VOGEL VERJEE

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1. MOORE V SWEET, 2018 SCC 52

Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown and Martin JJ. concurring)
Gascon and Rawon JJ. (dissent) *Unjust Enrichment, Life Insurance, Contract*

Lawrence Moore (L), the owner of a life insurance policy designated his then wife, Michelle Moore (M) as the revocable beneficiary. After their separation, L then orally agreed with M that if she paid all of the insurance premiums, he would keep her as the beneficiary of his life insurance policy and, as per this agreement, M paid approximately $7000 in premiums until L's death 13 years later. Unbeknownst to M, L had later named his new common-law spouse, Risa Sweet (S) as the irrevocable beneficiary of the policy. At L's death, his estate was insolvent, and the policy proceeds of $250,000 were paid into the court, awaiting judicial determination of M's application for same.

The Ontario Superior Court of Justice held that the policy proceeds would unjustly enrich S, and these proceeds should be subject to a constructive trust in favour of M. The Ontario Court of Appeal reversed the lower court's decision and held that S was entitled to the insurance proceeds. They cited that M was limited to receiving the amount of the premiums she paid and the juristic reason for S's enrichment at M's expense was her designation as an irrevocable beneficiary under the Insurance Act as opposed to a revocable one.

The Supreme Court of Canada (SCC) heard M's appeal on February 8th, 2018, and rendered its 7-2 judgement on November 23rd, 2018. The SCC affirmed M's entitlement to the insurance policy proceeds and granted M a constructive trust to remedy her unjust enrichment claim.

Côté J wrote for the majority and considered the SCC's earlier decisions which dealt with unjust enrichment, noting that the onus is on the plaintiff to establish 3 elements:

1) The defendant was enriched;
2) The plaintiff suffered a corresponding deprivation; and
3) There was no juristic reason for the defendant's enrichment and the plaintiff's corresponding deprivation.

The majority found that the first two elements were not in dispute. S was enriched when she received the insurance proceeds of $250k, and M suffered a corresponding deprivation, as she had paid the insurance premiums of $7k and was deprived of the $250k as well. The third element, the juristic reason analysis, involves a two-step inquiry.

Firstly, the claimant must demonstrate that the defendants benefit at the plaintiff's expense cannot be justified on the basis of "established" categories, for example, a contract, a gift, or another valid common law, equitable or statutory obligation. If any of these categories apply, the plaintiffs' claim will fail, as the defendant's benefit will be justified.

Secondly, if the plaintiff demonstrates that none of these juristic reasons apply, they have established a prima facie case, and the analysis can move to the second step. A defendant could defeat an unjust enrichment claim by demonstrating another residual reason for denying recovery, but the burden of proof falls on the defendant to show why the enrichment should be retained. The Court should consider both the reasonable expectations of parties, as well as public policy.

S argued that the provisions of the Insurance Act shielded her receipt of L's life insurance policy. The juristic reason for her to keep the insurance proceeds was that the insurance contract irrevocably designated her as the beneficiary. Côté J rejected this argument. She found that the legislation to which beneficiary designations are made was a mechanism for choosing a beneficiary. It did not deny common law or equitable rights of

others who may be entitled to the insurance proceeds, nor could it deny an unjust enrichment claim by a party deprived of the insurance proceeds despite a prior contractual entitlement. The majority did not recognize an irrevocable designation as a juristic reason which would undermine M's unjust enrichment claim.

As no juristic reason was found to apply in the circumstances, M had made a prima facie case for unjust enrichment. While Côté J acknowledged S's expectation of receiving the insurance proceeds upon L's death because she was validly designated as the irrevocable beneficiary, L and M had already entered into their agreement. S's expectation did not take precedence over M's prior contractual right to remain the beneficiary. Residual considerations favoured M, as her payment of the premiums kept the insurance policy alive and created S's entitlement to receive the proceeds upon L's death.

Once she concluded her analysis, Côté J turned to the issue of remedy. She held that a "personal" remedy like monetary compensation is the standard practice in cases of unjust enrichment, however, a proprietary remedy like a constructive trust may be granted if a monetary remedy would be inadequate and a plaintiff's contribution is linked or causally connected to the property over which a constructive trust is claimed. The insurance proceeds were thus subject to a constructive trust in favour of M. Côté J reasoned that a constructive trust should be granted to M because failing to grant one would create a risk that the money might be spent or accessed by other creditors in the interim.

