

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pheasant v. Thompson*,  
2023 BCCA 291

Date: 20230717  
Docket: CA48638

Between:

**Jason Pheasant**

Appellant  
(Defendant)

And

**Elizabeth Fiona June Thompson**

Respondent  
(Plaintiff)

Before: The Honourable Madam Justice Fenlon  
The Honourable Mr. Justice Fitch  
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated  
October 26, 2022 (*Thompson v. Pheasant*, 2022 BCSC 2010,  
Prince George Docket S2159528).

Counsel for the Appellant  
(via videoconference):

K.J. Hauer

Appearing in person on behalf of the  
Respondent  
(via videoconference):

B. Smith

Place and Date of Hearing:

Vancouver, British Columbia  
April 26, 2023

Place and Date of Judgment:

Vancouver, British Columbia  
July 17, 2023

**Written Reasons by:**

The Honourable Mr. Justice Abrioux

**Concurred in by:**

The Honourable Madam Justice Fenlon  
The Honourable Mr. Justice Fitch

**Summary:**

*The parties purchased property, which was registered in the appellant's name. After their relationship ended, the respondent continued to live on the property until it was sold in foreclosure proceedings. The appellant appeals from orders that the respondent was entitled to the majority of the net proceeds of the sale, and was entitled to recover double costs. Held: Appeal allowed in part, varying the order apportioning the surplus funds and the order awarding double costs. The judge erred in concluding that the appellant abandoned his legal claim to the property and funds. She focused her analysis on the appellant's entitlement to the funds, failing to apply the relevant legal principles to establish a claim in unjust enrichment and to select the appropriate remedy. It was not unreasonable for the appellant to refuse the respondent's offer to settle, as it included a term that he not contact her or her family.*

**Reasons for Judgment of the Honourable Mr. Justice Abrioux:**

**Introduction**

[1] This appeal arises from orders made following a summary trial concerning entitlement to surplus funds from the sale of a property in foreclosure proceedings.

[2] The appellant, Jason Pheasant, appeals the judge's orders in which she found that the respondent Elizabeth Thompson should receive the majority of the net proceeds of the sale of property purchased in Mr. Pheasant's name when the parties were in a relationship; and that she be awarded double costs after the date of her offer to settle her claim prior to the trial.

[3] For the reasons that follow, I would allow the appeal in part, vary the order apportioning the surplus funds between the parties, and vary the costs order to provide that Ms. Thompson recover ordinary costs in the Supreme Court of British Columbia.

**Background**

[4] The undisputed facts are set out in the reasons for judgment, which are indexed as 2022 BCSC 2010 (the "Reasons").

[5] In late November 2017, the parties took possession of a property in Quesnel that they had purchased for \$217,000 (the "Property"). It was in poor condition.

Ms. Thompson contributed about \$12,000 and Mr. Pheasant \$13,500 to the \$24,500 down payment. The parties sought to obtain a CIBC mortgage of approximately \$200,000, so as to apply \$195,000 to the purchase price and the remainder to CHMC fees. To obtain a lower interest rate, the parties agreed that Mr. Pheasant was to be the sole mortgagor and that the Property would be registered in his name only. Mr. Pheasant provided a personal covenant as required by CIBC.

[6] In December 2017, after less than a month of living together on the Property, the parties' relationship broke down and Mr. Pheasant moved out. In an email to Ms. Thompson dated December 31, 2017, he wrote:

I don't want this house it ties us together  
I just want to hand it back to the bank

[7] Ms. Thompson remained on the Property with her four young children from a previous relationship. She continued to send Mr. Pheasant money for the mortgage and property taxes. She also paid for all of the insurance and utilities. She maintained and made extensive renovations to the Property. She deposed that her expenses included approximately \$11,000 paid to various contractors and additional funds for her own repairs. With the exception of his contribution to the down payment and a small payment of approximately \$400, Mr. Pheasant did not contribute financially to the Property.

