**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Mattinson v. Fanning, 2011 NSSC 334

**Date:** 20110729
**Docket:** Hfx No. 348164
**Registry:** Halifax

**Between:**

Pauline Anne Mattinson

Applicant

v.

Andrew James Fanning

Respondent

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| **Judge:** | The Honourable Justice C. Richard Coughlan |
| **Heard:** | July 27, 2011 (in Chambers), in Halifax, Nova Scotia |
| **Decision:** | July 29, 2011 (Orally) |
| **Written Release of Decision:** | September 6, 2011 |
| **Counsel:** | Michael S. Ryan, Q.C. and Ezra B. van Gelder, for the Applicant<br>Andrew James Fanning, self-represented Respondent<br>Nicholas C. G. Mott, Watching Brief for the Toronto Dominion Bank |

**Coughlan, J.**: (Orally)

[1] Pauline Anne Mattinson applies for a declaration she is the sole beneficial owner of real property at 1259 Barrington Street, Halifax, Nova Scotia; that Andrew James Fanning has bare legal title to the real property which he holds on a resulting trust or, in the alternative, a constructive trust for Ms. Mattinson; and directing Mr. Fanning to convey legal title to the real property to Ms. Mattinson.

[2] Mr. Fanning, a long standing member of the Bar, was served with a copy of the notice of application in Chambers on May 27, 2011.

[3] Mr. Fanning did not file any documents responding to the application, but did appear at the hearing. He requested an adjournment, which I refused. He asked to give *viva voce* evidence, which I permitted him to do.

[4] Mr. Fanning testified he asked Ms. Mattinson, whom he knew, if he could live at 1259 Barrington Street. He moved in and lived there. Ms. Mattinson owned the building. Ms. Mattinson told him the Bank of Montreal was not going to renew the mortgage, so Mr. Fanning guaranteed a line of credit with the Bank of Montreal. Mr. Fanning does not know the status of the line of credit - Ms. Mattinson is paying it down.

[5] The real property was conveyed to Mr. Fanning by deed dated August 20, 2004.

[6] Mr. Fanning testified he paid expenses in connection with maintaining the property, including plumbing and electrical services. He also testified he paid the fire insurance initially after the property was conveyed to him, in the amount he thought of about $2,500 to $3,000. He said on one occasion he paid the plumber, Trevor, $5,000 and paid the plumber on numerous occasions - he was not sure of the number. Mr. Fanning acknowledged Ms. Mattinson obtained leases from the tenants, and the bank account from which the expenses of the real property were paid was Ms. Mattinson’s account in the name of Mattinson &White Rentals.

[7] Mr. Fanning did not produce any receipts or other documents evidencing his payment of any bills.

[8] Mr. Fanning acknowledged Ms. Mattinson collected the rents and ran the property.

[9] Mr. Fanning stated he paid arrears of the mortgage on the Barrington Street property. He gave $15,000 to a lawyer, Mr. David Grant, to pay to the Toronto Dominion Bank. Mr. Fanning did not provide any documentary evidence or call any witnesses about the payment of arrears of mortgage.

[10] Mr. Fanning stated Ms. Mattinson owed him $100,000, which debt Ms. Mattinson acknowledged by signing a promissory note to Mr. Fanning. The note concerns money Mr. Fanning loaned Ms. Mattinson.

[11] Mr. Fanning signed a lease dated September 1, 1998, leasing a unit in the Barrington Street property. The lease sets out the monthly rental as $700 per month. Mr. Fanning testified he initially paid $300 per month which was increased to $500 per month. He has paid no rent for the last seven months. Mr. Fanning says the real property at 1259 Barrington Street is his property. He testified he has been paying rent to himself.

[12] Mr. Fanning testified he did not cohabit with Ms. Mattinson. She moved in with him after her mother died. He did not cohabit with Ms. Mattinson in Tatamagouche, although Mr. Fanning has furniture of Ms. Mattinson's at his Tatamagouche residence.

[13] Ms. Mattinson testified she cohabited with Mr. Fanning - that they slept in the same bed for fifteen years. She moved in with Mr. Fanning when her mother died. Mr. Fanning and Ms. Mattinson decided they would rent her residence and live together. Ms. Mattinson stated she could never understand why her name was taken off the deed to the Barrington Street property.

[14] I accept that Mr. Fanning and Ms. Mattinson cohabited, and they moved in together after Ms. Mattinson's mother died.

[15] I have problems with Mr. Fanning's evidence. He says he did not cohabit with Ms. Mattinson, yet he was guaranteeing mortgages for her. He says he paid various expenses in connection with the property, but does not adduce corroborating evidence. I do not accept Mr. Fanning's evidence that he paid the expenses for the maintenance and upkeep of the real property. I accept Ms.

