IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78
Date: December 23, 2019
Docket Number: 201601H0070

BETWEEN:

SHOAL INVESTMENTS LIMITED	**FIRST APPELLANT**

AND:

PARO ENTERPRISES LIMITED	**SECOND APPELLANT**

AND:

NUVISION FOODS INC.	**THIRD APPELLANT**

AND:

ANNETTE MURPHY	**FIRST RESPONDENT**

AND:

RODNEY MURPHY	**SECOND RESPONDENT**

Coram: Green, Harrington* and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, Trial Division (Family) 201302F0704

Appeal Heard: June 15, 2018

Judgment Rendered: December 23, 2019

Reasons for Judgment by: Green J.A.
Concurred in by: O'Brien J.A.

Counsel for the Appellants: R. Paul Burgess, Q.C. and Judy Manning
Counsel for the First Respondent: Tony St. George
Counsel for the Second Respondent: Self-Represented

* Harrington J.A. took no part in the judgment pursuant to section 15(3) of the *Court of Appeal Act*, SNL 2017, c. C-37.002.

Green J.A.:

[1] This appeal concerns questions involving the scope of the remedies available under the *Family Law Act*, RSNL 1990, c. F-2, as well as outside of the *Act*, that are available to a spouse for division, or compensation in respect of, matrimonial homes and business assets where it is alleged that the other spouse, through various corporate mechanisms and property transfers, has attempted to put those assets out of the reach of the claiming spouse.

Context

[2] At the time of separation of the spouses in this case (they have been subsequently divorced), the legal titles to three properties (Huntley Drive, Clarenville; Main Road, Thorburn Lake; and Marathon Drive, Seminole, Florida) claimed by the wife, Annette Murphy, to be matrimonial homes were held in one of two companies, Paro Enterprises Limited and NuVision Foods Inc. The husband, Rodney Murphy, held one hundred percent of the shares of each of those companies. In addition to holding title to the claimed matrimonial homes, Paro and NuVision held considerable other assets, including other real estate holdings. They were actively operated as business enterprises of Mr. Murphy. Ms. Murphy claimed she was entitled to a share in those businesses on the basis of work she did for them in respect of their management, maintenance and operation.

[3] Following the parties' separation but before Ms. Murphy commenced court proceedings against her husband, Mr. Murphy purported to sell all of his shares in Paro and NuVision to Shoal Investments Limited, a company wholly owned by one Kevin King who had been, as described by the trial judge, "a constant presence in Mr. Murphy's business life for more than two decades" (Trial Decision, paragraph 76). The total consideration paid for all of the shares in each company was $1,000 per company. The trial judge characterized these amounts as "nominal" (paragraph 77). He later determined that the net asset value of the properties owned by the two companies, excluding the three claimed matrimonial homes, to be over two and a half million dollars.

[4] Following the transfer of the shares to Shoal, Mr. Murphy made an assignment in bankruptcy. Although the information provided to the Court as to the details of the bankruptcy was sketchy, it appears that the trustee in bankruptcy took no action to challenge the share transfers under the preference provisions in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or by way of the *Fraudulent Conveyances Act*, R.S.N.L. 1990, c. R-24.

[5] Subsequent to the acquisition of the Paro and NuVision shares, but after Ms. Murphy had commenced action against Mr. Murphy and Shoal, Shoal caused Paro to sell two of the claimed matrimonial homes to unrelated third parties. Although there was some indication in the evidence that the purchaser of one of the properties had connections to Kevin King, the owner of Shoal, the trial judge did not conclude that these transactions were anything other than *bona fide* and for substantial consideration. At the time of one of these transactions, Paro was not a named defendant in the proceeding commenced by Ms. Murphy. By the time of the other transaction, however, the proceeding had been amended to include Paro and NuVision as defendants.

[6] Ms. Murphy claimed entitlement to a half-interest in the three claimed matrimonial homes notwithstanding that title was held in either Paro or NuVision rather than by Mr. Murphy directly. She alleged that those homes were transferred to Shoal by means of Mr. Murphy's sale of the shares of those companies to Shoal without her consent and that the transfers were ineffective to deprive her of her rights.

[7] With respect to the business assets (the value of shares held in Paro and NuVision, less the value of the claimed matrimonial homes), Ms. Murphy claimed a share in them or compensation related to them based on her asserted contribution and effectively took the position that it did not matter that the ownership of the shares had been transferred to Shoal.

The Trial Judge's Decision

[8] At trial, claims by Ms. Murphy in respect of matrimonial homes, matrimonial assets, business assets and spousal support were dealt with. The judge found in favour of Ms. Murphy regarding her claims in respect of the matrimonial homes, matrimonial assets and business assets. He made certain compensatory awards in her favour as well as some consequential proprietary orders respecting one of the matrimonial homes. He did not limit liability for the awards respecting the matrimonial homes and business assets as against Mr. Murphy only. He made Shoal, Paro and NuVision jointly and severally liable with Mr. Murphy to Ms. Murphy for the satisfaction of the awarded payments.

This Appeal

[9] Although Mr. Murphy filed a notice of appeal (Court file # 2016 01H 0072), he did not pursue it. The current appeal, which is separately brought by Shoal, Paro and NuVision, challenges the conclusions and reasoning of the trial

judge insofar as they affect liability which he imposed on those companies. Although Mr. Murphy was named as a respondent on this appeal along with Ms. Murphy, he filed no materials and did not otherwise participate except as an observer in the courtroom.

[10] The current appeal therefore only concerns the claims in respect of the claimed matrimonial homes and the business assets insofar as liability was imposed on Shoal, Paro and NuVision. Specifically, the appellants challenge the following determinations as expressed by the trial judge in paragraph 175 of his judgment and reproduced as part of the formal order:

> It is hereby ordered that:
>
> 1. Paro Enterprises Limited, NuVision Foods Inc., Shoal Investments Limited and/or Rodney Murphy pay Annette Murphy $190,949.78 for her interest in the properties situate Main Road, Thorburn Lake, NL ($90,949.78) and 7296 Marathon Drive Seminole, Florida USA ($100,000) and Annette Murphy quitclaim to the registered legal owner(s) of those properties her right, title and interest to them.
>
> 2. NuVision Foods [Inc.] (or the registered legal owner of the property) convey the property at 92 Huntley Drive, Clarenville, NL to Annette Murphy, free and clear of any and all encumbrances, for which she forfeits her share of the equity in the property valued at $56,309 and pays from her overall share of the equity in their three matrimonial homes (being the Thorburn Lake property, the Seminole Florida property and the 92 Huntley Drive property) an equal amount to purchase the remainder of the equity in the 92 Huntley Drive property.
>
> 3. Paro Enterprises Limited, NuVision Foods Inc., Shoal Investments Limited and/or Rodney Murphy pay Annette Murphy $508,448.32 for her twenty percent (20%) interest in the business assets of Paro Enterprises Limited and NuVision Foods Inc.
>
> …
>
> 7. Paro Enterprises Limited, NuVision Foods Inc., Shoal Investments Limited and/or Rodney Murphy pay Annette Murphy's costs to be taxed on a party and party basis under Column III of the Scale of Costs.
>
> 8. Paro Enterprises Limited, NuVision Foods Inc., Shoal Investments Limited and/or Rodney Murphy are jointly and severally liable for all amounts directed above to be paid by "Paro Enterprises Limited, NuVision Foods Inc., Shoal Investments Limited and/or Rodney Murphy".

[11] The effect of item #8 is to make it clear that the liability of the three appellants in item #1, dealing with matrimonial homes, and item #3, dealing with business assets, was to be joint and several with Mr. Murphy.

[12] The appellants also appeal the costs disposition at trial which also made Paro, NuVision and Shoal's liability for costs co-incident with that of Mr. Murphy.

Consent Order Pending Appeal

[13] Shortly after filing the notice of appeal, the appellants applied to this Court for a stay of the judgment pending the hearing of the appeal. Ms. Murphy responded by expressing concern, amongst other things, that if a stay of enforcement were granted without conditions, Mr. King and Shoal could operate Paro and NuVision in the period pending appeal in a manner that might be prejudicial to her interests if she were ultimately successful on the appeal. In particular, they might dispose of assets in the real estate portfolio which they had indicated they intended to do.

[14] Following argument in front of Harrington J.A., the parties agreed to an order by consent dated July 28, 2016 (the "Order Pending Appeal") which placed some restrictions on the manner of disposal of real property held by Paro and NuVision. Sales of property were permitted to proceed but the net proceeds of sale less closing costs were to be held in trust by one of the law firms involved in the transaction until further order. Notice of each sale and an accounting in relation thereto was to be given to Ms. Murphy, and Paro and NuVision were not permitted to further encumber any of the remaining real estate assets.

[15] Further, a pre-judgment *lis pendens* which had been registered by Ms. Murphy in the Registry of Deeds relating to the Huntley Drive and Thorburn Lake properties was to remain in place (see this Court's previous judgment describing the circumstances relating to this matter: 2015 NLCA33; application for leave to appeal to Supreme Court of Canada dismissed, [2015] S.C.C.A. No. 401).

[16] In addition, Ms. Murphy was permitted to continue to occupy the Huntley Drive property, thus continuing a pre-judgment order of the trial judge (October 16, 2013) but, in contradistinction to the trial judge's order, which placed responsibility on Ms. Murphy for payment of mortgage, insurance and taxes, the appellants became responsible for payment of such matters henceforth.

[17] Ms. Murphy was also to be paid the sum of $50,000 by the appellants. Although the Order does not expressly say so, it is apparent that this payment was to be on account of any resulting liability remaining after the appeal. The order did not, however, specify which category of liability, nor which of Shoal, Paro or NuVision, was to receive the credit against any ultimate liability. Against those factual developments, the appeal proceeded.

Issues on Appeal

[18] The essential challenge to the trial judgment by Shoal, Paro and NuVision is in respect of the ruling that those companies be held jointly and severally liable with Mr. Murphy to satisfy the judgment. In essence, the appellants submit that there is no basis in law, and certainly no legal basis articulated by the trial judge, for holding that there should be joint and several liability, or any liability for that matter.

[19] The specifics of the argument differ according to the type of property being dealt with. The appellants challenge the applicability of the provisions of the *Family Law Act* dealing with claims to matrimonial homes and business assets in circumstances where title to such properties and assets is, at the time of trial, held by a person or corporate entity who is not one of the spouses and where there is no legal nexus, such as the application of the *Fraudulent Conveyances Act*, which, they submit, was neither pleaded nor relied on at trial, between the defendant spouse and the third party title holder.

[20] The appellants also assert that the trial judge failed to address Ms. Murphy's claims to business assets outside of the *Family Law Act*, which is where they say they should have been analyzed and dealt with, in view of the inapplicability of the *Act*, by considering the application of the principles of unjust enrichment and remedial constructive trust. They further assert that, although this would have been an appropriate avenue of analysis, the appeal record is not adequate for this Court to make any rulings in this regard.

[21] In essence, the appellants assert that the trial judge, without legal foundation, attempted a form of "piercing the corporate veil" in circumstances where that doctrine has no application.

[22] Failing those arguments, the appellants submit in the alternative that even if the appellants or some of them are to be fixed with liability, the trial judge made palpable and overriding errors in his valuations of the assets in question.

[23] For the purposes of analysis on this appeal, the following questions are engaged:

(a) The extent of applicability, if at all, of the *Family Law Act*, especially ss. 8 and 6(3), to the matrimonial home claims against the appellants;

(b) The extent of applicability, if at all, of s. 29 of the *Family Law Act* to the business assets claims against the appellants;

(c) The degree, if at all, to which the pleadings may restrict the ability of the court to address the claims against the appellants, in particular, claims of unjust enrichment and under the *Fraudulent Conveyances Act*;

(d) The application of the principles of unjust enrichment and the remedy of constructive trust to determining liability of the appellants;

(e) The adequacy of the appeal record to enable this Court to make determinations of liability on the basis of the *Fraudulent Conveyances Act* and unjust enrichment;

(f) The degree, if any, to which the trial judge may have made errors in his calculations of values of the assets in question and, by extension, in the ultimate size of the monetary awards made against the appellants;

Of course, costs both at trial and on appeal are also always in issue.

[24] Discussion and analysis of the foregoing matters will provide a roadmap for resolution of this appeal.

[25] The standard of appellate review with respect to item (f) is one of palpable and overriding error. Items (d) and (e), assuming the principles are applicable, are matters of first impression for this Court because the trial judge did not deal with them. The other items involve either questions of law or mixed law and fact where the legal question is clearly extricable; hence they are reviewable on a standard of correctness.

Considerations

(a) Matrimonial Home Claims

1. *Scheme of the Family Law Act*

[26] The appellants submit that the scheme of the *Family Law Act* only allows for a claim by a spouse in respect of a matrimonial home to be made against the other spouse. They further submit that where title to a property that would otherwise be a matrimonial home is held by a corporation and that corporation disposes of the property to a third party, the spouse claiming an interest in the property cannot claim the property, or the value, against the third party transferee.

[27] In light of these submissions, it is necessary to review the scheme of the *Act* as it relates to matrimonial homes and to identify the nature and extent of the interest that a spouse has in such property.

[28] Unlike the matrimonial property legislation in some other Canadian jurisdictions, which have adopted a deferred sharing regime in relation to all matrimonial property including a matrimonial residence, the *Act* creates an immediate and indefeasible proprietary interest on the part of each spouse in any property that meets the definition of "matrimonial home" in the *Act* from the moment the definition factually applies, not when it is declared by a court. That definition provides:

> 6 (1) In this Part [Part I – Matrimonial Home]
>
> (a) "matrimonial home" means the dwelling and real property occupied by a person and his or her spouse as their family residence and owned by either or both of them…

[29] The key to the definition's application is the occupation by the spouses as their "family residence," a phrase that is not further defined in the *Act*. In addition, the property must be "owned by either or both" of the spouses. This is reinforced by s. 8(1), the provision which defines the nature of the interest each spouse receives. It begins: "Notwithstanding the manner in which the matrimonial home is held by either or both of the spouses…" (Emphasis added).

[30] The trial judge ruled that each of the three properties in question was occupied by Mr. and Ms. Murphy as their family residence during their married life. There is no basis for concluding that the trial judge made a palpable or overriding error with respect to that conclusion. The appellants do assert,

however, that the definition and other provisions of Part I of the *Act* nevertheless do not apply because the title to each of the properties was held by either Paro or NuVision and not by "either or both" of Mr. Murphy or Ms. Murphy. They say this is especially important in this case because by the time the claims to the homes were litigated, the ownership of the companies had no connection with either of the spouses, the shares in Paro and NuVision having been transferred to Shoal.

[31] The definition of matrimonial home and the other provisions of the *Act* employing that phrase must, however, be read in light of subsection 6(3) which provides:

> The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling unit owned by the corporation shall be considered to be an interest in the dwelling unit for the purposes of subsection (1).

[32] Where it applies, this allows a court to look behind corporate title-holding and determine that a property that would otherwise meet the "family residence" test is nevertheless to be treated as a matrimonial home for the purpose of spousal claims to it. On a narrow construction, one might be tempted to say that this subsection should only apply where the shares in question have attached to them a specific condition that allows the shareholder to occupy the corporately-owned dwelling unit. That would be the position in corporate law. If it is not an incident of share ownership (a right or condition attached to the share itself) that there is an automatic right to use or occupy a particular corporate asset, the mere holding of a share in the corporation will not entitle a shareholder to access to any asset. Share ownership and property ownership or use are divorced.

[33] In the context of matrimonial property law, however, a more tenuous connection between share ownership and use and occupation of corporate property is recognized. In *Debora v. Debora* (2006), 275 D.L.R. (4th) 698 (Ont. C.A.) the Ontario Court of Appeal, interpreting a provision almost identical to section 6(3) of our *Act*, held that if an owner of shares in a corporation has a controlling interest that would enable him or her to vote the shares so as to give him or her a right of residence, that is sufficient for a provision like section 6(3) to operate. To give it a narrower, corporate-based interpretation would defeat the desired effect of the legislation (*Debora*, paragraphs 21- 30). One of the purposes of our *Act* is stated in section 5(b) to be to "give a half-interest in the matrimonial home to each spouse." Thus, if a dwelling unit satisfies the factual criterion of being occupied by spouses as their "family residence" a half interest in that unit should be assured to each spouse regardless of whether the title is

held directly by one or both of the spouses or a corporation controlled by one of the spouses.

