

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Gibson Estate (Re)*, 2017 NSSC 68

**Date:** 2017-04-03

**Docket:** Ann. No. 450389

**Registry:** Annapolis Royal

**Between:**

Joanne Gibson, personal representative for the Estate of Philip Ernest Gibson

Applicant

v.

Lynda G. Shand, also known as Lynn Shand

Respondent

**Judge:** The Honourable Justice Pierre L. Muise

**Heard:** August 8, September 19, September 20 and September 23,  
2016, in Annapolis Royal, Nova Scotia

**Final Written  
Submissions:** September 27, 2016

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**Library Heading**

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**Summary:** Ms. Gibson claimed \$77,000 was loaned to Ms. Shand by her late father, Mr. Gibson, and was still owed, with interest. It was to purchase and develop a property and pursue her business. It was secured by Mr. Gibson taking title to the property. She wanted Ms. Shand removed and the buildings

left on the property. In the alternative, she sought an order for the sale of the property with the proceeds being used to pay the amounts owing by Ms. Shand and the balance, if any, to be paid to her, or an order for payment of the amount left owing.

Ms. Shand indicated that only \$25,000 was loaned and that she had paid it all back except for \$2,700. She stated that the remainder of the \$77,000 advanced to her was for her to purchase things for Mr. Gibson. She also sought compensation for items which she had in Mr. Gibson's shed and which Ms. Gibson disposed of following his passing.

**Result:**

The loan and security arrangement created an equitable mortgage. Ms. Gibson established that the full \$77,000 was a loan. Ms. Shand failed to establish she had repaid \$22,300 or any lesser amount, to calculate the amount remaining to be paid to redeem the property. Her evidence was not sufficiently credible or reliable to do so, and, in any event, was not accompanied by the corroboration required by s. 45 of the *Evidence Act*.

However, the buildings were not fixtures and did not form part of the security for the loan. They simply rested on the property by their own weight, were still portable and lacked the requisite permanence.

Ms. Gibson, due to the total absence of any accounting, was unable to establish that no amounts had been repaid. Therefore, a rudimentary calculation of the amount remaining owing, for enforcement purposes, had to be conducted, erring in favour of Ms. Shand. It included interest of 5% pursuant to the Canada *Interest Act*. That amount was \$64,700. \$25,000 was deducted for the value of the land, which Ms. Gibson was awarded vacant possession of, and \$200 was deducted for the value of the items in the shed belonging to Ms. Shand. That left an amount owing for enforcement purposes of \$39,500.

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**Counsel:** Eric O. Sturk, and Greg Affleck, for the Applicant  
Laura Fowler (Agent), for the Respondent

## **INTRODUCTION**

- [1] This case arises from sad circumstances on both sides.
- [2] Joanne Gibson, because of the attitude of her late mother, Claire Gibson, had a strained and distant relationship with her parents. After her mother passed away in April of 2008, she reconnected with her father, Philip Gibson, and experienced a much improved relationship.
- [3] Lynda Shand had to move out of the first residence she purchased in Nova Scotia due to defects and had to leave her second residence because of what she described as harassment from her neighbours. She suffers from mental health difficulties and has attempted suicide. She has experienced, and continues to experience, financial difficulties. Her own daughter took money from her account, exacerbating those difficulties. She has been living in her current location without the usual amenities such as running water and a septic system. However, my decision on this Application cannot be based upon sympathy for either party.
- [4] The common element between the parties is Philip Gibson.

[5] Ms. Shand developed a mutually beneficial friendship with Mr. Gibson. She saw him as a father figure. He loaned her money to buy land, move, construct buildings and/or conduct her business. The land was purchased pursuant to a Purchase and Sale Agreement between the vendors and Ms. Shand. However, Mr. Gibson took the land in his name, apparently as security.

[6] Mr. Gibson passed away on June 30, 2015. At that point, Ms. Gibson became the executrix of his estate.

[7] As executrix, Ms. Gibson asked Ms. Shand to vacate the property so that she could list it for sale. Ms. Shand refused.

