CITATION: Lee et al. v. Lee et al., 2015 ONSC 954
COURT FILE NO.: CV-14-498769
DATE: 20150223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hui-Sik Lee and Byung Ae Lee, Applicants

AND:

Yong Kil Lee and Kelly Joanne Lee, Respondents

BEFORE: Sean F. Dunphy, J

COUNSEL: *Scott Lemke and Gordon Baker*, for the Applicants

Heather Hall, for the Respondent Kelly Joanne Lee

Shane Foulds, for Family Responsibility Office

HEARD: February 2, 2015

JUDGMENT

[1] This court is tasked with looking back through 25 years of troubled family history to ascertain the subjective intentions of members of the Lee family with respect to a single real estate transaction where only the most bare of objective records survive. To what degree have current recollections of past events been clouded and distorted by painful intervening events in what has doubtless been a very turbulent family history? The Lee family, very unfortunately, demonstrates all too well the truth of Tolstoy's statement that "every unhappy family is unhappy in its own way". The rifts that have developed within this family greatly complicate the task of assessing subjective evidence of parties that may have been influenced by subsequent events, however unconsciously, and the passage of time. This case presents neither villains nor victors, but this court must nevertheless apply the law impartially to the facts as it finds them based upon the totality of the evidence.

[2] While a number of theories have been advanced in support of the Applicants' claim to title to the subject property at 82 Empress Avenue in Toronto, the main theory pressed has been that of resulting trust. Courts have long assumed that gratuitous transfers of property from one party to another are subject to a rebuttable assumption that the property is held by the transferee under a resulting trust. The genesis of this assumption is said to lie in the venerable equitable maxim that "Equity assumes bargains, and not gifts" (per Laskin J.A. in *Burns Estate v. Mellon*, (2000), 48 O.R. (3d) 641, at para. 4).

[3] The thorny problem raised by this case is that while intention to make a gift is currently denied by transferor and transferee, both denials are subject to considerable doubt and credibility challenges due in large part to intervening events.

Procedural Background

[4] This case came on as a hearing of an application without viva voce testimony. The Applicants seek an order declaring them to be the owners of the property at 82 Empress Avenue, Toronto, an order vesting title to the property to them as joint tenants by reason of unjust enrichment or adverse possession, a declaration that any interest in the property of the Respondent Yong Kil Lee ("Yong") is extinguished and an order that the writ registered against the property by the Family Responsibility Office on behalf of the respondent Kelly Joanne Lee ("Kelly") be deleted.

[5] Although no oral evidence was called, the court had before it the various affidavits filed by the parties and their exhibits as well as transcripts of the cross-examinations conducted. The respondent Yong did not appear at the hearing of the application but had previously provided an affidavit admitting to the allegations contained in the Application and a consent to the relief sought by the Applicants. He did not file any material in opposition to it. The application was responded to by Yong's former spouse Kelly who was recently added as a party respondent on consent. The Family Responsibility Office also appeared at the hearing of the application and made limited submissions.

Status of Unrepresented Respondent

[6] As noted, Yong did not appear at the hearing of the application. The court was advised by Mr. Lemke (the Applicants' counsel) that Yong had contacted him to advise that he was unable to attend due to the snowstorm affecting the area the prior night. As communicated by Mr. Lemke, Yong indicated a willingness to participate by telephone if possible but also a strong desire that the matter proceed without delay. Yong has not been consistently represented in these proceedings, but had indicated a similar desire for a speedy hearing of the matter in prior case management conferences (including before Mew J. in December, 2014). On July 22, 2014, Yong delivered an affidavit to the applicants indicating "I agree with the allegations set out in the Application". A second affidavit sworn July 25, 2014 indicated that while it "is my belief that I have no interest in law or equity in the property…should it be determined that I have any interest in the subject property, I assign whatever interest this Honourable Court determines to my children Ava Lee and Mason Lee". Yong was cross-examined on his affidavits in these proceedings and the transcript of that examination was part of the record on this Application.

[7] On August 20, 2014, Mr. Smelko signed a consent to an order transferring the Empress property to the Applicants as counsel to Yong. Mr. Smelko has not, however, otherwise filed a general appearance in this matter on behalf of Yong.

[8] All parties were present in court on time save Yong on February 2, 2015 when the matter came on for a hearing. Ms. Hall for the respondent Kelly indicated that she had travelled a similar distance to that which Yong would have had to travel and had managed to be in court on

time. As Yong had indicated no intention of even attempting to appear later in the day, had previously consented to the substance of the relief being sought by the Applicant and had requested the court proceed speedily, I indicated to all parties that we would proceed as scheduled. No party requested an adjournment. No telephone facilities had been booked with the court office in advance and none could be arranged on short notice. Mr. Lemke advised Yong of those facts and the matter proceeded in his absence without objection communicated by him.

Background Facts

[9] The Applicants Hui-Sik Lee ("Hui-Sik") and Byung Ae Lee ("Byung Ae") are Korean immigrants to Canada. By all accounts they have been hardworking and successful. Hui-Sik is now 77 years of age and retired, Byung Ae is 69 years of age and also retired. It is apparent from the transcript of their cross-examination that their command of the English language is somewhat choppy. While they did ultimately appear able to understand the questions asked and provide answers to them, it might have been preferable had they chosen to resort to an interpreter for the purpose of the cross-examinations at least. Neither they nor their counsel appear to have thought that to be necessary and the record that emerges requires the reader to make some allowances for their language skills in assessing the transcripts. The task was difficult but I found myself able to understand what they were attempting to communicate.

[10] Yong is their only son and was born in 1970. He has a sister as well, but she does not figure in the matters at issue in this case.