[34] The trial judge referred to the *Debora* decision in his judgment and relied on it. He was correct to do so.

[35] It also does not matter, for the purpose of application of section 6(3), when title to a matrimonial home is placed in the corporate vehicle. It could have been before the parties were married, with the couple subsequently moving in and living there (the case of the Huntley Drive property); it could be after they were married and after they personally acquired and lived in the property as a matrimonial home before transferring it to the corporation, provided they continued to live in it as a matrimonial home after transfer to the corporation (the case of the Thorburn Lake property); or it could be after they were married where one spouse purchased it in his name but later transferred it to a corporation and then the parties commenced to live in it as a family residence (the case of the Florida property). The key in each case is the use and occupation of the property by the spouses as a family residence sometime during their marriage. Once that occurs, it does not matter if the title is held in a corporation so long as the corporation is effectively the *alter ego* of one of the spouses.

[36] It should also be noted that use and occupation of the corporate property does not have to be continuous in order to continue to qualify as a matrimonial home. With respect to each of the three properties in this case, there were short periods where the dwellings were rented to others and rental income was generated, presumably for the corporations concerned. That fact would, of course, be relevant to a judge's determination whether each property had the character of a family residence but ultimately it is the overall general characterization that matters. The trial judge heard evidence on this point and ultimately ruled that the level of rental activity did not detract from the general character of the properties as matrimonial homes. He made no palpable or overriding error in that regard.

[37] If a property meets the definition of matrimonial home, section 8 provides:

> (1) Notwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a ½ interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has.

(2) Subsection (1) creates a joint tenancy with respect to the matrimonial home.

[38] To re-emphasize a point made earlier, although subsection (1) refers to ownership and title being held by "either or both *spouses"*, that phrase must be read in conjunction with subsection 6(3) to accommodate the concept that title holding by a corporation controlled by one or both spouses is regarded as the equivalent of it being held by a spouse directly.

[39] The nature of the "half interest" that arises the moment the dwelling acquires the nature of a family residence is, according to subsection 8(2), a joint tenancy with its right of survivorship in the surviving spouse on death of the other (s. 8(5)(a)). The interest created is not, however, a true joint tenancy as it exists at common law. This point was made by Noel J. in the early case of *Murrin v. Murrin* (1981), 41 Nfld. & P.E.I.R. 314 (Nfld. S.C.). The reason is that all of the so-called "four unities" of interest, title, possession and time may not be present in this statutorily-created joint tenancy.

[40] Furthermore, as pointed out by Noel J., the legislation, in what is now section 10(a), provides that a spouse shall not dispose of or mortgage an interest in a matrimonial home "unless … the other spouse consents by signing the instrument of disposition or mortgage." That is different from a common law joint tenancy, where a joint tenant could by his or her unilateral act sever the joint tenancy and dispose of his or her half interest, thereby creating a tenancy in common (but not a joint tenancy, because there would no longer be a unity of title or time) between the remaining tenant and the new owner of the other interest. In that sense, as Professor Ziff points out in his text, *Principles of Property Law* (Scarborough, ON: Carswell, 1993) at p. 255, fn 19, the statutory interest in Newfoundland and Labrador is more akin to the old form of concurrent ownership known as tenancy by the entireties.

[41] I recognize that in *Walsh v. Canadian General Insurance Co.* (1989), 77 Nfld. & P.E.I.R. 118 (NFCA), a case dealing with an insurable interest under a fire insurance policy, Goodridge, C.J.N. stated at p. 121 that a statutory matrimonial joint tenancy "is no different than a joint tenancy existing at common law." However, I believe what he was focusing on were the legal *effects* of the statutory joint tenancy once created in relation to the type and extent of the interest vested in each spouse for the purpose of potential recovery by one spouse under a fire insurance policy where the other spouse was disentitled to recover by virtue of being the arsonist. Indeed, it is clear that Goodridge C.J.N. did recognize other differences between the common law and statutory joint tenancy in his discussion of the restrictions in the statute on the

ability of the statutory joint tenant unilaterally to sever the tenancy and dispose of his or her half interest.

[42] Accordingly, the better view is to regard the joint tenancy created by the *Act* as unique to its own circumstances. While the reference to joint tenancy in the *Act* can be informed as to its meaning and effect from the notion of common law joint tenancy, legal incidents of the latter that are inconsistent with the statutory requirements must give way to what the statute expressly or implicitly dictates.

[43] In this context, it should also be noted that although the *Act* refers to restrictions on a *spouse* being able unilaterally to dispose of an interest in a matrimonial home, that requirement must also be read in light of section 6(3). The effect is that if title to a matrimonial home is held by a corporation, because the husband is notionally to be regarded as still having an interest in the home, the husband is prevented from voting his shares in any way (including appointing a third party director or officer for such purpose) that would have the effect of depriving the other spouse of her "interest" in the home, including the transfer of title, by sale, to any other person. Effectively, there is an obligation on the corporation not to act to dispose of any part of the title to any property that is a matrimonial home unless the other spouse's consent, or disposition of that consent by a court as provided in the *Act*, is obtained.

[44] To the extent that it is necessary for the other spouse to exercise rights as joint tenant and to seek a court order for division of the home by partition or sale, the remedy may have to encompass an order against the corporation as the title holder in order to ensure that the spouse is not adversely impacted by the fact that the title is held by the corporation. In effect, the spouse will be notionally treated with respect to her half-interest as a joint tenant with the corporation and can seek remedies accordingly. While it is true that at common law, a corporation could not be a joint tenant because the right of survivorship would not operate properly, that does not matter for the purposes of remedies under the *Family Law Act* due to the fact that the statutory joint tenancy is unique.

[45] I pause here to consider – and reject – an alternative way to look at the effect of section 6(3). It might be possible to regard the effect of the subsection as, instead of allowing access to the dwelling for remedial purposes, it would amount to *substituting* the share(s) in question for the matrimonial home itself. That would mean that all rights to the home would instead only be exercisable against the share(s) so that the claiming spouse, through acquisition of a half-

interest in the shares(s), would be able to exercise whatever shareholder rights there are to cause the corporation to continue to make the home available for family purposes. Thus it would be the shares that would be the focus of any proprietary claim.

[46] This approach would not be in accord with the underlying intent of the legislation. The *Act's* purpose is to give a half-interest *in the matrimonial home* to each spouse (s. 5(a)). Substituting an interest in a share does not achieve this. A right to have a share interest sold, transferred or divided is not the same as having a right to have the property itself sold, transferred or divided. There would not necessarily be any correlation in the values of the share and the property itself. The corporation may also have other assets and liabilities that make the share worth more or less than the individual dwelling. Furthermore, transferring rights from the home to the share would be impractical. It would effectively frustrate other remedies the claiming spouse might have, for example, the right to seek temporary exclusive possession of the matrimonial home. Take this very case. Ms. Murphy sought and obtained from the court a temporary order entitling her to possession of the Huntley Drive home which was owned by NuVision. It would have been small comfort to her to have an order for possession of a share certificate. Accordingly, I reject such an interpretation of section 6(3).

[47] It follows that it does not matter when a family residence is acquired by the corporation. Acquisition can be before or after the property acquired the status of matrimonial home, as between the affected spouses. Furthermore, once the property acquires the character of a matrimonial home (regardless of whether title is held by one or both spouses directly or through a corporation where section 6(3) applies) each spouse has an indefeasible interest in it. The corollary – reinforced by section 10(1)(a) – is that one spouse or a corporate title-holder cannot purport to dispose of all or any half-interest in the property without the consent of the other.

[48] It further follows that it matters not that share ownership in the title-holding corporation may subsequently change. It is not share ownership that matters but ownership of the interest in the matrimonial home. The corporation still is the legal title-holder but for the purpose of remedies under the *Act*, the title is regarded as being held between the other spouse and the corporation as statutory joint tenants. In this way, the claiming spouse is not deprived of her statutory interest.

[49] Consequently, the claiming spouse may follow the matrimonial home into the corporation and seek remedies against it that would put her in the same position as she would have been in if title had been held directly by one or both of the spouses. A new owner of the shares of the corporation cannot be heard to object that he had nothing to do with the original spousal parties or that he entered the picture without any notice of the pre-existing spousal statutory interests or that the matrimonial interest somehow disintegrates as against the corporation once ownership of the corporation changes because of his or her lack of notice. An indefeasible legal interest in a matrimonial home created by the *Act* binds subsequent purchasers regardless of absence of notice. It is only property interests recognized in equity that are subject to defeasance by a *bona fide* purchaser for value without notice. The only exception with respect to defeasance of legal interests is in the case of registerable interests that are unregistered under the *Registration of Deeds Act, 2009* SNL 2009, c. 10.01, as against a subsequent purchaser for valuable consideration without notice who first registers his instrument (see sections 7 and 37). That legislation does not apply to statutorily-created property interests like the statutory joint tenancy in a matrimonial home because they are not created by instrument.

[50] Thus, the statutory joint tenancy of the matrimonial home, once created, binds all third party transferees whether they are innocent and acting in good faith or not. The only protection a purported transferee of an interest in a matrimonial home has is to rely on section 12 of the *Family Law Act* which reads:

> For the purpose of section 10 [imposing restrictions on disposition without consent], an affidavit of the person making a disposition or mortgage of property stating
>
> (a) that he or she is not a spouse at the time of making the disposition or mortgage;
>
> (b) that the property disposed of or mortgaged has never been the matrimonial home of the person and his or her spouse;
>
> (c) that the spouse of that person has released all rights to the matrimonial home by a separation agreement, marriage contract or a designation made under section 9; or
>
> (d) that where the person is not a spouse, he or she has not made a cohabitation agreement under Part IV,
>
> is proof that the property is not a matrimonial home unless the person to whom the disposition or mortgage is made had actual or constructive notice to the contrary.

[51] In the current case, that section does not apply because there has been no purported transfer of the title of the homes. They remain in the corporate vehicles they have always been in.

[52] Even if one could treat the transfer of the Paro and NuVision shares to Shoal as notionally a disposition of the homes to new owners, no affidavit that complies with section 12 was prepared and delivered at the time of the share transfer. Indeed, it would not in the circumstances have been possible, consistent with the obligation of speaking the truth, to give such an affidavit stating that the properties were not occupied as matrimonial homes. Furthermore, given the trial judge's finding that Kevin King, the sole shareholder of Shoal, was "complicit" in Mr. Murphy's attempt to put the assets out of reach of Ms. Murphy (Judgment, paragraph 125), it can be concluded that Mr. King had at least constructive notice, in the sense of being put on inquiry, of the character of the properties as matrimonial homes and would not have been able to rely on a section 12 affidavit even if one had been prepared.

[53] It was suggested in argument that this would put an improper burden on a purchaser in a commercial share purchase. The purchaser of the shares would bear the complete risk that title to residential property forming part of the corporation's assets would be subject to a spousal claim on the basis that the property was used at some time as a family residence. I agree that this risk does exist; however, it is not appreciably different than the risk that any purchaser of shares must take with respect to unknown claims against or defects in title to any of the corporate assets. Due diligence on any purchase may involve examination of title to significant key assets and the obtaining of appropriate declarations, warranties and indemnities, supported by security if necessary, from the vendor with respect to such contingencies. If the investigations are not undertaken and something later arises or if the warranties are proven to be false, the resulting loss suffered by the corporation could, depending on the nature of the share purchase agreement, be sought to be recouped from the share vendor.

[54] The type of risk involved is inherent in any share purchase transaction. A purchaser, faced with knowledge that one or more of the assets may be of a residential character should, to protect his or her interests in the transaction, inquire further as to whether the share vendor and any spouse of his or hers purported to use the property as a family residence at any point while the vendor was the controlling shareholder. If as a result of such inquiry, it appears that was a possibility, further inquiries and, if necessary, waivers, warranties and indemnities may be indicated.

[55] The conclusion from this analysis, therefore, is that the rights of a spouse to a matrimonial home held by a corporation in which the other spouse has a controlling interest at the time the character of the home as a family residence arises is not affected by the fact that the title is held by the corporation nor by any subsequent change in the ownership of the shares of the corporation. The matrimonial home, whether held in the other spouse's name or in the name of a corporation, cannot be disposed of, or the shares in the corporation disposed of, in a manner that would defeat the claiming spouse's rights. Furthermore, there is no necessity on the part of the claiming spouse to establish any improper potentially claim-defeating behavior, such as a fraudulent conveyance, on the part of the other spouse as a basis for continuing the claim to the property. The claiming spouse's continuing rights to the property arise from the nature of the indefeasibility of the spouse's proprietary interest created as a legal interest by statute.

2. *Application to this Case*

[56] In concluding that each of the three claimed properties, (referred to hereinafter individually as the Huntley Drive, Thorburn Lake and Florida properties) were matrimonial homes, thereby entitling Ms. Murphy to continuing remedies in respect of them, the trial judge relied on two factors, best expressed in his judgment as follows:

> [71] Overall, I find that the Huntley Drive, Thorburn Lake and Florida properties are matrimonial homes which the parties own as joint tenants and in which each has, using the wording from s. 8(1) of the *Family Law Act*, "…a ½ interest … and … the same right to use, possession and management … as the other spouse has." Let me be clear about why I make this finding. I am not simply saying that the properties are matrimonial homes because they belonged to either NuVision or Paro Enterprises of which Mr. Murphy was the only shareholder and director.
>
> [72] Mr. Murphy's control of these companies is important to my finding but equally important is how the parties occupied and used the three properties as their family residences, whether in the first (as with the Huntley Drive property), second (as with the Thorburn Lake property or third (as with the Florida property) ranks, in decreasing order of usage and primacy.

[57] The judge placed emphasis, as he should have done, on the twin factors of usage as a family residence and the application of section 6(3). Together, they provide the gateway into fashioning a remedy in favour of Ms. Murphy. Although the judge did not explain in his reasons why Ms. Murphy's claim was enforceable against Paro and NuVision notwithstanding the change in ownership of the shareholdings from Mr. Murphy to Shoal, his conclusion can be explained

on the basis of the analysis set out above (see paragraph 55). For those reasons, I reject the arguments of the appellants that the trial judge erred in not finding that Ms. Murphy was disabled from following her interest into the companies once ownership of them changed from Mr. Murphy to Shoal. Once she acquired her rights in the matrimonial home, those interests were indefeasible – even as against third parties – unless she consented to relinquish these rights (or the provisions of section 12 applied).

[58] The judge went on and valued Ms. Murphy's interest in each matrimonial home. He valued Ms. Murphy's half of the equity in the Huntley Drive, Thorburn Lake and Florida properties at $56,309, $90,949.78 and $100,000 respectively. He declared her entitlement to these amounts. Issues with respect to the correctness of these valuations will be dealt with later.

[59] For the present, it is enough to say that in the case of the Thorburn Lake and Florida properties, Paro had already purported to sell the properties to third parties (I make no comment about the effectiveness of those sales without the consent or participation of Ms. Murphy; presumably, appropriate s.12 affidavits were obtained from a representative of Paro – whether accurate or not – and which the new purchasers, if innocent, might be able to shield behind). Ms. Murphy could not therefore obtain a proprietary remedy against the properties by having them partitioned and sold. That had effectively already been done. What was left was a monetary remedy for their value. Half of the proceeds, however, represented Ms. Murphy's interest in the two properties and she is entitled to them. It was not sufficient, therefore, to limit a monetary remedy to a judgment against Mr. Murphy. Whatever value these properties represented remained with Paro and not in Mr. Murphy's personal name. Paro, as the recipient of the properties' value, represented by the sale proceeds, was an appropriate party to satisfy any judgment.

