

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Tabensky v. Campbell 2012 NSSC 39

Date: 20120125

Docket: SFPAMPAY-065415

Registry: Port Hawkesbury

Between:

Michelle Tabensky

Applicant

v.

Kevin Campbell

Respondent

Judge:

The Honourable Justice Moira Legere Sers

Heard:

October 20 and October 2, 2011, in Port Hawkesbury,
Nova Scotia

Counsel:

Michelle Tabensky, applicant, self represented
Wayne MacMillan, for the respondent

By the Court:

[1] The original application dated the 23rd of April, 2009, was commenced under the *Matrimonial Property Act* and subsequently amended on September 28th 2011. The parties were never married. The applicant is self represented.

[2] The amendment clarified that the applicant sought relief under the *Partition Act* as well as sale and a division of property and personal and business debts.

[3] Counsel did not object to the amendment. The issues were well known to both parties having been discussed in whole or in part at administrative pre-trials dated January 22, 2010; April 19, 2010; July 4, 2011; and July 21 2011.

[4] The respondent acknowledged in his brief at page 3 that the pleadings were consistent with a request for declaratory relief pursuant to Rule 38.07(5) of the Civil Procedure Rules 2009.

[5] The nature of the claims made by both parties invoke the courts consideration of equitable principles. While the self-represented party was unaware of the need to articulate this in the pleadings, her affidavit and his request for relief as well as the submissions of counsel for the respondent clearly speak to their individual requests for equitable relief.

[6] The applicant argued for a sharing of business debts, more specifically for the court to require the respondent to cover the deficiency after sale.

[7] The respondent asked for a share of the profits in the business, or in the alternative compensation in equity by way of deemed income from the business for the years he worked for the business. The respondent seeks a finding that the business income and vehicles were subject to a resulting trust in his favor.

[8] Both parties ask for a monetary award.

History of Relationship

[9] The parties began a common law relationship on October 1, 1994.

[10] Almost fourteen years later they separated on July 4, 2008. There was no agreement between them. There were no children of the union.

[11] The relationship and the subsequent separation has been fraught with high conflict and self-help remedies resulting in frequent police involvement.

[12] The assets and debts in dispute are:

- a home held in joint tenancy;
- a landscaping and snow plowing business registered in the applicant's name only;
- the disposition of business assets in the applicants name;
- the payment of business debts, some of which are joint debts;
- the disposition of a Volkswagen Jetta joint car and loan;
- household possessions and tools ; and
- a current defined and future undefined tax debt.

[13] I have not considered the issue of who owns the horse. Evidence on this point was lacking.

[14] The **applicant** seeks:

- A valuation of the family home in accordance with her 'Wambolt' appraisal (\$165,000 for 12 acres and \$24,000 for 18 acres);
- credit for insurance premiums paid on the home from July, 2008, to date;
- in response to the respondent's request for credit for post separation payments for the home, the applicant seeks occupational rent between August, 2008, and October 1, 2011, (38 months);
- division of property and payment of half equity;

-compensation for a tax debt of \$9,900.40 due to a tax reassessment of HST remittances resulting from a loss of business and personal records;

-restitution for future tax liability as a result of the loss of personal and business records;

-compensation for the deficiency on business debts of \$7,928.28 as a result of respondent's conduct;

-credit (in the amount of \$3,837.00) for the VW Jetta car and insurance payments resulting from a joint loan from August 1, 2008, to March, 2009;

-restitution for loss of business tools disposed of by respondent; and

-restitution for personal items left in home and disposed of by respondent.

[15] The **respondent** seeks the following relief:

-a valuation of the family home in 2009 at \$114,500.00 for 12 acres and \$12,000.00 for 18 acres;

-division of equity less a credit for the total of mortgage and interest payments paid by him for the home for 38 months;

-half interest in all income earned by the business between 2003 and 2008;

-in the alternative, a share in the business in the amount of \$39,000.00 to \$46,000.00 as compensation for the labour he performed for the business;

-\$26,000.00 in compensation for the difference between the value of the business equipment after debts and the actual sale value;

-compensation for the loss of personal assets, cash, and loss of tools in the amount of \$13,130.50;

-compensation in the amount of \$ 9,500.00 for the loss in sale price for the VW Jetta and four (4) wheeler less outstanding loans: and

- compensation for damage he alleges were caused to the home when the applicant removed her possessions.

The Home

[16] The first home the parties purchased in Mulgrave, Nova Scotia, in November of 1997 was subsequently sold.

[17] On December 16, 1999, the couple purchased land in joint tenancy in Long Point, Cape Breton, for \$12,000.00 from the respondent's grandfather's estate. The site has two brooks running through it. The property had been appraised at \$14,000.00.

[18] The residence and 12 acres make up one property (PID#50013051) 317 Chishlom Road, Long Point, Inverness County, N.S. The second parcel consists of another 18 acres and is separately assessed.

[19] Together, the couple built a new home in Long Point and moved into their home in March of 2002.

[20] Some of the land was developed as a hobby farm. They raised pigs, laying hens, chickens and turkeys as well as tending a large vegetable garden.

[21] The respondent has had exclusive possession of the home since separation. He changed the locks on this home in August, 2008, denying the applicant access.

Mortgage

[22] On October 30, 2001, they mortgaged the home for \$107,803.00. They remortgaged effective December 13, 2005, to secure an advance of \$37,139.10, raising the mortgage to a balance of \$139,191.50.

[23] In the end, the respondent's counsel did not contest the evidence tendered by the applicant that the proceeds of this remortgage paid the balance outstanding on the home building contract and the balance of the respondent's automobile loan of \$21,406.86.

[24] The letter of December 8, 2005, found at tab 1 of the respondent's affidavit confirms that the parties paid \$13,500.00 to obtain a discharge from the registered lien.

[25] The car loan payment is found at tab 1 of the applicant's affidavit sworn October 5, 2011.

[26] This is one of many indicia of a couple engaged in a joint venture.

Mortgage Payments

[27] The closest estimate of the mortgage balance as of the June, 2008, separation date is the statement indicating that as of December, 2008, the outstanding mortgage balance was \$126,424.63.

[28] The December 13, 2005, remortgage agreement confirms that monthly payments of principal and interest at a rate of 5.44% were \$975.46. The mortgage was renewable in January, 2011.

