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**Bob Aaron** *bob@aaron.ca*

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## Putting property in children's names is risky

There's a common misconception that the best way to avoid Ontario's 1.5 per cent probate fees on the value of an estate is to place the family home and other assets into joint ownership with a child or children, so that the property will automatically transfer to the survivor after death of the parents.

Unfortunately, making transfers like this doesn't always work out as intended, and the consequences can be disastrous.

That's what happened in the case of *Bergen v. Bergen**, heard this summer in British Columbia Supreme Court.

Charlotte Bergen is 79 years old. She and her late husband, Walter, were married for 52 years. After they retired in 1995, they bought a 23.9-acre (9.6 hectares) parcel of land near Paterson, B.C. with the intention of building a house there and moving out to the West Coast. Paterson is in the B.C. interior, near the U.S. border.

Three years after buying the property, the couple decided to put their son Robert on title jointly as to a one-third interest. Their intention was that Robert would eventually inherit the property and this would ensure that it bypassed probate and the accompanying expense.

Probate fees in B.C. for estates of more than $50,000 approach 1.4 per cent of the value of the assets.

Shortly after Robert became a part owner of the property, he began building a house on the site. Over the next five years, his parents advanced him more than $552,000 for construction costs, plus an additional $175,000, which was funded by a mortgage on the property.

Robert was under the impression that his parents were giving him the house and that he would eventually inherit it. His parents, on the other hand, intended it as their own retirement home, and in fact moved into it in the spring of 2000. This came a huge surprise to Robert, who viewed it as his parents reneging on their agreement to buy him the house that he was building.

At this point, the relationship between Robert and his parents deteriorated. Charlotte and Walter installed an alarm system and changed the locks.

In January 2006, the parents travelled to Ontario to visit their other son, and the day after they left, Robert and his wife, Tamsin, moved into the house. When his parents found out, they demanded the couple move, and eventually obtained a court order ordering Robert and Tamsin out and directing that the property be sold. The order was ignored.

Walter died in December 2007, and the hearing of Charlotte's lawsuit against Robert and Tamsin took place in July of this year. Charlotte's claim was for an order for the sale of the property and distribution of the proceeds. Robert's defence was that his parents were holding the property in trust for him because of an earlier bankruptcy and to protect him in light of his remarriage in 1996. He felt that his brother, back in Ontario, had received more than his fair share of his parents' generosity.

Justice T. Mark McEwan released his decision in August.

"At the heart of this case," he wrote, "there appears to be a terrible failure of communication."

In ruling against Robert, the judge wrote, "Robert's notion that there was a gift of the entire property to him is simply, on the facts, and in law, incorrect ... A promise to the effect that 'all this will be yours someday' does not give rise to a legal right."

McEwan ruled that Robert held his one-third interest in trust for his mother.

The judge ordered that ownership of the house be transferred to Charlotte, that Robert and Tamsin had to vacate it, and that Charlotte was free to sell it.

The lesson to be learned from the case is that parents who want to place properties in the names of their children in order to avoid Ontario probate fees of 1.5 per cent should be aware of the risks and seek professional advice before they do so.

## *Bergen v. Bergen, 2009 BCSC 1099 (CanLII)



## IN THE SUPREME COURT OF BRITISH COLUMBIA

| | |
|---|---|
| Citation: | *Bergen v. Bergen,* |
| | 2009 BCSC 1099 |

Date: 20090811

Docket: 8466

Registry: Rossland

Between:

Charlotte Dora Bergen and Walter Theodore Bergen

Plaintiffs

And:

Robert Walter Bergen and Tamsin Jane Bergen

Defendants

And:

**Charlotte Dora Bergen and Walter Theodore Bergen**

Defendants by Counterclaim

- and -

Docket: 13104

Registry: Nelson

Between:

**Robert Walter Bergen**

Plaintiff

And:

**Charlotte Dora Bergen and Walter Theodore Bergen**

Defendants

Before: The Honourable Mr. Justice McEwan

# Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiffs: | B. Cromarty |
| Appeared on own behalf: | R. W. Bergen |
| Appeared on own behalf: | T. J. Bergen |
| Place and Date of Trial: | Rossland, B.C.<br>July 6, 7, and 8, 2009 |
| Place and Date of Judgment: | Nelson, B.C.<br>August 11, 2009 |

**I**

[1] The plaintiff, Charlotte Bergen, is 79 years old. Her husband, Walter Bergen, died on December 3, 2007, after these proceedings had commenced. She continues as the successor in title to her husband s interest in the property that is the subject of these proceedings.

[2] The defendant, Robert Bergen is their son. Tamsin Jane Bergen is his wife.

[3] The lands and premises at issue are located south of Rossland, British Columbia, near Paterson. They are more particularly described as: Parcel A (See 85781I) Sublot 140, Township 9A, Kootenay District, Plan X63 Except Part included in Plan 16065 and NEP22074. The current title shows the plaintiff and her deceased husband as holders of an undivided 2/3 interest as joint tenants, with Robert Bergen holding an undivided 1/3 interest as tenant-in-common.

[4] The plaintiffs brought a Petition in Rossland in April of 2006 seeking sale and distribution of the proceeds, after all necessary deductions, solely to them. They sought certain other relief, some of which should have been brought by an action.

[5] The defendants responded with an action of their own, filed at the Nelson Registry of the Supreme Court, claiming that the plaintiffs held their interest in the property in trust for Robert Bergen and seeking transfer of the property to him.

[6] The procedural difficulties created by these pleadings were addressed by Davies J. on September 18, 2006. He directed that the matters be joined and proceed in the Rossland Registry, with the plaintiffs Petition and Affidavit standing as the originating proceedings and the plaintiffs Writ and Statement of Claim standing as a counterclaim. He also ordered that there be a trial of the matter. He directed the defendants to vacate the property in favour of the plaintiffs in the interim, and ordered a sale of the property, with the proceeds held in trust pending further order of the Court.

[7] This Order was subsequently modified on November 26, 2007 by Hinkson J., who removed the requirement that possession of the house be delivered to the plaintiffs but continued the order that the property be sold. These directions have been ignored, and the property remains in the possession of the defendants.

**II**

[8] How this came to be requires some background. The plaintiffs were married for 52 years. They had two sons, the defendant, Robert, now 49, and William, now 45. They lived in Kitchener, Ontario, where Walter operated an electrical and lighting business that had passed to him from his father. Walter offered both of his sons the opportunity to work in the business. Robert was not interested but William was, and the business and the building in which it was located, as well as the house owned by Walter s father, eventually devolved to William. William still resides in Kitchener.

[9] Robert lived a more peripatetic life. While it is unnecessary to go into detail, both Robert and William, during their adult lives, had financial assistance from the plaintiffs. They substantially paid for Robert s university education and helped pay for his acrimonious divorce and custody proceedings with his first wife, for example. By 1991 Robert had come out to Greenwood, British Columbia, where he worked as a carpenter and also as a substitute teacher. He had custody of his son Spencer, who was born in 1987. The plaintiffs came out to British Columbia periodically to visit with the defendant and Spencer.

[10] The plaintiffs retired in about 1995. They sold their home and moved to Lions Head, Ontario, where they had built another home. According to Charlotte Bergen, their trips to British Columbia got them thinking that after a lifetime in Ontario, it might be good to do something different, and they began to take an interest in purchasing property in this province. They asked Robert to look for something suitable.

[11] After looking at some properties in the Grand Forks area, the plaintiffs were shown the property in issue, a 23.9 acre parcel near Paterson. They purchased it in June of 1995. By this time Robert was living in Rossland with the defendant Tamsin Bergen, in a home that she owned. They subsequently married.