[60] Furthermore, for the reasons given earlier, Ms. Murphy is, by virtue of section 6(3), to be notionally regarded as being a joint tenant with Paro and should be entitled to a remedy against the other party on title. Accordingly, Ms. Murphy should be entitled to judgment for the value, whatever that may be, of her half interest in the Thorburn Lake and Florida properties against her spouse, Mr. Murphy, and also Paro on a joint and several basis. As well, to the extent that Paro retains the sale proceeds of the homes either in their original form or as represented by subsequent investment in other identifiable assets, Ms. Murphy should be entitled to a constructive trust on those assets to enable her claim to be satisfied. To the extent to which the sale proceeds were transferred out of the company, and they can be effectively traced, Ms. Murphy might also have a

claim against the party into whose hands the funds were transferred. But that is not a matter which can be decided in the current proceeding.

[61] Without assigning any reasons, the trial judge ordered that not only Mr. Murphy and Paro but also Shoal and NuVision should be jointly and severally liable to Ms. Murphy for the Thorburn Lake and Florida claims. In this he erred. There is no basis under the *Family Law Act* for holding liable other corporate entities that were not the holders of the title, to which section 6(3) could apply. To that extent, I agree with the submissions of the appellants, though for different reasons than they advanced.

[62] With respect to the Huntley Drive property, its title is still held in NuVision's name. It is still subject to the Order Pending Appeal referred to previously which allowed Ms. Murphy, as against NuVision, to continue to occupy the property with the appellants paying mortgage, house insurance and property tax payments relating to it. The judge determined, for reasons previously explained, that Ms. Murphy was entitled to half of the equity in the home. He valued her share at $56,309.

[63] Unlike in the cases of the other two matrimonial homes, however, Ms. Murphy was not limited to a monetary judgment against her spouse and NuVision. In principle, she was entitled to seek a partition or sale of the property and receive payment of her half interest from the proceeds. For the same reasons as were applicable to the other properties, her remedies in that regard were limited to judgments against Mr. Murphy and NuVision (the title-holder), not Paro or Shoal.

[64] Ms. Murphy, instead, sought an order that NuVision sell its half-interest in the property to her. The judge agreed with this approach. In so doing he was acting within legal principle. This Court has recognized that a court dealing with how to divide the value of a matrimonial home between spouses may order one spouse to sell his or her half interest to the other provided a fair process is adopted to ensure that the transferring spouse receives an equal share of the fair market value of the property at the time of transfer: *Gosse v. Sorenson-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76 at paragraph 35. This follows, the Court has said, from an expansive reading of section 14(1)(b)(iii) of the *Family Law Act* (and, I would add, from section 26 dealing with the powers of the court respecting matrimonial assets which, by definition, include matrimonial homes for this purpose: *Walsh v. Canadian General Insurance*, per Goodridge C.J.N. at p. 121: "Section 19 [now s. 26] provides for the division by the court of matrimonial assets, *including the matrimonial home*, upon the separation of the

spouses [emphasis added]). See also to like effect, *Hudson v. Simoni*, 2017 NLTD(F) 6, paragraphs 19-20.

[65] The appellants submit, however, that this power should be restricted to situations where the holders of the statutory title are still the spouses, and not where the title is held by a corporation. In light of my interpretation of section 6(3), and its application in this case, this submission has no merit. For the purpose of remedies under the *Act*, the corporation is to be treated as if the title holder was the other spouse. The corporate veil can and should be pierced for this purpose. Consequently, if the interests in the matrimonial home are to be regarded as a joint tenancy between the claiming spouse and the corporation, then to effectuate the spouse's right to purchase the other half-interest, an order can and should be made against the corporation.

[66] I conclude therefore that the trial judge made no reversible error in deciding to order NuVision to convey its half of the equity in Huntley Drive to Ms. Murphy.

[67] Two further things are to be noted, however, about the trial judge's order. First, the order went further and required NuVision to transfer not only the equity in the property to Ms. Murphy but instead the whole of the property "free and clear of any and all encumbrances" (paragraph 175, #2). In this case, the purchase price was calculated by reference to the equity in the property, i.e. Ms. Murphy was required to pay NuVision the value of NuVision's equity ($56,309). Normally, if a person purchases the equity in a property, he or she will have to assume and be responsible for any mortgage that may be secured on the property. If, on the other hand, the purchase is free and clear, the purchase price is calculated, not by reference to the equity, but to the full value and the mortgage is paid off out of the full sale proceeds prior to conveyance.

[68] The judge did not give any reasons for ordering that the property be conveyed free and clear of all encumbrances upon payment only of a purchase price calculated by reference to equity. This calculation was not challenged on this appeal; it was not included as a ground of appeal in the notice of appeal nor was it raised or argued in the written materials or in oral argument. It was not therefore a live issue. Accordingly, notwithstanding the unusual and unexplained nature of the order in this regard, I will deal with the matter on the basis of the judge's determination.

[69] Secondly, there appears to be a potential conflict in the manner in which the judge described the means whereby Ms. Murphy was to purchase NuVision's equity in the property. In his reasons, he stated:

> [173] … Ms. Murphy's half of the $112,618 equity in 92 Huntley Drive, or $56,309, will be deducted from the $247,258.78 that Ms. Murphy would otherwise receive from Shoal Investments, Paro Enterprises, NuVision Foods and/or Mr. Murphy for her interest in their three matrimonial homes.

In his final Order, he stated:

> [175] In the result, I order that:
>
> …
>
> 2. NuVision Foods (or the registered legal owner of the property) convey the property at 92 Huntley Drive, Clarenville, NL to Annette Murphy, free and clear of any and all encumbrances, for which she forfeits her share of the equity in the property valued at $56,309 and pays from her overall share of the equity in their three matrimonial homes an equal amount to purchase the remainder of the equity in the 92 Huntley Drive property.

[70] In the first paragraph above-quoted, the judge appears to be saying (correctly) that if Ms. Murphy were to keep her share of the equity instead of being compensated for it, the total amount she would otherwise be paid in respect of the three matrimonial homes (there now being only two for which she would be compensated) would have to be reduced by the value of her half-interest in the equity of Huntley Drive, $56,309. That would mean she would be entitled to payment in respect of the other two homes: $247,258 less $56,309, or $190, 949. This is confirmed by the judge's ultimate order (paragraph 175, item #1).

[71] In the second paragraph, however, the judge appears to recognize (correctly) that in addition to reducing the total matrimonial home cash payment of $247,258.78 by $56,309, representing Ms. Murphy's half-interest in the equity, she will also have to pay an additional $56,309 representing the half-interest of NuVision that she is purchasing. This seems to follow from the judge's statement that Ms. Murphy "forfeits her share of the equity … and pays from her overall share of the equity in their three matrimonial homes an equal amount to purchase the remainder of the equity …" (emphasis added), i.e. NuVision's share.

[72] The potential confusion arises with the reference to paying for NuVision's share out of the "overall share of the equity in their *three* matrimonial homes."

That could be taken to mean that NuVision's share was to be paid out of the total amount of $247,258 (the total amount of the equity in the three homes) whereas that amount would already have been reduced to $190,949 by reason of Ms. Murphy having forfeited $56,309 of that amount because she was to keep her equity and not to be compensated for it. To read the two paragraphs consistently, one must treat the reference in paragraph 175, item #2 to "their three matrimonial homes" as, instead to "their other two matrimonial homes." The result would be that, after payment for NuVision's share of the equity in Huntley Drive from the cash she was still entitled to for the other two matrimonial homes, the net amount she would be entitled to would be $190,949 less $56,309 for NuVision's share, or $134,640.

[73] The simpler way to express the payments due to Ms. Murphy, using the judge's analysis, would be to say that Ms. Murphy was owed $90,949 for the Thorburn Lake property plus $100,000 for the Florida property for a total of $190,949 but because Ms. Murphy owed NuVision $56,309 for the Huntley Drive property, the net amount to which she was entitled in respect of all three properties from the two companies, considered collectively, was $134,640. The result is the same.

[74] Two other consequential aspects of this order, however, remain problematic. The first relates to the setting of the sale price. That will be dealt with later in the general discussion relating to valuation.

[75] The second problematic aspect relates to the manner of satisfaction of the purchase price (whatever it is determined to be) by Ms. Murphy. The trial judge determined that Ms. Murphy could pay the price by means of a reduction in the total amount she was due "from her overall share of the equity in [the] three [in fact, the two remaining] matrimonial homes" (Paragraph 175, item #2). This convenient shorthand manner of accomplishing the payment would, of course, have worked on the trial judge's remedial approach because all of the monetary payments which Ms. Murphy was due were the joint and several obligations of Paro, NuVision and Shoal. On my revised analysis, however, only Paro is liable (along with Mr. Murphy) for the value of Ms. Murphy's interest in the Thorburn Lake and Florida properties and only NuVision (and Mr. Murphy) is liable in respect of Huntley Drive. Paro and NuVision cannot be treated as one entity for the purpose of inter-corporate credits.

[76] The same result, though not as tidy procedurally, can be achieved, however, by providing that Ms. Murphy can satisfy the payment to NuVision by assigning to NuVision, out of the amount due her from Paro for the other homes,

an amount equal to the purchase price determined in accordance with this judgment, thereby leaving it to NuVision to collect the purchase price directly from Paro. Such a provision falls within the notion of the court "setting 'the terms and conditions', including compensation to be paid, 'that the court considers desirable' " as explained in *Gosse* at paragraph 35. Alternatively, of course, Ms. Murphy could pay the purchase price directly if she has access to other sources of funds.

(b) Business Assets Claims

1. *Scheme of the Act*

[77] As in the case of the matrimonial homes, the appellants submit that they could not be made subject to any awards in favour of Ms. Murphy in respect of business assets because those assets, represented by the shares in Paro and NuVision, were transferred to Shoal before Ms. Murphy established any claim to them.

[78] For the reasons already given, I have concluded that holding title to a matrimonial home in a corporation that is controlled by one spouse and transferring the shares in that corporation to a third party does not automatically defeat the other spouse's claims. It does not follow, however, that the same situation applies in respect of business asset claims.

[79] The scheme of the *Family Law Act* operates differently in respect of claims to business assets. It is therefore necessary to consider the scheme of the *Act* as it applies to business asset claims.

[80] Claims by one spouse to the other spouse's business assets are dealt with on a contribution basis that is grounded in notions of unjust enrichment. Business assets are defined by section 18(1)(a) of the *Family Law Act* as "property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose."

[81] It is important to differentiate business assets from matrimonial homes and other matrimonial assets in terms of how they are dealt with in the legislation.

[82] In the case of matrimonial homes, the claim is, as we have seen, based on an automatic and immediate proprietary interest acquisition model founded on family usage. Each spouse acquires an indefeasible proprietary claim to the home. Entitlement does not depend on judicial discretion.

[83] In the case of matrimonial assets, the claim is based on notions of deferred sharing where the claiming spouse's entitlement and share is determined by a court after the fact upon the occurrence of a triggering event such as separation or divorce as outlined in section 21 of the *Act*. There is no proprietary claim arising from the marriage itself or from usage for family purposes. Rather there is a presumption of equality of sharing but that is subject to variation by judicial discretion based on notions of gross injustice or unconscionability (s. 22).

[84] The presumption of equal sharing requires the court to determine what property constituted matrimonial assets as of the occurrence of the triggering event according to the definition of matrimonial assets contained in section 18(1)(c) of the *Act,* then to determine, according to traditional principles of property ownership, which of those assets is owned by which spouse and, finally, to achieve equalization by deciding which spouse has a balancing claim against the other. The process is generally described in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 in the context of the Ontario deferred property sharing regime.

[85] As in the case of claims to matrimonial assets, claims to business assets likewise are determined, not on the basis of rights conferred automatically by virtue of matrimonial status but, rather, by a court after the fact. Unlike matrimonial assets claims, however, business assets claims are determined solely on the basis of contribution by the claiming spouse to the acquisition, management, maintenance, operation or improvement of the assets in question. There is no presumption of equality of sharing and no balancing of claims to equalization.

[86] In the case of claims to both matrimonial assets and business assets, the spouse therefore has no right to any such assets that were acquired in the other spouse's name until a court orders a remedy. Prior to that, each spouse only has a potential personal non-proprietary claim in respect of the assets. At best, it can be said that the claiming spouse has an inchoate right to sharing or compensation that only matures into a property interest if the court establishes both entitlement and share, applying the criteria set out in the legislation and then only if the court in its discretion grants a proprietary remedy to particular assets instead of making a compensatory order.

[87] The key section relating to claims to business assets is section 29 which provides:

> 29. Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order
>
> (a) direct the other spouse to pay an amount that the court orders to compensate the contributing spouse; or
>
> (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,
>
> and the court shall determine and assess the contribution without regard to their spousal relationship or the fact that the acts constituting the contribution are those of a reasonable spouse in the circumstances.

[88] This provision reflects one of the purposes of the *Act* in section 5(d) which is to "provide for judicial discretion in sharing business assets built up by a spouse during a marriage." It is to be noted, however, there is no discretion as to whether a remedy should be provided once a finding of contribution of work, money or money's worth has been made. At that point, one of the remedies permitted by section 29 *must* be granted ("the court *shall* by order…): *Hart v. Hart (No.2)* (1985), 60 Nfld. & P.E.I.R. 280, per Cameron J. at paragraph 23. The discretion is limited to a choice of which remedy should be applied.

[89] It is important to recognize, as the last sentence in section 29 makes clear, that the spousal status of the contributing spouse or the normal expectations that might traditionally exist for a spouse to make unremunerated contributions to the business does not diminish the entitlement to a remedy under the section. Thus, the old notions of what is "not an unusual effort by any wife in Newfoundland" to contribute without expectation of reward and therefore not counting as entitling a spouse to a share in property (per Mifflin J. in *Bursey v. Bursey* (1975), 8 Nfld. & P.E.I.R. 504 at p. 507) no longer apply.

[90] By the same token, the contribution that does qualify under section 29 must be an already-unremunerated or inadequately (i.e. unfairly) remunerated contribution: *Snook v. Snook*, 2010 NLCA 57301 Nfld. & P.E.I.R. 113 at paragraph 28. Otherwise, a remedy under the section would lead to double compensation.

[91] Section 29 is more limited with respect to business asset claims than the provisions respecting claims to matrimonial assets in a number of ways. First, there is no presumption of equal sharing. Secondly, entitlement to *any* degree of remedy depends on proof of some contribution of work, money or money's

worth. Thirdly, there is no discretion in the court to vary the amount of a share that would otherwise be indicated on the basis that such a result would be grossly unjust or unconscionable.

[92] Fourthly, by its terms, section 29 is restricted to claims made against *spouses*. The claim cannot be made against a corporate entity that might hold individual business assets. Unlike section 6(3) with respect to matrimonial homes and the corresponding section 18(3) with respect to other matrimonial assets, there is no provision which prevents a spouse from shielding against claims to business assets by use of a corporation holding those assets; in fact, holding business assets by means of a corporation can be expected to be a perfectly common arrangement. Claims to business assets that are managed and operated as part of a corporate enterprise must therefore be made against the other spouse, with the spouse's investment (shareholdings) in the corporation being regarded as the business asset. The contributing spouse's remedy is thus limited to a potential portion of the other spouse's shareholdings or a monetary compensation from the spouse for the contribution.

[93] It is worth emphasizing again that, unlike the case of the matrimonial home, the contributing spouse has no proprietary interest in any of the other spouse's business assets until such time as the court so orders. The other spouse may dispose of those assets without the consent of the contributing spouse until the court orders otherwise either by an interim order under section 30 or by a final order under section 29 (although it is to be noted that a contributing spouse may in theory assert a business asset claim during married cohabitation before separation and thereby obtain appropriate restraining orders).

[94] Exceptions to this conclusion could occur where a spouse purports to sell or transfer the business assets to which a contributing spouse might have a claim to a third party with intent to defeat, hinder, delay or defraud the contributing spouse within the meaning of fraudulent conveyance legislation, or within general principles pertaining to fraud, or where the contributing spouse might have a claim at common law or in equity against the corporate entity itself based on unjust enrichment.