[29] An August 4, 2009, statement shows monthly taxes of \$151.73.

[30] The respondent alone renewed the mortgage effective July 2, 2011, to January 1, 2012. He secured a six month fixed rate open for the balance of the mortgage (\$112,331.86) at 6.30% for a total principal interest and property tax payment of \$1,182.24. This document is the latest proof of the mortgage balance available to the Court.

[31] There will be no penalty if it is paid within the time frame.

Source of Mortgage Payments

[32] Payments for the mortgage generally came from a joint BMO checking account. The respondent's pay and employment insurance payments were deposited into this account.

[33] The respondent claims he made all mortgage payments pre and post separation.

[34] The evidence supports a conclusion that this was not always the case.

[35] The applicant agrees that this was the respondent's primary responsibility.

[36] However, on some occasions pre-separation, the respondent's pay was insufficient to pay the mortgage. On those occasions the applicant paid what was owing.

[37] The respondent testified the applicant did not deposit any money into his account to pay the mortgage. This is not correct. Exhibit 3 in the respondent's affidavit shows a deposit into the joint BMO account on June 8, 2007 for \$700.00 made by the applicant to ensure the mortgage was paid at a time when the respondent was in Alberta.

[38] The three banking statements dated the period ending July 6, August 3 and September 6, 2007, provided by the respondent illustrate that pre-separation on August 1st the mortgage was in arrears from time to time. Mortgage arrears were deducted in the amount of \$2,089.62 and on August 31st a mortgage arrears payment of \$1,140.17 was deducted from this account.

[39] The respondent admits that post separation he withdrew \$2,000.00 from the business account in the applicant's name only (Affidavit of Kevin Campbell, page 9, para. 83) to pay the mortgage.

[40] Money from the applicant's business and personal account supplemented the mortgage payments when necessary.

[41] The applicant's pay, her car allowance and business income went into her business account and her personal account.

[42] Monies from her business and personal accounts with the credit union also paid down personal and business vehicle loans, supported the couple providing car and insurance payments, cell phones, food, clothing, oil, power, fuel, heat, restaurant and other necessities of life for the couple.

[43] This is another indicia of a joint venture.

Mortgage, Taxes and Interest Payments

[44] The evidence does not allow for a conclusion as to exactly who paid what and when.

[45] The respondent provides an estimate (para. 24 of his affidavit) which does not match his pre-trial brief (page 7).

[46] Based on the only mortgage documents I have, were I to consider a credit for mortgage payments (as requested), the figures from separation in August, 2008, up to but not including October 1, 2011, (38 months) might reflect the following:

$\$1,127.19 \times 35 \text{ (months)} = \$39,451.65$

$\$1,182.24 \times 3 \text{ (months)} = \$3,546.72 \text{ (approximately)}$

TOTAL = \$42,998.37

[47] This figure represents what was required to be paid and not conclusively what each paid. I accept the evidence of the applicant that the respondent did not always pay the mortgage in full and on a timely basis.

House Insurance

[48] The applicant paid the monthly insurance on the home (\$80.58 per month) from separation in August, 2008, to October, 2011; a period of 38 months.

[49] Supporting documentation confirms she paid the following:

January, 2008, to December, 2008, - \$714.21;

January, 2009, to December, 2009, - \$1,033.53;

January, 2010, to December, 2010, - \$900.99;

January, 2011, to September, 2011, - \$725.22.

[50] From August to December, 2008, post separation, she paid \$297.58. From August, 2008, to September, 2011, she paid **\$2,957.32**.

Exclusive Possession

[51] The claims for credit for payments made to service the mortgage, occupational rent, and the disposition of business assets requires an analysis of the circumstances that existed and the reasons for the delay in the division of the property.

[52] The applicant alleges she left the home due to high conflict and domestic violence. The result of the criminal trial of these matters was not resolved before this hearing.

[53] There were a number of undertakings entered into by the respondent subsequent to numerous charges relating to domestic violence.

[54] The applicant advised that there are 19 assaults and two breaches of undertaking currently before the Court relating to her allegations of domestic abuse. She further advised that the RCMP have classified the respondent as a high risk to be lethal.

[55] The two undertakings before me, one dated August 7, 2008, and one dated August 29, 2008, in summary required the respondent to refrain absolutely from direct or indirect contact with the applicant.

[56] For the purpose of this hearing, I make no findings on the issue of domestic violence as it relates to their state of relationship except to the extent I have corroborating evidence that has affected the timely division of property and debts.

[57] At separation the respondent changed the locks on the home.

[58] He retained exclusive possession of the property and involved at least one of his family members in frustrating the applicant's entry, even with police involvement and court order.

[59] Entry to the property was risky and likely to incite further domestic conflict.

[60] The applicant offered to the respondent the option of taking over the business. The respondent declined this offer.

[61] The assets were owned by the business. Although the loans were joint, the respondent was not contributing to the loans either prior to or after separation.

[62] The applicant sought to obtain her personal belongings and to remove the substantial business assets for sale. The applicant sought police involvement to remove the vehicles in her name and to sell the business assets and, ultimately, the car.

[63] The applicant's state of mind is important to the issue of exclusive possession of the home and what transpired regarding the business assets and debts.

[64] On the 9th of June, 2009, the applicant filed a 100 paragraph affidavit setting out the particulars of her claim.

[65] At the hearing, the respondent objected to the inclusion of domestic violence evidence referred to in the applicant's affidavit.

[66] No objection was filed regarding the contents of this affidavit until the issue was raised at the commencement of this hearing.

[67] The Court struck some but not all of the paragraphs of the applicants affidavit. What remains illustrates a high level of conflict between the parties.

[68] The applicant believed she was compelled for her safety to leave the home. She testified the respondent held a gun to her head during one of their many altercations.

[69] Due to her stated fear of the respondent, she removed herself from the home on July 4, 2008. She testified:

“On July 4, 2008, at about 5:30 a.m. I started packing some cloths to leave after a lengthy assault which included him trying to choke me and shove me down the stairs, I finally made my escape at about 7a.m.

On July 6, 2008, Mr Campbell came to the barn and had a confrontation, he left very angry, went to my mother's residence and took my F-250 and hid it in the woods.

