SUPREME COURT OF NOVA SCOTIA
(TRIAL DIVISION)

Citation: *Misener v. H.L. Misener & Son Limited*, (January 13, 1977), Halifax SH No. 11507 (NSSC(TD))

1977 Carswell NS 19.
3 RFL (2d) 109.

Date: 1977-01-13
Docket: SH No. 11507
Registry: Halifax

Between:

Geraldine M. Misener

Plaintiff

v.

H.L. Misener & Son Limited

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Malachi Jones

Heard: January 13, 1977

Summary: Partition Act claim arising from a matrimonial property owned by spouses. Matrimonial home was bought with proceeds from earlier matrimonial home and spouses took title as tenants in common. Husband was president and principal shareholder: wife owned 1 share. The company employed the spouses. The company completed the basement in the new home, paid off the mortgage and the director's account was used to fund family expenses. At separation, the husband transferred his interest in the home to the company. The husband opposed the wife's application under the *Partition Act*, saying it would be detrimental to the children (aged 16, 19 and 21) who lived in the home with him. Jones, J. "failed to see" how this defence was open to the company (which was the defendant). His Lordship believed the children could adjust and the husband could afford to buy the wife's interest. The husband had a "scheme" to allege debts owed to the company were offset against the wife's interest in the home. Jones, J. was unable to find that the wife was under an obligation to make any payments to the defendant company, where the company had voluntarily made payments relating to the house without her request. The property was ordered sold with proceeds to be equally divided.

Key words: Family, Partition

1976 S.H. No. 11507

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

GERALDINE M. MISENER,

Plaintiff,

- and -

H. L. MISENER & SON LIMITED,
a body corporate,

Defendant.

HEARD before the Honourable Mr. Justice Jones, Trial Division, on January 5, 1977 at Halifax, Nova Scotia.

DECISION January 13, 1977

COUNSEL D. Stewart McInnes, E
P. Robert Covert, Esq.

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1976 S.H. No. 11507

IN THE SUPREME COURT OF NOVA SCOTIA

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BETWEEN:

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a body corporate,

Defendant.

JONES, J.:

This is an action for the sale of land under the Partition Act. In the defence and counterclaim the defendant raised certain accounts which it maintained should be set off in the event of a sale. The case arises out of marital property originally owned by the plaintiff Geraldine Misener and her husband Robert Misener. Mr. Misener is the president and principal shareholder of the defendant company.

On September 5, 1974 the plaintiff and her husband purchased 10 Delmac Court, Dartmouth as joint tenants. They had previously owned 15 Gourok Avenue, Dartmouth, which they sold for $63,000.00. They realized the sum of $41,862.47 on that sale. They invested $30,872.00 in the new home and assumed a

mortgage with Nova Scotia Savings & Loan Company for $11,597.55.

Mr. Misener has been associated with the defendant company for some 28 years. The company was previously owned and operated by his father. Following his father's death in 1968 Mr. Misener became the president and principal shareholder of the company. Mrs. Misener became secretary of the company. She also did bookkeeping and clerical work for the company. This continued until September 30, 1975. The company maintained a directors account. Exhibit D/10 is a copy of the account for the period from August 31, 1974 to August 31, 1975. On September 5, 10 and 12, 1974 three deposits of $4,000.00, $1,500.00 and $200.00 were made to the directors account by Mr. and Mrs. Misener. Mr. Misener maintained that this money was owed to the company for additional expenses involved in the construction of the home. The company also did work in completing the basement at 10 Delmac Court. Mr. Misener prepared an estimate of this work in the amount of $9,626.00, which he presented on the trial. He testified that this amount was owing to the company. On October 11, 1974 the company issued a cheque for $12,023.34 to Nova Scotia Savings & Loan Company to pay off the mortgage on the home. A debit for this amount is shown on the directors account. Cash advances were made from time to time out of the directors account to meet personal or family needs. In the Fall of 1975 Mr. and Mrs. Misener agreed to cash life insurance policies owned by Mr. Misener. The object was to get rid of the

premium payments. According to Mr. Misener, before this matter was completed Mrs. Misener left the family home on October 10, 1975. Mr. Misener took $11,200.00 in the insurance funds, bought debentures and deposited them to the credit of the directors account. This effectively reduced the balance owing to $386.72. Mr. Misener testified that it was the practice to repay the company when funds became available.