2. *Application to this Case*

[95] Apart from the matrimonial homes, Paro and NuVision had significant real estate holdings which generated rental income, as well as several small retail and food businesses. With the exception of two apartment buildings (9 Country Road and 23 Marine Drive) which had their own building managers,

Ms. Murphy claimed she provided services, up to thirty-five hours a week, to most of the other rental and retail enterprises in the form of cleaning, sourcing furnishings and supplies, advertising and showing properties to prospective tenants and allowing her name to be used to support bank guarantees for mortgage financing.

[96] Rejecting Mr. Murphy's different characterization of the evidence and the suggestion that Ms. Murphy had been adequately compensated for whatever services she provided to the businesses, the trial judge concluded:

> [114] I find that Annette Murphy contributed by her working for Paro and NuVision, or by providing money or money's worth to the companies when it acquired properties, and then in helping Mr. Murphy to manage, maintain, operate or improve the business assets that belonged to Rodney Murphy through his ownership of Paro Enterprises and NuVision Foods. Ms. Murphy is entitled to compensation for her contribution to those businesses…
>
> …
>
> [120] Ms. Murphy contributed extensively to the Paro and NuVision businesses. … It is worth noting … that Mr. Murphy regarded Ms. Murphy as so significant to his businesses that he actively petitioned her to return to them …
>
> [121] I find that Ms. Murphy's contribution while quite significant was not co-extensive with Mr. Murphy's influence in the businesses. His role was broader in scope…
>
> [123] Unlike the wives in [certain other cited cases], whose contributions to their spouse's businesses were relatively small, Mr. Murphy would not have enjoyed the success he did without Ms. Murphy.
>
> [125] I award Ms. Murphy twenty percent (20%) of the business assets that Mr. Murphy owned through the shares he held in Paro Enterprises and NuVision Foods when the parties separated.

[97] No palpable or overriding error has been demonstrated in the judge's treatment of the evidence in arriving at the conclusion that Ms. Murphy made a significant contribution to the acquisition, management, maintenance, operation and improvement of the business enterprises owned by Mr. Murphy through Paro and NuVision, nor with respect to his conclusion that she was entitled to compensation for that contribution.

[98] The trial judge went on, however, and decided that because the parties could never work in partnership it would be unrealistic to expect that Ms. Murphy should have a continuing share in the businesses. He therefore, after

quantifying her interest in the businesses, exercised the discretion conferred by section 29 and converted that interest to fixed compensation pursuant to section 29(a) of the *Act*. (It might also have been added that because by the time of trial the shares in the companies had been transferred to Shoal, the only effective remedy against Mr. Murphy, absent any transaction-reversal order under fraudulent conveyance legislation, would have been to order compensation). I see no basis for concluding that the trial judge erred in principle in choosing the compensation remedy over the remedy of a share in the businesses.

[99] The judge valued the businesses on a net asset value basis (excluding the matrimonial homes) as being worth $2,542,241.58. Applying 20% to that figure, he calculated the amount of compensation Ms. Murphy should receive for her contribution to those businesses as they existed at the time of separation at $508,448.32.

[100] In addition to holding Mr. Murphy liable for that amount, however, the trial judge also imposed liability on Shoal, Paro and NuVision on a joint and several basis. He gave no reasons for doing so. In imposing liability in this way, he erred in part.

[101] The remedy provided by section 29 is expressly limited to a personal claim against a spouse or a proprietary claim against the asset (in this case the shares) owned by the spouse. Ms. Murphy cannot assert a claim under that provision against the corporate bodies themselves that have benefitted from the contribution. Her claim is in respect of the shareholding held by the other spouse in those corporations. Thus, no remedy exists against Paro or NuVision under section 29. Whether a claim can be maintained against those companies on the basis on common law unjust enrichment is a separate matter that will be dealt with later.

[102] Furthermore, because the contributing spouse has no automatic proprietary interest in the business assets based solely on her contribution during the marriage, unlike in the case of a matrimonial home, there is no indefeasible property interest which can be followed into the hands of third parties which would justify maintaining claims against them in respect of that already-created property interest. Thus, absent a finding of a fraudulent conveyance or operation of another transaction – defeating principle based on fraud generally, there was nothing to prevent Mr. Murphy transferring his shares in Paro and NuVision to Shoal. Accordingly, a remedy against Shoal also cannot be justified under section 29.

[103] It should be added, however, that it seems a possible interpretation of the language used by the trial judge in characterizing the transaction between Mr. Murphy and Shoal and describing their involvement is that he regarded (although he did not expressly say so) the transaction as a fraudulent conveyance and attempted to fashion a remedy against Shoal on that basis. This is a matter to which I shall return. At this point, it nevertheless can be said that no remedy exists against Shoal solely on the basis of section 29.

(c) Availability of Claims Outside of the Family Law Act

[104] As noted above, the question remains as to whether the judge's attempt to impose remedies against the appellants, especially Shoal, can be sustained on the basis of unjust enrichment or principles relating to fraudulent conveyances, or both. To do that, it is first necessary to examine the pleadings used in the Family Division in order to determine the scope of what was in issue in the litigation. This was a matter of some dispute on the appeal.

1. *The Pleadings - Generally*

[105] The claim by Ms. Murphy in its final amended form named Mr. Murphy, Shoal, Paro and NuVision as defendants. In accordance with the requirements for attenuated pleading in the Family Division rules of court (using an "originating application" in a pre-set format rather than a freely-constructed statement of claim) the claims made by Ms. Murphy in respect of property were described briefly as follows:

> 1. I hereby seek an order for the following:
>
> |x| Division of Matrimonial Property
> |x| Other (*specify)* – per paragraph 7(e) and 14
>
> 7. (e) Other (provide details):
>
> [Shoal] is a corporate body duly incorporated under the laws of Newfoundland and Labrador and it is the sole shareholder of [Paro] and [NuVision]. [Mr. Murphy] has purportedly transferred all of the assets and/or shares of [Paro] and [NuVision] (which were solely owned by [Mr. Murphy]) to [Shoal]. [Paro] and [NuVision] held properties of which at least three were properties in which [Ms. Murphy] and [Mr. Murphy] resided as husband and wife, and which properties [Ms. Murphy] claims are "matrimonial homes". The alleged sale of [Paro] and [NuVision] to Shoal and the resulting transfer of the matrimonial homes occurred without the consent of [Ms. Murphy].

> 13. Property
>
> A. Claim
>
> … I am claiming the following:
>
> |x| Division of Property
>
> |x| Equal (skip paragraph 13(b))
>
> |x| Other: I claim a resulting and/or constructive trust in relation to the businesses operated (or formerly operated) by [Mr. Murphy] (*complete paragraph 13(b) below*)
>
> B. The reasons for my claim are: My claim in relation to the business assets is pursuant to section 29 of the Family Law Act and in particular that I have put money and/or monies worth into the businesses.
>
> 14. Other Claims
>
> I seek a declaration against [Mr. Murphy, Shoal, Paro and NuVision] that the real properties located at 92 Huntley Drive, Shoal Harbour NL, Main Road Thorburn Lake, NL and 7296 Marathon Drive, Seminole, Florida USA are matrimonial homes pursuant to section 6 of the Family Law Act and that any and all transactions involving those real properties involving [Mr. Murphy, Shoal, Paro and NuVision] be deemed null and void. I also seek from [Shoal, Paro and NuVision] a Deed of Conveyance reconveying the said properties. I further seek from [Shoal] my interest in Paro and NuVision.

[106] It should be noted, as was pointed out by counsel for Shoal, these claims do not expressly refer to or rely on the *Fraudulent Conveyances Act* or (though this was not mentioned during argument), the impeachable transactions provision of s. 170 of the *Judgment Enforcement Act*, SNL 1996, c. J-1.1 in support of Ms. Murphy's claims that "all transactions" involving the claimed matrimonial homes be deemed "null and void" and that Shoal, Paro and NuVision "reconvey" the properties as well as for an order that Shoal return her "interest" in Paro and NuVision.

[107] Of course, a pleading is not defective just because it does not stipulate the statutory or other legal basis upon which a claim is being asserted because it is not technically necessary to plead law. Generally, however, one must plead facts which support the essential elements of some cause of action: *Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, 338 Nfld. & P.E.I.R. 194 at paragraph 10. In this case, counsel points out that there is no express pleading

here that the impugned transfers were made with intent to defeat, hinder, delay or defraud creditors, including Ms. Murphy.

[108] Nor did the pleading specify the basis upon which a constructive trust "in relation to the business" (i.e. Paro and NuVision) was claimed in paragraph 13(A). In particular, it is not indicated whether the type of constructive trust was institutional in nature or meant simply to be a remedy to be applied to effect restitution for unjust enrichment.

[109] If this matter had been a proceeding dealt with as a civil matter in the Trial Division only (instead of in the Judicial Centre of Grand Bank which also tries cases within the jurisdiction of the Family Division), one might well be able to point to deficiencies in the manner in which the claims in this case were expressed. I would not, however, place much weight on such a criticism by counsel for the appellants at this stage, given the opportunity they had to seek clarification and particulars of any matter before trial if they felt unsure as to the nature and scope of the claims that they were facing. Furthermore, given the manner in which the *Family Law Rules* (as well as the *Supreme Court Family Rules* replacing them as of March 1, 2017) are structured, there is less emphasis on the formalities of pleading so long as the essence of the types of claims is evident. The parties are required to push their claim descriptions into standard form originating applications with check boxes to indicate standard types of claims and with limited spaces for elaboration. Of particular importance is Rule 56A.07(3) which read at the pertinent time:

> Unless the Court determines otherwise, the Court may deal with all issues in any way relating to the claims made in an originating application, even if an issue is not specifically referred to in the application, and the Court may make any judgment or order that the justice of the case may require.

(Emphasis added.)

[110] A similar provision exists in the newly-adopted *Supreme Court Family Rules* NL Reg 11/17 (Rule F 4.06(3)).

[111] I am satisfied that, especially on appeal where no objection was taken prior to trial, so long as the essence of the claim was capable of being identified in a manner that the defending parties would understand what they had to respond to, it is not open to a defendant to assert error on grounds of defective pleadings unless he or she can show prejudice to their defence. On this point, therefore, the issue in the current case is whether the bases upon which the relief was sought and obtained at trial, or maintained on appeal, were live issues of

which the defendants could reasonably have been aware and had the opportunity to respond thereto in a procedurally fair way.

2. *Pleading Unjust Enrichment and a Constructive Trust Remedy*

[112] The words "unjust enrichment" are not mentioned in Ms. Murphy's originating application. She does, however, plead that she made contributions in money or money's worth to Mr. Murphy's businesses, that is, Paro and NuVision. In the circumstances, that is sufficient to constitute an allegation that there was the conferral of a benefit on the two corporate entities and a corresponding deprivation to Ms. Murphy.

[113] Although she does not say there is an absence of any juristic reason for the enrichment, from a pleading point of view, that must obviously be her position because if it were otherwise she would have no claim. She does not have to plead a negative. It would be up to the defendant to demonstrate the existence of a juristic reason for denying the unjust enrichment claim. Indeed, Mr. Murphy did argue at trial, though unsuccessfully, that Ms. Murphy was adequately compensated for the benefits she said she conferred through the receipt, from the companies, of other benefits to her husband which had the effect of materially improving their marital lifestyle. If this had been established to the satisfaction of the trial judge, it could have amounted to a reason for not awarding not only a section 29 remedy but also a restitutionary one against the companies directly.

[114] Furthermore, Ms. Murphy expressly claims a recognized remedy for unjust enrichment, namely, a "constructive trust in relation to the businesses operated (or formerly operated) by [Mr. Murphy]." That makes it clearer that on the pleadings unjust enrichment is a potential issue. The reference to the businesses "formerly operated" by Mr. Murphy indicates that the claim is also being made notwithstanding the transfer in ownership of Paro and NuVision to Shoal. In any event, if there is an unjust enrichment claim it would have to be against the corporate entities directly, the alleged beneficiaries of the enrichment. In the circumstances, the companies would have to have known that they were a target for Ms. Murphy's claims in this regard.

[115] It is true that, read literally, the reference to "constructive trust in relation to the businesses" in paragraph 13.A of the originating application seems tied, by the italicized requirement in the standard form ("*complete paragraph 13(b) below*") to the statement in paragraph 13.B that the claim is "pursuant to section

29 of the *Family Law Act"* (and, by implication, not under common law unjust enrichment). However, given that section 29 claims can only be made against a spouse and that it is clear that by their inclusion as parties, claims were being made against Paro and NuVision as well, a more expansive reading would lead to the conclusion that the subsequent statement that "I have put money and/or money's worth into the businesses" also must relate to potential claims against the companies.

[116] This conclusion follows as well from the pre-trial skirmishes that occurred between the protagonists. Paro and NuVision were not named as defendants when the originating application was initially filed. However, Ms. Murphy later applied to add them as defendants. In the supporting affidavit to her application she deposed that 'there is an ongoing dispute … as to whether the proper parties are before the court to determine my rightful claim of matrimonial property and my interest in the proposed Third and Fourth Respondents [i.e. Paro and NuVision]" and that "in order to be clear as to the parties who are before the Court, I seek to amend my Originating Application to include [Paro] and [NuVision] as part of the action." She also deposed that "there is no prejudice to either of the Respondents [i.e. Mr. Murphy and Shoal, the original parties] in allowing such an amendment as all of the Respondents have been aware from the commencement of my Originating Application that they are involved in the action."

[117] The applications judge allowed the application and ordered that Paro and NuVision be joined, reasoning that they were "necessary parties" (*Murphy v. Murphy*, 2014 NLTD(F) 15, paragraph 43). In reaching that conclusion, he referred to the fact that Ms. Murphy "has a claim *on Mr. Murphy's business assets* because she worked without pay or for a reduced pay for his companies…" (paragraph 18; emphasis added). It is noteworthy that her claim was described by the judge not simply as *against* Mr. Murphy but *on* the claimed assets. i.e. effectively against Paro and NuVision as well. The judge also emphasized Ms. Murphy's allegation that "Mr. Murphy sold his shares in Paro and NuVision to prevent her from claiming an interest in these properties and that Kevin King is complicit with him" (paragraph 29).

[118] Taking a broad view of all of the foregoing matters, it is clear that the applications judge felt that, given the manner in which Ms. Murphy's claims had been presented, potential claims against Paro and NuVision could be made out. Such claims, in respect of the business assets (quite apart from the matrimonial homes) could only be asserted on the basis of unjust enrichment since a section 29 claim could only be made against Mr. Murphy.

[119] It is also noteworthy that, following joinder, neither Paro nor NuVision made any application seeking to have claims against them struck out or for them to be removed as parties to the proceeding. They did, however, file responses to the claims in which they asserted that all transactions were conducted at "arm's length" and "ought not to be impacted and/or disturbed by the consequences of the breakdown of the matrimonial relationship as between [Ms. Murphy] and [Mr. Murphy]". They further asserted that "any claim for relief that [Ms. Murphy] is seeking in relation to any alleged resulting and/or constructive trust in relation to any assets and/or shares of any business formerly owned and/or formerly operated by [Mr. Murphy] ought not to be directed as against [Shoal, Paro or NuVision]" and asked for a declaration that Ms. Murphy was not entitled to any relief as against them. The issue of claims by Ms. Murphy was therefore clearly joined between Ms. Murphy on the one hand and Paro and NuVision on the other. They could not be said to be unaware of the potential jeopardy they were facing in the litigation.

[120] I am satisfied, therefore, that from a pleading perspective, there was nothing to prevent an unjust enrichment claim from being dealt with either at trial or on appeal. It cannot be said that Shoal, Paro or NuVision would be taken by surprise or would be otherwise prejudiced if, following reception of the evidence, the trial judge included in his analysis, a consideration of a claim against Paro and NuVision for unjust enrichment. Indeed, on this appeal, counsel for the appellants submitted that the trial judge erred in not engaging in an analysis that would have addressed the potential application of the remedial constructive trust remedy based on unjust enrichment as the only basis for holding Shoal, Paro and NuVision liable with respect to business assets.