On July 7, 2008, I got the truck back -the bobcat trailer was damaged in an accident in Judique while Mr. Campbell was working the equipment at a residence.”

(I do not have enough evidence to conclude that the damage to the bobcat occurred during this time as Mr. Campbell was a primary user of this equipment. The paragraph is not time specific.)

[70] Again at paragraph 43 and 44:

43 “Mr. Campbell in his fury took the excavator to my mother’s residence, parked it behind the F-250 with the bucket in the box of the truck then left with the keys so I could not move the excavator or my truck until I obtained another key from the Kubota dealer.

44. That before leaving he entered the house and called me from the house saying he was taking the dog on me.”

[71] This incident was reported to the RCMP.

[72] Again at paragraphs 46 and 47, the applicant states:

46 “Mr. Campbell made harassing phone calls for most of the night until I unplugged the phone and shut off the cell phones.”

47 “On July 18th Mr. Campbell went to the Credit Union and withdrew \$2,000.00 from my business account to which he was not an authorized user.”

Mr. Campbell has admitted this.

[73] The applicant goes on to state at paragraph’s 53, 55 and 56:

53 “On August 1, 2008, I went to Mr. Campbell’s ...work site to obtain the keys for my F-250 ...I was unable to find them in the Volkswagen. He got off his machine and came over to me. There was a confrontation. He broke my cell phone in two and assaulted me. I called the RCMP.”

55 “Constable Goodwin and I went to the house in Long Point to get the keys but Mr. Campbell gave us the wrong house key. He had changed the lock on the house after I left.”

56 “On August 3, 2008, Mr. Campbell provided the RCMP with my keys and the RCMP officer informed him I will be coming for the rest of the equipment.”

Her intent was to find buyers for the equipment to repay the loans.

[74] With police involvement, the applicant and the police were able to obtain keys from the respondent in order to retrieve the balance of the business vehicles.

[75] On August 4, 2008, the applicant, with the aid of a tow truck, loaded plows and a four wheeler on a trailer, bobcat on the tow truck and the F-450.

[76] The applicant advises and the evidence supports the fact that she removed only the tie down straps, chains and the four wheeler from the shed:

59 “I had a tow truck follow me to the house and loaded plows and 4-wheeler on the trailer, bobcat on the tow truck and F-450 was driven to town. Only items removed from the shed were tie downs straps/chains and 4 wheeler.”

65 “On August 9, 2008, I made a deal with a (*potential purchaser*) for the sale of the equipment and moved this equipment to his business property.”

69 “On August 15, 2008, after receiving word from Mr. Campbell’s lawyer that he would cooperate with the sale, I had the RCMP and a tow truck accompany me to the property in Long Point to retrieve the missing items needed to complete the sale as well as my financial records, vehicle registration and any remaining keys.”

70 “Once there Mr. Campbell refused to provide them and we had to leave without them.”

79 “On September 19, 2008, a letter sent to Mr. Campbell’s lawyer advising he had until October 10th to pay me out for the Volkswagen and I would sign it over to him . If not, I would be cancelling the plate.”

107. “Mr Campbell will still not provide me with my personal and business financial documents”

Efforts to Sell the Home

[77] The applicant advised the respondent she wished to sell the property in early 2008. The respondent did not then nor now want to sell the real estate. He wishes to keep the property in the family. (paragraph 25, 26 - respondent's affidavit).

[78] Although the respondent agreed to list it in March of 2008, the property was placed for sale largely at his insistence at a price well above its market value.

[79] I have heard evidence that the realtor had difficulty keeping sale signs on the property and on various occasions attended the property to re-place the signs.

[80] It was clear to the realtor and to the Court that the respondent had no intentions of promoting and facilitating sale of the property. He confirmed in his testimony his wish to retain the property.

[81] On an Organizational Pre-trial Conference scheduled in January, 2010, both parties and counsel appeared before the Court (neither counsel continue on the file).

[82] The Court directed the applicant's counsel to complete the second (Wambolt) appraisal by February 22, 2010. The applicant at that time continued to seek access to the home to retrieve her business and personal records for income tax purposes.

[83] The matter returned for a pre-trial conference on April 19, 2010. The Court was advised that access to the property was obstructed by the respondent sufficient to impede their ability to comply with the Court's direction.

[84] When the appraiser went to the home with the applicant, the respondent refused to leave despite the existence of his undertaking not to have contact with the applicant. The appraiser and the applicant left.

[85] Subsequently, his counsel advised he would reconsider and allow the second appraisal and the search for missing documentation.

[86] On May 17th, Mr. Wambolt and the applicant arrived on the property. The respondent's sister-in-law, Lisa Campbell, and one other were present to observe. She provided Mr. Wambolt pictures of the flood.

[87] The respondent's sister-in-law ended the visit once the appraisal was completed. She refused to allow the applicant to use the phone to contact her lawyer. The shed and other buildings were locked. Ms. Campbell called the RCMP to have the applicant removed from the property.

[88] On July 21st the matter returned for further directions. An Order issued authorizing entry to the applicant once again for the purpose of completing a search for her records. Specific directions were ordered to facilitate a peaceable entry.

[89] On August 18, 2011, the applicant returned to the home with a third party present as arranged. The third party confirmed her testimony that in her search for her records in the attic she discovered photos left for her to see, a condom covering a stick end had been placed along the hatch framework with messages written by the respondent.

[90] The respondent admitted he wrote the messages. The photos and messages were tendered in evidence.

[91] There can be no other conclusion on the evidence. The respondent guarded these premises, obstructed the applicants access, frustrated the appraisal and the recovery of her records and engaged his sister-in-law to obstruct the applicant's entry even when authorized by his own counsel and subsequently by court order.

Valuation of Family Home

[92] Aside from the municipal assessment, four appraisals were completed on this property. Two of these are important for this division.

Municipal Assessments

[93] The applicant submitted a letter from an assessor with Property Valuation Services Corporation, confirming that the 317 Chisholm Road property has seen increases in value between the roll years 2007 and 2011 because of market increases.

[94] At the time of the Wambolt assessment, the municipal assessment was \$129,000.00.

[95] The current capped municipal assessment of the house is \$107,900.00 and the actual tax assessment is \$134,000.00. (para. 40, respondent's affidavit)

[96] The municipal tax assessments are not particularly helpful other than they describe property values that climbed steadily.

