

**SUPREME COURT OF CANADA**

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| **Citation:** Nishi *v.* Rascal Trucking Ltd.,2013 SCC 33, [2013] 2 S.C.R. 438 | **Date:** 20130613  **Docket:** 34510 |

**Between:**

**Edward Sumio Nishi**

Appellant

and

**Rascal Trucking Ltd.**

Respondent

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 47) | Rothstein J. (McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring) |

Nishi *v.* Rascal Trucking Ltd., 2013 SCC 33, [2013] 2 S.C.R. 438

Edward Sumio Nishi Appellant

v.

Rascal Trucking Ltd. Respondent

**Indexed as: Nishi *v.* Rascal Trucking Ltd.**

2013 SCC 33

File No.: 34510.

2013:  January 16; 2013:  June 13.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for british columbia

*Trusts — Purchase money resulting trust — Appellant using funds received from respondent to purchase property in appellant’s own name — Funds representing disputed monies owed to third party — Whether purchase money resulting trust should be abolished in commercial transactions in favour of unjust enrichment principles — Whether a transfer is gratuitous when it constitutes the discharge of a legal and moral obligation to a third party — Whether a proportionate interest in the property is acquired where the transferor attempted, but failed to secure the title holder’s agreement to an interest in the property — Whether presumption of resulting trust was rebutted.*

In 1996, Kismet Enterprises Ltd. owned approximately two acres of land in Nanaimo, British Columbia that it leased to Rascal Trucking Ltd. Rascal began operating a topsoil processing facility on the property that generated significant complaints from the neighbourhood. As a result, the City passed resolutions declaring that the facility was a nuisance. The City subsequently removed the topsoil and lodged the costs incurred of $110,679.74 against the property as tax arrears. Rascal’s lease included provisions which required it to “hold harmless” Kismet for “any and all liabilities resulting from Rascal’s operations on the property”, but at no point did Rascal reimburse Kismet or the City for the costs of the removal of the topsoil. Kismet determined that, as a result of the tax arrears and the existing mortgage to CIBC, there was no equity left in the property. It stopped making mortgage payments. Throughout the ensuing foreclosure proceedings, Mr. Heringa, the principal of Rascal, tried in a number of ways to acquire the property, but was unsuccessful. In May 2001, the property was sold to Mr. Nishi for $237,500. Nishi was assisted in the purchase by Rascal in the amount of $110,679.74, the exact amount of the tax arrears. Heringa sent Nishi’s lawyer several faxes containing offers with different terms, attempting to acquire an interest in the property. Nishi did not agree. Heringa subsequently sent a fax indicating that the monies would be advanced “without any conditions or requirements”. In November 2008, Rascal began this action claiming a one‑half undivided interest in the property. The trial judge dismissed the action but this decision was overturned on appeal.

*Held*: The appeal should be allowed and the decision of the trial judge should be restored.

There is no reason to depart from the long-standing doctrine of the purchase money resulting trust in favour of an approach based on unjust enrichment. While flexibility is no doubt desirable in certain areas of the law, the purchase money resulting trust provides certainty and predictability because it relies on a clear rule for determining who holds the beneficial interest in a property. When making a gratuitous transfer of property, the person who makes the transfer must have intended either to pass the beneficial interest (a gift) or retain it (a trust). A purchase money resulting trust is a species of gratuitous transfer resulting trust that arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person’s contribution. This presumption can be rebutted if the recipient of the property proves, on a balance of probabilities, that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self‑serving changes in intention over time.

Reviewing the trial judge’s reasons in their full context confirms that he understood that Rascal’s intention at the time of the advance was to contribute to the purchase price without taking a beneficial interest in the property because Rascal was motivated by recognition of the costs that it had imposed on Kismet. This intention, to make good on Rascal’s obligations to Kismet by way of a payment to Mr. Nishi, is not inconsistent with a finding of a legal gift. Moreover, Rascal’s stated intention was to make the advance without any conditions and its contribution towards the mortgage on the property was the amount of the tax arrears ($110,679.74) down to the penny. It was open to the trial judge to conclude that the presumption of resulting trust had been rebutted and it was well supported by the evidence.

