SUPREME COURT OF NOVA SCOTIA

Citation: *Bocaneala v Liberatore*, 2013 NSSC 372

Date: 2013-11-19
Docket: Hfx No. 414067
Registry: Halifax

Between:

Carla Raffaella Bocaneala

Applicant

v.

Marino Liberatore **and** ***Rossana Liberatore***

Respondents

Judge: The Honourable Justice Gregory M. Warner

Heard: November 5, 2013, in Halifax, Nova Scotia

Oral Decision: November 6, 2013

Counsel: **Matthew J. M. Gibbon**, for the Applicant
Gary A. Richard, for the Respondents

By the Court:

[1] As promised, this is an oral decision. It will be inarticulate. I may produce a written version. If I do, it will be edited for grammar and composition to make it more readable. In doing so, I will not change any reasons, results or any determinations of fact or law.

[2] This case involves application of the principles of unjust enrichment respecting a home claimed and occupied by the Applicant, legal title of which had been deeded by her to the Respondents.

[3] This decision is in three parts: First, a review of the background facts. Second, a review of the applicable legal principles. Third, the analysis of those principles to the facts.

[4] In litigation there are seldom any winners. While courtrooms should be avoided, trials are sometimes an unfortunate necessity. Trials result in decisions imposed by a stranger on the private affairs of people who usually know each other far better than anyone in the justice system.

Background Facts

[5] The Applicant Carla Bocaneala is the daughter of the Respondents Morina and Roseanna Liberatore. She is the mother of Lorenzo and Armando Bocaneala.

[6] In 1995, she and her then-husband Florin purchased a home at 232 Main Avenue, Halifax. In 2002, Florin and Carla separated. Their separation was acrimonious. Florin moved out; Carla remained in the home with primary care of their two young sons. It appears that Florin remained, after the separation, close to the Respondents, while Carla, if not estranged, had a strained relationship with her parents.

[7] In or about May 2006, four years after the separation, Florin and Carla were finally divorced. As part of the Corollary Relief Order issued at that time, Carla kept the home and continued to live there with her two sons. She also kept the matrimonial debts, which included, with the Bank of Montreal a house mortgage, line of credit and MasterCard, and with CIBC, a line of credit and VISA.

[8] Despite holding down two jobs, one with the CIBC; the other with the Nova Scotia Liquor Commission, the Applicant was unable to juggle matrimonial debts that she assumed in order to remain in the home. She was unable, or did not have the credit rating necessary, to consolidate and reorganize those debts. By late 2006, the Bank of Montreal had commenced foreclosure proceedings and obtained a foreclosure order.

[9] As the Respondents' counsel submitted, Carla was in dire financial circumstances and in imminent risk of losing her home. The mortgage balance at that time was about eighty thousand dollars.

[10] In desperation, and out of necessity, she called her father, with whom she had a strained relationship, for help, in particular, that the Respondents would remortgage her home using their credit to pay off her debts to the Bank of Montreal. Only after he had asked for and obtained papers that satisfied him that his daughter had sufficient income, and could afford to make the mortgage payment, he, a retired pensioner, agreed to help. Her father did the right thing.

[11] Carla deeded her home to the Respondents on December 6, 2006. Marino and Rossana applied for and, in short order, obtained a collateral mortgage at the Royal Bank for $112,500.00. It appears the money was received at the end of January 2007. This was enough money to pay off the Bank of Montreal mortgage and, as required by the Bank of Montreal as a condition of stopping the foreclosure action, to pay off her line of credit and MasterCard. No money was received or paid out other than to pay off the Bank of Montreal obligations. No other monies were advanced by the Respondents to the Applicant.

[12] In accord with the parties' agreement, Carla remained in the home, paid the mortgage to the Royal Bank by direct withdrawal from her account on a bi-weekly basis, paid the insurance of the home, and paid all other utilities and expenses connected with maintaining the home. Marino Liberatore paid the real property taxes.

