NOVA SCOTIA COURT OF APPEAL
Citation: *Reid v. Reid*, 2020 NSCA 32

Date: 20200324
Docket: CA 491586
Registry: Halifax

Between:

Brenda Reid

Appellant

v.

Kathleen Reid

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	January 22, 2020, in Halifax, Nova Scotia
Subject:	**Unjust enrichment. Constructive trusts. Damages in lieu. Punitive damages.**
Summary:	At her son Michael's invitation, Kathleen Reid sold her home and constructed an apartment attached to her son's house. Kathleen Reid paid for materials and family members contributed labour. Michael agreed that he would pay utilities. After he died, his widow, Brenda Reid, sought to evict her mother-in-law who eventually moved to a new apartment. Kathleen Reid sued for unjust enrichment. The judge awarded her five years' rent of $64,200 in her new apartment as damages in lieu of a constructive trust of the apartment in the Reid home. He also awarded $10,000 punitive damages for Brenda Reid's mid-winter efforts to expel her 82-year-old mother-in-law from the apartment. Brenda Reid appealed.

Issues: Did the judge err in:

- finding an enrichment;
- finding no juristic reason for the enrichment;
- awarding damages calculated on a lost constructive trust over the apartment;
- awarding punitive damages?

Result: Appeal dismissed. Brenda Reid was enriched by premature recovery of the apartment which was to be Kathleen Reid's until she died or could no longer live independently. That accorded with the parties' reasonable expectations which included payment of Kathleen Reid's utilities, which were not to be "set-off" against the cost of constructing the apartment. Since she was evicted and had to find a replacement apartment, that cost was an appropriate measure of her loss of a home for which she had paid and which Brenda Reid prematurely acquired. The award of punitive damages was justified in view of the shocking conduct of Brenda Reid in expelling Kathleen Reid from her apartment.

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Respondent

Judges:	Bryson, Hamilton and Fichaud, JJ.A.
Appeal Heard:	January 22, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Hamilton and Fichaud, JJ.A. concurring
Counsel:	Scott R. Campbell and Ibrahim Badawi, for the appellant Ian Gray and Mark Holden, for the respondent

Reasons for judgment:

Introduction

[1] Brenda Reid appeals awards for unjust enrichment and punitive damages granted by the Honourable Justice Gerald R. P. Moir, respecting her eviction of Kathleen Reid from an apartment Kathleen had built in Brenda Reid's home (2019 NSSC 229).

[2] John and Kathleen Reid enjoyed a long and fruitful married life. They had four sons and one daughter. They lived together in a home in Tatamagouche. After Mr. Reid died in 1996, Kathleen Reid lived alone. None of her family lived close by. Kathleen's son Michael lived in Ellershouse with his wife, Brenda Reid. They had a spare room and offered it to Kathleen Reid to live with them. She did come and stay from time to time, while retaining her home in Tatamagouche.

[3] In 1999, Michael Reid proposed a more permanent arrangement; Kathleen Reid would build an apartment attached to the Reid home for her occupation. She would pay for materials and other family members would contribute work and labour. A building permit was issued and the apartment was built. Michael and Brenda Reid agreed to pay the utility charges for the new apartment. Kathleen sold her Tatamagouche home and moved into the Reid home in Ellershouse.

[4] Although attached to the Reid home, Kathleen Reid's apartment had a separate exterior entrance. It was almost 1,000 square feet in area. There was an internal staircase into the Reid home. The apartment itself comprised a kitchen, sitting area, bedroom, baths, closets and entry ways. It was fully furnished with hardwood and laminate floors, eight windows, interior doors, cupboards and the like. The judge was satisfied that Kathleen Reid had spent at least $25,000 on materials to have the apartment constructed.

[5] Michael Reid died unexpectedly in 2010 and title to the family home passed to Brenda Reid as his joint tenant. All seemed to be well until 2014 when the relationship between Kathleen and Brenda Reid deteriorated. Kathleen Reid permitted her grandson and great-grandson to move in with her. Apparently Brenda Reid resented these new occupiers and their use of the premises. Ultimately, Brenda Reid determined to have her mother-in-law out of the apartment. She told Kathleen Reid that she intended to sell the property. She wanted Kathleen Reid to move elsewhere.