**Cases Cited**

**Applied:** *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; **referred to:** *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740.

**Authors Cited**

*Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed. by A. H. Oosterhoff et al.  Toronto: Carswell, 2009.

*Snell’s Equity*, 32nd ed. by John McGhee. London: Sweet & Maxwell, 2010.

*Waters’ Law of Trusts in Canada*, 4th ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith. Toronto: Thomson Carswell, 2012.

APPEAL from a judgment of the British Columbia Court of Appeal (Kirkpatrick, Frankel and Smith JJ.A.), 2011 BCCA 348, 21 B.C.L.R. (5th) 330, 309 B.C.A.C. 182, 523 W.A.C. 182, 340 D.L.R. (4th) 284, [2011] B.C.J. No. 1561 (QL), 2011 CarswellBC 2154, reversing a decision of Dley J., 2010 BCSC 649, [2010] B.C.J. No. 840 (QL), 2010 CarswellBC 1454. Appeal allowed.

*D. Geoffrey G. Cowper*, *Q.C.*, and *Joel Payne*, for the appellant.

*Craig P. Dennis* and *Owen J. James*, for the respondent.

The judgment of the Court was delivered by

Rothstein J. —

I. Introduction

1. A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person’s contribution. This is called the presumption of resulting trust.
2. The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.
3. Edward Sumio Nishi has legal title to property. Rascal Trucking Ltd., which advanced funds to assist in the purchase of the property, claims a beneficial interest in that property. The trial judge found that the presumption of resulting trust had been rebutted. That finding was overturned on appeal.
4. Mr. Nishi now asks this Court to restore the decision of the trial judge by replacing the doctrine of purchase money resulting trust with the doctrine of unjust enrichment and finding that Mr. Nishi was not unjustly enriched. Alternatively, Mr. Nishi says that the presumption of resulting trust was rebutted. I see no reason to disturb the long settled doctrine of resulting trust in favour of unjust enrichment. Rather, I would allow the appeal based on the factual findings of the trial judge that no resulting trust was created in this case.

II. Facts

1. In 1996, Kismet Enterprises Ltd. owned approximately two acres of land in Nanaimo, British Columbia. In April 1996, Kismet leased the property to Rascal. Rascal began operating a topsoil processing facility on the property.
2. Rascal’s topsoil operation generated significant complaints from the neighbourhood. As a result, the City of Nanaimo (the “City”) passed resolutions, declaring that the facility was a nuisance and authorizing the City to remove the topsoil in the event that neither Kismet nor Rascal did so. The City subsequently removed the topsoil and lodged the costs incurred, amounting to $110,679.74, against the property as tax arrears. Rascal brought an action challenging the City’s authority to pass these resolutions, but this Court ruled in favour of the City in 2000 (*Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342).
3. Rascal’s lease included provisions which required it to “hold harmless” Kismet for “any and all liabilities resulting from Rascal’s operations on the property”, but at no point did Rascal reimburse Kismet or the City for the costs of the removal of the topsoil.
4. Kismet determined that, as a result of the tax arrears and the existing mortgage to CIBC, there was no equity left in the property. It stopped making mortgage payments and in December 1997, CIBC began foreclosure proceedings. Throughout the foreclosure proceedings, Hans Heringa, the principal of Rascal, tried in a number of ways to acquire the property, but was rebuffed or ignored by CIBC.
5. Upon completion of the foreclosure proceedings, in May 2001, the property was sold to Mr. Nishi for $237,500. Before selling the property to Mr. Nishi, CIBC paid the tax arrears owing to the City.
6. Mr. Nishi was assisted in the purchase by Rascal who provided $85,000 in cash and assumed responsibility for paying $25,000 on the mortgage. Mr. Heringa acted as guarantor on the mortgage. Subsequent to the purchase of the property, Mr. Heringa instructed his staff that the total contribution to the mortgage should be $25,679.74. As a result, Rascal’s total contribution towards the purchase of the property was $110,679.74, the exact amount of the tax arrears lodged on the property due to Rascal’s topsoil activities.
7. With respect to this financial support, Mr. Heringa sent Mr. Nishi’s lawyer several faxes containing offers with different terms. On May 25, 2001, Mr. Heringa made an offer to contribute $85,000 in cash and to assume $25,000 in mortgage payments in exchange for a second mortgage to secure Rascal’s interest in the property and for the bottom half of the property. Part of the text of the May 25, 2001 fax is reproduced below:

(1) To advise that $85,000.00 can be applied to a purchase of this property for $232,500.00 plus Legal and Land Title costs, to be in the name of Edward Nishi.