First Listing - March 2008

[97] When the parties first listed the property around their separation in 2008, the respondent insisted the property (not including the additional 18 acre lot) be listed at \$295,000.00.

[98] The Prudential relator considered this to be in excess of it's actual value. While she advised she would have considered a price of \$175,000.00 to \$185,000.00 to be closer to then market value, she did not have current information nor access to the two more recent appraisals.

[99] She considered the hobby farm aspect of the property a positive selling feature. She was, however, unaware of the extent of the flooding or what if any repairs were made to correct the problem.

[100] This assessment is not particularly helpful to establish current value.

Respondent's Assessment

[101] The respondent provided an appraisal by Highland Appraisal dated March 17, 2009, assessing the property at **\$114,500.00**. This is well below the municipal assessment.

[102] Regarding the other 18acre (PID# 50293877) lot, the appraiser noted:

“The owner has told me that this property has been cut over, and wheat remains - is quite wet in areas. It is thought that the assessed value is \$12,000.00 is a realistic market value.”

[103] Her comments respecting the second parcel seem to rely on comments made by the respondent.

[104] Her total assessment for the two properties was **\$126,500.00**.

Applicant's Assessment

[105] Mr. Wambolt has completed several appraisals on the home. The first was in 2002 when it was built; the second for the remortgage in 2005; and the latest market appraisal effective May 21st of 2010 placing a value of between **\$165,000.00 and \$168,000.00** on the land and 12 acres.

[106] He assessed the second property (18 acres) at **\$24,000.00**.

[107] His total assessment of both parcels of lands was **\$189,000.00**.

[108] He assessed the depreciated replacement cost of the home at \$168,000.00.

Analysis of Appraisals

[109] Both appraisers are experienced, busy appraisers. Their differences have been explained by both appraisers.

Time of Appraisal

[110] Mr. Wambolt conducted the more recent 2010 appraisal, a year later than the respondent's appraisal. Mr. Wambolt's assessment is clearly more current.

[111] He saw the property in spring, observed it to be well drained, was aware of the one incident of flooding and considered the hobby farm as a positive factor.

[112] Ms. MacAdam assessed the property in winter. She noted that a summer assessment might result in a higher value.

Comparative Sales

[113] Mr. Wambolt used comparative sales of six properties that had actually sold at the time of the appraisal very close to the subject property. This lends credibility to his assessment.

[114] On March 17, 2009, the Highland Appraiser assessed the value, she noted:

“a lack of recent similar sales made it necessary to use the best available and adjust where needed.”(Tab 7)

[115] In her conclusions, she notes that at the time of her appraisals there were no other actual sales that could be used in a comparative analysis.

Effect of Flooding

[116] The flooding issue causes the most difficulty in choosing a value.

[117] There were two floods over the known history. The first, in 2003, occurred when a very large beaver dam had been allowed to develop down stream. It ultimately caused an obstruction in the river, resulting in a flood. The applicant advised that the Department of Environment paid for extraction of the dam and trapping of 18 beavers.

[118] The second flood was subsequent to separation between August 31 and early September, 2008, when the river/brook overflowed it's banks due to an unusual storm. This flood caused the basement to flood with 4" to 5" of water; with the driveway washing out in places.

[119] This was a unique flood, certainly not a recurrent one. The applicant testified that the Department of Environment undertook erosion protection.

[120] The respondent did not advise the applicant of this flood. She became aware of this subsequently when another claim was made by the respondent for the loss of personal possessions.

[121] The relators records indicated no previous flooding had occurred.

[122] The property condition disclosure statement signed by both the applicant and the respondent on March 16, 2008, confirmed that they were aware of no damage due to wind, fire, water, wood rot, pests, rodents or insects in relation to the subject property.

[123] The property had been in the respondent's grandfather's title prior to their purchase. Had it flooded presumably the parties would or ought to have disclosed that in the March 16, 2008, statement. This would tend to confirm the unusual nature of the flood.

[124] There is no evidence on which I could conclude the flooding was a regular occurrence.

[125] Ms. MacAdam advises that she took significant account of the possibility of another flood. This affected her assessed value.

[126] Mr. Wambolt had been given pictures depicting the flood damage by Lisa Campbell, the respondent's sister-in-law, when he attended the property for the appraisal. He included reference to the flood in his report.

[127] Mr Wambolt understood the problem had been corrected and did not believe it would have affected the value. He noted that had he concluded the problem continued, this fact would have resulted in a different value.

[128] The Emergency Management Office attended the property and affected repairs to the riverbank to avoid a second flood. The respondent is of the opinion that these repairs have been ineffective and anticipates some time in the future, further flooding to the property. Nonetheless, he wishes to maintain the property in the family.

[129] The damage which occurred during the flooding incident was the subject matter of a claim by the respondent notwithstanding the fact he did not continue the payments for the insurance.

[130] The respondent has provided no evidence that would allow me to conclude that flooding can be anticipated on a regular basis nor do I have evidence as to what, if any, repairs should be made or the cost of these possible repairs.

[131] The respondent's appraiser noted in her report the cost to cure the problem as explained to her by the respondent would have to be supplied as an incentive to buy. None were provided to the Court.

[132] I am unable, therefore, to determine that reparations would be necessary or settle on an amount that ought to be deducted for such suggested reparations to the river bank.

[133] The difference between the two assessments is considerable, (ie) between a total of \$126,500.00 and \$189,000.00.

[134] I do not have enough evidence to conclude the flooding is a regular occurrence. Nor am I in a position to estimate what would be an appropriate set off given neither the appraisers thought it necessary to do so.

[135] The respondent did not tender any evidence supporting his view that further reparations are necessary.

[136] I am satisfied that the more reliable assessment is that which took into consideration actual comparative sales in the same area.

[137] On the totality of the evidence, I accept Mr. Wambolt's appraisal as more reflective of the true value of the properties in question.

[138] I accept there was flooding on two occasions, one due to a beaver dam and one due to unusual weather conditions.

[139] I am unable, without other evidence, to draw any conclusions beyond the market value of \$165,000.00 for the house and 12 acres and the value of \$24,000.00 for the remaining 18 acres.

[140] I accept a total market value for both properties of \$189,000.00.