[13] In addition to making all the mortgage payments, Carla made capital improvements on the property after December 6, 2006. As described in her affidavit, these included a new furnace, a new complete bathroom as well as new wood floors in the hallway, stairway and entry.

[14] There was a dispute between Carla and Marino with respect to who painted the inside of the house; each claimed they did it. Marino says he did it in June and July 2013. Based primarily, but not exclusively, upon the fact that Marino attached a list of everything he had done in respect of 232 Main Avenue, Halifax since 1995, to his August 22nd affidavit, and did not include painting the inside of the house, but did include painting the outside of the house, I accept the affidavit and oral evidence of Carla over that of Marino.

[15] In 2011, Carla and her brother inherited money from the estate of their Uncle Antonio, Marino's brother. Carla advanced to Marino two bank drafts from her share of the inheritance, the first on November 17, 2011 in the amount of $11,249.90 and the second on January 9, 2012 in the amount of the $27,000.00. Both amounts were used to make bonus payments on the mortgage on the home occupied by Carla and her sons.

[16] Carla and Marino disagree on the reason Carla made these payments totalling $38,000.00 to him. Carla says it was specifically for the purpose of reducing the mortgage on the basis of their understanding that Marino and Rossana took the deed and obtained the mortgage to help her. The quicker she paid off the mortgage, the sooner she got the property back. Marino says that she made the payments out of appreciation for the help that he had provided her over the years.

[17] As noted, when Carla separated from Florin, it appears that Florin remained closed to Marino and Rossana; he even lived with them for a short time. The closeness between Florin and the Liberatores remains to this day. This contrasts with the non-existent or strained relationship between Carla and her father since her separation from Florin in 2002.

[18] In respect of the divergence of evidence between Carla and Marino, as to why Carla paid the $38,000.00 to her father at the end of 2011 and beginning of 2012, I accept Carla's evidence. Her financial circumstances were not such that she would have made such a gratuitous payment, or gift to a parent with whom she had a strained relationship. It is more likely than not that the payment was made for the reason she described. The property was hers. It was being held by the Respondents in trust for her. The sooner the mortgage was paid off, the sooner she would get the property back.

[19] By 2012 (the evidence is not clear on how long before 2012), Carla was in a common law relationship with Avni Loshi. He is not close to the Liberatores. If I recall correctly, Marino considered him a stranger. He did not trust Loshi.

[20] In October 2012, Carla wanted to buy a new larger home and to use the equity in 232 Main Avenue to help finance the purchase of the new home, and to rent out 232 Main Avenue. Despite her good income and stable employment, her previous poor credit record, at least in her view, prevented her from getting a mortgage in her own name.

[21] She caused her lawyer to approach Marino to request that the Respondents transfer 232 Main Avenue to Mr. Loshi. Neither she nor her lawyer explained to Marino her intentions or the reason for the request. I suspect she thought it was none of his business. In hindsight, she should view this unexplained request as a terrible mistake or error in judgment.

[22] Marino refused. At trial, he says that in 2006 the Respondents accepted title to 232 Main Avenue, and assumed the risk of the mortgage, as owners, to provide a home for their daughter and grandsons. Carla simply became a tenant. Marino answered one of Mr. Gibbon's questions with an answer to the effect, and I am paraphrasing: If anything went wrong, he (Loshi) could kick out her (Carla) and the kids out of the house. This answer is telling. I believe Marino's answer reflects the real reason that he refused Carla's request to reconvey 232 Main Avenue to Loshi, and in effect indirectly to her. He did not trust Loshi.

[23] This refusal brought to a head other conflicts. Carla's two sons, with whom the Liberatores are very close and protective, spent much time with the Liberatores and Florin. Since Carla moved to Ontario, her sons have remained living in Halifax with Florin and the Liberatores.

[24] Both parties retained lawyers to negotiate a resolution to their dispute about ownership of 232 Main Avenue. The negotiations were unsuccessful and this application was filed in the spring of 2013.