[8] In 2018, Mr. Pheasant filed a petition under the *Partition of Property Act*, R.S.B.C. 1996, c. 347 for sale and distribution of the funds, but later discontinued the proceeding.

[9] Every month, Ms. Thompson would transfer to Mr. Pheasant the exact amount owing for the mortgage and taxes (\$1,145.90 per month until July 2018, when the amount rose to \$1,174.62). In July 2019, without advising Ms. Thompson, Mr. Pheasant stopped making the mortgage payments and instead kept just over \$7,000 of these amounts.

[10] CIBC commenced foreclosure proceedings in December 2019. Ms. Thompson stopped forwarding funds to Mr. Pheasant in January 2020.

[11] An order *nisi* with a six-month redemption period was granted on December 14, 2020. The redemption amount was fixed at \$206,209.58, together with interest and certain costs. CIBC also obtained an order for personal judgment against Mr. Pheasant for the redemption amount and its party and party costs. In July 2021, an order was made granting CIBC conduct of the sale of the Property. In October 2021, the Property was sold for \$350,000. The \$108,780.33 remaining after the deduction of the amount outstanding under the mortgage and expenses associated with the sale (the “Funds”) were paid into court pending a further order of the court.

[12] Mr. Pheasant did not participate in the foreclosure proceedings until he became aware that the Funds existed and had been paid into court.

[13] Ms. Thompson filed a notice of civil claim in June 2021, which she amended in June 2022. On October 6, 2022, she filed a notice of application for a summary trial, seeking a declaration of her beneficial interest in the Property; declarations that Mr. Pheasant had breached contracts relating to sharing expenses and transferring the Property to her name; judgment in the amount of the Funds; and alternative relief, including an order for 80% of the Funds and the reimbursement of various expenses.

[14] Mr. Pheasant filed his own application on October 17, 2022, seeking a declaration that he and Ms. Thompson each had a 50% interest in the Funds, and an order that the Funds be distributed accordingly.

[15] On October 17, 2022, Ms. Thompson sent Mr. Pheasant an offer to settle, which I will discuss in further detail below.

[16] The matter was heard on October 25, 2022. The judge concluded that the parties’ applications could be resolved through a summary trial, as they had requested. She found that Mr. Pheasant had abandoned the Property and his legal claim to the Funds, and that the increase in the Property’s value between 2017 and

2021 was due to market forces and Ms. Thompson's improvements. As a result, she determined that Mr. Pheasant was only entitled to his contribution to the down payment (less the \$7,000 that he had misappropriated), and ordered that Ms. Thompson be paid the remainder of the Funds. She also awarded Ms. Thompson double costs, as she had offered to settle the matter.

[17] I will review the judge's analysis in more detail in relation to the grounds of appeal below.

[18] In reasons indexed as 2022 BCCA 410, Justice Griffin stayed the judge's order that monies be paid out to Ms. Thompson with respect to the amount of \$25,000 only. She also ordered that Mr. Pheasant post \$5,000 as security for costs of the appeal.

**On Appeal**

[19] Mr. Pheasant alleges that the judge erred:

- a) In finding that he had no legal claim to the Funds;
- b) In finding that he had legally abandoned the Property, the Funds, or both;
- c) In her equitable analysis, since it was grounded on these errors;
- d) In finding that the works, repairs, and maintenance done by Ms. Thompson increased the value of the Property;
- e) In finding that he was not entitled to any increase in the Property's value; and
- f) In awarding double costs against him.

[20] I have reframed Mr. Pheasant's grounds of appeal as addressing the following issues:

- a) Did the judge err in finding that Mr. Pheasant abandoned the Property and the Funds, and, by extension, in her unjust enrichment analysis?
- b) What is the appropriate remedy?
- c) Did the judge err in awarding Ms. Thompson double costs?