[121] That said, an unjust enrichment claim must be made against the recipient of the enrichment. In this case, that would be Paro and NuVision, not Shoal. Any monetary remedy could only be made against the parties allegedly unjustly enriched. The pleadings should be read and applied accordingly.

[122] That is not to say, of course, that a claim could not also be made against Mr. Murphy, as spouse, under s. 29 of the *Family Law Act* for compensation with respect to any contribution which Ms. Murphy could be said to have made in a more generic sense to the business assets which Mr. Murphy may have owned prior to their disposition. That involves different considerations. It may also involve issues of how, assuming liability were to be placed on both Mr. Murphy under s. 29 and upon Paro and NuVision on the basis of unjust enrichment, potential double recovery should be dealt with. That is a matter to which I will return later.

3. *Pleading Fraudulent Conveyance*

[123] The trial judge made a number of findings that called into question the *bona fides* of the transfers of the Paro and NuVision shares by Mr. Murphy to Shoal that on their face raise issues as to the potential application of the *Fraudulent Conveyances Act.* The judge, however, did not expressly purport to rely on that legislation in fashioning the remedies he granted. The appellants say that the judge was right not to do so because neither the *Act* nor the allegations necessary to support its application were pleaded.

[124] Generally speaking, trial fairness requires that lawsuits be conducted within the boundaries of the pleadings; otherwise a party might be deprived of the opportunity to argue an issue or to adduce evidence relative to that issue (*Quinlan Brothers Ltd. v. Coady*, 2013 NLCA 31, 336 Nfld. & P.E.I.R. 75 at paragraphs 56-57). The question, however, that must be addressed in every case on appellate review when questions of sufficiency of pleadings are raised, is whether regardless of technical compliance with the rules, the complaining party was prejudiced in being able to know the case he or she was facing and to be able to respond to it.

[125] The allegations in the originating application do assert that Mr. Murphy transferred the shares of Paro and NuVision to Shoal (paragraph 7(e)) and Ms. Murphy sought a declaration that all transactions relating to the properties held by Paro and NuVision (which included, but were not limited to, the three matrimonial homes) were "null and void." She also sought as relief: "I further seek from [Shoal] my interest in Paro and NuVision" (paragraph 14). Counsel for the appellants submitted that Ms. Murphy did not specifically plead a claim that the share transfer agreement be set aside and that there was a distinction between such a plea and a plea claiming the transaction was null and void. In the current context, that is a distinction without a difference. In either case, the claim is for a re-transfer of property that was the subject of the original transfer.

[126] Read purposively, Ms. Murphy's pleas could only mean that she was seeking a reversal of all transactions on the basis that they were in some manner improper. It is hard to conceive, given the circumstances of purported transfers of alleged matrimonial and business assets out of the possession and control of Mr. Murphy to a third party, Shoal, (who all related parties knew was connected, through Kevin King, to Mr. Murphy through past business dealings and with both Mr. and Ms. Murphy in past social dealings) that Ms. Murphy was not seeking a remedy based on the idea that Mr. Murphy had attempted to put assets to which Ms. Murphy might otherwise have been entitled beyond her reach – in

essence to attempt to defeat, hinder, delay or defraud Ms. Murphy of her potential claims.

[127] Indeed, that is how the trial judge analyzed the evidence, though without specifically adverting to the legislation. He concluded:

> [114] … [It was an] improvident sale of Mr. Murphy's shares in Paro Enterprises and NuVision Foods to Shoal Enterprises for no apparent reason than to put the assets of those companies beyond Ms. Murphy's reach …
>
> …
>
> [125] … Shoal Investments has been … complicit with Mr. Murphy in restructuring Paro Enterprises and NuVision Foods to deprive Ms. Murphy of compensation for interest in the matrimonial and business assets …
>
> …
>
> [141] One of the most distressing aspects of these proceedings is the support that Mr. Murphy received from Kevin King and Shoal Investments.

[128] He rejected other explanations for what happened put forward by Mr. Murphy and on behalf of Shoal as "conspicuously unconvincing" (paragraph 78) and concluded:

> [138] There is a more rational explanation for what Mr. Murphy did and it is the one I accept: He acted strategically to put their matrimonial and business assets beyond Ms. Murphy's reach.

[129] Counsel for the appellants also takes issue with the specific findings of the trial judge quoted above that Shoal, through Mr. King, was "complicit" with and gave "support" to Mr. Murphy in his efforts to deprive Ms. Murphy of her claims. Amongst other points, he relies on the fact that the pleadings did not specifically allege that Mr. King and Shoal were participants in and complicit with Mr. Murphy in those efforts. Relying on *Quinlan Brothers* as well as *Regal Realty Ltd. v. Pentagon Holdings Ltd.*, 2013 NLCA 45, 338 Nfld. & P.E.I.R. 66 and *Parlee v. McFarlane*, counsel submits that it was error for the trial judge to make findings of complicity and moral culpability on the part of Mr. King and Shoal because such matters were beyond the parameters of the pleadings. I do not agree. Once it is accepted that issues involving the concepts and principles underlying the *Fraudulent Conveyances Act* are engaged, that puts in issue the complete nature of the relationship between the transferor and transferee in the impugned transaction. The evidence might or might not disclose active knowledgeable involvement of the transferee in the effort to defeat, delay,

hinder or defraud creditors. But that is a matter of evidence, not pleading. Any alleged transferee facing a fraudulent conveyance claim would have to recognize that his or her relationship to the transaction and the actions and intent of the transferor would face scrutiny and result in appropriate characterization by the judge.

[130] In fact, the trial judge saw these matters as live issues well before the trial. He alluded to them in his pre-trial judgment dealing with the application of Ms. Murphy to join Paro and NuVision as parties to the litigation, referred to earlier:

> [29] … Ms. Murphy also believes that Mr. Murphy sold his shares in Paro and NuVision to prevent her from claiming an interest in these properties [the claimed matrimonial homes] and that Kevin King is complicit with him …
>
> …
>
> [33] … Ms. Murphy will have recourse to all three companies if she is entitled to a remedy against them. Thus, if Ms. Murphy can show that Mr. Murphy is trying to defeat her claims to matrimonial property by hiding it in his or Mr. King's companies, she can ask to set aside those transactions so that the property is accessible to her.

[131] Although these statements were made specifically in reference to the matrimonial homes, given that the homes were held in Paro and NuVision, which also held the business assets, it is obvious that any remedy relating to the share transfer to Shoal on the basis of an intention to defeat those claims would also place in jeopardy Shoal's position regarding the business assets on the same basis.

[132] In the same pre-trial application, the trial judge also ordered Shoal, Paro and NuVision to disclose to Ms. Murphy "all records pertaining to the sale of the shares in Paro Enterprises Limited and NuVision Foods Inc. to Shoal Investments" (paragraph 44, item #7). This in itself had to have been a strong indication to the appellants that scrutiny was being applied to the appropriateness of the sale transfer.

[133] Under these circumstances, I am satisfied that parties in the position of Shoal, Paro and NuVision, faced with the pleadings and how the case developed toward trial, would have to realize that they were potentially in jeopardy with respect to a possible remedy based on a finding that the shares were transferred by Mr. Murphy to Shoal, in the words of section 3 of the *Fraudulent Conveyances Act*, "with intent to defeat, hinder, delay or defraud creditors or others."

[134] Counsel for the appellants pointed out, however, that the general rules of civil pleading require that "necessary particulars" of fraud must be pleaded (*Rules of the Supreme Court, 1986*, rule 14.11(1)(a)). He submitted that this requirement applied equally within the *Family Law Rules*, at least in respect of claims against his corporate clients. He argued that the rationale for the relaxation in the family litigation context, as exemplified by Rule 56A.07(3) quoted earlier, is based on the fact that there is a certain knowledge base existing between two marital partners that makes it unnecessary for formal restating in pleadings of what might be obvious to the partners concerned because they, more than anyone, understand the nature of what their dispute is about. Such a rationale does not apply, however, to other joined parties, like Shoal, Paro and NuVision, who are extraneous to the marital relationship. While there is some merit to this submission, it is of less importance here where the extraneous third party is Kevin King, the principal of Shoal who was closely associated with the parties in both business and social contexts.

[135] Furthermore, a claim under the *Fraudulent Conveyances Act* does not have to be based on fraud; it is sufficient to establish that the transfer was made with intent to defeat, delay or hinder creditors. This is something short of an allegation of acting fraudulently in the tortious or criminal sense and, indeed, the trial judge in this case did not expressly rely on fraud in that sense. In any event, the fraud that must be established under the *Act* is fraud on the part of the transferor. The transferee must still return the property even if he or she acted innocently and did not participate in the fraud, purchasing for valuable consideration and in good faith, unless he or she had no notice or knowledge of any fraud on the part of the transferor (see section 4). Fraud is not therefore an allegation to which Shoal, Paro or NuVision, as opposed to Mr. Murphy, would have to respond in any event.

[136] Finally, viewed with appellate hindsight, it is not sufficient for the appellants to take the position that if the pleading was unclear they were entitled to "lurk in the shadows", as it were and not take any steps, by applications for particulars or applications to strike, to clarify the nature of the allegations against them. The requirement for pleading particulars of an allegation of fraud, even it did apply in the current case, merely sets up a right on the part of the person facing the allegation to seek particulars if they are not initially provided. Both parties have to act reasonably in fleshing out the details of any particular claim. It is only if, after the fact, a court reaches a conclusion that by the obtuseness of a pleading, a responding party was blindsided and deprived of an opportunity to know the case that was presented that he or she can claim

prejudice calling for a remedy. In the circumstances of this case, one cannot characterize the situation here as being in that category.

[137] I would also add that, even if Ms. Murphy did not specifically plead that the share transaction should be set aside (the normal remedy under the *Fraudulent Conveyance Act*) and even if the *Act* was not specifically being relied on, it is clear from the pleading and from how the case developed up to trial that Ms. Murphy was making claims based on the fact that Shoal and Mr. Murphy were, by virtue of the share transaction, participants in an agreement which had the effect of removing business assets from the ownership and control of Mr. Murphy and potentially putting them out of the reach of Ms. Murphy.

[138] Such a scenario raises, even outside of the operation of the *Fraudulent Conveyances Act*, the potential application of the doctrine of fraud in equity. This is a concept that is broader and more malleable then the notion of common law fraud or deceit. In *Chesterfield v. Janssen* (1750), 2 Ves. Sen. 125, Lord Hardwick speaking of fraud in equity, observed:

> Fraud is infinite, and were a count of equity once to lay down rules, how far they would go, and no further, in extending their relief against it, or to define the species or evidences of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive.

[139] In *Chesterfield*, Lord Hardwick gave as one example of actions that would amount to fraud in equity, the entry into a transaction which would amount to a fraud affecting persons not party to the transaction. In his words:

> This Court has undoubted jurisdiction to relief against every species of fraud.
>
> …
>
> 4. A fourth kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an imposition or deceit on the other persons not parties to the fraudulent agreement…
>
> (Emphasis added).

[140] Although the facts of the cases referred to by Lord Hardwick in support of this category of fraud in equity were far removed from the circumstances of the current case, the underlying principle in my view, still exists and can be applied to modern scenarios like the present. Here, the pleaded facts – the entry into a transaction by Mr. Murphy and Shoal to transfer shares in Paro and NuVision to Shoal which had the effect of defrauding Ms. Murphy, a third party, of her

ability to claim a share in the business assets in dispute, engages this notion of equitable fraud. Such a claim is therefore also within the scope of the pleadings.

4. *Conclusion on Pleading*

[141] I am not satisfied that Shoal, Paro and NuVision would face any prejudice if, on appeal, issues relating to unjust enrichment and transactions potentially impeachable under the *Fraudulent Conveyances Act* or involving notions of fraud in equity were factored into the analysis of any justification on appeal for any potential remedies which Ms. Murphy claimed.

[142] The case did not proceed as a simple piece of property litigation between spouses to which the family law legislation was the only source of legal remedy. Shoal, Paro and NuVision were made parties and they must have known that remedies extending beyond those that would normally apply as between spouses alone were being claimed. The companies did not seek further particulars of the claims, if in fact they were unclear to them, nor did they apply to strike out the claim on the basis that there was no cause of action pleaded. It is now too late to raise objections on the basis that the pleadings were not clear enough where they must have known the type of potential jeopardy that were facing and had an opportunity to respond to it.

[143] There is no reason in principle why in a *Family Law Act* proceeding other related claims, either under statute or common law or equity, cannot be joined with the claims under the family legislation so that they can all be dealt with comprehensively. Rule 56A.07(3), quoted earlier, specifically contemplates this and even permits it to happen where the issue is not referred to in the pleadings. While it might be conceptually and organizationally preferable to commence and deal with, say, a *Fraudulent Conveyances Act* claim separately and in advance of a matrimonial property and business asset claim, there is nothing to prohibit dealing with all issues together (subject, of course, to possible later severance of issues on grounds of trial convenience).

(d) Remedies based on Unjust Enrichment

[144] The issue here is whether, notwithstanding the fact that a section 29 business assets claim can, for reasons given earlier, only make Mr. Murphy liable, Ms. Murphy can nevertheless maintain a claim against Paro and NuVision directly on the basis of general principles of unjust enrichment. In my view, she can. This analysis provides justification for the trial judge's conclusion that the award respecting her contribution to the businesses should be

enforceable against not only Mr. Murphy but also against Paro and NuVision (but not, as previously explained, as against Shoal).

[145] The basic principles governing the rights and remedies for unjust enrichment remain the same for all subject areas, regardless of whether they arise out of a domestic context or not, but the courts must apply those common principles in ways that respond to the particular context in which they are being applied (*Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, per Cromwell J. at paragraphs 31-34). It is well-established in Canadian law that the establishment of a claim for unjust enrichment depends on the plaintiff being able to establish three elements: (i) an enrichment of or conferral of a benefit on the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment (*Kerr*, paragraph 32; *Economical Mutual Insurance Co. v. Bank of Nova Scotia*, 2015 NLCA 29, 367 Nfld. & P.E.I.R. 297, paragraph 21).

[146] The remedial response to the establishment of the cause of action results in restitution, or a giving back, to the plaintiff of the enrichment previously unjustifiably conferred on the defendant. The remedy can be either a personal monetary one, calculated by reference to value received (quantum meruit) or a proprietary one (constructive trust).

[147] The record indisputably supports the trial judge's conclusion that Ms. Murphy made substantial contributions, in the form of valuable services, to the businesses operated by Paro and NuVision. His finding in this regard is equally relevant to an unjust enrichment claim as it is to a claim under s. 29:

> [114] I find that Annette Murphy contributed by her working for Paro and NuVision, or by providing money or money's worth to the companies when it acquired properties, and then in helping Mr. Murphy manage, maintain, operate or improve the business assets that belonged to Rodney Murphy through his ownership of Paro Enterprises and NuVision Foods. Ms. Murphy is entitled to compensation for her contribution to those businesses.

[148] This finding makes it clear that the benefits were conferred by Ms. Murphy directly on the corporate entities, Paro and NuVision although Mr. Murphy, as sole shareholder when the benefits were conferred, would obviously have benefitted indirectly in terms of shareholder value from Ms. Murphy's efforts, which was sufficient for a statutory claim (section 29) to be made against Mr. Murphy as well.

[149] The benefit contemplated by the cause of action in unjust enrichment must be tangible but may be either positive or negative in nature, in the sense that the benefit conferred spares the defendant an expense he or she would have had to undertake (*Kerr*, paragraph 38). The contribution made by Ms. Murphy qualifies. The value of the benefit can be restored to Ms. Murphy by money. Accordingly, the first element of the cause of action has been satisfied.

[150] It is also clear that the conferring of these benefits on Paro and NuVision resulted in a corresponding deprivation to Ms. Murphy in the form of the expenditure of effort for the benefit of the companies that was, as found by the judge, not otherwise compensated. Thus, the companies' enrichment corresponds to the deprivation which Ms. Murphy suffered. The second element is therefore satisfied.