[6] Kathleen Reid did not move out as Brenda requested. Following a sustained campaign of harassment by Brenda Reid, Kathleen, her grandson and great-grandson left in May of 2017. At the time of trial, two years later, the home had not been sold.

[7] More will be said about the circumstances of Kathleen Reid's eviction when discussing the judge's award of punitive damages.

[8] Like many informal family arrangements, the terms of Kathleen Reid's occupation were not comprehensively agreed. But after reviewing all the evidence, the judge was satisfied this much had been resolved:

> [31] I find that Michael Reid and, through him Brenda Reid, agreed with Kathleen Reid as follows:
>
> 1. Kathleen Reid could construct an addition on the home of Michael Reid and Brenda Reid;
> 2. Kathleen Reid would pay for the addition;
> 3. Michael and Brenda Reid would charge Kathleen Reid no rent, and they would bear the expense of the common utilities.
> 4. Kathleen Reid would live in the addition.

[9] Upon further consideration of the evidence, the judge inferred Kathleen Reid could remain as long as she wanted:

> [38] I find the agreement included a term of years ending when Kathleen Reid moved out or died. Otherwise, she was entitled to live in "her" apartment rent-free for as long as she wished. It was to be hers and, as such, she did not need consent to accept visitors or roommates, especially her own family.

[10] The agreement between the parties was oral. Apparently it was unenforceable because the *Statute of Frauds* requires agreements respecting real property to be in writing. There is no suggestion from the parties or the trial judge that a claim for part performance could have been made. Nor was any claim advanced for proprietary estoppel owing to Kathleen Reid's detrimental reliance on Michael Reid's representations to her (see: *Maritime Telegraph and Telephone Company v. Chateau LaFleur Development Corporation*, 2001 NSCA 167 at ¶38-40, 49-50; *Zelmer v. Victor Projects Ltd.*, 90 BCAC 302 at ¶24-49). In coincident circumstances, proprietary estoppel and unjust enrichment may both produce constructive trust relief (*Ogle v. Ogle*, 2005 SKCA 14 at ¶12). However, the claim in this case was confined to unjust enrichment.

[11] In lieu of a constructive trust, the judge awarded Kathleen Reid rent on the apartment she moved into after leaving the Reid home. He ordered payment of $64,200.00, representing rent over five years.

[12] Brenda Reid makes two fundamental criticisms of the trial judge's decision. First, she says the judge erred in finding unjust enrichment. Alternatively, the judge erred in his assessment of remedy. Her elaboration on these points will be considered in the analysis which follows.

Did the judge err in finding unjust enrichment?

[13] A party seeking a remedy for unjust enrichment must establish:

1. An enrichment of the defendant;
2. A corresponding deprivation of the plaintiff;
3. An absence of juristic reason for the enrichment.

[14] Unjust enrichment awards are restitutionary. The plaintiff's deprivation is not limited to out-of-pocket expenses and so may not equal the defendant's enrichment. A benefit conferred may far exceed the initial deprivation suffered (see for example *Moore v. Sweet*, 2018 SCC 52 at ¶44). The nature and the quantum of the remedy may vary depending on the circumstances. It can be an amount equal to what a plaintiff gave or paid. Alternatively it may be an amount representing the "value retained" by the defendant. In some cases a proprietary remedy may be preferable to a monetary award (*Kerr v. Baranow*, 2011 SCC 10, at ¶49-50). More will be said about this when considering the judge's remedy.

[15] Brenda claims that no unjust enrichment was established at trial. She faults the judge in the following respects:

- He erred in finding that there had been an enrichment to Brenda arising from an increase in the value of her property as a result of Kathleen's construction of the apartment.

- He erred in finding no juristic reason for enrichment by failing to consider:

- the reasonable expectations of both parties.
- mutuality of conferred benefits.
- public policy arguments against unjust enrichment.

[16] These arguments will be addressed in order.

No enrichment?

[17] Brenda Reid insists that she received no benefit from Kathleen Reid when the apartment was added to the family home. She says no evidence was led respecting its impact on the value of the house—in particular, there was no evidence of an increased market value arising from construction of the apartment. Absent such evidence, no enrichment is established.