Mrs. Misener held only one share in the company. Mr. Misener acknowledged that he instructed his wife regarding the payment of accounts by the company and that he "ran" the company. There were no formal meetings of the directors. The directors account had been in operation for many years and was continued for Mr. Misener's convenience. Mr. Misener testified that no account was ever presented by the company for additional work on the house. Apart from the directors account there were no records of any indebtedness to the company. The $5,700.00 deposited in September 1974 was money belonging to Mr. and Mrs. Misener and came from the sale of the Gourok Avenue home. Mr. Misener was not certain as to why three separate deposits were made to the account. He acknowledged that work had been done on the family home in the past by the company and charged to other accounts in order to reduce profits.

Mrs. Misener testified that she contributed to the purchase of the family homes. She denied that there was any

agreement to repay the company for improvements on the family home. No account has ever been received from the company. The $5,700.00 was only paid to the company to meet the financial needs of the company. Mr. Misener was in charge of the company and instructed her on the payment of accounts. Mrs. Misener agreed that the mortgage was paid to the benefit of herself and Mr. Misener. She acknowledged that this amount would have to be repaid by herself and Mr. Misener. This was partly offset by the $5,700.00 deposit. Mr. Misener did not want a mortgage on the home. Mrs. Misener stated that she was not responsible for the directors account.

Mr. Misener resides at 10 Delmac Court with his three children. They are 21, 19 and 16 years of age. They are continuing their education. Mr. Misener is employed.

In the counterclaim the company alleged that it lost $11,250.00 on the sale of the company's assets as a result of a breach of the fiduciary duty which Mrs. Misener owed to the company as a director. I dismissed the counterclaim during the trial on the ground that there was no evidence to establish that the company suffered any loss as a result of the alleged breach of duty by Mrs. Misener.

The defendant admits on page 7 of the pre-trial memorandum that the parties are tenants in common. The defence was raised that a sale of the property would be detrimental to

the children. I fail to see how this defence is open to the company. In any event, this defence has not been established on the evidence. The children are of an age and education where no difficulty should be experienced in adjusting to a new home if that is necessary. There is nothing in the evidence to suggest that Mr. Misener is not in a position to buy the home or provide adequate accommodation.

Mr. Misener's interest in the property was conveyed to the company on October 23, 1975. No satisfactory explanation for the sale has been made by the defendant. In the light of this action, I can only assume that this was part of a scheme to offset alleged debts due to the company against Mrs. Misener's share in the property. I fail to see how the company can dispute the plaintiff's claim to a half interest in the freehold by raising equities between Mr. and Mrs. Misener. I refer to page 11 of the defendant's brief. When the Miseners took a conveyance of the property jointly there was a presumption of advancement.

Re Vermette and Vermette (1974), 45 D.L.R. (3d) 313 was an action for partition. The husband tried to claim money borrowed on a promissory note for the down payment on the home which was held in joint tenancy. The wife was not a party to the note. Guy, J.A., in delivering the judgment of the Manitoba Court of Appeal, stated at page 315:

"Freedman, J. (now C.J.M.), in Klemkowich v. Klemkowich (1954), 63 Man. R. 28, 14 W.W.R. 418, says at p. 29:

> 'The respondent's submission on this point in essence was that his solicitor, at the time of the purchase of the property in 1945, had recommended that title be taken in both names jointly because on the death of one spouse the property would pass to the other. He states, however, that he never intended to grant any rights in the property to his wife during his lifetime. The solicitor in question was not called as a witness. I say at once that this evidence, even if accepted, is insufficient to rebut the presumption which arises by law. When a husband takes title to property jointly in the names of himself and his wife there is a presumption of a gift to the wife of a one-half interest in the property during their joint lives. That presumption can be rebutted only by cogent evidence, the nature of which may vary from case to case. Certainly it cannot be rebutted by evidence of a unilateral and unexpressed intention on the part of the husband that he intended the property to be his own during his lifetime. I hold, therefore, that the applicant is a joint tenant with her husband of the property, and that she is empowered under sec. 19 of The Law of Property Act, RSM, 1940, ch. 114, to make this application for an order that the property be partitioned or sold.'