[151] On the record as presented, there is no reason in law or justice for the companies to retain the benefits conferred by Ms. Murphy. The trial judge considered and rejected the argument that she was adequately and properly compensated for what she did by her participation in the comfortable lifestyle that she and Mr. Murphy enjoyed as a result of the economic success of the business ventures. It is, further, implicit in the way the judge viewed the evidence that the effort expended by her could not be considered as a gift or voluntary donation of time and effort out of natural love and affection flowing simply from a notion of it being "not an unusual effort by any wife in Newfoundland" (per Mifflin C.J. in *Bursey*, cited earlier) or from legitimate expectations of the parties (See *Kerr*, paragraphs 40-45 for a discussion of how the third element of the cause of action should be applied in the domestic context). Furthermore, there is no contract, statute or other legal principle that calls for a denial of recovery. None of the established categories of juristic reasons for denying recovery exist and neither Mr. Murphy nor the appellants were able to show any other reason to deny recovery against the very entities that were the recipients of the conferred benefits.

[152] It might be argued, however, that inasmuch as the matrimonial property regime under the *Family Law Act* governed Mr. and Ms. Murphy's affairs as spouses, it was intended that that regime be comprehensive to the exclusion of any other set of principles that might apply to non-spouses in an equivalent domestic situation. In *Kerr*, Cromwell J., in referring to matrimonial property reform statutes, described them as "comprehensive" which "provide the applicable legal framework."

[153] This is in one sense the reverse argument to that advanced in *Peter v. Beblow*, [1993] 1 S.C.R. 980 where it was submitted the legislative decision to exclude unmarried couples from property division legislation indicated that the court should not use the unjust enrichment doctrine to solve their property disputes. The Court in that case rejected that argument, with McLachlin J. asserting that "It is precisely where an injustice arises without a legal remedy that equity finds a role" (p. 944).

[154] In the circumstances of the current case, where the trial judge has found that Mr. Murphy deliberately tried to put his assets out of the reach of Ms. Murphy and declared bankruptcy specifically to assist in achieving that purpose (Judgment, paragraph 124), and that Mr. King, the controlling shareholder of Shoal, the transferee of the shares in Paro and NuVision, was complicit in restructuring Paro and NuVision to deprive Ms. Murphy of compensation for her claim for a share in the business assets (paragraph 125), I do not consider it inappropriate to allow a claim in unjust enrichment directly against Paro and NuVision so as to enable substantial justice to be done. Without that, Ms. Murphy may be deprived of an effective remedy. The *Family Law Act* does not deal comprehensively with such a scenario. It must be supplemented by other doctrines that can subsist consistently with it. I note in passing that in another context in *Rawluk, supra.*, the constructive trust remedy based on unjust enrichment was held to be compatible with the family law legislation in Ontario and was not abolished or superceded by it.

[155] In reaching this conclusion, however, it does not follow that Paro and NuVision should be held jointly and severally liable for the value of the total contribution which Ms. Murphy made to both companies. Each company can be held liable only in respect to the benefits conferred on *that* company. Determining the amount in respect of each company will involve some tricky questions of valuation and will require consideration as to whether such a valuation can be fairly made on the appeal record as it exists. I will postpone consideration of those issues until later in my reasons.

(e) Remedies on the basis of a Fraudulent Conveyance

[156] So far, I have concluded that Ms. Murphy has established claims, not only against Mr. Murphy but also against Paro and NuVision in relation to Ms. Murphy's interest in the matrimonial homes and also, on the basis of unjust enrichment, in relation to her contribution to or conferral of benefits on the business assets formerly held by Mr. Murphy. The specific remedy to be granted

in respect of those claims, and the valuation of the claims, remains, of course, yet to be addressed.

[157] But, none of the foregoing claims will result in a remedy directly against Shoal, as previously explained. It might be otherwise, however, if the transfers of the Paro and NuVision shares from Mr. Murphy to Shoal can be successfully attacked as an invalid transaction under the *Fraudulent Conveyances Act* (*FCA*), or if the doctrine of fraud in equity is applicable.

[158] Sections 3 and 4 of the *FCA* provide:

> 3. Every conveyance of real property or personal property and every bond, suit, judgment and execution at any time had or made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against those persons and their assigns.
>
> 4. Section 3 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to him or her notice or knowledge of the intent set out in that section.

[159] The "conveyance" referred to in section 3 includes, by virtue of sub-section 2(a), a "transfer, assignment, delivery over, payment, gift, grant, alienation, bargain … of, in, to or out of real property or personal property by writing or otherwise." Shares and securities are included in the definition of "personal property" in paragraph 2(b). Thus, in principle, the *FCA* applies to transfers of the shares of Paro and NuVision to Shoal if the requisite intention to "defeat, hinder, delay or defraud" is established and Ms. Murphy can be said to fall within the class of "creditors or others."

[160] The term "creditors or others" encompasses those who, even if they are not creditors at the time of the challenged transfer, might become creditors at a later date. It is wide enough to include any person who has a legal, equitable or statutory claim against the transferor by virtue of which he or she is or may become entitled to rank as a creditor of the transferor (*Canadian Imperial Bank of Commerce v. Boukalis*, [1987] 3 W.W.R. 505, 11 B.C.L.R. (2d) 190 (BCCA), leave to appeal to SCC refused, 12 B.C.L.R. (2d) xxxvi; *Miller v. Debartolo-Taylor*, 2015 ONSC 2654). The intent of the *FCA* is to protect both past and future victims; the key is the intent of the transferor at the time of the transfer (*Pirbhai v. Rani*, 2012 ONSC 345). The *Act* applies in the matrimonial context where one spouse or cohabitor attempts to put assets out of reach of the other so as to frustrate or impede the ability of the other to recover legitimate

matrimonial claims (*Cabaniss v. Cabaniss*, 2009 BCSC 1478, 74 R.F.L. (6th) 352; *Lee v. Lee and Snelgrove* (1978), 19 Nfld. & P.E.I.R. 60, 4 R.F.L. (2d) 318 (NF Dist. Ct.); *Kashyap v. Canadian Imperial Bank of Commerce* (1997), 148 Nfld. & P.E.I.R. 200 NFCA).

[161] Ms. Murphy falls within the class of "creditors and others" because she had potential claims of a proprietary and personal monetary nature against Mr. Murphy arising out of the breakdown the marriage. The trial judge concluded that Mr. Murphy transferred the shares in Paro and NuVision to Shoal at a significant undervalue (he called the consideration "nominal") and the judge concluded on the evidence that the "improvident" sale was "for no other reason than to put the assets of those companies beyond Ms. Murphy's reach". It was a transaction in which the trial judge held that Kevin King, acting through Shoal, was "complicit."

[162] As noted earlier, the appellants took issue with the judge's finding of complicity. They pointed to evidence from Mr. Murphy, both oral and documentary, that they say showed that Paro and NuVision were heavily indebted to Shoal and that in the circumstances there was every justification for the sale of the Paro and NuVision shares to Shoal for the nominal consideration that was provided. It is evident that the judge did not accept this evidence, believing it to have been contrived. He was entitled to reach this conclusion. I see no palpable and overriding error in the manner of the judge's treatment of the totality of the evidence and the inferences he drew from it.

[163] The appellants also say, however, that the judge erred, in reaching his conclusions about the moral culpability of Mr. King and Shoal, by relying on hearsay evidence in the form of a text message from a person not called at trial that suggested that Mr. Murphy continued to have involvement with the Florida property after the time when the shares in Paro had been transferred to Shoal. It is true that the judge did refer to and purport to rely on the text message but he did so as an "example" of Mr. Murphy's continued involvement, stating that he was "not surprised by these implications because of the close personal and business relationships between Mr. Murphy and Mr. King" (Judgment, paragraph 142). He concluded that the text message "supported" Ms. Murphy's position that Mr. King was accommodating Mr. Murphy to defeat Ms. Murphy's claims. I am satisfied that the judge was entitled to reach the conclusions he did without reliance on the challenged text message. It was not material to the result.

[164] Although the judge did not employ the terminology actually used in the *FCA* ("defeat, hinder, delay or defraud"), his findings of fact amounted to the

same thing and fall within the scope of the *Act*. This is made clear by the judge's conclusion that:

> [140] [Mr. Murphy] adopted an extreme, defensive action aimed at making himself judgment-proof. He failed.

[165] I am satisfied, therefore, that although the trial judge did not explicitly refer to and rely on the *FCA* in his reasoning, his factual conclusions justify the application of the legislation to the disputed transaction and further justify the conclusion that the purported transaction was not effective to defeat any legitimate claims Ms. Murphy may have had against Mr. Murphy.

[166] The question that next follows is what remedy flows from this? The *FCA* does not expressly describe the type of remedy which a successful claimant under the *Act* can obtain. It merely declares that the transaction is "void." Nevertheless, it is generally understood that the remedy to which the claimant is entitled is a declaration voiding the transaction as between the transferor and transferee and revesting title to the property in the transferor (*McGuire v. Ottawa Wine Vaults Co.* (1913), 48 S.C.R. 44, per Anglin J. and Brodeur J. *obiter*, p. 56). In *Montreal Trust Co. of Canada v. Hickman*, 2001 NFCA 42, 204 Nfld. & P.E.I.R. 58, this Court expressed it this way:

> [18] The cause of action under the Fraudulent Conveyances Act is designed to obtain the reversal of one or more transfers of property which have been undertaken to enable a debtor to defeat, hinder, delay or defraud creditors. The remedy is the reversal of the transaction, by means of a declaration that the transfer is "void" so that the property reverts to the debtor's store of assets and is then made available once again to the debtor's creditors by way of execution.

[167] The focus has therefore traditionally been on the effective reversal of the impugned transaction. Reversal is not automatic in all cases, however. As Goodridge J. noted in *Horwood Lumber (1974) Limited v. Snow* (1977), 19 Nfld. & P.E.I.R. 71 (NFSC TD), a declaration that a transaction is void under the *FCA* is discretionary and may be refused (paragraph 29). This is consistent with the point made in *Montreal Trust* that although section 3 of the *FCA* provides that the impugned transaction is "void" the transaction is in reality "voidable", requiring rescission by virtue of the intervention of the court before the effectiveness of the transaction will be brought into question (paragraph 18, footnote 3). See also *Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102, 411 D.L.R. (4th) 639 at para 19; *Halsbury's Laws of Canada – Debtor and Creditor* (2018 Reissue), HDC-109.

[168] In some cases, it may not be possible to achieve transaction reversal in a manner that will satisfy the underlying purpose of the legislation of ensuring that the creditor's legitimate claims are not defeated or seriously compromised. For example, the transferee may subsequently have purported to dispose of the property to another innocent party, thereby making it impossible for the original transferee to give it back to the transferor. Alternatively, the original transferee may have dissipated the property in other ways, say by improvident use, such that what can be retransferred may be worth a fraction of the value of the property at the time of the original transfer. A simple reversal of what is left may not do substantial justice.

[169] The Court in *Montreal Trust* observed that it had not been made aware of any authority that recognized that a creditor may, on the basis of some statutory cause of action arising out of the *Act*, assert a claim for *damages* against the transferor or the transferee, if the property cannot be recovered or located (para. 19). However, it went on to acknowledge that there were cases that recognized that a claimant may follow into the hands of a transferee *the proceeds of disposition* of property which had been subsequently transferred by the transferee to a third party by virtue of a subsequent unimpeachable transaction (paragraphs 28-31). The Court referred to the decision of Adams, D.C.J. in *Carew v. Power and Melvin* (1984), 47 Nfld. & P.E.I.R. 251(NF Dist. Ct.) where it was held that where a transferee in a transaction impeachable under the *FCA* had disposed of the property to another the proceeds of disposition of that property could be impressed with a trust in the hands of the original transferee in favour of the claimant. By this device, the purpose of nullifying the intent to defeat, hinder, delay or defraud creditors can be achieved without a retransfer of the property even though the original property has been conveyed on to another innocent party, by ensuring that the value representing the property is still available to the claimant.

[170] In like manner, in *Cabaniss*, where a husband, in contravention of fraudulent conveyance legislation, used substantial funds that would have been potentially subject to his wife's matrimonial claims to purchase real property and placed it in the name of his current common law partner to avoid his wife's marital property claims, the court did not order the husband or his partner to return the cash (because it had already been spent) but instead allowed the wife to trace the funds into the resulting property and declared the wife entitled to a charge against that property in the partner's name, which could be registered in the land registry.

[171] In fact, some cases assert that treating the transferred property as exigible in the hands of the *transferee* for the benefit of the creditors is a sounder approach than making a "reversion" order revesting the property in the transferor (*Guthrie*, paras 19-24). On this theory, following satisfaction of the creditors' claims, any surplus remaining can and should remain with the transferee, since the transferee is entitled to retain the transferred property as against the transferor (*Guthrie*, para 21).

[172] This approach gives a certain latitude to the court to fashion a remedy that is appropriate in the circumstances once a transaction has been found to fall within the *FCA* as being one made with the intent to defeat, hinder, delay or defraud creditors. It also follows that although the general rule is to order a retransfer of the property to the original offending transferor, so as to make it available to *all* creditors – not just the claimant – that is not an invariable requirement.

[173] In the current case, the impugned transaction is the transfer of Mr. Murphy's shares in Paro and NuVision to Shoal at a significant undervalue. Upon a finding that the transfer of the shares was made with the intent to defeat, delay, hinder or defraud Ms. Murphy as a creditor of Mr. Murphy, a transaction in which the principal of Shoal was complicit, the traditional response would be to declare the retransfer of the shares into Mr. Murphy's name so that Ms. Murphy could satisfy her claims in whole or in part out of the value of those shares.

[174] The trial judge did not make such a retransfer declaration. Instead, he made Shoal jointly and severally liable, along with Mr. Murphy, Paro and NuVision, for all of Ms. Murphy's claims. For reasons explained earlier, however, there can be no justification for joint and several liability on the part of Shoal in respect of the matrimonial home, business asset (Section 29) and unjust enrichment claims. The question that remains is whether joint and several liability in respect of the business assets can be justified as a remedy under the *FCA* or some other basis such as fraud in equity.

[175] In the current circumstances, there would be problems with a remedial approach that involved a simple declaration that the share transfer is void. Since purporting to acquire the shares, Mr. King, through Shoal, has assumed control over the continued operations of Paro and NuVision. He has, for example, caused Paro to sell the Thorburn Lake and Florida properties. Unless the proceeds of sale of these properties were kept invested in Paro, as opposed to being spent in some other non-proprietary way or being transferred by way of

dividends or otherwise to the parent company Shoal, there is no guarantee that the Paro shares retained the value they had at the time of transfer. Further, other properties were contemplated being sold as indicated by the Order Pending Appeal. Although the net proceeds of these sales were to be held on trust pending further order, remaining non-real estate assets were not subject to the order. More generally, both companies, by being managed and operated at the direction of Shoal in the intervening years, would likely have changed in value, either upwards or downwards.

[176] The result is that if there were a retransfer of the shares at this time, the shares would not likely represent their original transfer value. Indeed, depending on inter-corporate restructuring or rearrangements involving Shoal as parent company, the shares may not have any value. If they are now of lesser or of no real value, Ms. Murphy would potentially be prejudiced. She would not have a remedy in keeping with the legislative purpose of the *FCA*. On the other hand, if the shares were of a greater value, Shoal would potentially be prejudiced by having to give back more than the value that had originally been transferred.

[177] In the special circumstances of this case, the better approach is to fashion a remedy, as the trial judge did, to make Shoal jointly and severally liable with Mr. Murphy with respect to Ms. Murphy's business asset claims. Even if this could not be achieved as a remedy under the *FCA*, it can, in my view, be accomplished by relying on the principles of fraud in equity. The findings of the trial judge bring the case equally within Lord Hardwick's fourth category of equitable fraud as stated in *Chesterfield v. Janssen*. It is an example of "fraudulent conduct affecting persons other than those who were parties to it". (G.W. Keeton, *An Introduction to Equity* (London: Sir Isaac Pitman & Sons Ltd., 6th Ed. 1965, p. 233), describing the principle underlying the *Chesterfield* fourth category). The agreement between Mr. Murphy and Shoal to put the business assets beyond the reach of Ms. Murphy, in which Shoal (through Mr. King), was complicit, clearly affected the position of a third part, Ms. Murphy. Mr. Murphy and Shoal, as the beneficiary of the transfer of the assets, should be liable to account to Ms. Murphy for the amount by which she was deprived as a result of the transaction.

