

Date: 961212
Docket: S025945
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GARY STANTON-LINDER and GLENN STANTON-LINDER,
Executors of the Estate of Kenneth Stanton Linder,
Deceased and the said GARY STANTON-LINDER and
GLENN STANTON-LINDER

PLAINTIFFS

AND:

RITA PATRIQUIN

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WARREN

Counsel for the Plaintiffs:

R. T. Todd

Counsel for the Defendant:

R. P. Hamilton

Place and Date of Hearing:

New Westminster, B.C.
October 21, 22 & 23, 1996

Issues

[1] The plaintiffs seek partition and sale of the home registered in the name of the deceased and his surviving spouse, the defendant, and occupational rent. The defendant counterclaims and pleads to set aside an unconscionable bargain and for compensation for the unjust enrichment of the deceased's estate.

Background and Findings

[2] The deceased and the defendant lived together from 1977 to 1980 and during that time they acquired a house in Vancouver, presumably with equality of contribution. Both had children from previous relationships. They separated after three years and the defendant bought the deceased's interest in the Vancouver property. They continued to date and went on trips together over the intervening eight years and then, in 1988, they re-established a living arrangement, buying a house in joint tenancy in September 1988. The purchase price was approximately \$164,000 of which the deceased contributed roughly \$63,000 and the defendant the balance. The house was free of encumbrances.

[3] The deceased had serious medical problems which predated their resumed relationship which led to him taking early disability retirement in 1986. After the deceased and the

defendant resumed cohabitation in 1988, the deceased received a disability pension due to his ill health and he remained at home while the defendant continued at her long time employment with a grocery chain working in Vancouver where she travelled each working day by bus.

[4] I am satisfied the deceased believed he worked as hard in the home as the defendant did outside. His sons gave evidence that he did the housework, home maintenance and shopping and cooking. The defendant gave evidence that the deceased's efforts around the home were rather less of a contribution than his boys believed or for that matter what the deceased may have believed. Whatever the level of physical contributions, the deceased and the defendant certainly made every effort to split each and every expense 50/50, for there was evidence before me of the minutest accounting detail. This is not to be considered a condemnation or criticism of the parties; rather to highlight the meticulous efforts they made to share the financial aspects of life absolutely equally.

[5] By his will drawn in July 1990, the deceased left his entire estate to his two children. The joint tenancy was severed only after the defendant and the deceased arranged to attend before a Notary Public in November 1993 and less than four months later Mr. Stanton-Linder Snr. died. When the defendant declined to sell the property or to buy out the estates one half interest, the executors commenced this action

seeking partition and sale and invoking the provisions of the *Partition of Property Act* and claiming occupational rent and the other usual claims.

[6] The defendant, by her statement of defence and counterclaim, asserts a constructive trust, alleging that the severing of the jointure was the result of pressure by the deceased and claiming that the severing was an unconscionable arrangement.

[7] There is evidence that when the parties bought the Richmond property, the unequal contribution came about as a result of the deceased telling the defendant that all he could contribute was the \$63,000. I am satisfied on the evidence that this was not the case. Of course, I do not have the benefit of the deceased's evidence of the circumstances of the unequal contribution, but his bank records of the time show that he retained some \$20,000 in his account after the house was purchased.

[8] The severing of the jointure was carried out by one Nancy Schick, a Notary Public of some 14 years experience. She testified that the defendant came to see her in September 1993 concerning her will. As was her practice, Ms. Schick discussed in a general manner the client's circumstances and took instructions from the defendant that her children were to be the beneficiaries as both she and the deceased wanted their

interests to go their respective children. When the defendant informed Ms. Schick that the house was registered as joint tenants, Ms. Schick informed the defendant that upon death a joint tenants interest passed to the survivor. Ms. Schick testified that the defendant told her she already knew that as she and the deceased had already been to another Notary. The matter was left with the defendant who was to discuss it with her "husband" and get back to Ms. Schick. Arrangements were made for the defendant to return and complete her will in five days. It was the evidence of Ms. Schick that the defendant appeared to understand the distinction between joint tenancy and tenancy in common. The defendant returned on September 27, 1993 and completed the formalities of signing the will.

[9] On October 21, 1993 Ms. Schick's office received telephone instructions, purportedly from the defendant, to draft the necessary transfer documents to convert the title into tenancy in common. As a result Ms. Schick prepared the appropriate documents and both the deceased and the defendant attended upon Ms. Schick on November 18, 1993 to sign the Freehold Transfer. It was the evidence of Ms. Schick that she explained again the significance of the transfer even though the deceased informed her he knew of its effect. Ms. Schick said that she was not aware of any tension or stress between the defendant and the deceased when they attended to sign the Transfer form and she made a note at the time indicating "advised both parties affect of breaking joint tenancy". I am

satisfied on the evidence of Ms. Schick that both the defendant and the deceased were acting freely and informed when they attended upon her and signed the Transfer.

