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Unjust Enrichment and Constructive Trusts

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UNJUST ENRICHMENT AND CONSTRUCTIVE TRUSTS

I. Introduction

We often use the terms unjust enrichment and constructive trusts interchangeably. But, it is useful to distinguish them.

Unjust enrichment is a cause of action. To succeed in an unjust enrichment claim, the plaintiff needs to establish three elements:

(1) an enrichment;

(2) a corresponding deprivation;

(3) absence of a juristic reason for the enrichment.

(*Petkus v. Becker*, [1980] 2 S.C.R. 834.)

Although there may be substantive constructive trust claims, in most of the recent Canadian cases, constructive trusts are remedial. The courts impose a constructive trust over property as a remedy. Many of the cases in which the courts have imposed a constructive trust are unjust enrichment cases. But, the courts may also impose a constructive trust in other circumstances if the court finds that the defendant should not in good conscience be permitted to retain the property.

(*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.)

Nor is the plaintiff who proves unjust enrichment entitled to a remedial constructive trust in every case. In many cases the courts make a monetary award. The majority of the Supreme Court of Canada in *Peter v. Beblow*, [1993] 1 S.C.R. 980, has said that the court must find a monetary award to be inadequate before imposing a constructive trust.

In estate litigation, unjust enrichment claims are typically brought by disappointed family or friends who claim to have provided care, labour, money or property to the deceased in the expectation of a more substantial inheritance. The ability to make an unjust enrichment claim may be particularly important for someone who does not have standing to apply to vary the deceased's will under the *Wills Variation Act*. A spouse or child may also rely on an unjust enrichment claim and the remedial construct trust to advance a claim to an interest in property that devolves to a beneficiary outside of the deceased's estate (and outside of the ambit of the *Wills Variation Act*). For example, a spouse may claim an interest in land held by her spouse in a joint tenancy with his children from a previous marriage.

When the *Wills Variation Act* does apply, the court may consider unjust enrichment principles to measure the extent of the testator's legal obligations to the claimant.

In this paper, we will look at some of the cases dealing with unjust enrichment claims and remedial constructive trusts during the last decade.

II. Unjust Enrichment

A. Absence of Juristic Reasons

Conceptually, the first two elements of an unjust enrichment claim are simpler than the third. In *Peter v. Beblow*, Madam Justice McLachlin (as she then was) said that the courts take "straightforward economic approach to the first two elements." Did the defendant, or the deceased, receive a benefit to the plaintiff's detriment?

The third element raises interesting issues concerning who has the burden of proof, and what may constitute a juristic reason.

The Supreme Court of Canada considered these issues in *Garland v. Consumers' Gas Company*, [2004] 1 S.C.R. 629. The case was a class action suit brought on behalf of those of Consumers' Gas costumers who had paid illegal penalties on late payments.

In his reasons for judgment, Mr. Justice Iacobucci wrote that the burden is on the plaintiff to show an absence of a juristic reason from one of the established categories. The established categories are a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations.

Once the plaintiff has shown that there is no reason to deny recovery from an established category, the plaintiff has then made a *prima facie* case. To rebut, the defendant may then show that there is some other reason apart from one of the established categories to deny recovery. The court should consider both the reasonable expectations of the parties, and public policy considerations when deciding if the defendant has rebutted the plaintiff's case.

By the way, the customers won.

B. Unsuccessful Claims

Not every contribution does an unjust enrichment claim make. The courts require that the extent of the claimant's contributions reach a certain threshold before making findings of unjust enrichment.

In *Strudwick v. Morrison* (1996), 21 R.F.L. (4th) 185 (B.C.S.C), the Court dismissed the plaintiff's unjust enrichment claim against his stepmother's estate. He had worked part-time as a teenager on his family's farm. The plaintiff's father had left the farm to the plaintiff's stepmother. On her death, the

stepmother left her estate to her own children. Mr. Justice Blair, while acknowledging that the result might be unfair to the plaintiff, found that the plaintiff's contributions to the farm were not of sufficient consequence to support a successful unjust enrichment claim.

