IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Nicholson v. Whyte, 2005 NSSC 198

Date: 20050713
Docket: SFHOTH-020020
Registry: Halifax

Between:

William Alexander Nicholson

Applicant

v.

Tracey Anne Whyte (*nee* Hoopey)

Respondent

Judge:	The Honourable Justice R. James Williams
Heard:	June 1 and 2, 2005, in Halifax, Nova Scotia
Written Decision:	July 13, 2005
Counsel:	Mr. Robert Cragg, for the applicant Mr. G. Michael Owen, for the respondent

By the Court:

[1] William Alexander (Sandy) Nicholson and Tracey White were in a relationship from approximately 1992 to 2000. They lived together during this time. They separated in 2000. They were never married. Mr. Nicholson commenced an action on October 7, 2002:

1. Seeking relief under the *Matrimonial Property Act*.

   The decision of the Supreme Court of Canada in *Walsh v. Bona* (2003) 32 R.F.L.(5th) 81 made it clear that the *Matrimonial Property Act* did not apply to unmarried couples. This portion of the pleadings was effectively abandoned.

2. Claiming an interest in assets by way of "the principles of unjust enrichment and/or constructive or resulting trust".

   Evidence was led by Mr. Nicholson in relation to two assets:

   a. a property at 83 Saskatoon Drive; and
   b. a property at MacIntyre Lane.

A. The Relationship

[2] Mr. Nicholson was married when he met Ms. Whyte. He did not tell Ms. Whyte this for some time. He left his wife and family, moved into a motel and then in with Ms. Whyte at her home. It appears that Mr. Nicholson remained married throughout his entire relationship with Ms. White.

[3] Mr. Nicholson was unemployed for lengthy periods during the relationship with Ms. Whyte. He lost a job with Cameron Publishing in approximately 1995. His income from 1995 to 1999 was reported as:

1995	$19,839
1996	$2,622
1997	nil

1998	nil
1999	$5,425

[4] Throughout this time he states he paid his wife and child $1,000/month in support.

[5] In 1992, 1993 and to the fall of 1994 he worked at Cameron Publishing earning some $50 - 60,000/year.

[6] Ms. Whyte views the relationship with Mr. Nicholson as having been "rocky, unstable". She says they spent little time together. He is said to have drank excessively and sailed a lot.

B. The Law

1. Resulting Trusts

[7] The law relating to resulting trusts was summarized in *Hamilton v. Hamilton* (1996) Carswell Ont. 2421 (Ont. C.A.) where the court stated at paragraph 39:

> 39 A presumption of a resulting trust arises in favour of persons who contribute financially to the purchase of property but do not take title in their own name, and do not intend to give a gift of the entire beneficial interest in the property to the registered or recorded title holder. Equity presumes that the non-titled party does not intend a gift when he contributes to the purchase price of a property. The non-titled party is treated as the equitable holder of the beneficial interest; the extent of his or her beneficial interest is proportionate to the financial contribution made to acquire the property. The presumption of a resulting trust is rebuttable on a showing by the title-holder that the non-titled party intended the title-holder to have the property for his or her own benefit. The presumption of a resulting trust is also rebuttable on a showing that the transfer to the titled party was not gratuitous. See Oosterhoff and Gillese, *Text, Commentary and Cases on Trusts*, 4th ed. (1992) and Hovius, *Family Law: Cases Notes and Materials*, 3rd ed. (1992).

2. Unjust Enrichment

[8] The court in *Hamilton* distinguished a resulting trust and constructive trust at paragraph 40:

> 40. The concept of a constructive trust is different from that of a resulting trust. Dickson, J. In *Becker v. Pettkus*, [1980] 2 S.C.R. 834 held that for a court to impose a constructive trust, there must be an unjust enrichment arising from the way in which title is held. An unjust enrichment exists when there is an enrichment on the part of the titled party, a corresponding deprivation on the part of the non-titled party and no juristic reason for the titled party to retain the enrichment. There must also be a link between the benefit conferred and the property claimed to be subject to the trust: see *Peter v. Beblow* (1993), 101 D.L.R.(4th) 621 (S.C.C.) at 649-50.

[9] Professor Donovan W.M. Waters (see *The Trust in Family Law: Property Division and Remedy*, materials from the Federation of Law Societies National Family Law Program, 1998; and also "The Nature of the Remedial Constructive Trust", p. 165, *Frontiers of Liability Vol. 2*, P.B.H. Birks, ed, Oxford U. Press 1994) is careful to distinguish liability (the reason there is a right to relief) and remedy (the relief).