[25] In the meantime, in late 2012, Carla was exploring several options for advancement in her employment with CIBC. At least one of those options would have required her to relocate from Halifax. I accept her evidence that she discussed these options with her sons. She did not discuss the options with her father, with whom she had strained relations, but she was certain, and I infer she was probably correct in inferring, that, because of the very close relationship between her sons and their grandparents, the latter probably knew of her plans fairly soon after the boys knew.

[26] In January 2013, she was offered and accepted a transfer to London, Ontario to become a branch manager. She wanted her sons to move with her but agreed that they would finish their school year in Halifax and move at the end of June 2013. Lorenzo is 15 and Armando is 13.

[27] As I said before, both sons were very close to their grandparents and spent a lot of time with them. In 2011, after a dispute between Carla and Armando, both sons lived for about six weeks with their grandparents.

[28] It appears that these children are caught in the middle between the Applicant and Respondents. The issue of parenting and custody is apparently before a court in Nova Scotia and while the terms of the present parenting orders are unclear, the parenting dispute with the Respondents and Florin is ongoing. At present the children are living in Halifax and since May, have had no contact with Carla.

[29] In May 2013, Marino unilaterally caused the house insurance, water and power for 232 Main Avenue, which until that time had been in the name of and paid by Carla, to be put in his name. Apparently in May, he took physical control of 232 Main Avenue and began paying the mortgage.

[30] The Court accepts the evidence of Carla that since she moved to London and the children remained in Halifax; she has being paying child support in accordance with the *Divorce Act* and the *Federal Child Support Guidelines*.

[31] Fact finding requires the Court to assess both reliability and credibility. Reliability relates primarily to the assessment of a witness's capacity to observe, recall and communicate accurately. Credibility involves the assessment of the believability or truthfulness of evidence.

[32] In *R v Béland*, [1987] 2 SCR 398, at paragraph 20, the Supreme Court recognized the significance of oral evidence in the assessment of credibility since litigation replaced trial by combat as the method for resolving disputes.

[33] To assist in the assessment of credibility courts have approved many tools. I have done so in several decisions, including, in particular, *Re Novak Estate*, 2008 NSSC 283. Among the tools used are:

i) a consideration of the motives that witnesses may have to give the evidence as they do;

ii) the consistency or inconsistency over time between the witness's different iterations of the facts, and internal inconsistencies within a witness's testimony;

iii) the presence of collaborative or supporting evidence;

iv) the demeanor or the manner of giving evidence, but with caution; and,

v) above all, the court has to assess what appears to make common sense; in that regard, this Court notes the words of Justice O'Halloran of the British Columbia Court of Appeal in *Faryna* v. *Chorny,* 1951 CarswellBC 133, at paragraphs 9 and 10:

> If a trial judge's finding of credibility is to be depend solely on which person he thinks makes the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and just would then depend upon the best actors in the witness box. . . . the appearance of telling the truth is but one of the elements. . . . Opportunities for knowledge, powers of observation, judgment, memory, ability to describe clearly what the witness has seen or heard, as well as other factors, combine to produce what is called credibility. . . . The credibility of interested witnesses, that is . . . cannot be gauged solely by the test of whether the personal demeanor of particular witness carried conviction of the truth.

The key passage is this:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[34] It is not required that a trier of fact believes or disbelieves a witness's evidence in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and attach different weight to different parts of it.

[35] I find as a fact on a preponderance of probabilities that Carla, when she says she asked her father to get a mortgage and help her pay off the Bank of Montreal, and that she would deed him the house and pay the mortgage, did not intend to gift her home to him. I find that she and the Respondents agreed that she would pay all the bills of the home, including the mortgage. That is more likely, and a more accurate description of the circumstances that existed in December 2006, than Marino's evidence that Carla gave him her home. It is consistent with their subsequent conduct. It is the only thing that makes sense of the $38,000.00 that Carla advanced to Marino in late 2011 and early 2012. There is no other logical or possible explanation for that.

[36] I find implausible the suggestion that she simply turned over the house, lock stock and barrel, and intended to enter into a simple landlord-tenant relationship. It is not consistent with her making capital improvements. It is not consistent with her paying the house insurance. It is not consistent with paying the additional principal payments on the mortgage.