[18] Brenda Reid unfavourably contrasts this case with *Murphy v. Colbourne*, 2016 NSSC 211, in which the court acknowledged that value to a defendant may not bear direct relation to expenditure by a claimant. Nevertheless, in *Colbourne* there were property tax records showing an increase in assessed value which allowed the court to infer that the home improvements paid for by the plaintiff had been of value to the defendant.

[19] In this case, there is evidence of increased assessment value of Brenda Reid's property following construction of the apartment. But she maintains it is a frail foundation on which to find an enrichment.

[20] Brenda Reid also points to the British Columbia case of *Scholz v. Scholz*, 2013 BCCA 309, in which the court rejected evidence of an enrichment arising from the claimant's construction of a coach house on the defendant's property. But *Scholtz* is plainly distinguishable because the coach house did not increase the living space and thus the value of the Scholz home, and the stand alone value of the coach house was unknown.

[21] In the end the judge was unpersuaded by Brenda Reid's submission that the apartment was of no value:

> [48] We must not unnecessarily insist on expert evidence. We are expected to use our common sense when facts are established, including facts about the value of a residential property. Proof that the living area of a residence was substantially increased by labour and material of good quality may be proof of a significant increase in value.

> …
>
> [59] I find that Kathleen Reid added significantly to the value of the Ellershouse property. I also find that the five categories of expenses alleged by Brenda Reid do not offset that value in any way. The finding of a significant increase in value is based on my observation about a one third increase in the size of the dwelling, the sums invested by Kathleen Reid towards the addition, the labour and other contributions made generously by her sons, and the apparent quality of the construction.

[22] Whether the apartment added value to Brenda Reid's house was a matter of fact for the judge. That she expended considerable time and effort—both personal and legal—to evict Kathleen Reid is some indication of the value to Brenda of recapturing the vacant apartment from her mother-in-law. The judge made no clear and material error in finding enrichment to Brenda.

Was there a juristic reason for any enrichment?

[23] Brenda Reid augments her first ground of appeal by arguing that even if there were an enrichment, there was a juristic reason which should have precluded any award in Kathleen Reid's favour.

[24] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 addresses the absence of juristic reason:

> 44 … the proper approach to the juristic reason analysis is in two parts***. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery.*** … The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> [Emphasis added]

[25] Once a *prima facie* case has been established, the defendant can rebut it in certain circumstances. Referring again to *Garland*:

> 45 ***The prima facie case is rebuttable, however, where the defendant can show that there is another reason to deny recovery.*** As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances

> of the transaction in order to determine whether there is another reason to deny recovery.
>
> 46 ***As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations***. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.
>
> [Emphasis added]

Reasonable expectations:

[26] Relying on the foregoing principles, Brenda Reid argues that the judge wrongly restricted his analysis of reasonable expectations by focusing on the "unenforceable agreement" between Michael Reid and Kathleen Reid. Brenda Reid complains that the judge confined himself to Kathleen's expectations whereas the emphasis should have been on the expectations of both parties:

> It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant ….
>
> *Kerr*, at ¶124

Brenda says her expectations were not considered.

[27] In fact, to repeat an earlier quotation, the judge did consider Brenda Reid's expectations because he was satisfied that she agreed with her late husband:

> [31] ***I find that Michael Reid and, through him Brenda Reid, agreed with Kathleen Reid as follows:***
>
> 1. Kathleen Reid could construct an addition on the home of Michael Reid and Brenda Reid;
>
> 2. Kathleen Reid would pay for the addition;
>
> 3. Michael and Brenda Reid would charge Kathleen Reid no rent, and they would bear the expense of the common utilities.
>
> 4. Kathleen Reid would live in the addition.
>
> [Emphasis added]

[28] Although the judge found that Brenda Reid was not a party to any discussions between Kathleen Reid and Michael Reid, nevertheless he was satisfied that Michael Reid's agreement with his mother represented the wishes of them both. Honouring the agreement during Michael Reid's lifetime and for some years thereafter until Kathleen Reid's grandson and great-grandson moved into the apartment, demonstrates Brenda's acquiescence with the agreement reached.

