

CITATION: Bachand v. Leclair et al., 2024 ONSC 4044
COURT FILE NO.: CV-22-90652
DATE: 2024/07/18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CLAUDE BACHAND, by his litigation guardian, GENEVIÈVE BACHAND (the Applicant)

AND

DANIELLE LECLAIR & MARC AGOSTINI (the Respondents)

BEFORE: Justice Marc R. Labrosse

COUNSEL: Margot L. Pomerleau, for the Applicant

Hayley Crawhall-Duk, for the Respondent Danielle Leclair

Charles R. Daoust, for the Respondent Marc Agostini

HEARD: July 08, 2024

REASONS FOR DECISION

The decision in this matter was originally rendered orally but this court was not aware that the matter was not being recorded.

These written reasons now replace those oral reasons.

Overview

[1] This application was originally filed under the *Partition Act*, R.S.O. 1990, c. P.4, for the sale of the jointly owned property at 145 & 147 Columbus Avenue in the City of Ottawa (the “Property”). The joint owners are the applicant Claude Bachand, and the respondent Danielle Leclair. Both Mr. Bachand and Ms. Leclair hold 50% of the Property in trust for the respondent Marc Agostini.

[2] After a number of appearances before this court, the parties agreed to a process for the sale of the Property with the funds to be held in trust. On July 23, 2023, the Property was sold and the net proceeds of sale were held in trust by the applicant’s counsel.

[3] The parties were unable to come to a resolution as to how to divide the net proceeds of sale. Accordingly, it was agreed that the parties would submit their positions to this court, and a determination would be made as to how the proceeds of sale should be divided between the applicant and both respondents.

[4] Just prior to the determination of that issue, the parties resolved the claims of Mr. Agostini and filed a consent order to that effect. The draft order contemplates that Mr. Agostini is entitled to 50% of the net proceeds of sale plus the sum of \$5,500 in costs payable by the respondent Danielle Leclair. A consent order was filed by the parties to finalize the resolution with Mr. Agostini.

[5] As for the balance of the proceeds of sale, the applicant claims that he is entitled to 25% of the net proceeds of sale plus his cost of the application. The respondent Ms. Leclair is of the view that the applicant has always held his 25% interest in the Property in trust for her and that she has always maintained a beneficial interest over the applicant's claimed interest. Accordingly, Ms. Leclair claims that she is entitled to the balance of the proceeds of the sale plus her costs.

The relevant facts

[6] Prior to April 2013, the respondent Danielle and the respondent Marc were friends and business associates in various capacities. Around early 2013, Danielle and Marc collaborated on a business venture purchasing a semi-detached property on Montreal Road in the city of Ottawa. Marc was the property owner and Danielle was an investor.

[7] At about the same time, Marc and Danielle began discussing the possibility of jointly purchasing and financing the Property. Prior to finalizing the arrangements, Marc informed Danielle that he could not take title to the Property or sign onto the mortgage due to other financial obligations.

[8] At that time, Danielle was in a romantic relationship with the applicant Claude Bachand, who was her previous employer when she worked on Parliament Hill. Danielle was unable to qualify for a mortgage to purchase the Property. Claude agreed to be a guarantor on the mortgage to facilitate the purchase of the property Danielle wanted to buy.

[9] The Agreement of Purchase and Sale of the Property was entered into on February 11, 2013. In that agreement, Claude, Danielle, and Marc are all listed as the buyers.

[10] Prior to the closing of the transaction, on March 6, 2013, Danielle and Marc entered into an agreement which provided that they were purchasing the Property in equal shares between Marc and Danielle. The March 6, 2013 agreement goes on to state that Danielle is to be the official owner of the Property but that both Marc and Danielle will share in the responsibilities, expenses, revenues, and advantages in equal shares. Furthermore, the March 6, 2013 agreement states that in no circumstance shall Marc be less than a 50% owner of the Property, even if Danielle must resort to a co-signer or co-owner, including but not exclusively limited to Claude Bachand. Accordingly, as of March 6, 2013, Claude's involvement was contemplated as he was listed as a buyer on the Agreement of Purchase and Sale but he did not have any rights or obligations under the March 6, 2013 agreement.

[11] The March 6, 2013 agreement goes on to state that Danielle will rent an apartment at \$1,400 per month and the other apartment will be rented out with a sharing of responsibilities and benefits between Danielle and Marc. All decision making was to be made equally between Marc and Danielle.