[8] Ms. Gibson brought the within Application claiming that \$77,000 was loaned to Ms. Shand by Mr. Gibson, and is still owed, with interest at five percent per annum, from July 2013. She wants Ms. Shand removed and the buildings left on the property. In the alternative, she seeks an Order for the sale of the property with the proceeds being used to pay the amounts owing by Ms. Shand and the balance, if any, to be paid to her.

[9] Ms. Shand contests the Application. She indicates that only \$25,000 was loaned and that she has paid it all back except for \$2,700. She is also

seeking compensation for items which she had in Mr. Gibson's shed and which Ms. Gibson disposed of following his passing.

[10] Ms. Shand's evidence also made reference to services she provided Mr. Gibson. Initially, it suggested she was claiming \$165,000 from the estate for those services. However, on cross examination she confirmed that she was not making any such claim as Mr. Gibson was her friend. She explained that it was included by her agent as something she hypothetically could claim.

## **ISSUES**

The issues to be determined in the case at hand are as follows.

1. How much money did Philip Gibson loan Ms. Shand?
2. How much did Ms. Shand repay?
3. Did Mr. Gibson taking the land in his name create an equitable mortgage?
4. Are the buildings on the land fixtures or chattels?
5. What is the value of the items belonging to Ms. Shand that Ms. Gibson disposed of?

6. What, if any, remedies should be granted?

## **LAW AND ANALYSIS**

### **NOVA SCOTIA EVIDENCE ACT SECTION 45**

[11] Mr. Gibson is not here to give his version of the loan arrangement and repayment. Therefore, section 45 of the Nova Scotia *Evidence Act* becomes relevant. It states, among other things, that:

“In any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgment or admission of the deceased, unless such testimony is corroborated by other material evidence.”

[12] Therefore, irrespective of how credible the evidence of Ms. Gibson or Ms. Shand is, I cannot grant judgment in their favour unless such evidence is corroborated by other material evidence. Such corroborative evidence may be in the form of circumstantial evidence and fair inferences of fact arising from proven facts: *Harvey Estate (Re)*, 2006 NSSC 118, paragraph 15.

**ISSUE 1: HOW MUCH MONEY DID MR. GIBSON LOAN MS. SHAND?**

[13] The onus is on Ms. Gibson to establish the amount of the loan.

[14] She relies on the documentary evidence she has discovered as executrix of her father's estate to establish that. Therefore, the credibility and reliability of her affidavit and oral evidence has little impact on the strength of her case.

[15] For the purposes of the limited extent that her credibility and reliability impacts this application, I will pause here to comment on the issue.

[16] She generally gave her evidence in a straightforward and un-evasive manner. She generally readily admitted points against interest. She did not appear to harbor animosity for Ms. Shand. She generally maintained appropriate demeanor. Her evidence generally made sense.

[17] On the other hand there are points that detract from her credibility and reliability. As the sole beneficiary of Mr. Gibson's estate, she has a personal interest in the outcome of the proceedings. She became upset on cross examination when it was suggested that she had witnessed her father's reference letter. She generally responded that her father had told her about

key points related to the relationship and arrangement between him and Ms. Shand, even though she acknowledged he had not advised her of something as significant as when he had broken his arm. However, she explained that that was because he was stoic and did not want to worry her. At one point in her evidence, she displayed some evasiveness. When asked why her father wanted to change his will on June 25, 2015, she initially responded that he said he wanted to see a lawyer and did not say he wanted to change his will. She, immediately thereafter, readily conceded that she was aware that he had a will prepared at that time. There was also a minor and unimportant inconsistency in her evidence. She testified that she had no idea why Ms. Shand wanted to go to her father's residence on a certain night. That was inconsistent with her affidavit evidence that indicated that Ms. Shand had a key to go tend to Mr. Gibson's animals.

[18] Lastly, she provided affidavit and oral evidence stating that she had disposed of her father's journals because they did not appear to contain any information that would be useful for any legal purpose. However, she acknowledged that they were: "filled with records of day-to-day activities that he and [her] mother enjoyed"; referred to conversations between her father and her as well as her visits to her father; and, contained stories of

when she was born. I was surprised to hear of her attitude towards those journals, given that content. Although everyone has different priorities, it is surprising that those journals did not hold significant sentimental value for her. That may be because of the long period of estrangement. However, she testified that she and her father had reconnected and had a good relationship, following her mother's death. In those circumstances, I would have expected that the journals would hold even more sentimental value for her.

