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**** HIGHLIGHTS ****

- * The British Columbia Court of Appeal has set aside the decision of a trial Judge who imposed a constructive trust in favour of the parent who advanced a substantial amount of money to her son and daughter-in-law to purchase a farm. The Court of Appeal concluded that there was an unjust enrichment, and that evidence of the parties' intention that the parent was to be repaid was not clear enough to create a juristic reason to negate a constructive trust based on the existence of a contract. The Court, however, found that a monetary judgment for the amount advanced would be an adequate and sufficient remedy, granted a judgment for the amount of the advance, and directed that the parent be removed from title as a joint owner because it was never intended that the parent would be an owner -- only that the parent have security for the repayment of the advance. The Court examines the law with respect to unjust enrichment, constructive trusts and the proper remedies for constructive trusts. (*Harraway v. Harraway*, [CALN/2010-001](#), [\[2009\] B.C.J. No. 2457](#), British Columbia Court of Appeal)

**** NEW CASE LAW ****

Harraway v. Harraway; [CALN/2010-001](#), Full text: [\[2009\] B.C.J. No. 2457](#); [2009 BCCA 561](#), British Columbia Court of Appeal, L.S.G. Finch C.J.B.C., P.A. Kirkpatrick and D.M. Smith J.J.A., December 10, 2009.

Constructive trust -- loans -- remedies.

Colinda Harraway ("Mrs. Harraway") appealed to the British Columbia Court of Appeal from an Order of the British Columbia Supreme Court which declared that her mother-in-law, Constance Fournier ("Ms. Fournier") was entitled to an 80% beneficial interest in a farm property (the "Farm") which Mrs. Harraway maintained had been purchased as a

matrimonial home for herself and her husband, Matthew Harraway ("Mr. Harraway"). Ms. Fournier was the mother of Mr. Harraway.

Mr. and Mrs. Harraway were involved in divorce proceedings.

Ms. Fournier had contributed substantial funds for the purchase of the Farm. The trial Judge found that the contribution was not intended as a gift.

The trial Judge found that there was insufficient evidence to establish a resulting trust. The Judge, however, found that there had been an unjust enrichment and that imposing a constructive trust for 80% of the Farm would be an appropriate remedy.

On appeal, Mrs. Harraway raised two issues [para. 11]:

- 1) Did the trial judge err in holding that Mr. Harraway and Mrs. Harraway were unjustly enriched? Specifically, was it an error to hold that there was no loan and thus no juristic reason for the enrichment?
- 2) If there was unjust enrichment, did the trial judge err in holding that a constructive trust was the appropriate remedy for unjust enrichment?

Decision: Finch, C.J. (Kirkpatrick, J. and Smith, J. concurring) [at paras. 58-60] allowed the appeal, set aside the constructive trust and granted a monetary award in favour of Ms. Fournier.

Finch, C.J. considered the following issues:

A. Were the Harraways Unjustly Enriched?

Finch, C.J. summarized the law and the issues as follows at para. 14 to 22

[14] Unjust enrichment has three elements: see *Garland v. Consumers' Gas Co.*, [2004 SCC 25](#) at para. 30:

1. An enrichment of the defendant;
2. A correspondent deprivation of the plaintiff; and
3. An absence of juristic reason for the enrichment.

[15] There is no question that the Harraways were enriched and that Ms. Fournier suffered a corresponding deprivation. This is a simple case where money moved from one party to another party.

[16] The real issue in this case is whether there is an "absence of juristic reason for the enrichment".

[17] The "absence of juristic reason" element is examined in two stages: Garland at paras. 44-45.

[18] First, Ms. Fournier has the burden of showing "that no juristic reason from an established category exists to deny recovery": Garland at para. 44. There is a short list of established categories of juristic reasons that Ms. Fournier must disprove.

[19] The list of established categories is set out in Garland:

1. A contract.
2. A disposition of law.
3. A donative intent.
4. Other valid common law, equitable, or statutory obligations.

[20] If Ms. Fournier shows that there is no juristic reason from an established category, then a prima facie case of unjust enrichment is made out.