The dissenting judges Gascon and Rowe JJ held that M, who was only a revocable beneficiary under the insurance policy, did not have a right to challenge L's redesignation of S as the policy's irrevocable beneficiary, except by suing L for breach of contract. They argued that there was no correlative deprivation between M's failed contractual expectations and S's enrichment. They further argued that even if a correlative deprivation was found, the Insurance Act provided a clear juristic reason for any enrichment received by S through M's loss as a creditor of L's insolvent estate. Concern was expressed regarding irrevocable beneficiary designations being challenged by an insured's creditors, as this would encourage litigation, which the Insurance Act was implemented to avoid.

Practical Implications: Ensure that life insurance clauses designate the beneficiary as irrevocable and receive confirmation of same.

2. JLL v JLC, 2018 ABQB 838

A.D. Grosse J.C.Q.B.A *Mootness, Contact, Grandparents, Variation*

Appeal from the Order of D. Mah Prov. J. and Appeal fromt the Amended Order of J.R. Shaw Prov. J

The Appellant Mother sought to appeal two decisions of the Provincial Court of Alberta: i) an interim Order granting contact to the child's maternal grandparents during the Christmas holidays and ii) amendments made to a previous order involving specifics of the Grandparents' ongoing contact arrangement. Both appeals dismissed.

The first order, granted by Judge Mah on December 20, 2017, gave the Grandparents contact with the child over the Christmas holidays despite the Mother's opposing submissions. The Mother filed her appeal of this order on January 11, 2018. The Court of Queen's Bench found that the Mother's appeal was moot as there was "no live controversy or concrete dispute" since Christmas had passed and the contact time had already occurred. The Court further held that this was not an appropriate case where the Court should exercise its discretion to decide the appeal in any event.

The second order was granted by the Court (the "Shaw Order") and arose from a written decision issued by Judge Shaw on November 2, 2016 (the "Shaw Decision") . The Shaw Decision followed an October 2016 trial where the Grandparents sought ongoing contact with the child. The Grandparents were ultimately granted contact with the child during the Father's parenting time. The Mother appealed the Shaw Order in November 2016 and her appeal was dismissed.

On January 17, 2018, the Court issued an amended version of the Shaw Order adding two additional paragraphs that were explicitly directed in the Shaw Decision but were not included in the original Shaw Order. The Mother appealed the amendments (having already appealed the Shaw Order unsuccessfully) on the following grounds i) the Shaw Order should not have been amended without notice to counsel/counsel is entitled to notice if a judge is going to change the terms of an order, ii) the Shaw Order fails to include a provision that any contact time of the Grandparents should not interfere with the parenting time of the Mother, iii) the amendment can be interpreted that any change in the parenting time of the Father could trigger an application by the Grandparents

to seek contact time with the Child during the Mother's parenting time.

The Court of Queen's Bench dismissed the Mother's appeal. The amendments added to the Shaw Order were found to have come directly, "almost word for word" from Judge Shaw's written decision (para 36). Further, the parties had agreed in oral argument that the original Order would be drafted and issued by the Court. The Mother was unable to appeal on the Order's merits as she had already done so prior to the amendments and the Justice at that time had in fact considered the very provisions of the Shaw Decision later added to the Order on January 17, 2018. Procedurally, the Court also found that "returning the matter to Judge Shaw with a direction that he provide the parties with an opportunity to address his proposed amendments on a procedural basis only would accomplish nothing" (para 38).

Practical Implications: It is imperative for counsel to confirm that Reasons for Judgment align with the an Order that is produced by the court clerk's and that any ambiguity between an Order and the Reasons for Judgment are rectified.

3. KRAUSS v KRAUSS, 2018 ABCA 367

Brian O'Ferrall J.A., Frans Slatter J. A., Marina Paperny J.A.

Appeal from the Order of W.T. DeWitt J.C.Q.B.A. *Mobility, Viva Voce*

The Appellant Father in this case sought to appeal a mobility order that allowed the Mother to move to Calgary from Red Deer with their four year old daughter. The Father appealed on both procedural and substantive grounds. Appeal dismissed.