Mattinson's evidence that she paid the expenses in connection with the real property. I do accept Mr. Fanning loaned Ms. Mattinson money from time to time, which was evidenced by a promissory note Ms. Mattinson executed in favour of Mr. Fanning.

[16] I find the facts are as follows:

[17] The real property at 1259 Barrington Street, Halifax was conveyed to Ms. Mattinson and her then husband by her mother by deed dated April 18, 1980. The property consisted of a building with one commercial and five residential units. In 1986, Ms. Mattinson and her husband separated and her husband quit claimed his interest in the real property to Ms. Mattinson.

[18] In 1981, Ms. Mattinson incorporated Mattinson &White Interior Design Limited ("MW Design") to carry on her business as an interior designer. Since its incorporation, MW Design has maintained an office and showroom in the commercial unit of the property.

[19] Since 1980, Ms. Mattinson managed all aspects of the property under the business name Mattinson & White Rentals. This management includes the execution of rental agreements, collections of rents and payment of all property and business taxes, mortgage payments, and maintenance costs. She has maintained a bank account in the name of Mattinson & White Rentals with the Bank of Montreal in Halifax for this purpose.

[20] On June 19, 1986, Ms. Mattinson obtained a mortgage secured against the property from Central Trust Company.

[21] On December 23, 1988, Ms. Mattinson obtained a second mortgage secured against the property from Central Trust Company.

[22] Both mortgages with the Central Trust Company were subsequently released.

[23] In 1990, MW Design obtained a commercial line of credit in the amount of $60,000 from the Bank of Montreal ("BMO"). As security, Ms. Mattinson mortgaged the property to BMO on December 11, 1990.

[24] In or about 1992, Mr. Fanning moved into one of the residential units of the property, but did not execute a rental agreement with Mattinson & White Rentals until the lease I mentioned previously.

[25] In or about 1995, Mr. Fanning and Ms. Mattinson started seeing each other romantically.

[26] On August 16, 1999, Ms. Mattinson obtained a second mortgage against the property from Equisure Trust Company ("Equisure") in the amount of $285,000. Mr. Fanning guaranteed the Equisure mortgage. Ms. Mattinson also executed an assignment of rentals to Equisure on August 16, 1999.

[27] The Equisure mortgage matured in 2004. Ms. Mattinson did not qualify for refinancing. Mr. Fanning offered to obtain financing on her behalf. They were told by the Toronto Dominion Bank that it would grant a mortgage to Mr. Fanning only if he were the sole legal owner of the property. As a result, Ms. Mattinson conveyed the property to Mr. Fanning by warranty deed dated August 20, 2004. Mr. Fanning did not pay Ms. Mattinson any money for the property and she transferred title only so that he could obtain a mortgage secured against the property.

[28] On August 20, 2004, Mr. Fanning obtained a mortgage from the Toronto Dominion Bank in the amount of $365,000. Mr. Fanning also executed an assignment of rentals dated August 20, 2004.

[29] Most of the proceeds from the 2004 mortgage was used to repay the outstanding balance of the Equisure mortgage. The Equisure mortgage was released on August 23, 2004. Ms. Mattinson also gave a portion of the proceeds to Mr. Fanning to repay him for money he had previously lent her. Ms. Mattinson used the remainder for personal and business expenses.

[30] On June 14, 2005, Mr. Fanning obtained a second mortgage against the property from TD in the amount of $450,000.

[31] In 2006, Mr. Fanning and Ms. Mattinson began to cohabit after Ms. Mattinson's mother died. Between 2006 and 2010 they lived in his unit at the property.

[32] On March 31, 2006, the 2004 mortgage was repaid in full and released.

[33] In 2007, Ms. Mattinson needed additional funds to cover accrued personal expenses for the care of her elderly mother who died in 2006. As a result, Mr. Fanning agreed to refinance the 2005 mortgage. On September 27, 2007, Mr. Fanning obtained a mortgage from TD in the amount of $510,000. Mr. Fanning also executed an assignment of rentals dated September 27, 2007.

[34] The proceeds from the 2007 mortgage were used largely by Ms. Mattinson to repay the outstanding balance of the 2005 mortgage. A portion of the proceeds were used to repay Mr. Fanning for money he had previously lent her. Mr. Fanning transferred the remainder of the proceeds to Ms. Mattinson for her personal use.

[35] The mortgage in respect of the line of credit obtained by MW Design in 1990 was released on November 19, 2007.

[36] The 2005 mortgage was repaid in full and released on December 21, 2007.

[37] In 2010, Mr. Fanning and Ms. Mattinson ended their relationship. Ms. Mattinson moved out of Mr. Fanning's apartment on October 1, 2010. Most of her personal belongings remained in Mr. Fanning's possession in his apartment and at another property owned by him. Mr. Fanning has not paid rent since October 1, 2010.