[11] On July 31, 1990, Yong acquired title to the property at 82 Empress Avenue, Toronto. The transferor was the "Estate of Reginald Bruce Gibson" and the purchase price was $345,000. It appears that a vendor take-back ("VTB") mortgage of approximately $160,000 was granted at closing (although not apparently registered) and that approximately $160,000 was paid in cash or cash equivalent at closing. Obviously the numbers do not mesh perfectly, but the difference ($25,000) is not material to the issues before the court. The VTB mortgage was not produced nor was the solicitors file available for inspection nearly 25 years after the fact, the purchaser's solicitor having since passed away. There is no dispute between the parties as to the source of the funds paid at closing – Yong provided none of the funds required at closing to purchase the house. His father made all the arrangements.

[12] No party took the position in argument that anything turned on the fact that Yong received title to the property from a third party at the direction of his father rather than from his father directly. The property was clearly proceeds of a transaction entirely arranged by Hui-Sik and for which he supplied or arranged all of the funding.

[13] There is no documentary evidence to establish whether Hui-Sik alone, Hui-Sik and Byung Ae jointly or Byung Ae alone provided the funds. As there is no dispute as between the Applicants, I don't find the issue to be particularly material beyond noting that confusion as to the precise beneficiaries of a trust may suggest weakness in the proof of it. The only banking evidence filed was in respect of Hui-Sik and showed his account as being the source of some of

the mortgage payments. No banking information of Byung Ae was filed and it is not known whether she provided any part of the purchase price or contributed her own funds to the subsequent maintenance or operating costs of the property (she may have paid the property taxes in cash in person, but the source of such payments was not identified with specificity).

[14] At the time of this transaction, Yong was living at home with his parents and attending York University. He was at least partially dependent on his parents, receiving room and board, assistance in acquiring computers and in paying tuition. The parents' evidence was that he was dependent; his own evidence suggested that he had some other income from employment. The evidence of both parents suggests that they were somewhat disappointed in Yong's progress towards achieving independence at this stage in his life. I don't have any hesitation in finding that he was financially dependent upon his parents at that time, although he may have had some independent sources of income, particularly during the summer. Nothing turns upon the precise degree of dependence although the parents' testimony on cross-examination certainly constitutes an admission to some degree of dependence.

[15] Yong's current evidence regarding his role in the transaction is to the effect that his father told him to go the lawyer's office one day to sign the documents and he did so. He received no explanation for the transaction and asked for none. The question of intention at that date is of course central to the case, but there appears little reason to doubt that Yong had little to no involvement in the transaction prior to its completion and did what his father told him. Yong explained on cross-examination that culturally, in his family, Hui-Sik commanded a high degree of respect and obedience and he was obeying his father's commands in this transaction.

[16] Importantly, there is no evidence from any party suggesting that there was an explicit understanding that Yong was to hold the property in trust for Hui-Sik alone or Hui-Sik and Byung Ae jointly. There can be no suggestion of an express trust at this juncture nor were any trust documents drawn up or executed.

[17] Be that as it may, on July 31, 1990, Yong became the owner of the property and whatever needed to be done by way of financial contribution or other arrangements to bring about that state of affairs was arranged by Hui-Sik and the family's lawyer. As noted, the extent of Byung Ae's financial or other contribution at this time is simply not known.

[18] Between 1990 and 1992, Yong continued to live at home and attend York University. There is some dispute on the evidence as to whether he did anything in terms of management of the Empress Avenue property such as collecting rent cheques, mowing lawns or the like. I accept that he likely did little to nothing in this regard.

[19] On July 31, 1992, a mortgage in favour of CIBC was placed on the property with a principal amount of $160,000. I accept that this mortgage was intended to replace the unregistered VTB mortgage records of which are no longer available. Yong was the mortgagor and Hui-Sik signed as guarantor. Byung Ae took no part in the transaction and there is no suggestion on the evidence that CIBC as mortgagee was led to believe that Yong was not a beneficial owner of the property at this time. If, as claimed, Byung Ae was a joint beneficial

owner from the outset, her absence from this mortgage transaction is somewhat inconsistent with that claim. Hui-Sik participating as guarantor is also inconsistent with his alleged standing as beneficial owner, there being no whisper of explanation as to why secrecy regarding the true ownership needed to be maintained in 1992 as against CIBC.

[20] Between 1990 and 2003, the Empress Avenue property was used as an income property and rented to third parties. There is no serious dispute on the evidence to contest the finding that Yong paid none of the utility, maintenance or property tax bills in relation to the Empress property nor were any of the rent cheques from the property deposited into an account of his. No record of the income from the property was produced. It is not known if Yong's tax returns included income from Empress Avenue at any point in time.

[21] In 1992, Yong moved away from home. The evidence suggests that this occurred sometime in the fall of 1992 after he decided to change schools from York University to Ryerson University, a change with which his parents were not in agreement. Thereafter, Yong had little to no contact with his parents. There was some dispute in the evidence as to whether the degree of contact was "little" or "none". Nothing turns on such fine distinctions. There is no evidence to suggest that Yong had any material contact with the Empress Avenue home after its purchase in 1990 beyond his (limited) role in the placing of the mortgage on the property in 1992. Kelly's evidence suggests that he drove by the property a few times after their relationship began. She has no information that he ever went inside the house and nothing in his evidence suggests otherwise.

[22] On January 28, 2002, the Empress Avenue property was transferred from the Land Registry to the Land Titles system. As of that date, the property had been continuously rented to tenants from the date of its acquisition in Yong's name in 1990. Yong's name continued to appear on City of Toronto property tax and water invoices. The CIBC mortgage was still in place in Yong's name with Hui-Sik as guarantor.

[23] The CIBC mortgage was finally repaid in August, 2003 although it was not finally discharged until 2013. Nothing turns on the delay in registering the Notice of Discharge. From 1992 until 2003, the CIBC mortgage was kept current and was eventually paid off. Hui-Sik's evidence (confirmed in part by the documents produced) was that he paid the remainder of the mortgage down from the proceeds of the sale of another rental property the couple formerly owned. There is certainly no suggestion that Yong had any role in payment or discharge of the mortgage.