The courts also consider any benefits person asserting an unjust enrichment claim received from the deceased.

In *Huculak v. Kallenberger*, 2005 BCSC 239, the Court dismissed a stepdaughters unjust enrichment claim against her stepmother's estate. Although the stepdaughter had provided care to her father (who predeceased her stepmother) and to her stepmother, she lived rent-free in their house for 11 years. After taking into account the rent-free accommodation and the $40,000 gift in the stepmother's will (out of a $275,000 estate), Mr. Justice Barrow dismissed the stepdaughter's unjust enrichment claim.

The court may find that the provision in the deceased will satisfies any unjust enrichment claim the person asserting the claim would otherwise have had.

In *Leclair v. Leclaire Estate* (1998), 48 B.C.L.R. (3d) 245 (C.A.), the deceased left a will leaving half of his estate to his wife, and half to his son from a previous marriage. His main asset was proceeds of sale of an apartment building the title to which he had held in his sole name. The wife argued that she had contributed labour to the maintenance and improvement of the building, and was entitled to a constructive trust in her favour over half of the proceeds of the sale as against her late husband's estate. The effect would be that she would get three-quarters of the sale proceeds (half through a constructive trust, and half of the estate's remaining one-half interest under the will.) The trial judge agreed that the husband had been unjustly enriched during his lifetime by the wife's contributions to the apartment building. But, the deceased had remedied any injustice to the wife in his will. "The trust is merged in the will." The Court of Appeal upheld the trial judge's dismissal of the wife's claim.

In *Kask Estate v. Welsh*, 2000 BCSC 791, the defendant Beverley Welsh raised unjust enrichment in a counterclaim to a claim made her sister, who was the executrix of their father's will. Mrs. Welsh and her husband provided significant care to her father in their home for the last four years of his life. Unfortunately, they also depleted his assets by over $200,000 at a time when he was not competent to manage his affairs. Mrs. Welsh's father left half of his estate to Mrs. Welsh and the other half to her sister. The Court rejected Mr. and Mrs. Welsh's claim that they should be compensated for the care they provided to her father out of the estate. Mr. Justice Lowry found that they had no expectation that they would receive more than half of Mrs. Welsh's father's estate when they provided care to him.

C. Monetary Awards

If the plaintiff successful prosecutes an unjust enrichment claim, he or she is entitled to a monetary award unless a monetary award does not adequately compensate the plaintiff.

But, the quantum of a monetary award for unjust enrichment is not limited to the market value of any services the plaintiff provided. The court may use either a value received or a value survived approach to determine the quantum (see *Pickelein v. Gillmore* (1997), 30 B.C.L.R. 44 (C.A.)). In cases where there is a close relationship between the person making the claim and the person who benefited, the court may take the supportive relationship into consideration (see *Clarkson v. McCrossen* (1995), 3 B.C.L.R. (3d) 80 (C.A.)).

The cases during the last 10 years indicate that trial judges have considerable discretion in assessing the quantum of a monetary award.

In *Emmerling v. Eschment Estate*, [1998] B.C.J. No. 1103 (S.C.), the plaintiff was a tenant and friend of Gunter Eschment. During the last two years of Mr. Eschment's life his eyesight was poor, and his health failed. The plaintiff made meals for Mr. Eschment, did his laundry, drove him to appointments and was his friend and companion. Mr. Eschment said he would provide for the plaintiff in his will, but then died intestate. After taking into consideration the fact that the plaintiff paid below market rent to Mr. Eschment and then to his estate, Mr. Justice Edwards awarded the plaintiff $40,000 for unjust enrichment out of an $842,000 estate.

In *Lineham v. Forfert Estate*, 2003 BCSC 1324, the plaintiff was a realtor who assisted his neighbour, a "curmudgeonly eccentric spinster," including managing her properties over a thirteen year period. She had given him gifts worth $37,700 during her lifetime. She had also told the plaintiff and others she was providing for him in her will. But, she died having left the plaintiff out of her will. Her estate was worth about $700,000. The plaintiff claimed $240,000, alleging that she had promised to pay him $150 per month per property. The Court rejected a claim in contract, but awarded the plaintiff $100,000 on a quantum meruit basis.