[38] During their relationship, Ms. Mattinson occasionally borrowed money from Mr. Fanning. Ms. Mattinson executed a promissory note in favour of Mr. Fanning concerning the monies borrowed.

[39] Ms. Mattinson continues to incur costs associated with the upkeep of the property, including payments of principal and interest on the 2007 mortgage until very recently. Ms. Mattinson now wishes to sell the property, pay out the 2007 mortgage which is in arrears, repay the amount owing under the promissory note and generally move on with her life.

[40] The real property has an assessed value of $585,100 ($403,700 residential taxable and $181,400 commercial taxable). On June 28, 2011 the Toronto

Dominion Bank commenced a foreclosure action in respect of the real property. Mr. Fanning and Ms. Mattinson are named as defendants.

[41] Ms. Mattinson is considering listing the real property for sale, for an asking price of $1,350,000.

[42] Does Mr. Fanning hold the real property on a resulting or constructive trust for Ms. Mattinson?

[43] In dealing with the issue of resulting trusts, Cromwell, J, in giving the Court's judgment in *Kerr v. Baranow*, 2011 SCC 10, stated at paras. 16, 17 and 18:

> ... However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": *Oosterhoff*, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters'*, at p. 21.
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> Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of property, and in the second case because there was no consideration for the contribution to the acquisition of the property.
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> The Court's most recent decision in relating to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 798, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "the trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added).

[44] In this case, the real property was transferred to Mr. Fanning as Ms. Mattinson did not qualify for a mortgage. Mr. Fanning made no contribution toward the purchase of the property. The real property was solely transferred to

Mr. Fanning as he was able to obtain mortgage financing. I find there was no common intention that Mr. Fanning would acquire beneficial ownership of the real property. In the result, I find Mr. Fanning holds the real property on a resulting trust for Ms. Mattinson.

[45] In the event I am in error in finding a resulting trust exists, I go on to determine whether a constructive trust exists.

[46] In order for there to be a constructive trust, there must be an unjust enrichment which cannot be compensated by a monetary judgment.

[47] The requirement to establish whether an unjust enrichment exists was set out by McLachlin, J. (as she then was) in *Peter v. Beblow*, [1993] 1 S.C.R. 980 at p. 987 as follows:

> The basic notions are simple enough. 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. These proven, the action is established and the right to claim relief made out. ...

[48] There is an unjust enrichment here, in that, Mr. Fanning has been enriched by obtaining legal title to the property. Ms. Mattinson has been deprived of the property. There is no juristic reason for Mr. Fanning's enrichment.

[49] In order for a constructive trust to arise, there must be a direct link between the property and the contribution of the person who suffered the deprivation. Here that connection between Ms. Mattinson and the property exists. She owned the real property for many years before conveying it to Mr. Fanning. She has paid the costs of maintaining the property. A monetary award is not adequate considering Ms. Mattinson's connection with the real property, also the real property has significant value. Ms. Mattinson wishes to sell it, pay her debts and use the remaining equity to finance her retirement.

[50] Based on the evidence before me, I find Mr. Fanning holds the real property on a constructive trust for Ms. Mattinson.

[51] What is the extent of the constructive trust?

[52] In *Peter v. Beblow*, *supra*, McLachlin, J., stated at paras. 28 and 29:

> ... It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.
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> From the point of view of doctrine, "the extent of the interest must be proportionate to the contribution" to the property: *Pettkus v. Becker, supra*, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.

[53] Mr. Fanning has not contributed to the value of the real property. He did not assist with the maintenance or upkeep of the property. I do not accept that he made any payments on the mortgages on the real property. I find Ms. Mattinson paid the expenses incurred in the maintenance and upkeep of the real property.

[54] Mr. Fanning is entitled to be paid the money he is owed by Ms. Mattinson pursuant to the promissory note Ms. Mattinson gave him.

[55] Ms. Mattinson is entitled to an order declaring she is the sole beneficial owner of the real property located at 1259 Barrington Street, Halifax, Nova Scotia; that Mr. Fanning holds legal title to the real property on a resulting trust, or as I also found in the alternative on a constructive trust for Ms. Mattinson and directing Mr. Fanning convey legal title to the real property to her by deed. The same form of deed is to be used by which Ms. Mattinson conveyed the real property to Mr. Fanning.

[56] The matter of the promissory note is not before me and therefore I am not in a position to adjudicate on that matter. I certainly hope the parties can work something out. There is an acknowledgement by Ms. Mattinson that there was a promissory note. As Mr. Ryan quite correctly points out, that is for another day and, of course, as my decision stated, the only thing I found was that there was a promissory note. The promissory note is not in evidence before me. There are many defences to an action on a promissory note.

[57] Considering all of the facts of this matter, I first of all award the sum of $1,000 - take that as the base - and apply a multiplier of two, to provide for costs in the amount of $2,000.

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Coughlan, J.