Business Assets and Debts

[141] The Applicant testified she was not the person who initiated, nor did she want this business. This is not in dispute. The respondent wanted to start this business.

[142] She also advises it was the respondent that demanded she be the owner and the person legally responsible for the business, it's administrative aspect as well as assisting in the purchase and use of the business assets. There is no opposition to this evidence.

[143] The applicant also worked full time with a few gaps in her employment due to a change in her career or attending school.

[144] The respondent had previous experience in heavy equipment. In 1998, the respondent ploughed for Ocean Nutrition. From 1998-1999 to 2005 he ploughed for Chisholm of Troy Cottages.

[145] He testified that the applicant looked into the finances and figures and in October, 2003, they started the snow removal business. (para.45, respondent's affidavit)

[146] In October, 2003, he began snow removal for the applicant.

[147] He has been employed part time out West as a heavy equipment operator. He also worked construction .

[148] He brought this experience into the relationship and the operation of the business.

[149] Between 2003 and 2006 he was seasonally employed and worked for the business in winter. He drew employment insurance (EI) which supplemented his annual income.

[150] The applicant formally started a sole proprietorship land excavation and snow removal business, registered on August 4, 2006. This became known as Chisholm Brook Properties Limited. The business was registered in her name alone.

[151] The respondent considered this a joint venture. (para.102, respondent's affidavit)

[152] In October of 2003, the applicant obtained her first commercial snow removal contract.

[153] They both shopped for the necessary equipment purchased for the business included the following:

- a) 2001 Ford F-450 4x4 with 8.5Fisher Minute Mont Plow and 11 dumpbox;
- b) 2008 Ford F-250 4X4 quad cab diesel and 2004 8.2 Boss V-Blow;
- c) 2005 Bobcat Skidsteer Loader with 80 snow bucket, 4 Forks and 74 low profile bucket. (purchased new);
- d) 2005 Tandem Axel Equipment Trailer;
- e) 2000 Kubota Mini Excavator; and
- f) 1998 Yamaha 600 Grizzly four wheeler.

[154] The respondent admits that he was a co-signer on the equipment loan for the bobcat, the excavator, the F-450 and the 2004 VW Jetta TDI.

[155] Title was in the applicant's name only. As well, liability insurance was in her name alone. The financing was arranged by the applicant.

[156] She was responsible for the payments.

[157] He admits that all income from the contracts was deposited into the business account.

[158] The respondent believes that the payments for these loans also came from the business account; an account not in his name. He had a debit card to access money for gas and supplies and personal needs.

[159] He believes he contributed to the pre-separation payment of the loans through his work out West. There is no record of any business payments made by the respondent either before or after the separation.

[160] The applicant tendered evidence that confirmed the payments came from her accounts.

[161] The respondent admits he put his income in their joint BMO account out of which the mortgage was paid.

[162] The applicant worked full time elsewhere as well as completing all administrative work for the business; all bookkeeping and banking, quoted prices and prepared contract bids. She also helped considerably in the actual operation of the equipment.

[163] In 2005, this business expanded to landscaping.

[164] In 2006, the respondent went West to work.

[165] The income from this work out West went into the joint BMO account.

[166] Out of the business account in the name of Chisholm Brook Property Services (her name only) with the East Coast Credit Union came the monthly payments on the equipment as well as insurance, car payments, business expenses, power and other personal needs including food, clothing, oil, power, fuel, heat, restaurant and other incidentals.

[167] The parties had another joint account with East Coast Credit Union into which the applicant put her pay. She paid out the utilities, heat, lights, food and insurance for the home and vehicles.

[168] The applicant advises, and the respondent did not disagree, that he did not want to have any income from the business paid to him as it would affect his EI payments.

[169] The company did not make a profit in any of the years of operation

[170] The applicant also maintained the home almost exclusively, worked the garden, cared for the animals and played a significant role in the relationship.

[171] The respondent confined himself to on-site operation of heavy equipment for snow removal, etc. He acknowledged he played no role in the management and administration of the business. He acknowledges that the applicant handled all money matters.

[172] The respondent worked for the business in winter, between 2003 and 2006 he also fished in May and June, and worked construction during summer and fall.. Between 2006 and 2008 he started to work out West.

[173] The applicant indicates there was never any payment by the respondent to the business loans.

[174] His source of income when not working construction out West was from EI. The applicant assisted him with on line applications for EI.

[175] Any income from this business was deposited to her name only in her business account. She claimed all income for tax purposes.

[176] The applicant left the family home on July 4, 2008. Between that date and August 7th, matters escalated between them.

[177] Since the separation, the applicant paid all debts with the exception of the mortgage and utilities.

[178] The applicant has been responsible for the remaining payments for equipment and vehicles. The respondent does not deny that he made no payments on these loans post separation.

[179] It is clear on the facts that although the business was in the applicant's name this was a joint venture.

[180] The respondent's previously acquired heavy equipment experience and the applicant's business skills formed the foundation for the business operations.

[181] With the separation, the business relationship and the business ended. The respondent was not interested in maintaining the business.

[182] However, the applicant remained responsible for paying significant outstanding loans on the vehicles without the respondent's assistance.

[183] The facts in evidence paint a clear picture of the conflict that existed at and after separation. I cite them because they are relevant to the claims in issue.

Mitigation

[184] After ascertaining the respondent did not want to take control of the company, the applicant then proceeded to attempt to sell the business assets in order to cover the indebtedness.

[185] The applicant had arranged sale of the equipment to a third -party person.

[186] Some items she needed to complete the sale were missing including vehicle registrations and remaining keys. She sought to retrieve these missing items and brought a tow truck with her. She needed the vehicle registration forms, her financial records and the keys.

[187] The police accompanied her to the property on August 15, 2008, having received word from the respondent's lawyer that he would cooperate with the sale.

[188] Once there, the respondent refused to provide the missing items.

[189] The sale arranged by the applicant for the equipment fell through as the controllers, tailgate and spreader were not retrieved. This left the applicant burdened with payments and insurance.

[190] On November 5, 2008, the respondent went to the third-party prospective buyer and removed the tailgate salt spreader.

[191] On November 7, 2008, the applicant moved the F-450 to Seaboard Tire and took the bobcat to her residence.