[37] I conclude that Marino was concerned for his daughter's welfare but thought he knew better than her what her best interests were. In one sense, he was attempting to protect her.

The Law

[38] Carla seeks an order for a declaration that the title to 232 Main Street, Halifax, is hers on the basis of resulting trust or unjust enrichment. Both legal concepts fall under the third and newest branch of civil law. The other traditional branches are contracts and torts. The common law with respect to both torts and contract is only relevant in this case in the analysis of the existence or non-existence of a juristic reason at step three of the unjust enrichment analysis. This is not a straight forward contract or tort case.

[39] For this decision, I am first going to deal with the claim for title based on unjust enrichment. I follow the framework for analysis set out by the Supreme Court of Canada, and summarized in this Court's recent decision in *Annapolis v Kings Transit*, 2012 NSSC 401 in paragraphs 5 to 9 and 47 to 61, and in particular, paragraph 60, where I set out five questions to deal with five steps in the unjust enrichment analysis. I rely upon and incorporate not those principles and apply them as applied to the facts at paragraphs 62 to 115 of that decision.

[40] In *Annapolis v Kings Transit*, the law is summarized as follows:

> [48] Unjust enrichment is an equitable principle, a notion that equity will intervene to protect against an unfairness that is not recognized by the common law or legislation. Equity does not override legislation or the common law, but imputes an obligation on those who have legal rights and responsibilities to act fairly. Equity looks at the substance of conduct, not the form. Where the equities are equal, the law prevails. Those seeking equity, must act equitably.
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> [49] Unjust enrichment specifically addresses when to reverse the unjust or unwarranted transfers of tangible economic benefits. Because unjust enrichment is an equitable principle, and not a rule of law, the circumstances in which it arises are unlimited. Intervention by a court is therefore discretionary, but that discretion cannot be exercised capriciously or arbitrarily.
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> [50] Intervention is dependent entirely upon the particular factual and social context out of which the claim arises (*Kerr*, para 34), and, where an established category justifying the benefit does not exist, on the legitimate expectations of the parties and moral or policy-based arguments (*Kerr*, para 44), and must be well grounded in the evidence (*Kerr*, para 88).
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> . . .
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> [57] *Garland* clearly recognizes that unjust enrichment is an evolving principle and not a clear and certain rule of law. If the applicant establishes that

one of the established justifications for retention of a benefit does not apply on the factual matrix, the door is open, in the second part of the juristic reason analysis, to a consideration of the reasonable expectations of parties (expanded upon in *Kerr*) and public policy considerations, that may yield new justification. At paragraph 46, the *Garland* court clearly identified, in step two of the juristic reason analysis, three possible outcomes: (1) establishment of a new category of juristic reason for the enrichment; (2) no new category of juristic reason but a juristic reason in the particular circumstances of a case; and (3) no juristic reason for the enrichment.

[41] At paragraph 60 I outlined, as follows:

> [60] The analytical framework described in *Garland*, beginning at para 28, and *Kerr*, beginning at para 31, is as follows:
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> 1. Was the defendant enriched by the plaintiff? Enrichment connotes a tangible economic benefit conferred on the defendant. This analysis is devoid of moral or policy considerations. In *Kerr*, the Court clarified that the benefit may be positive or negative.
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> 2. Was the plaintiff deprived? The *Garland* and *Kerr* courts do not analyze this step in any depth. Deprivation or detriment does not appear to have been in serious dispute in these cases. In *Garland*, the transfer of money was directly from the plaintiff to the defendant. In *Garland*, the Court described deprivation as involving a tangible, economic deprivation, devoid of moral or policy considerations. In *Kerr*, the Court clarified that the deprivation is a "corresponding" deprivation that may, in respect of a benefit to the Defendant, occur directly or indirectly.
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> 3. While the *Garland* Court described the issue in para 28 as: "Is there a juristic reason for the enrichment?", the analysis begins at para 38 and clearly frames the third question as whether there is "an absence of juristic reason" for the enrichment. The answer to the question may require a two-step analysis. As noted above, in response to academic and judicial commentary, the Court described the first step as requiring the deprived party to prove that none of the established justifications for the benefit apply. If it is successful, the evidential burden shifts to the beneficiary to establish a juristic reason for retention, either by establishing a new category of juristic reason, or alternatively, that in the particular circumstances of the case (without establishing a new category) the retention is justified. Justice Cromwell amplifies the juristic reason analysis at paras 40 to 46 in *Kerr*.
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> 4. Can the Defendant avail itself of any defence? *Garland* effectively sets this up as a fourth question (para 28.2 and beginning at para 62). In *Garland* the defences advanced included the "change of position" defence, and the "regulated

