IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brody v. Leonard,*
2024 BCSC 1251

Date: 20240711
Docket: S231660
Registry: Vancouver

Between:

Robert Henry Brody

Petitioner

And

Cynthia Rose Leonard

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for Petitioner:	D.J. Barker
Counsel for Respondent:	T.W. Brine
Place and Date of Hearing:	Vancouver, B.C. July 21 and November 6, 2023 and March 1, 2024
Place and Date of Judgment:	Vancouver, B.C. July 11, 2024

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Introduction

[1] This petition concerns 125 Ridge Park Road, Penticton (the "Property"). The petitioner acquired a leasehold interest in the Property in 2018. In December 2019, while the parties were in a relationship, the respondent was added to the "title" as having a joint interest. The petitioner now seeks declarations that the respondent holds her interest in the Property on a resulting or constructive trust for him and has no beneficial interest. The petitioner also seeks orders that the respondent be released from the covenants of a mortgage registered against the Property and be removed from "title" to the Property.

[2] The petition is opposed by the respondent. She submits that she provided value for her interest in the Property and that the parties agreed she would be entitled to 50% of the increase in the equity in the Property, if the Property was sold.

[3] For the reasons that follow, the petitioner is entitled to a declaration that the respondent holds her interest in the Property in trust for the petitioner. The petitioner is also entitled to an order the respondent is to be removed from the "title" but only after the mortgagee consents to her removal as co-covenantor and after the other parties to the lease agreement consent to her removal as a tenant.

Facts

The Property and its Purchase

[4] The Property is located on Reserve 07397 Penticton No. 1. It is part of "designated lands" as defined under the *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*]. Pursuant to the *Indian Act*, title to such designated lands remains in the Crown but leases are permissible. Such lands, and leases are registered in the Indian Lands Registry System ("ILRS"), a federal registry.

[5] The lessor of the lands upon which the Property is located is Skaha Hills Limited Partnership ("Skaha Hills LP"). It acquired its interest pursuant to a lease from the Crown, effective August 1, 2015, for a term of 99 years. The lease is registered in the ILRS as No. 6088335.

[6] By a sublease dated June 15, 2014, and registered in the ILRS as No. 6083029, Skaha Hills LP leased lots 537 and 542 on Plan 10337 to the Penticton Indian Band. The Property comprises part of Lot 542, more specifically, it is Lot 542-25.

[7] Pursuant to an Assignment of Sublease registered in the ILRS as No. 6110610, the petitioner acquired his interest in the Property as a subtenant/homeowner on October 25, 2018. He purchased the interest for $704,383. The purchase was financed with a down payment of $50,000 and two private mortgage loans; one securing $478,500 with an interest rate of slightly in excess of 8% (the “First Circle Mortgage”) and the other securing $210,000 with an interest rate of 10% or 12% (the “Jetmov Mortgage”). Both mortgages were duly registered in the ILRS.

The Relationship and Langley Apartment

[8] The parties met in 2018 and became engaged in April 2019. They planned to be married in May 2020.

[9] In September or October 2019, the respondent and her son moved into the petitioner’s rented apartment in Langley (the Langley apartment”).

[10] The parties disagree on who paid the rent for the Langley apartment after the respondent and her son moved in. The petitioner deposes that he paid the rent and the respondent paid for food. The respondent deposes that she paid the majority of the rent.

[11] I have reviewed the parties’ bank statements for the relevant period. Based on that review, I am satisfied and find as a fact that the respondent effectively paid the rent in the months of September, October and December 2019. I say effectively because all rent payments were actually withdrawn from the petitioner’s bank account but, for the months of September, October and December 2019, the respondent transferred the necessary funds to the petitioner’s account. The rent for

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all other months was paid by the petitioner from his own funds, including all rent payments made in 2020.

The Refinancing

[12] Throughout 2018 and 2019, the petitioner was involved in ongoing divorce proceedings with his ex-spouse. On November 14, 2019, reasons for judgment were rendered in that proceeding which, *inter alia*, allowed the petitioner to retain his interest in the Property but required him to make various payments to his ex-spouse in the total amount of approximately $110,000. The payments included $15,000 for her interest in the Property.

