

# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Vowk v. Brame*, 2006 YKSC 24

Date: 20060331  
Docket No.: S.C. No.: 03-B0010  
Registry: Whitehorse

BETWEEN:

**LISA-MARIE MARY VOWK**

PLAINTIFF

AND:

**KENNETH LEE BRAME**

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

Lisa-Marie Mary Vowk  
Peter Morawsky

On her own behalf  
For the Defendant

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is a summary trial to determine whether there should be an unequal division of the parties' communal property in favour of the plaintiff. The main issues are:

1. the extent to which the plaintiff made payments towards a mortgage which was used to purchase both the family home and another rural property, without any contribution from the defendant; and

2. the extent to which the defendant contributed towards the initial purchases of each of those properties.

The properties have been sold and the sale proceeds constitute the communal property which must now be divided.

## **BACKGROUND**

[2] The parties lived together in a common law relationship from approximately May 1999 to the fall of 2002. In October 1999, after the relationship began, the plaintiff purchased a property on Willow Crescent in Whitehorse in her name alone. The couple did extensive renovations to the property and lived together there, making it their family home. In September 2001, they refinanced the existing mortgage on that property and transferred it into both of their names. The refinancing provided the parties with further funds to put towards the purchase of the rural property on the Takhini River road, which was jointly purchased by them in July 2002. As a result, although the couple ultimately purchased two pieces of communal property, there was only one mortgage, which was registered against the Willow Crescent property. Nevertheless, the mortgage payments effectively covered the purchase of both properties.

[3] The evidence was unclear about precisely when the parties separated. As I understand it, the separation took place over a relatively protracted period of time, from approximately the end of August to early November 2002. The defendant moved out of the Willow Crescent property in about October 2002.

[4] The defendant was later incarcerated from July 2 to November 24, 2003 and, as a result, he became temporarily disentitled to the disability benefits he had been

receiving from the Workers' Compensation Health and Safety Board ("WCB") for a work-related injury in 1998.

[5] The plaintiff claims that the defendant ceased contributing to the mortgage payments in October 2002 and did not resume doing so until June 2004, as a result of an interim order by me that he pay monthly spousal support in the amount of \$369.92, in effect, to cover half of the mortgage payment and half of the taxes on both of the couple's properties. There is no dispute that the defendant made those payments until the sale of both properties in 2005. There is also no dispute that the plaintiff made the mortgage payments, without any contribution by the defendant, from September 2003 to May 2004. The issue is whether the defendant made any contributions towards the mortgage payments over the period from October 2002 to August 2003, and if so, to what extent.

[6] The net proceeds of the sale of both of the properties is approximately \$94,184.53, which is being held in trust by the law firm of the defendant's counsel pending this Court's order for the distribution of those proceeds.

[7] The plaintiff has applied for such an order and seeks an unequal division of the proceeds to reflect her claim that she made a number of payments towards the mortgage, property taxes and insurance with no contribution from the defendant. Although her application referenced the *Family Property & Support Act* as authority for an unequal division of the proceeds, she now acknowledges that this legislation is not applicable, since the parties were never formally married. Therefore, she must look to the common law of unjust enrichment to support her claim.

[8] The defendant's position is that these properties were jointly held by the parties and that the proceeds from their sale should presumptively be divided into equal shares, at a minimum. If anything, the defendant claims to have made a greater contribution to the couple's joint income over the years, and therefore he says he may well be entitled to more than 50 percent of the sale proceeds.

## **ANALYSIS**

### ***Contribution to Mortgage Payments***

[9] The plaintiff stated repeatedly that she exclusively made the mortgage payments from October 2002 until May 2004, without any contribution from the defendant. However, the defendant responded with bank statements showing numerous transfers over that period from the defendant's personal account to the parties' joint account, from which the mortgage payments were deducted. In reply, the plaintiff said that the parties had a verbal agreement that any monies paid into the joint account by the defendant were to pay off his portion of a joint Visa credit card account in the plaintiff's name, to which the defendant had charged certain personal items. However, there is no reference at all in any of the plaintiff's five affidavits which specifically alleges such a verbal agreement. The only evidence on this point came from the plaintiff herself during the summary trial. During her submissions at the close of the summary trial, the plaintiff acknowledged the contribution of funds from the defendant into the joint account after October 2002, but said she "would rather" apply those funds to the Visa debt.

[10] The defendant specifically denied such an agreement in his second affidavit at para. 36. He was not cross-examined on that point by the plaintiff at the summary trial.

There is also significant evidence that the transfers made by the defendant were intended to cover his share of the monthly mortgage payments. In the defendant's third affidavit, he attached a copy of a bank memo which indicated that he made a transfer to the joint account on December 2, 2002, in the amount of \$390.98, "to cover half of mtg pmt". The mortgage payment at that time was for \$781.96 ( $\div 2 = \$390.98$ ). An identical deposit was made by the defendant into the joint account on January 2, 2003. From January 16 through to August 1, 2003, payments made by the defendant into the couple's joint bank account were rounded up to \$400 even.

