

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Daws v. Buckler*, 2003 YKSC 60

Date: 20031105
Docket: S.C. 02-B0072
Registry: Whitehorse

Between:

PATRICIA NORAH DAWS

Plaintiff

And:

DAVID BRYAN BUCKLER

Defendant

Appearances:
H. Shayne Fairman
Glen R. Thompson

Counsel for the Plaintiff
Counsel for the Defendant

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

INTRODUCTION

[1] This trial is about a brief cohabitation between Ms. Daws and Mr. Buckler. Prior to their cohabitation, Ms. Daws purchased a residence where the two cohabited. Mr. Buckler purchased a recreational property, which had to be placed in their joint names to secure a mortgage. The issues to be addressed are the intention of the parties regarding the ownership of the properties, whether or not a constructive trust should be imposed or, alternatively, a monetary award granted.

[2] In this case, Ms. Daws seeks a finding of separate property, while Mr. Buckler seeks a finding of joint property, constructive trust, or a monetary award.

THE FACTS

[3] I will first set out my findings of fact in the less controversial areas, and then deal with the evidence on the intention of the parties and my findings of fact in that regard.

[4] I find as follows:

1. Ms. Daws is the Public Service Commissioner for the Yukon Territory and Mr. Buckler owns a business called The Electrical Shop.
2. Ms. Daws is divorced and Mr. Buckler is twice divorced.
3. Ms. Daws has two daughters who are independent and not living at home. Mr. Buckler has two teenage sons, one in Whitehorse and the other at a private school in British Columbia.
4. Mr. Buckler still has ongoing financial obligations for his sons. Ms. Daws expressed the wish to protect her assets for the benefit of her daughters.
5. Ms. Daws and Mr. Buckler had their first date in July 2001. Their relationship progressed over the summer and fall.
6. In September 2001, Ms. Daws leased a recreational property at Tagish Lake, outside Whitehorse (the Tagish property). Ms. Daws entered the one-year lease in her name only. She and Mr. Buckler spent weekends there in the fall and winter of 2001 and 2002. Ms. Daws had an interest in purchasing the Tagish property, which was for sale. They agreed to share the costs associated with leasing the Tagish property.

7. Ms. Daws and Mr. Buckler discussed the idea of permanent cohabitation in December 2001. At that time, Ms. Daws owned a house (the Squanga Avenue property) and Mr. Buckler owned a house (the Hart Crescent property), both in Whitehorse. Mr. Buckler spent a lot of time at the Squanga Avenue property.
8. Until they discussed permanent cohabitation, Ms. Daws was considering the idea of downsizing into a condominium. However, the parties agreed to enter into a permanent relationship and live together when a suitable property could be found. Neither had an interest in a marriage.
9. Ms. Daws could obtain a larger mortgage than Mr. Buckler. She wished to purchase a residence in Whitehorse in her name, and Mr. Buckler would purchase the Tagish property in his name. Mr. Buckler agreed to this proposal.
10. Ms. Daws sold her Squanga Avenue property in December 2001 and arranged a housesit for January through May 2002, while they looked for property in Whitehorse.
11. Mr. Buckler and Ms. Daws looked for a property together and finally settled on the 12 Spinel residence (the Spinel property). Mr. Buckler was a friend of the vendors, and he negotiated a purchase price of \$240,000.00.
12. He prepared a standard form purchase and sale agreement for the Spinel property (the Spinel agreement) with his stepbrother, who is a realtor.
13. The Spinel agreement was initially drafted by Mr. Buckler and his stepbrother, with both Mr. Buckler and Ms. Daws as purchasers. When Ms. Daws reviewed the Spinel agreement with Mr. Buckler, she crossed out Mr. Buckler's name and she signed as the sole purchaser. Mr. Buckler witnessed her signature.

The Spinel agreement was dated January 15, 2002, with a closing date of March 1, 2002. Mr. Buckler understood that Ms. Daws was the sole purchaser.

