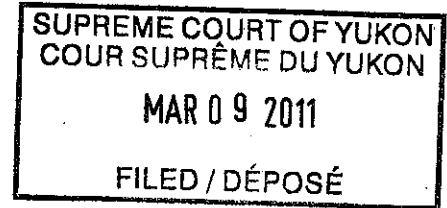


SUPREME COURT OF YUKON



Citation: *Turnbull v. Boxall*, 2011 YKSC 24

Date: 20110309
S.C. No. 09-B0038
Registry: Whitehorse

Between:

GEORGE NELSON TURNBULL

Plaintiff

And

VALERIE FAYE BOXALL

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

George N. Turnbull
Kathleen M. Kinchen

Appearing on his own behalf
Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Turnbull applies for an equal interest in a residence owned by Ms. Boxall based upon a verbal agreement, or alternatively, based upon the principle of unjust enrichment during their common-law relationship. He also applies for spousal support.

THE FACTS

[2] The parties were in a common-law relationship from the fall of 1998 to May 21, 2009. Mr. Turnbull is 47 years old and Ms. Boxall is 45 years old.

[3] There are no children of the relationship and Ms. Boxall has two children from a previous relationship.

[4] Mr. Turnbull and Ms. Boxall met in 1998 while they were students at Yukon College.

[5] Mr. Turnbull received his real estate licence in 1998 and had a successful career in that field. Despite his good income in real estate, Mr. Turnbull always wanted to pursue a property developer role. His income increased slowly and continued to rise until he began the Grizzly Valley enterprise in 2005. Between 2005 and their separation, Mr. Turnbull's real estate income declined as he devoted his time to house construction with an eye to making a profit.

[6] His income tax returns indicate his income as follows:

2000	-	\$78,713
2001	-	\$56,254
2002	-	\$58,203
2003	-	\$42,635
2004	-	\$60,028
2005	-	\$67,916
2006	-	\$24,566
2007	-	\$24,609
2008	-	\$20,828
2009	-	\$24,685

[7] Mr. Turnbull refused to take a part-time job to assist in the difficult financial period from 2005 to 2009.

[8] After their separation, Mr. Turnbull found it difficult to remain in Whitehorse, where he had to see Ms. Boxall. He moved to Barrie, Ontario, and became the maintenance man for a 100-unit motel. He has written his Ontario real estate exam.

[9] Ms. Boxall's earnings for 2000 – 2009 are:

2000	-	\$44,999
2001	-	\$50,323
2002	-	\$53,059
2003	-	\$55,424
2004	-	\$63,530

2005	-	\$80,548
2006	-	\$76,892
2007	-	\$86,678
2008	-	\$91,019
2009	-	\$93,049

[10] In the period 2005 – 2009, Ms. Boxall earned extra income to finance the Grizzly Valley property purchases and construction. She also kept the household going as well as supported Mr. Turnbull and her children who were not fully independent.

[11] In 1998, Ms. Boxall was living in a residence on Finch Crescent (the "Finch house") that she had purchased from monies received in her previous divorce settlement. Ms. Boxall was the registered owner. Mr. Turnbull moved into the Finch house in the fall of 1998.

[12] In December 2000, Ms. Boxall sold the Finch house and purchased a new home on Falcon Drive (the "Falcon house") for \$167,000 with a down payment of \$40,000 and a mortgage of \$127,000. Mr. Turnbull was the real estate agent for the Falcon house. He did not take his commission of \$4,080. Ms. Boxall was the sole registered owner of the Falcon house.

[13] Mr. Turnbull paid \$400 a month as a contribution to the household expenses for 20 of the 28 months that they resided in the Falcon house.

[14] In the spring of 2003, Ms. Boxall sold the Falcon house and purchased a house on Langholz Road for \$239,000 (the "Langholz house"). She made a down payment of \$70,000 and took out a mortgage in the amount of \$169,000. She is the sole registered owner of the Langholz house. Mr. Turnbull again acted as the agent for Ms. Boxall and received a commission of \$3,465.99, which netted him \$1,422.43.