**Entitlement to and Apportionment of the Funds**

**The Judge’s Reasons**

[21] After reviewing the disputed facts, the judge made a number of key findings regarding the parties’ intentions with respect to the Property:

[70] ... I make the following findings of fact:

- a) The parties bought the property together with intention at that time that they would both own it equally.
- b) Mr. Pheasant's name was the only one on title and mortgage in order for them to take advantage of a lower rate of interest...
- c) The relationship ended abruptly.
- d) At that moment (December 2017), they had no agreement as to what to do with the property, but it was clear that Mr. Pheasant was no longer interested in it from the point of view of living there or keeping it, and he was uninterested in contributing to it financially.
- e) However, he was interested in avoiding foreclosure at that time to preserve his credit rating...
- g) In the spring of 2018, Mr. Pheasant wanted the property sold, not only to get his name off the title, but also to distance himself from both it and having to deal in any way with Ms. Thompson.
- h) However, within about a month, he changed his mind and discontinued the proceeding under the *Partition of Property Act*...
- j) Thus, I do find that the parties had an arrangement to their mutual benefit that Ms. Thompson had exclusive use and possession of the property in exchange for her paying all expenses relating to it, including mortgage, taxes, insurance as well as being completely financially responsible for its upkeep, repairs, and renovations.
- k) I find that arrangement is consistent with the parties' conduct, especially Ms. Thompson's sending e-transfers to [Mr.] Pheasant and his paying the mortgage. It is also consistent with Mr. Pheasant's statements in their communications: not only that he wanted her children to have a home but that he wanted to get back what he put into it, in other words the \$13,500 down payment he paid.

l) I do not find that Mr. Pheasant was interested at any point in the property as an investment or vehicle from which he would profit.

m) The parties anticipated and expected that at some point, Ms. Thompson would assume the mortgage and then get title to the property. However, they did not agree on a timetable or a deadline for when that would happen or how...

[22] The judge also addressed the parties' disagreement as to the cause of the nearly 60% increase in the Property's value between its acquisition and the foreclosure sale. She concluded:

[70] ...

p) I find that the increase in the property's value between 2017 and 2021 was due to both market forces and the considerable improvements done to the property, including renovations for which Ms. Thompson alone was responsible.

[23] The judge explained that Ms. Thompson's claims were based in contract, unjust enrichment, and trust. Family law concepts were inapplicable, as the parties did not cohabit long enough to qualify as a common-law relationship. She concluded that there was no contract between the parties, as there was no meeting of the minds or certainty with respect to fundamental terms, and the parties never executed proposed draft agreements. As a result, the judge determined that the resolution of the issues depended entirely on equitable principles.

[24] The judge found that Mr. Pheasant abandoned the Property and any legal claim to the Funds paid into court, as he triggered and did not participate in the foreclosure process. The judge pointed out that Ms. Thompson appeared at all foreclosure hearings and was attempting to assume the mortgage and have title transferred to her.

[25] The judge disagreed with Mr. Pheasant's reasons for his alleged entitlement to a 50% interest in the Funds. She stated that his contribution to the down payment did not automatically entitle him to half of the Property's value at sale. The judge found that his action alone triggered the foreclosure and any resulting damage to his credit rating, as Ms. Thompson's payments to him were sufficient to cover the mortgage. The judge noted that Mr. Pheasant only asserted any right to an interest

in the Property beyond his contribution to the down payment after he became aware of the Property's sale price. The judge concluded that:

[103] Given all those factors, I find he would be unjustly enriched at the expense of Ms. Thompson if he received one-half of the funds paid into court. On all the evidence, I find that he is only entitled to get his down payment back. Accordingly, he is entitled to that portion of funds that together with the amounts he kept from Ms. Thompson that she thought was going to the mortgage (about \$7,000), which together amounts to \$13,500. Therefore, if my math is right, of the \$108,780.33, he is entitled to \$6,452.28. Ms. Thompson is entitled to \$102,328.05.

[26] The judge declared that Ms. Thompson had a beneficial interest in the Property and granted her judgment in the amount of \$102,328.05. She did not grant Ms. Thompson the alternative relief she sought. In particular, the judge explained that she would not order the reimbursement of the \$25,000.00 that Ms. Thompson sought for repairs and renovations, as "she is getting the benefit of spending that money by the increase in value to the property": Reasons at para. 112.

