CITATION: Tsitsos v. Poka, 2021 ONSC 3418
COURT FILE NO.: CV-13-00494353-0000
DATE: 20210511

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Georgia Tsitsos, Haralabos Tsitsos and Steven Tsitsos	)	*A. Van Kralingen and K. Chau*, for the Plaintiffs/Defendants by Counterclaim
Plaintiffs	)	
	)	
– and –	)	
	)	
Kakouli Poka	)	*A. Habas*, for the Defendant/Plaintiff by Counterclaim
	)	
Defendant/Plaintiff by Counterclaim	)	
	)	
-and-	)	
	)	
Georgia Tsitsos and Haralabos Tsitsos	)	
	)	
Defendants by Counterclaim	)	
	)	
	)	
	)	
	)	**HEARD: September 21-25, 28-30, October 1-2, 2021**

VELLA J.

REASONS FOR JUDGMENT

I. OVERVIEW

[1] These proceedings arise out of a breakdown of a previously close, loving and trusting relationship between Georgia Tsitsos ("Georgia") and her sister Kakouli Poka ("Kakouli"), and their respective families.

[2] Georgia, the eldest, married Haralabos Tsitsos ("Bobby") and they immigrated to Thompson, Manitoba in 1988 when Georgia was pregnant with Steven Tsitsos ("Steven"). Kakouli, who had two children born in Greece named Lina Poka ("Lina") and Demitry Papasotiriou-Lateigne ("Demitry"), immigrated to Thompson in 1996.

[3] The sisters had a challenging childhood in Greece, particularly after the death of their father leaving their family impoverished. This mutual hardship forged a strong bond between Georgia and Kakouli.

[4] In the action, Georgia and Bobby seek a declaration for the allocation of the proceeds from the sale of a house municipally known as 41 Hill Crescent, Toronto, Ontario (the "Hill Property"), currently paid into the court, as amongst Kakouli, Bobby and Georgia, respectively. There is no dispute about the fact that they were all joint tenants on title, and each held an undivided one third ownership interest in this home. The Hill Property was eventually bought outright by Kakouli in 2017. In order to determine the allocation of the net sale proceeds, I must decide whether Kakouli obstructed the timely sale at a less than fair market value, and whether she ousted Bobby and Georgia on the breakdown of their relationship in 2013, and, if so, what remedies Bobby and Georgia are entitled to as a consequence. There are also related claims by Georgia, Bobby and Steven based in conversion concerning various goods and chattels left at the Hill Property that they claim ownership over including, notably, a Steinway & Sons Grand Piano.

[5] The counterclaim by Kakouli concerns whether Bobby and Georgia have been unjustly enriched by contributions (both monetary and in kind) allegedly made by Kakouli resulting in her being the beneficial owner of 50% of the shares in two businesses operating in Thompson, Manitoba. The businesses are owned by Bobby and Georgia and are called the Santa Maria Pizza and Spaghetti House Ltd. ("Santa Maria Pizzeria") and 3314910 Manitoba Inc. (the "Strand"), collectively referred to as the "Manitoba businesses". Put another way, are the Manitoba businesses a joint family venture within the extended family context?

[6] However, what this proceeding is really about is the legal effect of actions and unwritten understandings within a previously close extended family relationship that transpired over the course of approximately 20 years (1992 – 2013).

[7] It is a tragedy that these families have been torn apart over their diametrically opposed views as to what the other is "entitled" to under the law. They have turned to the court to resolve their disputes.

II. PRELIMINARY MATTERS

[8] This action proceeded by way of a summary procedure trial. For trial, affidavits were filed for each witness (the "trial affidavits") together with a joint book of documents. I permitted the parties to testify in chief for 15 minutes each and allocated ten minutes for the examination in chief of each of the non-party witnesses. Fulsome cross examination followed thereafter. In light of the nature of the procedure, the parties agreed there would be no re-examinations.

[9] The trial proceeded as a "hybrid" trial meaning that some of the witnesses testified in court (while respecting all COVID-19 court protocols), and some of the witnesses testified virtually. Each of the parties testified "live" in court.

[10] At the outset of the trial, the plaintiffs and the defendant each brought motions to strike approximately 130 paragraphs and exhibits from the trial affidavits. I reserved and released my ruling that evening.

III. ISSUES

[11] I will deal with the counterclaim first, followed by the action.

[12] At trial, Kakouli withdrew her claim based in breach of oral contract and confirmed that she is only pursuing the unjust enrichment claim.

[13] Therefore, the issues to be determined in the counterclaim are:

a) Have Georgia and Bobby been unjustly enriched at the expense of Kakouli? The unjust enrichment analysis will be informed by whether the Manitoba businesses are a joint family venture. This, in turn, will require an examination of the following factors:

   i. Did Kakouli transfer the sum of $150,000 to Georgia and Bobby in June 1992 with the mutual intent that she would become a 50% beneficial owner in the Manitoba businesses?

   ii. Were Kakouli's caregiving services provided for Steven to allow Georgia and Bobby to work full time at the Manitoba businesses and develop profitable enterprises with the mutual intent of Kakouli's efforts being recognized by way of a beneficial interest in these businesses?

   iii. Did Kakouli perform labour services at the Manitoba businesses, again with the mutual intent of Kakouli's efforts being recognized by way of a beneficial ownership interest in them?

b) If Kakouli has proven her claim based in unjust enrichment, what is the appropriate remedy:

   i. a proprietary remedy in the form of a constructive trust over a proportionate percentage of the shares in the Manitoba businesses and an accounting of profits, and/or

   ii. an award of damages?

[14] The defendants by counterclaim also raise the following issue:

a) Is Kakouli's counterclaim for unjust enrichment barred by operation of either the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, or the Manitoba *Limitations of Actions Act*, C.C.S.M. c. L150?

[15] The issues to be determined in the action are:

a) Did Kakouli wrongfully oust Bobby and Georgia from occupying the Hill Property on November 24, 2013 by changing the locks on the doors and the alarm system's code? If so, are they entitled to occupation rent or some other form of compensation?

b) Did Kakouli unjustifiably delay or obstruct the sale of the Hill Property, causing it to be sold for an amount below fair market value? If so, what is the measure of damages?

c) Has Kakouli wrongfully maintained possession, or disposed, of certain personal belongings that the plaintiffs say they own? If so, what is the appropriate remedy?

d) What is the correct allocation of the net sale proceeds from the Hill Property in the sum of $1,046,870.55 (plus accrued interest) currently paid into court and/or is an accounting remedy warranted?

IV. THE COUNTERCLAIM: Were the plaintiffs unjustly enriched?

i. Credibility

[16] As a preliminary note, my findings of fact will depend significantly upon an assessment of the credibility of the witnesses. By credibility, I mean an assessment of the veracity of what has been said, not the ability of the witness to accurately tell the truth. Aside from the passage of time, there are no reliability factors that featured prominently in my task of determining who was telling the truth and on what issues, with the exception of the evidence of Ioannis Papasotiriou.

[17] As the trier of fact, I can accept all, some or none of any particular witness' testimony.

[18] The essence of a credibility assessment is set out by O'Halloran J.A. in the frequently cited case of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his [or her or their] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[19] A further passage of *Faryna*, at p. 357, is particularly apt in this matter, "[t]he law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses."

[20] There are many factors a trier of fact must consider in assessing the credibility and reliability of witnesses and written evidence: see *Gray v. Brathwaite*, 2017 ONSC 1696, at para. 9,

citing *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178 (S.C.), for a helpful list of assessment factors.

[21] In the case before me, I considered various factors in assessing the veracity of the testimony of the various witnesses within the context of the evidence as a whole, including:

a) The internal consistency of the testimony; i.e., has a witness consistently told the same version of events over the course of time;

b) Whether there is any external evidence that either supported, or refuted, the testimony of the witness; i.e., the testimony of other witnesses, and/or documentary evidence;

c) Are there any factors that warrant a drawing of an adverse inference against the witness?

d) Was the witness forthright and candid, or evasive and non-responsive in the course of their testimony?

e) Did the witness appear to have selective memory?

f) Does the version of events testified make sense within the context of this extended family and their surrounding circumstances?

[22] The relevant factors I considered in assessing the credibility and reliability of the affidavit evidence included the following as found in *Gray*, at para. 9:

a) presence or absence of details supporting conclusory assertions;

b) artful drafting which shields equivocation;

c) use of language in an affidavit which is inappropriate to the particular witness;

d) indications that the deponent has not read the affidavit;

e) affidavits which lack the best evidence available;

f) lack of precision and factual errors;

g) omission of significant facts which should have been addressed; and

h) disguised hearsay.

[23] Throughout the evidence, on behalf of both sides, there were explanations for certain courses of action or inaction (particularly with respect to the lack of writing to evidence the alleged financial arrangements and other economic transactions), that were justified on the basis of Greek family values and culture. One must tread very carefully when taking such subjective factors into

consideration so as, in part, to ensure that no findings of fact are influenced by negative stereotypical perspectives. However, where there is common ground between the parties on a culturally informed perspective that is advanced as relevant to understanding the circumstances informing their relationship, as here, then it is appropriate to take that perspective into account in assessing the plausibility of the competing versions of events proffered.

ii. Unjust Enrichment and Joint Family Ventures

[24] I deal with the counterclaim first, since the events underlying this claim predates the purchase of the Hill Property and it also gives important context to the claims asserted in the action.

[25] At trial Kakouli framed her case in unjust enrichment. She seeks a declaration that a constructive trust was established over 50% of the shares of each of the Manitoba businesses. She also seeks an accounting of the profits of those businesses from the date they were purchased by Bobby and Georgia.

[26] The premise of the unjust enrichment claim and constructive trust remedy advanced by Kakouli is that the Manitoba businesses are effectively a "joint family venture", as defined by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269. In this respect, Kakouli asks this court to expand the concept of a joint family venture to an extended family situation.

[27] The accounting of profits is requested so that the court may determine whether Kakouli received her 50% share of the profits from 1992 to the present.

[28] Unjust enrichment is an equitable cause of action. In order to establish unjust enrichment, Kakouli must prove that there has been an enrichment of Bobby and Georgia, she has suffered a corresponding deprivation, and there is no juristic reason for the enrichment.

[29] There was no suggestion at trial that, should I find that there was an enrichment and corresponding deprivation, there was a juristic reason for the enrichment. Therefore, the analysis will only focus on the first two elements.

[30] Furthermore, remedies for unjust enrichment are restitutionary, and can result in either a constructive trust over proprietary interests, or a monetary damages award: *Kerr*, at para. 50; *McConnell v. Huxtabl*e, 2014 ONCA 86, at para. 36. Kakouli submits that a constructive trust was created over 50% of the shares currently held by Georgia and Bobby in the Manitoba businesses. No evidence was led to establish a monetary award valuing the shares and profits. While a monetary award is generally preferred, the current circumstances, if proven, would warrant a proprietary remedy since shares are a revenue generating asset, the Manitoba businesses are a going concern, and the shares are privately held. For the same reason, an accounting of profits and set off of the benefits realized by Kakouli would also be warranted.

[31] All parties placed considerable reliance on the Supreme Court of Canada's decision rendered in *Kerr*.

[32] *Kerr* involved family law disputes between common law spouses arising from two different appeals heard together. Both appeals dealt with the principles of unjust enrichment in a domestic relationship where at issue was whether a joint family venture had been established by the claimant spouse.

[33] The Supreme Court, at paras. 50-52, recognized that a minor or indirect contribution to the acquisition of property (and wealth in general) by one domestic partner is not enough to satisfy the unjust enrichment test. However, a direct contribution towards the acquisition of property, combined with an indirect contribution that enabled the property holder spouse to acquire the property, may satisfy the test provided the claimant demonstrates that the contribution constituted a "'sufficiently substantial and direct' link" to the acquisition of the property over which the constructive or resulting trust is sought. Furthermore, at para. 53, the extent of the trust over the property must be proportionate to the claimant's contribution.