[15] During the relationship, Ms. Boxall paid all the costs of the mortgage, insurance, taxes, oil, telephone and cable. She did the majority of the cooking, cleaning and laundry. Mr. Turnbull contributed to a lesser extent by supplying firewood. On moving into the Langholz house, Mr. Turnbull agreed to pay \$1,000 a month as his contribution to household expenses. There is a great dispute about how much was paid by Mr. Turnbull, but I find that it was less than half the amount he had agreed to pay. The apparent reason is that Mr. Turnbull began to pursue commercial interests rather than his real estate employment and, as a result, he had a reduced income in the years 2006 - 2009. There is also evidence that Mr. Turnbull was behind in his obligations to his previous family and had a bad credit record.

[16] Mr. Turnbull testified that he and Ms. Boxall had a verbal agreement that they would share in the profit from the Langholz house, less the down payment owing to Ms. Boxall. Ms. Boxall denies the agreement and states that the residences were always in her name alone as an asset for her and her two children. I accept Ms. Boxall's evidence in this regard. Her wish to protect her house as an asset for her and her children was a priority for her after having one failed marriage. She had no interest in a marriage with Mr. Turnbull, and I find that the common-law relationship was in serious trouble by 2006. Ms. Boxall only remained in the relationship to finish the Grizzly Valley house construction venture which had resulted in a large debt that she had to carry until the properties were sold.

[17] I accept Mr. Turnbull's evidence that he made a number of improvements between 2003 and 2009 to the Langholz house, which he valued in excess of \$100,000. He did some landscaping which included a fence and a shed and preparing a lawn. He

also did some repairs and alteration inside the house and painted the exterior.

Ms. Boxall paid for the materials in most cases, but there is no doubt that Mr. Turnbull provided the labour, in some cases with the assistance of Ms. Boxall. There is a dispute about the value of the improvements because many of them were not completed to the finished condition that one would normally expect for a residence. The value Mr. Turnbull places on the improvements is a market value based upon what the improvements would cost in the market place, if they were performed by private contractors. Ms. Boxall was very dismissive of Mr. Turnbull's contribution but I find that there should be a value of \$50,000 placed on these improvements, despite their unfinished condition.

[18] The parties have each retained appraisers to value the Langholz house.

Ms. Boxall's appraiser valued the property at \$425,000 and Mr. Turnbull's appraiser valued the property at \$525,000 based upon the completion of certain improvements. I am satisfied that the appraisal of \$425,000 is accurate. I also find that the increase in value from \$239,000 to \$425,000 is not related to the improvements made by Mr. Turnbull on the Langholz house.

[19] While together, the parties participated in a number of business ventures that were generally unsuccessful. The business ventures were very stressful, financially and emotionally, and contributed to the breakdown in their relationship.

[20] Ms. Boxall had no involvement in Mr. Turnbull's Airline Inn or Hanson Street ventures which were unsuccessful. However, she did assist in a restaurant venture that failed as well. The restaurant venture was all arranged by Mr. Turnbull and ended up in

litigation with a judgment against Mr. Turnbull that was executed against a Grizzly Valley property during its construction.

[21] The property development venture began with the purchase of a Grizzly Valley property in 2005. The plan was to build a house and sell it for a profit. Ms. Boxall provided the purchase price of \$74,500 through her line of credit. Mr. Turnbull negotiated a construction loan and the property was registered in both names. Mr. Turnbull negotiated two further loans. Mr. Turnbull initially controlled the disbursement of the funds for construction until the restaurant litigation resulted in a judgment against him. Ms. Boxall's account was used thereafter. I find as a fact that Mr. Turnbull was the primary mover in the Grizzly Valley venture but he could not pursue it without the financial support of Ms. Boxall.

[22] Mr. Turnbull took 17 months to complete the first Grizzly house and it did not sell immediately; Ms. Boxall secured a mortgage to pay off the construction loan. The Grizzly house was transferred to Ms. Boxall and the restaurant judgment in the amount of \$37,255 was paid off.

[23] Surprisingly, two more Grizzly Valley properties were purchased for speculative housing purposes. The lots were placed in Ms. Boxall's name and Mr. Turnbull negotiated the \$160,000 purchase price at an interest rate of 24%. Ms. Boxall had to remortgage her Langholz house to pay off these loans. At that time, Ms. Boxall was carrying a total debt of \$580,000 between two mortgages and her line of credit. In order to meet payments, Ms. Boxall had to work at two jobs for several years while Mr. Turnbull worked on the Grizzly Valley properties, but earned little income. Ms. Boxall estimates her financial contribution to Mr. Turnbull's construction ventures to

be \$74,800 after the final accounting and delays in selling the properties. Mr. Turnbull was not earning any significant income during the 4 – 5 years spent on the Grizzly Valley construction venture.