### **Standard of Review**

[27] It is well known that the standard of review for a question of law is correctness, while findings of fact and questions of mixed fact and law (absent an extricable error of law) are subject to a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 36.

### **Analysis**

#### ***Abandonment of the Property***

[28] Mr. Pheasant accepts that Ms. Thompson had a beneficial interest in the Property and thus the Funds. He says, however, that the judge's finding that he had no legal claim to the Funds ignores the principle that the fund from a foreclosure sale stands in place of the land, which he had owned. Accordingly, if the proceeds of sale from a foreclosure exceed the amount owing on the mortgage, the surplus is payable to him as the mortgagor. He argues further that a registered interest in land cannot be abandoned, and that a mortgagor does not lose legal interest in the surplus because of non-participation in foreclosure proceedings.

[29] Mr. Pheasant also submits that the judge misunderstood the relationship between equity and the common law; the former, he says, modifies and supplements the latter. He says that the judge considered irrelevant factors, including his misappropriation of funds from Ms. Thompson, failure to tell her that he had triggered the foreclosure, and his expectations regarding the Property before he learned of the increase in value.

[30] Ms. Thompson acknowledges that an indefeasible title is “conclusive evidence at law and in equity... that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land” under s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250. She argues, however, that this statutory presumption can be rebutted to account for underlying equitable interests: *Suen v. Suen*, 2013 BCCA 313 at para. 34. Given her contributions, she says that she had an equitable interest in the Property and was entitled to the fruits of its increase in value. Ms. Thompson argues that this increase was a result of her extensive renovations and mortgage payments.

[31] While I agree with the judge that resolution of the issues depended on a consideration of equitable principles, I would, respectfully, conclude that she erred in her analytical approach. Specifically, I disagree with her conclusion that Mr. Pheasant “abandoning” the Property and not participating in the foreclosure proceedings could result in the conclusion that “not only did he physically abandon the property, but also he abandoned any legal claim to it”: Reasons at para 88. Her consequent misidentification of the “only issue”—“whether Mr. Pheasant had any equitable interest in the funds, and if so, to what extent”—permeated her unjust enrichment analysis: Reasons at para. 91.

[32] The judge did not cite any legal principles or refer to any authority that could ground her conclusion that Mr. Pheasant had, at law, “abandoned” a claim to an interest in real property. Mr. Pheasant acknowledges that abandonment is a relevant concept in some areas of property law, such as the law relating to chattels, but neither party referred this Court to any authority for the proposition that what

occurred in this case could result at law in an abandonment of an ownership interest in real property.

[33] The judge’s conclusion that Mr. Pheasant had abandoned his legal interest in the Property by his non-participation in the foreclosure proceedings is also not supported by the facts. Mr. Pheasant remained the legal owner of the Property upon execution of the mortgage. As is typical of modern mortgages, it operated as a charge on his interest in the land rather than a conveyance: *Hsieh v. Lui*, 2017 BCCA 51 at para. 55. He therefore remained the Property’s legal owner until the completion of the court-approved sale of October 2021.

[34] The judge found that “once the property was sold, [Mr. Pheasant] was no longer the owner”: Reasons at para. 88. This did not, however, mean that he had no legal interest in the Funds. This Court has explained “[t]hat we are now dealing with money in court rather than the land does not change rights”; instead, the “money simply takes the place of the land”: *Bank of British Columbia v. Tri Holdings Ltd.* (1992), 71 B.C.L.R. (2d) 58 at para. 38, 1992 CanLII 1089 (C.A.), citing *Household Realty Corporation Ltd. et al. v. Attorney General of Canada*, [1980] 1 S.C.R. 423, 1979 CanLII 179. After the mortgage was discharged and the distributions made as set out in the order approving sale, the amount remaining—the Fund—would therefore ordinarily revert to Mr. Pheasant as the Property’s legal owner.