[24] There is some minor confusion surrounding the date that the Applicants actually moved into the Empress Avenue home. Their original claim to have done so in 1990 was plainly wrong and a cursory review of the names, addresses and account numbers (and account number changes) of the utility records filed in their original application record ought to have made that plain to a careful reader before the inconsistency was pointed out to them later in the proceeding. Their second set of affidavits sworn in November, 2014 alleged that they moved into the Empress Avenue home in 2001. Once again, they appear to be in error since their cross-examination testimony indicated that they moved in *after* selling their 191 Park Home Avenue

house (where they had been living since before 1990) and that transaction did not close until 2003. The proceeds of that closing were also used to repay the CIBC mortgage in 2003. The actual moving date – be it 2003 or 2001- is of only minor significance. I find the most likely move in date to be August, 2003.

[25] From 2003, Hui-Sik and Byung Ae have lived in the Empress Avenue home as their primary residence and the property was accordingly no longer rented out to tenants. Both parents are now retired. There is no dispute that Hui-Sik and Byung Ae have taken care of all property tax and utility payments in relation to the Empress Avenue home. The property continues to be registered in Yong's name and property tax bills have continuously been addressed to the Empress Avenue home in Yong's name (but paid by one or the other of his parents).

[26] Yong and Kelly met in or about 1996 and began living together shortly thereafter. They were married in 2003 and had two children in 2007. Kelly has never met Hui-Sik or Byung Ae nor have the children of the marriage ever met their paternal grandparents. Yong and Kelly separated in 2009 and a Divorce Order was issued on June 11, 2012 (the "FLA Judgment").

[27] Under the FLA Judgment, Yong was ordered to transfer the family home to Kelly and to pay an additional $296,480.63 as an equalization payment. The equalization payment was established based upon the value of both the family home and the Empress Avenue property, the value of which was attributed to Yong in making the calculation. The FLA Judgment also ordered support (spousal and child) as well as certain other amounts to be paid by Yong. Yong neither opposed the FLA Judgment nor took steps to have it varied or set aside. It is still of full force and effect.

[28] Yong has never made any payments of the costs and equalization payments ordered in the FLA Judgment. Counsel for the Family Responsibility Office (the "FRO") advises the court that while some sporadic payments of support have been collected using the robust collection tools at their disposal, the continuing arrears of spousal and child support were $170,417.26 as of January 26, 2015. The total of support, costs and equalization orders unpaid under the FLA Judgment is thus approximately $500,000.

[29] Yong is self-employed and has shown little willingness to make the ordered support payments. The FRO advise that enforcement of the writ of seizure and sale may be the only means of obtaining any substantial satisfaction of the FLA Judgment.

[30] A notice in respect of the FLA Judgment was registered against the Empress Avenue property on December 21, 2012 by the FRO on behalf of Kelly and ultimately this litigation ensued.

[31] Hui-Sik and Byung Ae continue to live in the Empress Avenue home. They formerly have had several properties – both investment and residential – over the years. In 1990, they had at least two properties, their home and a rental property at 141 Park Home Avenue in Toronto which was sold many years later. They are retired and are understandably worried about being

forced to leave what has become their home to pay the obligations of a son with whom they have had very little connection for 20 years or more to a former wife they have never met.

[32] The only valuation evidence in respect of the Empress Avenue home before the Court is a valuation obtained by Kelly dated March 13, 2012 indicating a range of values for the Empress Avenue property of between $1,120,000 and $1,230,000 in that era. There was no contest taken with these numbers. Given the general rise in Toronto real estate values since 2012, it is likely that those appraised values are quite conservative today.

Issues

[33] The Applicants claim to be entitled to title to the Empress Avenue property free and clear of the interests of Yong or his judgment creditor (the respondent Kelly) on four theories. These are (i) resulting trust, (ii) express trust, (iii) unjust enrichment or (iv) adverse possession.

(i) Resulting Trust

[34] It is trite law that a gratuitous transfer of property from one person to another gives rise to a *rebuttable* presumption of resulting trust. It is said in support of this assumption that "equity assumes bargains and not gifts". This assumption of the courts of equity was formerly closely allied to a related assumption known as the presumption of advancement whereby certain categories of recipients of gratuitous transfers were deemed to be likely objects of gifts resulting in a rebuttable presumption in the opposite direction: a gratuitous transfer in circumstances giving rise to the presumption of advancement is presumed to be a gift and the onus is on the grantor to establish the resulting trust. Statutory reforms as well as a series of cases culminating in the case of *Pecore v Pecore*, [2007] 1 S.C.R. 795 have abolished much of the presumption of advancement. Presumptions in either case are rebuttable under the normal civil standard of proof being balance of probabilities.

[35] In the present case, no party claims the application of the presumption of advancement. While dependent, Yong was a 20 year old adult living with his parents in 1990. Since *Pecore,* no automatic presumption of advancement applies in such cases. Accordingly, the onus is on the respondent Kelly to demonstrate on the balance of probabilities that a gift was intended in this case to avoid the presumption of resulting trust. Can she do so notwithstanding the current denials of Yong and both of his parents?

[36] The Applicants claim that the transfer of the house to Yong in 1990 was gratuitous and that accordingly the burden is upon the respondent to prove intention to make a gift. They point to all of the actions since 1990 where Hui-Sik and Byung Ae have acted as owners of the property – collecting rent, paying utilities and property taxes and, in 2003, moving into the property themselves. They also allege today that they never intended a gift at that time and, at least in the affidavits and cross-examination testimony taken in 2014, Yong appears to agree. Accordingly, they state, the property must be found to have been held by Yong as trustee under a resulting trust since 1990 and they are entitled to the relief claimed.

[37] The Application was responded to only by Kelly who was added as a respondent on consent after the Application had commenced. Yong having consented to the relief claimed, Kelly was the only adverse respondent. As judgment creditor, she argues that Yong was beneficial owner from and after July 31, 1990. She alleges the Applicants do not come to the court with clean hands and she testified to Yong in happier times (prior to his separation from Kelly) often referring to his ownership of the property in terms suggesting that he was beneficial owner and the family would live in it one day. In this she was supported by her mother Dorothy Cappe who had similar discussions with Yong over the years.