[24] The parties separated on May 21, 2009, Mr. Turnbull resided in a trailer that he had placed on the final Grizzly Valley property. After Mr. Turnbull completed the upgrades to trailer, the property was sold. Mr. Turnbull has not provided any accounting for the costs associated with the Grizzly Valley properties or any indication of profit or loss. The Grizzly Valley venture can be considered a losing business venture given Mr. Turnbull's labour invested, his lack of income during this period and Ms. Boxall's substantial financial contribution.

ISSUES

[25] There are two issues to be determined:

1. Has there been an unjust enrichment of Ms. Boxall. If so, should Ms. Boxall's contribution be set off against the claim for unjust enrichment?
2. Should Mr. Turnbull receive spousal support from Ms. Boxall?

ANALYSIS

Issue 1.: Has there been an unjust enrichment of Ms. Boxall. If so, should Ms. Boxall's contribution be set off against the claim for unjust enrichment?

[26] The law of constructive trust is based upon the concept of unjust enrichment and requires three elements:

1. an enrichment;
2. a corresponding deprivation; and

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

[27] Mr. Turnbull raises his claim of unjust enrichment only with respect to the Langholz house. He provided little if any information on the financial transactions that he and Ms. Boxall participated in with respect to the Grizzly Valley properties. It was clear in the evidence that the Langholz house was never part of the speculative business ventures of the parties but was always treated as Ms. Boxall's asset for her and her children. There was no joint enterprise or mingling of finances for the Langholz house. It was purchased by Ms. Boxall and was not the subject of financial contributions or major construction improvements by Mr. Turnbull.

[28] In this case, there is clearly an enrichment conferred and a corresponding deprivation on the part of Mr. Turnbull for his landscaping and household improvements. I have found a value of \$50,000 for his improvements to the Langholz house. There is no juristic reason for the enrichment, although it provided some compensation for his lack of financial contribution to household expenses.

[29] However, before considering whether Mr. Turnbull's efforts should be compensated by a proprietary or a financial remedy, it is appropriate to determine if Ms. Boxall has a defence or set-off. In this respect, I adopt the analysis of Huddart J.A. in *Wilson v. Fotsch*, 2010 BCCA 226, at para. 46:

After unjust enrichment has been established and any defences have been addressed, a court's next task is to determine whether a monetary award is adequate or whether a proprietary interest is merited. Only if a monetary award is inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed, may a proprietary interest be considered: *Pettkus* at 852. A minor or indirect contribution is insufficient: *Peter* at 997.

[30] This approach to the calculation of mutual benefits was adopted by the Supreme Court of Canada in the case of *Kerr v. Baranow*, 2011 SCC 10, at para. 104, as follows:

In my view, there is much to be said about the approach to the mutual benefit analysis mapped out by Huddart J.A. in *Wilson*. Specifically, I would adopt her conclusions that mutual enrichments should mainly be considered at the defence and remedy stages, but that they may be considered at the juristic reason stage to the extent that the provision of reciprocal benefits constitutes relevant evidence of the existence (or non-existence) of juristic reason for the enrichment (para. 9). This approach is consistent with the authorities from this Court, and provides a straightforward and just method of ensuring that mutual benefit conferral is fully taken into account without short-circuiting the proper unjust enrichment analysis. ...

[31] I find that the unjust enrichment established by Mr. Turnbull is more than compensated by Ms. Boxall's financial contributions toward Mr. Turnbull's housing ventures. Ms. Boxall put her own residence at risk and worked two jobs while Mr. Turnbull made very little contribution to the household expenses. In my view, it would be unfair to consider Mr. Turnbull's improvements to the Langholz house without placing them in the context of the corresponding financial benefits of \$74,800 that Ms. Boxall provided Mr. Turnbull during the relationship. Although I have valued the respective contributions at different amounts, I acknowledge that both evaluations are somewhat speculative and therefore a set-off of the contributions is appropriate.