[192] On November 9, 2008, the applicant was able to sell the excavator.

[193] On November 21, 2008, she sold the bobcat and on November 21st she sold the four wheeler.

[194] On November 27th the applicant was advised that the F-450 was missing from Seaboard Tire and as a result she initiated a claim with the insurance company for the loss of the F-450.

[195] The applicant assumed all post separation indebtedness and took responsibility for the sale of the equipment to pay down the outstanding indebtedness.

[196] Finally due to delay, missing parts and as a direct result of the refusal of the respondent to cooperate in the sale, the applicant sold some of the items on Kijiji, leaving a balance on the equipment loans of \$5,013.58 plus biweekly payments for a total loss to her of **\$7,928.28** (viva voce testimony).

[197] Having found this to be a joint venture, the respondent shall be responsible for half the deficiency.

The Respondent's Claim for Compensation for Work Performed

Historical Income

[198] I have reviewed the income information provided by the applicant from 2005 to 2007. I have also reviewed the income information provided from the respondent from 1996 to 2000 and 2006 to 2008.

[199] I do not have complete historical information. However, I am able to conclude that the respondent's income has always been supplemented with Employment Insurance. In 1996, with employment and EI he reached a high of \$62,118.00 to a low of \$29,234.00 in 1998.

[200] In 2006-2008 his employment income was a high of \$38,585.00 in 2007 to a low of \$18,811.00 in 2008. Her employment income for 2005-2007 was a high of \$36,502.00 in 2007 and a low of \$32,062.00 in 2006.

[201] The business returns show negative business income for each of the three years 2005, 2006 and 2007.

[202] While the respondent chose not to receive income from the business he clearly was supported by any income earned.

[203] The applicant claimed the income paid the taxes owing on this income, assumed the liability and used whatever she could to supply their home and themselves with essentials.

[204] He also received EI for the period of time he worked in the applicant's business.

[205] If I were to now retroactively assess what his income should have been, that might trigger a reassessment and possible repayment obligation from EI.

[206] There is no evidence that either the applicant or the respondent took a salary from the business. The money in the business account, and in her account, went towards the couples joint needs.

[207] This was clearly a joint operation.

[208] The request for entitlement for a retroactive award representing lost salary has not been proven .

Business and Personal Records

[209] The applicant has advised that she has tried to retrieve her business and personal records from the home. The Court records note she has attended court on numerous occasions to attempt to locate the business records which were left in the home shared by both parties.

[210] She has not been able to retrieve her personal tax information as a result of this high conflict. His family involvement barred her from timely access to the home.

[211] The respondent has exercised absolute control over entry, save and except only for court order authorizing the supervision of the applicant on the attending and searching of the property. The respondent has been absent for large periods of time and during that period of time he and his family have secured the property.

[212] The personal papers that remained in the home were required for her income tax.

[213] Their loss and the failure of the respondent to provide these in a timely fashion will result in income tax charges.

[214] Due to his conduct, she was unable to complete her 2008 income tax return. Also, she could not submit the required tax remittances.

[215] She received a notice that she was to pay **\$9,900.40**, a debt that arises out of their joint operation, (Tab 3 - applicant's affidavit sworn October 5, 2011; Notice of Assessment, mailing date January 29, 2010) as a result of her failure to file the Goods and Services Tax/Harmonized Sales Tax Return as required by the *Excise Tax Act*.

[216] To the date of this hearing, she has been unable to file her 2008 income tax return and has been advised that she will be held accountable.

[217] The business records were within the control of the respondent who had access and exclusive possession of the property and they are now gone.

[218] The responsibility for the delivery of those personal records in accordance with court order rested with the respondent. At one point, he advised he delivered the records to her lawyer and at another he advised he did not know where they were.

[219] I find as a fact that the respondent has frustrated all attempts by the applicant to recover her personal belongings.

[220] Having already decided that this was a joint business endeavor, both shall be responsible for the penalty arising from the failure to file appropriate tax returns.

[221] The respondent shall be liable for half of any debt that accrues as a result of the applicant's failure to have these documents returned.

[222] To that end, I authorize a hold back on the division of the equity to cover the respondent's share of this debt.

Personal and Household Possessions

[223] During these most turbulent times, on August 7, 2008, the applicant attended at the home with two of her friends when the respondent was not present. Both of the friends testified that they assisted the applicant with removing some household items and personal belongings.

[224] The applicant itemized and took pictures of what she removed.

[225] I am satisfied by the testimony of the two individuals who were present on the property, together with the applicant, that she removed only what she said she removed and that the tools, if removed, were not removed by her.

[226] I am satisfied that the division she effected, albeit without the consent of the respondent, was not as extensive as that testified to by the respondent.

[227] I am satisfied by the totality of the evidence that the applicant attempted to make a division of the materials in the household as fairly as possible. She has set out her division in her affidavits.

[228] This self help remedy enraged the respondent. He alleges that the applicant cleaned out the house almost entirely.

[229] The respondent took exception to the condition of the couch left for him indicating it was not of equal value.

[230] He alleges that they unplugged the freezer full of frozen food and that they ultimately removed two freezers. The applicant denies this.

[231] However, in his testimony, he ultimately agreed with the affidavits of the applicant's two friends, who accompanied her to the home, regarding the personal property that was left in the house by the applicant and her companions.

[232] With respect to the evidence tendered by the applicant regarding items she removed on August 7th, the respondent confirms in his affidavit at page 15, that he concurs with her list with one exception. He advises that there is a schedule "A" to his affidavit setting out tools which were removed from the property that were kept in the shed.

[233] He advises he believes the applicant removed these tools. He was not present for the removal. He advises that he noticed they were missing on August 7th because the door to the shed was open when he returned home that day.

[234] Except for the gas water pump, he advises these are tools he purchased.

[235] Although the applicant wanted to take a barbeque that she had purchased in 2004 for \$948.68, and an elliptical trainer that her parents had purchased for her for \$700.00, she was unable to do so. It was too heavy to lift and the other individuals wished to leave the premises as quickly as possible. The testimony is consistent.

[236] The applicant was entitled to access the property. Her access was frustrated and risky. However her removal of personal and business property further aggravated the conflict .

[237] I am left in no doubt that she would not have recovered her possessions through legal means. However, the risk was considerable for that which was gained.