[13] The petitioner deposes that after he received the reasons for judgment in his divorce proceeding, he had to decide whether to sell the Property. There were discussions between the petitioner and the Royal Bank of Canada (“RBC”) and between the parties that ultimately led to the respondent being a co-covenantor on a new RBC mortgage and being added as a co-subtenant to the Property. The sequence of events leading to this result is not entirely clear from the evidence. At paras. 20-23 of his first affidavit, the petitioner deposes as follows:

> 20. Ms. Leonard suggested to me that we should keep the Property so that it could be used as a vacation home. Ms. Leonard also suggested that we should refinance the Property to obtain a lower interest rate. Ms. Leonard offered to make the mortgage payments on the Property as her salary was over $400,000 per year.
>
> 21. At all times, Ms. Leonard and I agreed that the Property was always mine and mine alone and did not constitute an "investment" for Ms. Leonard.
>
> 22. I attended the Royal Bank of Canada to inquire about refinancing. I was rejected for refinancing without a guarantor. Ms. Leonard agreed to guarantee the mortgage.
>
> 23. As Ms. Leonard had poor credit, RBC would only allow her to guarantee the mortgage if she was also put on title as a co-signer.

[14] The respondent agrees that she was the one who suggested that the petitioner refinance the existing mortgages on the Property. She also deposed that the two of them discussed whether they could qualify for a mortgage together. She says this conversation occurred immediately after the petitioner received the result

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of his divorce proceeding and prior to the petitioner attending at RBC. In his second affidavit, the petitioner denies that there was any discussion about the two of them applying for a mortgage together prior to his first meeting with RBC. He deposes that it was only after his first meeting with the bank that there was a discussion about the respondent being a guarantor.

[15] There is minimal documentation about the bank meetings and discussions between the parties. The documentation consists of a single letter from RBC dated December 4, 2019 advising that the parties had been pre-approved for a mortgage.

[16] I prefer the evidence of the petitioner over that of the respondent concerning the sequencing of the events that led to the new mortgage. The petitioner's evidence, although not detailed, is more detailed and fulsome than that of the respondent.

[17] Accordingly, I make the following findings of fact:

a) After receiving the reasons in his divorce proceeding, at the suggestion of the respondent, the petitioner attended at RBC to inquire about refinancing the existing First Circle Mortgage and Jetmov Mortgage;

b) The petitioner was told at the meeting with RBC that he would not qualify for a mortgage without a guarantor;

c) The respondent then agreed to guarantee the mortgage but RBC refused to accept her as a guarantor and suggested instead that she be added to the title to the Property; and

d) The parties then had discussions about adding the respondent to the title.

The Agreement

[18] The parties disagree on the exact nature of the agreement between them relating to adding the respondent to the title. The respondent deposes that there was an express agreement between the parties that she was to be entitled to 50% of any increase in the equity in the Property from the date she was registered on title. The

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petitioner denies this. He says they never had a discussion about sharing equity and the only discussion they had was that the respondent agreed to make the mortgage payments.

[19] I do not accept the evidence of the respondent that there was an express agreement she would be entitled to 50% of the increase in equity and find as a fact that the respondent agreed to make the mortgage payments in exchange for being added to the title.

[20] First, at various points in her cross-examination, the respondent admitted to an agreement that she would make the mortgage payments on the Property. Excerpts from her cross-examination are as follows:

> 188 Q You could have kept making mortgage payments as per your agreement with Brody as per being a joint owner on the property after February 18th, 2020, couldn't you?
>
> A For a period of time, yes.
>
> …
>
> 193 Q And that mortgage was taken out on the promise that you had as a couple planning to marry that you would bear the mortgage payments; correct?
>
> A Correct.
>
> 194 Q That was your agreement?
>
> A That we both would, but yes, correct.
>
> 195 Q No, no. You agreed to make the mortgage payments. He was going to pay something else. That was the deal, wasn't it?
>
> A What else was he going to pay?
>
> 196 Q I don't -- I'm not answering your questions. You agreed to make the mortgage payments – you already admitted this --
>
> A M'mm-hmm.
>
> 197 Q -- on this RBC --
>
> A Yes. I agreed to make the mortgage payments on the RBC, but I do not know that he agreed to pay for anything else.
>
> …
>
> 274 Q Now, just so -- I want to just make sure I understand what the full agreement was between you and Brody when you were contemplating somehow being involved in relation to the -- what became the RBC mortgage. If I put it to you that what was ultimately agreed was that you would make the

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> mortgage payments on the RBC 24 mortgage; correct? That was one thing you agreed to do?
>
> A Yes.