[34] Important for this case, the Supreme Court, at para. 34, emphasized that the legal principles underlying unjust enrichment "must be applied in the particular factual and social context out of which the claim arises" and that courts "must apply those common principles in ways that respond to the particular context in which they are to operate." This is apt in the case at bar since Georgia, Bobby and Kakouli testified that in the Greek family culture, commercial and financial matters are not necessarily reduced to writing because there is no need to be formalistic in dealings amongst family and close friends. Another cultural value asserted by the parties was the importance of sharing as amongst extended family members.

[35] It is clear from *Kerr,* that a joint family venture primarily arises from a domestic spousal relationship in which one spouse focuses on the direct acquisition of wealth while the other spouse supports that endeavour through both direct and indirect (in kind) contributions. These contributions may include directing one's own financial resources to a common pool of resources, looking after the children, devoting "free" services to the enterprise, and foregoing employment and other income earning opportunities as a result. In these scenarios, the claimant spouse generally becomes significantly economically dependent on the property holding spouse because of those contributions and sacrifices.

[36] However, the doctrine of unjust enrichment is a remedial one that applies to relationships other than spousal relationships: see *Kerr,* at paras. 71-72. Therefore, in the event I find that there was no joint family venture, that does not, in and of itself, preclude a finding of unjust enrichment, though it will be very telling in this case as the essential factual elements are the same.

[37] In *Kerr,* at paras. 31-32, Cromwell J. stated:

> "At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit

> was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request. [Citations omitted.]
>
> Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788."

[38] Before applying the unjust enrichment analysis to a joint family venture, the court must first determine whether the business enterprise in question was truly a joint family venture. Cromwell J., at para. 89, identified the four elements indicative of a joint family venture, while noting that this framework is only a guide:

a. *Mutual effort*, such as the pooling of capital or income, collaborative efforts towards a common goal, the decision to have and raise children together, and the length of the relationship can all be indicators of whether the parties have formed a partnership and jointly worked towards the acquisition of property and wealth: at paras. 90-91;

b. *Economic integration* in the sense that the parties integrated their income, assets and expenses, and worked together towards a common goal for the benefit of the family unit at the expense of self-interest. Cromwell J. characterized this factor as "the degree of economic interdependence and integration that characterized the parties' relationship" combined with the priority of the family unit's welfare over that of an individual member's economic interests: at paras. 92-93;

c. *The actual intent* of the parties to treat an enterprise as a joint family venture. Actual intent is given considerable weight in joint family ventures and may be explicit or inferred by conduct: at paras. 94-97; and

d. *Family priority* as the paramount consideration in the organization of spousal efforts and resources is the fourth element. This refers to mutual decision making between the spouses in which one spouse makes sacrifices for the future financial welfare of the family unit to their own personal economic detriment: at paras. 98-99.

[39] The framework of analysis applicable to joint family ventures, as set out in *Kerr*, is a helpful way to assess the intersection of the lives of the Tsitsos and Poka families through the lens of unjust enrichment. These four elements assist in elucidating whether there has been an enrichment and corresponding deprivation, and whether a constructive trust remedy is appropriate.

[40] Cromwell J. also observed that the factors within the four-part test often overlap, as they do in the case before me.

iii. The Parties' Positions

[41] The burden of proof is on Kakouli to prove that there has been an unjust enrichment: see *Peters v. Swayze*, 2018 ONCA 189, at para. 9.

[42] Kakouli points to three main contributions to the acquisition and accumulation of the Manitoba businesses that prove they are a joint family venture in which Bobby and Georgia were unjustly enriched and that she suffered a corresponding deprivation.

[43] First and foremost, Kakouli places much emphasis on her alleged contribution of $150,000 that she says she gave to Georgia and Bobby to purchase the Santa Maria Pizzeria and, directly or indirectly through a reinvestment of profits from the pizzeria, the Strand. She argues that this was the direct contribution to the acquisition of the Manitoba businesses giving rise to an enrichment of Georgia and Bobby, and a corresponding deprivation on her part.

[44] In addition, Kakouli relies on the services she says she provided to the Manitoba businesses and her role as a primary caregiver for Steven as her indirect contributions in support of her position that these businesses were a joint family venture, and evidence that a joint family venture was intended.

[45] Kakouli submits that there is evidence that is consistent with her position that she is a 50% beneficial owner of the Manitoba businesses which she referenced as the "financial arrangement" in the pleadings:

a) the fact that Georgia and Bobby provided her with a steady stream of income as reflected on T-4s from the Manitoba businesses from 1997 to 2012;

b) her access to a joint bank account with Georgia into which Georgia and Bobby made deposits for various purposes, including Kakouli's and Steven's living expenses, and carrying costs associated with the various residential properties they bought commencing in 2005; and

c) putting her on title of the original property paid for by Georgia and Bobby, a condominium unit at 455 Sentinel Avenue in North York (the "Sentinel unit") and later the 322 Horsham Avenue property (the "Horsham Property"), even though she neither directly contributed monies toward the purchase price nor directly contributed to the carrying costs.

[46] Kakouli also heavily relies on two agreements she claims were made with Georgia as evidence of actual intent to establish the 50% beneficial partnership she had with Georgia and Bobby:

a) a 1998 written agreement in which the sisters agreed to leave their estates to each other (the "1998 Agreement"); and

b) a 2008 written agreement in which Georgia allegedly agreed to transfer her 50% share in the Manitoba businesses to Kakouli, thus formalizing the prior verbal understanding (the "2008 Agreement").

[47] Georgia and Bobby categorically deny that they discussed any opportunity with Kakouli for her to invest in the Manitoba businesses. They also deny receiving any money at all from Kakouli in or around 1992 to 1994 and deny there was any intent that she would become a partner or beneficial owner in the Manitoba businesses.

[48] Georgia and Bobby also deny that Kakouli's caregiving role with Steven was understood to be in exchange for Kakouli having a beneficial ownership interest in the Manitoba businesses. Rather, they all looked after each other's children over different periods of time, and it was convenient to Kakouli and to them that Kakouli would eventually move to Toronto with Steven.

[49] As for the income she received each year from the Manitoba businesses as reflected on the T-4s issued by those corporations, it is their position that this was a form of income splitting as was done for Steven, as they were financially supporting Kakouli and her children out of family love and affection. The same rationale applied to putting Kakouli on title of the various properties opening the joint bank account with Kakouli, and to Georgia's underlying intent in signing the 1998 Agreement.

[50] Georgia denies that she signed the 2008 Agreement or attended at a meeting at which this agreement was ostensibly prepared by Kakouli's son, Demitry.

[51] In short, Bobby and Georgia deny receiving any contribution, financial or otherwise, from Kakouli, towards the purchase or development of the Manitoba businesses, and deny that Kakouli meets the framework set out in *Kerr* for establishing a joint family venture.

[52] Accordingly, I must decide on the basis of the evidence in its totality who is telling the truth with respect to these key assertions of fact. This, in turn, required an assessment of the credibility of Bobby, Georgia and Kakouli, and their respective witnesses, within the context of the trial evidence as a whole.

iv. The First *Kerr* Element: Mutual Effort

Did Kakouli provide funds for the purchase of the Manitoba businesses?

[53] Kakouli claims that she provided the sum of $150,000 to Georgia and Bobby so that they could buy the Santa Maria Pizzeria from Bobby's father in June 1992. She claims that she obtained 24 million drachmas or the equivalent of $150,000 from her ex-husband, Ioannis Papasotiriou ("Ioannis"), and that she then provided Georgia and Bobby the sum of $150,000 through her then domestic partner, George Markopouliotis. Kakouli's evidence is that it was understood as amongst her, Georgia and Bobby, that in exchange for this direct financial investment, Kakouli would be a 50% beneficial owner of both the Santa Maria Pizzeria and, later, the Strand, in partnership with

Bobby and Georgia. She saw herself as a silent partner and understood from Georgia that she could not become a registered owner until she was a Canadian citizen.

[54] Kakouli's evidence was very general in terms of the discussions she indicated she had, primarily with Georgia, about this potential investment and partnership opportunity. Under cross examination Kakouli testified that the initial conversation was with Georgia and occurred in early 1992 by telephone – likely February or March – when she was still in Greece. She also testified that there was no discussion of how large her ownership interest would be but that she later assumed it would be 50% of the Santa Maria Pizzeria. She did not recall any specific discussion around the purchase of the Strand in 1994. However, she assumed it was purchased with the profits generated by the Santa Maria Pizzeria and reasoned that since she was a 50% owner, therefore the Strand purchase was partially financed by her share of the profits making her a 50% owner of that business as well.

[55] She also testified that within the Greek family tradition and culture, everything is shared and that is what she did with her sister by arranging to acquire the funds and then sending them to her. She added that she implicitly trusted her sister.

[56] Kakouli testified that she knew what the purchase price was but did not discuss with Georgia what she and Bobby actually needed to buy the Santa Maria Pizzeria or how the balance would be financed. Rather Kakouli just tried to get as much as she could from her ex-husband, Ioannis, and was happy when he agreed to advance 24 million drachmas to her. At the time, in 1992, 24 million drachmas translated into approximately $150,000.

[57] In support of her claim, Kakouli tendered the affidavit of Ioannis and he was called to testify. The objective of this evidence was to provide confirmation as to the transfer of 24 million drachmas to Kakouli. His affidavit was written and sworn in English, however, he required an interpreter in order to testify. Under cross examination, Ioannis admitted that someone had verbally translated the English affidavit into Greek for him word for word. He did not know the identity of the person who translated the affidavit, except to say that it was not his lawyer. Ioannis admitted he had a problem reading English and that he had not spoken to English speaking people for many years. There was no certificate of translation accompanying the affidavit.

[58] The plaintiffs objected to the admission of the affidavit and testimony into evidence. In the absence of a certificate of translation, and based on Ioannis' admissions, I had no confidence that Ioannis knew what he was attesting to at the time he swore the affidavit or that the affidavit had been properly and accurately translated to him. Accordingly, I struck the affidavit and ruled Ioannis' testimony was inadmissible pursuant to, or by analogy to, s. 125(2)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and on the basis the affidavit and his the resulting testimony was unreliable. The affidavit should have been prepared in the Greek language, and then translated into English and certified by an affidavit of the translator.

[59] Furthermore, Kakouli's version of having secured a large sum of money from Ioannis did not stand up to scrutiny. Kakouli's evidence was that she had a very acrimonious break up with

Ioannis requiring much litigation. She confirmed that Ioannis, whom she said was a billionaire in terms of drachmas, refused to pay his modest child support for years forcing her to take him to court.

[60] Kakouli also produced a child support agreement between herself and Ioannis dated June 17, 1992. The timing of the agreement is notable as it coincides with the timing of the alleged advancement of 24 million drachmas by Ioannis to Kakouli and the purchase of the Santa Maria Pizzeria. This agreement sets out Ioannis' obligations with respect to child support obligations for Lina and Demitry from July 8, 1988, to July 31, 1994. The total amount of drachmas payable under this "private agreement" (as it is styled) was in the approximate range of 3,700,000 drachmas. This is well short of the payment of 24,000,000 drachmas alleged to have been paid by Ioannis to, according to Kakouli, secure her and their children's future.