(2) Royal Bank (Colleen Tourout) is to advance a First Mortgage. We are taking a 25 year amortization, 5 yr Term, with payments to include Taxes. H. Heringa will act as a Guarantor.

(3) Rascal Trucking Ltd. will be responsible for the payments on $25,000.00 of the Mortgage.

(4) We would like Edward Nishi to sign Registrable Form documentation for a Second Mortgage for $110,000, no interest, to secure Rascal’s interest in this land. This Second will not be Registered as yet, and only at some later date perhaps, with the consent of both of us.

(5) There should be an Agreement that Edward Nishi will apply for, transfer & convey the bottom 1/2 of the property to Rascal Trucking Ltd., after completion of the Sale, and that it is the intent that Rascal can use, and later own the bottom portion of the property, commencing at the halfway point of the upper driveway, as per the attached Plan. [Emphasis in original; A.R., at pp. 113-14.]

1. There is no evidence that Mr. Nishi accepted this offer.
2. On May 28, 2001, Mr. Heringa sent a fax modifying his earlier offer and stating that “the $85,000.00 is to be applied to the purchase without any conditions or requirements, and these instructions are irrevocable” (A.R., at p. 117). He stated that the request for a second mortgage and for the bottom half of the property to be conveyed to Rascal were “just possibilities, for future reference [and] consideration, and that’s all” (*ibid.* (emphasis in original)). The text of this second fax is reproduced below:

(1) So there is no confusion, Instruction #1, is a stand alone instruction, and the $85,000.00 is to be applied to the purchase without any conditions or requirements, and these instructions are irrevocable. The sale must complete, in the name of Edward Nishi. Items 2 & 3 are only to confirm what is to occur.

(2) The rest (Items 4 & 5) are just possibilities, for future reference & consideration, and that’s all.

(3) However, if you think that a Second Mortgage or anything else makes sense, to properly protect Nishi, Kismet & Rascal, in the future, from demands from the City or from future Nuisance charges, etc., please advise . . . . Also, Rascal doesn’t want to lose its legal non-conforming status in regard to topsoil processing at this site. [Emphasis in original; A.R., at p. 117.]

1. In November 2008, Rascal began this action claiming a one-half undivided interest in the property.
2. For reasons that will become apparent, it is relevant that Mr. Heringa and Cidalia Plavetic, the principal of Kismet, had had a long-standing business and personal relationship. It is also relevant that Ms. Plavetic and Mr. Nishi are common law partners and have lived on the property since 1997.

III. Judicial History

A. *Supreme Court of British Columbia*

1. Rascal advanced three arguments before the trial judge. First, Rascal argued that there was an agreement between the parties that half of the property would belong to Rascal. The trial judge rejected this argument but noted that “[Mr. Heringa’s] intention and desire to secure an interest was obvious, but Mr. Nishi would not agree” (2010 BCSC 649 (CanLII), at para. 39).
2. Second, Rascal argued that since it had contributed to the purchase price of the property but did not take title, a resulting trust arose such that Rascal was entitled to a share of the property in proportion to its contribution to the purchase price. The trial judge rejected this argument, finding that while there was “no issue of a gift”, Mr. Nishi’s evidence was that there was no intention for Rascal to have an interest in the land (paras. 42 and 47). The trial judge found that the purpose of the payment was to satisfy the debt from Rascal to Kismet as a result of the tax arrears for which Rascal acknowledged responsibility due to the “hold harmless” undertaking by Rascal in its lease with Kismet. The trial judge also relied on the fact that the amount of the contribution ($110,679.74) was equal to the tax arrears caused by Rascal.
3. Third, the trial judge rejected Rascal’s claim for a constructive trust on the basis of unjust enrichment, finding that the purpose of the contribution was simply to place Ms. Plavetic, Mr. Nishi and Kismet in the same position as if the nuisance and resulting tax arrears had never been caused by Rascal.