[21] Second, in an email dated December 8, 2022, the respondent wrote to the petitioner as follows:

> Hi Bob,
>
> Thank you for the well wishes. We are all doing fine. I hope you and your family are well too.
>
> I have given this some thought and I had a brief consultation with a lawyer about this. It seems that the law is clear that I am entitled to one half of the equity built from the appraised value of the property at the time we placed the mortgage on it. I appreciate that you have carried the financials on this property. It was explained to me that if you had not chosen to live in the property that we would have rented it out to cover the costs and that you would have had to in either case had to live somewhere, as I did.
>
> …

[22] There are two notable aspects to this email dated December 8, 2022. First, this email is the first time the respondent suggested she was entitled to 50% of the increase in the equity. Second, she states that, after meeting with counsel, "the law is clear that I am entitled to one-half of the equity". She does not state that there was an agreement to this effect. Rather, the inference I draw is she was told she was entitled to 50%, presumably because of a misapprehension of her rights under the *Family Law Act*, S.B.C. 2011, c. 25.

[23] Third, consistent with the petitioner's version of the agreement, the respondent did make the mortgage payments on the refinanced mortgage until she lost her job, which I address more fully below.

[24] Accordingly, I accept the evidence of the petitioner and find that there was never any agreement that the respondent was to get 50% of the increase in the equity on the Property. Rather, the agreement between the parties relating to the Property was that the respondent would be added to the title in exchange for her making the payments on the refinanced mortgage.

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The Assignment of Sublease and New Mortgage

[25] Pursuant to an Assignment of Sublease dated December 20, 2019, between the petitioner as “Assignor”, the petitioner and respondent, jointly, as “Assignees”, Skaha Hills LP as “Lessor” and the Skaha Hills Homeowners Association as the “Homeowners Association”, the petitioner and respondent became joint tenants of the Property. The Assignment of Sublease was registered under the ILRS as No. 6119913.

[26] After some difficulties, including due to a problem with the respondent’s credit rating, the parties obtained the new mortgage with RBC on January 15, 2020. The new mortgage was in the amount of $728,000 with an interest rate of 2.89% and bi-weekly payments of $1,571.20. On January 15, 2020, the RBC account manager advised the petitioner by text: “We are reaching out to let you know your mortgage has been advanced”.

[27] The RBC mortgage was duly registered on title under the ILRS. The funds from the new mortgage were used to pay off the First Circle Mortgage and Jetmov Mortgage, which were then duly discharged.

[28] The parties disagree on whether the petitioner could have qualified for the new mortgage on his own. In his second affidavit, the petitioner deposes that he had sufficient equity and a good credit score such that he could have qualified. I do not accept this evidence. First, it is contrary to his evidence in his first affidavit where he said “I was rejected for refinancing without a guarantor”. Second, although the petitioner may have had a good credit score, the evidence does not suggest his equity in the Property at that time was great. The Property was appraised at $910,000 at the time of the refinancing but the amount owing on the First Circle Mortgage and Jetmov Mortgage was slightly in excess of $710,000. Accordingly, his equity in the Property was only approximately 21%.

[29] The parties also disagree on whether the petitioner could have continued to make the mortgage payments on the First Circle Mortgage and Jetmov Mortgage, if those mortgages had not been refinanced. The petitioner deposes that he could

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have done so. I accept this evidence as he had cash savings of $130,000 in November and December of 2019.

Post-Refinancing

[30] Subsequent to the re-financing, two events occurred in quick succession. First, on January 16, 2020, the respondent effectively lost her job, for which she had been very handsomely remunerated. Second, in early February 2020, the relationship between the parties came to an end, although they continued to live together in the Langley apartment until April 1, 2020.

[31] The parties agree that from March 2020 onwards, the petitioner made all of the mortgage payments on the Property. They further agree that the petitioner repaid the respondent for two mortgage payments that she had made.

[32] In her cross-examination, the respondent admitted that the petitioner offered to repay her for the payments she had made and she accepted his offer. Her cross-examination evidence at Questions 102 to 112 was as follows:

> 102 Q All right. Now, when your relationship – your conjugal type of relationship ended, and I understand, you know, you were -- you had that gap period where you were still together but you were sharing a bed but, you know, you weren't boyfriend/girlfriend, if I can put it that way, you asked for Mr. Brody to pay you back the mortgage payments that you had paid, didn't you?
>
> A No. He offered to.
>
> 103 Q All right. Well, how do you recall that he offered to, Ms. Leonard? Because it would seem to me that you're the one who has the credit issues and you'd like to get your money back. No?
>
> A No.
>
> 104 Q You didn't want your money back; is that your evidence?
>
> A Mr. --
>
> 105 Q You didn't want your money back; is that your evidence?
>
> A Can you rephrase the question.
>
> 106 Q Did you want your money back which led to him paying you back the two times 1,571.20?
>
> A I accepted the money back.
>
> 107 Q Did you want it back?