> industry" or obedience-to-a-statute defence. In *Kerr* the defences included the "mutual enrichments" defence.
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> 5. What remedy, if any, should the court order? One of the features of equity is that equitable remedies are discretionary. The Supreme Court has not suggested, either in *Garland* or *Kerr*, that unjust enrichment has lost its equitable foundation such as to restrict the discretion of the Court in granting a fair remedy, or refusing any remedy.

[42] Before entering into the five-step analysis, I wish to deal first with Mr. Richard's submission that the time of the enrichment and deprivation that is relevant in this analysis as of December 6, 2006.

[43] While I agree that what happened on December 6, 2006 is central to the analysis, the analysis does not stop there and covers the full range of circumstances that began before December 6, 2006 and continued to the present.

[44] At step one, the question is: "Was the defendant enriched by the plaintiff?"

[45] The Respondents had been given the legal title to 232 Main Avenue, Halifax on December 6, 2006, in exchange for taking out a mortgage, which was in an amount sufficient to pay off Carla's debt to the Bank of Montreal. No more, no less.

[46] Carla argues that the Liberatores received a benefit of the equity in the house of at least $28,000.00 at that time because a collateral mortgage cannot be issued for more than 80% of the appraised or market value of the property. The Liberatores say there was no equity on December 6, 2006; the reason being that the property was subject to a foreclosure order and Carla did not have the ability to save the property from the foreclosure sale. Both are correct.

[47] I accept that the market value of the property probably exceeded the amount of the mortgage taken out by the Liberatores, based on whatever appraisal was made in December 2006, but that equity was paper equity and not real equity in the circumstances that confronted Carla on the day she went to her father for help.

[48] The issue in step one, devoid of moral or legal considerations, is a simple issue. Was there a tangible economic benefit conferred on the Respondents? I conclude that a tangible benefit was conferred. While the Liberatores were, in one sense, put at risk by signing a mortgage for $112,500.00, I am satisfied that the value of the property, at that time, was at least equal to, if not greater than, the amount of the mortgage. Before agreeing to take out the mortgage, Marino had satisfied himself, by obtaining pay records from his daughter, that between her two jobs with the Bank of Commerce and Liquor Commission she had sufficient income to make the mortgage payment. He arranged it so that she would pay the mortgage directly. He did his due diligence.

[49] While theoretically there was a possibility of a loss to him, realistically there was not.

[50] Apart from the potential increase in the value of the property, which would be a reasonable expectation respecting property in metropolitan Halifax, Carla agreed, and in fact paid the mortgage - not just the interest but the principal, at the rate of $402.65 bi-weekly. This included life insurance that would pay off the mortgage in the event of her death, according to the mortgage disclosure statement attached to one of the affidavits.

[51] Between February 14, 2007 and April 2013, she made all mortgage payments of principal and interest, totalling approximately $91,000.00.