[61] The explanation given by Kakouli for the lack of documentation regarding the alleged payment of 24 million drachmas is that Ioannis did not want to be associated with the payment for fear of attracting government attention in Greece. However, it does not make sense that Ioannis, whom Kakouli described as the cause of an acrimonious break up which included violence, whose delinquency in paying child support required her to pursue legal recourse, and whose lawyers required the June 17, 1992 agreement for Ioannis' tax purposes, would suddenly be prepared to hand over 24 million drachmas on Kakouli's mere request, and without any documentation evidencing that this money would go to buy a partnership interest in the Santa Maria Pizzeria.

[62] Georgia produced a 1985 certificate from a Greek tax office for a court proceeding which certified that Ioannis' net income was 353,250 drachmas. This document was obtained by Kakouli and provided to Georgia. This document was not objected to, nor cross examined upon, on behalf of Kakouli. Kakouli deposed that the tax certificate understated Ioannis' income and was, in any event, time limited. However, the document casts further doubt on Kakouli's claim that Ioannis was a "billionaire" in terms of drachmas.

[63] Lina gave evidence on this point. She testified that she overhead a conversation Kakouli had on the telephone with her aunt, Georgia, in 1992, in which her aunt told Kakouli that she would be a 50% owner of the pizzeria. She testified that she heard both sides of the conversation because she was on a telephone extension line. However, on cross examination she was confronted with her affidavit in which she deposed that she only heard her mother's side of the conversation and based her belief on that and what her mother told her afterwards. Lina then became argumentative with counsel concerning the wording of her affidavit. However, she did not mention being on a telephone extension and overhearing Georgia's side of the conversation in her affidavit, and this would have been an important fact to have included. Furthermore, Lina's testimony contradicts Kakouli's evidence that it was only later that Kakouli came to believe that she was a 50% beneficial owner. In 1992, there was no discussion about percentage ownership.

[64] Lina also testified that she saw the 24 million drachmas, which was a huge sum of money, and that it was in a business type brown bag. When pressed to provide a better description of what she saw, again she became combative. She did not describe the brown bag as a suitcase, contrary

to Kakouli's testimony. She testified that she saw the money when her mother and George Markopouliotis brought it home and she does not know what happened to it thereafter. She testified that she did not, understandably given her young age, have anything further to do with the money. She also testified that she had conversations with her father about the money but did not provide specifics. However, the statements attributed to Ioannis are hearsay and I attach no weight to them.

[65] Finally, when Lina was asked how much she loaned to her mother to open a furniture store (in 2010) in Toronto, Lina could not remember how much she loaned to her mother or any of the particulars of this more recent event. This appeared to be an example of selective memory.

[66] I found Lina's evidence on this issue to be unpersuasive.

[67] Demitry did not provide helpful evidence on this point as it was largely hearsay based on statements made by his father, Ioannis. His evidence was that he had spoken with his father about the 24 million drachmas and that he understood the money was provided to make up for the lack of timely child support. He testified that, as a young boy, he was excited about the prospect of owning a pizzeria.

[68] Kakouli's spouse, Wasiem Diab ("Wasiem"), also gave evidence on this issue. Likewise, his evidence was unhelpful and largely consisted of statements made to him by Kakouli after the alleged financial contribution was made. As such, his testimony on this issue violates the rule against oath helping and is not entitled to any weight.

[69] Kakouli testified that she was aware of the involvement of George Mavridis ("Mavridis") as a partner in the Santa Maria Pizzeria and assumed that her contribution would be used by Bobby and Georgia to purchase their share of that business. She became aware of Mavridis' intention to sell his share of the Santa Maria Pizzeria in 1994 and believes that Georgia bought out his shares from the profits of the pizzeria and that 50% of those profits belonged to her.

[70] Of importance, Kakouli specifically withdrew from her trial affidavit an exhibit that purported to be her bank account record evidencing a deposit and withdrawal of 24 million drachmas in and around May 1992. The bank account was identified by bank account number from Xiosbank in Athens, Greece. Xiosbank was later acquired by Piraeus Bank. In addition, Kakouli withdrew her second supplementary trial affidavit explaining the document that her friend, Bassem Kirollos (a witness at trial), located with her bank account number on it, and the affidavit of the Greek lawyer who allegedly obtained the subject Greek bank statement. Kakouli's explanation for these last-minute withdrawals was that she was concerned that the plaintiffs' objection to their admissibility would cause an adjournment of the trial. I find this to be an unsatisfactory explanation. The transfer of the 24 million drachmas featured prominently in this trial and is clearly a critical factual element underpinning Kakouli's claim based in unjust enrichment. Without being able to establish this alleged direct financial contribution to the Manitoba businesses, Kakouli's claim is seriously undermined.

[71] Furthermore, Georgia deposed that the same bank account that Kakouli claims to have used was in fact Georgia's account. This bank account was not opened until November 1992 and is supported by email correspondence between Georgia and a bank employee from the Piraeus Bank tendered in evidence. This is well after the June 1992 purported advancement of funds by Kakouli through George Markopouliotis. Georgia was not cross examined on this issue, and Kakouli offered no evidence other than her testimony to refute Georgia's evidence on this critical matter.

[72] The plaintiffs ask that I draw an adverse inference against Kakouli for having withdrawn the bank records and her lawyer's letter. The withdrawal of the records combined with the inadmissibility of Ioannis' evidence leaves a gaping hole in Kakouli's case. I am drawing an adverse inference and in any event accept Georgia's evidence that the bank account in question was not opened at the time Kakouli alleges, and, further, that it was Georgia's personal bank account.

[73] Bobby and Georgia offer a different narrative of the events leading to their purchase of the Manitoba businesses.

[74] It is uncontested that Bobby's father immigrated to Canada from Greece in 1962. In 1976, Bobby's father started a restaurant business in Thompson, Manitoba which came to be known as the Santa Maria Pizza and Spaghetti House. He catered to the local mining projects in and around Thompson.

[75] In 1988, Bobby and Georgia immigrated to Canada and began working at the father's pizzeria restaurant.

[76] In 1992, Bobby's father needed money due to tax-related issues and offered to sell the pizzeria to Bobby for $425,000. As Bobby did not have the money to buy the pizzeria, he reached out to his "close" friend, George Markopouliotis. Mr. Markopouliotis had been Bobby's best man at his wedding and was in an intimate relationship with Kakouli.

[77] According to Bobby, George Markopouliotis offered to send $200,000 USD. This loan was sent as follows: $25,000 USD on May 14, 1992, $75,000 USD in May 1992, and $99,973 USD ($100,000 USD less bank charges) on June 23, 1992. Two bank drafts evidencing the first third installments were entered into evidence and were sent from Paris, France. There was no documentary evidence of the second installment. Markopouliotis confirmed this version of events.

[78] In the meantime, Bobby had already approached Mavridis, a businessman in Thompson, to see if he would be interested in going into the pizzeria business with Bobby. Mavridis agreed and had committed to buying a 50% interest in the pizzeria restaurant with Bobby, as co-owners.

[79] Bobby testified that he had accepted the money from George Markopouliotis ("Markopouliotis") but didn't need all of it because he had already committed to Mavridis. He kept the money at Markopouliotis' insistence and only used approximately $20,000 of it towards the purchase of the Santa Maria Pizzeria. He testified that he returned the money in installments

provided to Markopouliotis in cash and to Markopouliotis and his cousin by bank drafts. The full amount was returned by 2000.

[80] Georgia attached two wire transfers from her in the sum of $50,000 USD payable to Dimitrius Markopouliotis dated May 11, 1993 and the other in the sum of $35,000 USD payable to George Markopouliotis dated October 6, 1993 in support of her and Bobby's testimony that they repaid Mr. Markopouliotis.

[81] According to Bobby, and confirmed by Mavridis at trial, the purchase price of $425,000 was financed as follows:

i. $100,000 came from Bobby (comprised of $80,000 from their personal savings and the remaining $20,000 from Markopouliotis' loan);

ii. $100,000 came from Mavridis;

iii. $200,000 came from a loan provided on June 16, 1992 from the Federal Business Development Bank ("FBDB"); and

iv. The remaining $25,000 was paid to Bobby's father later from the pizzeria's business revenues.

[82] Mavridis decided to sell his 50% share in the Santa Maria Pizzeria. On June 30, 1994, Mavridis sold his share to Georgia for $120,000. With the sale, Georgia assumed Mavridis' liability under the FBDB loan agreement. Mavridis also confirmed this chain of events.

[83] The following documents were tendered in evidence without objection:

i. Articles of Incorporation showing that the Santa Maria Pizzeria was incorporated on June 17, 1992;

ii. Corporate resolution from the Santa Maria Pizzeria dated June 17, 1992, confirming that Mavridis signed an agreement of purchase and sale dated June 2, 1992, for the purchase of the assets of Bobby's father's pizzeria (unincorporated) business, and that the agreement of purchase and sale was assigned to the Santa Maria Pizzeria. The two shareholders are shown as Bobby and Mavridis.

iii. Corporate resolution from the Santa Maria Pizzeria accepting assignment of the loan secured by Mavridis from the FBDB in the sum of $200,000. Attached to the resolution was a copy of the executed loan agreement with FBDB, and a payment schedule evidencing an initial payment, and then equal monthly payments over the next 120 months at the interest rate of 10.25%;

iv. Notice of Change of Directors showing Georgia replaced Mavridis as a director on June 30, 1994; and

v. The Santa Maria Pizzeria's register showing that Mavridis and Bobby were the first, and equal, shareholders on June 17, 1992. Georgia replaces Mavridis as a shareholder on June 30, 1994.

[84] Mavridis testified that though he had met Kakouli while he was a co-owner of the pizzeria, he never understood her to be a partner of any type. He testified that Kakouli never mentioned to him her alleged ownership stake in the business or anything to suggest that she had financial interest as a partner in the business.

[85] Mavridis' relationship with Bobby was as former business partners. Mavridis presented in a straightforward manner. He did not embellish his evidence. He has no personal stake in the outcome of this litigation. He was unshaken in cross examination. I recognize the limitation of his knowledge. If Kakouli was a silent partner, and no one told Mavridis of her partnership interest, then it is plausible that his testimony is not inconsistent with Kakouli's except on the important point that approximately half of the financing of the purchase price for the Santa Maria Pizzeria came from the FBDB ($200,000) and another $100,000 came from him. Mavridis also has no direct knowledge of how Bobby sourced his $100,000 contribution.

[86] That said, I find Mavridis' evidence compelling on the issue of the financing and corporate structure of the Santa Maria Pizzeria in 1992, and it is consistent with Bobby's account and the documentary evidence.

[87] In 1995, Bobby and Georgia purchased property with a movie theatre and other commercial units from Bobby's father through a newly incorporated business, the Strand, for $331,050. According to Bobby's evidence, the purchase price was funded in part through a loan from Scotiabank, and the balance from Bobby and Georgia's bank account, which included the funds remaining from Markopouliotis' personal loan that had not yet been paid back.

[88] The documents filed in evidence supports this version of events:

i. Loan agreement from Scotiabank dated May 2, 1995, in the sum of $168,300;

ii. Articles of Incorporation for the Strand dated April 12, 1995;

iii. Resolution from the Strand dated May 8, 1995, confirming promissory notes made in favour of Scotiabank totalling $168,300 and signed by "all" the Directors; namely, Bobby and Georgia. The loan with Scotiabank is stated also to be secured by a mortgage registered on title of the Strand's property in the principle sum of $240,000;

iv. The Shareholders' Register of the Strand showing Georgia and Bobby as equal shareholders as of April 12, 1995; and

v. The Shareholders' Register of the Santa Maria Pizzeria showing that Georgia and Bobby each own 50 common shares, while the Strand owns 100 Class A preference shares.