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A No.

108 Q You -- did you refuse it?

A No.

109 Q Why didn't you want it back?

A It never occurred to me to have it back.

110 Q Well, if he came and said to you, here's your 2 payments toward the mortgage, you knew what it was coming for, didn't you?

A I accepted it.

111 Q Right. You knew what it was coming for, didn't you?

A Yes.

112 Q All right. And you accepted it, didn't you?

A I accepted it.

[33] The parties disagree on the number of mortgage payments that were made by the respondent and whether she was reimbursed for all of them. The respondent deposes that she made three bi-weekly mortgage payments under the refinanced mortgage. The petitioner concedes only that the respondent made two mortgage payments. He denies that she made a third payment.

[34] I have reviewed the parties' supporting bank statements. The respondent's bank statements show only two mortgage payments being withdrawn from her account, suggesting she made only two payments. Additionally, in cross-examination, although she acknowledged she accepted his offer to reimburse her for the mortgage payments, she was unable to explain why she did not request reimbursement of the alleged third payment. Her cross-examination on these points was as follows:

135 Q I just want to go back to the -- Mr. Brody's repayment -- payment back to you of the mortgage payments, the two that you admit that he had made to you…. Now, what I want to ask you, I want to go back to your evidence about that, is do you actually have any recollection of the discussions you had with Mr. Brody about him paying you back the two that you admit were paid back? Do you have any recollection of the discussions?

A Roughly.

136 Q Well, I'm going to put it to you that you asked him to pay you back because you needed the money.

A That is untrue.

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137 Q What's your recollection?

A He -- when we were deciding to separate, he offered to pay back the mortgage payments that were made on the Penticton property, and I accepted.

138 Q And he paid you back at the time what you understood were the mortgage payments made; is that correct?

A Yes.

…

143 Q But he didn't pay you back -- sorry, you don't have a recollection of him paying you back for the third one?

A I don't recall.

144 Q Right. And you didn't raise the third one at the time?

A No.

145 Q And that was just through inadvertence, I assume. Was it?

A No.

146 Q Well, he wanted to pay you back for your payments. If you were -- paid a third one, it would seem to me that you would have said to him, well, what about number 3? No?

A I didn't say that.

147 Q Why didn't you?

A I don't know.

[35] Considering all of the evidence, I find the following facts:

a) the respondent made only two mortgage payments under the RBC mortgage of $1,571.20 each;

b) upon the breakdown of the relationship, the petitioner offered to repay the respondent for the mortgage payments she made;

c) the respondent accepted the petitioner's offer; and

d) the petitioner did, in fact, repay the respondent for the mortgage payments she made.

[36] On April 1, 2020, the lease on the Langley apartment came to an end. The petitioner then moved into the Property and the respondent moved elsewhere.

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Value of the Property and Contributions

[37] As I have indicated, the petitioner acquired his interest in the Property on October 25, 2018, for $704,383 and the Property was appraised at $910,000 when it was refinanced in December 2019.

[38] The BC assessment for the Property for 2023 is in evidence. It shows the following assessed values as of July 1 the previous year.

Year	Assessed Value
2023	$1,205,000
2022	$996,000
2021	$808,000
2020	$840,000
2019	$725,000

[39] The petitioner further deposes that he believes the market value of the Property as of June 2023 was $1,250,000. He bases this belief on a real estate listing of a similar property. This is weak and inadmissible evidence of the current market value of the Property.

[40] The precise current market value of the Property is not particularly relevant to the issues I must decide. It is clearly over $1 million and probably approximately $1.2 million or slightly greater.

Positions of the Parties

[41] The positions of the parties have changed somewhat since the pleadings were filed and since the hearing first commenced before me.

[42] Initially, both parties assumed that s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], applied to this matter with the result that the registered title was

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indefeasible. However, during the second day of the hearing, the applicability of s. 23(2) of the *LTA* was called into question because of the Property being on reserve land. The matter was then adjourned to allow the parties to consider this issue. At the recommencement of the hearing, the parties correctly identified that s. 23(2) of the *LTA* has no application to the Property because it is "designated lands" under the *Indian Act* and registered in the ILRS.