[10] Some months later, in August 1994, after the death of Mr. Stanton-Linder Snr., Ms. Patriquin telephoned the office of the Notary, Ms. Schick, and spoke with an employee there to enquire how to get an interest in the property consistent with her greater financial contribution to the purchase price.

[11] The defendant is presently 66 years old and retired from her employment. She has 3 children from her previous marriages, the deceased had 2, although none of the children, save the defendant's youngest, lived with the parties during their years of cohabitation. At her Examination for Discovery the defendant related the history of the two properties they had owned: the buy-out of the deceased's interest in the first for approximately \$16,000, the purchase of the second for approximately \$164,000 and her greater contribution to it of \$101,840. Although the deceased was in bad health and receiving a disability pension, that, together with the defendant's employment income was sufficient to pay their expenses with some surplus. She stated during her discovery that they maintained meticulous accounting records of their expenses and even kept a log book in the car to track their respective shares of holiday costs. With reference to her meetings with the Notary and the Transfer into tenancy in common, the

defendant agreed that possibly she had called Ms. Schick to discuss severance and that Ms. Schick had talked to her of a way for her children to get her half of the house. As for the defendant's expectations, she testified that she expected to get out what she had put in plus a pro rata share of any increase.

[12] In her direct evidence, Ms. Patriquin said that she and the deceased had enjoyed a good relationship until the last few months when the deceased became unhappy. Presently her income consists of her employment pension, a portion of the deceased's C.P.P., some Social Security benefits and some income from Canadian Securities. As well she has 4 R.R.S.P.s with a value under \$17,000.

[13] The funding for the second house was arranged in the manner it was because the deceased said that "all he could afford to put in was \$62,000" and this resulted in the defendant putting in \$102,000 leaving her with savings of only a little over \$2,000. The defendant also testified that she told the deceased, "Well, I'll just own more of the house than you do." In her evidence she agreed the deceased responded saying he "did not think that would be right" or words to that effect. That evidence satisfies me that the defendant and the deceased addressed their minds to unequal ownership early on during their second period of cohabitation and did not arrive at any agreement. Further, taken with her evidence at

Discovery and the subsequent severance of the jointure, I am satisfied that at the time before the death of Mr. Stanton-Linder, the parties agreed that the ownership would be equal. Certainly everything else appears to have been equally divided, down to the most minute item.

[14] The defendant did give evidence that at the beginning of their second cohabitation the deceased was handling the financial affairs unfairly so that she was paying more of the expenses although she was not able to express the shortfall in dollar terms.

[15] Following the death of Mr. Stanton-Linder, the defendant's daughter moved in with her mother and stayed in the house without paying any rent. The plaintiffs have claimed occupational rent, in part because of this, but in my view of the circumstances, the daughter's period of residence with her bereaved mother is not a basis for such a claim. The defendant has been solely responsible for paying the taxes and insurance on the property since February 1994 totalling some \$4,800.

[16] As for the severance of the title, the evidence of the defendant does not convince me that she lacked any understanding then, or now, of the difference between joint tenancy and tenancy in common. I am satisfied on the evidence that both she and the deceased discussed both the status of the title and their mutual desire to leave their respective estates

to their own children and the need therefore, to sever the jointure. I am not satisfied that this step was taken by the defendant as a result of any pressure or stress upon her by the deceased or that the severing was the result of any ignorance on the part of the defendant. She agreed in cross examination that there was no agreement that she should own more of the subject property - she just felt she should own more because of her greater financial contribution. She also agreed in cross examination that she wanted to "leave her half" of the house to her children and when she had left the office of the Notary following her first discussion, she knew she wanted to leave her children her half of the house. Clearly, the defendant did not expect to inherit the deceased's half interest in the house.

Submissions - Plaintiffs

[17] The plaintiffs submit that they are prima facie entitled to partition and sale pursuant to the provisions of the Act and the decisions of this court in *Aleksich v. Konradson*, [1993] BCJ No. 1360 and *Barrone v. Smith*, [1991] BCJ No. 2648. Further, the plaintiff argues that the defendant cannot claim on a constructive trust because there has been no "unjust enrichment": no deprivation. For this the plaintiffs rely upon the decision of the Supreme Court of Canada in *Peter v. Beblow*, [1933] 3 W.W.R. 337 and particularly the following passage from the reasons for judgment of Cory J.:

In *Pettkus v. Becker*, supra, Dickson J. had this to say at p. 849 with regard to juristic reasons for the enrichment:

"I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it."