[89] The timing of the alleged financial arrangement presents some challenges for Kakouli, and the numbers do not add up. It is her evidence that her $150,000 was to contribute to the purchase price of the Santa Maria Pizzeria. There was never any actual discussion with her about purchasing the Strand. However, Kakouli says that she assumed that any of her money that was not used for the purchase of the pizzeria must therefore have gone towards the purchase of the Strand, together with her share of the profits earned by the pizzeria from 1992 to 1994.

[90] The limited evidence I have from the profitability of the Santa Maria Pizzeria in advance of the purchase of the Strand suggests it was not particularly profitable yet given its indebtedness. Mavridis testified that he received approximately $9,000 prior to selling his share to Georgia for $120,000. It is also evident from the documentary evidence that the pizzeria was still indebted to the FBDB and the purchase of the Strand was partially financed by a separate bank loan from Scotiabank. It bears noting that Bobby and Georgia assumed personal liability for the bank loans, and Kakouli did not bear any personal exposure for these debts of the Manitoba businesses.

[91] Also, the alleged contribution of $150,000 did not translate into a 50% contribution to the purchase price of the Santa Maria Pizzeria which was $425,000. It is acknowledged by Kakouli that she did not directly contribute any additional funds towards the Strand's $331,050 purchase price.

[92] Markopouliotis was called to testify on behalf of Bobby and Georgia. Markopouliotis denied having acted as a middleman for Kakouli. He maintained that he lent the sum of $200,000 USD to Bobby as a personal loan, and that he was repaid in full by Bobby and Georgia by installments, one of which was paid to his cousin at his request. He identified the $35,000 USD bank wire from Georgia to him, and the $50,000 USD bank wire payable to his cousin, Demitrius Markopouliotis, on his behalf. Markopouliotis explained that currency in Greece was unstable at the time, and he wanted Bobby to keep the funds in Canada and why he did not ask for repayment of the full amount immediately.

[93] Given the consistency from each side regarding the currency difficulties in Greece, George Markopouliotis' explanation is plausible.

[94] Markopouliotis testified that he was a close friend to Bobby. He was in a spousal relationship with Kakouli from approximately 1984 to 1994 and he was upset when she left him. However, he denied receiving any money from Kakouli to give to Georgia and Bobby, much less 24 million drachmas. Rather, Markopouliotis explained that he sent $200,000 USD to Bobby when Bobby told him of the opportunity to buy the pizzeria, and that Bobby did not have the funds. Markopouliotis claims that he sent $200,000 USD so that Bobby could buy the pizzeria without the need to include a partner.

[95] Markopouliotis also testified that in July 2015, Kakouli paid him an unexpected visit at his home in Greece. He claims that Kakouli asked him to sign papers and she told him it was so she could receive half of her sister's property. He declined to sign the documents, claiming that he did not agree with Kakouli's version of events. This is in contrast with Kakouli's evidence. She admits visiting Markopouliotis in Greece but testified that Markopouliotis told her that he was going to support her version of events, including his role in the transfer of 24 million drachmas, or $150,000, from Ioannis to Bobby. She further testified that Markopouliotis never followed through on his promise.

[96] I did not find Markopouliotis to be a compelling witness. He appeared resistant and argumentative at times during cross examination. He admitted to being convicted of forgery in Greece in 2017, however, no admissible evidence was led with respect to what this conviction, in Greek law, entailed. He was also largely consistent with his affidavit evidence under cross examination. I accept his testimony regarding his role in the events leading to the purchase of the Santa Maria Pizzeria to the extent that it was consistent with Bobby and Georgia's respective testimony and the documentary evidence.

[97] I also find that the visit between Kakouli and Markopouliotis in July 2015 occurred, that it was at the initiative of Kakouli, and that Kakouli's purpose was to convince Markopouliotis to support her version of events with respect to the 24 million drachmas. I find that one or more documents were prepared or presented by Kakouli to Markopouliotis for his consideration. None of the documents that Kakouli prepared or presented to Markopouliotis were produced at this trial by Kakouli. Markopouliotis was not cross examined on his version of this interaction with Kakouli. Therefore, I find that the meeting in Greece occurred as relayed by Markopouliotis, and that he was asked to sign documents in 2015 that supported Kakouli's version of events but declined because he did not accept Kakouli's version as true.

[98] Bobby and Georgia were largely consistent in their testimony concerning the respective purchases of Santa Maria Pizzeria and the Strand. Bobby, in particular, presented in a clear and straightforward manner about the financial and corporate structuring of the purchase of the Santa Maria Pizzeria and later the Strand. His evidence is supported by the financial and corporate records produced, as well as the evidence of Mavridis and Markopouliotis.

[99] Based on the evidence as a whole, Kakouli has not proven on a balance of probabilities that she provided the sum of $150,000 to Bobby and Georgia in or around 1992, or at all. More specifically, Kakouli has not satisfied me that she provided any monies to Bobby and Georgia to invest or become a partner with a beneficial interest in the Manitoba businesses.

Employment Contribution at the Manitoba businesses

[100] Kakouli's evidence is that she spent many hours a week working at the Santa Maria Pizzeria and the Strand movie theatre. She submits that this work supports her view that the Manitoba businesses were a joint extended family venture. She relies in part on the T-4's issued

by the Manitoba businesses to her from 1997 to 2012 to support her claim that she worked at the Manitoba businesses. Again, her evidence diverges from that of Bobby and Georgia.

[101] Under cross examination, Kakouli agreed that her passports accurately showed her extensive travels between Canada and Egypt over the same time period she said she worked at the Manitoba businesses. Some of these trips were for extensive periods of time, and they overlap with the time she testified she worked at these businesses. The purpose of these trips was to spend time with Wasiem.

[102] Also, she agreed that when she moved to Toronto in 2006, she no longer worked at the Manitoba businesses but changed her focus to caring for Steven (as I will review in the next section of these reasons). Notwithstanding her move to Toronto, she continued to receive T-4 slips from the Manitoba businesses through to 2012. That practice stopped in 2013.

[103] Wasiem supported Kakouli's evidence that, at least for the six-week time period he was in Thompson with Kakouli in the fall of 2000, they spent time at both Manitoba businesses every day and that Kakouli would perform work-related tasks. However, it is clear from Wasiem's evidence that Kakouli also spent much time out of Canada with him, and thus away from the Manitoba businesses.

[104] Wasiem confirmed that he met Kakouli at the end of 1995 or beginning of 1996 when Kakouli visited Egypt to visit him and they formed a romantic relationship. Kakouli visited him three more times in Egypt and, on July 6, 1997, they were married in Egypt. Wasiem worked on a cruise ship at the time, and Kakouli would come when he was not working. He estimated Kakouli came to Egypt to be with him approximately four to five times a year. They bought an apartment together in Alexandria, Egypt at the end of 1998 or the beginning of 1999. He immigrated to Canada in late 2000 to be with Kakouli.

[105] Wasiem and Kakouli separated in January 2001. They reconciled in 2005 and continued their domestic relationship. He has no knowledge of Kakouli's role in the Manitoba businesses in the interim.

[106] Wasiem testified that Kakouli routinely spent entire summers in Egypt, often bringing Steven with her.

[107] Kakouli testified that Wasiem overstated her visits to him.

[108] I found Wasiem to be a forthright witness. He did not embellish his evidence. I accept his evidence on these issues.

[109] Peter Marks and Victoria Tretjak were called by the plaintiffs. Peter Marks ("Marks") was a long-time movie projector operator at the Strand. He started in 1997 and worked for nearly 30 years at the movie theatre until his retirement in 2012. He testified that, during his work shifts, he never saw Kakouli work at the movie theatre, but did see her come to the movie theatre approximately 10-12 times a year. Marks specifically denied that Kakouli performed any of the

tasks she claimed to in her affidavit, at least in his presence. He clarified under cross examination that his routine was to attend at the Strand six days a week, for about one to one and a half hours per shift, to turn on and off the movie projector.

[110] Victoria Tretjak ("Tretjak") worked as the cook at the pizzeria for close to 30 years. She was still working at the pizzeria until the COVID-19 pandemic struck. During her time as a full-time employee, she did not see Kakouli work at the pizzeria. Her shift was from 1:00 p.m. to 10:00 p.m. She saw Kakouli visit the pizzeria often with Georgia and the customers but was not aware of her performing work. She specifically denied that Kakouli worked in the kitchen with her and assisted with making pizzas in direct contradiction to Kakouli's evidence.

[111] Neither of these witnesses can account for all of the time period over which Kakouli claims to have performed services for the Manitoba businesses. They were not at the Manitoba businesses during every hour of operation. However, Tretjak, in particular, was able to provide a fairly complete picture based on her own extensive hours of employment in the kitchen at the pizzeria. Notwithstanding that Marks and Tretjak were longstanding loyal employees, they presented in a straightforward manner. Marks had been retired for 8 years and therefore no longer had a vested interest in terms of employment. I accept their general evidence on this issue.

[112] In my view, while Kakouli overstated her role at the Manitoba businesses, Bobby and Georgia understated her role. However, on balance, I find that Kakouli did not perform significant services at either of the Manitoba businesses between 1996 and 2005, and there were large gaps within that time frame in which she did not work at either of those businesses at all. I find that while Kakouli was living in Thompson she assisted Georgia on a regular basis with some of Georgia's tasks. However, by the time she moved to Toronto in 2006, she no longer performed any services at the Manitoba businesses.

[113] I accept Bobby and Georgia's explanation that the income they provided Kakouli with, as reflected by the T-4s, was to provide to her with a form of income support through income splitting to family members, as opposed to a financial entitlement reflecting Kakouli's share of the profits or representing wages for employment. They testified that Steven, similarly, received income reflected by T-4s as a form of income splitting, and they were not challenged on that assertion. Kakouli continued to receive T-4s and the related income after she moved to Toronto in similar amounts as she received prior to 2006. Kakouli never questioned the amounts she received and there is no evidence to substantiate that she was receiving annual sums commensurate with a share of profits derived from the Manitoba businesses, or by way of dividends.

[114] I will address Kakouli's role as caregiver for Steven under the fourth *Kerr* element, Family Priority, but recognize it is an overlapping factor in support of Kakouli's case under the mutual efforts section of the *Kerr* joint family venture test.

v. The Second *Kerr* Element: Economic Integration

Access to Joint Bank Account

[115] In *Kerr*, at paras. 92-93, the court requires an examination of the extent of the economic integration and interdependence between the domestic partners in a consideration of whether they were involved in a joint family venture. Cromwell J. wrote,

> "The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture … The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations.
>
> The parties' conduct may further indicate a sense of collectivity, mutuality and prioritization of the overall welfare of the family unit over the individual interests of the individual members. These and other factors may indicate that the economic well-being and lives of the parties are largely integrated. [Citations omitted.]"

[116] The extent of the economic integration as between Georgia and Bobby, on the one hand, and Kakouli, on the other hand, is the existence of the joint account that was established when the Horsham Property in Toronto was bought in 2005. The joint account was held in the names of Georgia and Kakouli. The deposits into that account came from Bobby and Georgia that ultimately derived from the revenues generated by the Manitoba businesses and personal investments. The purpose of the account was to pay for the living expenses of Steven and Kakouli, as well as the expenses and carrying costs of the Horsham Property and later the Hill Property. Kakouli's view was that the deposits into this joint account also reflected her share of the profits from the Manitoba businesses.

[117] Notably, Kakouli admits she did not make separate deposits into the joint account. It is evident that Kakouli earned some income during this period (including the income reflected by the T-4's issued by the Manitoba businesses) and kept that income separate from the joint account. So too did Georgia and Bobby have their own bank account separate from Kakouli's and the joint account.

[118] As well, Kakouli ran her own furniture business in Toronto for, according to her testimony, a few years. Kakouli did not provide any particulars of her income from that business.