[38] Kelly also advanced arguments that Yong had "earned" his interest in the property through various services for his parents over the years and that allegations of cigarette smuggling by Hui-Sik in the past might somehow taint him with unclean hands for purposes of this Application. I find no need to pursue either line of inquiry further here as there was no evidence in the former case and no conceivable relevance in the latter.

[39] I do not accept that this case can be resolved by a mechanical application of the burden of proof depending upon which of the two equitable assumptions (resulting trust or advancement) are applied. These presumptions of equity are just that – presumptions. They are not mechanical rules to be applied by a judicial automaton in order to produce pre-determined results. Common sense is not checked at the judicial door. These assumptions are designed to assist not obstruct the court in doing justice in the particular circumstances of a case.

[40] I do not find it to be imposing an unwarranted "burden of proof" merely to examine the plausibility of a non-gift scenario in light of the state of affairs as it existed at that time in comparison to the evidence suggesting a gift. Finding as I do that there are credible and reasonable inferences of a gift being intended at the time contrasted with a complete and utter lack of any consistent explanation from the Applicants or Yong today as to why the property was placed in Yong's name at that time is not tantamount to imposing a burden of proof upon the Applicants.

[41] Where the totality of the circumstances makes the premise of a bare trustee relationship inexplicable, dubious or untenable and that of a gift more likely and plausible, a burden of satisfactory explanation for the nearly 25 years of silence regarding the alleged true beneficial ownership arises. Whether this is expressed as a formal "burden of proof" matter or simply enters into the scales when the evidence presented by the party with the burden is considered matters little.

[42] I shall therefore proceed to examine what evidence there is to support the premise of a gift being intended in 1990. As there is clear conflict in the evidence given today as to what the intention in 1990 was as well as significant questions of credibility and reliability impacting such statements, I shall examine the weight to be attached to those statements later.

[43] While not amounting to circumstances currently giving rise to the presumption of advancement post-*Pecore* given that Yong was a 20 year old student at the time, Yong's situation in 1990 was certainly analogous to the circumstances which *underlie* the presumption

of advancement. While the court in *Pecore* rejected any survival of the presumption of advancement in the case of transfers even to dependent adult children, Rothstein J. did find (at para. 41) that "*while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust*".

[44] No consistent or satisfactory explanation (apart from gift) has been suggested as to why Yong was initially placed on title when the property was purchased in 1990 and why nothing was done to change the status in 1992 when the CIBC mortgage was put in place. On the other hand, these actions are perfectly explainable when placed within the matrix of the contemporary evidence (not tainted by the ex post facto reconstructions of memories 25 years later and influenced by subsequent events and feelings).

[45] Hui-Sik's testimony indicated that Yong was then a 20 year old student living at home and had no income. The clear impression of both parents' testimony was that they were not satisfied with the efforts their son was making to get established in life in 1990. Hui-Sik insisted on underscoring the fact that both parents already had two properties at that time, a fact which was clearly of some importance to him although he could not explain why. He denied flatly that he was a cheat when tax evasion motives were suggested on cross-examination. Finally, Yong described the very firm authority of Hui-Sik in the culture of his family and his general attitude of deference and obedience to his father's authority.

[46] Assembling these pieces together in the context of the evidence as a whole, I have no trouble accepting that Hui-Sik – viewing Yong as he viewed and treated him in 1990 - intended the house to be beneficially owned by Yong when he arranged for the house to be placed in Yong's name. His motives for so doing appear plain enough to me.

[47] It is not hard to infer from this evidence that Hui-Sik concluded that the house would provide Yong with a starting point to manage an investment and grow it in the same way Hui-Sik and Byung Ae had managed a variety of small businesses and investments over the years. If Yong was showing difficulty in achieving independence, this could be a catalyst to help him get there. Hui-Sik and Byung Ae already had two houses in their own name, whereas Yong had no income and no assets. Placing this new property in Yong's name would kill two birds with one stone – provide a means of helping to launch a drifting Yong in his future while sheltering future income and gains from taxes. Yong was of course a family member still living at home but with no income. The property thus remained in the family, Yong was given a possible hand up in life and tax consequences of future gains were optimized.

[48] Given the traditional nature of the family structure, Hui-Sik would never have imagined the rupture in relations that was to come two years later and would thus have had no reason to have qualms about having the property owned by his son and thus within the family orbit even if outside his legal control. His control as father figure in the family structure was otherwise unquestioned in that era according to Yong. Legal control through a trust relationship would not have been necessary in circumstances where the family culture was such that paternal authority in the family was as strong as it was in this case. Yong claimed that he went along with the

transaction because he was told to and asked no questions. I find it probable in the circumstances that Hui-Sik did advise Yong that the property was for his benefit although Yong and Hui-Sik have either forgotten the conversation or chosen not to reveal it. Hui-Sik did not contemplate or consider his son's future divorce and the risk that the property might thereby escape the family's overall control.

[49] I find the gift explanation entirely satisfactory and reasonable on the evidence as it existed in 1990-1992 before consideration of the current denials of that intention are taken into account. It is also consistent with Hui-Sik's repeated references to Yong's lack of taxable income and the fact that he and his wife already owned two properties in their own name. Is there any other explanation as plausible?

[50] The only other explanation suggested – and there is no evidence to support it – was that Hui-Sik was seeking either to shelter assets from creditors (there being no evidence that he had any creditors of note at that time) (nor any statement by him that he had such an intention) or from CRA (similarly no concrete information as to what threats were feared from CRA in 1990). The problem with the CRA tax evasion theory is that Hui-Sik himself denies it. It is rather circular to say that he must have intended to evade taxes because he didn't declare them – is it not more logical to say that he must have intended to have no beneficial ownership because he prepared his tax returns for many years thereafter consistent with that honest intent? The tax evasion as motive theory would pose further problems for the Applicants of course since cases such as *Holland v Holland* [2007] O.J. No. 4329 (O.S.C.) might pose obstacles to a party seeking to affirm the validity of a transfer for some purposes while disaffirming it for others. It seems more reasonable for me to infer that people's actions are what they appear to be and as represented both to a Bank making a mortgage loan two years later and to the Canada Revenue Agency.