[52] There is no direct evidence as to what portion of those payments were principal and interest, but the mortgage disclosure statement, shows that after five years (January 2012), the total payments on principal and interest would be $43,300.00 and of that interest was $26,900.00, leaving slightly under $18,000.00 principal paid in five years. And, at that rate for the next 14 months, I estimate that the principal payments made by Carla were about $61,000.00 ($23,000.00 in bi-weekly payment and bonus payments of $38,000.00) and interest payments of about $30,000.00. Said differently, part of her contribution to the tangible value of 232 Main Avenue was 75 months at $710.00 a month, which is around $53,250.00 in principal and interest payments, plus $38,000.00 in extra payments, for a total of $91,000.00 payments. Of the $91,000.00, $23,000.00 of the bi-monthly payments and all of the $38,000.00 in bonus payments, or around $61,000.00, went to reduce the principal mortgage debt.

[53] The arrangement in 2006 provided that she would make the mortgage payments directly, she would pay the utilities, and she would pay the home insurance. The Respondents have a tangible economic benefit because, as of the present time, the property has been sold. It is subject to an agreement of sale for $202,000.00.

[54] All of the payments on the mortgage, until May 2013, were made by Carla.

[55] She maintained the property. She made capital improvements, the particulars of which are identified in her affidavit, and shown to have cost her about $10,000.00.

[56] The tangible, economic benefit is that the Liberatores have title to a property worth about $200,000.00 less the outstanding mortgage balance, estimated to be approximately $60,000.00.

[57] Their financial contribution to the property has been six years of property tax payments, and some contribution to maintenance costs, especially since May 2013. There is no evidence before the Court of the amount paid for property taxes, but based upon present assessment rates in the City of Halifax, and the apparent value of the property, I estimate that they would total not more than $2,000.00 a year, or about $12,000.00 over six years.

[58] Step two of the analysis asks the question: "Was the plaintiff deprived?" The *Garland* and *Kerr* courts do not analyze this step in any depth. Deprivation or detriment does not appear to have been in serious dispute in those cases. In *Garland*, the transfer of money was directly from the plaintiff to the defendant; the court described deprivation as involving a tangible

economic deprivation, devoid of moral and policy considerations. In *Kerr*, the court clarified that the deprivation is a corresponding deprivation that may, in respect of a benefit to the defendant, occur directly or indirectly.

[59] The deprivation is a fairly easy question to calculate in this case. Carla made the monthly mortgage payments over approximately 75 months of over $53,000.00 and made additional principal payments of $38,000.00, which reduced the mortgage debt by about $61,000.00. In addition, she made capital improvements, which normally a simple tenant is not required to do and does not do, of about $10,000.00. She paid the house insurance, a benefit to the owner not to the occupant.

[60] To the extent that the Respondents have been enriched, the Applicant has been directly deprived.

[61] Step three is the most important analysis. Quoting from *Annapolis v Kings Transit*:

> While the *Garland* Court described the issue in para 28 as: "Is there a juristic reason for the enrichment?", the analysis begins at para 38 and clearly frames the third question as whether there is "an absence of juristic reason" for the enrichment. The answer to the question may require a two-step analysis. As noted above, in response to academic and judicial commentary, the Court described the first step as requiring the deprived party to prove that none of the established justifications for the benefit apply. If it is successful, the evidential burden shifts to the beneficiary to establish a juristic reason for retention, either by establishing a new category of juristic reason, or alternatively, that in the particular circumstances of the case (without establishing a new category) the retention is justified.

[62] The analysis is set out in *Kerr v Baranow*, 2011 SCC 10, in particular, at paragraphs 31, 41 and 43:

> [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain . . . For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request. . . .
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> [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 . . . 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. . . . 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" . . .

[63] Paragraph 43 is incorporated by reference.

[64] Yesterday in argument in response to his submission that Carla was in dire financial circumstances in December 2006, the Court asked Respondents' counsel whether he would describe her approach to Marino for help as an act of desperation made *out of necessity*, and he agreed that that was a valid description of the circumstances. That is one of the specific examples identified by the Supreme Court of Canada of when the retention of a deferred benefit may be considered unjust.

[65] Marino says that the advances of $38,000.00 in November 2011 and January 2012 were intended as gifts. I have already stated that I do not agree. There is no evidence which I accept as credible and reliable that, when Carla approached her father, in desperation and out of necessity, to save the roof over the heads of herself and her two sons, her intention was to make a gift to her father or her mother.