[11] I find there was no verbal agreement, as alleged by the plaintiff. Rather, the plaintiff unilaterally decided that she would not credit the defendant with making these payments as his contribution toward the mortgage. I further find that all the payments made by the defendant over the period from October 1, 2002 to August 1, 2003, inclusive, were intended to cover his portion of the mortgage and he is to be credited accordingly.

### ***Occupation Rent***

[12] In order for the plaintiff to receive an unequal division of the communal property in her favour on the basis of unjust enrichment, she must prove an enrichment of the defendant, a corresponding deprivation to herself, and an absence of any juristic reason for the enrichment. Here, the defendant says that after the parties separated in the fall of 2002, the plaintiff continued to have the sole use and occupation of the Willow Crescent property and therefore she should have been obliged to pay occupation rent to the defendant. Thus, the plaintiff's payments towards the mortgage and other common expenses during the period from September 2003 to May 2004 can be construed as an

effective payment of occupation rent to the defendant. And to the extent that he has been enriched by those payments, this effective payment of occupation rent provides a juristic reason for that enrichment.

[13] As I held in *Brost v. Brost* 2004 YKSC 57, at para. 46, the concept of occupation rent is an equitable approach used to achieve justice when one of two joint owners has exclusive possession of the family home. The principle derives from an implied contract between the joint owners of the premises that if one of the joint owners permits the other to use and occupy the premises, the occupier will compensate the joint owner who has left the premises. Courts have allowed one-half of the amount the home could be rented for, less taxes, insurance and any mortgage paid during the period of possession, to be credited to the joint owner who lives outside the family home. Evidence is normally required as to the probable rent which such a home could attract before making such a credit.

[14] In this case, there was no evidence led as to the probable amount which the Willow Crescent property might have rented for during the period over which the plaintiff occupied the premises to the exclusion of the defendant, being from October 2002 until September 2005. As I understood him, the defendant's counsel suggested that the two-bedroom mobile home on the property was renting for about \$600 a month before the couple did their extensive renovations to the property. He therefore implied that after those renovations, the property could probably have been rented for a greater monthly amount.

[15] For her part, the plaintiff conceded in her submissions that around that time period a neighbouring property, comprised of a three-bedroom mobile home, had been

renting for about \$750 a month. On that basis, she estimated that the Willow Crescent mobile home, which was only a two-bedroom, would have rented for between \$500-600 per month.

[16] For argument's sake, even if I were to attribute a probable rental value of \$750 per month for the Willow Crescent property, that would still fall short of the amount of the monthly mortgage for much of the disputed period. From October 2002 until October 2003, the monthly mortgage payment was \$781.96. Thus, there would be no notional profit for occupation rent as the amount of the mortgage payment exceeded the probable monthly rental.

[17] The plaintiff then refinanced the mortgage and from November 2003 until September 2005, the mortgage payments were \$641.42. However, the plaintiff also paid property taxes of \$1,175.05 and insurance payments of \$777.68, for a total of \$1,952.73. If I were to divide that sum by the number of months in the period when the mortgage payments were reduced to \$641.42, i.e. from November 2003 through to and including May 2004, an amount of \$278.96 per month, on average, would be added to the mortgage payment of \$641.42, for a total of \$920.38 monthly. Once again, even assuming the property could be rented for \$750 per month, there would be no notional profit for occupation rent.

[18] From June 1, 2004 until the Willow Crescent property was sold in September 2005, the mortgage, plus property taxes, totalled \$739.34, which I round up to \$740 monthly. Since the property was sold in mid-September, I would exclude that month. That would leave a period of 14 months, during which the plaintiff occupied the premises to the exclusion of the defendant, while the defendant was continuing to pay

one-half of the mortgage and taxes. A notional rent of \$750 monthly would thus result in a profit of only \$10 a month for about 14 months, or \$140. Even then, only one-half of that amount would be credited to the defendant.

[19] In the result, I give no credit to the defendant for occupation rent, as there is no evidence to support such a calculation and even a generous estimate, based upon the submissions of the parties, would result in only a nominal amount of credit.

***Defendant's Contribution to Willow Crescent Purchase***

[20] There is also an issue about how much, if anything, the defendant personally contributed to the purchase of the Willow Crescent property. In his second affidavit, he claimed to have paid approximately \$2,500 towards that purchase. However, there was no documentation or other corroborative evidence supplied by him in support of that allegation, which is denied by the plaintiff. The defendant also admits that the property was purchased in October 1999 for an even \$50,000, using a mortgage of \$49,281.25 from the Canadian Imperial Bank of Commerce. Thus, after the application of the mortgage funds, there would only have been a balance due on closing of \$718.75. The defendant's counsel suggested that there may well have been other adjustments made on closing to account for the need for the defendant to contribute \$2,500, but he acknowledged that this was pure speculation. I also note that, at different times, the defendant's counsel has provided me with tables of calculations as an aid to his submissions. The first such table was attached as schedule "B" to his outline on this application, which lists the alleged \$2,500 contribution by the defendant. However, that payment is noticeably missing from the table submitted by the defendant's counsel at the summary trial on March 8, 2006. I don't know if that indicates that the defendant was



not seriously pursuing this claim, but in any event, I am unable to find on a balance of probabilities that the defendant made this contribution and I give him no credit for it.