[51] In the present case, the paper record of ownership is highly equivocal as regards the "bargain" assumption of equity. Yong has remained on title, he has remained on the property tax and water utility bills as well as on the gas bills (and I note at least some account number changes over the years, very likely in connection with changing tenants or the Applicants ultimately moving in). Why would the Applicants have continued to apply for new gas accounts on tenant changes in Yong's name if they were the only beneficial owner? Why would Hui-Sik have provided a *guarantee* of a mortgage in Yong's name as late as 1992 without disclosing his own beneficial interest or that of his wife? If Hui-Sik and Byung Ae were beneficial owners then, why did Hui-Sik alone make the mortgage payments and provide the guarantee? Why no declaration of trust registered or even provided at that stage if not in 1990?

[52] While the Applicants may have collected rents, they have provided no evidence as to the name on any of the leases nor any evidence to sustain their claim to having treated the rents collected as their own by declaring them on their tax returns (Hui-Sik alone appears to have declared rental income, and then only in 2001-2003). The Applicants waited until 2013 to begin asserting any claim to ownership of the property, allowing this court to issue the FLA Judgment in reliance upon the apparent ownership they now dispute. Even if the Applicants had no knowledge of the FLA proceedings (and I have no reason to suspect they did), their decades of

silence enabled steps to be taken in reliance upon the apparent ownership records that the Applicants knew to exist and allowed to subsist. In all of the circumstances, the decades of silence and the equivocal paper record impose an onus upon the Applicants at some level at least to offer a reasonable explanation for the rationale behind the alleged secret trust. I challenged counsel for the Applicants to suggest one in argument and he was unable to do so. I carefully sifted through all of the transcripts of all of the examinations, all of the exhibits and affidavits and nowhere could I find a single, consistent suggestion of an explanation for the unusual form this real estate transaction took.

[53] The paper record is consistent with gift in a family context, but does not support any rational bare trustee assumption. The lack of any consistent or rational explanation for Hui-Sik remaining a silent beneficial owner cannot be ignored. Absent some illicit intent – and the Applicants deny that – what other explanation other than gift can there be? An escrow or nominee arrangement might be established as part of a commercial transaction. There may be other reasons for using a nominee, such as to facilitate swift action by beneficial owners who may be absent or possibly to seek to avoid *Planning Act* complications. No such suggestion was made here. Why would this situation have been created and why would it persist for decades if not for gift or fraud? The Applicants denying fraud, there is left only a finding of gift.

[54] What weight can I grant to the current denials of the intention to make a gift advanced by the Applicants and Yong? In the 25 intervening years, Yong has become estranged. More importantly in this family culture, Yong is now divorced and there is a danger of a non-family member (Kelly) obtaining an indirect interest in the property. Is it unlikely that Yong, though estranged from his parents, might nevertheless join forces with his family to make common cause against a former wife (non-family member)? Is it unlikely that a general sense of family obligation and residual deference to a father could, with the passage of time, come to appear like a legally binding resulting trust? On the evidence it seems to me that this is precisely what has happened and lies behind the current denials of the intention to make a gift advanced by the Applicants and Yong.

Credibility of Yong

[55] Kelly's evidence as well as that of her mother Dorothy Cappe, is that Yong mentioned his ownership of the Empress Avenue house on multiple occasions over their relationship with him and that he did so in terms consistent with his own beneficial ownership of the property.

[56] Yong filed two affidavits that have been cross-examined upon claiming that he was never intended to have a beneficial ownership interest in the Empress Avenue home and that it was accordingly never meant as a gift.

[57] To further complicate matters, Yong was party to the FLA proceedings initiated by his former wife Kelly which resulted in an equalization order which itself was based upon Yong's beneficial ownership of the Empress Avenue property. The FLA Order has not been challenged or set aside and is thus binding on Yong, at least as between Yong and Kelly.

[58] I must commence my analysis by noting my conclusion that I accept the evidence of Dorothy Cappe and Kelly regarding Yong's statements concerning his ownership of the Empress Avenue property without hesitation. Neither of them made any effort to "gild the lily" by overstating their case in any material respect. Mr. Lemke attempted to make some hay from the fact that neither witness was able to give detailed particulars of exactly which conversation with Yong occurred when or where. I am not persuaded that the lack of precision in their recitation of Yong's frequent claims of ownership of the Empress Avenue property detracts from the sincerity and accuracy of their reporting of the conversations. There is an air of reality to their story and they did not claim that Yong gave many or indeed any significant details as to how he came to own the property. Accordingly I do find as a fact that Yong claimed beneficial ownership of the Empress Avenue property on several occasions between 1996 (date his relationship with Kelly began) and 2009 (when the parties separated).

[59] It was suggested, but not heavily pressed, that the testimony of Dorothy Cappe and Kelly in relation to Yong's allegations of ownership of the Empress Avenue home should be excluded as hearsay evidence. While Yong is a respondent in this case, he is a respondent who has admitted the claim of the Applicants in a fashion which would very likely defeat, in whole or in part, the efforts of his former spouse to collect upon the support and equalization payments that this court ordered him to pay. In short, I find that the evidence of his prior statements- which clearly contradict the evidence he has placed before the Court in aid of the Applicants' claim – can be used for the purpose of impeaching the credibility of that recent evidence of Yong. These statements do not necessarily demonstrate that Yong was correct when he made them. His claims to ownership of Empress Avenue could have been hollow boasts. I accept the hearsay evidence of Dorothy Cappe and Kelly only as evidence that Yong made them, not that they are necessarily true.