In *Moyes v. Ollerich Estate*, 2005 BCCA 518, the plaintiff provided significant personal care to her stepmother, Mrs. Ollerich, especially during the last several years of the stepmother's life. They were close, and their relationship was a long- standing mother-daughter type relationship. The plaintiff's stepmother left $25,000 in her will to the plaintiff, with most of the $700,000 estate going to Mrs. Ollerich's brother.

The summary trial judge, Madam Justice Beames, awarded the plaintiff an additional $125,000. She found that a monetary award was adequate. On appeal, the executor of Mrs. Ollerich's will argued that the award in *Clarkson* set a goal post of $125,000, and that the care provided by the plaintiff to the deceased were not as extensive in *Moyes v. Ollerich* as in *Clarkson*.

The Court of Appeal dismissed the appeal, noting that *Clarkson* did not set an upper limit. With respect to the quantum of the award, Madam Justice Prowse said that "[i]t is clear from the authorities that trial judges have considerable discretion in that regard to take into account the specific circumstances before them."

D. Constructive Trust Awards for Unjust Enrichment

Trial judges also have considerable discretion in making constructive trust awards.

In *Kreeft v. Kreeft*, 2001 BCSC 893, the four plaintiffs had contributed labour to help their father construct an auto body shop. Their father had made promises to them that they would inherit the auto body shop and subjacent lands. After their father transferred the lands into a joint tenancy with his second wife, they sued both their father and his wife in unjust enrichment. Mr. Justice Drossos found for the children, and held that there was a sufficient connection between the children's labour and the lands to impose a constructive trust on the lands. He awarded one of the children a 5% interest, and each of other three plaintiff children a 4 % interest.

In *Proulx v. Daniels*, 2001 BCSC 441, the plaintiffs, Mr. and Mrs. Proulx were husband and wife. Mr. Proulx mother, Mrs. Daniels and his step-father, Mr. Daniels, promised them that if they moved in with them in Victoria and provided the Daniels with care during their older years, Mr. and Mrs. Daniels would leave them their house. Mr. and Mrs. Proulx sold their house in Edmonton—a city where their children and grandchildren lived, and where Mr. Proulx had a good job—to move to Victoria to care for Mr. and Mrs. Daniels. They provided substantial care, including around-the-clock care to Mrs. Daniels in the seven months before her death. On Mrs. Daniels' death, her interest in the house passed to Mr. Daniels by right of survivorship. After Mrs. Daniels died, Mr. Daniels asked Mr. and Mrs. Proulx to leave, and denied that he and his late wife had promised to leave them the house.

Madam Justice Dorgan found that Mr. Daniels had been unjustly enriched by the care that Mr. and Mrs. Proulx had provided to him and his wife. Madam Justice Dorgan considered a monetary award to be inadequate. Mr. and Mrs. Proulx had a reasonable expectation that they would receive the house. Mr. Daniels had a fixed income, which would limit his ability to pay a monetary award. Madam Justice Dorgan was also concerned with the way Mr. Daniels dealt with his assets, holding his funds in joint accounts with Mrs. Proulx's brother, making a monetary award potentially unenforceable. She imposed a constructive trust on the house, subject to Mr. Daniels' right to occupy the house until he vacated the property or until his death.

Wilcox v. Wilcox, 2000 BCCA 491 illustrates how unjust enrichment principles dovetail with the *Wills Variation Act*. The plaintiff was one of Edith Wilcox's four children. The plaintiff lived with their mother in a house they owned together from 1970 until Edith Wilcox's death in 1996. The plaintiff and her mother both contributed financially to the house and household expenses, but the Court found that the plaintiff contributed more funds over the years. The plaintiff also provided the household chores and provided personal care and services to their mother after 1989 when their mother became ill. The plaintiff and her mother's relationship became strained in about 1993. The plaintiff and her mother held title to the house in a joint tenancy until August 1995, when Edith Wilcox unilaterally severed the joint tenancy. Edith Wilcox also made a new will in December 1995, leaving substantially all of her estate to the plaintiff's three siblings.