[12] The property was purchased for $89,000.00. The funds were provided by the plaintiffs. In about 1997 the plaintiffs began to think it would be good to put a house on the property. In 1998 they decided to put Robert on the title as to a 1/3 interest in joint tenancy. The intention was that Robert would eventually inherit the property and this would ensure that the property by-passed probate. It is apparent there was some sentiment that since William had already had some benefit from the arrangements made in Ontario, this would be fair to Robert.

[13] The parties versions of what happened at this point diverge significantly. Charlotte Bergen s evidence is that once she and Walter decided to move to British Columbia, they thought it would be good to give the job of managing and building the house to Robert. He had been living by renovating houses and increasing their equity, and they thought the project would be helpful to him in developing his skills.

[14] Robert s evidence is that the understanding was that his parents had offered to buy him a home. He chose a post and beam design, chose the site, and set about building a road, seeing that a well was drilled, and logging the property in order to supply the materials with which to build the house. He arranged for this timber to be milled in Meadow Creek and transported back to the site. He says he devoted himself full time to the task. He acknowledges that he sought the approval of the plaintiffs at several junctures, as the work proceeded.

[15] All of this was financed by the plaintiffs. They sent money out to Robert as he requested it. Between June 4, 1997 and November 7, 2002, Walter and Charlotte Bergen transferred a total of $552,475 to Robert according to their records. This was in addition to the amount paid to purchase the property in the first place.

[16] By June of 1999 the plaintiffs had run out of money and needed to register a mortgage on the property in order to complete the house. This mortgage had a balance of $175,000 at the time this litigation commenced. Robert Bergen was obliged to sign this mortgage as part owner. The plaintiffs made the payments under the mortgage with no assistance from the defendant, until after they had left the property in 2006.

[17] According to Charlotte, the plaintiffs came out from Ontario in November of 1999, expecting to move into the house. It was not ready for occupancy, and after staying with the defendants briefly, the plaintiffs moved into an apartment in Warfield, waiting for the house to be completed.

[18] This is quite at odds with Robert s version which is that it was a surprise to him when his parents called to advise that they had a deal on a moving vehicle and wanted to fly him out to drive back with them with their furniture. He says he did not expect them to move in, and that this amounted to his parents reneging on the understanding that they had bought him a property and were buying him the house he was building.

[19] Despite the amounts that had been advanced, the house was still not finished when the plaintiffs moved in the spring of 2000. They hired a contractor to complete some work they considered necessary at a cost of $8,243.54. Robert explained that he was unable to stay on the job because he had to make a living.

[20] The plaintiffs lived in the house until January of 2006. During that time the relationship with Robert deteriorated seriously. Apart from refusing to complete the job, the plaintiffs complained that he repeatedly came on the property, watching them and wandering about. He sometimes entered their home. This led them eventually to change the locks and later to install an alarm system. In 2001 they severed the joint tenancy. In October of 2004 the plaintiffs obtained a quote for some $36,000 for what it would cost to complete the house to the stage where they could get an occupancy permit. They could not afford to pay for this work.

[21] In December of 2003 the defendant had a solicitor write the plaintiffs, setting out his understanding that the plaintiffs intended to give him the property and asking for confirmation that that was the arrangement.

[22] Charlotte wrote back:

We want you to know that we had a verbal agreement and that was, eventually or some day this would become his.

The house, at this time, is not finished and will probably be put up for sale at some time as we are in debt to the bank for $175,000.00 which would have to be settled. If it comes to this, Robert owns 1/3rd of the property and this is all he would get as Walter and I each own 1/3rd jointly.

We have sold our homes in Ontario and the proceeds were applied here at this place. We have paid for everything involving construction etc. and have copies of the cheques and this includes wages etc.

Sorry, but he will have to wait until we make a decision, meanwhile he will just have to wait.

[23] The solicitor wrote back that the defendant [did] not accept that an open ended time frame to complete the transfer of property [was] reasonable . The letter went on to say that the defendant [would] expect possession of the property on or before July 1st, 2004 .