[60] Yong's evidence on the whole suffered from many of the inconsistencies that his parents' testimony suffered from. He claimed to have lived in the Empress Avenue house (I find that he never did), he claimed his parents lived in the house from 1990 (he should certainly have known that was untrue). His evident hostility towards his former wife has apparently provided him with greater degree of animus against her than his altercations with his father in past years have produced. Through it all, Yong is still their son; Kelly is no longer his wife.

[61] Yong's failure to oppose an equalization order in the FLA proceeding which was based upon his beneficial ownership of the Empress Avenue property is clearly another important factor in assessing which of the two versions of the story regarding the nature of his ownership of the Empress Avenue property is true. He had every possible incentive to assert his lack of beneficial ownership during the FLA proceedings if he knew that he had no interest in fact. There would be little sense in his intentionally making (or acquiescing in) a false claim of ownership in the FLA proceedings since the certain result would have been to trade an immediate obligation to pay his ex-wife a higher equalization payment against uncertain litigation with his parents to try to claim full ownership. The FLA Judgment has now been issued and, at least as against Kelly, Yong cannot now claim that he was merely a nominee. The judgment is res judicata and Yong is estopped from denying its elements as against Kelly although of course the judgment is not binding on the Applicants

[62] Based upon the prior inconsistent statements to Kelly and Dorothy Cappe as well as FLA Judgment which Yong allowed to issue premised on his beneficial ownership of the Empress Avenue property, I have concluded that Yong's current denial of any beneficial ownership is to be viewed as lacking in credibility. Whether Hui-Sik mentioned to him that Empress Avenue was to be for him to move into one day or that he would eventually grow to manage it and earn the rents from it we shall never know. Yong has either forgotten or chosen not to remember. I cannot attach any weight to his current denials in assessing the resulting trust issue however. I am satisfied that Yong believed that he had a beneficial interest in the home when he made those statements to his former wife and mother-in-law. What basis he had for that belief, we cannot now ascertain beyond noting that it is consistent with the evidence. Does this prove a gift by itself? No it does not. It is however an element to be placed in the balance in assessing the totality of the evidence in light of the burden of proof.

Credibility of Hui-Sik and Byung Ae

[63] Res judicata and estoppel as against Kelly do not bind Yong to make false claims against his parents. The FLA Judgment cannot be ignored, but it cannot bind Yong's parents who were not parties and likely had no notice of it.

[64] In looking at their evidence as a whole, I have come to the conclusion that the testimony of Hui-Sik and Byung Ae touching on the resulting trust questions cannot be relied upon as credible any more than Yong's evidence can. Three contradictions in particular strike me as being quite telling and have supported me in my conclusion from all the evidence that I cannot accept the testimony of any of these three witnesses as to the key issue of this case being the intention of the parties when Empress Avenue was purchased in the name of Yong in July, 1990.

<u>Unexplained Contradiction No. 1: When did Applicants move into Empress Ave?</u>

[65] In their initial affidavits sworn February 6, 2014, Hui-Sik and Byung Ae both alleged that they moved into the Empress Avenue home on July 31, 1990 (i.e. the date of closing). This assertion was plainly intended to support the claim that the home was always purchased for the parents' benefit and turned out to be utterly false. After Kelly filed materials which challenged their story, the applicants filed new affidavits sworn November 5, 2014 telling a very different story.

[66] In the new affidavits Byung Ae and Hui-Sik both testified very specifically to having collected rents from various tenants at Empress Avenue for a number of years, finally moving into Empress Avenue in 2001. Even that information later proved to have been wrong on cross-examination where it appeared that they moved into the Empress Avenue home after selling the property that they had formerly lived in with Yong (191 Park Home Avenue). The parcel register for this property demonstrated that this sale had not occurred until 2003. While nothing turns on the minor error between claiming occupancy in 2001 vs. 2003, the initial affidavit delivered an entirely erroneous impression regarding the Empress Avenue Property (that it was purchased as the family home vs purchased as a rental property). The original version of the evidence made the suggestion of a gift less plausible. It would also have rendered the adverse

possession claim more tenable. This "error" was as to a very material fact and has not been adequately explained.

[67] The parents lived in the 191 Park Home Avenue home for a number of years with their son Yong and for about a decade after he moved out. The Empress Avenue property was rented out for about 12 years before the parents finally moved into the home in 2003. The cross-examination transcripts suggest that Hui-Sik in particular had good recall as to the couple's rental properties and their various tenants over the years While I might have excused confusion on their part as to the precise number of years Empress was rented vs the years it was occupied, the assertion that it was *never* held as a rental property was plainly wrong and is not the sort of memory lapse I would think BOTH parents would have been susceptible to make innocently.

[68] I have considered the claim in the affidavits that Hui-Sik has been diagnosed with early stages of dementia. That assertion of dementia appeared on the evidence to be more than a little strained. The undertakings delivered after Hui-Sik's cross-examination contain no medical evidence to corroborate a medical diagnosis of dementia and I can only conclude that the claim of such a diagnosis made in the affidavit was also exaggerated or false. The undertakings contain a medical note dated December 22, 2014 (after the affidavits and cross-examinations). The note evidences Hui-Sik having self-reported some memory deterioration over the previous year to his doctor but no abnormal medical conditions amounting to dementia are signaled. There is no evidence whatsoever to attribute any lapses in Hui-Sik's testimony to medically diagnosed issues, nor even a suggestion that Byung Ae is so afflicted. I can find no basis to make more than normal, minor allowances for memory lapses regarding events 25 years in the past in the case of Hui-Sik, having regard to his age. Nothing in that finding would suggest an excuse for the inconsistencies in Hui-Sik's testimony throughout this proceeding.

[69] The issue of the date of the parents moving into Empress Avenue was a relevant fact and not a mere collateral detail. It could have led to an entirely mistaken finding of adverse possession. The mistaken evidence given in the earlier affidavits would have been significantly misleading. It *was* corrected in a timely fashion, but never adequately explained. This casts grave doubts upon the credibility of those two witnesses.