After Edith Wilcox's death, the plaintiff brought a *Wills Variation Act* claim. The main asset of the estate was Edith Wilcox's half-interest in the house. At trial, the trial judge held that Edith Wilcox had been unjustly enriched by the plaintiff's financial contributions and personal care and services. He imposed a constructive trust on Edith Wilcox's half-interest in the house in favour of the plaintiff. He also awarded the plaintiff insurance monies in respect of some damage to the house and the sum of $6,500.

On appeal, Madam Justice Saunders agreed that Edith Wilcox was unjustly enriched by the plaintiff's contributions. The plaintiff had an expectation that she would receive her mother's interest in the house by right of survivorship. But Madam Justice Saunders also said that the unjust enrichment did not entitle the plaintiff to the entire interest in the house. The extent of the unjust enrichment was more limited. After considering the plaintiff's legal claim in unjust enrichment, Madam Justice Saunders turned to the plaintiff's moral claims. She found that the plaintiff had a stronger moral claim than her siblings. On the basis of both the plaintiff's legal and moral claims, Madam Justice Saunders upheld the award of the house and insurance monies to the plaintiff. She did allow the appeal to the extent of eliminating the award of $6,500 to the plaintiff. Instead, the Court of Appeal held that the small amount of cash in the estate would be divided equally among Edith Wilcox's four children.

In *Schnogl v. Blazicevic*, 2005 BCCA 575, the plaintiff rented a suite from Mr. and Mrs. Balen, with whom he was friends. Over the years he gave them considerable assistance, including doing repair and maintenance work to their house and yard, contributing financial to a new roof, and providing personal care to the Balens in their elder years (he was 20 years their junior.) They dissuaded the plaintiff from moving from his suite in their home, telling him that when they died the house would be his.

The executor of Mr. Balen's will attempted to characterize the relationship between the Balens and the plaintiff as a landlord-tenant relationship, arguing that Mr. Balens had already benefited by having paid below-market rent. But the trial judge found that the relationship took on a filial quality. The Balens did not have any children.

Mr. Justice Cullen at trial found a sufficiently strong link between the plaintiff's contributions and the Balens' house to impose a remedial constructive trust. He noted that the plaintiff had a reasonable expectation to inherit an interest in the house. He awarded the plaintiff a 90% interest in the house.

The Court of Appeal reduced the award to a two-thirds interest in the house. With respect to the kind of remedy, Madam Justice Prowse held that it was open to the trial judge in his discretion to impose a constructive trust. She also said that trial judges have considerable discretion on quantum, but in this case a 90% award was disproportionate to the benefits received by the Balens. She wrote at para. 21:

> In determining whether the trial judge erred in awarding Mr. Schnogl a 90% interest in the property, I do not lose sight of the fact that these cases are essentially fact-driven. For that reason, it is of limited assistance to compare awards in one case with those in another. Trial judges are given considerable leeway to tailor an award to fit the precise circumstances before them. In this case, however, I am satisfied that the

> trial judge's determination did not adequately take into account the fact that Mr. Schnogl continued to work full-time during the time that he provided his services to the Balens, and that he continued to benefit from a significantly reduced cost of room and board during the time he lived with them. While the services he rendered were extensive and prolonged, and while he gave up the valuable opportunity to purchase his own residence, the extent of the unjust enrichment obtained by Mr. Balen must take into account these additional factors.

E. Factors to Consider when Arguing Quantum of Monetary or Constructive Trust Awards for Unjust Enrichment

In looking at the cases, I think the following factors are relevant in quantifying an award for personal services in an unjust enrichment claim:

(1) the nature and extent of the plaintiff's personal services;

(2) the nature of the relationship between the plaintiff and the beneficiary of the plaintiff's personal services, and where there is a supportive relationship, the supportive relationship is compensable;

(3) the plaintiff's legitimate expectations;

(4) any sacrifices that the plaintiff made;

(5) any benefits conferred on the plaintiff; and

(6) the value of the assets.