[29] "Underpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties" (*Kerr*, at ¶94). That autonomy finds expression in the parties' intentions which the Court will generally respect (*Kerr*, at ¶96-97). While these observations arose in the context of determining the existence of a domestic joint family venture, the underlying unjust enrichment principles are the same for all cases (*Kerr*, at ¶33-34).

[30] The role of reasonable expectations is primarily focused on whether there is a juristic reason for an enrichment. But this must apply both ways: to whether a benefit can be retained by a defendant and whether any benefit to the plaintiff can be retained. Taking mutual benefits into account does not depend on whether the defendant has pleaded set-off or has counterclaimed; either way they must be considered (*Kerr*, at ¶111). In this case, the judge found that the reasonable expectation of the parties was that Kathleen would build and remain in her apartment until she could no longer do so. She would not be paid by Michael and Brenda who would "inherit" the apartment at that time. In the meantime, they would pay utilities.

Mutual benefits:

[31] Mutual benefits may be considered to establish a reasonable expectation of a juristic reason to retain benefits. But fundamentally they are considered at the defence/remedy stage. As Justice Cromwell put it in *Kerr*:

> [115] ***The fact that the parties have conferred benefits on each other may provide relevant evidence of their reasonable expectations***, a subject that may become germane when the defendant attempts to show that those expectations support the existence of a juristic reason outside the settled categories. However, given that the purpose of the juristic reason step in the analysis is to determine whether the enrichment was just, not its extent, ***mutual benefit conferral should only be considered at the juristic reason stage for that limited purpose***.

> (3) Summary
>
> [116] I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.
>
> [Emphasis added]

[32] Brenda Reid says there was no evidence that either party reasonably expected that Kathleen would be repaid for constructing the apartment. She points to payment of such things as utilities offsetting Kathleen Reid's investment in the property. She notes that at one point her husband Michael "felt that we were even" with Kathleen Reid. This submission misses the nature of the benefit conferred. The apartment was intended to be Kathleen's home, but thereafter it would belong to Michael and Brenda Reid. The ultimate "benefit" was not simply the money expended, but the enjoyment of the fruits of that expense—first for Kathleen and later for Michael and Brenda.

[33] Brenda Reid adds that the "mutual conferral of benefits" should have cancelled the value of Kathleen's contribution to the property and should have led to an inference of a "*quid pro quo"*.

[34] Here Brenda Reid is attempting to use an accounting exercise to overcome the judge's factual finding of reasonable expectation. That finding addressed the expectation that certain occupational expenses would be paid for by Michael and Brenda Reid during Kathleen Reid's tenure. It was not a question of allowing her to remain until the parties were "equal" and then Kathleen Reid would be "on the street". To repeat, Brenda Reid's own conduct in honouring the agreement for some years after her husband's death is consistent with the judge's finding and inconsistent with her present argument.

[35] Moreover, Brenda Reid's attempt to obtain credit for benefits conferred on Kathleen contradicts the judge's findings of the agreed benefits:

> [81] Kathleen Reid moved from a rent-free home in Tatamagouche to a rent-free apartment in Ellershouse. There was no obligation to pay rent. Nothing to set-off. On Brenda Reid's own evidence, the utilities were in exchange for the contributions.

[36] The judge explained how mutual benefits were subsumed in reasonable expectations:

> [84] The first stage juristic reason that justifies Kathleen Reid having made no contribution to common expenses is contract, albeit unenforceable. Brenda Reid's own evidence justified her bearing the common expenses on the ground that Kathleen Reid paid for the addition.
>
> [85] The evidence precludes a second stage juristic reason. Reasonable expectations are defined by the unenforceable agreement, including payment of common expenses.

