October 15, 2010

Are the Creditors Paying Attention?

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Cases Considered:

Seguin v Graham and 1356248 Alberta Ltd., 2010 ABQB 582

I find it odd that someone who has failed to file tax returns for the last 14 or so years and who has been pursued by Ontario's maintenance enforcement program for failing to pay child support for at least 7 years would commence a court action that brings these facts plus details of his annual income and net worth to light in the public forum that is a courtroom. And yet that is exactly what Donald Seguin did when he sued Sandra Graham for unjust enrichment and claimed a constructive trust over her house or, alternatively, a judgment for half of the increase in value of the house over the course of their cohabitation. The subsequent publication of the decision of Mr. Justice R.A. Graesser on the Alberta Courts website and on the Canadian Legal Information Institute's (CanLII) website in late September puts the facts out there for anyone to read. Justice Graesser's consideration of Mr. Seguin's efforts to avoid the acquisition of assets and his attempts to shelter his assets from his creditors make this rather ordinary case concerning the division of assets on the breakdown of a common law relationship of interest to more than the parties themselves. One has to wonder, however, if the creditors are paying attention?

Facts

Justice Graesser begins his summary of the facts by focusing on Mr. Seguin and his status as a debtor. He notes (at para. 8) that Mr. Seguin moved from Ontario to Alberta in the fall of 2003 after the breakdown of his marriage:

> He had not paid the required child support to his ex-wife so had run afoul of Ontario's maintenance enforcement program. Ontario's MEP would appear to have pursued him to Alberta such that he could not use registry services here for things like obtaining a driver's licence. He also had some income tax problems as a result of not filing tax returns for the last 14 or so years.

A carpenter by experience, Mr. Seguin quickly found work with his uncle in Morinville, Alberta. He also met Sandra Graham, a cashier as a local gas station, and rented an apartment in Morinville, into which she and her two teenage children moved in April 2004. For the next six months, Mr. Seguin paid the rent and utilities for the apartment they all shared, while Ms. Graham contributed little or nothing in the way of money, services or work.

However, by the fall of 2004, Ms. Graham and her husband had settled their matrimonial property issues and Ms. Graham was anxious to invest her share in a house for herself and her

children. She found a house in Legal to purchase for $63,000 and Mr. Seguin provided the $500 deposit for her offer and interim agreement. The Legal house was registered in Ms. Graham's name alone. She provided all of the cash to close — approximately $15,000 — from her matrimonial property settlement and she obtained a $48,000 mortgage in her name alone, due to Mr. Seguin's "awkward financial situation" (at para. 17). Thereafter, she paid the mortgage and taxes from her own bank account. It is this house — or rather its increase in value over the duration of their cohabitation — that Mr. Seguin made a claim to.

It was difficult to ascertain Mr. Seguin's financial contribution to the Legal house, if any, because, as Justice Graesser put it (at para. 24), he "operated in a cash environment." Mr. Seguin was paid by his uncle as an independent contractor to avoid coming to the attention of Ontario's maintenance enforcement program (MEP) and the Canada Revenue Agency (CRA) as an employee. Ms. Graham facilitated Mr. Seguin's avoidance of his creditors. In April 2007, she registered a trade name, SDRS Enterprises. The idea was to allow employers to make payments to SDRS, not to Mr. Seguin, so the payments wouldn't be attached by MEP or the CRA.

Credibility was obviously an issue in determining the relevant contributions to the relationship by each party. In the end, Justice Graesser was satisfied that Mr. Seguin contributed far less to the joint household than he claimed, but significantly more than Ms. Graham was prepared to admit. Mr. Seguin's contributions were mainly in the form of improvements to the Legal house, improvements that included laminate floors, a new staircase (unfinished), countertops and backsplash in the kitchen (unfinished), cabinets in kitchen, the construction of a pantry, the re-siding of the house. While Mr. Seguin provided significant labour to many renovations and improvements to the Legal house, most of the materials and services — about $50,000 worth — were paid for by Ms. Graham.

Ms. Graham's income from 2005 to 2007 was between $11,000 and $18,700 per year. Mr. Seguin's earnings were found to be approximately $23,000 per year during the same time period.

The Legal house, which had been bought for $63,000 in 2004, was valued at $160,000.00 at the time of the separation in the fall of 2008. Its value as at the date of trial was $152,000, but it was heavily mortgaged because Ms Graham had acquired a convenience store business for $330,000, taking $93,000 out of the equity in the house to do so. As Justice Graesser put it in summarizing the facts (at para. 60):

> Mr. Seguin started the relationship with his clothes and tools, and ended up with some clothes and a few more tools. Mr. Seguin clearly contributed something of value to the relationship, enabling Ms. Graham, on her very limited income, to purchase, improve and refinance the Legal house, as well as acquire a business for some $330,000.

Law

Justice Graesser does not discuss the law in detail. Unjust enrichment actions seeking an accounting for and a division of property at the end of a common law relationship are fairly common these days and the rather vague legal principles to be applied are well known. This is a highly fact-specific area of the law.