III. Liabilities and Unjust Enrichment

A. Rights of Debtors Inter Se

The principles of unjust enrichment may also affect how liabilities are allocated among debtors *inter se.*

The issue in *Parrot-Ericson v. Stockwell*, 2006 BCSC 1409 was this: If two people own real estate that they have mortgaged in a joint tenancy, and one of them dies, does the estate of the deceased have to contribute to the mortgage, or does the surviving joint tenant have to pay it all?

Helen Parrott-Ericson and her husband, Goran Ericson, borrowed $420,000, which they used to buy two condominiums, both of which they owned as joint tenants. The loans were secured by mortgages of the condominiums.

When Mr. Ericson died, Mrs. Parrott-Ericson became the sole owner of the condominiums by right-of-survivorship. Mrs. Parrott-Ericson asked the executor of Mr. Ericson's estate to pay one-half of the loans out of Mr. Ericson's estate. The executor refused.

Mr. Justice Sigurdson held that Mrs. Parrott-Ericson was not entitled to contribution from her husband's estate.

When two or more people are both liable on a loan, the *prima facie* rule is that they will share it equally, unless they have agreed on some other proportions.

But in this case, the Court found that the general rule that each debtor is required to contribute equally does not apply. Because Mrs. Parrott-Ericson has received the benefit of sole ownership of the condominiums, the Court held that the Mrs. Parrott-Erickson would be unjustly enriched if the executor were required to pay one-half of the amounts owing on the mortgages. In Mr. Justice Sigurdson's words, at para. 27:

> Here, on the evidence, I find that the mortgage debt and the land were clearly connected in this sense. The joint and several loan was the basis upon which the property was acquired. It was still a substantial burden on the property at the time of the deceased's death. There was no arrangement that the estate would be liable for one-half of the debt. Of course, equity will impose that obligation in order to avoid unjust enrichment. That is the usual rule, because ordinarily there is unjust enrichment if the liability is not shared. However, here on the facts of the case at bar, I think that, given the joint debt was used to acquire the land and the petitioner received the land entirely, I find that she would be unjustly enriched if the estate had to pay one-half of the debt. On that basis, the petitioner's claim must fail.

Parrot-Ericson v. Stockwell dealt with the rights of debtor's *inter se*, but not with the rights of the creditor, who could presumably look to the estate for payment of the mortgage.

B. Rights of Creditors

In theory, a successful unjust enrichment claimant could get a priority over third party creditors of the person who has been enriched if the court imposes a remedial constructive trust over the debtor's assets. The successful claimant would then have a proprietary interest in the assets that would likely defeat the debtor's unsecured creditors, and possibly even secured creditors.

This issue was recently considered in a bankruptcy case, *Melchior v. Pricewaterhouse Coopers*, 2007 BCSC 136.

Mr. Cable and Ms. Melchior lived in a common-law relationship for about 10 years. Mr. Cable had invented and patented a wood gluing apparatus and process. He also had the majority interest through a holding company in a wood production and sale business: Interact Wood Products Inc. Ms. Melchior also had a smaller interest in the holding company.

Both Mr. Cable and Ms. Melchior were involved in the business. In order to get some capital, Interact Wood Products borrowed $3.5 million from a private lender. He gave a personal guarantee, and gave the lender a security interest in his patent rights.

The business failed. Both Interact Wood Products and Mr. Cable personally went bankrupt.

Ms. Melchior asserted a claim in the bankruptcy proceedings to an interest in the patent rights. She claimed that Mr. Cable held the rights as a resulting or constructive trustee for her. If she were successful, she would have the rights of a co-owner to the patent. She could set up another operation with Mr. Cable's assistance, and use the patent rights. She could use the patent and compete against a co-owner.

One of the arguments Ms. Melchior made was that Mr. Cable, and his creditors, was unjustly enriched by her efforts in the business.

Mr. Justice Masuhara found against Ms. Melchior. He found neither an enrichment, nor a corresponding deprivation.

Ms. Melchior was well paid for her work in the business. She drew salaries, and Interact Wood Products Ltd. covered some of her expenses such as some of her meals. Although she received benefits from the business, including the loan, she was insulated from most of the financial risks.