[238] The respondent confirmed that these items of hers she left behind have been distributed according to his own wishes.

[239] Each have tendered lists of the property.

[240] I do not accept the respondent's version as to the division of personal property.

[241] In fact, his subsequent testimony tends to corroborate that the applicant left many items for the respondent.

[242] When the applicant removed some of her possessions, the respondent subsequently submitted an insurance claim to Marsh Adjustment Bureau Limited citing to the insurance company that his home had been broken into and his possessions stolen.

[243] The claim was denied by letter dated February 4, 2011.

[244] The company subsequently terminated the home owner's policy effective November 1, 2011.

[245] I reject the valuations provided by the respondent as to the value of the items. There is no supporting or corroborating evidence supporting his valuations. The items are valued at prices which have not been shown by evidence as reasonable.

[246] I consider the division of personal property as complete with no need for adjustment.

Allegations concerning Damage to the Home after Separation

[247] The respondent alleges that the applicant committed damage when she and her friends removed her personal possessions. He estimates this damage at \$1,864.50.

[248] I have heard three witnesses testify as to the condition of the home when the possessions were removed by the applicant. Their testimony is credible.

[249] I am not satisfied that the damage as noted has been proven on a balance of probabilities, nor am I satisfied that the quote would reflect reparations to the damage alleged by the respondent as having occurred during the move.

[250] With respect to the damage to the shed, it is clear that the respondent refused access to the applicant. She owned the property and was being denied access.

[251] The applicant broke the lock to get into the shed. That, I conclude, is a natural consequence of the respondent's refusal to allow the applicant to peaceably assess, itemize and divide the personal property and allow the applicant to mitigate her losses by collecting and selling the business assets. This was joint property.

[252] The respondent continued to frustrate court approved access to the home despite his counsels consent to have the applicant attend the property to facilitate a second evaluation; to allow her an opportunity to retrieve her personal and business items.

Cash

[253] I am not satisfied on the evidence that the applicant removed other items other than as admitted by her in her statements.

[254] In particular, the respondent has not provided sufficient evidence to allow me to conclude that the applicant removed \$3,500.00 in cash which he claims was hidden in a plastic container in the back corner of the basement, in a cavity designed for the sump pump. Nor am I satisfied that she removed the silver dollar coins, one dollar bills, the laptop, CDs, three-in-one printer, keys or outdoor security camera.

[255] The property has been largely secured by the respondent and his family and one could not assume that these items have been removed by the applicant as opposed to the respondent or third parties attending the property in the respondent's absence.

Personal Vehicle

[256] The VW Jetta was registered to the applicant. The debt was a joint debt. Aside from two car payments made by the respondent, the applicant made the car and insurance payments.

[257] The applicant continued to pay the loan payments and insurance on the VW Jetta driven by the respondent, registered to her.

[258] The VW Jetta payments were \$386.01 from August, 2008, to March, 2009. The applicant claims \$4,166.84 for these eight (8) payments made by her in the amount of \$3,088.08, together with insurance.

[259] The vehicle was removed from her property by /on behalf of the respondent without the applicant's consent.

[260] The respondent kept the car from July, 2008, until October, 2008, without securing independent financing for the vehicle.

[261] On October 10, 2008, upon failing to have the vehicle returned to her, she cancelled the registration. While the applicant was able to retrieve her vehicle, the respondent kept the key.

[262] On November 25th the car dealership contacted the applicant and advised her that the respondent had not made October's monthly payment. She arrange for the payment.

[263] The car was listed for sale and sold by the applicant in March, 2009.

[264] The evidence is that the applicant had use of another car and made little use of the VW Jetta post separation.

[265] The evidence of value, contribution and possible profit and /or loss cannot be extracted with reasonable certainty on the evidence before me.

Conclusions

[266] Throughout the testimony it is clear that the applicant handled all personal and business matters for the couple. She had the ability and the knowledge and her testimony has consistently been proved to be the more accurate of the two.

[267] The respondent was not interested in knowing or following the accounting and he relied on her to be responsible for these tasks.

[268] In this partnership, both personal and business, there are real and personal property issues and business loss issues.

[269] Dealing first with the real property issues, it has been decided that when parties hold title to property in joint names there is a presumption that the proceeds of sale shall be divided equally, **Anderson v. Wilson** (1986), 73N.S.R.(2d) 1 (T.D.); **Primeau v. Jollimore**, 2006 NSSC 152 at para33; **Soubliere v. MacDonald**, 2011 NSSC 98 (N.S.S.C.).

[270] When domestic partners enter into joint ventures, such as the business venture, and the losses arising from that venture, they may ask for equitable remedies.

[271] The leading case of **Kerr v. Baranow**, 2011 SCC 10, the Supreme Court of Canada reviews and further defines the historical development of equitable claims in unregistered domestic partnerships.

[272] Beginning at paragraph 36, the Court speaks to three principle elements of unjust enrichment:

C. The Elements of an Unjust Enrichment Claim

(1) Enrichment and Corresponding Deprivation

36 The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

37 The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 31.

38 For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).

39 Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

(2) Absence of Juristic Reason

40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it

simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp.784 and 788; *Garland*, at para. 30.

41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.); *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (*Peel*, at p. 803).

[273] The parties before me have business debt which arises out of their joint venture. The cases referred to speak generally to a situation where one party retains a disproportionate share of the family wealth. There is, however, nothing to prohibit this analysis when considering joint debt:

60 At least one other basis for an unjust enrichment claim is easy to identify. It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the "value received" and the "value surviving", as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a "joint family venture", and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

[274] The respondent testified that this was a joint venture.

[275] He admitted the applicant maintained the bills, controlled the books and was in the best position to accurately identify the cost of the equipment, payments made, the sale and resulting deficiency.

[276] The evidence supports that the respondent relied absolutely on the applicant for maintaining records and for all financial operations.

[277] Where his evidence differs from the applicant, with respect to the purposes for loans payments etc., I accept the applicant's as the most accurate.

[278] The respondent suggested the vehicles were undersold. As a result, he claims lost profits from the sale of the assets.

[279] There is no credible evidence to support his calculations. In fact, his own conduct played a significant role in the delay and disposition if, in fact, he could establish that the vehicles were undersold.