14. Ms. Daws made all of the arrangements with the TD Bank for a mortgage and retained a solicitor to represent her. Mr. Buckler did not participate in the completion of the transaction, except to confirm with the solicitor that the vendors would be leasing the Spinel property back from Ms. Daws for two months, when the vendors attempted to renege on the lease-back commitment. Ms. Daws paid the down payment of \$1,000.00 and the closing funds in the amount of \$31,304.07.
15. Ms. Daws and Mr. Buckler spent weekends together at Ms. Daws' housesit until late April, when Mr. Buckler and Ms. Daws began to cohabit just prior to assuming possession of the Spinel property in May 2002.
16. Ms. Daws wanted to be sure that her assets would go to her daughters and arranged to meet a lawyer, a Mr. Phelps, to discuss and prepare a cohabitation agreement.
17. Mr. Phelps did not practice family law, but met with Mr. Buckler and Ms. Daws on February 4, 2002 for approximately half an hour. He spoke with Mr. Buckler first, as they knew of each other. When Ms. Daws arrived, Mr. Phelps made it clear that he was representing Ms. Daws and that Mr. Buckler would have to obtain independent legal advice. Ms. Daws stated her instructions that she would own the Spinel property and Mr. Buckler would own the Tagish property, but all expenses for the two properties would be shared equally. Mr. Phelps took three months to prepare the draft cohabitation agreement.

18. In the meantime, Mr. Buckler was trying to sell his Hart Crescent property. He eventually sold the property on April 26, 2002, using the same solicitor that Ms. Daws used for the Spinel property purchase.
19. Ms. Daws was anxious about purchasing the Tagish property, as another interested party came along. Mr. Buckler was in a position to buy the property because he had sold the Hart Crescent property. Both enjoyed the Tagish property, and Ms. Daws arranged to meet the vendors.
20. Ms. Daws drew up a rough handwritten purchase and sale agreement, dated May 3, 2002, for \$167,000.00, with a deposit of \$25,000.00. Mr. Buckler signed it as the sole purchaser and gave the vendors a cheque for \$25,000.00.
21. Mr. Buckler was unable to obtain mortgage financing to close the Tagish property purchase. Ms. Daws had to step in and co-sign for the Tagish property, with her bank providing the financing. The purchase closed in July 2002, with Mr. Buckler and Ms. Daws as joint tenants. Mr. Buckler could not provide the closing funds, so Ms. Daws contributed \$7,261.05 and Mr. Buckler \$1,281.61.00.
22. Mr. Buckler repaid Ms. Daws the \$7,261.05 in August 2002. He had sold his interest in a business property and received \$300,000.00 in the summer of 2002. The title to the Tagish property remains in joint tenancy.
23. When Mr. Buckler and Ms. Daws took possession of the Spinel property in May 2002, it was a disaster. The vendors had left the house and property in a filthy condition, which shocked both Mr. Buckler and Ms. Daws. Mr. Buckler

was particularly upset, as he had trusted his friends to live up to the bargain and provide the Spinel property in a tidy and sanitary condition.

24. To their credit, Mr. Buckler and Ms. Daws simply resolved to clean up and repair the Spinel property. The expenditures can be categorized as those caused by the vendors, improvements made by Mr. Buckler and improvements made by Ms. Daws.
25. As the relationship was still on track, neither party was concerned about a precise accounting of the 50-50 arrangement and whether or not each party was making an equal contribution.
26. Ms. Daws spent \$15,000.00 on new hardwood floors and painting. Mr. Buckler purchased a washer and dryer, light fixtures and wiring and a security system. However, Mr. Buckler's expenditures were often done by his business and he claims mark-ups on labour and supplies.
27. It is also a fact that Mr. Buckler expended funds for the improvement of an office above the garage, which was primarily used by him. Both Ms. Daws and Mr. Buckler take the position that some expenditures were for the personal benefit of the party making the expenditure. It is my finding that all the expenditures directly benefited the property. In terms of value, Ms. Daws' expenditures were real dollars paid out while most, but not all, of Mr. Buckler's expenditures were from his business and marked up, both on labour and supplies.