[35] As such, Mr. Pheasant benefited from a presumption that he had both a legal and beneficial interest in the Property before the sale, and, by implication, in the Funds generated by the sale. The proper focus of the judge’s inquiry, therefore, should have been whether Ms. Thompson had rebutted that presumption by demonstrating that she held a beneficial interest in the Property in the amount that she claimed. While Mr. Pheasant’s “abandonment” of the Property in the sense of his disputed contribution to its increased value may be a relevant factor in quantifying the appropriate remedy, it does not ground a claim in unjust enrichment.

[36] Accordingly, the finding that Mr. Pheasant had abandoned his legal interest in the Property and the Funds was, in my view, an error in law.

[37] As a result of this conclusion, the judge framed the issue as one of Mr. Pheasant's entitlement. Although Mr. Pheasant had accepted that Ms. Thompson had some equitable interest in the Funds, he contested Ms. Thompson's assertion that her improvements increased the value of the Property, and instead offered an equal division of the Funds based, it appears, on her contribution to the down payment. By proceeding on the basis that the only issue was Mr. Pheasant's equitable interest in the Funds, the judge focused on rebutting his arguments regarding his entitlement to a 50% interest in the Funds instead of identifying the legal framework relevant to an unjust enrichment analysis.

[38] A three-part test applies to establish an unjust enrichment claim that can attract a remedy. A "plaintiff will succeed on the cause of action in unjust enrichment if he or she can show: (a) that the defendant was enriched; (b) that the plaintiff suffered a corresponding deprivation; and (c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason" justifying the enrichment: *Moore v. Sweet*, 2018 SCC 52 at para. 37. The first two criteria require that the plaintiff lost something of value that corresponds to the defendant's gain: *Moore* at paras. 41, 43. If no established category of juristic reason applies, such as a contract, the defendant may show a residual reason to deny recovery: *Moore* at paras. 57–58.

[39] The judge did not apply this three-part test. In light of the parties' dispute as to the nature of the enrichment and corresponding deprivation, her failure to make the specific findings required was, in my view, an error of law.

[40] Notwithstanding this conclusion, the judge nevertheless made sufficient factual findings to establish that Mr. Pheasant would be unjustly enriched were he to receive the 50% of the Funds that he was claiming.

[41] The judge found that, in addition to paying part of the down payment, Ms. Thompson paid all of various expenses, and her extensive renovations increased the Property's value: Reasons at para. 70. If Ms. Thompson only received 50% of the Funds generated from the Property's sale to reflect her contribution to

the down payment, and Mr. Pheasant received the remaining 50%, she would suffer a deprivation that would correspond to his enrichment. There has been no suggestion that any juristic reason explains this enrichment, and the judge specifically found that no binding contract existed between the parties: Reasons at paras. 83–84. As a result, I would conclude that Ms. Thompson has established a claim in unjust enrichment.

***The Appropriate Remedy***

[42] The judge’s analysis of the remedy to which Ms. Thompson was entitled also does not set out relevant legal principles.

[43] If a claim for unjust enrichment has been established, the court must find the appropriate remedy. A monetary award is sufficient to achieve restitution in most circumstances, and may be considered the “default” remedy: *Moore* at para. 89. Monetary awards can be quantified using the “value received” approach, which looks to the value of the unpaid services: *Kerr v. Baranow*, 2011 SCC 10 at paras. 49, 55. The “value survived” approach, which looks to the claimant’s contribution to the value of the property, is available in more limited circumstances, such as where the parties were engaged in a joint family venture: *Kerr* at paras. 55, 87.