The deprivation was the loss of business because of market reversals. It was not the type of deprivation against which the law of unjust enrichment afforded protection.

Furthermore, there were juristic reasons for the lender to benefit from its security ahead of any claims by Ms. Melchior. The lender made the loan in good faith on the basis of its agreement with Mr. Cable and Interact Wood Products Ltd. The patent was registered in Mr. Cable's sole name. Ms. Melchior was aware of the terms of the loan agreements, but raised no objection to Mr. Cable giving the lender a

security interest in the patent when the loan was made. Ms. Melchior did not assert any claim to an interest in the patent until after Interact Wood Products defaulted on the loan. She had no reasonable expectation to an interest in the patents.

Although Ms. Melchior does not appear to have had a very strong case on the facts, I suspect that it may often be difficult to persuade the court to grant a remedial constructive trust if doing so will defeat the rights of third party creditors. To succeed, one would likely need to persuade the court that the equities favoured the person asserting the claim over the creditors, and not just as against the debtor.

IV. Limitation Periods

The choice of remedy could affect the limitation period for bringing a claim.

There are two decisions in 2007 in which the Supreme Court of BC has considered the limitation period for claims in which the plaintiffs have sought a remedial constructive trusts. Both *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2007 BCSC 640 and *Smith v. Vancouver City Savings Credit Union*, 2007 BCSC 771, are class action suits. In *Sun-Rype*, the proposed class of plaintiffs are customers of *Archer Daniels Midland Company*, which, Sun-Rype alleges, illegally fixed prices. In *Smith v. Vancouver City Savings Credit Union*, the proposed class are customers of the defendant, who allegedly charged rates of interest in excess of the *Criminal Code* rate of interest. In each case, the proposed representative plaintiffs plead that the defendants were unjustly enriched, and in each case seek a remedial constructive trust over the funds the defendants received from their customers.

In each case, the defendants argued that the claims were statute barred, alleging that a six-year limitation period under s. 3(5) of the *Limitation Act* applied.

The proposed plaintiffs in these two cases argued that their claims fell under the 10-year limitation period for trust claims under s. 3(3) of the *Limitation Act*.

The defendants argued that these were not truly trust claims. They were not founded on a pre-existing trust or fiduciary relationship. They were not substantive trusts, but were claims based on other causes of action. The defendant's argued that where the constructive trust is remedial, rather than substantive, the 10-year limitation period in s. 3(3) of the *Limitation Act* does not apply.

In both cases, the courts agreed with the proposed plaintiffs that the ten-year limitation period would apply if the proposed plaintiffs are successful in persuading the court at trial to impose remedial constructive trusts. In *Sun-Rype*, Mr Justice Rice, after noting that the definition of "trust" in s. 1 included "a constructive trust," wrote at para. 77:

> In the circumstances, I am obliged to construe 'constructive' according to its plain meaning, which, as I have already said, embraces the remedial constructive trust as well as the substantive. Indeed, there may be something to be said for the convenience, and even the protection, of lumping all constructive trusts together for limitation purposes. Not many lay persons, and not all professional advisors, are likely to appreciate the distinction of a remedial constructive trust. The harsh consequence of missing a limitation date because of that are alleviated by having one general category.

In contrast, if the plaintiff is entitled to a monetary award for unjust enrichment, but not a constructive trust, the limitation period falls under s. 3(5) of the *Limitation Act*, and must be brought within six years of when the cause of action arose (subject to any postponement or confirmation).

(*Smithson v. Hansen*, 2005 BCSC 305 (Master).)

V. Conclusion

What makes unjust enrichment and constructive trusts so useful and interesting are the flexibility they afford. If your client has made significant contributions and can establish the three elements of unjust enrichment, the court has broad discretions to do what the court considers just. In contrast to *Wills Variation Act* claims, you do not have to establish that your client is a child or spouse, nor is your client's claim limited to a claim to those assets that fall into the estate.

The Court of Appeal has given trial judges a fair amount of leeway in determining the quantum of an award.

Unjust enrichment principles may be applied to allocate debts as well as assets.