[24] Nothing further happened, although lawyers continued to be involved.

[25] On January 19, 2006 the plaintiffs travelled to Kitchener to visit their other son, William, and his family. This was a trip they had made most years. Charlotte suggested that they were also happy to get away from the stress of dealing with Robert s incursions, and the essentially uncommunicative unpleasantness that had come to characterize their relationship.

[26] The day after the plaintiffs left, the defendants moved into the house. When the plaintiffs discovered this a few days later, they demanded that the defendants move out. The defendants refused and the plaintiffs initiated their petition. Despite an order to vacate that was extant for over a year, the defendants have never left, nor have they cooperated with the continuing court direction that the property be sold.

[27] In light of the occupation of the house by the defendants, the plaintiffs ceased paying the mortgage as of May 1, 2006. The Toronto-Dominion Bank initiated foreclosure proceedings in October 2006. Robert paid out the mortgage for $185,300 using money derived from property owned by his wife. The defendant complains that he was not notified that his parents had ceased to pay. He appears to have expected that they would continue to do so, while he lived in the house against their wishes.

[28] The defendant asserts that his brother William had, during this time, run into financial difficulties, closing the electrical business in 2002, and assigning rents from the building he owned to creditors. He asserts that the plaintiffs provided ongoing financial assistance to William which is what ultimately put them in debt. There is certainly some evidence that they may have assisted William to some extent. The defendant suggests that given the problems over his divorce from his first wife and after he declared bankruptcy in 1994 and remarried in 1996, the proper characterization of the arrangement is that his parents had agreed to hold the property *in trust* for him in the event of further matrimonial or financial strife.

[29] Robert suggests that when the mortgage was placed on the residence he was unaware that the plaintiffs were experiencing changes in their financial situation due to the problems at Bergen Electric Ltd. He testified that he believed his parents were wealthy and that, in effect, the property and the advances to build the house were all gifts to him. He characterizes the transaction in paragraph 30 of his statement of defence in the following terms:

Defendant, Robert Walter Bergen, has acted as the sole owner, with the Plaintiff s knowledge and consent from the time the property was purchased, throughout the planning, permitting and construction of the home. The Plaintiffs simply deposited money in the Defendant s bank account as it was needed.

[30] The defendant s claim is, accordingly, that there ought to be an order that the plaintiffs transfer their interest to him.

[31] Robert says this despite the evidence, which he does not dispute, that his mother now lives in a small apartment in Kitchener, and that her sole means of support is her Canada Pension Plan and an Old Age supplement. He and his wife, on the other hand, have substantial equity in another home in Rossland which they acknowledge they share.

**III**

[32] At the heart of this case there appears to be a terrible failure of communication. It is regrettable that Walter was not available to testify, although the evidence is that he may have been suffering from the onset of Alzheimer s disease during, if not throughout, the period during which the dealings over this property took place.

[33] There is no question that the defendant feels that his brother has had, during his lifetime, more than his share of his parent s bounty. The plaintiffs, however, appear to have made every effort to maintain good relations with both of their sons. It is evident that there are complexities to the relationships that drive some of what happened, and that even the plaintiffs generosity has sometimes been grounds for resentment. It is very difficult to understand, for example, how to square Robert s behaviour toward his parents with the fact that for four years of the time they lived in the house they were also caring for his son, Spencer, with no assistance from him.

[34] What is clear is that Robert wanted to build a home and that he felt entitled to draw on his parents as he believed his brother had. He seems to have developed some notion that his parents assets were effectively held in trust for their children, at least to the extent of what he supposed had been given to William. His pleadings and his testimony only reinforce this impression. He suggests it was *his* house and his parents only contributed the money. This notion is manifest as well in his demand through his solicitors, that the *promise* of a gift be converted to a gift on a peremptory deadline.