[44] A proprietary remedy—typically a constructive trust—may also be imposed. The extent of such a trust is ascertained using the “value survived” approach: *Virk v. Singh*, 2022 BCCA 153 at para. 86. As the majority in *Moore* explained, however, it is only available in specific circumstances:

[91] ... [C]ourts will impress the disputed property with a constructive trust only if the plaintiff can establish two things: first, that a personal remedy would be inadequate; and second, that the plaintiff’s contribution that founds the action is linked or causally connected to the property over which a constructive trust is claimed ([*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71], at para. 149; *Kerr*, at paras. 50-51; *Peter [v. Beblow]*, [1993] 1 S.C.R. 980], at p. 988). And even where the court finds that a constructive trust would be an appropriate remedy, it will be imposed only to the extent of the plaintiff’s proportionate contribution (direct or indirect) to the acquisition, preservation, maintenance or improvement of the property (*Kerr*, at para. 51; *Peter*, at pp. 997-98).

[45] The judge did not apply these principles regarding the selection and quantification of the appropriate remedy for an unjust enrichment claim. In my view, this also constituted an error of law.

[46] The judge did not clearly explain which type of remedy she imposed and why. She noted that Ms. Thompson’s claims were based in part in trust law, declared that she held a beneficial interest in the Property, and granted both parties judgment for amounts from the Fund. It is apparent that she followed the “value survived” approach, although she did not describe it as such. She determined the proportion of the parties’ contributions to the increased value of the Property at sale, rather than the value of the services that Ms. Thompson rendered. Taken together, these elements of the judge’s reasoning appear to reflect a constructive trust approach.

[47] I will proceed on the basis that the “value survived” approach is the appropriate method of calculation. On appeal, the parties did not argue that the judge ought to have employed a “value received” approach or imposed a different type of remedy. While the parties have not addressed the adequacy of a monetary award as opposed to a constructive trust over the Funds, the judge found a causal connection between Ms. Thompson’s contributions and the increased value of the Property: Reasons at paras. 65, 70. I would add that, as I explain at para. 74 below, \$33,780.33 remains in court and is available to be impressed with a trust, and that the remainder has been distributed to Ms. Thompson. In these circumstances, I would impose a constructive trust over each party’s portion of the Funds: see *Moore* at paras. 93–94.

[48] The “value survived” approach to ascertaining the extent of a constructive trust asks what proportion of the value available for division—here, the \$108,780.33 in Funds—is attributable to each party’s contributions: *Virk* at paras. 86–87. The judge concluded that Mr. Pheasant was only entitled to his \$13,500 contribution to the down payment, representing approximately 12% of the Funds (subsequently reduced by about \$7,000 to account for his retention of Ms. Thompson’s intended mortgage payments); Ms. Thompson was entitled to the rest.

[49] The issue is whether the judge’s awards reflect a fair and equitable distribution, considering the parties’ respective contributions: *Virk* at para. 89.

[50] The source of the Property’s significant increase in value is at the core of the parties’ dispute. Its purchase price was \$217,000, comprised of \$195,000 in mortgage funds and about \$12,000 and \$13,500 contributed by Ms. Thompson and Mr. Pheasant, respectively. The Property sold for \$350,000, leaving the Funds as a surplus following the discharge of the mortgage and payment of certain expenses.

[51] The judge attributed the increase to Ms. Thompson’s efforts. She found that Ms. Thompson’s keeping up with the mortgage payments "allowed the property to increase in value with the rise in the market", as "[h]ad she not paid, logic dictates it would have been foreclosed earlier and not appreciated in value": *Reasons* at para. 65. The remaining increase was due to Ms. Thompson’s “considerable improvements done to the property”: *Reasons* at para. 70.

[52] Mr. Pheasant submits that Ms. Thompson was effectively overcompensated for what he says are the minor improvements that she made to the Property. The judge’s conclusions regarding Ms. Thompson’s contributions involve questions of fact which, absent overriding and palpable error, are entitled to deference. The judge had a considerable body of evidence upon which to reach her conclusions on these points and I would find no reviewable error.

[53] Mr. Pheasant also points out that the judge’s calculations gave insufficient weight to the fact that, without his contribution to the down payment and willingness to be the sole mortgagor, the Property could not have been acquired in the first place. The risk that he took on ultimately materialized when the order *nisi* included a personal judgment against him in the amount required to redeem the mortgage.