[10] Unjust enrichment is the basis of liability. To prove unjust enrichment a claimant must show:

a. an enrichment;
b. a corresponding deprivation;
c. the absence of any juristic reason for the enrichment.

(*Pettkus v. Becker*, (1980) 2 S.C.R. 834, *Sorochan v. Sorochan*, (1986) 2 S.C.R. 38, *Keddy v. McGill*, (1991) 106 N.S.R.(2d) 306 (N.S.C.A.), *Hamilton*, supra.)

[11] If liability can be grounded in unjust enrichment two principle remedies are available:

a. monetary damages;
b. remedial constructive trust.

[12] Monetary damages are based on either the value of the property or the services rendered. The value of the services may be considered having reference to the increase in value of the property (*Everson v. Rich*, (1988) 16 R.F.L.(3d) 337 (Sask. C.A.)) or the market value of the services rendered.

[13] The remedial constructive trust is redress that allows the court to award a specific asset (or portion thereof) to the claimant. It gives an interest in property. For a remedial constructive trust to be available there must be a connection, direct or indirect, between the unjust enrichment and the acquisition, maintenance or improvement of the property (*Sorochan v. Sorochan*, supra).

[14] Where an unjust enrichment is established, the court must choose between these remedies (monetary damages and remedial constructive trust). The conferring of a property interest (via remedial constructive trust) has the potential of creating difficulties - forcing sales, priority issues with third parties, et cetera. Because of this monetary damages may be a preferred remedy.

[15] McLeod and Munro (Matrimonial Propertly Law in Canada, I-6, Special Property Rules, p. 39) state with regard to this choice of remedies that four questions might be asked:

> In Peter v. Bellow, Cory, J. accepts the comments of Hovius and Youdan as helpful in forming the relief:
>
> 1. Is the plaintiff's entitlement relatively small compared to the value of the property?
>
> 2. Is the dependant able to satisfy the plaintiff's claim without a sale of the property in question?
>
> 3. Does the plaintiff have any special attachment to the property?
>
> 4. What hardship would be caused to the defendant if the plaintiff received a title interest?

[16] I would add a fifth question:

5. Is there any reason why monetary damages might be inappropriate?

C. The Properties in Question

1. 83 Saskatoon Drive

[17] 83 Saskatoon Drive is a property on Kearney Lake. The parties noticed it when "out on a drive". At the time it was a church property. The church was boarded up.

[18] The property was purchased and renovated into a home. They moved into it in 1995.

[19] In February of 2000 Mr. Nicholson moved out (Ms. Whyte had left the home briefly, then returned shortly before this). In September of 2002 the home was destroyed by a fire. Ms. Whyte rebuilt the home. Mr. Nicholson claims he is entitled to half of the present value of the home based on unjust enrichment. His assertions (or those made on his behalf) as to the basis of the unjust enrichment and other evidence in relation to this includes:

(a) His brother suggested Sandy Nicholson had told him a Clarence Nicholson (a relative of Sandy Nicholson who was a clergyman) aided with the sale/purchase. How this was done was not specified. It appeared from the evidence that Clarence Nicholson died in 1980 - long before the events in question.

(b) Mr. Nicholson said he and Ms. Whyte put in an offer to purchase. The agreement of purchase and sale was signed by Ms. Whyte alone. Sandy Nicholson witnessed her signature. No unjust enrichment arises from witnessing a signature.

(c) Mr. Nicholson suggested he oversaw the renovation of the church/house. The evidence indicates there was a general contractor paid for by Ms. Whyte.

(d) Mr. Nicholson said he supervised the renovations on his own when Ms. Whyte was away for six weeks, that "I was there every day" (in the summer of 1994). His cross-examination led to the acknowledgement that he was both at Chester Race Week and in PEI

for a separate 10 - 11 days during this time. It would be charitable to describe his evidence as exaggerated.

(e) Mr. Nicholson said the property was put in Ms. Whyte's name alone for a number of different reasons:

- He said the property was put in her name because he was an entrepreneur and he "did not want to risk losing the property". The evidence indicated he was a contract employee of Cameron Publishing with no other business interests during this time period. He was not, as he claims, an entrepreneur.

- He suggested it was put in her name because he was "getting divorced". The evidence indicates he was divorced many years later. He was and would have been under a positive duty to disclose property interests to his wife. Mr. Nicholson was unable to indicate whether the purchase of Saskatoon Drive was before or after he signed a separation agreement with his wife. Ms. Whyte denies the suggestion that "keeping the purchase from his wife" was a rationale for the property being put in her name. I accept her evidence.