Procedural grounds: The Father submitted that the change in parenting arrangements should not have been ordered in a special chambers hearing, as it was based only on affidavit evidence and without a *viva voce* hearing.

The Court of Appeal recognized that a *viva voce* hearing is not necessary "if a judge finds that he or she can make a fair and just determination on the basis of the evidence filed" (para 4). In this case, the Court of Appeal observed that neither party had expressed concern or reservation with the process before the chambers judge, with both counsel agreeing that the matter should proceed to special chambers and filing the required material for same. Additionally, the filed affidavits from both parties suggested very little conflict on material aspects relevant to the application. As a result, the Court of Appeal found that "*viva voce* evidence was not necessary here because there were no material conflicting evidence and no credibility issues" (para 6).

Substantive grounds: The Father further submitted that the chambers judge overlooked important parenting factors in rendering his decision, including the nature of his relationship with the child. The Father shared parenting with the Mother and argued that the move would be detrimental to his relationship with the child. The Court of Appeal, noting that the parties put forward their parenting schedule in oral submissions, found it "clear that the chambers judge appreciated exactly what the parenting arrangement was" (para 8).

The Father also submitted that the chambers judge wrongly or improperly applied the Gordon v Goertz factors in assessing what was in the child's best interest. The Court of Appeal found that the *Gordon v. Goertz* test not only applied in this matter but that the chambers judge had assessed all relevant factors properly in determining that it was in the child's best interests to move to Calgary with her Mother.

Practical Implications: If you believe oral evidence is needed in order for the court to make a fair determination, do not agree to a filed evidence only process. If you believe the evidence is strong enough without oral evidence, the court may agree, particularly if there is no conflicting evidence proffered.

4. HOSSEIN v. NOUH, 2018 ABQB 912

B.R. Burrows J.C.Q.B.A. *Foreign Divorce, Public Policy*

The Applicant Wife sought spousal support from her former Respondent Husband. The Husband opposed the application on the basis that the Court did not have jurisdiction to grant relief because the parties were divorced in Egypt five years before the support application was made.

The parties were married in Egypt in 1979 and emigrated to Canada in 2001 with their three children. The Wife later returned to Egypt with the children. The marriage became strained and the Wife sought and obtained a divorce in Egypt in 2012. The Husband provided support to the Wife from 2012-2017, pursuant to what he claimed was an oral agreement that was to last for five years.

The parties' divorce judgment in Egypt did not address spousal support. There was no evidence before the court regarding whether the Wife did not seek spousal support in the Egyptian divorce proceedings, or if a spousal support order was not available under Egyptian divorce law. Both parties agreed that the Egyptian court had jurisdiction to grant the divorce; however, at issue was whether the divorce should be recognized in Canada.

The Wife argued that the Egyptian divorce should not be recognized because it did not address spousal support and was therefore contrary to Canadian public policy. The Wife cited *Zhang v Lin*, 2010 ABQB 420 in support of her position, in which Veit J. held that a Texas divorce would not be recognized because it did not deal with spousal support and this was contrary to Canadian public policy.

Burrows, J. distinguished the present case from *Zhang*, noting first that the Wife did not present any evidence as to Egyptian divorce law and spousal support. If the Egyptian court did not order spousal support because it was not sought, rather than because it was not available under Egyptian law, then there would be no public policy concern. Second, it was the Wife who had chosen to initiate the Egyptian divorce. She could not subsequently abandon the legal consequences of her choice to obtain a divorce in that jurisdiction. The Wife's application was dismissed.

Practical Implications: Only in very limited circumstances will inconsistency with Canadian public policy justify non-recognition of a foreign judgment.

5. HARBAUGH v. HARBAUGH, 2018 ABQB 922

K.M. Horner J.C.Q.B.A. *Unequal Division of Property, Support Overpayment, Occupation Rent*

The parties in this case separated after 22 years of marriage, but the case did not go to trial until approximately 13 years post-separation, when the Husband retired and filed his application regarding the issues of retroactive and prospective spousal support, occupation rent and the division of matrimonial property.