[119] She also had a spousal relationship with Wasiem from 1997 and divorced in 2002. They reconciled in or around 2006 and remarried. They were recently separated at the time of trial. It is apparent that Kakouli established her own household in Egypt with Wasiem. She and Wasiem agreed that they bought an apartment together in Alexandria, Egypt as their home.

[120] There was no suggestion in the evidence that Wasiem and Kakouli's finances as domestic partners/spouses were integrated with Bobby and Georgia's finances.

[121] Further, other than the deposits made into the joint bank account, and the income provided as reflected by the T-4's, the revenues from the Manitoba businesses were not intermingled with any of Kakouli's own bank accounts.

[122] A third relevant consideration is the fact that three residences were established in Toronto of which Kakouli and Georgia were joint tenants, and in the case of the Hill Property, Bobby was also a joint tenant. I will review these transactions in more detail later in these reasons. However, of relevance to this factor, Georgia and Bobby maintained their own residence in Thompson separate and apart from Kakouli after she moved to Toronto in 2005, while Kakouli, for a period of time, maintained a separate residence in Egypt with Wasiem. The only period of cohabitation amongst Georgia, Bobby and Kakouli was when Kakouli came to live with them when she immigrated to Canada. There has been no suggestion in the litigation that Kakouli has any ownership claim over the house in Thompson, beneficial or otherwise.

[123] The requisite degree of economic integration, required in *Kerr*, between Kakouli's household and that of Bobby and Georgia and their respective finances is lacking.

vi. The Third *Kerr* Element: Actual Intent

[124] Kakouli relies on two documents to support her claim that there was a clear mutual intent on the part of herself, Georgia and Bobby that she have a 50% beneficial interest in the Manitoba businesses.

1998 Agreement

[125] Georgia and Kakouli entered into the 1998 Agreement on January 15, 1998. It is an agreement to leave their entire estates to each other, and a promise to look after each other's children. A draft will is attached to this agreement.

[126] There is also a clause preventing either sister from changing the contemplated will without the consent of the other.

[127] Georgia signed the will but later changed it without telling Kakouli. There is no evidence that Kakouli ever executed the contemplated will.

[128] Both parties acknowledge that they signed the 1998 Agreement.

[129] Kakouli stated that she requested this agreement because she no longer trusted Bobby as a result of an alleged situation involving him, and she wanted assurance that she would ultimately receive Georgia's share of the business. Georgia's explanation is that she signed the 1998 Agreement to satisfy Kakouli's fear that her children would not be looked after by Bobby in the event Georgia predeceased him. She denied that the 1998 Agreement was intended to reflect an underlying assumption that Kakouli held a 50% beneficial interest in the Manitoba businesses.

2008 Agreement

[130] The second document was hotly contested at trial. Kakouli testified about a dispute she had with Georgia after Georgia accused her of misspending $2,000 from their joint account. She further testified that Georgia offered to sign an agreement that would formalize Kakouli's beneficial

interest in the Manitoba businesses. They went to Demitry's law office, unannounced, for this ostensible purpose.

[131] The 2008 Agreement was dated on January 21, 2008.

[132] The agreement was prepared by Demitry. Demitry is identified in the agreement as a barrister and solicitor in good standing. It purports to memorialize an agreement by Georgia to "formally and legally convert 50% ownership and title of all businesses and assets owned by her". It also establishes a commitment that Kakouli will continue to care for Steven on a full-time basis but will not do so "in the event of violence or threats of violence against her" by Steven. According to Kakouli and Demitry, a transfer of shares was supposed to have been handled by Georgia's lawyers in Manitoba.

[133] Georgia adamantly denies ever seeing this agreement before it was produced late in this litigation and claims that her signature has been forged.

[134] Bobby testified that while he knew about the 1998 Agreement before the litigation as a result of Georgia telling him, he did not know about the 2008 Agreement until it was produced in this litigation.

[135] Demitry testified that his mother and aunt came to his office without prior warning on January 21, 2008. They were distraught and wanted him to put the alleged financial arrangement into writing. This was at the insistence of Georgia, following a dispute in which Georgia allegedly accused Kakouli of misusing $2,000 from their joint bank account. Demitry initially testified that he simply documented what he was told to. However, when the provision in the 2008 Agreement relating to Georgia consenting to an order against her for the transfer of 50% ownership interest in the Manitoba businesses and in the assets and investments owned by those businesses was pointed out to be something not likely coming from a layperson, he admitted that he added the clause on his own volition.

[136] Further, Demitry could not remember how many copies he made, but claimed that he gave the original to Georgia to have her lawyers draft up the proposed transfer of shares. Yet, no follow-up is ever done by Kakouli, or suggested by Demitry, when no such share transfer was forthcoming. Demitry would have turned his mind to this issue when he added the enforcement provision. No explanation was provided for this lack of action, except that the sisters trusted each other.

[137] The plaintiffs did not admit authenticity of this document and the original cannot be located. Neither party called a handwriting expert to give an opinion concerning the authenticity of the signature attributed to Georgia.

[138] Where a party is relying on the words used in a document, she must adduce primary evidence of its contents by producing the original document: Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis Canada, 2009), at p. 1217. However, secondary evidence may be

admissible where the court is satisfied that the original has been lost or destroyed. In order to satisfy this requirement, the party adducing the copy must satisfy the court that reasonable efforts were made to locate the original: Lederman, at pp. 1218-19. If the original document is alleged to be in the possession of another party, then a notice to produce the document can be delivered upon that party. If the party refused to comply with the notice, then she may not refute the authenticity of the copy of the document at trial.

[139] In addition, r. 51.02(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that a party may serve a request to admit the authenticity of a document. If authenticity is admitted, then a copy of the original document can be admitted into evidence.

[140] The first time this critical document was produced or even mentioned was in 2019. The Statement of Defence and Counterclaim is dated April 2014 and it was amended in February of 2015. No mention of the 2008 Agreement, the fact that such an agreement was made, or the meeting in Demitry's office, is made in the pleadings.

[141] Demitry testified that when he was arrested on an unrelated matter, the police seized his law practice and personal files in 2014. He did not have access to his files until they were released in 2018. At that time, he found the photocopy of the 2008 Agreement and immediately handed it over to Kakouli's former lawyer. No explanation was offered for why the former lawyer did not promptly disclose this highly relevant document.

[142] As well, no explanation was offered for why this 2008 Agreement was never listed in Schedule C of the Affidavit of Documents or referenced in any way in the pleadings. At minimum it ought to have been referenced in the counterclaim given its obvious importance to establishing Kakouli's contention that she was a 50% beneficial owner in the Manitoba businesses. Its absence from Schedule C of Kakouli's Affidavit of Documents, sworn March 3, 2016, is all the more disturbing, since Schedule C lists 64 documents and references that the documents listed as having been formerly in the possession or control of Kakouli included those seized by the Toronto Police Services; i.e., from Demitry's law practice and personal files. This is the source of documents that Demitry claims he found the photocopy of the 2008 Agreement from, after they were released by the police and returned to him.

[143] In addition, there is no evidence demonstrating that Kakouli made a request for production of the original document or delivered a request to admit the authenticity of this document.

[144] I am also concerned that Demitry, as a lawyer, apparently did not consider that he might be in a conflict of interest at the time of this alleged meeting. He testified that he did not recommend that his aunt obtain independent legal advice before signing this document. He explained that Georgia was not his client. However, he agreed in cross examination that his mother trusted him to be her lawyer in this matter, because she asked him to draft the agreement. If this meeting occurred, one would have expected the lawyer to recommend that the non-client seek independent legal advice before signing such an agreement, complete with an enforcement clause.

[145] Counsel for the plaintiffs challenged Demitry's credibility under cross examination by referring him to comments made by a judge questioning the credibility of his testimony in an unrelated proceeding. This line of cross examination is impermissible, and I draw no conclusion regarding Demitry's credibility based on the observations of another judge in an unrelated proceeding: see *R. v. Ghorvei*, 1999 CanLII 2475 (Ont. C.A.), at para. 31. Parenthetically, counsel engaged in this form of cross examination with Kakouli as well. For the same reasons, I draw no conclusion regarding Kakouli's credibility based on another judge's observations in unrelated proceedings regarding her either.

[146] In any event, even if I accepted that the 2008 Agreement was authentic (and I do not), neither it nor the 1998 Agreement, assists Kakouli with demonstrating actual mutual intent because it does not reflect Bobby's acceptance. Indeed, the 2008 Agreement explicitly anticipates that Bobby will not agree to the transfer of a 50% ownership interest in the Manitoba businesses.

[147] I am not satisfied that the photocopy of the 2008 Agreement is authentic or that the alleged meeting of January 21, 2008, ever occurred. While I accept that the burden of proof in forgery lies on the party asserting the forgery, it is open to me to consider all of the surrounding circumstances in determining whether the 2008 Agreement was signed by Georgia. I find that the 2008 Agreement, and the meeting giving rise to it, did not happen for the following reasons:

- the surrounding circumstances of this alleged meeting are suspicious;
- the failure to disclose this meeting before 2019;
- the lack of any effort to enforce this ostensible agreement given Demitry's role in drafting it and looking after his mother's interests;
- the failure to plead the agreement or the circumstances surrounding it; and
- the failure to list this document in Schedule C, notwithstanding other relevant documents originating from Demitry's law practice and personal files were listed;
- the failure to attempt to authenticate the 2008 Agreement.

vii. The Fourth *Kerr* Element: Family Priority

[148] Family priority is explained in *Kerr*, at paras. 98-99, as the extent to which the domestic partners give priority to their family over themselves (as individuals) in their overall decision-making process. The greater the sacrifice of one domestic party to enable the other to earn income or build wealth for the sake of the family, to the former's economic detriment, the more likely this factor will favour the finding of a joint family venture under the rubric of unjust enrichment.

[149] There is no question that Kakouli and Georgia gave high priority in their making important decisions to each other's welfare, including their children, from a familial standpoint. At the earliest stage, Georgia and Bobby took primary responsibility for looking after Demitry and Lina

in Thompson, Manitoba from 1991 until Kakouli's arrival in Canada in 1996. Before that, Kakouli and their mother took responsibility for looking after Steven for a brief period as an infant in Greece while Bobby and George worked at the pizzeria to establish a life in Canada. Later, Bobby and Georgia bought the Sentinel unit in the summer of 1997 for Lina and Demitry to live in while attending university. According to Georgia and Bobby, since they were already paying rent on behalf of Lina and Demitry, it made sense to buy a unit as an investment rather than continuing to pay rent. Lina stayed in the Sentinel unit until it was sold in 2007.

[150] Kakouli takes the position that the fact that she was put on title of the Sentinel unit with Georgia is evidence that Georgia and Bobby acknowledged her beneficial interest since the money used to buy this condominium unit was taken from the revenues generated by the Manitoba businesses. Georgia's response was that Kakouli was upset that, at the age of 36, she had nothing to her name. As a result, Georgia and Bobby determined that they would make Kakouli a co-owner with Georgia so that she would have a foothold in Canada. Georgia and Bobby testified that Kakouli was put on title out of family love and affection. It was noted that the deposit was only $7,000 and the rest was financed by a mortgage.

[151] During this timeframe (1997 to 2005), Kakouli and Steven travelled to Toronto, from Thompson, from time to time for Steven's music lessons. When in Toronto, they stayed at the Sentinel unit with Demitry and Lina. In May 2005, the Horsham Property was bought. Again, it was purchased in the names of Kakouli and Georgia as joint tenants. It was financed by Bobby and Georgia, and in 2007, when the Sentinel unit sold, from the proceeds of that sale. In 2005, Steven and Kakouli moved to Toronto on a full-time basis so that Steven could continue his musical studies and career. Kakouli was also able to be close to her children who were living in Toronto.