[178] The circumstances here are akin to civil conspiracy for which co-conspirators are jointly liable (*Cruise Connections Canada v.* Szeto, 2015 BCCA 363 at paragraphs 43 and 45).

[179] By holding Shoal and Mr. Murphy jointly liable as a remedy for fraud in equity, it is not necessary to decide whether a similar result is an appropriate

remedy under the *FCA*. It is sufficient to say that the transaction that Mr. Murphy and Shoal engaged in with the intent to defeat, hinder, delay or defraud Ms. Murphy of her claims is sufficient to justify joint and several liability under principles of fraud in equity. While liability under the *FCA* may exist, the transaction – reversing remedy need not be invoked.

[180] I would only add that to the extent that Ms. Murphy is able to recover any portion of her claims in respect of business assets from Paro and NuVision, it would not be necessary to recover that portion from Shoal. Shoal would then only have to account for any remaining unrecovered portion.

[181] Mr. King and Shoal can hardly be heard to complain about a remedy that enables them to keep the shares and only give back an amount of which Ms. Murphy was deprived by Mr. King's complicity and then only to the extent that recovery cannot be obtained from other sources. Further, it appears that Mr. Murphy's trustee in bankruptcy has not sought to invoke the *FCA* on behalf of any remaining outstanding creditors of Mr. Murphy, if indeed any now exist. Accordingly, the need to protect any other creditors that might be present when a transaction is ordinarily attacked under the *FCA*, by ordering a complete reversal of the transaction, is not indicated in this case.

[182] Accordingly, I would affirm the trial judge's judgment against Shoal to the extent that he found Mr. Murphy and Shoal to be jointly and severally liable to Ms. Murphy in respect of her business asset claims.

(f) Valuations

[183] Because I have concluded that there is no basis for holding Shoal, Paro and NuVision jointly and severally liable for the total of all of Ms. Murphy's claim entitlements, as the trial judge did, it is necessary to place a value on each of her claims individually and to determine which defendant, beyond Mr. Murphy, should be required to pay each claim. I will deal with each in turn.

[184] Before discussing individual valuations, however, it must be observed that the matter of valuation is complicated here because the issue of valuation is being raised by the appellants, Shoal, Paro and NuVision, not Mr. Murphy. Though named as a party to this appeal, he did not make any submissions in support of the appellants. Further, in his notice of appeal filed in relation to his own appeal, which has not been perfected or proceeded with, Mr. Murphy did not raise issues of valuation with respect to the matrimonial homes. He limited his appeal relative to valuation to certain matters concerning the approach to

valuation of the business assets. What the appellants are attempting to do, therefore, is to attack collaterally certain findings made against Mr. Murphy in matrimonial proceedings in circumstances where he is not taking issue with them himself. Generally speaking, the issue of valuation of claims between spouses should be an issue between them. A third party ought not to be able to attack those valuations where to do so might have an adverse effect on one of the parties. This is a factor to be taken into consideration where discretionary decisions of the trial judge are now being questioned.

1. *Thorburn Lake and Florida Matrimonial Homes*

[185] Ms. Murphy is entitled as against Paro, as the former title holder, to a judgment for half the sale proceeds of the Thorburn Lake and Florida properties. She is also entitled to a constructive trust on the assets of Paro representing those proceeds that were received by Paro in respect of the sales. (As noted earlier, if the proceeds of sale were subsequently transferred to another party and she is not able to satisfy her claims from remaining Paro assets, she might also be entitled, to the extent she can trace the funds, to claim against the party to whom those funds were transferred, but that would have to be determined in a separate action).

[186] The trial judge valued Ms. Murphy's entitlement to half of the value of these two properties as contained in a document, entered as Exhibit A.M. #5 at trial, prepared for Mr. Murphy in the spring of 2013 in the context of an approach by him to Ms. Murphy to work out an arrangement with her relative to the assets that had been accumulated during the marriage. He effectively treated the exhibit as an admission by Mr. Murphy as to value at the time of its preparation.

[187] The appellants submitted that the trial judge erred in treating A.M.#5 as an indication of true value. They point out that the document was prepared as an attempt by Mr. Murphy to save the marriage and was never an acceptance by Mr. Murphy that the values stated were intended to represent true fair market values.

[188] The judge valued the equity in the Thorburn Lake property at $181,899 (the declared value of $325,000 on A.M.#5 less outstanding mortgage of $143,100.44) and declared Ms. Murphy's entitlement to half the equity in the property to be $90, 949.78. However, the property was subsequently sold by Paro for $350,000. The sale, presumably at a fair market value, is a better indicator of the value of the property especially since it was later in time. No

appraisals were needed in these circumstances. As noted by Cameron J. in *Ridler v. Ridler* (1984), 51 Nfld. & P.E.I.R. 19, value on disposal is generally the best evidence on division of the matrimonial home. The valuation process having been put in issue by the appellants, adjustments can be made upwards or downwards even though Ms. Murphy did not cross-appeal. However, information is lacking about the mortgage balance at the time of sale. Presumably it was lower, thereby increasing the equity value. On the other side of the ledger, in the normal course there would be expenses of sale, such as real estate and legal fees that would come out of the proceeds, thereby reducing the equity. In the absence of evidence of these offsets, the fairest thing to do would be to determine the equity by deducting the higher mortgage balance as stated on A.M.#5 from the actual sale price and make no allowance for assumed transaction closing costs, on the not unreasonable assumption that the increase in equity that would have occurred from the deduction of the lower mortgage balance would be roughly offset by the transaction costs.

[189] On this analysis, Ms. Murphy's half interest in the equity in the Thorburn Lake property would be higher than that calculated by the trial judge: $350,000 less $143,100 = $206,900, with Ms. Murphy's half being $103,450.

[190] A similar analysis can also be made in respect of the Florida property which was sold in 2013 for $185,000. In this case, however, the sale price was less than the value on A.M.#5 and there was no mortgage balance. It can be assumed, however, that transaction costs would come out of the proceeds. There was some evidence that selling costs in the amount of $2,929 U.S. were incurred. Deducting the Canadian dollar (at a rate of $1.313) equivalent of $3,846 from the sale price would leave $185,000 less $3,846 = $181,154, half of which would be $90,577.

[191] On these calculations, Ms. Murphy's entitlement against Paro to half the equity in the two properties concerned would be $103,450 (Thorburn Lake) plus $90,577 (Florida) = $194,027.

2. ***Huntley Drive Matrimonial Home***

[192] In the case of the Huntly Drive property, the title was held by NuVision. It was not sold as of the appeal hearing. The trial judge ordered that Ms. Murphy could buy NuVision's interest in the home. For reasons given earlier, that was an acceptable order to make.

[193] The issue of valuation in this context, therefore, relates to establishing the amount which Ms. Murphy should have to pay to NuVision to acquire the other half interest. The appellants in this case take issue with the manner in which the trial judge established the purchase price. They say that it was inappropriate to use the value declared in exhibit A.M.#5, which the trial judge relied on, as it was dated. The value should be determined, they say, as at the time of transfer of title, which has not yet occurred.

[194] In *Gosse v. Sorensen-Gosse*, *supra.*, this Court expressed the view that in exercising discretion to order one spouse to sell his or her half interest in a matrimonial home to the other spouse, the trial judge should strive to achieve a result that is "reasonably consistent" with the public policy objective stated in section 5(b) of the *Family Law Act* of giving a half interest in the matrimonial home to each spouse (paragraph 32). That would mean that the court should employ a process that would "ensure that the transferring spouse received an equal share of the fair market value of the matrimonial home at the time of transfer" (paragraph 35). Since the fair market value of property is subject to change over time, achieving the statutory objective of equality between the spouses requires the judge to give consideration to the probable result, in terms of market value, at the likely point in time when the order being made will be implemented (paragraph 36). The Court held that the trial judge in that case erred in the exercise of her discretion by failing to consider the impact of the fact that the appraisals she relied on were 20 months out of date by the time the buy-out order was made. Wells J.A. concluded:

> [43] … the UFC judge erred in law by failing to exercise her discretion in a manner that would ensure compliance with the requirements of the *Family Law Act*, to achieve a benefit for each spouse that is as close to equal as is practicable in the circumstances, in respect of the real value of the matrimonial home. In circumstances where, instead of the property being sold to a third party one of the spouses is to acquire it, and there are stale appraisals, a trial judge should order valuation as at the date of the anticipated transfer of title if one of the parties requests it and there is some indication of, or potential for, significant change of value.

[195] To like effect, see also *Hudson v. Simoni*, 2017 NLTD(F) 6, 2017 CarswellNfld 51.

[196] In practical terms, the actual completion of transfer of the property may often take place months following the trial and release of judgment ordering the transfer. If rigidly applied, that would require a new appraisal of the property at or near the transfer date almost as a matter of routine in order to determine a transfer price that would ensure that that each spouse will share equally in the

current value of the home. The resulting transfer price may well be lesser or greater than values assigned at an earlier time, depending on the vicissitudes of the market in the meantime. The principle expressed in *Gosse*, however, has a degree of flexibility built into it. It operates where "one of the parties requests it" and "there is some indication of, or potential for, significant change of value". Further, it is clear that exactitude is not being sought; the result should be only as close to equal "as is practical in the circumstances."

[197] In the current case, the Court was not pointed to any indication in the appeal record that Mr. Murphy or NuVision requested a further appraisal at the time of transfer. Indeed, Mr. Murphy did not make this an issue in his notice of appeal. Furthermore, the appellants did not point to any evidence in the record that gave an indication that the real estate market in the Clarenville area had strengthened since 2013. Based on perceptions of the market in the province generally, if anything the market may well have declined, thereby reducing the amount that Ms. Murphy would have to pay to acquire NuVision's half interest (See. e.g. the affidavit of Stephanie Butt sworn July 27, 2016 and filed in relation to the Order Pending Appeal, paragraph 12: "… the real estate market for both residential and commercial sales and rentals in the Clarenville area is experiencing a downward trend…"). In these circumstances, even if the trial judge could be said to have erred in not addressing the possibility of ordering a further appraisal, I do not think it necessary to put the parties in this acrimonious and expensive dispute to the further expense of a new appraisal at the time of transfer of title to Ms. Murphy, especially where Mr. Murphy is not seeking it and there is no real indication in the record that NuVision would be likely to receive more for its interest.

[198] Accordingly, I would not set aside the trial judge's order or his valuation of a half interest of $56,309.

3. *Business Assets – Section 29*

[199] The trial judge valued the business assets, represented by Paro and NuVision, compendiously at $2,542,241.58 (excluding the three matrimonial homes) and concluded that the nature and extent of Ms. Murphy's contribution to the acquisition, management, maintenance, operation or improvement of those assets justified an order of compensation equal to 20% of the value of the business assets.

[200] Strictly speaking, the business assets in this case were the shares in Paro and NuVision, not the specific assets on the companies' balance sheets.

However, in a closely-held corporation where there is no general market for the shares, awarding a proportion of the shares to a separating or divorcing spouse, thereby perpetuating a fractured relationship, will often not be indicated (see *Hart (No. 2)* per Cameron J. at para. 25). Further, the valuation of those shares would generally have to be undertaken by reference to net asset values or income stream analysis rather than by searching for some hypothetical fair market value (*Hart v. Hart (No. 3)* (1986), 60 Nfld. & P.E.I.R. 287 at para 288).

[201] Under section 29 of the *Family Law Act*, the judge had a discretion either to award compensation to the contributing spouse instead of awarding a share of the interest of the other spouse in the assets. The trial judge referred to case law which indicated that a compensatory award is generally but not invariably indicated where the contribution is small relative to the other spouse's or where the claiming spouse did not take a significant role in the management or operation of the business (*Snook v. Snook*, 2010 NLCA 57; *Dobbin v. Dobbin*, 2009 NLUFC 11, 284 Nfld. & P.E.I.R. 6). The judge found, however, that Ms. Murphy's contribution was "quite significant" though not as extensive as Mr. Murphy's (paragraph 121). He observed that "Mr. Murphy regarded Ms. Murphy as so significant to his businesses that he actively petitioned her to return to them" (paragraph 120). Notwithstanding the significance of the contribution, however, he opted for a compensatory award over a share of the assets themselves:

> [125] I award Ms. Murphy twenty percent (20%) of the business assets that Mr. Murphy owned through the shares he held in Paro Enterprises and NuVision Foods when the parties separated. However, I would quantify Ms. Murphy's interest in those assets and convert her interest to fixed compensation, which is more appropriate in this case. …
>
> (Emphasis added.)

[202] It was necessary, therefore, for the judge to place a value on the subject companies in order to calculate the 20% to which he felt Ms. Murphy was entitled as compensation. In doing so he relied on exhibit A.M.#5 which listed values of each of the companies' property holdings, the balance of the mortgage financing and calculations of net equity. No appraisals of these properties were put in evidence. Nevertheless, the trial judge expressed confidence in relying on A.M.#5 for the purposes of valuation.

[203] The appellants take issue with this approach on a number of grounds. They say that the exhibit, which was prepared by an accountant, was not intended by Mr. Murphy to represent fair market value of the companies'

properties but as a document designed to persuade Ms. Murphy to continue to be involved in the enterprises by giving her "the best picture possible" so that they could work as partners to save the businesses. He testified that it did not contain a complete statement of all the indebtedness of the companies. Furthermore, the accountant testified that the companies were effectively worthless. Mr. Murphy also testified that the companies owed $941,500 to Shoal and that justified his sale to Shoal at a nominal value because that was all the companies were effectively worth.

[204] The trial judge considered the evidence and submissions relative to the alleged indebtedness of the two companies to Shoal and rejected them. Amongst the reasons he gave for rejecting of the Paro/NuVision-Shoal indebtedness were his poor view of Mr. Murphy's credibility, the lack of reference to the indebtedness on A.M.#5 or on the companies' financial statements, the lack of detailed knowledge on Mr. Murphy's part as to how the indebtedness was documented, the lack of a paper trail for the alleged advances, the lack of evidence that the companies were behind in their mortgage payments and the fact that Mr. Murphy had never advised Ms. Murphy that the companies were in any financial difficulty. In the end, the judge found the evidence relating to the companies' "dire finances" to be "conspicuously unconvincing" (paragraph 78). He concluded:

> [137] The parties had some personal debt and Mr. Murphy may have had some actual or contingent tax liabilities but none of their financial obligations were unmanageable. Yet, Mr. Murphy forsook all of their abundance by selling his shares in Paro and NuVision to Shoal Investments at token values, claiming "dire financial circumstances" as justification. In short, I am more than skeptical; I do not believe his claims that they were indigent.
>
> …
>
> [139] There is a more rational explanation for what Mr. Murphy did and it is the one I accept: He acted strategically to put his matrimonial and business assets beyond Ms. Murphy's reach.

(Emphasis added.)

[205] The trial judge, finding Mr. Murphy's credibility, his evidence and his explanations wanting, and concluding that Mr. King, through Shoal, was "complicit", made clear findings of fact that do not disclose any palpable or overriding error. He was justified in the circumstances to rely on A.M.#5 for the purposes of valuation and to disregard the protestations of Mr. Murphy that it did not properly represent the value of the company and to conclude that "there

is practically no recognizable debt that Mr. Murphy has proved against the companies" (paragraph 143).

[206] These findings of the trial judge extend to other suggestions of debt made by Mr. Murphy. In addition to the $941,500 debt, which was allegedly incurred to enable the companies to buy certain real estate, Mr. Murphy had also asserted other indebtedness by the companies to Shoal totaling $158,404, apparently incurred the day Shoal acquired Mr. Murphy's shares in Paro and NuVision. These included charges for things like snow-clearing in July, which is a bit of a stretch even in Newfoundland and Labrador. The judge was entitled in the circumstances to reject this evidence.