[35] Robert s notion that there was a gift of the entire property to him is simply, on the facts, and in law, incorrect. A promise to make a gift is not enforceable. Robert s demand for delivery of title in 2004, on the grounds that it was unreasonable for his parents to retain their assets beyond July 1, 2004 had no viable legal foundation.

[36] Moreover, the mere transfer of title or, as in this case, the fraction of title Robert was given does not lead to a presumption of gift but to a presumption of resulting trust. Because equity presumes bargains, the onus of proving a gift falls upon the defendant. In *Waters, Law of Trusts in Canada*, Second Edition (Toronto: Cornwell, 1984) at p. 308, this is explained:

Where a person transfers his property into another s name, or into the names of himself and another, and does so gratuitously, the principle underlying Dyer v. Dyer (1788), 30 E.R. 42, would seem logically to apply to this situation also. Since Equity assumes bargains, and not gifts, he who has title gratuitously put into his name must prove that a gift was intended. In the case of purchase by one person taking title in the name of another, the resulting trust produces this effect, namely, of putting the onus of proof of a gift upon the transferee. It is not enough for the transferee to show that the transfer was complete and perfect , in the sense that the transferee is fully vested with title to the property, he must also show that a gift was intended.

[37] Here the defendant is quite unable to show that there was a gift. He, himself, suggests that somehow the gift was made without an alienation of the property to him, on a theory that the gift was then subject to a sort of reverse trust so that 2/3 remained in his parents names to protect it from claims by his (then) new wife. This is hardly an outright gift or transfer of the property.

[38] Charlotte s evidence is far more cogent and fits with the surrounding facts. She acknowledges that her general intention and that of her husband was to purchase property and to build a home in British Columbia, and that that property would be Robert s when the time came, because William had had the benefit of the property in Ontario. The plaintiffs took the concrete step of placing the property in Robert s name as a 1/3 joint tenant, which was a more secure way of ensuring that he would succeed in title than leaving it to the hazards of testamentary disposition.

[39] It is reasonable to infer, in the circumstances, that the plaintiffs election to allow Robert to select the kind of house that would be built on the property was partly a recognition of an intention that someday it would be his. Nothing in evidence, however, displaces the presumption that the property and improvements purchased entirely with funds advanced by the plaintiffs is held on a resulting trust in their favour as to the 1/3 title held by the defendant.

[40] Beyond that starting point there is the question of the defendant s efforts. The house was clearly a labour of love on his part. His extraordinary attachment to the property was obvious as he gave his evidence. It was clear from his reaction when the mortgage went into default. He took extraordinary steps to pay it out in order to salvage the possibility of keeping the property. It was also evident in the haste with which he moved in when his parents left for Kitchener, and in his willingness to defy explicit court orders to vacate and to cooperate with a sale.

[41] There is no question that if Robert could show that his labours enhanced the value of the property over and above what his parents put into it, he (and his wife, to the extent her contribution could be shown), would be entitled to an accounting in his favour to reflect the value of their contributions. The fact that he is quite unable to establish that there was a gift leaves him in a position where, as I understand his evidence, he feels he was induced to put a great deal of effort into this project in the expectation that upon completion somehow it would become his. It would obviously be manifestly unfair for the plaintiffs to benefit from his efforts in such circumstances, if he conferred value on the property, even if his motivation was his own mistaken understanding of the plaintiff s intentions, rather than anything arising out of their representations to him.

[42] It is also obvious that, to the extent the amount of money the plaintiffs provided to the defendant for the construction of the house is not accounted for in the material costs, but reflects compensation for his efforts, such a claim would be diminished.

[43] The defendant is unable to provide accurate records as to what he spent on materials and other building costs and how much he took out as living expenses . The plaintiffs have not kept an itemized accounting, although certain specific expenditures can be identified. By and large, however, it appears that they pretty much paid on demand until their money was gone (and then went into debt by way of mortgage), while the defendant made demands as and when he needed to, apparently in the belief that his parents had money to spare. There is scant evidence that the project had a budget or an expected total cost, or that there were any controls in place as it went along. The plaintiff says that she and her husband proceeded on the basis that the total cost would be around $300,000, while Robert says that he had estimated the cost to be $150 per square foot, or $450,000 for a 3000 square foot house. It is not possible to reconcile these estimates, as between the parties assertions.