- Mr. Nicholson suggested that since he is some 13 years older than Ms. Whyte the property was put in her name "in case he died first". She denies this. Again, I accept her evidence.

- He suggested there was concern that there might be a "judgment or lien from his wife". Again, this is denied by Ms. Whyte. Again, I accept her evidence. I note also that his evidence was that he "always" paid his support to his wife.

(f) Phyllis Whyte, Tracey Whyte's mother, signed and guaranteed the mortgage for 83 Saskatoon Drive. Phyllis Whyte gave additional security (a second mortgage on her home) for the purchase of the home. At the time Mr. Nicholson was earning $60,000.00 with Cameron Publishing. He signed nothing. He guaranteed nothing.

(g) Mr. Nicholson suggested his efforts at "city hall" resulted in the property being re-zoned. His evidence in this regard is convoluted, vague, self-important and, I conclude, exaggerates his role. The re-zoning was not of an isolated property and not as a result of his efforts.

(h) Geoff Keddy, a friend of Mr. Nicholson's, provided an estimate of renovations to the property. The estimate was addressed to and paid for by Tracey Whyte (Hoopey). Mr. Nicholson claimed he "hired and paid for" Mr. Keddy. The evidence indicates otherwise.

(i) Mr. Nicholson said "I negotiated the mortgage" and "I found the financing". In fact, a mortgage broker was used and paid for by Ms. Whyte.

(j) Mr. Nicholson said "I purchased a Jacuzzi". The evidence (her cancelled cheque) indicates Ms. Whyte paid for at least a significant portion of its cost.

(k) Mr. Nicholson claims the purchase price was $89,000.00. It was $79,900.00.

(l) Saskatoon Drive was refinanced on December 2, 1994. Mr. Nicholson had nothing to do with this.

(m) Mr. Nicholson asserted that he sold his boat in 1994 and put the proceeds into the house and running of the house. This is asserted in his May 9, 2005 affidavit. It was not asserted in earlier affidavits. His affidavit states at paragraph 9:

> In 1994, I sold a boat that I owned for approximately $70,000. These proceeds went into the construction of the house and running of the household, as needed.

When cross-examined, he indicated that his payment for the sale of the boat was $55,000.00 plus "a Kirby's Sailboat", which was sold for $15,000.00. He did not remember what the sales commission

was. He sold the boat through a broker. Ocean Yacht Sales was the broker. Ms. Whyte denied these assertions, saying he kept the monies from this sale. Ocean Yacht Sales' office manager was called to give rebuttal evidence. She indicated that the sale gave the vendor (Mr. Nicholson) $37,000.00 minus $3,000.00 commission = $34,000.00, plus a Kirby 25 Sailboat.

The sale was November 23, 1995, not in 1994, as he asserted. Mr. Nicholson asserted that he was paying his wife and child $1,000.00/month from 1995 to 1999 when he had little or no income. He was wrong about when the sale of the boat was, wrong about the amount. I conclude he did not contribute these monies to "his household with Ms. Whyte" or Saskatoon Drive. I conclude he spent these monies on his independent obligations to his wife (and, in all probability, used a portion of them in the purchase of the MacIntyre Lane property)..

(n) Mr. Nicholson asserts he did some household painting and helped install a staircase. Neither gives rise to a claim for unjust enrichment in these circumstances. Given the parties' relationship, these activities were, in a word, insignificant.

(o) Mr. Nicholson asserted he did some "legal work" when the house was liened. The Court file on this lien was obtained. Again, it appears Mr. Nicholson exaggerated his role.

(p) All mortgage, taxes, insurance and other costs in relation to this property were paid for by Ms. Whyte.

(q) At the time of the purchase of 83 Saskatoon Drive $10,000.00 was borrowed from Phyllis Whyte (Ms. Whyte's mother), and $10,000.00 from Lora Nicholson (Mr. Nicholson's mother). Ms. Nicholson was re-paid by Ms. Whyte on June 14, 2003. Ms. Phyllis Whyte was also re-paid by Tracey Whyte. I can identify no legal basis for this to give rise to an claim by Mr. Nicholson. Loans were made, and re-paid.