[43] The petitioner submits the respondent holds her interest in the Property on a resulting trust for the petitioner or, alternatively, that the respondent has been unjustly enriched by the transfer and holds her interest on a constructive trust for the petitioner. The petitioner specifically denies that there was any agreement between the parties that the respondent would receive 50% of the increase in the equity in the Property. The petitioner submits that the only agreement between the parties was that the respondent would make the mortgage payments in exchange for being added to the title.

[44] The respondent initially specifically pleaded s. 23(2) of the *LTA* and submitted that that registered title was conclusive evidence of the respondent's interest in the Property. However, as indicated, the respondent now concedes that the *LTA* has no application. The respondent nevertheless submits that the doctrines of resulting trust and unjust enrichment do not apply as the respondent gave value for her interest in the Property, namely the ability of the petitioner to refinance. The respondent further submits that the parties had a binding agreement that, if the property was sold, she would receive 50% of the increase in the equity after she became a joint owner.

Analysis

Breach of Contract

[45] It is regrettable that the parties failed to appreciate the inapplicability of the *LTA* to this matter at an earlier stage. In my view, this has resulted in the parties resorting to the doctrines of resulting trust and unjust enrichment/constructive trust in circumstances where it was not necessary. Both parties have argued the existence

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of an agreement between the parties. This matter could have and should have been approached as a simple case of breach of contract.

[46] I have found as a fact that there was an agreement between the parties. I have further found that the agreement was, as the petitioner submitted, that the respondent would be added to the title in exchange for her promise to make the mortgage payments on the refinanced mortgage.

[47] The petitioner complied with his obligations under the agreement; he added the respondent as a co-tenant to the sublease. The respondent, however, made only two mortgage payments. She then accepted the petitioner's offer to reimburse her for those payments and she was reimbursed for those payments.

[48] The respondent's acceptance of the petitioner's offer constituted a rescission of the parties original agreement by mutual consent. The result is that the parties are to be returned to their original positions.

[49] Accordingly, on simple contract principles, the petitioner is entitled to have the respondent removed as a co-tenant to the Property.

Unjust Enrichment/Constructive Trust

[50] Additionally, although it is not necessary to resort to unjust enrichment and constructive trust, it is my view, that the petitioner has made out such a claim.

[51] I have been referred to several authorities on unjust enrichment and constructive trusts but I need not consider them. The applicable principles are summarized in *Freeland v. Farrell*, 2022 BCCA 99 [*Freeland*], which has somewhat similar facts, although it was a case involving s. 23(2) of the *LTA*.

[52] In *Freeland* "during a short-lived romance" the parties purchased a home together. They both signed the mortgage and were on title as joint owners. The parties had agreed that they would each pay one-half of the cash purchase of the closing price and one-half of the mortgage payments. However, this did not occur and Mr. Freeland provided the entirety of the down payment and made all of the

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mortgage payments. Before the parties could move into the property, their relationship ended.

[53] At trial, Justice Murray held that Mr. Freeland had established both a resulting trust and a constructive trust based on unjust enrichment. Her orders were appealed to the Court of Appeal, where she was upheld in reasons written by Justice Marchand (as he then was).

[54] Justice Marchand summarized the principles applicable to a claim of unjust enrichment and constructive trust as follows:

> [73] There is, again, no debate that to succeed in his unjust enrichment claim, Mr. Freeland has to establish:
>
> - an enrichment to Ms. Farrell;
> - a corresponding deprivation to him; and
> - the absence of any juristic reason for the enrichment.
>
> [74] In *Kerr*, Cromwell J. noted that the Supreme Court of Canada "has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation": at para. 37. Justice Cromwell explained:
>
> > [38] For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
> >
> > [39] Turning to the second element — a corresponding deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).
>
> [75] With respect to the third element, Cromwell J. confirmed that a two-step analysis is required to determine whether there is a juristic reason to deny recovery. At the first step, the court is concerned with established categories that can constitute a juristic reason, such as a contract, a disposition of law or a donative intent. If there is no established category, a prima facie case under the juristic reason part of the analysis arises. The prima facie case is rebuttable at the second step. At the second step, the

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> onus is on the defendant to identify another reason why the enrichment should be retained. The exercise at the second step turns on two factors, namely the parties' reasonable expectations and moral and policy-based arguments about whether particular enrichments are unjust: *Kerr* at paras. 43–44.

[55] In my view, the first two elements of unjust enrichment are clearly met here. The respondent was enriched because she has a joint interest in a tenancy having a value of in excess of $1 million. The petitioner has suffered a clear corresponding deprivation as he is deprived of the interest that has been granted to the respondent.