28. I find that Mr. Buckler's expenditure claims were prepared in January 2003, months after the work was done. Mr. Buckler has a shaky memory and his time calculations were re-created.
29. There is also a category of expenses for light, heat, utilities, telephone and mortgage payments that I find to be the normal operating expenses of a home that the parties agreed to share equally.
30. At the same time that Ms. Daws and Mr. Buckler moved into the Spinel property, Ms. Daws finally received the draft cohabitation agreement. Because of the clean-up and work involved to live in the Spinel property, Ms. Daws did not review the draft cohabitation agreement until August 2002, when she found it was in error, in that it treated the Spinel property as joint property and had a provision for dividing it on separation.
31. In August 2002, the relationship began to deteriorate. The parties agreed to meet a counsellor and continued counselling during September and October. At the final counselling session on November 5, 2002, the parties agreed to terminate their relationship.
32. At this point, both parties directed their attention to the draft cohabitation agreement. Ms. Daws takes the position that it is in error and does not reflect her instructions for a regime of separate property. Mr. Buckler maintains that the draft agreement reflects precisely what they agreed upon, i.e. a regime of joint property.
33. Mr. Phelps testified on behalf of Ms. Daws that he has no specific memory of what was said at the February 4, 2002 meeting, but his notation of "equal

interest” could mean that they intended to share equally in the Spinel and Tagish properties. He also recalled that his interpretation from “the brief meeting” was that putting down equal down payments and sharing in the expenses meant joint purchases.

34. Mr. Phelps stated that the clause on division of the Spinel property was merely a proposal for discussion.

35. In my view, Mr. Phelps got it wrong. Ms. Daws never agreed to a joint purchase of the Spinel property. I accept the evidence of Ms. Daws, which was credible and consistent, that she wanted to own the Spinel property and Mr. Buckler to own the Tagish property separately.

36. Mr. Buckler testified that he wanted the Spinel and Tagish properties to be held jointly. However, there was never a verbal agreement or executed written agreement to do that. Mr. Buckler generally had a very bad memory as to his role in the purchase of the Spinel property, which he attributes to his medical condition and medication. He suffers from Crohn’s disease and diabetes. He was fully aware of Ms. Daws’ desire to protect her assets for her children.

[5] I now turn to the events following the decision to separate on November 5, 2002. Ms. Daws asked Mr. Buckler to leave the Spinel property. He claimed that he had an equal right to stay and would not leave. He occupied the bedroom of one of his boys and the office above the garage. It was a very stressful time for both parties, especially when a pipe broke, causing extensive, but fortunately insured, damage. A confrontation took

place between Ms. Daws' family members, who were helping with the clean-up, and Mr. Buckler.

[6] Mr. Buckler claimed that he was medically and financially unfit to leave the Spinel property. In fact, at trial, he stated that he had an apartment leased on January 1, 2003.

[7] Ms. Daws was forced to go to court to have an order for exclusive possession, which was granted on January 21, 2003, effective February 15, 2003. The order permitted Mr. Buckler to leave a significant amount of personal property at the Spinel property and access to it. Mr. Buckler has also registered a *lis pendens* against the Spinel property.

[8] Mr. Buckler also testified that he did not have to pay mortgage payments on the Spinel or Tagish properties until June 2003 by court order. There is only one court order, and it contains no such provision. In fact, the offer to forgo Mr. Buckler's mortgage contributions was based on the submission by counsel for Ms. Daws that Ms. Daws would forgo contribution to the mortgage payments on the two properties from December 2002 to April 2003, to facilitate Mr. Buckler's relocation from the Spinel property. It was offered without prejudice to either party making future claims for mortgage payments.

[9] Mr. Buckler continued to use the Tagish property and has not paid any mortgage contribution for it, despite demands from the mortgagor. As a result, Ms. Daws had her credit at the TD Bank cancelled, as she stopped her payment of the Tagish mortgage in May 2003.

[10] Ms. Daws proposed listing the Tagish property for sale in November 2002. Mr. Buckler refused to do so until September 2003. Mr. Buckler acknowledged that he took

the position that the Tagish property could be foreclosed on, as he no longer cared. Because Mr. Buckler does not do any banking with the TD Bank, his credit has not been affected. Mr. Buckler acknowledged at trial that he is responsible for one-half of the Tagish property monthly mortgage payment.

[11] Ms. Daws has made all the mortgage payments on the Spinel property since December 2002.

[12] The parties have agreed that the Spinel property is valued at \$255,000.00 as of July 7, 2003. The increase in value of \$15,000.00 is based on:

- a) \$2,500.00 for improvements including hardwood floor, painting and countertops in the kitchen.
- b) \$2,500.00 for improvement in market conditions, and
- c) \$10,000.00 for an increase in land value.