[66] It is possible that, if enrichment occurs as a result of a contract as in the *Annapolis v Kings Transit* matrix, the contract may justify enrichment. There was no contract between these parties in December 2006. I find that there were intentions and understandings but no clear agreement on all the necessary terms of a contract.

[67] There exists no statutory or other common law restriction that could deny recovery by the Applicant.

[68] In short, in dealing with the established categories for retention of enrichment, none of them apply in this particular circumstance.

[69] We look next at stage two of the third step. Because the claim is unjust enrichment, because it involves equity, the absence of an established category of juristic reason does not close the door to retention of a benefit by a beneficiary. Reasonable expectations or public policy considerations may justify retention of the benefit by the Liberatores.

[70] Respondents' counsel made two submissions that may fit within stage two of step three.

[71] First is his argument that the Liberatores were put at risk by taking out the mortgage in conjunction with or in exchange for the receipt of the title to 232 Main Avenue. If that risk had have been a real risk, in the sense that it is not just theoretical (similar to the fact situation

described by Justice Cromwell in *Kerr*), then it may justify retention of some, if not all, of the benefit.

[72] But I said earlier in this decision, while theoretically the Liberatores were at risk by signing the mortgage, there is no evidence that the value of the property, if a default had occurred, would not have satisfied the value of the mortgage. There is no evidence that there was, in fact, a risk of the value of the property being less than the mortgage debt because of market conditions. The property was well maintained, and all payments were being made. An assessment of the credit worthiness of Carla had been made by her father when he looked at whatever papers he looked at that satisfied him that she had the ability to make the mortgage payments.

[73] The "at risk" argument does not justify retention of the benefit in this case.

[74] The second argument advanced is that Marino was holding the property for the benefit of, and to protect, his grandsons.

[75] I am satisfied that that was not Marino's purpose or intent in December 2006. This unspoken purpose or intent arose later when Marino came to mistrust Carla's wisdom in the way she was living her life. He decided later that he had an obligation to protect his grandchildren, and keeping 232 Main Avenue was part of that obligation. He did not disclose or act on this intent, and appears only have formed this intent, after Carla requested that her home be deeded to Mr. Loshi in October 2012.

[76] I do not accept that any such intention was contemplated, considered or discussed by Marino, or with Carla, in December 2006 or at any time before October 2012.

[77] Any concern that Marino may have as to whether his grandsons were being properly maintained by Carla was and is without foundation. I conclude that, while there appears to be an ongoing dispute about parenting of her two children, and it appears to involve the Liberatores, Carla is fulfilling her financial and legal obligations for the support of her two children. There is no justification for the Respondents keeping the tangible economic benefit that Carla conferred on them and holding it for the benefit of her children, absent evidence that she is not fulfilling her legal obligation to her children.

[78] With regards to stage two of step three, I find no juristic reason for the retention of the enrichment.

[79] That leads to step four, and paragraph 60 of *Annapolis v Kings Transit*:

> 4. Can the Defendant avail itself of any defence? *Garland* effectively sets this up as a fourth question (para 28.2 and beginning at para 62). In *Garland* the defences advanced included the "change of position" defence, and the "regulated industry" or obedience-to-a-statute defence. In *Kerr* the defences included the "mutual enrichments" defence.

[80] Counsel did not directly address possible defences. Justice Cromwell's analysis in *Kerr* of the so-call "mutual benefit" or "enrichment conferral" defence has some resonance in the factual matrix of this case.

[81] In *Kerr*, each of the parties conferred some benefits on the other. The Supreme Court's analysis included a balancing of those respective enrichments and deprivations at step four. The benefits did not all go in one direction. They flowed both ways.

[82] Carla recognized that she had received a benefit when her father paid the property taxes on her home. With her October 2012 request for reconveyance, she offered to reimburse him for the property taxes he had paid.

[83] My analysis of the "mutual benefit conferral" defence, applied to the facts of this case, show benefits flowing both ways.