[152] Kakouli took primary charge of Steven for many years in Toronto when they moved to the Horsham Property to further his musical studies. By this time Steven was 15 years old. Kakouli continued to take Steven to Egypt for holidays in the summer. She promoted his concerts in Toronto. She acted as a guardian to Steven on a day-to-day basis in Toronto, though Bobby and Georgia were still ultimately responsible for their son's well-being. Kakouli also helped look after Steven when they were in Thompson, Manitoba in the years from 1996 to 2005. However, during the Thompson period all were living in the same household belonging to Georgia and Bobby and they also looked after Steven.

[153] There is no suggestion that Georgia and Bobby's initial caregiving role over Lina and Demitry from 1991 to 1996 was part of a "financial arrangement". Georgia and Bobby took this responsibility on to help as part of the extended family. Kakouli, Lina and Demitry still constituted their own family unit, separate and apart from Bobby, Georgia and Steven. The same can be said of the arrangement in which Kakouli and Steven moved to Toronto. Steven was still part of the nuclear family unit with his parents, and the extended family unit with Kakouli. The fact that their various lives intertwined over portions of the respective childhoods of Steven, Demitry and Lina does not change the fact that they were separate family units with their own distinct priorities, challenges, and aspirations.

[154] While there is evidence suggesting that the two family units functioning as a collective featured in some of the decisions made – notably the purchase of the Sentinel unit, followed by its sale, and the successive purchases of the Horsham Property and the Hill Property – and that there were periods of time over which the raising of children was assumed by each of the parental units with Kakouli devoting more time to the caring for Steven than Bobby and Georgia did with respect to caring for Lina and Demitry, this degree of decision making does not reach the degree required in and of itself to establish a joint family venture within the framework of *Kerr*..

viii. Conclusion

Were the Tsitsos' unjustly enriched? Are the Manitoba businesses a joint family venture?

[155] This case differs factually from what the courts have characterized as "joint family ventures" within the context of an unjust enrichment analysis. Kakouli's relationship with the Tsitsos' cannot be characterized as a long-term domestic relationship in which the two family units resided, and acted, as one to create communal wealth within the framework set out in *Kerr*. Based on the evidence, this relationship is better characterized as a mutually supportive extended family relationship, rather than an economic interdependent relationship giving rise to equitable or legal obligations. I am not foreclosing a scenario in which a true joint family venture could exist within an extended family. However, the evidence in this case falls far short of that characterization when all of the factors are considered.

[156] By way of summary, while Kakouli was significantly dependent on the financial support of Bobby and Georgia, did assist with looking after Steven for some of his childhood and teenage years, and attended at the Manitoba businesses from time to time between 1996 and 2006 to offer support, the evidence falls short of establishing that her contribution met degree required to constitute a "'sufficiently substantial and direct' link" to the acquisition and growth of the Manitoba businesses.

[157] Critical to establishing the direct and substantial contribution element of the joint family venture analysis was Kakouli's assertion that she contributed $150,000 towards the purchase price of the Santa Maria Pizzeria with any surplus funds being directed to the purchase of the Strand. Kakouli failed to prove this essential fact. This finding alone, in this case, negates a finding that the Manitoba businesses were a joint family venture as it is the only purported direct contribution that could have satisfied the substantial and direct link test.

[158] However, many other factors show that Kakouli had an economic and domestic life separate from Georgia and Bobby as already reviewed in these reasons in detail.

[159] Again, by way of summary, Kakouli had independent domestic relationships. She was married to Ioannis from 1978 to 1985 (separated in 1980). Then, she had an intimate domestic relationship with Markopouliotis from approximately 1984 to 1994. Thereafter she met Wasiem in 1995 and married him in 1997. They divorced in 2002 but reestablished an intimate relationship

shortly afterwards and their relationship continued until 2008. Then, in 2011, they got back together. They are, as at the date of trial, still spouses though they are separated.

[160] Owing to her relationship with Wasiem, Kakouli divided her time from 1997 to 2000 between Thompson, Manitoba and Alexandria, Egypt. In 2000, Wasiem moved to Canada with Kakouli. They spent approximately six weeks in Thompson together. Wasiem returned to Egypt and Kakouli visited him for periods of time. They bought an apartment together in Alexandria. Between 2010 and 2011, Kakouli started her own furniture business in Toronto. There is no suggestion that Bobby and Georgia expected or required her to give up any opportunities to work or live independently in Toronto. While she did look after Steven, by the time they moved to Toronto, Steven was a teenager. Kakouli did not put forward any evidence of lost employment or career opportunities that she suffered as a result of caring for Steven.

[161] Kakouli did not immigrate to Canada until 1996. It must be remembered that both the Santa Maria Pizzeria and the Strand were well established businesses when Bobby and Georgia began working at those established businesses in 1988.

[162] It is also important to remember that Demitry came to Thompson to be with Georgia and Bobby in 1991 at the approximate age of 11, and Lina followed in 1993 at the approximate age of 15, to start new lives in Canada. Demitry's arrival in Thompson is before there was any opportunity to purchase the Santa Maria Pizzeria.

[163] In conclusion, I find that Kakouli failed to prove that Bobby and Georgia were enriched by her contributions to the extended family relationship, or that she suffered a corresponding deprivation. Rather, the evidence demonstrates that this was a story of one sister, Georgia, supporting her sister, and her sister's children, when Kakouli decided that Canada would provide better opportunities for them. This trusting and mutually supportive relationship continued over the course of approximately 20 years until the difficult events involving Demitry and the criminal justice system in 2013, as will be expanded upon in the next section of these reasons. Such events take a toll on families, and these events caused enormous tension between Georgia and Kakouli.

[164] As a result of my finding, I need not address what the appropriate remedy would have been had I found that there was an unjust enrichment of Bobby and Georgia.

V. LIMITATION PERIOD: Is the Unjust Enrichment Claim Barred?

[165] In light of my ruling, I need not rule on the alternative argument by Georgia and Bobby that the unjust enrichment claim is time barred under the Ontario, or alternatively, the Manitoba limitations statutes.[1] However, had I found there to have been an unjust enrichment, that cause of

[1] During the course of closing arguments, I asked the parties for their position as to which limitation statute applied: Ontario's or Manitoba's. The plaintiffs pleaded reliance on the Ontario *Limitations Act, 2002* in their Statement of

action arose in or around 2013 when Georgia and Bobby stopped providing income to Kakouli as a result of the breakdown. Before this date, there was no real indication that the Tsitsos' were denying Kakouli had a 50% beneficial interest in the Manitoba businesses. While the plaintiffs urge that the deprivation occurred when Georgia declined to transfer her shares in the Manitoba businesses to Kakouli pursuant to the alleged 2008 Agreement, the real deprivation occurred when the status quo was changed and Kakouli was cut off from all means of income and income support in 2013. Up until that point, Kakouli had no reason to believe that Georgia did not recognize her 50% beneficial interest, since the income support continued until the breakdown. A similar analysis is found in *Gray*, at paras. 13-34.

VI. THE ACTION: Claims related to the Hill Property

[166] The plaintiffs' claims stem from the breakdown in the sisterly relationship between Kakouli and Georgia and the impact of that breakdown on the parties' respective economic interests related to the Hill Property. This home has been described by the parties as a luxury home located on the Scarborough Bluffs.

[167] The plaintiffs request a monetary remedy and an accounting remedy under s. 122(2) of the *Courts of Justice Act*.

[168] The parties agree that the house was bought on May 5, 2012, for 3.35 million dollars with the immediate purpose of Steven and Kakouli living in the residence, while Steven pursued his musical lessons and career in Toronto. It is also agreed that the house could ultimately be a retirement residence for Bobby, Georgia and Kakouli.

[169] Bobby, Georgia and Kakouli agree that they are joint tenants with an equal undivided one third interest in the Hill Property.

[170] It was agreed that Georgia contributed $417,965.40 from the net sale proceeds of the Horsham Property. However, there is a dispute as to how much Bobby and Kakouli, respectively, contributed towards the purchase price owing to an advance made by Wasiem in the sum of $161,000.

[171] Bobby and Georgia claim that Kakouli paid the sum of $578,956.40 comprised of $417,956.40 (being her share of the net sale proceeds from Horsham Property) and an additional $161,000 advanced by Wasiem. At trial, Bobby testified that it was his understanding that Kakouli was the lender of this money to him and Georgia, and that she in turn received the money from Wasiem. Bobby further testified that he was told by Kakouli that the $161,000 would be set off by

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Defence to the Counterclaim. I asked for written submissions on the applicability of the Manitoba *Limitations of Actions Act* and the Ontario *Limitations Act, 2002*. The plaintiffs' counsel provided written submissions; however, no submissions were received by the defendant/plaintiff by counterclaim.

the amount Georgia and Bobby had paid for Demitry's legal fees, which had been in excess of that sum of money.

[172] Kakouli claims that Bobby was to have paid $452,190.43 but was short, so borrowed the sum of $161,000 from Wasiem. She acknowledges that money was paid by Georgia for Demitry's substantial legal fees, but says it was an advance on her share of the profits. Wasiem testified that it was his understanding that he was lending the money to Bobby, but that he never spoke directly with Bobby about the proposed loan. Rather, his dealings were with Kakouli, who, in turn, asked him to lend the money to Bobby. Wasiem gave the funds to Kakouli in the form of bank drafts, and Kakouli gave those bank drafts to the real estate lawyer. Apparently, there is ongoing litigation in respect of the repayment of the $161,000 commenced by Wasiem and so I will not comment further on this discrepancy.

[173] The parties also agree that the home eventually sold to Kakouli on May 24, 2017, for 2.9 million dollars, and that the net proceeds of sale (after payment of the outstanding mortgage) in the sum of $1,046,870.55 (including interest accrued to the date of trial) is currently paid into court to the credit of this action.

[174] The breakdown in the relationship between Georgia and Kakouli occurred in 2013. Up until that time, Georgia and Bobby had been paying the legal fees for Demitry who was facing serious criminal charges. Georgia advised Kakouli that they were not going to pay anything further (having paid approximately $170,000 to that point in time). Kakouli admitted that, while upset, she hid a very expensive violin (that cost $800,000) and two similarly expensive violin bows used by Steven. The violin and bows were returned after an intervention by Demitry.

[175] Thereafter, a further incident occurred in August 2013, involving Steven, Georgia and Kakouli at the Hill Property. Kakouli alleges that Steven had become increasingly aggressive, verbally and physically, towards her over the years. Steven denies any such pattern of behaviour. In any event, on this occasion, Kakouli claims that Steven was singing and playing a song on the piano that was disrespectful and hurtful towards Demitry. When Kakouli tried to stop Steven, an altercation ensued amongst Kakouli, Georgia and Steven. Steven and Georgia deny that Steven was the aggressor.

[176] Then, according to Kakouli, less than a week later, Steven was singing and playing this hurtful song again. A further altercation occurred prompting Kakouli to call the police. Lina and Wasiem witnessed this event. The police ultimately attended but Kakouli did not press charges. While Steven denies this occurrence, Wasiem confirmed that he had witnessed this entire incident, and that he initially intervened to stop Kakouli from calling the police. However, when the police attended, Kakouli ultimately decided not to pursue charges in order to preserve Steven's reputation.

[177] Steven admitted in cross examination that he sent some email messages that contained derogatory language towards Demitry.

[178] I accept that these altercations occurred and that this last incident was the final event leading to the breakdown of this extended family relationship.

[179] On September 5, 2013, Georgia took Steven back to Thompson, in light of this upheaval. They took some of Steven's personal belongings with them.