[13] The Tagish property is valued at \$160,000.00 and is presently listed at \$185,000.00 at Mr. Buckler's insistence.

[14] Finally, I accept the accounting of mortgage payments in Exhibit 73 prepared by Ms. Daws. It is Ms. Daws' calculation of who is owed money based on an arbitrary date of December 1, 2002 as the date Ms. Daws assumed full expenses for the Spinel property (despite Mr. Buckler residing there until this court ordered removal on February 15, 2003) and Mr. Buckler for the Tagish property, which he has had the sole use of since December 2002. As a result, Ms. Daws must be credited \$5,835.55.

THE LAW

[15] As I have found that there was no agreement to own the Spinel property jointly, I must consider whether a constructive trust should be imposed on the Spinel property to provide an interest for Mr. Buckler.

[16] The law of constructive trust is based upon the equitable concept of unjust enrichment. As stated in *Peter v. Beblow*, [1993] 1 S.C.R. 980, para. 3, an action for unjust enrichment requires three elements:

1. an enrichment;
2. a corresponding deprivation; and
3. the absence of a juristic reason for the enrichment.

[17] If these elements are established, the next consideration is the nature of the remedy. Two alternatives are available:

1. an award of money based upon the value of the services rendered; or
2. where a monetary award is inadequate and there is a substantial and direct link between the contribution and the property, a constructive trust may be imposed, entitling the claimant to an interest in the property.

[18] In *Peter v. Beblow*, *supra*, at para. 22, the court clearly stated that finding a claimant entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As a general principle, the courts “should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.” (para. 26)

[19] The following, approved in the dissent in *Peter v. Beblow, supra*, is a useful list of factors in determining whether a monetary award may be more appropriate than a constructive trust:

- (a) whether the claimant's entitlement is relatively small compared to the value of the property;
- (b) whether the monetary claim can be satisfied without a sale of the property in question;
- (c) whether the claimant has any special attachment to the property;
- (d) whether there would be a hardship to the registered owner of the property if the claimant was awarded an interest.

ANALYSIS

[20] The claim for unjust enrichment relates entirely to the Spinel property. I am of the view that it has been made out in this case.

[21] The first element, an enrichment, consists of the repairs and upgrades made to the property by Mr. Buckler. Arguably, some of these were made without the request or approval of Ms. Daws, but Ms. Daws did not object while their relationship was intact. However, it can also be said that the value of these enrichments do not necessarily translate directly into an increased appraisal value of the Spinel property, as is the case with many improvements made to residential properties. I will discuss the valuation of the repairs and upgrading below.

[22] The second element is met, as Mr. Buckler did not receive any compensation. Counsel for Ms. Daws conceded that there was a corresponding deprivation to Mr. Buckler.

[23] The third element is that there was no obligation on Mr. Buckler to provide these services, and thus, no juristic reason for the enrichment.

[24] I turn to the question of the appropriate remedy. I am of the view that a claim for constructive trust, i.e. awarding Mr. Buckler an interest in the Spinel property, has not been made out. There are a number of reasons:

1. The cohabitation relationship existed for a mere six months. While not a conclusive factor, it surely supports a monetary award rather than an interest in the property.
2. The value of the repairs and upgrades is relatively small compared to the value of the property. In January 2003, the Spinel property was worth \$240,000.00. A residential real estate appraiser valued the property at \$255,000.00 as of July 7, 2003.
3. There is no necessity for a sale of the Spinel property to satisfy the monetary award. Ms. Daws is quite capable of satisfying the final award, especially after setting off the money Mr. Buckler owes her.
4. Mr. Buckler has no special attachment to the Spinel property. He has lived there for a short period of time. The Spinel property was the choice of Ms. Daws.

5. Ms. Daws has spent \$15,000.00 on the hardwood floor improvement. As the real estate appraiser indicated, \$2,500.00 of that is reflected in the appraised value of the Spinel property.
6. Finally, a court ordered sale of the Spinel property could result in the proceeds being less than the \$240,000.00 Ms. Daws paid for the property after deduction of the real estate commission. This would be a significant hardship to Ms. Daws and of little value to Mr. Buckler.