[37] Brenda Reid had earlier cited *Granger v. Granger*, 2016 ONCA 945 to argue the judge ignored Kathleen's onus to prove any enrichment. But on set off and mutuality of benefit, *Granger* supports Kathleen, not Brenda:

> [84] First, Katarina testified that she never expected to receive rent from John. This admission presents great difficulty for her in discharging the onus of proving a valid set-off. As noted by Maddaugh & McCamus, quoted above, if the expectation of the parties was that one party would provide personal services and the other would deduct from the value of those services the cost of room and board, then a valid set-off may be made out. ***But if the "parties' understanding was that the room and board was being provided gratuitously", then no deduction is appropriate.***
>
> [Emphasis added]

[38] Even if the exchange of mutual benefits favoured Brenda, that advantage would have to yield to the parties' reasonable expectations: that having built the apartment, Kathleen would live in it rent free. Without Kathleen's detrimental reliance described by the judge, there would have been no apartment and no mutual benefits. Reasonable expectation created, and therefore enjoys priority over, any mutual benefits.

Public policy:

[39] Brenda Reid next makes public policy arguments that the judge effectively converted Kathleen Reid's occupancy into a constructive trust of a life interest—thereby offending the *Matrimonial Property Act* which would have required Brenda Reid's consent as spouse to any disposition of matrimonial property. She adds that the judge's decision ignored Michael Reid's gifting of his interest in the property to his wife in his Will.

[40] Respectfully, these arguments also miss the point. Equitable rights and remedies do not depend on legal or statutory rights but supplement them unless legislatively excluded. By way of one example only, the *Matrimonial Property Act* reverses the presumption of resulting trust in the case of a transfer between spouses. The statute recognizes and, indeed, presumes the existence of the equitable right of resulting trust to which the legislation refers in order to modify it (*Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 21).

[41] Similar arguments were made in *Peter v. Beblow*, [1993] 1 S.C.R. 980 and more recently in *Moore* (at ¶13). In *Peter*, the argument was that the Legislature had excluded unmarried couples from property division legislation and therefore the court should not do by way of constructive trust what the Legislature had declined to do. The Court explained that this misunderstood equity's role to right an injustice which lacks a legal remedy (at p. 994, quoted in *Kerr* at ¶45).

[42] Similarly in *Moore*, the court determined that equitable relief was not precluded simply because Ms. Sweet was legislatively immune from the deceased policy holder's creditors. Ms. Moore had agreed to pay the life insurance premiums for her late husband and he agreed that she would be the beneficiary. He later so designated Ms. Sweet. The majority in *Moore* rejected the argument that Ms. Moore's contractual claim against her late husband's estate obviated equitable relief against Ms. Sweet directly for unjust enrichment.

Should a monetary award based on a constructive trust have been awarded?

[43] As Justice Cromwell explained in *Kerr* remedies for unjust enrichment are restitutionary:

> [46] Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

[44] A constructive trust is most commonly the proprietary remedy to which Justice Cromwell refers in *Kerr*. Unlike a conventional trust, a constructive trust is remedial and may be imposed irrespective of the intention of the parties because a monetary remedy would be inadequate. Because constructive trusts are proprietary, they may give greater protection to a claimant and have implications

for third parties. But the plaintiff must show a causal connection between the benefits conferred and the acquisition, preservation, maintenance or improvement of the property claimed (*Kerr*, at ¶50).

[45] Brenda Reid advances two arguments against a constructive trust. First, she says that the appropriate remedy should have been monetary, not proprietary, and commensurate with Kathleen's actual expenditure, less benefits conferred on her by Brenda and Michael. Second, she complains that the relief granted was not pleaded. Brenda begins her criticism with the judge's comment about the deprivation suffered by Kathleen:

> [66] The deprivation suffered by Kathleen Reid that corresponds with the benefit obtained by Brenda Reid can be seen in either of two ways. One is the money invested, and gifts made, to construct the apartment on the Ellershouse property. The other is the expectation of having her own apartment for her, her visitors, and her roommates to peacefully enjoy.

[46] As earlier described, the judge awarded Kathleen Reid $64,200.00 representing five years' rent. Brenda submits that the judge erred in awarding anything more than $25,000 (less set off). She alleges a misuse of "reasonable expectation" to elevate the amount or value of Kathleen's deprivation to that of a replacement apartment. This argument reduces what Kathleen created and Brenda appropriated, to a *quantum meruit* calculation of unjust enrichment.