The test put forward is an objective test. The parties entering a marriage or a common law relationship will rarely have considered the question of compensation of benefits. If asked, they might say that because they loved their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence to the contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end. [counsel's emphasis]

[18] In the *Aleksich* decision, Clancy J. held that constructive trust was available as a remedy to prevent unjust enrichment, but a party could not succeed simply on the basis of a contribution from which the other party derived a benefit. It must be established that the retention of the benefit would be unjust. Here the plaintiffs say the retention of any benefit would not be unjust.

[19] In the *Barrone* decision, the plaintiffs rely upon these words of Spencer J. found at page 4:

During cohabitation the petitioner might also be regarded as building up a claim for a constructive trust under the authority of *Pettkus v. Becker*. It matters not which route is taken to achieve a just result between the parties. On the facts of the case at bar, placing the title in joint names enables a finding of intent to benefit to be made that was not available on the facts of *Petkus*. [counsel's emphasis]

The plaintiffs argue that this is particularly apt to the case before me, because the title was put in the joint names, not once but twice, without any distinction as to contributions. Clearly then there was an intention to benefit.

Submissions - defendant

[20] The defendant submits that she should be entitled to sole ownership because the transfer from jointure was unconscionable and should be set aside. In support of this argument counsel relied upon the decision of the B.C.C.A. in *Smyth v. Szep*, [1992] 2 W.W.R. 673 and *Richard v. Richard*, (1993) 48 R.F.L. (3d) 132 [N.B.C.A.]. In the first case, Taylor J.A. held at page 681 that equity will grant relief where there is inequality combined with substantial unfairness, and that in its modern application poverty and ignorance combined with lack of independent advice on the part of the party seeking relief

(plus, presumably, some evidence of unfairness) places an onus on the other party to show that the bargain was in fact fair.

[21] As for her claim in constructive trust, the defendant submits that given her work outside of the home requiring absences of 12 hours a work day, her greater share of the housework and entertaining of family and friends and her significantly larger contribution to the purchase price brought about by the deceased claiming to have no more money, are sufficient to establish the requirements of an unjust enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Anderson v. Balascak*, (unreported) (August 16, 1993) New Westminster No. C903553 Fraser J; and *Renko v. Stevens Estate*, (1996) 19 B.C.L.R.(3d) 349 Harvey J.

[22] Counsel submits that the constructive trust interest should be equated with the value of the deceased's interest in the former matrimonial home and to the extent that this interest is less than the deceased's full interest then it should be set-off against the claim for occupational rent, particularly because of the defendant's larger interest in the house, her payment of the taxes and insurance and her general upkeep of the home. Finally, and in the alternative presumably, the defendant submits that this court should award the defendant a life interest in whatever portion of the equity the estate is awarded, thereby avoiding a sale of the house and the displacement of the defendant.

Decision

[23] I cannot conclude on a careful consideration of the evidence that the defendant has discharged the burden upon her of establishing an unconscionable arrangement brought about the change to a tenancy in common. None of the requisite elements are present in my view. As Davey J. noted in *Morrison v. Coast Finance* (1965), 54 W.W.R. 257 (the passage referred to by Taylor J.A. in *Smyth supra*), there must be proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger.

[24] With regard to the claim in trust, the essential ingredients of such a claim are an enrichment, a corresponding deprivation and the absence of a juridical reason for the enrichment: *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

[25] Here, the defendant was persuaded to make a greater contribution to the purchase price by the deceased who wanted to preserve some of his other assets. He was thereby enriched and she was correspondingly deprived. Further, I can find no juristic reason for the enrichment. Accordingly, the defendant has established her claim of unjust enrichment and she is entitled to be compensated for her deprivation.

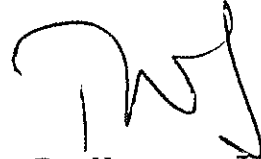
[26] The remedy is alternative, as noted by McLachlin J. in *Peter v. Beblow* supra at p.995: either a monetary award or a trust. In my view, here the appropriate remedy is to make a monetary adjustment to the shares of the selling price of the home.

[27] It follows that the plaintiffs are entitled to succeed on their action for partition and sale but that the defendant is entitled to a greater than one half share in the property. That share shall be the result of her monetary contribution divided by the original purchase price multiplied by 100 which I calculate to approximate 62%. Because the defendant enjoyed the occupation of the house but maintained it as well, I make no award to the plaintiffs for either occupational rent nor to the defendant for compensation for the cost of taxes or insurance.

Orders

[28] Accordingly, there will be an order for sale with the net sale proceeds being divided 62/38 in the defendant's favour. The defendant shall be at liberty to purchase the estate's 38% interest within 60 days of the date of these reasons. Because success was divided (unless there have been offers exchanged which may lead to a different result in the

costs), I order that each party bear their own costs but with liberty to apply.



T. P. Warren J.