[19] Ms. Gibson's expressed attitude towards the journals, in my view understandably, raised concerns for Ms. Shand that the journals may have contained information to corroborate her evidence. Unfortunately, their destruction has made it impossible to know. However, Linda Gould, Mr. Gibson's last housekeeper, also looked at the journals with Ms. Gibson. She indicated that there was no mention of herself in the journals as they stopped before she started working for him. She confirmed they contained information regarding when Ms. Gibson was born. She indicated that they contained references to daily occurrences, such as his wife getting a permanent. She said that references to Ms. Shand were only in relation to things like her coming over and having coffee. She indicated that she

thought it was her own idea to burn them as there were a lot of papers to get rid of, and it would take her a long time to get rid of them because of the limited number of blue bags she could put out for each collection.

[20] Despite these points raising concerns regarding the credibility and reliability of Ms. Gibson's evidence, for reasons which will become apparent when I discuss the credibility and reliability of Ms. Shand's evidence, I found Ms. Gibson's evidence to be somewhat more credible and reliable than that of Ms. Shand.

[21] Mr. Gibson's bank records reveal transfers to Ms. Shand totalling \$77,000. Three bank drafts showing such transfers were entered into evidence. The one dated July 8, 2013, is in the amount of \$12,000. The one dated July 17, 2013, is in the amount of \$50,000. The one dated August 29, 2013, is in the amount of \$15,000.

[22] A reference letter dated October 2013, and bearing what is purported to be Mr. Gibson's signature, refers to a \$1,000 birthday gift he made to Ms. Shand. The Applicant does not dispute that gift even though she disputes that it is Mr. Gibson's signature and that he prepared the document. There is no indication that gift was part of the \$77,000 advanced.

[23] The reasons she gives for not believing that the document was written by her father include the following. It contains spelling and grammatical errors which he would be unlikely to make. His name is spelled incorrectly. His signature does not look like her father's regular signature on other documents. The document appears to have been written on a computer and printed. Her father does not use a computer. She added that she did not know who signed as a witness. Ms. Shand suggested it was Ms. Gibson. Ms. Gibson disputed that.

[24] Comparison signatures for Ms. Gibson were available. Some of the comparison signatures are inconsistent with each other, and none, in my view, are consistent with the witness signature on the reference letter. It is not even clear that that witness signature says "J. Gibson". It looks more like "A. Jobson". Therefore, I find that, more likely than not, Ms. Gibson did not sign as a witness to her father's signature on that letter.

[25] I have compared what purports to be the signature of Mr. Gibson on the reference letter with other signatures which are accepted as having been his. They share many similarities. However, there are some notable dissimilarities. In the comparison signatures, all of the letters lean forward. In the reference letter signature, the letters of the middle and last name are

more upright, and some even lean back slightly. Also, the second top loop on the “G”, is much higher than the first on the reference letter signature. In all of the comparison signatures, it is much lower. In addition, in the reference letter he wrote his middle name in full. That may be explained by the fact that the letter was intended for use in other potential legal proceedings between Ms. Shand and the Legards. In that circumstance, it would be reasonable for Mr. Gibson to want to sign in such a formal way. When he signed his Will on June 25, 2015, he used his middle initial. However, the lawyer who drafted the Will also used the middle initial, not the full middle name. On the other hand, whoever typed the reference letter, did not use any middle name or initial, and the full name is signed. I recognize that people are not always consistent in their signatures. However, simply by comparing the signatures provided, I cannot determine whether or not Mr. Gibson signed the reference letter. Unfortunately, no witness to the purported signature was made available to confirm it,

[26] Even if I found the document to have been signed by Mr. Gibson, it is of little assistance in determining the issues before the Court, as the most relevant information in it is clearly false. It states: “As many times as I offered Lynn financial assistance, even a loan, she flat out refused my help

and has done so to this day.” It was purportedly signed in October 2013. At that point, Mr. Gibson had recently given Ms. Shand a total of \$77,000 in bank drafts. Ms. Shand acknowledged that \$25,000 of that amount was a loan. Even if he and Ms. Shand had just characterized it as a loan after-the-fact, he still had clearly provided her financial assistance by October 2013.