[84] The value of 232 Main Avenue, now being sold, is the result of contributions of both the Applicant and the Respondents.

[85] The Applicant, apart from receiving the benefit of occupation of the residence, for which she paid all the utilities bills, and the interest portion of the mortgage payments, contributed to the present value of the property: mortgage principal of $61,000.00, capital improvements of $10,000.00, and the house and mortgage life insurances on the property.

[86] The Respondents paid the property taxes. For the purposes of this analysis, I estimate the property taxes may have amounted to $12,000.00 to date. They have been making mortgage payments since May 2013. Also, Marino, a handy man, made contributions to the maintenance of the residence.

[87] The long list of maintenance items attached to his affidavit, are without estimated or actual costs and without the dates of the repairs. The list includes repairs made since 1995, when the Applicant first purchased the property. None of the repairs made before December 2006 are particularly relevant to this analysis. Equity involves fairness and flexibility. The repairs since December 2006 and their value are relevant but are not clearly identified.

[88] The Applicant's counsel submits that Marino did nothing that he has not done and would not do for any of his children. He had gratuitously helped his son. In my view, that is irrelevant. It is the fact that there was a benefit conferred for whatever reason, whether a family reason or not, that is relevant.

[89] I accept there are some tangible economic benefits contributed to the value of the property, and therefore to Carla, by the repairs and maintenance Marino carried out since December 2006. I wondered whether to adjourn the hearing to obtain better particulars and to quantify these particulars. I conclude that an adjournment will not help resolve anything between the parties. Besides it was each party's responsibility to be ready to put their best foot forward at trial.

[90] I now intend to place a value on the tangible economic benefits each has made to the value of the property.

[91] I accept that Carla has contributed to the value of the property, separate from utilities, maintenance, and interest on the mortgage, about $71,000.00; $61,000.00 in principal mortgage payments, and about $10,000.00 in capital improvements that a tenant would not pay unless they considered themselves to be an owner.

[92] The monetary value of the contribution by the Liberatores is harder to calculate. It includes payment of the property taxes from December 2006; mortgage, insurance and some utility payments since May 2013, and an unquantified amount for maintenance since December 2006.

[93] Somewhat arbitrarily, but based on inferences from the evidence before the Court, I quantify the respective contributions by Carla and Liberatores to the value of 232 Main Avenue as 80% of the net value of the property by Carla, and 20% of the net value by the Liberatores.

[94] In summary, I find that there were mutual enrichments.

[95] Dad came to the rescue of his daughter, despite their strained relationship, when he had to, but 232 Main Avenue was not Dad's property. Each contributed and should share in its value in accordance with their contribution.

[96] I now come to step five of the unjust enrichment analysis, and again quote from paragraph 60 of *Annapolis v Kings Transit*:

> 5. What remedy, if any, should the court order? One of the features of equity is that equitable remedies are discretionary. The Supreme Court has not suggested, either in *Garland* or *Kerr*, that unjust enrichment has lost its equitable foundation such as to restrict the discretion of the Court in granting a fair remedy, or refusing any remedy.

[97] The house has been sold, or it is under an agreement of sale, and for the purposes of today I am assuming that if the closing has not taken place, the property will be sold forthwith.

[98] I order that the net proceeds from the sale of the property, which is subject to a trust interest of both the Applicant and the Respondents, after payment of the mortgage balance, outstanding as of today, and of any reasonable and necessary costs of the sale, presumably legal and real estate commissions, shall be apportioned between the Applicant and the Respondents – 80% to the Applicant and 20% to the Respondents.

[99] I declare that the property is held in trust for the Applicant and the Respondents in accordance with their respective tangible economic contributions to the value of the property as determined in this decision.

[100] I have not considered costs of this application. If you cannot agree, and there is going to be an order for costs, I require submissions from both parties within 30 days.

[101] If it goes beyond one month, then I will assume the parties have agreed on costs or that neither party is seeking costs and none will be ordered.

Warner, J.