[25] The question remains as to what monetary award should be granted to Mr. Buckler. I specifically exclude the clean-up services that Mr. Buckler did at the Spinel property. Both Mr. Buckler and Ms. Daws did what they had to do to make the premises livable on possession. I also exclude his expenditures on the hot tub that he installed in May 2002 and removed on his departure.

[26] I include the improvements and upgrades, despite the argument that some of these relate to Mr. Buckler's personal interest in electronics.

[27] I will value the washer and dryer purchase, the front porch repair and the security system at full value, in the total amount of \$2,906.39.

[28] For those improvements found on Electrical Shop "invoices" prepared by Mr. Buckler solely for the purpose of showing his contribution, I will arbitrarily discount them by fifty percent to reflect the mark-up of labour and product, as well as his reliance on his less than satisfactory memory for their calculation. I do not include the GST calculation.

[29] I will refer to the exhibit numbers so that counsel can determine how the monetary award was calculated. Counsel may speak to this issue if there are calculation concerns.

The exhibits are 34, 35, 38, 39, 40, 42, 46, 47, 48, 49, 55, 56, 57, 58, 59, 61, 62, 63 and 65. The discounted value is \$4,676.52, which added to the \$2,906.39 amount makes a total monetary award of \$7,582.91.

[30] However, the credit of \$5,835.55 to Ms. Daws must be deducted from Mr. Buckler's claim, leaving a balance owing to Mr. Buckler of \$1,747.36.

[31] The Tagish property remains to be dealt with. Mr. Buckler paid a down payment of \$25,000.00. The balance of the purchase price in the amount of \$8,542.66 was paid by Ms. Daws in the amount of \$7,261.05 and Mr. Buckler in the amount of \$1,281.61. Mr. Buckler reimbursed Ms. Daws the \$7,261.05 on August 22, 2002.

[32] The Tagish property remains in the joint names of the parties, but it should now be transferred into the name of Mr. Buckler as that was the original agreement and he uses the property. Mr. Buckler has portrayed the Tagish property as a burden and despite the fact that Ms. Daws does not use the Tagish property, he takes the position that Ms. Daws should continue to pay one-half of the mortgage. I do not find this to be a reasonable approach when Mr. Buckler has the exclusive use of the cabin and has paid for the Tagish property. It was never intended by Ms. Daws that it would be a joint purchase, and she only contributed to ensure that Mr. Buckler could purchase the property. It would also be a surprising outcome when Mr. Buckler was the person who refused to list the Tagish property in December 2002. In my view, the Tagish property became a weapon in the dispute and led directly to a loss of Ms. Daws' credit facility at her own bank. Mr. Buckler has his business and personal accounts at the Royal Bank. As a result, his failure to pay the Tagish mortgage after May 1, 2003 caused a loss of credit and embarrassment for Ms. Daws at her own bank.

[33] In the circumstances, I order that Ms. Daws pay the balance owing to Mr. Buckler in the amount of \$1,747.36 directly to the TD Bank on the Tagish mortgage. Mr. Buckler shall pay the arrears and ongoing payments of the Tagish mortgage and bring the mortgage into good standing forthwith.

[34] As Mr. Buckler has all the equity in the Tagish property, I order its transfer to Mr. Buckler with removal of Ms. Daws from any mortgage liability. Mr. Buckler shall have until December 31, 2003 to accomplish this. In the event that Mr. Buckler fails to accomplish this by December 31, 2003, Ms. Daws shall have the right to apply for conduct of sale and bring any reasonable offer to the court for approval of a sale.

[35] To summarize, I make the following order:

1. The Spinel property is owned solely by Ms. Daws and the *lis pendens* shall be discharged forthwith at Mr. Buckler's expense.
2. Ms. Daws shall pay the amount of \$1,747.36 to Mr. Buckler by way of a payment on the mortgage on the Tagish property.
3. Mr. Buckler shall bring the mortgage on the Tagish property into good standing forthwith.
4. Mr. Buckler shall have until December 31, 2003 to refinance the mortgage on the Tagish property and remove Ms. Daws from any mortgage liability. If this condition is met, the Tagish property shall be transferred to Mr. Buckler free of any claim by Ms. Daws. If this condition is not met, Ms. Daws shall have conduct of sale of the Tagish

property and may bring any reasonable offer to court for approval,
including an offer received prior to December 31, 2003.

[36] Counsel may speak to costs.

VEALE J.