[27] Statements from Mr. Gibson’s RBC Home Line Plan, a line of credit secured by his home, were entered as part of Exhibit 12. They cover the period from July 3, 2013 to August 31, 2013. They reveal that he took, from that line of credit, \$10,000 on July 8 and \$50,000 on July 17. It is noteworthy that the July 8 withdrawal is exactly the same date as the \$12,000 bank draft to Ms. Shand and the July 17 withdrawal is dated exactly the same date as the \$50,000 bank draft to her. This, in my view, is clear evidence that he borrowed those amounts from his line of credit to provide the bank drafts in question to her. Although the July 8 withdrawal is \$2,000 less than the amount of the bank drafts, the bank documents revealed that Mr. Gibson had enough monies being deposited in his account on a regular basis to be able to cover the additional \$2,000 from his regular funds.

[28] Further statements from Mr. Gibson's RBC Home Line Plan were entered as Exhibit 3. It contains statements for the months of July, August, September, November and December of 2015, as well as for January, February, March, April, May, June and July of 2015. The maximum limit on the line of credit was still \$80,000. Throughout those statements the outstanding balance is shown as being \$79,998.09. Monthly payments were being made varying from approximately \$200 to \$250.

[29] Unfortunately no Homeline Plan Statements were provided for the period between September 1, 2013 and the end of June, 2015. However, Exhibit 12 does contain a History Report from the RBC Customer Support Functions Centre. It makes reference to the \$10,000 and \$50,000 line of credit withdrawals in July 2013. It also notes that, in mid-September of 2013 Mr. Gibson withdrew \$15,148.09, then in mid-October withdrew \$5,200 from that same line of credit. The \$15,148.09 withdrawal is approximately the same amount as the \$15,000 bank draft written to Ms. Shand only a couple of weeks earlier. It is, therefore, supportive of a finding that it was borrowed in order to replenish the amount used for that bank draft. It is also noteworthy that the mid-October withdrawal of \$5,200 would at least roughly coincide with the time during which Ms. Shand paid,

according to her \$3000, to have her buildings moved from Nictaux to Melvern Square (i.e. the Stronach Mountain Road Property). That might support a finding that it was borrowed to assist her in covering the expenses of moving. However, that is not alleged as a further loan amount to be added to the \$77,000.

[30] The statement in Exhibit 12 for Mr. Gibson's Scotiabank Personal Deposit Account number 7504926, shows, on August 22, 2013, entries, in the deposit and withdrawal columns, in the amount of \$14,500 each, one identified as "CHEQUE RETURNED NSF", and the other identified as "CHEQUE". There are corresponding entries in the statement in Exhibit 17 for Ms. Shand's Powerchequing Account number 81893 85633 22. It shows a deposit in the amount of \$14,500 on August 22, 2013. Then, it shows a \$14,500 withdrawal on August 23, with a notation stating "Returned cheque PE Gibson Insufficient Funds". These corresponding entries indicate that Mr. Gibson attempted to provide Ms. Shand a cheque in the amount of \$14,500, but was unsuccessful due to there being insufficient funds in the account that he wrote the cheque on. Then, he provided a bank draft shortly after, i.e. on August 29, 2013, in a very similar amount, i.e. in the amount of \$15,000.

[31] A letter dated October 4, 2012, to Mr. Gibson, from his financial advisor, Bronson Rafuse, contained references to Mr. Gibson having spoken to him about borrowing the money to be used to fund a small business, with the only security being that he would hold title to property “being constructed by Lynn Shand”, and to Mr. Gibson’s comment that he would “not foreclose on Lynn were she to default on payment”. According, to Ms. Gibson, Mr. Gibson had told Ms. Gibson about this letter and reviewed its contents with her.

[32] The letter provides further corroboration and makes it reasonable to infer that the amount subsequently borrowed by Mr. Gibson from his Line of Credit was for the purposes of the funding Ms. Shand’s business venture.