***Defendant's Contribution to Takhini Property Purchase***

[21] The defendant also claims to have personally contributed \$9,000 to the purchase of the Takhini River property in July 2002, again for an even \$50,000. He deposed and testified that this amount of money came from a lump sum settlement payment he received from WCB in the amount of \$9,195.66 on July 3, 2002. The amount of this settlement and the date of its payment is confirmed in a memorandum from WCB dated September 17, 2004.

[22] Further, there is corroborative evidence that the parties would have been about \$10,000 short at the time of the closing of that purchase. According to the bank statements on the couple's joint account at CIBC, they received mortgage proceeds of about \$55,000 in late September 2001, after refinancing the existing mortgage on the Willow Crescent property. However, between the time that they obtained the additional mortgage proceeds in September 2001 and the closing of the Takhini River property purchase in July 2002, the couple had spent approximately \$15,000 on various purchases, leaving them with only \$40,000 to contribute to the purchase. In fact, a cheque for the latter amount was written on January 29, 2002 and, as I understand it, was provided to their lawyer in trust towards the Takhini River property purchase. When the time came to close the transaction in July 2002, the couple were still short. The defendant testified that after receiving the settlement cheque from WCB of \$9,195.66, he happened to run into their lawyer and immediately provided him with an additional \$9,000. He isn't sure whether he endorsed the WCB cheque over to the lawyer or

whether he cashed the cheque and then paid the lawyer \$9,000 in cash, as there is no documentation in support of that particular transaction. The final \$1,000 needed to close the purchase was apparently jointly contributed by the parties.

[23] While the plaintiff also denies the defendant made this contribution to the Takhini River property purchase, I find that he has proven on a balance of probabilities that such a contribution was made. There is simply no other explanation for how the purchase of the Takhini River property could have closed otherwise, or where the \$9,000 came from, if not from the defendant. I therefore credit the defendant with this contribution in making a distribution of the sale proceeds.

#### ***The Laundry Centre***

[24] It is agreed between the parties that the plaintiff purchased a laundry centre for the Willow Crescent property with \$1,179.99 of her own funds, which was sold as a fixture of that property. She should therefore be entitled to credit for one-half of that amount, or \$590.

#### ***Distribution of Communal Property***

[25] I find that the couple's communal property, being the combined sale proceeds of the Willow Crescent and Takhini River properties, should be divided according to the following table of calculations:

Table of Calculations							
Date	Defendant's Deposits to Joint Account	Date	Mortgage Payments out of Joint Account	Property Taxes	Insurance	Laundry Centre	Defendant's Payment Towards Takhini River Property
Oct 1/02	\$ 480.00	Oct/02	\$ 781.96				
Nov 1/02	390.00	Nov/02	781.96		\$ 400.00		
Dec 2/02	390.98	Dec/02	781.96				
Jan 2/03	390.98						
Jan 16/03	400.00	Jan/03	781.96				
Feb 5/03	400.00	Feb/03	781.96				
Mar 3/03	400.00						
Mar 17/03	400.00	Mar/03	781.96				
Apr 30/03	400.00	Apr/03	781.96				
May 20/03	400.00	May/03	781.96				
Jun 2/03	400.00						
Jun 16/03	400.00	Jun/03	781.96				
Jul 2/03	400.00	Jul/03	781.96	\$1175.05			
Aug 1/03	400.00	Aug/03	781.96				
		Sep/03	* 781.96				
		Oct/03	* 781.96				
		Nov/03	* 641.42				
		Dec/03	* 641.42				
		Jan/04	* 641.42		\$ 188.84		
		Feb/04	* 641.42		47.21		
		Mar/04	* 641.42		47.21		
		Apr/04	* 641.42		47.21		
		May/04	* 641.42		47.21		
<b>TOTAL</b>	<b>\$5651.96</b>		<b>\$14,655.42</b>	<b>\$1175.05</b>	<b>\$ 777.68</b>	<b>\$1179.99</b>	<b>\$9000.00</b>
<b>HALF</b>			<b>\$ 7327.71</b>	<b>\$ 587.53</b>	<b>\$ 388.84</b>	<b>\$ 590.00</b>	<b>\$4500.00</b>

\* Mortgage payments made exclusively by the plaintiff

### Mortgage

One-half of total mortgage payments out of joint account	\$ 7327.71
Less Defendant's deposits to joint account	<u>5651.96</u>
Additional amount Defendant should have paid as his equal share of mortgage	<b>\$ 1675.75</b>

### Plaintiff's Credits

Additional amount Defendant should have paid on mortgage	\$ 1675.75
One-half of taxes paid by Plaintiff	587.53
One-half of insurance paid by Plaintiff	388.84
One-half of laundry centre paid by Plaintiff	<u>590.00</u>
	<b>\$ 3242.12</b>