[47] As a general proposition, restitutionary damages can be contrasted with expectation damages which inform the calculation of loss for breach of contact. But this principled distinction may conceal a practical coincidence of the two in some cases. For example, in *Moore* the plaintiff obtained a constructive trust remedy over $250,000 of life insurance proceeds because she had agreed to pay the insurance premiums so that she could be the beneficiary of the policy. Her former husband later changed the designated beneficiary. Ms. Moore had paid $7,000 in premiums. In vindicating Ms. Moore's claim, Justice Côté for the majority (at ¶44) quoted Justice La Forest in *Lac Minerals* at 669-70:

> …the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for this benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." [Emphasis of La Forest J.]

[48] In awarding a constructive trust, the Supreme Court considered it irrelevant to the unjust enrichment analysis that Ms. Moore had a contractual claim against her late husband's insolvent estate (*Moore*, at ¶51).

[49] *Moore* cites the difficulty of recovery as a reason for imposing a constructive trust in that case.

[50] In some respects, Kathleen's claim against Brenda is stronger than Ms. Moore's. First, Kathleen actually enjoyed the apartment she had built whereas Ms. Moore never had—and may never have received—the insurance money. Second, Ms. Moore was suing an innocent third-party beneficiary, not someone who had intentionally appropriated a benefit. However, as earlier described, the focus on an accounting exercise fundamentally misunderstands the benefit to Brenda lost by Kathleen—the enjoyment of the apartment as a home. It was always the case that Brenda would eventually acquire the benefit of Kathleen's expenditure, when Kathleen died or left. The apartment alone was not the "benefit". What Brenda received was the premature enjoyment of the fruit of Kathleen's expenditure—and that home is what Kathleen lost.

[51] It is difficult to comprehensively describe when courts will prefer the proprietary remedy of constructive trust to a personal remedy. To *précis* La Forest, J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p.p. 678-79, a constructive trust may be awarded when:

1. The plaintiff should have the priority over unsecured creditors that a right of property confers;
2. The plaintiff should have the benefit of changes in value in the property, rather than the wrongdoer;
3. The wrongdoer prevented the plaintiff from obtaining specific and unique property;
4. The moral quality of the wrongdoer's act may make it appropriate to deprive the wrongdoer of property improperly acquired;
5. It is "virtually" impossible to value the property;
6. The property is unique.

[52] In fact, the judge did not ultimately grant a constructive trust. But he used that potential remedy to approximate a monetary equivalent. Having decided that the benefit was a home for a term of years, he ordered reimbursement to Kathleen

equal to an apartment for the foregone years at the Reid home. The judge awarded Kathleen Reid a sum based on the cost of renting replacement accommodation for five years which he said "approximates the value of constructive trust of a life tenancy in the property" for that period. The judge considered the law when making his award:

> [86] Return of an investment is often the starting point for a damages award to compensate for unjust enrichment. The same goes for value of services. In this case, I would combine the two to recognize the services rendered on Kathleen Reid's behalf exclusively. In the right circumstance, there would be an offset for mutual benefits. See *Kerr* at para. 47 to 49 and 55 to 99, 100, and 124.
>
> [87] It is now clear that investment and services may be more justly compensated on the basis of appreciated wealth, or "value survived": *Kerr*, para. 85, 100, and 158.
>
> [88] ***Neither approach does justice to Kathleen Reid's claim.*** She relied to her detriment on the promise she could live, free of rent and free of mortgage payments, closer to her family for as long as she wanted. There is a strong connection between this promise and what Kathleen Reid gave up. She gave up her rent-free and mortgage payment-free home in Tatamagouche and used most of the proceeds for the materials necessary to build the Ellershouse apartment.
>
> [Emphasis added]

[53] There is some novelty to the judge's remedy because he does not ground his award in an assessment of the enhanced value of the Reid home arising from the addition of the apartment. But that is because that calculation does not address what Kathleen lost and Brenda gained.

[54] In *Kerr*, the Supreme Court emphasized the need to accommodate the flexibility of the cause of action with flexibility of remedy:

> [73] Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it. …

[55] And later:

> [79] … The unjust enrichment principle is inherently flexible and, in my view, the calculation of a monetary award for a successful unjust enrichment claim should be equally flexible. …

[56] The judge's assessment of the loss to Kathleen and the benefit to Brenda best reflects the reality that the apartment was intended to be Kathleen's home for the foreseeable future.