[33] On the other hand, Ms. Shand provided evidence that only \$25,000 of those bank drafts was a loan to be repaid. She said it was \$25,000 out of the July 17, 2013 bank draft totalling \$50,000. It was used to purchase the land in question.

[34] The questions to be answered are whether, that evidence should be accepted or not, and, if rejected, whether, on the whole of the evidence, the

most reasonable inference is that the full \$77,000 in bank draft transfers was a loan to Ms. Shand.

[35] Ms. Shand indicated that the remainder of the funds were given to her to take care of Mr. Gibson's affairs, such as paying for bills and groceries, driving him around, including to medical appointments, participating in various activities, picking up gardening supplies for him, and going out to eat. She explained that Mr. Gibson did not like going to the bank all the time and did not trust his caregivers, Linda Gould and, before her, Isabelle Amero.

[36] Whether her explanation makes sense or not is part of assessing the credibility and reliability of her evidence.

[37] Ms. Shand gave, as a reason for Mr. Gibson putting \$50,000 in her account, to use for him, that he did not want cash around the house for fear that Linda Gould, the housekeeper, would take it. However, she said she gave Mr. Gibson the loan repayments in cash. Those are incongruous explanations. When cross-examined on the incongruity, she tried to explain it away by saying that he had a safe and he would say he needed cash for workers who were coming. That, itself, is also inconsistent. Further, the

“safe” explanation would apply equally to counter the reason for the \$50,000. He could easily have kept it himself in his own safe instead of giving it to Ms. Shand.

[38] While being cross-examined on why she would be repaying Mr. Gibson in cash, Ms. Shand asked how else she could do it. It was suggested to her that she could have given him cheques or put the money into his bank account. She started by explaining that she did not always have access to the bank. Then she stated that she could not explain it and that there was “a mess going on”.

[39] There are also other points which do not appear to make sense.

[40] If Ms. Shand’s evidence that only \$25,000 of the \$77,000 was a loan with the remainder being spent on Mr. Gibson is true, it would mean that around \$50,000 was spent on Mr. Gibson from July to October, 2013.

[41] Ms. Shand did testify that she saw Mr. Gibson give money to others, in the form of what she called “all kinds of donations” to organizations such as PETA, Ducks Unlimited and the fire department. She also testified that, if Mr. Gibson was “going to the city”, she would take out a couple of thousand dollars for him. The example she provided of an activity he

participated in in Halifax was a brewery tour. In addition, she said that, when Ms. Gould first started, some of the money went for buying food that Mr. Gibson liked. None of that was corroborated.

[42] Ms. Shand also stated that she saw Mr. Gibson give Ms. Gould money to pay her phone bill, saying that he would not be able to get a hold of her if she did not do so. Ms. Gould confirmed that. However, she indicated that it was only a few hundred dollars and she paid him back.

[43] There was some corroboration that there may have been a reason to mistrust Ms. Gould. The statement of Jerry Noble was admitted by consent. It states that he had to lay off Ms. Gould “because of missing money at different times”. That suggests that Ms. Gould was responsible for that missing money. However, that was not specified. In addition, there was no corroborating evidence that Mr. Gibson had been informed that Ms. Gould had been fired because of being responsible for missing money.

[44] Ms. Shand did testify that Mr. Gibson had told her that Ms. Gould had been taking things and asking him for money. That was unrelated to Mr. Noble’s statement. The only corroboration was the evidence of Ms. Gould that she did bring food to her house to prepare meals for Mr. Gibson and

did, on one occasion, advise him that she needed money to pay her phone bill so that her phone service would not be terminated.

[45] Linda Gould did not start working for Mr. Gibson until 2014. Therefore, it would not explain the \$50,000 transferred in July 2013.

[46] Linda Gould testified that she was Mr. Gibson's caregiver from March or April of 2014 until when Mr. Gibson passed away in 2015. She and Mr. Gibson became friends to the point where she brought him to her house for Christmas, Easter and his birthday. She helped him with housekeeping, laundry, doctors appointments, prescriptions, cooking, and errands, including shopping and going to the bank. She also took him to her house for dinners.