[180] On October 30, 2013, Kakouli signed an agreement at Georgia's insistence, in return for Georgia's agreement to act as a surety for Demitry who was incarcerated and awaiting a bail hearing. The agreement provided that Kakouli would vacate the Hill Property. Georgia insisted on this because if she became Demitry's surety she would have to live at the Hill Property, and she did not want Kakouli to be there.

[181] As it ended up, Demitry was denied bail and Georgia left the Hill Property and returned to Thompson.

[182] Wasiem and Kakouli returned to the Hill Property on November 24, 2013, only to find that the locks had been changed on all but one door, through which they gained access to the house.

[183] Kakouli changed all the locks and alarm system code on or about November 24, 2013.

[184] At this point, the relationship between Georgia and Kakouli deteriorated significantly, to the point, it would appear, of no (foreseeable) return.

i. Ouster

[185] Bobby and Georgia claim that when Kakouli changed the locks on the doors, together with the alarm code, Kakouli ousted them from their entitlement, as joint tenants, to unfettered access to Hill Property.

[186] Ouster is the wrongful exclusion of an owner from that owner's property: *M. v. H.* (1994), 17 O.R. (3d) 131 (Gen. Div.). The changing of locks of a house thereby preventing the owner from re-entry is a well-recognized act of ouster. The changing of the alarm system is another way of effectively excluding an owner from the property.

[187] In this case, Kakouli admitted to changing the locks and alarm code on November 24, 2013. Kakouli offered to let Bobby and Georgia enter upon notice to her and advised she would permit Steven to come onto the property between the hours of 9:00 a.m. and 5:00 p.m. to practice piano. However, she would not give Bobby and Georgia a set of keys or the new alarm code.

[188] This limited form of access offered by Kakouli is inconsistent with Bobby and Georgia's right to possession as joint tenants. Kakouli's offer to let Steven back into the house for the limited purpose of practicing on the piano did not cure the ouster.

[189] Furthermore, Kakouli's claim that she feared for her safety with Steven is not an excuse. Rather, changing the locks was a form of self-help remedy exercised by Kakouli. If she was fearful

for her physical safety, she had other lawful routes to pursue in the civil and criminal justice systems.

[190] As such, Kakouli ousted Bobby and Georgia from November 24, 2013, though to the date the house was sold.

ii. Remedy for Ouster

[191] Bobby and Georgia claim a monetary remedy to compensate for their loss of the use and enjoyment of the Hill Property. The primary purposes of buying that house, from their perspective, was to give Steven and Kakouli a place to live, and then to possibly occupy it themselves, with Kakouli, in their retirement years.

[192] They have claimed occupation rent over the period of ouster in the monthly sum of $3,140.31. This sum is the equivalent of one third of the monthly mortgage payment paid by Bobby and Georgia. This claim totals $131,893.02.

[193] In addition, the Tsitsos' also claim the sum of $135,589.53 for carrying costs comprised of one third of the monthly mortgage, insurance, property taxes, utilities, landscaping, appraisal and elevator repairs, over the period of the ouster. It is uncontested that the Tsitsos' paid a total of $406,768.60 as primarily by way of mortgage payments and other lesser costs during this time period, and that Kakouli contributed nothing to the mortgage.

[194] The Tsitsos' acknowledge that Kakouli paid an additional $47,104.75 in carrying costs and so should receive credit for their two-thirds share in the sum of $31,403.17, reducing this claim to $104,186.36.

[195] It is also undisputed that the plaintiffs had to pay $97,145 as rent for Steven's alternative accommodation which was necessary as a result of the ouster until Steven returned to Thompson to live with his parents.

[196] Bobby and Georgia note that they continued to pay carrying costs associated with the house from the date of the ouster to December 2017, when they advised they would no longer make any further mortgage payments in light of the ongoing dispute. The mortgage was maturing and the mortgagors advised that they would not be renewing it.

[197] Finally, Bobby and Georgia allege that the house was sold at below market value to Kakouli because Kakouli obstructed their ability to sell the house in a timely manner and at fair market value. They alleged that the fair market value of the Hill Property was $3,450,000. It sold for $2,900,000 to Kakouli. Therefore, they claim that Kakouli should pay additional damages in the equivalent of Bobby and Georgia's two thirds' share of the shortfall in fair market value for a total of $366,666.67.

[198] As mentioned earlier, the plaintiffs also seek an accounting under s. 122(2) of the *Courts of Justice Act*:

> An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share.

[199] In my view, for the reasons that follow, an accounting is not the most expeditious way to resolve the matters in this dispute fairly and equitably. As held by the Court of Appeal for Ontario in *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills* (1986), 55 O.R. (2d) 56 (C.A.), "it is a basic right of a litigant to have all issues in dispute resolved in one trial", where feasible. Accordingly, I will review each of the proposed areas of recovery and provide a ruling.

Occupation Rent and Carrying Costs

[200] The claims for occupational rent and the carrying costs are equitable remedies to be exercised in the discretion of the court: see *Mastron v. Cotton*, [1926] D.L.R. 767 (Ont. App. Div.), at pp. 768-69; *Cormpilas v. Ioannidis*, 2020 ONSC 4831, at paras. 22-24, citing *Dagarsho Holdings Ltd. v. Bluestone*, 2004 CanLII 11271 (Ont. S.C.), at para. 26.

[201] I have the discretion to fix the quantum of occupation rent without the benefit of expert evidence, if the circumstances warrant this form of relief: *Casey v. Casey*, 2013 SKCA 58, at paras. 54-55.

[202] In *Kazmierczak v. Kazmierczak*, 2001 ABQB 610, at para. 88, the Court of Queen's Bench of Alberta held,

> In limited circumstances the Courts would recognize a right to occupation rent in favour of the joint tenant who was out of possession. In his book *Principles of Property Law* (Scarborough: Carswell, 1993) Professor B. Ziff summarizes the law with respect to occupation rent at p. 266:
>
> > These rules require elaboration. Given that all co-tenants are inherently entitled to possession of each and every part of the property, no matter the size of their individual shares, one co-owner cannot exclude or "oust" another (say, by changing the locks). Not only is this direct action unlawful, but also where the conduct of one co-owner is so egregious that one would not expect the other party to remain, this amounts to a constructive ouster. If a party is locked out or forced to leave by the expulsive conduct of the other, the remaining owner may be charged with an occupation rent. *No occupation rent is normally payable simply because one owner has enjoyed exclusive possession.* [Emphasis in original.]

[203] The factors informing the quantum of occupation rent are set out in *Griffiths v. Zambosco* (2001), 54 O.R. (3d) 397 (C.A.), at para. 49, and includes any other competing claims in the litigation.

[204] The Tsitsos' agreed to purchase Hill Property with Kakouli as joint tenants. They agreed to pay the carrying costs of this house, including the mortgage payments, in part because Steven was also living there. Indeed, Kakouli never contributed to any mortgage payments, nor was she asked to. Furthermore, their agreement to pay the carrying costs was not expressed to be dependent upon Steven living at Hill Property. While the Tsitsos' expressed an intention to possibly retire at Hill Property in the future, that intention had not yet crystallized as at the date of sale of the house. Moreover, the intention of all the parties was that Kakouli would also have the right to live in the house before and after the Tsitsos' retirement, irrespective of whether Steven was living there also, and without an expectation that she would contribute to the carrying costs.

[205] Accordingly, the costs assumed by Georgia and Bobby over their two-third proportionate share of the costs attributed to the Hill Property were always intended to be a gift to Kakouli in consideration of love and affection. This is consistent with Georgia and Bobby's position throughout the trial; namely, that all of the monies that they contributed to the financial welfare of Kakouli, including a disproportionate share of the carrying costs of the various residences purchased with Kakouli, were a gift to Kakouli. They did this because they acknowledged that Kakouli was of limited financial means as compared to them, and consistent with the Greek family and cultural traditions that they aspired to.

[206] In my view, the appropriate remedy, given this extended family context, is that Kakouli is responsible for reimbursement of the rent paid on behalf of Steven in the sum of $97,145.00 and Kakouli forfeits the carrying costs she paid in excess of her one third share in the sum of $31,403.17.

iii. Claim for Depreciated Sale Price of the Hill Property

[207] Bobby and Georgia claim that the fair market value of the Hill Property was 3.45 million dollars. They therefore claim a loss of $366,666.67 which is two thirds of the alleged $550,000 loss of value attributable, they say, to Kakouli's failure to cooperate with the sale of the Hill Property.

[208] I am not satisfied on the evidence that the sale of the Hill Property was delayed or sold below fair market value, or, alternatively, that the sale price achieved was below fair market value by reason of undue interference by Kakouli with efforts by various real estate agents to sell the property.

[209] Bobby and Georgia rely on *Mathieson v. Ostrowski*, 2011 ONSC 1031, for the proposition that expert evidence is not required to establish the fair market value of a property in family-related disputes. In that case, the non-occupant spouse claimed that the occupant spouse obstructed the sale of the property and as a result the property was sold under fair market value. However, in *Mathieson*, the plaintiff called the real estate appraiser to give evidence of the fair market value of the property, and also called the real estate agent to give evidence on the difficulties faced in their efforts to sell the property. Furthermore, in *Mathieson*, the court ultimately found that the sale

price was close enough to the fair market value and therefore declined to issue an award under this heading of damages.

[210] No such evidence was led by the Tsitsos' here, other than a written appraisal dated May 4, 2014 that provided a fair market value appraisal of the property. The Tsitsos' did not file a trial affidavit from the author of the written appraisal. Kakouli, in a response to a request to admit, admitted that York Simcoe Appraisal provided the parties with the appraisal report. However, I do not interpret the response to accept the truth of the content of the appraisal report, but only the fact it was provided to the parties and what it said. The appraisal report stated that the fair market value of the Hill Property at that time was 3.45 million dollars.

[211] By the time of trial, this appraisal report was stale dated and had not been updated to a date close in time to the actual sale.

[212] The Hill Property was up for sale for three years. In the intervening period, the property was pulled off the market by the Tsitsos' for approximately eight months and the parties went through a series of real estate agents – some criticized by Kakouli and others by the Tsitsos'.

[213] The evidence shows that the Hill Property was up for sale for approximately three years before the Tsitsos' and Kakouli bought it in 2012. Therefore, the period of time it took for this property to sell was comparable to the last time it was placed on the market.

[214] Further, Diamond J. issued an order reducing the listed sale price from 3.57 million dollars in January 2017 to 3.2 million dollars from April to May 2017.

[215] While it appears that there was frustration by the sales agents concerning repair and maintenance issues, I had no direct evidence from any of the sales agents in terms of placing that frustration into any meaningful context. More specifically, I had no direct evidence from the sales agents concerning who was to blame and what impact the actions or inactions may have had on the sale price or the length of time it took to sell this home. While Georgia and Bobby understandably were frustrated at having to pay ongoing repair and maintenance costs while Kakouli excluded them from entry, it was their choice not to pay for the repairs and maintenance apparently recommended by the real estate agents along the way that might have expedited the sale and increased the sale price of the Hill Property.

[216] The real estate agent acting for the Tsitsos' and Kakouli delivered an unconditional offer to purchase the Hill Property in December 2016 for 2.8 million dollars. The Tsitsos' were prepared to accept this offer. Kakouli then made her offer to purchase for 2.9 million dollars which the Tsitsos' accepted.

[217] Georgia and Bobby have failed to satisfy me that the house was sold below fair market value or, alternatively, that if it was, the sole cause or a major contributing factor, was attributed to Kakouli. Further, and in any event, the Tsitsos' were prepared to accept an offer to purchase that was $100,000 less than what they realized. There was no suggestion that they would be

accepting either offers on the stipulation that they intended to hold Kakouli accountable for an alleged below fair market value sale.