[280] His claim for a deficiency after obstructing the sale of these items and preventing her attempt to mitigate the loss is not tenable.

[281] There is strong evidence to conclude that the respondent received a benefit to the applicant's detriment.

[282] He lived in the home, failed to pay the insurance, made claims that likely contributed to the loss of insurance, refused admission and timely resolution of the sale of the business assets and resolution of the home ownership, refused to pay on the business debts and obstructed the applicant as she attempted to mitigate their losses.

[283] There exists no juristic reason for this benefit. There is no evidence to support an intent to convey by gift or contract this benefit to the respondent to the applicant's detriment.

Damages

[284] This is a situation where the actual damages are discoverable. There is a tax bill that must be paid and a deficiency that must be paid. Thus far, the applicant has been the only payor.

[285] The Supreme Court provided further insight as follows:

72 Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, at p. 47.

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. This means that a monetary remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or other of the two remedial options into which some have tried to force them.

[286] The applicant asked to be compensated from the house proceeds for the penalties she incurred.

Conclusion

[287] The value of the home shall be the current value (\$189,000.00).

[288] Due to the high level of conflict and police involvement with this couple, a partition of the land and home is certainly not advisable . (section 28(1)(a) The **Partition Act**)

[289] The only appropriate remedy is to order sale.

[290] Should the respondent wish to retain the property, he shall have 30 days from the date of this decision to pay out the applicant's interest as directed herein. Failing a full payout as directed, the home and properties shall be immediately listed 31 days after the date of this decision.

[291] The mortgage will be taken as current as of the trial date (\$112,331.00). I understand that the respondent does not intend to sell the property. However, in accordance with **Simmons v. Simmons**, ordinary disbursements will be deducted.

[292] Should the respondent refuse to cooperate with the listing of the property and subsequent sale and transfer of title, the sheriff for the county shall assist in the transfer of title in accordance with section 28(4) of the **Partition Act**.

[293] The respondent was equally responsible for some of the business loans and largely responsible for the reduction in sale value because he sabotaged the safe removal and sale of these items.

[294] Therefore, he shall bear half the responsibility for this debt of \$7,928.28 which shall be added to her share of the equity. That sum is \$3,964.

[295] In addition, on the balance of probabilities, he had custody of her personal and business papers in the home. I am satisfied he either hid or destroyed her personal and business papers left in the home. Despite court order, he obstructed her recovery of these items resulting in penalties to her of \$9,900.40.

[296] He shall be responsible for half of this amount when Revenue Canada seized her account. That sum is \$4,950.

[297] He has claimed compensation for the payments of mortgage, principal and interest paid from separation in August, 2008, to October, 2011.

[298] This matter has not settled peaceably due to the respondent's refusal to allow timely access for appraisals, timely access to obtain personal and business records, obstructed sale of the business assets and he has not responded to efforts to finalize payment of debts.

[299] He has obstructed repeated efforts by the applicant to get her personal and business records and to remove from the property her remaining personal items and business assets to mitigate against any deficiency that may result in a charge against them and their property.

[300] He has also enjoyed exclusive possession of the home to her detriment yet he refused to pay the insurance premiums.

[301] His claim in payments made towards the mortgage principal and interest I have found to be \$40,998.37. Some of these payments she made. Her claim for payment of the home insurance is \$2,957.32.

[302] Ordinarily, one might be entitled to some compensation for these payments in situations of a common law relationship. In return, she would be entitled to occupational rent due to the fact he deliberately prolonged his exclusive possession.

[303] His counsel argues that I have no evidence of appropriate rent to set off his claim. If one could not rent the home, one would have to at least pay the mortgage and keep the bank satisfied or one would lose the equity entirely.

[304] I disallow both his claim for credit for payments made, her claim for insurance payments made (she has enjoyed an increase in the equity) and her claim for occupational rent.

[305] Assuming a sale price of \$189,000.00, for the two lots reduced by 5% real estate fees and HST, \$800.00 legal fees and the mortgage balance as at July, 2011, of \$112,331.00, the equity remaining is equity of \$65,002.

[306] If I were to divide the equity in half each would receive a share of \$32,501.

[307] However, out of his share of the equity he shall also pay her half of the business deficiency (\$3,964.) .

[308] He shall also pay her half of the tax liability in the amount of \$4,950.00 and she shall provide a receipt.

[309] The applicant's share shall be one half the equity plus half the current tax debt (\$4,950.) and half the business assets deficiency (\$3964.) for a total of \$41,415.

[310] In the event the respondent wishes to keep the property, he shall provide the applicant with \$41,415. within 30 days of the date of this decision, that is the 24th

day of February 2012. She shall provide in return a quit claim deed from the applicant to the respondent prepared by the respondent's lawyer.

[311] In the event the applicant does not receive this sum on that date, I grant her exclusive possession of the property effective 31 days immediately after the date of this decision, that is Saturday the **25th day of February 2012** .

[312] The order shall include the ordinary police enforcement clause to effect the purpose of this order.

[313] She shall immediately list the property without the respondent's consent and accept any reasonable offers without the necessity of the respondent's consent.

[314] In the event of sale to an arms length purchaser, immediately upon completion of the sale, the applicant shall effect a calculation regarding the equity after real estate commissions, HST and legal fees are paid as well as any mortgage penalty. The actual sale price shall be used as the starting figure.

[315] In accordance with this decision, she shall be entitled to half (1/2) the equity after sale in addition to half (1/2) the tax debt and vehicle loan deficiency as noted above.

[316] Any penalty that accrues as a result of the respondent's failure to act in accordance with this order shall be deducted from his share of the equity.

[317] Any indebtedness in excess of the mortgage outstanding as of the date this case was heard or encumbrance made without the consent of the applicant will be the sole responsibility of the respondent.

[318] Unfortunately, I have insufficient evidence to speak to the tools she claims were taken and sold, he claims were retained by her; the payments made by the applicant towards the VW Jetta before sale and others costs including interest on the business loans.

[319] In addition, I have little information regarding a future tax debt and am unable to address that possible indebtedness without further evidence.

[320] Nor am I able, due to the lack of evidence, to assess the value of what the respondent sold or gave away during the term of his exclusive possession.

[321] Counsel for the respondent shall prepare the order.

Moira C. Legere Sers, J.