, Justice Dickson (as he then was) for the plurality stated:

In the well-known work, *Underhill's Law Relating to Trusts and Trustees* (12th ed.), it is said (at p. 9) that trusts may be created:

- (i) intentionally by the act of the settlor, in which case they are called express trusts, or
- (ii) by implication of a court of equity, where the legal title to property is in one person and the equitable right to the beneficial enjoyment thereof is in another, in which case they are called constructive trusts.

Resulting trusts are treated under the head of constructive trusts, for the reason, it is said, that it would be extremely confusing to divide them into such as depend on intention, and such as do not.

Notwithstanding the reluctance, the distinction is of practical importance. Constructive trusts are analyzed by the author as either resulting trusts, in which the equitable interest springs back or results to a settlor or his representatives, or non-resulting trusts; a resulting trust will be presumed in favour of a person who is proved to have paid the purchase money for real property *in the character of purchaser* if the real property is conveyed to another. [emphasis added]

[22] Mr. DiFrancesco's factum quotes (Justice) Eileen E. Gillese, *The Law of Trusts* (Toronto, Irwin Law, 1997), c. 6 (B) (2) (Q.L.):

Where one person provides the funds to purchase property, but title is conveyed to another, or into the joint names of the purchaser and another, that other becomes a resulting trustee for the purchaser. The principle is applicable to both real and personal property. Operation of the resulting trust doctrine arises in this case from the presumption that people do not make gifts.

...

In order for the presumption to apply, the claimant must show that it was she who provided the purchase money.

Two paragraphs after this quotation, Justice Gillese states:

Even where claimants can establish that they paid their purchase money, they must prove that they did so *as a purchaser*. [emphasis added]

To the same effect: Oosterhoff & Gillese, *Text, Commentary and Cases on Trusts* (Carswell 5<sup>th</sup> ed., 1998) pp. 327-28.

[23] Waters, *Law of Trusts in Canada* (2<sup>nd</sup> ed.), p. 305 states:

Though the claimant can establish that he owned and paid over the purchase money, he must also prove that he acted throughout *as a purchaser*. If in fact he was lending the money to the transferee, then his relationship with the transferee is that of a creditor with a debtor. It is not open to him to argue that he advanced the money which facilitated the purchase of the property, advantageous though such a position might be to the claimant in the event of the transferee's bankruptcy.

Cases which have applied this principle include: *MacKenzie v. Ryan* (1900), 33 N.S.R. 252 (S.C. *in banco*) at p. 259; *Clark v. MacInnis*, [1953] O.W.N. 551 (O.H.C.) at p. 552; *AMK Investments Ltd. (Trustee of) v. Kraus* (1996), 42 C.B.R. (3d) 227 (Ont. C.J. Gen. Div.) at para. 11; *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.*, [1998] B.C.J. No. 28 (B.C.S.C.) at ¶ 26, affirmed [1998] B.C.J. No. 2847 (C.A.).

[24] To establish the presumption of a resulting trust, and shift the onus of rebuttal, it is not sufficient that Mr. DiFrancesco simply prove that he was the source of the funds for Barone Monti to buy the equipment. Mr. DiFrancesco must also prove that he advanced this money in the character of a purchaser.

[25] The chambers justice found that Mr. DiFrancesco was not acting in the character of a purchaser:

[26] . . . The evidence of the auctioneer leads me to believe that, while Mr. DiFrancesco was financing the purchase of the equipment, it was not for himself but rather for the defendant.

[26] There is evidence to support this finding:

(a) Mr. DiFrancesco authorized Mr. Golods to appear at the auction. Mr. Golods represented himself to Woody's as the representative of Barone Monti, not of Mr. DiFrancesco. Mr. Golods approved a registration form for the bid which stated that the purchase would be invoiced to Barone Monti,

not to Mr. DiFrancesco. After the auction, the invoice, acknowledged by Mr. Golods' signature, was made out to Barone Monti, not to Mr. DiFrancesco.

(b) According to the principal of COP, Mr. Golods told COP that he represented Barone Monti, not Mr. DiFrancesco.

(c) There was no evidence from Mr. Golods. Nothing refuted his ostensible authority as agent for Barone Monti.

(d) Mr. DiFrancesco did not suggest to the auctioneer that Mr. DiFrancesco should be named as purchaser until August 2004, over one year since the auction, and after AVPM's execution against the equipment.

(e) Mr. DiFrancesco was an officer and director of Barone Monti. He could not recall whether he was a shareholder in Barone Monti, testimony which the chambers justice considered to be vague and unsatisfactory. In any case, it appeared that Mr. DiFrancesco was not at arm's length with Barone Monti.

(f) The chambers justice found:

While some of the equipment described during the hearing would no doubt be useful to Mr. DiFrancesco in his mushroom growing business, the court is satisfied that much of the equipment had no relevance to his mushroom business, and had no other useful purpose than in compressing and processing peat moss.

The sale of peat moss was Barone Monti's business.

(g) Mr. DiFrancesco and Mr. Monticchio of Barone Monti testified that in the past Mr. DiFrancesco would make purchases from Barone Monti.

[27] The chambers justice did not identify what he envisaged as the components of Mr. DiFrancesco's role as financier. But it is not difficult to complete the picture. The chambers justice found that much of the equipment had no value to Mr. DiFrancesco's business, but would be useful for Barone Monti's business. Mr. DiFrancesco's advance to purchase this equipment for Barone Monti could only be as a lender or financier, not a purchaser. Even for equipment usable in Mr. DiFrancesco's mushroom business, the transaction

would not be an immediate purchase by Mr. DiFrancesco. Rather it would be two consecutive transfers of title, first to Barone Monti to be followed by a separate transfer from Barone Monti to Mr. DiFrancesco, with Mr. DiFrancesco's advance to Barone Monti financing the first purchase. AVPM's execution occurred after the transfer to Barone Monti and before the second transfer from Barone Monti, and at that moment of execution Mr. DiFrancesco's character remained as a financier, not yet a purchaser.

- [28] There was evidence to support the chambers justice's finding that Mr. DiFrancesco acted as financier, not purchaser. There was no palpable and overriding error of fact and no extractable error of law.

*Conclusion*

- [29] I would grant leave to appeal but dismiss the appeal with \$1,000 costs, inclusive of disbursements, payable by Mr. DiFrancesco to AVPM.
- [30] The appellant initially described himself in the style of cause as "DiFrancesco & Sons Mushrooms" which is a business name. According to the evidence, Mr. Anthony DiFrancesco is the sole proprietor. The correctly named appellant is Mr. Anthony DiFrancesco, carrying on business as DiFrancesco & Sons Mushrooms, and the reasons and order will reflect this change to the style of cause.

Fichaud, J.A.

Concurring:

Bateman, J.A.

Oland, J.A.