[12] Prior to the purchase of the Property, Danielle and Claude met with the real estate lawyer for the transaction who advised them that Claude could not only be a guarantor of the mortgage. He had to be an owner of the Property and a grantor on the mortgage. Accordingly, Claude was made a joint owner with Danielle. On March 27, 2013, a Declaration of Trust was signed by Danielle and Claude to recognize Marc's 50% beneficial interest in the Property.

[13] The March 27, 2013 Declaration of Trust provided that 50% of the Property was held in trust for Marc by Claude and Danielle. Furthermore, the declaration recognized that Marc was entitled to 50% of the rental income and he was obligated to pay 50% of the expenses of the Property. Marc's consent was required for the sale of the Property and Marc would be entitled to 50% of the net proceeds of the Property upon sale.

[14] According to Danielle's affidavit, at the time of the meeting between Claude, Danielle, and the real estate lawyer, Claude assured Danielle that he had no intention of retaining any ownership

in the Property. No document was signed as between Danielle and Claude to confirm this arrangement or to confirm that Danielle was retaining beneficial ownership of Claude's interest on title to the Property. There is no evidence as to why no similar declaration of trust was signed by Claude for the benefit of Danielle. No party presented the real estate file into evidence.

[15] Marc and Danielle jointly provided the entire down payment for the Property, being \$44,182, in equal parts. Claude did not contribute to the down payment. At no time after the purchase of the Property did Claude financially contribute to the Property. Specifically, Claude did not contribute to the mortgage payments, taxes, utilities, insurance, or maintenance expenses, nor did he share in the income generated by the Property.

[16] In 2018, the financial arrangements for the Property were in question and Marc notified both Danielle and Claude that the mortgage was at risk of being in default together with the payment of property taxes. In this regard, Claude was advised of the issues in the same fashion that Danielle was.

[17] On March 23, 2021, Claude and Danielle entered into an agreement regarding Claude's guarantee of the mortgage. In that agreement, titled "Convention de libération", Claude acknowledged that he no longer wished to be a guarantor for the mortgage and that it was only supposed to be a short-term arrangement to allow Danielle to acquire her property.

[18] The purpose of the Convention de libération was to allow Danielle to renew the mortgage on the Property for one more year. However, the document only speaks to Claude as a guarantor of the mortgage and not as a grantor of the mortgage. Also, it does not contemplate that Claude was a 25% owner of the Property or that he was entitled to any share of the proceeds if Danielle was required to sell the Property.

[19] The Convention de libération went on to have Danielle recognize that she would have to make arrangements for the financing of the Property and meet the requirements of the lender, failing which she would have to sell the Property.

[20] In 2022, following the signature of the Convention de libération, Claude had a fall resulting in head trauma and loss of autonomy. He is often confused and is unable to perform simple tasks

or recall basic information. Thus, the applicant in this application is his daughter operating under the authority of a Power of Attorney.

[21] Following the commencement of this application, the Property was sold in July 2023 and the net proceeds of sale were held in trust pending a resolution on the distribution of the net proceeds of sale.

Issues and the law

[22] It is the applicant's position that without any agreement dealing with the beneficial ownership of Claude's interest in the Property, the applicant is entitled to his 25% of the net proceeds of sale plus costs. The applicant advances that it was available to Danielle that Claude sign a similar declaration of trust in order to confirm who retained Claude's 25% beneficial interest in the Property. As this was not done, there is no basis to claim that Danielle continues to be the beneficial owner of Claude's interest in the Property.

[23] The applicant highlights that without Claude's agreement to be liable for the mortgage, that the purchase of the Property would never have been completed and, accordingly, given his assumption of risk (which almost materialized itself in 2018 when the financial arrangements were struggling), this is sufficient to confirm his interest.

[24] As for the respondent Danielle, she relies on the principles of purchase money resulting trust, proprietary estoppel, unjust enrichment, and quantum meruit in support of her position that she has retained a beneficial ownership over Claude's 25% interest in the Property.

[25] On the issue of purchase money resulting trust, the following principles of law form part of the respondent's factum and have not been challenged by the applicant. Generally, the applicant states that they do not apply to this factual circumstance.

[26] It is not disputed that, pursuant to the *Partition Act*, the court has a broad discretion in making orders upon partition and sale of a property. As set out in *Sauve v. Davidson*, 2024 ONSC 2091, that discretion includes the power to make all allowances and give such directions as will result in equity to the parties.

[27] The law of equity presumes bargains, not gifts: see *Pecore v. Pecore*, 2007 SCC 17, at para. 24.