Unexplained Contradiction No. 2: Professional Advice

[70] A second issue where inconsistent testimony was offered by Byung Ae and Hui-Sik relates to the alleged "professional advice" which they claim led to the decision to place the Empress Avenue home in Yong's name in July, 1990. The Applicants' February 2014 affidavits offered no explanation whatsoever to explain why the Empress Avenue home was placed in the name of Yong even though all of the funds for the purchase came from his parents. Indeed, the February affidavits claim that both parents had always considered the property to be theirs from the outset and acted accordingly. After the intervention by Kelly in this matter, a more complete story emerged in the second set of nearly identical affidavits filed by the Applicants in November, 2014. In these, they claim to have received "professional advice that it would be beneficial to us if we put the third property into Yong's name". Both believed the advice to be "true and correct" and they claimed that they followed the advice in putting the house in Yong's

name. When the parents (later) became estranged from Yong, they did not have the property transferred "because the issue was not relevant to us". This new version of the story also proved to be almost entirely misleading and wrong when subjected to cross-examination.

[71] On cross-examination Byung Ae simply stated that it was Hui-Sik's idea to put the Empress Avenue home in Yong's name and admitted that she had "no idea" why this was done. She mentions efforts to transfer the property out of her son's name after he left home which were not pursued because her son was angry with her husband and a lawyer told them it would be expensive. She did not claim that it was "irrelevant" to them. Rather, her evidence suggests that they feared (at what time frame, we cannot now determine) that Yong would have fought any attempt to secure a transfer. At no point does Byung Ae suggest on cross-examination that she ever received professional advice regarding title to the house as her affidavit explicitly claims nor does she suggest she had any knowledge that Hui-Sik had received such advice. Her affidavit on this point – then only weeks old - was thus almost completely contradicted by her testimony on cross-examination.

[72] Hui-Sik also told quite a different tale from his own recent affidavit in cross examination. At one point he mentioned that he and his wife already had two houses in their name "so the house maybe use my son, no income, nothing, just to use my son's name…He don't working one penny, no income, all my money control" (p. 39). However, the very next question when asked why he did it, he simply answers "He's my son" – words which would appear in context to support the idea of a gift being intended. After further back and forth where Hui-Sik again references the attraction of the property being in the name of his son who had no income at the time, he finally suggests (at p. 42) that a Mr. Moon Young Lee had made the suggestion to him. I have already referenced this testimony in part above in concluding that a gift appeared the more plausible explanation, but this testimony does not support "professional advice" nor any suggestion that correcting title years later was "irrelevant".

[73] While Mr. Moon Young Lee is apparently given credit by Hui-Sik for the suggestion of using his son as nominee owner of the Empress Avenue home, Hui-Sik was unable to express any rationale for this advice nor did he make any claim that Mr. Moon Young Lee was any sort of professional upon whom he relied. To the contrary, he disclaimed receiving any professional advice and termed Mr. Moon Young Lee a "bum".

Unexplained Contradiction No 3: Declaration of Revenue from Empress Avenue

[74] In this case, this court is not asked to pronounce judgment for or against any party in relation to possible tax evasion. However, I may have regard to the treatment by the parties of the rental income from Empress Avenue in assessing the claims by the Applicants that they were ALWAYS the beneficial owner of the property.

[75] Empress Avenue was rented to tenants for approximately 13 years. Hui-Sik's income tax returns produced from the period provide no indication of any rental income being declared prior to 2001. Byung Ae's tax returns have no indication of rental income despite her alleged status as full joint owner with Hui-Sik.

[76] I conclude based on this evidence that the Applicants did not in fact treat the Empress Avenue property as being beneficially owned by them in their sworn tax declarations until many, many years after its acquisition (if then). Their contemporary sworn tax declarations are not consistent with the position now taken.

[77] It was alleged in argument that the tax returns of Hui-Sik at least do contain declarations of income from Empress Avenue. The matter was raised on cross-examination and was clearly in issue. The Applicants proffered no additional evidence to support their claim that Hui-Sik had in fact declared the income. Rental income was explicitly declared in 2001-2003 by Hui-Sik and Hui-Sik alone. No rental income is declared in prior years and if were to be alleged that such income were somehow subsumed in other categories of declared income, further particulars would have been necessary to support that claim. The evidence clearly suggests no such declaration was made by Hui-Sik or Byung Ae and the Applicants made no effort to file additional evidence to suggest otherwise.

[78] Accordingly, I find that neither Hui-Sik nor Byung Ae treated Empress Avenue as beneficially owned by them in their sworn tax returns in the era immediately after the acquisition. Contemporary evidence will always bear greater weight than self-serving testimony in later years as to intention in earlier years. The sworn evidence of the tax returns is not consistent with the parents' current claim to beneficial ownership.

Conclusions re Credibility

[79] I cannot accept that these significant unexplained and highly material errors and inconsistencies in the testimony of both Applicants were entirely innocent or unintentional.

[80] I find that having regard to all of the evidence, I must reject the current denials of Hui-Sik, Byung Ae and Yong of any intention to confer a gift upon Yong in 1990 and conclude that on the balance of probabilities that Yong acquired the Empress Avenue property beneficially on July 31, 1990.

[81] Accordingly, I find that the presumption of a resulting trust arising from the circumstances of Yong's acquisition of title in July 1990 is rebutted on the balance of probabilities and there is no basis to require a transfer of title of the Empress Avenue property to the Applicants on this ground.

(ii) Express Trust

[82] There is no evidence whatsoever to support the existence of an *express* trust prior to the commencement of this Application. Neither the alleged beneficiaries (Hui-Sik and Byung Ae) nor the alleged, trustee (Yong) provided any evidence that they turned their minds to the question in the slightest. The confusion as to Byung Ae's role if any at that point adds a further element of confusion to the analysis since any express trust would require certainty as to beneficiaries and the consent in 2014 of Hui-Sik to include Byung Ae as a beneficiary is no evidence that she was in fact a beneficiary in 1990. If the events of July 31, 1990 are to have

created a trust relationship, it can only be through a resulting trust and I have found no such trust to be established on the evidence here.