[54] This Court has recognized that a pledge of credit can ground beneficial ownership. Taking on a “substantial debt”, making it possible for others to “buy property they otherwise were unable [to] buy” and exposing oneself “to the risk of having to meet mortgage payments or reimburse a shortfall if there was default”

represents a valuable contribution to the purchase of property: *Bajwa v. Pannu*, 2007 BCCA 260 at para. 13, cited in *Freeland v. Farrell*, 2022 BCCA 99 at para. 52. In my view, failing to account for this contribution was an error.

[55] Bearing in mind the judge’s findings of fact and the factors to which I have referred in paras. 48–54, I would vary the judge’s order by adjusting the parties’ entitlement to the Funds. I would increase Mr. Pheasant’s proportion of the Funds from approximately 12% (representing the \$13,500 he contributed to the down payment) to 20% to account for his pledge of credit. Ms. Thompson is entitled to the remaining 80%. From Mr. Pheasant’s share, which I calculate as \$21,756.07, I would then deduct the \$7,047.72 that he misappropriated from Ms. Thompson’s intended mortgage payments.

[56] As a result, Mr. Pheasant is entitled to receive \$14,708.35 from the Funds, and Ms. Thompson the remaining \$94,071.98. Any interest earned on the Funds is to be allocated in the same 80:20 proportion.

### **Double Costs**

[57] Ms. Thompson sought double costs based on her offer to settle on the following terms:

... In an effort for resolution of this matter, I am prepared to offer you the following in full and final settlement of this claim:

1. 30% of the net sale proceeds from the sale of the Property, currently held in court to the credit of the CIBC Action (with 70% to myself), which will include all interest.

Upon:

- a. The execution of a Release of All Claims relating to these and other matters as between the parties;
- b. Entering of a consent order in the CIBC Foreclosure action releasing the funds pursuant to this offer;
- c. You agreeing to make no contact with myself and any family member of mine; and
- d. Each party to bear our own costs.

[Emphasis added.]

[58] Ms. Thompson deposed that Mr. Pheasant had moved in with her estranged sister after he vacated the Property in December 2017.

[59] Mr. Pheasant did not respond to the offer.

### **The Judge's Reasons**

[60] The judge awarded double costs on the basis that Mr. Pheasant had not accepted the offer to settle, which she observed was significantly better than what he had achieved following the trial. While the no-contact condition was “concerning”, she held that Mr. Pheasant, who had counsel, was obligated to inform the unrepresented Ms. Thompson that what she was seeking was improper and unenforceable, but he did not do so, nor did he make a counteroffer: Reasons at paras. 132–136. The judge concluded that the double costs should be paid out of the Funds.

### **Standard of Review**

[61] The standard of review for costs awards is highly deferential. Interference is only warranted “if the trial judge erred in principle or if the award is plainly wrong”: *Bains v. Antle*, 2019 BCCA 383 at para. 30. Judges have a broad discretion in making double costs awards, but it must be “exercised judicially and in a principled manner”: *Bains* at para. 33.

### **Analysis**

[62] Mr. Pheasant argues that the judge erred in awarding double costs to Ms. Thompson. He says that the no-contact term was outside the scope of the litigation and nonjusticiable. He adds that requiring his lawyer to advise Ms. Thompson that the term was unenforceable would undermine the solicitor-client relationship.

[63] For her part, Ms. Thompson says that Mr. Pheasant did not respond to her offer to settle, and that she would have considered removing the no-contact condition had he objected to it. She submits that a response from Mr. Pheasant's counsel advising of the unenforceable term would not constitute legal advice.

[64] Under Rule 9-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, a court may take settlement offers into account in calculating costs:

Rule 9-1 — Offers to Settle

...

Cost options

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

...

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

...

Considerations of court

(6) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[Emphasis added.]