[28] The burden is on the individual who receives a gratuitous transfer of property to rebut the presumption of bargain by proving that it was intended as a gift at the time of transfer.

[29] The applicant highlights that in many cases where a purchase money resulting trust is found, the grantor has no interest in the Property. The applicant attempts to distinguish those cases from the present situation where Danielle has always retained her 25% interest in the Property. However, the Court of Appeal in *MacIntyre v. Winter*, 2021 ONCA 516, confirms that a joint tenancy and the right of survivorship is not sufficient to rebut the presumption of a resulting trust. At para. 33, the Court of Appeal provides an example of a purchase money resulting trust where grantor and the grantee are joint tenants.

[30] In *Grasso v. Bhatt*, 2019 ONSC 746, the court summarizes the principle surrounding the purchase money resulting trust as follows at para. 53:

Our common law has recognized, since at least the 18th century, “that the trust of a legal estate ... whether taken in the names of the purchasers and others jointly... whether in one name or several, whether jointly or successive, results to the [person] who advances the purchase money”: *Dyer v. Dyer* (1788), 2 Cox 92. When a person contributes financially to the acquisition of property but is not registered on title to the property, a presumption of resulting trust in favour of that person generally arises: *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 17 and 25; *Lequelenec v. Lequelenec*, [1991] O.J. No.731, at para.47. The presumption allocates the burden of proof. The onus is placed on the grantee (i.e., the person who gratuitously receives title to the property) to rebut the presumption by demonstrating that a gift of the property was intended by the grantor (i.e., the person who contributed to the purchase): *Pecore v. Pecore*, [2008] 1 S.C.R. 795, at para.24 and *Kerr v. Baranow*, at para.19. [Footnote omitted.]

[31] Accordingly, and as stated in *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, in the context of a purchase money resulting trust, the presumption is that the person who advanced the purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price.

[32] In *Andrade v. Andrade*, 2016 ONCA 368, the Court of Appeal stated, at para. 61, that a presumption is of greatest value in cases where evidence concerning the transferor's intention may be lacking – for example where the transferor is deceased.

[33] The relevant issue is the intention of the grantor at the time of the transfer, when the funds were advanced: see *Nishi*, at paras. 30 and 41.

[34] The applicant relies on the fact that the parties entered into commercial agreements and that they were sophisticated enough to understand the need to properly document the existence of a beneficial interest, if it existed, by way of a declaration of trust. On or about the closing date for the purchase of the Property, Claude and Danielle signed a Declaration of Trust to preserve Marc's beneficial interest in the Property. The applicant states that it would make no sense for Claude and Danielle not to have done so for Danielle's beneficial interest given the reality that Claude was required to be an owner of the Property to sign on to the mortgage.

[35] The applicant states that Claude earned his interest in the Property, including the beneficial interest in the Property, by making the transaction happen with the use of his credit. He states that the intentions of the parties are clear within the written documents that were signed and those include the March 6, 2013 agreement, the Declaration of Trust and the Convention de libération signed in 2021.

[36] Returning to these documents, they provide a significant amount of information about what Danielle's intention was at the time she advanced half the funds for the purchase of the Property.

- a. The Agreement of Purchase and Sale lists Claude, Danielle, and Marc as the buyers. Given the terms of the other agreements, it seems clear that the parties had yet to determine everyone's role in the transaction.
- b. The March 6, 2013 agreement between Marc and Danielle clearly contemplates shared 50% ownership and a sharing of benefits and liabilities. It also contemplates the possible involvement of Claude as co-signer or co-owner but does not grant him any decision-making despite the fact that he is listed as a buyer on the Agreement of Purchase and Sale.

- c. The Declaration of Trust provides Danielle's clear intention of how she agreed to preserve Marc's 50% beneficial interest in the Property.
- d. Although signed several years later, the Convention de libération recognizes that Claude's original involvement in the Property was meant to be short-term to allow Danielle to acquire her property. At that time, he seems to believe that he can simply no longer be liable as a guarantor. That document corroborates that it was initially intended for Claude to simply be a guarantor of the mortgage for a short period of time to allow Danielle to purchase her property.
- e. Interestingly, the Convention de libération is meant to allow Claude to withdraw from his obligations towards the mortgage on the Property. There is no mention that Claude was to be bought out from his 25% interest. The Convention fails to recognize that Claude has any ownership interest in the Property nor that he is entitled to his share of the proceeds of sale if the Property was sold.