[57] In oral argument, Brenda Reid supplemented her factum by arguing the judge erred in his use of an expectation interest measure of damages. At best, she says Kathleen Reid should have received a monetary award equivalent to her contribution to the property. By giving her the equivalent of a home for five years, the judge was impermissibly implementing an unenforceable oral agreement, rather than restoring Kathleen Reid's actual expenditure.

[58] Again, Benda Reid's submission here misunderstands what was lost and what was gained. To repeat, as the judge found, Kathleen Reid was induced to leave her home and move in with her son and daughter-in-law:

> [88] … She relied to her detriment on the promise she could live, free of rent and free of mortgage payments, closer to her family for as long as she wanted. There is a strong connection between this promise and what Kathleen Reid gave up. …

[59] The parties had no expectation that Kathleen Reid was going to be paid for the apartment she built. Nor would Brenda and Michael Reid pay for it. In the end, Kathleen Reid would be gone because she was too old to live in her apartment or because she had died. And in the end, Michael and Brenda Reid would "inherit" the apartment. The real loss to Kathleen Reid in this case—and the concomitant gain to Brenda Reid—was the *premature* acquisition of the apartment Kathleen Reid built. She lost a home for the balance of her life of independent living. Brenda Reid obtained early occupation of the home that she could not expect to have until Kathleen left of her own accord or died. Brenda Reid was enriched by its early acquisition. Proper restitution to Kathleen Reid was to provide her with the best alternative available—funds for an apartment in lieu of the one she built to occupy for a period of years. This would be the closest thing to restoration of the home which Kathleen Reid had lost.

[60] Brenda Reid also objects that the amount calculated by the judge relied upon the cost of a three bedroom apartment because Kathleen Reid wanted to continue supporting her grandson and son. Brenda Reid says that Kathleen Reid could have only claimed for a one bedroom apartment.

[61] The evidence was that Kathleen Reid's grandson and great-grandson were living with her in her apartment in the Reid home. The judge found it was reasonable that she should be able to replace that accommodation. A three bedroom apartment accomplishes that.

[62] Brenda Reid complements her objection to the relief granted to Kathleen Reid by complaining that it was not pleaded.

[63] While acknowledging that Kathleen Reid's pleading was not a model of clarity, the following replies can be made to Brenda Reid's submission:

1. As a general matter, equitable relief in the context of an unjust enrichment claim is discretionary and it is difficult to predict with certainty what remedy may be accorded a claimant;
2. The pleading clearly described the facts which supported the relief granted: in particular the agreement by which Kathleen Reid left her home in Tatamagouche and financed the construction of an apartment in Michael and Brenda Reid's home;
3. Kathleen Reid's pleading in this case asked for $90,000—substantially more than the judge actually awarded;
4. The pleading sought various relief, including compensation for an "increase" in the value of the property; return of the value of Kathleen Reid's property, contributions to "moving expenses, travel expenses as well as other expenses incurred as a result of her move";

[64] Brenda Reid cites two authorities in support of her "not pleaded" submission: *Gillani v. Karmali*, 2014 ONCA 325 at ¶25-26; *Kirton v. Mattie*, 2014 BCCA 513 at ¶71-72. Importantly, however these cases ground the rule on prejudice to the party who has not been able to respond to the unpleaded claim. In *Smysniuk v Stecyk*, 2015 SKCA 54, the court explained why a failure to claim specific relief may not be fatal:

> [32] But the general rule is most aptly summarised by Richards J.A. in *Hamilton v Macdonell* (at p. 497) as: "…***where the facts as alleged in the plaintiff's pleadings would justify a relief not specifically prayed for, and that relief is such as is not inconsistent with the relief which is specifically prayed for***, such other relief may be given under the prayer for further and other relief". So, while plaintiffs must undoubtedly endeavour to claim in the prayer for relief all relief that they seek or to which they may be entitled, a failure to do so does not necessarily disentitle a plaintiff to relief.