B. *Court of Appeal for British Columbia*

1. The Court of Appeal allowed Rascal’s appeal (2011 BCCA 348, 21 B.C.L.R. (5th) 330). That court held that a presumption of resulting trust arose because of a gratuitous transfer between unrelated parties. This presumption was not rebutted because the trial judge had found that there was “no issue of a gift”. The trial judge had erred in finding that the presumption had been rebutted because that finding was based on Mr. Nishi’s intention and not Rascal’s intention. The Court of Appeal observed that it is the intention of the person who advances the funds and not the intention of the recipient that is relevant. The trial judge had concluded that “[Mr. Heringa’s] intention and desire to secure an interest was obvious”. The fact that Rascal had an obligation to indemnify Kismet for the tax arrears could not serve to rebut the presumption because Mr. Nishi, to whom the payment was made, was a legal stranger to Kismet.

IV. Analysis

1. Mr. Nishi appealed to this Court on two grounds. First, he argued that the purchase money resulting trust doctrine should be abandoned in favour of an approach based on unjust enrichment and that no unjust enrichment occurred here. Alternatively, he argued that if the purchase money resulting trust is to be retained, it would not apply in this case. I would not give effect to the first ground of appeal. In my view, there is no reason to depart from the long-standing doctrine of the purchase money resulting trust. However, I would allow Mr. Nishi’s appeal because there was no resulting trust arising on the facts as found by the trial judge.

A. *Should the Purchase Money Resulting Trust Be Abandoned?*

1. The purchase money resulting trust is a species of gratuitous transfer resulting trust, where a person advances a contribution to the purchase price of property without taking legal title. Gratuitous transfer resulting trusts presumptively arise any time a person voluntarily transfers property to another unrelated person or purchases property in another person’s name (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters’ Law of Trusts in Canada* (4th ed. 2012), at p. 397).
2. As Cromwell J. noted in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 12, it has been “settled law since at least 1788 in England (and likely long before) that the trust of a legal estate, whether in the names of the purchaser or others, ‘results’ to the person who advances the purchase money”. Despite this recent endorsement of the purchase money resulting trust, Mr. Nishi argues that it should be abandoned in favour of the doctrine of unjust enrichment. The purchase money resulting trust provides certainty and predictability. Mr. Nishi has not advanced arguments that would support overruling the Court’s jurisprudence in this area.
3. This Court has recently considered under what circumstances it should overrule a prior decision of the Court (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489). It is best not to depart from precedent unless there are compelling reasons to do so (*Henry*, at para. 44). The Court will exercise caution in overturning decisions of firm majorities, particularly when those decisions are recent (*Fraser*, at para. 57).
4. In this case, Mr. Nishi is asking this Court to depart from both *Kerr* and *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, two recent appeals decided unanimously or by firm majorities. These decisions represent just the most recent endorsements of long-standing doctrine. There is no concrete evidence that the purchase money resulting trust is unworkable or has lead to untenable results (*Fraser*,at para. 83). Nor has Mr. Nishi shown that the purchase money resulting trust has been “attenuated or undermined by other decisions of this or other appellate courts” (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778).
5. Mr. Nishi advances four reasons for abandoning the purchase money resulting trust and gratuitous transfer resulting trusts more generally: overlap with the doctrine of unjust enrichment in terms of purpose; overly restrictive framework for the types of intention that motivate transactions; absence of remedial flexibility; and overall lack of flexibility in terms of what can be considered relative to unjust enrichment.
6. Mr. Nishi’s first argument is that since the purchase money resulting trust essentially responds to unjust enrichment, it is unnecessary to retain it as a separate doctrine. Even if the purchase money resulting trust is considered to be an inherently restitutionary concept, I would still not give effect to this argument. The argument appears to have been summarily made and in the absence of harm, confusion or other disadvantage, I am not satisfied that conceptual overlap is a sufficient reason to abandon the purchase money resulting trust. This is particularly true in light of the fact that the purchase money resulting trust has been a feature of the common law since at least 1788 and provides certainty and predictability in situations where a person has made a gratuitous advance.
7. Mr. Nishi’s second argument — that purchase money resulting trusts provide an overly restrictive framework for the types of intention that motivate transactions — must fail because it is based on too narrow an understanding of the scope of gifts in law. The concerns that Mr. Nishi raised in how the Court of Appeal applied this test to the facts here can be resolved more appropriately by considering the legal meaning of the word “gift”. As will be discussed in more detail below, the legal concept of a gift is broad enough to include the type of advance made in this case. Legal gifts do not require philanthropic motivations. The trust-gift dichotomy, as Mr. Nishi describes it, is not restrictive. Rather it reflects the fact that when making a gratuitous transfer of property, the person who makes the transfer must have intended either to pass the beneficial interest (a gift) or retain it (a trust).
8. Mr. Nishi’s third and fourth arguments can be considered together. In essence, Mr. Nishi argues that the doctrine of unjust enrichment is preferable because of its flexibility in terms of factors to be considered, overall focus on justice between the parties and broader remedial options. However, desire for flexibility does not constitute a compelling reason for departing from the unanimous decision of this Court in *Kerr*, which was issued just two years ago. While flexibility is no doubt desirable in certain areas of the law, the purchase money resulting trust provides certainty and predictability because it relies on a clear rule for determining who holds the beneficial interest in a property. Absent strong dissenting opinions in this Court, contrary decisions in provincial appellate courts or significant negative academic commentary that would justify disturbing such a settled area of the law, there is no reason to abandon the purchase money resulting trust.

