November 9, 2017

Clarified: The Rebuttable Presumption of a Purchase Money Resulting Trust

By: Jonnette Watson Hamilton

Case Commented On: *Singh v Kaler*, 2017 ABCA 275 (CanLII)

Singh v Kaler is a useful case for two purposes. First, it clearly describes the work that a presumption does — making useful evidentiary points. Second, it clarifies the test for finding a resulting trust based on the payment of money. Clarification of the law was evidently necessary. According to the majority — Justices Patricia Rowbotham and Sheila Greckol (at para 22) — the trial judge erred in law by applying the test for resulting trust that was set out in cases predating the 2013 Supreme Court of Canada decision in *Nishi v Rascal Trucking Ltd*, 2013 SCC 33 (CanLII). While there is a dissenting opinion, the dissent is confined to a limitations point; the Court of Appeal is unanimous on the presumption and resulting trusts points.

The basic facts in the case are quite simple, although the details get complicated. Harminder Singh and Jarnail Sihota — the appellants — paid the majority of the cash-to-close for the purchase of a 9-acre parcel of land beside the Trans-Canada Highway near Chestermere, Alberta in 1996. Between the two of them, they contributed $39,000 towards the purchase price of $220,000. Narinder Kaler and Harjinder Sahota — the respondents — paid the $10,000 deposit and the $7,530 balance of the cash-to-close and secured the $165,000 mortgage. Title to the land ended up in the name of the respondents only. The land was estimated to be worth $2,000,000 to $3,000,000 in 2015.

There were two issues at trial and on appeal. The first, and the sole focus of this post, was how to legally characterize the appellants' contribution. Was it a debt repayment? A loan to the respondents? A gift to the respondents? Or was it an investment? Only the latter would create a resulting trust. The second issue was whether the appellants' claims were time barred.

The trial judge, in *Singh v Kaler*, 2015 ABQB 738 (CanLII) at para 124, held that the appellants were creditors. He also held that Jarnail Sihota's debt claim was statute-barred so he could not collect anything. As for Harminder Singh, Justice McIntyre had ordered that the $10,000 that she lent the respondents be returned to her with under the *Judgement Interest Act*, RSA 2000, c J-1.

The Court of Appeal allowed the appellant's appeal because the facts raised the presumption of resulting trust and the burden of rebutting that presumption should have been on the respondents and they did not discharge it (at para 7).

In clarifying burdens of proof and legal presumptions, the Court of Appeal describes a rebuttable presumption of law as "a rule of substantial of law that prescribes a particular legal consequence upon proof of a particular fact(s)" (at para 20, quoting Sopinka, Lederman and Bryant: *The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis, 2014) at § 4.25). More simply, they

held that the party who wants to rely on a rebuttable presumption must prove "a particular fact" or what the Court of Appeal calls the "basic fact". In this case, the basic fact was "proof of an advance of money to fund the purchase of the property" (at para 20). Once the appellants proved the basic fact, the presumption of resulting trust ensured that they would win unless the respondents produced evidence to rebut the presumption. In other words, "a rebuttable presumption is a rule of law compelling the trier of fact to reach the conclusion *in the absence of evidence to the contrary*'" (at para 21, quoting the *Law of Evidence in Canada* at § 4.28, emphasis in the original).

The Supreme Court expanded on the rebuttable presumption of law that applies in cases of purchase money resulting trusts in *Rascal Trucking*:

> A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.
>
> The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time. (at paras 1-2, emphasis in the original, quoted in *Singh* at para 22)

The emphasized portion of this quotation points to one of the errors made by Justice McIntyre. Only the intent of the appellants at the time they advanced the funds was relevant; post-advance evidence was only relevant if it showed intent at that earlier time (at para 25). Justice McIntyre, however, had considered that the appellants did not act as owners or purchasers during the 19 years that the property was in the name of the respondents (at para 3).

The majority noted that, while the trial judge referred to *Rascal Trucking*, he applied the test from older cases (at para 22). Before *Rascal Trucking*, the leading case in Alberta was *B & R Development Corp (cob Abbey Lane Homes) v Trail South Developments Inc*, 2012 ABCA 351 (CanLII), which followed *Annapolis Valley Peat Moss Co Ltd v Barone Monti Trading Inc*, 2005 NSCA 57 (CanLII). The relevant portion of the test from *B & R* required a claimant to prove that the claimant "acted throughout as the purchaser" and advanced the money "in the character of a purchaser" (at para 23, quoting *B & R* at paras 60-61).

