Would you get caught in a trust vs. gift dispute when handling purchase funds?

It can be uncomfortable to talk about money. When handling real estate purchases and domestic contracts, however, lawyers can't afford to accept purchase funds on a "no questions asked" basis.

Why not? Because if purchase funds come from somebody other than the prospective owner, the doctrine of resulting trust presumes that, regardless of who is on title, the owner holds the property in trust for whoever advanced the funds.

Purchase money resulting trust alive and well: *Nishi*

The doctrine of purchase money resulting trust was reaffirmed by the Supreme Court of Canada in its June 2013 decision in *Nishi v. Rascal Trucking Ltd.*([2013] 2 SCR 438, 2013 SCC 33 (CanLII)). The case facts are complicated. In a nutshell, when Nishi purchased a property on which Rascal had previously run a topsoil business, Rascal transferred $110,000 to Nishi. The property was subject at the time to tax arrears of $110,000, which included the cost of the municipality's cleanup of the topsoil operation after it was ordered to cease operation. A few years later, Rascal sued Nishi for a part share of the property, relying on an alleged purchase money resulting trust.

The trial judge ruled against Rascal, who later won on appeal. At the Supreme Court, Nishi urged the court to abandon the doctrine of resulting trust and to decide the case based on unjust enrichment which, Nishi argued, had not occurred. Instead, the court reaffirmed the doctrine of resulting trust, finding that where a party provides funds for another party's purchase of real estate, there is a presumption that the purchaser holds the property in trust for the funder (to the extent of his/her contribution). On the facts, however, there was sufficient evidence that the Rascal funds were intended as reimbursement of the remediation costs, and therefore, while not a "gift," the transfer was made without expectation of obtaining an interest in the property – which was enough to rebut the presumption of a trust in favour of Rascal.

What are the implications for real estate lawyers? The decision in *Nishi* means that when a party other than the title holder is contributing funds, intentions matter a great deal; and that a lawyer who fails to document those intentions is at risk of a claim.

The nuts and bolts

There is a significant body of law with respect to resulting trusts, not only in the context of real estate, but also in other commercial contexts and in family and estates law. Here are some of the particulars.

Does the parties' relationship matter?

Not very much.

The presumption of trust creation arises regardless of the relationship between the parties, except in the case of a parent who advances money to a minor child. Where a parent contributes to a property purchased by an adult child – even where the child is

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economically needy – the law presumes a trust unless there is evidence of an intention to make a gift (see *Pecore v. Pecore* [2007] 1 SCR 795, 2007 SCC 17 (CanLII)).

The same goes for transfers between spouses, although in that scenario, there are wrinkles: where spouses take title as joint tenants (or put money into a joint bank account), s. 14 of the Ontario *Family Law Act* (FLA) provides that shared ownership is intended. And where a party contributes to what becomes a matrimonial home, the property division rules of the FLA will apply – but only to married spouses. Real estate lawyers should be aware, however, that not all homes purchased by couples are matrimonial homes; and, of course, that not all couples are married.

Other complications in the family law context arise from the application of alternative analyses, like the concept of "joint family venture" and "unjust enrichment" (see for example the decision in *Kerr v. Baranow* ([2011] 1 SCR 269, 2011 SCC 10 (CanLII)). Indeed, in some cases, courts have relied on unjust enrichment evidence to insert flexibility into resulting trust remedies (see for example *Lazier v. Mackey* 2012 ONSC 3812 (CanLII)).

Whose intentions prevail?

In a much older line of cases under family law that includes the decision in *Murdoch v. Murdoch* (1973 CanLII 193 (SCC), [1975] 1 S.C.R. 423), courts talked about the influence of evidence of the parties' "common intention" on the determination of ownership of an asset. However, in deciding *Nishi*, the Supreme Court made it clear that the intention that is determinative is that of the person providing the funds. This guidance likely simplifies the resolution of these cases, because presumably, it's the very denial of (or disagreement about) a common intention that lands parties in litigation. Instead of requiring each party to provide evidence about both his/her own intention and the other party's agreement, it is simpler to require the funder to provide evidence in support of the presumption, and the owner to provide rebuttal (gift) evidence.

Although the *Nishi* decision suggests that it's the funder's intention that "matters," the more challenging evidentiary burden is on the legal owner – so when handling this kind of purchase transaction, a lawyer needs to document his/her client's intention regardless of whether the client is the funder or the prospective title holder.

Lawyers need to be nosy about recipients, too!

Asking questions about *recipients* of funds is also important. For one thing, it helps protect against fraud. But did you know that releasing mortgage funds to a third party (someone other than the title holder or other specified types of payees) can trigger a denial of coverage for the lender under some insurers' title insurance policies? For more on this see the "E&O claims exposure when mortgage advance goes to fraudulent third party" article at page 21 of this magazine.

How to manage the risks

How can lawyers reduce the risk of a claim related to a trust vs. gift dispute? Here are some simple tips:

- Always ask where/who purchase money is coming from (and whether it's from an account held jointly with anyone else) when handling a purchase of real estate.
- If purchase money is coming from a third party – e.g. purchaser's parent – avoid future complications by encouraging the parties to put their intentions in writing. If your client is the prospective owner and asserts that the money is a gift, request a written acknowledgement stating this from the funder. If the money is a loan but the parties do not intend the funding party to gain an interest in land thereby – put this in writing.
- If your client is a person advancing purchase funds to a non-spouse, ask whether he/she intends that the purchaser hold the property in trust, and put the answer in writing.
- If you are retained jointly by a funder who is not going on title and a purchaser who is going on title but not contributing funds (and they are not parent and minor child), have one of the parties receive independent legal advice.
- If you are retained by a couple – particularly a non-married couple – and purchase funds are coming from only one of the two parties out of an account not held jointly between them, advise one of the parties to obtain independent legal advice. Explain the implications of putting the title in the non-funder's name, and/or of taking title as joint tenants.
- Be alert to situations in which the property to be purchased seems to exceed the apparent means of the purchaser. Ask about the source of the funds. For one thing, this scenario is a red flag for fraud. Even if there is no fraud, parties may arrange for a person not advancing the funds to take title to avoid capital gains tax for the funder; but if the relationship breaks down, a trust vs. gift dispute may ensue (see, for example, 2014 ONSC 5258 (CanLII)).
- When handling domestic contracts (for example, a cohabitation agreement for unmarried parties or a prenuptial agreement) always require that the parties have independent legal advice, and discuss the implications of resulting trusts – not just with respect to purchase money, but also with respect to contributions to value – with your client.
- When advising unmarried spouses about domestic agreements and property, be sure to explain that regardless of their expectations, rights on separation may be determined based on trust, unjust enrichment, and/or "joint family venture" analyses. Explain the implications of merging (or not merging) finances and buying property separately or jointly. ■

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