The Husband retired from work in 2016 and continued to pay spousal support without a court order until 2017. The Husband claimed that he had overpaid spousal support and sought to have $117,000 repaid to him. The Wife argued that a claim for retroactive spousal support overpayment over 13 years was restricted by similar principles set out in *DBS v. SRG*, 2006 SCC 37 and that if allowed, would create a significant financial hardship to her at a time when her spousal support was likely to be reduced or cease entirely.

Through her analysis, Horner J. found that the Husband had overpaid spousal support to some extent; however, it was not possible to determine the amount by which he overpaid as the Husband was unable to produce sufficient evidence to support the claim. While Horner J. found that it would be unfair to allow the retroactive spousal support overpayment claim by the Husband, she also found that it would be unfair to order additional retroactive spousal support for the Wife from 2017 to the time of trial. The Wife's claim for compensatory spousal support had been satisfied over the 13 years of separation in which the Husband deposited funds into the parties' joint bank account and the likely overpayment the Wife had been advantaged from. No order for retroactive spousal support was made in favour or against either party.

Horner J. also dismissed the Wife's claim for ongoing spousal support on a compensatory basis, noting that she had received significant spousal support since the date of separation, the parties' three adult children had achieved economic self-sufficiency (with no medical evidence to support the children's dependancies) and that it was proper for spousal support to end with the Husband's retirement in 2016.

The Wife resided in the matrimonial home from the date of separation until trial. She paid for interest on the

mortgage, property taxes and insurance as well as some repairs and maintenance. On the issue of occupation rent, Horner J. reviewed the factors set out by Slatter J. in *Kazmierczak v Kazmierczak*, 2001 ABQB 610 at para 95:

(a) The spouse who is not in possession generally should not be entitled to occupation rent if the other spouse is occupying the premises with the children of the marriage, and is not making a claim for support or a contribution towards the expenses of the house.

(b) Where the spouse in possession does make a claim for contribution towards the expenses of the house, that claim, the cross-claim for occupation rent, and any claim for spousal or child support should be considered together. The occupation rent would be a potential expense item in one party's budget, and a revenue item in the other party's budget.

(c) In many cases it would be simpler just to eliminate the claim for occupation rent from the equation, and deal with child support and spousal support at large. However, given that the Federal Child Support Guidelines now mandate certain levels of support for children, it may be unfair not to include a notional occupation rent in the guideline income and budgets of the parties, at least when considering spousal support.

(d) The spouse in occupation will generally not be entitled in the matrimonial property proceedings for any credit for the mortgage payments and taxes paid by him or her. Those payments should be a part of the support equation. The only possible exception is with respect to the portion of the mortgage payment that actually goes to reduce principal, as notionally one-half of that payment is made on behalf of the non-occupying spouse. See *Balzar v Balzar*. However, if the party in occupation had not adequately maintained the property, and has essentially eroded its capital value, a set-off for the excessive wear and tear might be called for.

(e) There will be cases, such as *Scott v Scott*, where the family unit can no longer afford to maintain the previous matrimonial home. If one spouse insists in staying in occupation of the house, and is prepared to make the necessary financial sacrifices, then fairness may require that occupation rent be included in the overall equation.

(f) Rarely, if ever, should one spouse be able to bank a claim for occupation rent, and present that claim in capitalized form years later as part of a matrimonial property action.

The Husband argued that if his claim for occupation rent was to be unsuccessful, the court should consider it in his claim for an unequal distribution of the value of the matrimonial home and Horner J. agreed with same. The value of the home had risen over the 13 years since the date of separation; however, Horner J. found that given the Husband's overpayment of spousal support, it would be just and equitable to depart from the presumption of equal distribution. The Husband was granted 75% of the value of the equity of the matrimonial home.

Regarding the Husband's pension, Horner J. ordered that both parties should receive equal distribution of the funds accrued throughout the marriage until separation. The Husband would receive the benefit of his pension accruals following the date of separation due to the length of time the parties had been separated, as well as the considerable payments the Husband had already made to the Wife by way of his earnings and not matrimonial assets.

Practical Implications: You cannot escape responsibility for failing to pursue your claim in a diligent and timely manner.