[20] Mr. Nicholson's claims with respect to 83 Saskatoon Drive are largely exaggerated, inaccurate or unrelated to establishing a claim based on unjust enrichment. If anyone was enriched in this relationship it was Mr. Nicholson - he was supported through years of unemployment or underemployment. There is no enrichment of Ms. Whyte or the Saskatoon Drive property. There was no deprivation to Mr. Nicholson. There is no unjust enrichment in relation to this property.

2. MacIntyre Lane

[21] A lot on MacIntyre Lane was purchased in 1996. It is a lakefront lot on First Lake in Sackville. Ms. Whyte paid the deposit on the offer. The property was registered in her name. The purchase price was $18,000.00. She paid $2,000.00. She states she was going to borrow the rest from her mother. She says Mr. Nicholson "insisted" on paying the balance, $16,000.00 - and did so - undoubtedly with money from his boat sale(s) in late 1995. His income that year was $2,622.00. He was paying his wife $1,000.00 per month at this time.

[22] Ms. Whyte has paid the property taxes since the purchase of MacIntyre Lane.

[23] Ms. Whyte asserts that she has paid Mr. Nicholson for his "claim" to an interest in MacIntyre Lane. Her affidavit of April 29, 2005 states, at paragraph(s):

> 94. THAT Cybergarden Inc. was registered by me, only, with no other parties involved.
>
> 95. THAT when I incorporated the Company in 1998, the Applicant (Nicholson) was unemployed and was not involved in the incorporation and took no interest in same, that I refer this Court to Exhibit "24", the Applicant's income was nil.
>
> . . .
>
> 98. THAT I was looking for an investor for Cybergarden Inc. to facilitate research and development and product expansion. That the Applicant (Nicholson) identified that Rob Steele, an existing client, might be willing to provide risk capital for start-up companies.

99. THAT based on the Applicant's 'lead', I subsequently had many meetings with Rob Steele and his financial advisors, prepared many financial projections and provided a substantial amount of documentation which ultimately resulted in Rob Steele investing $400,000 in my company in August 2000 - in return, I issued Mr. Steele 25% of the shares to the company (Cybergarden Inc.)...

100. THAT when it appeared that the Rob Steele investment in Cybergarden Inc. was going to proceed, the Applicant (Nicholson) started to demand an interest in the Company for himself. The Applicant no longer lived at 83 Saskatoon Avenue, and would cause embarrassing scenes in the office, yelling at me, pounding his fists on the table, and repeatedly telling me that I was nothing without him and that he would leave the Company if I didn't give him a share. The Applicant (Nicholson) threatened to sabotage the Rob Steele investment if I did not agree to make him a shareholder.

101. THAT the above noted behaviour went on for weeks. That the Applicant, during these scenes, said to me that I had 'screwed him out of the 'Church' and that he wasn't going to be screwed again'.

102. THAT in the end, I gave the Applicant (Nicholson) a 30% share of Cybergarden Inc., which by the value established from the Rob Steele investment, represented $480,000. I felt beaten and exhausted and finally told the Applicant that I would give him these shares "for whatever it was that he thought I owed him for the 'Church', the Sackville land, his efforts in attracting an investor, etc. - everything."

. . .

105. THAT the Applicant's work efforts at Cybergarden were sporadic, unreliable, and an overall drain on the finances and morale of the company.

106. THAT often the Applicant would appear at the office simply to pick up his cheque then leave immediately. That he was often unreachable for days on end.

107. THAT by mid 2001 Cybergarden Inc. was doing well. That the company had 'landed' a major contract with the Bank of Nova Scotia due to the efforts of an employee, Neal Spidell. That we also 'landed' a significant contract with Labatt's Brewery due to my efforts of flying to Toronto and negotiating a contract.

108. THAT based on the Bank of Nova Scotia contract the company invested in vehicles, equipment and employees, which would be needed for the Bank of Nova Scotia contract.

109. THAT by 2001, Cybergarden Inc. had approximately 20 employees.

110. THAT following September 11th, 2001, the Bank of Nova Scotia contract was postponed indefinitely, but I did not lay off staff immediately.

...

114. THAT by the end of June 2002, my company's options had run out due to the Bank of Nova Scotia postponing the contract, and the expiry of the Labatt's contract.

115. THAT I subsequently laid off all staff and gave notice that we would have to vacate the office premises. That by the 1st of July 2002 the electricity was cut off and we were out of business.

. . .

120. THAT I made an attempt to collect the Company's receivables so as I could attempt to pay the payables, ie., some of the trade suppliers to keep my reputation.