[218] However, the costs attributable to facilitating the sale of the Hill Property, paid by Bobby and Georgia, are appropriate recovery items. The act of ouster prompted the sale. Based on the evidence, I fix those costs in favour of Bobby and Georgia at $7,694, comprised of the appraisal, landscaping and elevator repair costs.

[219] As I stated earlier in these reasons, the $161,000 lent by Wasiem towards the purchase price of the Hill Property is the subject of other litigation. Accordingly, I will not wade into it except to say that this sum did not factor into my assessment of the remedies discussed above in relation to the Hill Property.

iv. Conversion of Personal Property in the Hill Property

[220] Conversion is a tort that addresses the wrongful interference with goods and chattels owned by another. Conversion is proven when the claimant demonstrates ownership over the goods in question, and that the holder of the goods refuses to return them. In *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at para. 31, Iacobucci J. characterized this tort as one of strict liability.

[221] Damages for the tort of conversion are assessed on the date of the wrong, not the date of trial: see *Bankruptcy of Kostiuk (Re*), 2002 BCCA 410, at para. 28, citing John G. Fleming, *The Law of Torts*, 9th ed. (Ontario: Carswell, 1998), at p. 76.

[222] Bobby and Georgia claim that a number of items remain in the Hill Property that belong to them. They are referencing furniture including, most notably, a Steinway & Sons Grand Piano which was bought on or about February 21, 2006, for $85,000, as per their Notice of Special Damages, served October 24, 2019, and filed with the amended trial record.

[223] Georgia deposed in her affidavit sworn May 14, 2019, that it is difficult to determine with precision which items of furniture currently situated in the Hill Property are owned by she and Bobby. Georgia candidly conceded in her trial affidavit that their furniture may be intermingled with the furniture that came from: the apartment occupied by Kakouli and Wasiem in Egypt; Wasiem's mother's home in Egypt that was shipped to Canada in 2005; a business selling furniture from Egypt that Kakouli owned in Toronto prior to the purchase of the Hill property; and Demitry's house on Ossington Avenue which was sold in 2013.

[224] Georgia deposed that she, Steven and Kakouli travelled to Egypt in 2005 whereupon Georgia placed orders for French style reproduction furniture that was then sent to the Horsham Property and that she arranged for payment through the deposits to the joint account. Georgia also produced records showing deposits of $135,000 into the joint account in 2005 and a further 47,956 deposited in 2006. Georgia claims that the initial deposit of $135,000 was for renovations and furnishings at Horsham Property while the deposit of $47,956 was entirely to purchase furniture for the Horsham Property. The furniture was then moved to the Hill Property.

[225] Kakouli claims that none of the furniture currently located at the Hill Property belong to Georgia and Bobby. Rather, she claims that all of the furniture came from her apartment in Egypt, Wasiem's mother's home in Egypt, the furniture business she ran from 2010 to 2011, and Demitry's house. She admits that no furniture has been retrieved from the Hill Property by Georgia and Bobby.

[226] Kakouli did not produce any direct evidence from Wasiem's mother in order to provide what furniture might belong to Wasiem's mother. Wasiem was only able to identify a relatively small number of furnishings from 6 photographs as coming either from his and Kakouli's matrimonial apartment in Egypt, or from his mother's home Egypt. He confirmed that some of the furnishings from his and Kakouli's apartment from Egypt went to his new house in Toronto. Demitry did not identify any furniture that ostensibly came from his house. Kakouli did produce a shipping receipt evidencing furniture being exported from Egypt to her business showing a value of $18,220, however, the description of the furniture is very generic and she did not indicate which of those pieces were sold through her business and which remain at the Hill Property.

[227] The Tsitsos' based their claim on two alternative scenarios. First, if the property is returned, they seek a value of the property in the sum of $74,318. In the alternative, if the property is not returned, then they seek the sum of $174,970.24 being the value of the property on the date of the ouster. The Notice of Special Damages organizes the property claimed as follows:

a) Bobby and Georgia: Steinway and Sons Grand Piano, china and kitchenware, and furniture; and

b) Steven: Sundry sheet music books and other music related books, Apple iMac computer, various clothing, and Magic Cards sold to Alpha Beta Unlimited.

[228] Many items have now been returned to the Tsitsos' as evidenced by the items that are struck from Appendix A to the Notice of Special Damages.

[229] There was little documentary evidence to support the price claimed for each individual item of personal property at issue.

[230] With the exception of the Steinway & Sons Grand Piano, which I will deal with separately, I am declining to issue a declaration that the disputed items be returned to the plaintiffs and opt, instead, to make a monetary award of damages based in conversion. History shows that past requests and efforts to return personal items have been met with mixed success, at best, given the acrimony amongst the parties.

Magic Cards

[231] I am satisfied on the evidence that Demitry wrongfully sold Steven's Magic Cards to Alpha Beta Unlimited in January 2015, for the sum of $1,318.66. As the Magic Cards were in Kakouli's control and possession and she refused or neglected to return them to Steven. I find that Kakouli is liable for this sum to Steven.

Remaining Items (Other than the Piano)

[232] For the remaining items, excepting the piano, I am assessing damages at one half the requested value as a fair assessment of damages in the circumstances. I am satisfied on the evidence that some such items of personal property were likely left behind at the Hill Property that belong to Georgia, Bobby or Steven. On the other hand, there are other items, notably furniture, that belong to Kakouli, Wasiem or Wasiem's mother. In coming to this finding, I accept Wasiem's evidence that some of the items of furniture, which he identified from photographs at trial, came from either his mother's apartment in Egypt or his and Kakouli's apartment in Egypt. However, this was a minority of the furniture claimed by Georgia and Bobby.

[233] I also accept Steven's evidence with respect to the computer, value of the sheet music and music books which had his own musical notations, and his description of the types of clothing and values he paid. This included "designer brand" clothing, which was itemized with associated prices, though not receipts reflecting all of the values. Much of the documentary evidence tendered related to screenshots or copies of postings on Kijiji in 2015 relating to items that looked like items belonging to Steven.

[234] However, the evidence on both sides of the ledger regarding ownership and value was lacking. While some documentary evidence was submitted showing the purchase price of some of the disputed items, notably the kitchenware and china, the invoices reflected a large number of items for the Santa Maria Pizzeria from a Winnipeg wholesaler that are not claimed. The invoices fail to distinguish between those items that went to the pizzeria versus those that went to the Hill Property.

[235] I therefore assess damages at 50% claimed as follows:

i. the Sundry sheet music books and other music related books (Steven's): $9,628.50;

ii. Apple iMac Computer (Steven's): $900;

iii. Various clothing owned by Steven: $17,462.15 (see updated list, appendix B to the plaintiffs' factum);

iv. China and Kitchenware: $6,308.99; and

v. Furniture: $7,500.

Steinway & Sons Grand Piano

[236] Kakouli claims that she purchased the Steinway & Sons Grand Piano from her share of the profits. However, in light of my ruling that she was not a beneficial co-owner of the Manitoba businesses, she did not earn profits from those enterprises from which to purchase the piano. Kakouli did not suggest that she paid for the piano with other resources.

[237] In addition, the evidence shows that the piano was paid for by way of two bank drafts, each in the sum of $42,500 and each drawn from Kakouli and Georgia's joint bank account. The joint bank account was comprised of deposits made solely by Georgia and Bobby. The fact that one of the bank drafts was signed by Kakouli does not alter the fact that the monies to pay for the piano came from Georgia and Bobby.

[238] Georgia produced the following documents in evidence:

i. a sales contract and invoice dated February 21, 2006, from Pianos Prestige, and made out to Georgia for the sale of the piano;

ii. a letter dated February 21, 2006, from Pianos Prestige, addressed to Georgia asking her to sign the sales contract; and

iii. an insurance policy for the piano that Georgia pays for, and with Georgia as the insured.

[239] Notably, the Tsitsos' paid a considerable sum to purchase a violin and bows for Steven. According to the same Lloyds of London insurance policy that also lists the piano as insured property, the insured value of the violin is $900,000 USD, and the insured value of three bows are $45,000 USD, $150,000 USD, and $275,000 USD. It was two of these bows that Kakouli hid from Steven and Georgia when the dispute over Demitry's bail hearing arose.

[240] Furthermore, it was agreed that Steven went to New York to select the piano to be purchased. Kakouli claims he was doing this as a favour to her, as she does not play piano and he was a prodigy pianist. However, Steven claims that he was sent because the piano was being bought for his use by his mother, and that each piano has a unique feel requiring the prospective owner to try several before selecting the right one. It was acknowledged by all parties that Steven was a child prodigy and has an extraordinary talent as a pianist and violinist and was pursuing a career as a concert pianist at the time of the purchase. Kakouli's explanation that she always wanted a grand piano, even though she does not play, and that is why she purchased one does not have an air of reality when assessed against the competing evidence.

[241] On the totality of the evidence, I find that the piano was bought by Georgia for use by her son. The piano was purchased with funds drawn from the joint bank account but with deposits made by Georgia and Bobby. Accordingly, title of the piano belongs to Georgia. I am satisfied that the value of the Steinway & Sons Grand Piano as at the date of conversion was the original purchase price of $85,000 and therefore assess damages at $85,000 plus prejudgment interest from the date of conversion, which coincides with the date of ouster. However, in the event that Georgia and Kakouli agree that Kakouli will surrender the piano to Georgia in good condition, this damage award will be forfeited by Bobby and Georgia, and Kakouli will receive $85,000 in addition to the amount otherwise allocated to her.

VII. JUDGMENT

[242] For the reasons above, this court grants judgment in favour of the plaintiffs as follows:

a) damages to Georgia and Bobby Tsitsos in the sum of $203,647.99, comprised of $97,145.00 (Steven's rent), $85,000 (Grand Piano), $7,694.00 (costs associated with sale of Hill Property), $6,308.99 (china and kitchenware) and $7,500 (furniture);

b) damages to Steven Tsitsos in the sum of $29,309.31, comprised of $1,318.66 (Magic Cards), $9,628.50 (music books etc), $900 (computer), and $17,462.15 (clothing/shoes);

c) prejudgment interest is granted in accordance with the *Courts of Justice Act*;

d) postjudgment interest is granted in accordance with the *Courts of Justice Act*; and

e) costs in an amount to be determined.

[243] The counterclaim is dismissed with costs;

[244] The parties are to provide me with brief written submissions (not exceeding 2 pages from each party) regarding the allocation of the funds currently paid into court consistent with the judgment, and are to add to the above damages payment in the sum of $17,500 to Georgia and Bobby consistent with the charging order granted on consent with respect to the outstanding costs award against Kakouli. If the parties cannot parties cannot agree on joint submissions, the plaintiffs will provide their submissions within 5 business days from the release of these reasons, and the defendant will provide her responding submissions within 5 days from receipt of the plaintiffs' submissions.

[245] The parties shall also have ten business days from the release of this decision to discuss costs. If the parties cannot agree, then the plaintiffs/defendants by counterclaim will deliver their costs outline and written submissions, not to exceed ten pages double spaced, within ten business days thereafter. The defendant/plaintiff by counterclaim shall then have ten business days to provide her written responding submissions and costs outline. The respective submissions are not to exceed 5 pages in length (in addition to the cost outlines).

Vella J.

Released: May 11, 2021

CITATION: Tsitsos v. Poka, 2021 ONSC 3418
COURT FILE NO.: CV-13-00494353-0000
DATE: 20210511

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Georgia Tsitsos, Haralabos Tsitsos
and Steven Tsitsos

Plaintiffs

– and –

Kakouli Poka

Defendant/Plaintiff by Counterclaim

- and -

Georgia Tsitsos and Haralabos Tsitsos

Defendants by Counterclaim

REASONS FOR JUDGMENT

Vella J.

Released: May 11, 2021