[21] Under the second stage, the onus shifts to Ms. Harraway to rebut the prima facie case of unjust enrichment. This can be done by showing another reason to deny recovery to the claimant, and why the enrichment should be retained. Garland at para. 45. At this stage, the court must have regard to the "reasonable expectations of the parties" and "public policy considerations:" see Garland at para. 46.

[22] The only issue that arises on this appeal is whether or not there is a juristic reason for the enrichment in the form of a contract. ...

And at para. 27:

[27] If a contract is found to govern the transfer of monies there will be a juristic reason for the enrichment and, thus, no unjust enrichment. In *The Law of Restitution*, looseleaf (Aurora: Canada Law Book, 2009), Maddaugh and McCamus describe the:

... well-established idea that it would be open to [Ms. Harraway] in any restitution case to prove that [Ms. Fournier] should not recover because the benefits had been conferred by [Ms. Fournier] under a valid contract or had been voluntarily transferred to [Ms. Harraway] as a gift.

Finch, C.J. observed that there were a large number of documents including notes signed by Ms. Fournier which indicated that Ms. Fournier felt that the Harraways had borrowed from her. The documents included a promissory note signed by the Harraways in her favour and a letter demanding payment of the balance due to Ms. Fournier.

Although Finch, C.J. felt that there was evidence to support Mrs. Harraway's position that the payments were in the nature of loans, he concluded that the evidence was not capable of supporting a valid and enforceable contract, stating at para. 45 and 46:

[45] However, as found by the judge, the evidence is not capable of supporting a valid and enforceable contract. The documents do not establish an unambiguous debt in an amount certain. One cannot tell whether one or more of the documents refer to the same debt. The evidence falls short of establishing a valid and enforceable loan contract because the terms of any such contract are uncertain.

[46] The fact that the parties intended to treat the transfers as loans is insufficient to avoid a finding of unjust enrichment because there is no valid and enforceable contract. In *The Law of Restitution*, Maddaugh and McCamus state:

Where the enrichment results from the performance of a valid contractual obligation, the general policy favouring the security of transactions weighs against the intervention of restitutionary claims. Only if the transaction can be found to be unenforceable for a reason recognized either at law or in equity can the possibility of a restitutionary claim for the value of benefits conferred be entertained. ... Restitutionary claims may only arise if the agreement was rendered ineffective. (3:200.30) [Emphasis added].

Finch, C.J. therefore concluded [at para. 47 and 48]:

[47] In the absence of a valid and enforceable contract, a prima facie case of unjust enrichment is made out because there is no juristic reason to justify the enrichment. No argument was raised by Mrs. Harraway under the second stage of Garland analysis to rebut the prima facie case of unjust enrichment.

[48] Thus, it would appear that the Harraways were enriched, Ms. Fournier was correspondingly deprived, and there is an absence of juristic reason for the enrichment. Unjust enrichment has therefore been established.

B. Is a Constructive Trust the Proper Remedy in This Case?

Finch, C.J. observed that imposing a constructive trust was not the only remedy for an unjust enrichment [at para. 50 to 54] relying on passages from *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 3 S.C.R. 574 at p. 674; *Peter v. Beblow* [1993] 1 S.C.R. 980 at p. 987-988; and *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213, at para. 50.

Finch, C.J. observed [at para. 54] that the strongest argument for a constructive trust remedy is that it is necessary to provide a meaningful remedy, and that the strongest argument against a constructive trust is that a monetary remedy is adequate.

Finch, C.J. concluded at para. 56 that a constructive trust was not necessary to provide a meaningful remedy, stating, as follows:

[56] A constructive trust is not necessary to provide a meaningful remedy to Ms. Fournier. Rather, as set out above, the evidence shows that Ms. Fournier intended to transfer the money as loans, and did not advance the monies on the basis that she would become a part owner or share in any appreciation of the real estate. We were not directed to anything in the record that would make a constructive trust necessary to provide Ms. Fournier with a meaningful remedy. Therefore it follows that the much simpler remedy of a monetary award is adequate and sufficient.

He also concluded that Ms. Fournier was entitled to the \$145,964 she had provided; that Ms. Fournier was not entitled to a proprietary interest in the Farm; and that she should be removed from title, as her one-third joint interest was only provided to her as security for the amount she had paid [at para. 58 and 59].

**** CREDITS ****

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