B. *Did a Resulting Trust Arise for the Benefit of Rascal?*

1. Rascal’s contribution to the purchase of the property was made without consideration and Rascal and Mr. Nishi are not related. Therefore, the legal presumption of resulting trust applies (*Pecore*, at paras. 24 and 27). This is because in such circumstances equity presumes bargains rather than gifts (*Pecore*, at para. 24). In the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price (see *Waters’ Law of Trusts in Canada*, at p. 401).
2. However, the presumption of resulting trust can be rebutted if the recipient of the property proves, on a balance of probabilities, that the person who advanced the funds intended a gift (*Pecore*, at paras. 24 and 44). The relevant intention is the intention of the person who advanced the funds at the time of the contribution to the purchase price (*Pecore*, at para. 59). Therefore, for Mr. Nishi to rebut the presumption in this case, he must prove that Rascal intended to make a gift at the time that Rascal made a contribution to the purchase price, in May 2001.
3. In my view, the trial judge was correct to conclude that the presumption was rebutted in this case. In his May 28, 2001 fax, Mr. Heringa indicated that the contribution to the purchase price and his intention to pay $25,000 of the mortgage was made “without any conditions or requirements, and these instructions are irrevocable” (A.R., at p. 117). As will be discussed below, a contribution to the purchase price without any intention to impose conditions or requirements is a legal gift. While Mr. Heringa argued that there was either an agreement to transfer a portion of the land to him or an intention for him to hold a beneficial interest, the trial judge preferred the evidence of Mr. Nishi (para. 40).
4. The Court of Appeal held that the trial judge’s findings (1) that there was no issue of a gift and (2) that Mr. Heringa’s intention to obtain an interest in the property was obvious, meant that the presumption of resulting trust had not been rebutted. In my view, the Court of Appeal erred in the inferences it drew from the trial judge’s reasons on these two key issues.

(1) The Meaning of “Gift”