[44] The only objective evidence of value is to be derived from tax assessments and appraisals.

[45] Charlotte Bergen submits that the amount the plaintiffs put into the property was $552,476, in addition to the $89,000 they paid to buy the lot. They put another $8,243 into it after Robert left the job and had an estimate of $36,823 left to pay, in order to complete.

[46] Robert says that, in fact he only got about $450,000 from the plaintiffs. For present purposes it is not necessary to reconcile the difference. This is because either way the amount that went into the project is a long way out of line with the appraised value of the property.

[47] In April of 1999, Strand and Godfrey Appraisals found the market value upon completion to be $355,000. This appraisal was commissioned for the purpose of obtaining the Toronto Dominion Bank Mortgage. Of significant interest is the evaluation found under Cost Approach . After allocating $100,000 to land value, the appraiser estimated the building costs at $227,124, calculated as 2949 square feet at $76.00 per square foot, or half the amount the defendant suggests he was quoted. A little over $50,000 was allocated to extras for a total under the cost approach of some $375,000.

[48] In 2005 Strand and Godfrey appraised the property at $420,000. The cost approach reflected an escalation in the price per square foot to $150 for a new cost value of $442,350.

[49] In 2006 the property was assessed by Richard Turner, another local appraiser. He used the same per square foot cost of $150 but measured the building at 2776 square feet, or $416,000. His market appraisal was $515,000.

[50] The 2009 tax assessment values the property at $521,000.

[51] All of these figures suggest that it cost the plaintiffs considerably more for the defendant to build this house than it would have cost to pay someone to provide the materials and labour to build it. Robert s estimate of the cost, valuing his time appropriately in his terms, approaches one million dollars. He says that he intended to live in the house for a long time and that the immediate actual value was not a matter of concern to him.

**IV**

[52] There are a great number of imponderables in this case. I have alluded to the unfortunate matter of Walter s death. The fact that he may have been suffering from Alzheimer s disease for a considerable period of time, and whether that had any influence on the course of this project or the apparent lack of oversight, is now only a matter of speculation.

[53] Despite the fact that a promise to the effect that all this will be yours someday does not give rise to a legal right, it seems clear that some over-estimation of entitlement, and of his parents means, led the defendant to imagine that it was appropriate for him to build the house he wanted at his parents expense, both as to the cost of the building and as to his living expenses while he did so. It is very telling that when there was not enough to do to justify significant advances from the plaintiffs, he found himself in need of other work to maintain himself and his family, and unable to complete the project. I simply do not accept his suggestion that he worked all the time for little or no remuneration. The numbers do not come close to supporting such a position.

[54] It appears that had the work been performed with any efficiency at all the plaintiffs would never have had to borrow the money they did to advance the project to its ultimate incomplete state. This gives rise to an issue as to whether the defendants are entitled to credit in full or at all for the mortgage payout.

**V**

[55] In summary, there is no question that the defendant, Robert Bergen, holds his 1/3 interest in the property on a resulting trust for the plaintiffs who advanced all of the money to purchase the lot and to build the house. They grossly overpaid for it. The plaintiff is entitled to an order vesting title in her name alone. I so order.

[56] It follows that she is entitled to immediate possession of the house and conduct of sale. I so order.

[57] The defendants are directed to vacate the house by August 31, 2009.

[58] The plaintiff provided a list of items which she says were in the house when the defendants took possession. The defendant s evidence as to what was in his possession was rather unclear. It appears that he has not ascertained which of the plaintiffs personal belongings remained in the home when the defendant and his wife started to occupy it. I think the appropriate direction is that the defendants shall leave anything belonging to the plaintiffs in the house when they go. There shall be liberty to apply further if there are significant discrepancies between what remains now and what the plaintiff says was left behind.