[37] In the end, I have concluded that the applicant has failed to rebut the presumption of a purchase money resulting trust for the following reasons:

- a. It is clear that only Marc and Danielle contributed to the purchase of the Property and that they alone made the contributions to the payment of the mortgage, expenses, and management of the Property.
- b. While Claude did eventually sign as a grantor of the mortgage, where a party's only contribution to a purchase is to sign on to the mortgage, this is insufficient to rebut the presumption of a purchase money resulting trust. While I am of the view that the role of a guarantor is more significant than courts have recognized in the past, particularly when things go badly, I am influenced by the direction of the Court of Appeal in *Andrade*, at para. 64:

Once it is accepted that Luisa had money of her own, and that it was her money that was used to purchase the house and to pay down the mortgages, then a purchase money resulting trust could arise. Luisa borrowed the deposit and

paid it back, and she serviced the mortgages using money from her own bank account. Although they signed the mortgages, there was no evidence that the legal title holders considered themselves responsible for making any of the payments. Luisa borrowed their “names”, not their money. All of this is consistent with Luisa having advanced the purchase price of the property.

The scenario described in *Andrade* is clearly apposite. The evidence is that at the time of the purchase, Danielle and Claude considered Claude to be a guarantor. That was the original intent and it was still Claude’s belief at the time of the Convention de libération. There was no evidence that Claude believed that he was responsible for making his share of the payments, nor that Danielle ever expected him to do so. The Court of Appeal concluded in *Andrade* that the respondent had failed to rebut the presumption of a resulting trust where the title holders had only signed on as mortgagors.

c. There is a clear absence of evidence from the closing date for the purchase of the Property to explain how Claude and Danielle proceeded with Claude not only being a guarantor but a grantor of the mortgage. The absence of a second Declaration of Trust for Danielle’s beneficial interest causes this court to pause. However, while the applicant states that Danielle would never have been able to purchase the Property without Claude being a grantor of the mortgage, the law makes it more relevant that Claude would have never gotten his 25% interest without Danielle having made 50% of the downpayment, payment of expenses, and management of the Property. While there is limited evidence of exactly what transpired on the closing date, the various agreements allow the court to gain some insight of how the role of each owner evolved starting with the signature of the Agreement of Purchase and Sale and ending with the Convention de libération.

d. The main evidence of what happened at the time of the purchase is from Danielle, who states in her evidence that Claude advised at the time that he had no intention of retaining any ownership of the Property. The applicant has no ability to confirm or dispute that evidence. While it is somewhat self-serving, there is still evidence that

supports the statement and also evidence that contradicts it. For example, Danielle states that she and Claude were told on the day before closing that Claude had to be on title. This information is contradicted by the fact that Claude is listed as a “Buyer” on the Agreement of Purchase and Sale dated February 11, 2013. Again, there is a gap in the evidence caused in part by Claude’s health issues. The statements attributed to Claude by Danielle is evidence to be considered along with all the other evidence, including the fact that they were romantic partners. Regardless, that evidence is not determinative of the issues.

e. This is precisely why in circumstances such as this, where there is an absence of relevant evidence, the presumption of a purchase money resulting trust takes on more importance. The applicant must establish that it was Danielle’s intention to gift 25% of the ownership to Claude in consideration for his becoming a grantor of the mortgage. When considering all the evidence, I am unable to conclude that the bargain was for Claude to retain his 25% ownership simply as a result of being a grantor of the mortgage. This is precisely what Claude says in the Convention de libération. While the applicant has stated that this was the deal and Claude abided by his end of the bargain, the existence of such a deal has not been established on a balance of probabilities and the documentation actually supports the contrary – that Claude did not intend to have an ownership interest in the Property over the long term and participate in the investment property.

[38] As a result of my conclusion on the first issue, there is no need to address the remaining issues raised by the respondent, Ms. Leclair.

[39] Accordingly, this court orders that the applicant, Claude Bachand, by his litigation guardian Geneviève Bachand, held his interest in the Property in trust for Danielle Leclair.

[40] The respondent Danielle Leclair is entitled to the remaining net proceeds of sale, subject to the agreement with Mr. Agostini and further arrangements made by the parties. The draft order filed for Mr. Agostini will issue.

[41] The parties are encouraged to resolve the issue of costs and if unable to do so, may provide written submissions on costs within 15 days of the date of these Reasons for Decision, and the applicant will have 15 days to respond. These submissions on costs should be no longer than three pages plus attachments.

JUSTICE MARC R. LABROSSE

Date: July 18, 2024

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Justice M. Labrosse

Released: July 18, 2024