1. The trial judge found that there was “no issue of a gift” (para. 42). The Court of Appeal took this statement to mean that the presumption of resulting trust was therefore not rebutted, because to rebut it would require Mr. Nishi to prove that the contribution was a gift. In my respectful view, the Court of Appeal erred by taking this statement in isolation as conclusive of the trial judge’s reasoning.
2. In the trial judge’s reasons, immediately following his statement about there being “no issue of a gift”, he states: “The presumption of a resulting trust is rebuttable by the title holder showing that the payment was not intended to create a beneficial interest” (para. 42). This demonstrates that the trial judge understood the test for rebutting the presumption to be based on the absence of intention to create a beneficial interest for the transferor. There would have been no need for the trial judge to continue his analysis beyond his statement about there being no issue of a gift, if the trial judge had not been of the opinion that an intention to create a beneficial interest in the transferor was the test for determining whether the presumption of resulting trust had not been rebutted.
3. The conclusion of the trial judge was that Mr. Nishi had satisfied the burden on him of rebutting the presumption of resulting trust. In so concluding, the reasons of the trial judge appear to suggest that he distinguished between a gift and absence of an intention by the transferor to hold a beneficial interest after the advance. Although he made such a distinction, his conclusion that there was no intention to create a beneficial interest in the property for Rascal is legally the same as saying that there was an intention to make a gift to Nishi. The trial judge erred in distinguishing between a gift and intention to create a beneficial interest for the transferee but that error was inconsequential.
4. Indeed, the trial judge’s error may well be explained by reference to the academic authorities as some authorities have phrased the test for rebutting the presumption of resulting trust using language about intention not to hold the beneficial interest in the property. For example, *Snell’s Equity* describes the type of evidence required to rebut the presumption as “any evidence tending to indicate that A’s intention was that B should take the beneficial interest in the property acquired with A’s purchase money” (J. McGhee, ed., *Snell’s Equity* (32nd ed. 2010), at para. 25-012). Similarly, *Oosterhoff on Trusts* describes the presumption of resulting trust as “a presumption that the apparent donor did not intend to give the beneficial ownership of the assets to the recipient” (A. H. Oosterhoff et al., eds., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at p. 640).
5. In my view, these formulations are simply another way of describing whether the transferor’s intention was to create a legal gift. There is no second category of intention that rebuts the presumption. *Pecore* and *Kerr* did not recognize a different category of intention, other than intention to make a gift, that would rebut the presumption. This is consistent with other authorities such as *Waters’ Law of Trusts in Canada* where the proof required to rebut the presumption is intention “to make a gift of the property” (p. 401; see also pp. 406 and 409). In Canada, our jurisprudence is that there is no difference between the intention to make a gift and the intention that the transferor not hold a beneficial interest. In other words, in the case of a gratuitous transfer, there is a gift at law when the evidence demonstrates that, at the time of the transfer, the transferor intended the transferee to hold the beneficial interest in the property being purchased.
6. Reviewing the trial judge’s reasons in their full context confirms that he understood that Rascal’s intention at the time of the advance was to make a legal gift — i.e. to contribute to the purchase price without taking a beneficial interest in the property. As the trial judge found, Rascal’s contribution to the purchase price was motivated by recognition of the costs that it had imposed on Kismet, the company owned by Ms. Plavetic, Mr. Heringa’s friend. As I will explain, this intention, to make good on Rascal’s obligations to Kismet by way of a payment to Mr. Nishi, is not inconsistent with a finding of a legal gift. Moreover, as was clear from the May 28, 2001 fax, Rascal’s stated intention was to make the advance without any conditions such as obtaining a beneficial interest in any portion of the land.
7. The trial judge’s comment that there was “no issue of a gift” was made in the context of reviewing Mr. Nishi and Ms. Plavetic’s perspective on the purpose of the payment:

In this case, there is no issue of a gift. Neither Mr. Nishi nor Ms. Plavetic considered the plaintiff’s contribution to be a gift. [para. 42]

Mr. Nishi and Ms. Plavetic did not see the payment as a gift, because as the trial judge went on to describe, Rascal acknowledged its responsibility for a debt to Kismet related to the tax arrears arising from Rascal’s topsoil operation. However, it made no sense for Rascal to make that payment directly to Kismet since Kismet was subject to other liabilities and was essentially defunct. If Rascal had made the payment to Kismet, it would not have assisted Mr. Heringa’s friends to obtain title to the property. Making the contribution to the purchase price, therefore, enabled Rascal to live up to its moral commitment in a way that practically benefited Mr. Heringa’s friends. It also left open the possibility that in the future they might agree to a second mortgage or a transfer of a portion of the property to Rascal.