[59] The plaintiff claims damages for wrongful entry and trespass. It has been established that several significantly upsetting incursions took place, founded in the defendant s misapprehension as to his legal position and his resentment over his parents refusal to give him their remaining assets while they were still alive. As noted, this caused the plaintiffs to change locks, put in an alarm system, and led to an atmosphere that made getting a respite from the unpleasantness with the defendants one of the incentives for their leaving in January 2006.

[60] This was regrettable behaviour. As has been noted, even if the plaintiffs had reneged on a promise to give him the property, the defendant had no enforceable right to it. The equities all favour his parents: they not only paid for everything, but they paid sums that are so far above anything that can be accounted for by value that the defendant must have taken the direct benefit of that money, or been responsible for a degree of inefficiency that amounts to the same thing.

[61] The state of the pleadings after the order for joinder leaves the plaintiff s claims for damages appended to a petition and not really properly framed. It was clearly the intention of the Order of Davies J., however, to get the issues that could be gleaned from both parties pleadings before the Court expeditiously. At an interlocutory stage, the Court is sometimes called up on to assess procedural requirements in light of a rough estimate of what the case is really about. Here it was clear that this case was primarily about the ownership and right of possession of the property at issue. The claims for damages for trespass and aggravated damages, while apparently ancillary, are nevertheless matters which cannot be addressed without the specific analysis required for such claims. The Court cannot simply throw something in for trespass.

[62] The question of whether there is a trespass at all, where the claim is against a 1/3 owner, the question of when the license the defendant had to enter on the property terminated, and the question of what effect Hinkson J. s Order might have upon the concept of trespass in this case are all at large, as are a number of other matters I might consider. I do not think the pleadings or the submissions have really been directed to this aspect of the claim. I am also concerned, in view of the equities that remain to be assessed, whether a claim in trespass except as to the conduct that should more properly described as a nuisance essentially overlaps the concept of adjustments for use and occupation. I simply adjourn the claim in trespass pending the sale of the property, and the further orders set out in these reasons.

[63] If there were any obvious relationship between the value in the property and the amount the house cost to build, a credit to the defendant for the amount he spent to pay out the mortgage would go without saying. He simply took out the bank s position, which the plaintiffs would have been obligated to pay, had he not done so. It seems apparent, however, that claims for use and occupation, and for money paid in excess of value may have some impact on whether the defendant is entitled to all of that money or whether the Court should allow an offset. I therefore direct that from the net proceeds, otherwise payable to the plaintiffs, the sum of $185,000 be held back, and paid into Court. I then direct that there be an accounting before the Registrar as to the actual amounts spent by the plaintiffs, the value of the defendants occupation of the property and any other accounts the parties submit to the Registrar, upon notice to each other, for consideration and for a Report and Recommendation as to how the funds remaining in court ought to be distributed.

[64] Charlotte Bergen is entitled to special costs.

[65] This matter shall be put over to the court list on September 21, 2009, to ensure compliance with the order that the defendants vacate the premises. There has been significant, unexplained, non-compliance with court orders to date. Any further failure to comply may result in proceedings for contempt, the penalty for which, it should be understood, may include incarceration.

[66] Nothing in this Order should be interpreted as discouraging the parties from attempting to settle matters between themselves. This is a very unfortunate case and anything that may bring it to an end amicably is to be encouraged.

[67] Nothing before the Court at the hearing of this matter suggested any independent claim against Tamsin Jane Bergen. She appears to have been supportive of her husband, but not to have had any direct role in the issues between the plaintiff and Robert Bergen. The Orders made so far are not joint and several, unless there are matters that arise concerning her on the further accounting. There shall be liberty to make further submissions should that turn out to be the case.

T.M. McEwan

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The Honourable Mr. Justice McEwan