> [33] On this basis, I find it was open to the judge to make an award of compensatory damages as against Stanley and John because ***Alan's pleadings are broad enough to contemplate such an award as against them (i.e., he put the appellants on notice with his claim they had "deprive[d] him of his property")***, he adduced evidence of his damages in that regard, and such an award is not inconsistent with the relief for which he had specifically prayed.
>
> [Emphasis added]

[65] The purpose of pleading is to put the defendant on notice of the jeopardy that may be faced. Brenda Reid does not allege that she did not know the case she had to meet—just the relief ultimately granted. That relief was argued in closing submissions. Brenda Reid did not then object—and does not do so now—that her evidence would have been any different had that specific relief been earlier claimed. She did not seek an adjournment. The parties filed post-trial briefs. There is no apparent evidentiary or legal prejudice arising from the specific relief belatedly sought and granted.

[66] In this case, the nature of the jeopardy was identified. Although not precisely quantified, that is in large measure a consequence of the equitable cause of action and the flexibility of the available remedies. The relief granted was available in light of the cause of action pleaded and the evidence led. Kathleen was not thereby prejudiced. The judge did not err in granting the relief awarded.

Punitive damages:

[67] The harrowing circumstances of Kathleen Reid's eviction by Brenda Reid attracted an award of $10,000 for punitive damages. In order to expel her 82-year-old mother-in-law, Brenda Reid:

- Served a *Protection of Property Act* notice on Kathleen Reid in February of 2017 to prohibit her from occupying the apartment that she had built and notifying her that she was subject to arrest and detention, and attempted to have the police do so;
- Changed the locks, intending to put her elderly mother-in-law out of her home in the middle of winter. Another member of the Reid family opened the apartment from inside and thereafter someone remained in the apartment to ensure others could gain entry;

- Shut off the water to the apartment in February of 2017, leaving Kathleen Reid to melt snow and buy bottled water for consumption. She lacked sufficient water for normal household needs;
- Threatened to shut off electricity to the apartment, although withheld acting on this threat until May.

[68] Before the trial judge, Brenda Reid defended her right to evict her mother-in-law. The judge quoted Brenda Reid's position from her counsel's argument:

> [105] …
>
> The Respondent submits that it makes no sense that property owners ought to be punished for – and deterred from – exercising their sacrosanct right to exclusive possession of their own property by taking reasonable, incremental, and necessary steps to remove unlawful trespassers. Accordingly, the Respondent submits that this is not an appropriate case to give any serious consideration to the Applicant's claim for punitive damages.

[69] The judge's laconic reply readily dispensed with that submission:

> [106] The problem with the premise is that Brenda Reid did not have a "sacrosanct right to exclusive possession". The problem with her conduct is she acted as if she did.
>
> [107] Coming upon a woman in her eighties who has lived for almost two decades in an apartment she built on the home of close relatives, one does not exhaust inquiry into her rights just by a trip to the Registry of Deeds.

[70] In general, damages in civil cases represent payment for injuries sustained; they are not intended to punish the wrongdoer. Punishment is typically the province of criminal and quasi-criminal law. However, in exceptional cases, punitive damages are available for intentional wrongful acts that are "so malicious and outrageous that they are deserving of punishment on their own" (*Honda Canada Inc. v. Keays*, 2008 SCC 39 at ¶62).

[71] Punitive damage awards should be "reasonably proportionate to the blameworthiness of the defendant, the plaintiff's vulnerability, the harm or potential harm directed specifically at the plaintiff and the need for deterrence". The judge should take into account other sanctions to which the defendant is subject, and the advantages gained by the defendant's misconduct" (*Industrial Alliance Insurance and Financial Services Inc. v. Brine*, 2015 NSCA 104, at ¶171,

quoting from the Supreme Court in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at ¶43). A discretionary award of punitive damages should be reserved for exceptional cases. They focus on the defendant's conduct, not the plaintiff's loss, to address the former's egregious conduct (*National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47).

[72] One only need review the shocking mid-winter attempts to evict her elderly mother-in-law, to be convinced that Brenda Reid's conduct satisfied the principles described by the Supreme Court, cited above.

Conclusion

[73] The judge did not err in fact or law in his application of the principles of unjust enrichment nor in the imposition of an appropriate remedy. His award of punitive damages is unimpeachable.

[74] The appeal should be dismissed with costs of $5,000.00, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.