See also Hyman v. Hyman, [1934] 4 D.L.R. 532, and Fetterly v. Fetterly (1965), 54 D.L.R. (2d) 435, 54 W.W.R. 218."

He also stated at page 316:

"Both parties are agreed that the house should be sold and the proceeds divided equally between the parties — husband and wife. The only problem is that the husband and his father, Clovis Vermette, feel that the debt of $8,000.00 is repayable out of the proceeds of the sale of the house before the balance is divided.

This would mean:

a) that by some sort of legal legerdemain the promissory note for $8,000 signed by George Vermette in favour of his father Clovis Vermette, on October 6, 1969, has become a charge against the half-interest of the wife in the property at 904 Renfrew St.; and

b) it was not a gift. Nor was the $1,500 of the husband's

money.

I am at a loss to understand how a promissory note signed by the husband can become a debt of the wife, and thus some enforceable charge against her which can be claimed against her interest in this land."

In Germain v. Germain (1969), 70 W.W.R. 120, Wilson,J stated at page 124:

"Commonly, cases such as the present centre about the claim of a wife to a share in the ownership of property for whose acquisition her contribution in cash is dwarfed by that of her husband. Commonly, too, the courts have declined to embark upon a dollar-for-dollar accounting between them, and have referred the parties to their own initial engagement for ownership of the concerned property, as recorded in the state of title. Ought the matter to be viewed differently, when the wife's investment exceeds that of her husband?"

There is no evidence in this case to rebut the presumption. From the evidence I infer that Mr. Misener fully intended that his wife would share in the property. I am unable to find on the evidence that the payment of $5,700.00 into the company was made in satisfaction of any particular debt, in view of the history of the directors account. I cannot accept Mr. Misener's evidence that Mrs. Misener made any agreement to repay for repairs or additions to the home for that amount or for $9,626.00. No such accounts were ever set up by the company or rendered to Mr. or Mrs. Misener.

The directors account was controlled by Mr. Misener for his own convenience. While Mrs. Misener received benefits from the account, she had no real control over it. Mrs. Misener

did not make any commitment to repay the account for advances, any more than the third director. Mrs. Misener held one share in the company as a matter of convenience to the other shareholders. There was no undertaking on her part to reimburse the directors account although she knew that it placed a burden on the family. Mr. Misener used the account to pay the mortgage. Following that payment there were a number of debits and credits in the account. Assuming an obligation on the part of the directors to repay the account, at the time the action was commenced there was no balance due except $386.72. It cannot be said that the deposit of $11,250.00 was strictly on account of the mortgage. Mr. Misener had an obligation to the company which he apparently saw fit to retire. The following passage is from 9 Halsbury's Laws of England, Fourth Edition, paragraph 653:

> "A voluntary payment made by one person on behalf of another without his request is not recoverable as money paid to his use, however clearly the payment is for the defendant's benefit, and even though it may relieve him from a legal liability, or though followed by an express promise of reimbursement without valuable consideration. It has been said, however, that where the person for whom a voluntary payment has been made has the option of either adopting or declining the benefit, and he elects to adopt it, he will become liable to repay the money so paid on his behalf."

I am unable to find that Mrs. Misener was under an obligation to make any payments to the defendant company, which should be taken into account on the sale.

As pointed out in Davis v. Davis, [1954] 1 D.L.R.

827, the petitioner has a prima facie right to a partition or sale of the lands. The only practical course in this case is to order a sale of the lands with the proceeds to be shared equally between the plaintiff and the defendant.

The plaintiff is entitled to her costs of the claim and counterclaim to be taxed in one bill of costs. As requested by counsel, I will hear the parties on the form of the order including the payment of costs in the event that they are unable to agree.

J.

Halifax, Nova Scotia
January 13, 1977.

1976 S.H. No. 11507

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TRIAL DIVISION

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	)	DECISION
- and -	)	OF
	)	JONES, J.
H. L. MISENER & SON LIMITED, a body corporate	)	