[56] The third element of the test is whether there is a juristic reason for the enrichment. The respondent argued that the juristic reason was in contract, one of the established categories. However, I have determined that the contract was not as the respondent submitted. The onus, therefore is on the respondent to identify another reason why the enrichment should be retained taking into account the expectations of the parties and other arguments about whether the enrichment is unjust.

[57] The respondent has not discharged this onus. The expectations of the parties were that the respondent would make the mortgage payments, something which she has not done. The only other argument advanced by the respondent with any merit is that the petitioner would not have obtained the RBC mortgage without the petitioner's help. I agree that is the case but it does not address the unjustness that exists with the respondent having a joint interest in a Property to which she has contributed nothing, despite a promise to pay.

[58] What occurred here is almost identical to what happened in *Freeland* where Marchand J. found no juristic reason for Ms. Farrell to retain her interest in the property to which she had not contributed.

> [79] As for juristic reason, I cannot agree that the parties' intention that Ms. Farrell be a co-purchaser provides any justification for her to retain an enrichment in the form of a beneficial interest in the Property.
>
> [80] As noted, the parties' intention was rooted in the expectation that Ms. Farrell would pay her share. She did not. Ms. Farrell simply cannot assert at the first step of the juristic reason analysis that a bargain she breached

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> establishes a juristic reason for her to retain an enrichment. At the second step of the analysis, Ms. Farrell's unilateral and unexplained failure to live up to her end of the bargain shatters any reasonable expectation she may have had to a beneficial half-interest in the Property. Further, I can think of no moral or policy reason to justify her retaining a beneficial half-interest in a property that, on the judge's supported findings, she did not contribute to in any tangible way.

[59] Accordingly, I equally find that the petitioner has established unjust enrichment and entitlement to the imposition of a constructive trust.

Availability of Relief

[60] The respondent submits that the relief requested in the petition is not available as the other parties to the sublease and the mortgagee are not parties to the petition.

[61] The petitioner now accepts that the orders cannot go as requested but submits that conditional orders can be made as was done in *Freeland*.

[62] In *Freeland*, the court was presented with a similar issue, in that the mortgagee in that case had not been named a party and therefore the relief requested was not available. Rather than remit the matter back to the trial court, Marchand J. imposed "a practical solution".

> [83] It is not clear to me why Mr. Freeland did not name RBC as a respondent in his petition. RBC has a clear interest in the Property and the outcome of the case. As RBC is not a party, I agree with Ms. Farrell that the judge's order that she be released from the covenants of the mortgage is unenforceable.
>
> [84] Given the rapid increase in the market value of residential properties across British Columbia over the past few years, the judge's findings with respect to Mr. Freeland's financial circumstances and Mr. Freeland's demonstrated ability to service the mortgage, it is highly unlikely that RBC will object to releasing Ms. Farrell from the covenants of the mortgage.
>
> [85] In these circumstances, I would set aside the judge's unenforceable order and impose a practical solution. Specifically, I would require Ms. Farrell to transfer her legal interest in the Property to Mr. Freeland on her receipt of evidence that RBC has consented to her being removed from the mortgage. Once that has been done, the parties can promptly remove Ms. Farrell from the title as ordered by the judge. In the event that Mr. Freeland is unable to secure the consent of RBC to release Ms. Farrell from the covenants of the

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> mortgage, I would grant the parties leave to return to the court below for directions.

[63] In my view, the same type of conditional order can and should be made here. It is highly likely that RBC will not object to releasing the respondent from the mortgage given that there has been a substantial increase in the value of the Property and given her many existing financial debts, including to Canada Revenue Agency. Further, it is extremely unlikely that the other parties to the Assignment of Sublease will have any objection to the removal of the respondent as a joint tenant.

Orders

[64] Accordingly, I declare that the respondent has no beneficial interest in the Property and I order that the respondent is to be removed as a joint subtenant of the property upon: (1) confirmation from RBC that she is removed as a co-covenantor under the RBC mortgage; and (2) confirmation from the other parties to the Assignment of Sublease that they consent to her removal as a joint subtenant or, alternatively, that they execute a new Assignment of Sublease naming only the petitioner as the subtenant.

[65] The parties have leave to speak to me should they require further directions to give effect to these orders.

[66] As the petitioner was successful, the costs of this petition are awarded to the petitioner.

"Giaschi J."

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