1. Indeed, Mr. Heringa’s instructions to his staff on payment of his contribution towards the mortgage on the property refer to the amount of the tax arrears ($110,679.74) down to the penny. The necessary implication is that Mr. Heringa viewed the payments as connected with that moral obligation. If Mr. Heringa’s intention at that time was for Rascal to take a beneficial interest in the property, the moral obligation would not have been fulfilled since Rascal would have used the payment to obtain a corresponding interest in the land and not to make good on its moral obligation. In other words, for these parties, one payment cannot be used both to discharge the moral obligation and to obtain a beneficial interest in the land. The two intentions are incompatible.

(2) Evidence of Rascal’s Intention

1. Evidence that arises subsequent to a gratuitous transfer can be admissible to show the true intention of the transferor (*Pecore*, at para. 59). However, it is the intention of the transferor *at the time of transfer* that is determinative. The difficulty with subsequent evidence is that it may well be self-serving or the product of a change in intention on the part of the transferor (*Pecore*,at para. 59).
2. The trial judge commented on Rascal’s intention twice in his reasons. When discussing whether there was an agreement between Rascal and Mr. Nishi to convey part of the property to Rascal, the trial judge stated that “[Mr. Heringa’s] intention and desire to secure an interest was obvious, but Mr. Nishi would not agree” (para. 39). Later in his reasons, the trial judge stated that he “specifically accepted the evidence of Mr. Nishi that there was no intention to have any interest in favour of Rascal created in the land” (para. 47). In my view, neither of these statements is inconsistent with the trial judge’s conclusion that the presumption of resulting trust was rebutted.
3. The trial judge’s first statement was made in the context of discussing whether Mr. Heringa and Mr. Nishi had formed a contract that conveyed an interest in the land to Mr. Heringa. The trial judge stated:

His intention and desire to secure an interest was obvious, but Mr. Nishi would not agree. As a result, I conclude that there was no agreement whereby Mr. Heringa was to be given an interest or ownership position in the land. [Emphasis added; para. 39.]

Mr. Heringa’s desire to obtain an agreement whereby half of the property would be conveyed to him was clear from the content of the May 25, 2001 fax in which he asked for an agreement to transfer and convey the bottom portion of the land to Rascal. However, Mr. Heringa withdrew this request in his May 28, 2001 fax by stating that there were to be no conditions or requirements attached to the financial support.

1. Rascal argued before this Court that the trial judge’s finding that Mr. Heringa’s “intention and desire to secure an interest was obvious” constitutes a finding of fact as to Rascal’s intention to hold a beneficial interest in the property as a result of the advance. However, the trial judge’s findings with respect to the presence of an intention and desire to enter a contract should not be applied to the issue of resulting trust, when the trial judge did not choose to do so. The trial judge obviously did not consider his finding of an intention to contract to be determinative of intention for the purpose of the resulting trust analysis. Mr. Heringa withdrew this request in his May 28, 2001 fax by stating that there were to be no conditions or requirements attached to the financial support. It was open for the trial judge to organize his factual findings in this manner.
2. With respect to the trial judge’s second statement — that he “accepted the evidence of Mr. Nishi that there was no intention to have any interest in favour of Rascal created in the land” — the trial judge was speaking not just of Mr. Nishi’s evidence as to his own intention at the time but also Mr. Nishi’s evidence as to Mr. Heringa and Rascal’s intention at that time. This follows from his discussion of Rascal’s acknowledgement of its responsibility for the debt (paras. 45 and 47).
3. At trial, it was Rascal’s position that at the time of the contribution to the purchase price, Mr. Heringa and Rascal’s intention was for Rascal to retain the beneficial interest in proportion to that contribution. The trial judge essentially concluded that Mr. Heringa’s evidence at trial about Rascal’s intention at the time of the transfer could not be relied upon. Consistent with the caution of this Court in *Pecore*, this is a quintessential example of why after-the-fact evidence should be viewed with skepticism, because it often demonstrates a change in intention, not the intention at the time of the advance. It was open to the trial judge to reach this conclusion and it was well supported by the evidence, particularly Mr. Heringa’s May 28, 2001 fax. The trial judge’s decision is not in error and ought to be restored.

V. Disposition

1. The finding of the trial judge that the presumption of resulting trust was rebutted is sound. I would allow the appeal and restore the decision of the trial judge with costs to Mr. Nishi throughout.

*Appeal allowed with costs throughout.*

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