121. THAT I had forgotten that the Applicant (Nicholson) had signing authority on the Company's bank account. That despite the fact the Applicant (Nicholson) knew the Company was in dire financial trouble he did, without my knowledge between September 26, 2002 and November 26th, 2002 withdrew $3,380.00 with a bank card which he activated on or about September 26th, 2002. I deactivated the card on November 22nd, 2002.

[24] Mr. Nicholson states at paragraph 13 of his May 27, 2005 affidavit:

13. I was supposed to receive a portion of the Cybergarden shares due to my efforts with the business. As the Respondent mentioned, I was the one who attracted the investor. I also worked for the business. I did receive dividends, although they were approximately $31,000.00 per year, not $50,000.00 as stated by the Applicant. This, as well as having expenses like high-speed internet and vehicle expenses, were compensation for the

> work that I did with the company (and was often not paid for). They were in no way connected with the fact that the Respondent and I purchased two properties together.

[25] The *Statute of Frauds*, R.S.N.S. c.442, s.4, provides that no interest in land may be granted or surrendered except in writing. Section 5 provides that this does not apply to the creation of an interest in land by trust.

[26] Whatever interest Mr. Nicholson has in MacIntyre Lane, it cannot be said to have been surrendered as asserted by Ms. Whyte. It was not done in writing as required by the *Statute of Frauds*.

[27] What interest does he have?

(a) He contributed money directly to the purchase of MacIntyre Lane. A resulting trust arises unless it may be shown he intended to make a gift of the entire beneficial interest to Ms. Whyte, the registered owner. There is no evidence that it was so intended. I do conclude that the intent at the time of purchase was to share the property.

(b) An unjust enrichment may also be said to be proven - as there is established:

- an enrichment: the $16,000.00 contribution to the purchase in Ms. Whyte's name;
- a deprivation: its loss to Mr. Nicholson;
- no juristic reason for the enrichment: it was not a gift of the entire beneficial interest.

In my view, considering the whole of the circumstances before me, an unjust enrichment analysis is preferred, more flexible.

[28] Hovius and Youdan (at pp. 106-107, The Law of Family Property, Carswell, 1992) discuss the inter-relationship of resulting trusts and unjust enrichment:

> The presumption of resulting trust can be viewed as a particular expression of the principle of unjust enrichment: it may be explained as a device for preventing

> unjust enrichment. . . . However, the orthodox law dealing with the presumption of resulting trust does not give rise to a choice of remedies; nor does it, in general, give the court flexibility. . . .

[29] The interest he establishes (whether by unjust enrichment or resulting trust) is, in my view, modified by a further unjust enrichment. From the time of its purchase, Mr. Nicholson effectively abandoned the property and his interest in the property to Ms. Whyte. She alone has paid the taxes on the property since 1996. There is an enrichment to him (she paid all of the taxes on a property he has an interest in), a deprivation (she paid the monies) and no juristic reason for the enrichment.

[30] In these circumstances it would be unfair, inequitable, in my view, to conclude that he was entitled to a 16/18th interest in the property. I conclude that Mr. Nicholson is entitled to a one half interest in the MacIntyre Lane lot. His affidavit of May 9, 2005 suggests that $50,000.00 is its fair market value. Ms. Whyte's 2002 Statement of Property also suggests a value of $50,000.00. I would accept that figure as the property's value. I have considered the questions referred to earlier:

1. Is the plaintiff's entitlement relatively small compared to the value of the property?
   A. No. It is half.

2. Is the defendant able to satisfy the plaintiff's claim without the sale of the property?
   A. Possibly.

3. Does the plaintiff have any special attachment to the property in question?
   A. Not that is apparent from the evidence.

4. What hardship would be caused the defendant if the plaintiff received a title interest?
   A. The parties have an extremely conflictual relationship.

5. Is there any reason why monetary damages might be inappropriate?
A. None known.

[31] Mr. Nicholson will receive his interest in the MacIntyre Lane property as follows:

Ms. Whyte shall pay Mr. Nicholson $25,000.00 within two months of the issuance of the order arising from this decision. Failing that, the property will be listed for sale, sold and its proceeds split after disbursements, disposition costs, et cetera.

[32] I will retain jurisdiction to deal with this latter remedy should the parties be unable to execute it by agreement (for example, being unable to agree on a real estate agent or listing price).

Costs

[33] I will deal with costs upon the request of either party - in which case a date will be set for brief oral submissions.

J. S. C. (F. D.)

Halifax, Nova Scotia