[32] In any event, it is appropriate to consider whether Mr. Turnbull's improvements to the Langholz house would, standing alone, give rise to a monetary award or a proprietary interest. According to *Peter v. Beblow*, [1993] 1 S.C.R. 980, at para. 100, I should consider the following factors:

- (a) is Mr. Turnbull's contribution or entitlement relatively small compared to the whole property;
- (b) can Mr. Turnbull's contribution be satisfied without a sale of the property;
- (c) does Mr. Turnbull have any attachment to the property; and
- (d) would there be any hardship for Ms. Boxall if Mr. Turnbull obtained an interest in the property.

[33] In my view, Mr. Turnbull's unjust enrichment claim should not result in a proprietary interest. His contribution was relatively small, a sale of the property is not necessary to satisfy it and he has no particular attachment to the property. There was no joint or family enterprise with respect to the Langholz residence, no pooling of funds, or any marriage-like relationship that would establish a joint enterprise.

[34] As a result, a monetary award would be appropriate and, as indicated, it was more than set-off by Ms. Boxall's contribution to the Grizzly Valley properties.

Issue 2.: Should Mr. Turnbull receive spousal support from Ms. Boxall?

[35] Mr. Turnbull expresses his spousal support claim this way:

Mr. Turnbull is now trying to start over with nothing and relocating to a new place. Ms. Boxall still has her good paying job and is living in a house with \$300,000 equity. I would say she is in a lot better place than myself.

Mr. Turnbull is also entitled to support as his income was directly affected with the building of the houses and could not recover. For a specified time only.

[36] The case law recognizes three conceptual grounds for spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory. See *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. The most common basis of spousal support is compensation where one spouse has made contributions to the

family and thereby sacrificed a job or improvements to income-earning potential. In many cases, it reflects the fact that a spouse will require support to get retrained or return to the workforce.

[37] In the case of common-law relationships, s. 37 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, provides that a court may order support:

... if the court is satisfied that an order for support is justified having regard to the need of the applicant for and the ability of the respondent to provide support, the court may determine and order support in accordance with this Act in the same manner and subject to the same considerations as apply in the case of an application under section 34.

[38] Section 34(4) provides:

...

(4) In determining the amount, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including

- (a) the assets and means of the dependant and of the respondent and any benefit or loss of benefit under a pension plan or annuity;
- (b) the capacity of the dependant to provide for their own support;
- (c) the capacity of the respondent to provide support;
- (d) the age and the physical and mental health of the dependant and of the respondent;
- (e) the length of time the dependant and respondent cohabited;
- (f) the needs of the dependant, in determining which the court may have regard to the accustomed standard of living while the parties resided together;
- (g) the measures available for the dependant to become financially independent and the length of time and cost

involved to enable the dependant to take those measures;

(h) the legal obligation of the respondent to provide support for any other person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) the conduct of the dependant and respondent;

(k) a contribution by the dependant to the realization of the career potential of the respondent;

(l) if the dependant is a spouse, the effect on their earning capacity of the responsibilities assumed during cohabitation;

(m) if the dependant is a spouse, whether the dependant has undertaken the care of a child who is of the age of majority and unable because of illness, disability, or other cause to withdraw from the charge of their parents;

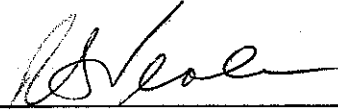
(n) if the dependant is a spouse, any housekeeping, child care, or other domestic service performed by the spouse for the family; and

(o) any other legal right of the dependant to support other than out of public money.

[39] In my view, this is not a case where one spouse should be compelled to support the other. Mr. Turnbull is not a dependant. He does not lack in training or capacity to provide for himself. He was employed with a good income and chose to pursue business ventures that were unsuccessful. With the support of Ms. Boxall, Mr. Turnbull had the opportunity to pursue a speculative housing venture that did not work out. It was not a business that Mr. Turnbull was compelled to pursue for family reasons. Mr. Turnbull did not have to relocate. He made all his decisions for personal reasons and he is fully capable of maintaining himself in the same style as when he resided with Ms. Boxall.

CONCLUSION

[40] I dismiss Mr. Turnbull's claim for unjust enrichment and spousal support. I award costs to Ms. Boxall.



VEALE J.