[65] This Court explained the approach to the reasonableness inquiry in *Bains*:

[34] As the judge recognised, the court must consider the first factor under Rule 9-1(6)(a) without the benefit of hindsight... The question is not whether the offer itself was reasonable, but whether it was unreasonable to refuse it: *Cottrill* at para. 30. In answering this question, the court may consider the recipient's subjective reasons for rejecting the offer, but must also decide whether those reasons are objectively reasonable: *C.P. v. RBC Life Insurance Co.*, 2015 BCCA 30 at para. 97.

[35] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27, this Court set out several factors that may be considered in assessing the reasonableness of refusing an offer. They include: the timing of the offer; whether it had some relationship to the claim; whether it could easily be evaluated; and whether some rationale for it was provided.

[Emphasis added.]

[66] I agree with the judge’s finding that, except for the term that Mr. Pheasant not contact Ms. Thompson’s sister, the offer was “completely reasonable”. As the judge observed, the “offer is significantly better than what Mr. Pheasant achieved, and it is better than what Ms. Thompson offered as an alternative in her application”: Reasons at para. 131.

[67] And yet the judge found that the no-contact condition was “improper and unenforceable”: Reasons at para. 136. I also agree with this conclusion.

[68] The judge nevertheless exercised her discretion to award double costs to Ms. Thompson based on her conclusion that Mr. Pheasant’s counsel ought to have advised her of the condition’s unenforceability: Reasons at para. 136.

[69] I cannot agree. I consider the no-contact condition to be fatal to the validity of the offer. In my view, there was no obligation on Mr. Pheasant, let alone his counsel, to respond to the offer under the *Rules* regardless of whether Ms. Thompson was represented by counsel.

[70] The judge’s reasoning on this point is, in my view, contrary to a lawyer’s professional obligations in respect of self-represented parties. His counsel had no duty to provide Ms. Thompson with information that could assist her. The Law Society of British Columbia’s *Code of Professional Conduct for British Columbia* provides:

5.1-1...

Commentary

...

[3] The lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client’s case.

...

7.2-9 When a lawyer deals on a client’s behalf with an unrepresented person, the lawyer must:

- (a) urge the unrepresented person to obtain independent legal representation;

- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[71] Accordingly, it cannot be said that it was unreasonable for Mr. Pheasant to refuse an offer containing the no-contact term. While it may have been preferable on a practical level for Mr. Pheasant to submit a counteroffer, he was under no obligation to do so, and his decision not to negotiate further did not render his refusal unreasonable.

[72] I would allow the appeal on this ground and make an award of single costs in the Supreme Court.

**Disposition**

[73] I would allow the appeal by:

- a) varying the trial order by impressing the Funds, together with any interest that may have been earned thereon, with a constructive trust, 80% in favour of Ms. Thompson and 20% for Mr. Pheasant;
- b) ordering that there be deducted from Mr. Pheasant's allocation the \$7,047.72 that he misappropriated from Ms. Thompson, and that this amount be added to her allocation; and
- c) awarding Ms. Thompson her ordinary costs in the Supreme Court.

[74] At the time of the appeal, \$33,780.33 of the Funds remained in court, representing the judge's entire award to Mr. Pheasant of \$6,452.28 and \$27,328.05 of the \$102,328.05 awarded to Ms. Thompson.

[75] In accordance with paras. 55–56 above, I would award Mr. Pheasant \$14,708.35. Of that sum, I would order that \$5,000 remain in court pending the quantification of Ms. Thompson's ordinary costs in the Supreme Court, and that such

costs be paid to Ms. Thompson first from that amount. I would therefore order that \$9,708.35 be paid out of court immediately for Mr. Pheasant's benefit.

[76] Finally, I would order that the remaining \$19,071.98 in court be paid out of court for Ms. Thompson's benefit.

[77] I would also order that the \$5,000 that Mr. Pheasant posted as security for costs of the appeal be paid out to him or at his direction.

[78] In my view, there has been divided success on appeal. I would make no order as to costs in this Court.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Fitch"