[207] The appellants also argue that the judge should, nevertheless, have not attempted a valuation of the companies on the basis of asset valuations. Instead, they say, he should have considered assigning a share value on the basis of a cash flow analysis, as was suggested by Michael Power, Shoal's accountant. The judge considered this alternative basis for valuation and rejected it:

> [147] Overall, nothing that either Mr. Murphy or Mr. Power put forward in their evidence convinces me that Paro Enterprises or NuVision Foods were so burdened with debt that their shares were worthless. Mr. Power said that he formed his opinion that the companies were worth nothing because their cash flow was so deficient.
>
> [148] I do not accept the companies had no value even on that basis; but asset value not cash flow is a more appropriate method to value these companies because they are investment companies, heavily into residential and commercial leasing and are "asset-heavy".

[208] The trial judge was entitled to approach the valuation in the way that he did. In *Hart (No. 3)*, Cameron J. observed at p. 288:

> The assets approach is generally used where the hypothetical purchaser is really looking at the company's underlying assets and not to the shares *per se*. This method may also be appropriate where the business is being valued as a going concern, but not earning an adequate return on its invested capital. A determination of a liquidation value is an asset approach. In part that is the approach used [by one of the expert valuers]. However, he has omitted to make reference to certain tax and phase down costs which would be the result of liquidation.

[209] That approach is applicable here, although the judge did not appear to consider whether there ought to have been any adjustment to account for hypothetical liquidation and other incidental costs associated with the real estate portfolio held by the companies.

[210] Although the judge did not explicitly rely on this point, I would add that Mr. Power's evidence that there was effectively no cash flow from the companies was predicated on his assumption that the companies owed over a million dollars to Shoal and had to service that debt. In view of the judge's conclusions that this debt could be disregarded, the evidentiary platform for Mr. Power's opinion is undermined in any event.

[211] Thus, the judge was entitled to place a net asset value on the property assets of Paro and NuVision by reference to A.M.#5. In doing so, he also disregarded certain other indebtedness listed on the exhibit and did not deduct it in the course of his calculations. He took this approach because he concluded that it effectively was personal debt and not related to the businesses. In the circumstances there was no palpable and overriding error disclosed by his doing so.

[212] Finally, the appellants also submitted that the valuation placed on the services provided by Ms. Murphy ($508,448) was too high (and thereby undermined the asset value approach adopted by the trial judge) because there was clear evidence, including acknowledgements from Ms. Murphy herself, and a finding by the trial judge that she had "had little to do with" (Judgment, paragraph 95) and therefore made no significant contribution to, two Clarenville properties owned by Paro, a 20-unit apartment building at 9 Country Road (net asset value of $486,615) and a four-unit apartment complex at 23 Marine Drive (net asset value of $75,679). Accordingly, the appellants say, this was an "egregious example" of the judge's failure to carry out a proper valuation and to "award Ms. Murphy a 20% interest in" those two properties (Appellant's factum, paragraph 106).

[213] This argument is misconceived. The decision of the judge was not to award an interest in each specific asset held by Paro but to compensate Ms. Murphy by awarding her an amount in compensation *equivalent to* a percentage of the value of <u>all</u> assets held by Paro. This did not require a one-to-one correspondence between the contribution and each asset contained in the Paro portfolio. The services were rendered to the company as a whole. It is the contribution to the business operations, not particular properties, that is relevant in circumstances where the business asset is the company as a whole rather than a single specific asset. Although it was a roundabout way to value services rendered, there was nothing wrong in the judge valuing those services as *equivalent* to a percentage of the value of the asset portfolio of the company.

[214] There are some who might object that the resulting approach employed by the trial judge, which did not consider liquidation and other incidental costs in the asset valuation, and valued services as a percentage of asset value as opposed to quantifying the extent of the services themselves and applying a unit value to them, effectively used a "broad sword rather than a scalpel" in arriving at value. It must be remembered, however, that the method of calculation of the amount to which a contributing spouse is entitled under section 29 is in the end an inexact science and the judge must make do in many cases with imperfect information. As Cameron J. noted in *Hart (No. 2)*, "it is the nature of claims under s. 27 [now s. 29] that rarely will the contribution be able to be measured with precision" (para 25). Similarly, Welsh J.A. in *Snook* has more recently stated: "determining a proper award [under s. 29] is an imprecise exercise". In *Snook*, the award made was essentially of an impressionistic nature (as it must be when dealing with contributions that are sometimes intangible in nature) and amounted to the Court fixing on a figure that it felt fairly and broadly represented appropriate compensation.

[215] Accordingly, given the nature of the evidentiary record and the findings of fact made by the trial judge, there is no basis for valuing the companies as essentially worthless or for setting aside the valuation arrived at. Thus the valuation of the companies at $2,542,241 and calculating the amount by which Ms. Murphy should be compensated at 20% of that amount ($508,482) must stand.

4. ***Business Assets – Unjust Enrichment***

[216] As noted earlier, the award of compensation to a spouse under section 29 for contribution to acquisition, management, maintenance, operation or improvement of a business asset must be made against the other spouse. I have concluded, nevertheless, that Ms. Murphy can also maintain claims directly against Paro and NuVision on the basis of unjust enrichment for the value received by them as a result of the services provided by her to them. However, the manner of valuation of the claims is of necessity different. They cannot be globally determined as the trial judge did with respect to the section 29 claim. That is because claims can only be made against the entity which was the recipient of the enrichment. The problem in this case is that differentiating the value that has been conferred on Paro, as opposed to NuVision, is difficult to do on the appeal record. One cannot quantify the amount of work performed by Ms. Murphy separately for each of the companies nor, even if one could quantify it, is there any evidence as to a valuation method, such as an hourly rate for the time spent on each company, that would enable one to value the

enrichment conferred on each. Indeed, in respect of some of the services provided, they may have conferred benefits on both.

[217] Recognition of this problem does not necessarily lead to the conclusion that the claim must be dismissed. The unjust enrichment claims here are in the nature of *quantum meruit* claims. The case law recognizes, just as in the case with respect to section 29 claims, that the court will often have imperfect information and in order to do rough justice it may have to try to fashion a remedy out of what is at its disposal. In *Way v. Latilla* [1937] 3 All E.R. 759, for example, where the claim was on a *quantum meruit* basis for the value of services rendered by the appellant in introducing certain mining concessions for acquisition by the respondent, it was held, in the absence of proof of a concluded contract for remuneration, that the appellant was nevertheless entitled to a reasonable remuneration for the benefits conferred on the respondent. Addressing the problem of how to fix remuneration in circumstances where the evidence was imperfect and the nature of the services themselves were hard to value, Lord Wright stated at p. 766:

> … the question of the amount to which the appellant is entitled is left at large and the court must do the best it can to arrive at a figure which seems to be fair and reasonable to both parties, on all the facts of the case. … The precise figure can only be a rough estimate. If what the court fixes is either too small or too large, the fault must be ascribed to the parties in leaving this important matter in so nebulous a state. But, forming the best judgment I can, I agree with your Lordships that the figure to be awarded for the appellant should be L5000 …
>
> (Emphasis added.)

[218] This approach has been applied in Canada at the appellate level: *Hugh's Contracting Ltd. v. Stevens* 2015 BCCA 401, 381 B.C.A.C. 33; *Lou Petit Trucking Ltd. v. Petit*, [1990] 3 W.W.R. 252, 69 D.L.R. (4th) 258 (Man. C.A.).

[219] In the current case, we have the evidentiary findings of the trial judge that a fair value of the total services provided by Ms. Murphy was $508,482. Although this amount was arrived at by applying a percentage to the net asset value of the companies, the judge appears to have intended the resulting amount to be compensation for services rendered rather than a share of assets earned (paragraph 125). By fitting the award into subsection 29(a) of the *Family Law Act*, the judge was awarding her compensation for her contribution, i.e. the benefit conferred by her on the companies. Thus, the amount of $508,482 can be taken for present purposes as the total value of the services provided by Ms. Murphy to both companies.

[220] The remaining problem is to apportion that amount between the two companies. As noted earlier, the appeal record does not permit a quantification of the extent of the services rendered to one company as opposed to the other. In these circumstances, the fairest way to accomplish apportionment is to do so by reference to the relative size of the two enterprises that would have required and benefitted from Ms. Murphy's services. That can be roughly measured by comparing the net asset values of the two companies and apportioning the overall value of the services in proportion to those relative asset values.

[221] The total net asset value of Paro, as found by the trial judge was $1,628,856. The value for NuVision was $913,384. Comparing these two values, it can be seen that the relative asset values are 64% for Paro and 36% for NuVision.

[222] Applying this proportion to the total value of services of $508,482, it can be said for current purposes that Ms. Murphy's unjust enrichment claim against Paro should be 64% of $508,482 or $325,428. That would leave $183,054 for the claim against NuVision.

5. *The Potential for Double Recovery*

[223] Ms. Murphy should not, of course, be entitled to recover a section 29 claim against Mr. Murphy as well as separate unjust enrichment claims against each of Paro and NuVision. The trial judge attempted, in effect, to avoid such a result by the different process of making all of the liability of Mr. Murphy joint and several with Paro and NuVision (as well as with Shoal). Because there is no basis for declaring joint and several liability in the current circumstances, that option is not available.

[224] In ordinary circumstances, the issue would not normally arise because a section 29 compensation claim (as opposed to a share-of-assets claim) could be enforced against any of the other spouse's assets including but not limited to the business assets in respect of which the claims arose. In the current case, however, Mr. Murphy purported to transfer the business assets represented by Paro and NuVision to Shoal and thereby try to put them out of reach of Ms. Murphy. In this situation, I see no reason why Ms. Murphy should be required to attempt to recover under her section 29 claim against Mr. Murphy before proceeding against Paro and NuVision directly. She should be entitled to proceed to recover in any way she can. Anyone satisfying all or part of a judgment debt would then be subrogated to her claim against Mr. Murphy for the amount which was paid in satisfaction of that debt.

Summary and Conclusion

[225] The appellants, Shoal, Paro and NuVision sought reversal of the trial judge's order (i) requiring them, jointly and severally, to pay Ms. Murphy for her interest in the Thorburn Lake and Florida matrimonial homes; (ii) requiring Paro to convey the Huntley Drive matrimonial home to Ms. Murphy; (iii) requiring them, jointly and severally, to pay Ms. Murphy compensation for her contribution to the business assets represented by Paro and NuVision; and (iv) to pay costs.

[226] In the result, I have concluded that the judge erred in making all liability for the matrimonial home claims and the business assets claim joint and several amongst Mr. Murphy, Shoal, Paro and NuVision. However, I have further concluded that notwithstanding the transfers of the Paro and NuVision shares by Mr. Murphy to Shoal, there remains *several* liability on the part of Paro in respect of the claims for compensation for Ms. Murphy's interest in the Thorburn Lake and Florida matrimonial homes and in respect of unjust enrichment of Paro and NuVision for the benefits conferred on them. Further, I have concluded that NuVision remains liable to Ms. Murphy in respect of its obligation to sell its interest in the Huntley Drive matrimonial home to Ms. Murphy. Finally, I have concluded that Ms. Murphy can maintain a remedy against Shoal jointly and severally with Mr. Murphy to the extent that she is unable to obtain full recovery of her claims against Paro and NuVision. I have also adjusted some of the valuations associated with each claim.

[227] Accordingly, I would allow the appeal in part, set aside paragraphs 1, 2, 3 and 8 of the trial judge's order and substitute therefor the following provisions:

1. a. Paro Enterprises Limited and Rodney Murphy are jointly and severally liable to pay Annette Murphy $194,027 for her interest in the properties situate at Main Road, Thorburn Lake, NL ($103,450) and 7296 Marathon Drive, Seminole, Florida, USA ($90,577) and Annette Murphy shall, if requested, quit claim to the registered legal owner(s) of those properties her right, title and interest to them.

   b. Until paid, Annette Murphy shall be entitled to a constructive trust on the assets of Paro Enterprises Limited, including money held in trust by solicitors referred to in the Order Pending Appeal of this court dated July 28, 2016, to the extent of the money received by Paro Enterprises Limited for

the sale to third parties of the Thorburn Lake and Florida properties.

2. a. NuVision Foods Inc. (or the registered owner of the property) shall convey the property at 92 Huntley Drive, Clarenville, NL to Annette Murphy free and clear of any and all encumbrances, for which she forfeits any claim for compensation for her share of the equity in the property (valued at $56,309) and pays an additional amount of $56,309 for the remainder of the equity in the 92 Huntley Drive property.

   b. The obligation to pay the sum of $56,309 may be satisfied by the assignment by Ms. Murphy to NuVision of the sum of $56,309 due to Annette Murphy from Paro Enterprises Limited in respect of the obligation in paragraph #1.

3. a. Rodney Murphy shall pay to Annette Murphy the sum of $508,448 for her contribution under section 29 of the *Family Law Act* to the acquisition, management, maintenance, operation or improvement of the business assets of Paro Enterprises Limited and NuVision Foods Inc.

   b. Paro Enterprises Limited shall pay to Annette Murphy the sum of $325,428 and Annette Murphy shall be entitled to a constructive trust in an amount not exceeding $325,428 over monies representing sales of assets of Paro Enterprises Limited held by solicitors referred to in the Order Pending Appeal of this Court dated July 28, 2016.

   c. NuVision Foods Inc. shall pay to Annette Murphy the sum of $183,054 and Annette Murphy shall be entitled to a constructive trust in an amount not exceeding $183,054 over monies representing sales of assets of NuVision Foods Inc. held by solicitors referred to in the Order Pending Appeal of this Court dated July 28, 2016.

   d. To the extent that Paro Enterprises Limited and/or NuVision Foods Inc. satisfy the awards made in paragraphs 3b and 3c they shall be subrogated to the entitlement of Annette

Murphy against Rodney Murphy under paragraph 3a in the amounts paid by them.

e. Shoal Investments Limited and Rodney Murphy are jointly and severally liable to account to Annette Murphy in an amount up to $508,448 for any amounts not recoverable by Annette Murphy from Paro Enterprises Limited and/or NuVision Foods Inc. in respect of the obligations in paragraphs 3b and 3c.

[228] Paragraphs 4, 5, and 6 of the trial judge's Order should remain in force. Paragraph 8 of the order should be deleted. I would also add that because of the complex nature of the revised order, the parties should have leave to apply for directions and clarification of any matter dealt with.

[229] I would also observe that there may additionally be outstanding issues that remain to be dealt with arising out of the Order Pending Appeal of this court dated July 28, 2016 pertaining, amongst other things, to:

- disposition of proceeds of sale of properties formerly owned by Paro and NuVision and presently held in trust,
- the release of the *lis pendens* in the Registry of Deeds,
- an accounting with respect to mortgage payments, insurance costs and property taxes related to the Huntley Drive property together with the possible issue of occupation rent in relation thereto, and
- the determination of which of the appellants is to receive credit for the advance payment of $50,000 to Ms. Murphy. The parties should have leave to apply for directions regarding these and related matters.

[230] As to costs, the appellants sought a reversal of the costs order at trial (paragraph 7 of the Order) and claimed instead that they should have been entitled to costs at trial. They further sought costs against Ms. Murphy on the appeal. This, of course, was based on the assumption that they should have been successful at trial and on appeal in shedding any liability to Ms. Murphy and placing it solely on the shoulders of the bankrupt Mr. Murphy. Although they were successful in reversing the trial judge's finding of joint and several liability in respect of some matters, they were not successful in avoiding liability in a

substantial way. In that sense, Ms. Murphy was still substantially successful against the appellants.

[231] I see no reason why in these circumstances Ms. Murphy should not be entitled to her costs both at trial and on appeal. Accordingly, I would affirm paragraph 7 of the Order of the trial judge and would also award her party and party costs on the appeal calculated in accordance with Column 3 of the Scale of Costs.

J.D. GREEN J.A.

F.P. O'BRIEN J.A.