In Alberta, equity still governs the division of assets on the breakdown of a common law relationship. Other provinces have amended their matrimonial property legislation to add non-

married couples within their property-splitting regimes. For example, in Manitoba the re-named *Family Property Act*, CCSM c F25, s 1(1) defines the "common-law partner" of a person as someone who either registered a common-law relationship under *The Vital Statistics Act*, or cohabited with him or her in a conjugal relationship for a period of at least three years and provides each common-law partner with the right to an accounting and an equalization of assets. As another example, in Saskatchewan the new *Family Property Act*, SS 1997, c F-6.3, s 2(1), defines "spouse" to include two persons who are cohabiting or have cohabited with the other person as spouses continuously for a period of not less than two years. Other provinces are contemplating the inclusion of common law partners. The British Columbia White Paper on Family Relations Act Reform: Proposals for a New Family Law Act (Victoria, British Columbia: Ministry of Attorney General, July 2010) at 81-82, canvasses the issue at length. Despite these reforms in neighbouring provinces, in Alberta couples who cohabit but do not marry must still use causes of action and seek remedies in what is still a fairly unpredictable area of the law.

As Justice Graesser notes, the leading Alberta case is the Court of Appeal decision in *Panara v Di Ascenzo*, 2005 ABCA 47. The parties in that case had cohabited from 1988 to 1992 and then married. The wife claimed a constructive trust based on unjust enrichment during the 4 year period of cohabitation. As the Court of Appeal noted (at para 22), in a common law relationship, there is no presumed entitlement to property sharing. Nonetheless, remedies are available to unmarried couples who are unfairly disadvantaged upon breakdown of their relationship. Three things must be proven in order to establish a claim based on unjust enrichment: an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment: *Pettkus v Becker*, 1980 CanLII 22 (SCC), [1980] 2 SCR 834 at 848; *Sorochan v. Sorochan*, 1986 CanLII 23 (S.C.C.), [1986] 2 S.C.R. 38 at 44; *Peter v. Beblow*, 1993 CanLII 126 (S.C.C.), [1993] 1 S.C.R. 980 at 987. The first two elements — an enrichment and a corresponding deprivation — require a transfer of wealth and the third element — the absence of any juristic reason — is what makes the transfer of wealth unjust and reversible by the courts: Donovan WM Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) at 466.

What does the absence of a juristic reason look like in the common law relationship context? As the Alberta Court of Appeal stated in *Panara v Di Ascenzo* (at para 22):

> In the context of establishing unjust enrichment arising from a common law relationship, the provision of domestic services may constitute an enrichment and the devotion of free labour may constitute a corresponding deprivation because a common law spouse has no general legal duty to perform work and services for his or her partner: *Sorochan* at 46; *Peter* [v. *Beblow*], at 991. In other words, the relationship alone does not constitute a juristic reason for the enrichment.

The reversal of the unjust enrichment may be accomplished by requiring a defendant to pay an amount equal to the value of the transfer of wealth or the defendant might be required to return the transfer *in specie*, something usually accomplished by means of a constructive trust (Waters at 469). The value of the contribution must be considered when determining the provision of a remedy: *Panara v Di Ascenzo* at para 42.

Application of the law to the facts

Justice Graesser determined that all the elements of unjust enrichment were present (at paras. 84-85):

> [E]nrichment is obvious; deprivation is equally obvious - Mr. Seguin took time off work, or time out of the rocking chair if I were to accept Ms. Graham's evidence as to what Mr. Seguin had been doing. The deprivation corresponds to the enrichment.
>
> A juristic reason for the enrichment and deprivation is absent: there was no contract, no agreement that Mr. Seguin would provide services in exchange for rent, and there was no obligation on him to do any work around the house.

Justice Graesser concluded that, to the extent that Mr. Seguin's labour added to the value of the Legal house, he should share in the increase of that house's value. He settled on 33% as being a fair and reasonable estimate of Mr. Seguin's contributions.

In determining what amount Mr. Seguin would get 33% of, Justice Graesser noted that Ms. Graham had taken $93,000 in equity that was in the house to invest in her convenience store business in October 2007 and that equity still existed in the business. Justice Graesser concluded (at para. 103) that the $93,000.00 represented the equity in the Legal house for the purpose of valuing Mr. Seguin's proportionate share of the increase. Therefore, If Mr. Seguin's interest was valued on the basis of his proportionate contribution, it would be 33% of $93,000 or $31,000. Justice Graesser also valued Mr. Seguin's services on a *quantum meruit* basis and reached approximately the same amount: $30,000 to $36,000.

Justice Graesser therefore awarded Mr. Seguin a monetary judgment of $31,000, secured by a charge against the Legal house.

Conclusion:

Justice Graesser addressed the fairness of giving Mr. Seguin an interest in the Legal house despite his intention of either avoiding the acquisition of assets or sheltering his assets from his creditors. Was public policy served by giving Mr. Seguin an interest?

> In my view, the answer that it is, as otherwise, Ms. Graham, to whom he owed no duties, would be the beneficiary of his inappropriate intentions, rather than his creditors including his ex wife and Revenue Canada. Otherwise, a windfall would be bestowed on Ms. Graham (at para. 97).

Justice Graesser expects Ontario's Family Responsibility Office — that province's name for their maintenance enforcement program — and the CRA to collect the $31,000. Ms. Graham obviously did not deserve a windfall because she had facilitated Mr. Seguin's "inappropriate intentions" by setting up SDRS. Rather than giving the value of Mr. Seguin's work on the Legal house to Ms. Graham, he expects Mr. Seguin's children and Canadian taxpayers to benefit. Will they?