[83] Having rejected a resulting trust, I must also find that there was no express trust in favour of the Applicants (or either of them) in respect of the Empress Avenue home as of the date of closing of the transaction in 1990.

[84] This finding does not, however, entirely dispose of the express trust issue. By two affidavits and a signed consent, Yong has consented to all of the claims of the Applicants and has disclaimed any beneficial ownership of the property. While he appeared to indicate a desire to transfer the property (if he had an interest in it) to his children in the second July affidavit, his first affidavit expressly disclaimed any such interest and the consent dated August 20 confirmed that disclaimer. I have disregarded those statements as regards the state of affairs that existed on July 31, 1990 in relation to the resulting trust issue. That does not mean I must disregard them for all purposes.

[85] It is open to me to find on that evidence, and I do so find, that from August 20, 2014 (the date of the consent to judgment in this matter signed by counsel on behalf of Yong), Yong has held the Empress Avenue property in trust for the Applicants. As his interest on that date was subject to the notice of the FLA Judgment then registered on title, I hold that the interest Yong held in trust for his parents as of that date was similarly subject to the FLA Judgment as filed against title.

[86] Accordingly, I find that the Applicants shall be entitled to a transfer of the property from Yong as of August 20, 2014 free and clear of claims from him but subject to the satisfaction of the FLA Judgment claims that were due and payable thereunder as of August 20, 2014 plus interest thereafter in accordance with its terms. Since Yong has held the Empress Avenue property in trust for the Applicants since August 20, 2014, support obligations under the FLA Judgment falling due after such date were not secured by the notice as filed as Yong had no further interest in the property thereafter.

(iii) Unjust Enrichment

[87] Unjust enrichment does not add anything to this analysis in my view for the following reasons. If I had found in favour of resulting trust, then there would be no question of unjust enrichment by definition. Having found against resulting trust as I have on the basis of a finding of an intention to make a gift in 1990, a finding of "unjust" enrichment is precluded.

[88] It *is* possible that I could conclude that the Applicants did not intend to make a gift to Yong of the mortgage payments made after the split in their relationship which occurred in 1992. Since the CIBC mortgage of $160,000 was repaid substantially entirely in the time frame after Yong moved away from home and became deeply estranged from his parents, it would be harder to conclude any intention to make a further gift to him in that era. No such claim in relation to these payments was specifically pleaded or argued in this case.

[89] In the circumstances, the matter would appear to be academic in any event. Having found an express trust in favour of the Applicants as of August 20, 2014, any claim to unjust enrichment for payments made after 1992 is entirely satisfied by that transfer. Even after satisfaction of the claims under the FLA Judgment registered against the home as of August 20, 2014, the remaining equity in the home would have a value well in excess of $600,000 which clearly exceeds any calculation that might have been arrived at using an unjust enrichment analysis had Yong not consented to transfer his interest in the home to his parents.

[90] Were I to be wrong in that conclusion, an accounting of rents received as well as deemed rents post 2003 net of expenses incurred would have to be undertaken to ascertain the extent of the unjust enrichment. Again, having regard to the express trust that I have found from August 20, 2014, the inquiry is not necessary.

(iv) Adverse Possession

[91] I do not propose to dwell upon the claim of adverse possession. The Applicants raised it in their written argument but not at the hearing. The argument is quickly disposed of. The property became subject to the *Land Titles Act* R.S.O. 1990, c. L-5 on January 28, 2002. From and after that date, s. 51 of the *Land Titles Act* provides that no claim to adverse possession can be acquired. Since the Applicants were not in physical possession of the property until 2003 (or, as they would argue, 2001), they had simply not had physical possession at all or at any rate for less than ten years.

[92] Prior to 2002, the property was in the possession of tenants. While there is no suggestion in the evidence to contradict Hui-Sik's evidence that he collected the rents during this time frame, there is nothing whatever in the evidence to suggest that he did so in a manner so as to make the possession of the tenants his own. No leases naming Hui-Sik as landlord have been produced. What utility bills and tax bills have been produced from the era name Yong as owner. The pre-2002 evidence of adverse possession is at best equivocal and a long way from that which would be required to establish adverse title as of January 28, 2002. No title that had not been completely acquired prior to such date can be acquired by adverse possession afterwards. I cannot find in favour of the claim of adverse possession and dismiss it.

Conclusion

[93] In the result, I find that Kelly shall be entitled to enforce the writ of seizure and sale against the Empress Avenue home to the extent of (i) the amount of the FLA judgment outstanding on August 20, 2014; plus (ii) post-judgment interest on the foregoing amounts after such date until the time of payment. Collections made in respect of support payments after August 20, 2014 are to be applied first to support payments falling due under the FLA Judgment after such date and thereafter to amounts due prior to such date (i.e. in reduction of the prior claim against the Empress Avenue property). The Applicants shall be entitled to an immediate order vesting title in the Empress Avenue property to them but subject to the amounts payable under the FLA Judgment as ordered hereunder and the existing registration by the FRO shall remain in place until all amounts ordered to be paid by this judgment have been paid.

[94] I have considered the matter of costs in this matter. This case represents a multi-generational family tragedy. Tragic that Yong and his parents and sister are so thoroughly alienated from each other, tragic that Yong has apparently severed relations with his own children, tragic that those children know nothing of their grandparents, tragic that support orders are not being paid, tragic that Yong has failed to address any issues he has with the level of those support orders in a timely way if he had any basis to do so. There have been steps taken by both sides that I would rather not have seen taken. There have been no winners in a case such as this, regardless of the outcome. In these exceptional circumstances, I have declined to award costs to any party.

Sean F. Dunphy, J

Date: February 23, 2015