The majority noted that these quoted requirements from *B & R*, and similarly stated ones in *Annapolis Valley* and numerous other decisions, were traceable to Donovan W.M. Waters' *Law of Trusts in Canada*, 2nd ed (Toronto: Carswell, 1984) (at para 23). The majority even noted that the fourth edition continued to set out the requirements as quoted: Donovan W. M. Waters, Mark

R. Gillen and Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 402 (at para 23). Just why the source was important is not said.

I mention the majority's precedent tracing for two reasons. First, the Supreme Court of Canada in *Rascal Trucking* did not purport to change the law of resulting trusts with respect to what the claimant had to prove to raise the presumption. Its decision centered around the intent that needed to be shown to rebut the presumption; see Robert Chambers, "The Presumption of Resulting Trust: *Nishi v. Rascal Trucking Ltd.*" (2014) 51 Alberta Law Review 667. The Supreme Court even stated, in response to an argument that the purchase money trust should be abandoned, that "[i]t is best not to depart from precedent unless there are compelling reasons to do so" (at para 23) and declined to do so. Second, the majority in *Singh* later stated that "pre-*Rascal Trucking* and *Pecore* case law has been *overtaken*," and consequently, "it is *no longer appropriate* to require the person advancing the funds to prove he or she was 'acting throughout as purchaser'" (at para 26, emphasis added). "Overtaken" is an odd way to describe a change in the law due to a Supreme Court of Canada case. It certainly suggests that the statements of the law in *B & R, Annapolis Valley* and *Waters' Law of Trusts in Canada* were correct prior to *Rascal Trucking*. Perhaps this use of "overtaken," rather than overturned or overruled, is a way to describe the Supreme Court of Canada's approach of changing the law without explicitly overruling its previous statements of that law (e.g., in *R v Kapp*, 2008 SCC 41 (CanLII), with respect to the test set out in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 1999 CanLII 675 (SCC) and in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII), with respect to the law set out in *R v Marshall; R v Bernard*, 2005 SCC 43 (CanLII)). I am not complaining that the Supreme Court seems more willing to overrule its past decisions that it subsequently thinks to be wrong; see the review in Debra Parkes, "Precedent Unbound: Contemporary Approaches to Precedent in Canada" (2007) 32 Manitoba Law Journal 135 at paras 25-37. I am complaining that they seem willing to change the law without acknowledging that is what they are doing. Perhaps "overtaken" is a good metaphor to describe this phenomenon — time has passed and, without any announcement, so has the old law, overtaken by the new.

But I digress.

Applying the *Rascal Trucking* approach, once Justice McIntyre accepted that the appellants' $39,000 was advanced toward the purchase price of land to which the appellants did not take title, the Court of Appeal held that the presumption should have been applied and the burden should have been shifted to the respondents to rebut it (at para 30). That it was not was an error in law (at para 33).

The majority reviewed Justice McIntyre's account of the respondents' evidence (at paras 34-41) and concluded that evidence all pointed to a resulting trust in proportions that roughly coincided with the parties' respective contributions (at para 42).

As a result, the respondents were found to be the trustees of the land for the benefit of the appellants, who were tenants in common in proportion to their interests (at para 44). Harminder Singh contributed $10,000 of the total deposit and cash-to-close of $66,300 and therefore had a 15% interest, and Jarnail Sihota contributed $29,000 for a 45% interest.

The Court of Appeal's decision should have a substantial impact on the material well-being of the parties. By finding that the appellants were investors rather than creditors, the Court of Appeal increased the current value of Harminder Singh's initial $10,000 investment from $10,000 plus interest to 15% of roughly $2-3,000,000, and the current value of Jarnail Sihota's $29,000 from zero to 45% of roughly $2-3,000,000.

This post may be cited as: Jonnette Watson Hamilton "Clarified: The Rebuttable Presumption of a Purchase Money Resulting Trust" (9 November, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/11/Blog_JWH_Singh_v_Kaler.pdf