[47] She indicated that, at the beginning he was quite independent. However, towards the end, she had to be beside him all of the time. Initially he had a cart that he pushed and would sit on when he went to the bank. At the end, she had to push him to the teller in a wheelchair.

[48] She indicated that he would withdraw money every week. It was normally between \$600 and \$700. The funds would be used to buy groceries and pay bills. He would spend approximately \$70 on groceries. If

the funds were low in his account he would transfer money from his Visa to his account to help pay bills. She saw him make such transfers at the teller. He would also withdraw money for Ms. Shand, and she and Mr. Gibson would take it to her. She stated that he frequently gave Ms. Shand money. They would also take her containers of gas for her vehicle so that she could come to his house for coffee. In addition, he would sometimes pick up extra food when doing groceries and they would give it to Ms. Shand to help her out. She explained that one night after Mr. Gibson had been speaking with Ms. Shand on the phone, he thought mistakenly that he had hung up the phone. However, the line was still open and Ms. Gould heard Ms. Shand crying, saying that no one understood how broke she was.

[49] Ms. Shand agreed that Mr. Gibson did bring her gas and, at his house, gave her little things like cans of soup and pudding cups. However, she denied that he bought her groceries and gave her money.

[50] Ms. Gould testified that Mr. Gibson gave Ms. Shand money to: pay for people working on her property; to go to Digby to register her vehicle; and, to fix her vehicle. She said she saw the money pass from Mr. Gibson's hand to Ms. Shand's. Mr. Gibson told her that he was giving her money to

register her truck so that she would visit him and so that they could go “garbage hunting” together.

[51] According to Ms. Shand, she merely rode into Digby with Ms. Gould and Mr. Gibson, at a time when Mr. Gibson was going to see Dr. Black, and paid her own fine so that she could insure her vehicle. She added that Mr. Gibson always offered her money; but, she did not take it. However, she acknowledged that he brought her things like pudding and milk, as her health was critical. She had gone down to 84 pounds.

[52] Ms. Gould had no interest in these proceedings. She gave her evidence in a straightforward, un-evasive manner. She readily acknowledged points against interest, errors in her testimony and things she could not recall. I found her credible, and, subject to uncertainty on her part, reliable. Where her evidence conflicted with that of Ms. Shand, I preferred her evidence over that of Ms. Shand.

[53] Ms. Shand testified that the \$50,000 was exhausted shortly before Mr. Gibson died. However, her bank records reveal that both it and the settlement funds she received in the amount of \$25,126.67, on March 14, 2014, were exhausted by May 12, 2014, i.e. more than a full year before Mr.

Gibson passed. Therefore, her evidence on that point is inconsistent with that undisputed documentary evidence, negatively impacting her credibility and reliability.

[54] The comments in the next issue section regarding Ms. Shand's credibility and reliability also apply to, and have been considered as part of, determining her credibility and reliability on this issue regarding the amount of the loan.

[55] I also examined the bank statements for Ms. Shand's Scotiabank Account with a view to determining whether they corroborated Ms. Shand's assertion that, apart from \$25,000, the remaining funds transferred from Mr. Gibson to her were used for his benefit, as opposed to whether they indicated use by her to purchase and develop her property, pursue her business and/or for her own personal expenses.

[56] In conducting this assessment I have kept in mind that Mr. Gibson had his own income, which he did not appear to have any trouble living off of. He had regular monthly payments of \$610.17 from "REG. DES RENTES" and \$500 from "Investors" being deposited into his RBC Account Number 7504926. He also received, in that account, monthly monies from "Canada".

They varied from about \$140 to \$185, with him having received an additional payment of about \$1,405 on May 6, 2013. In addition, he received intermittent other payments from “Investors”, such as one in the amount of \$12,000 on April 24, 2013. He had \$989.79 from “NORTHERN TRUST”, and amounts from “CANADA” ranging from \$546.07 to \$550.99, being deposited into his RBC Account Number 0000028 each month. The statements in relation to those accounts also show that he was taking ample money out of those accounts to live on.

[57] I have also considered that it would not appear to make sense that Mr. Gibson, who had been living on his own income without apparent difficulty, would borrow almost \$80,000, and hand at least \$77,000 of it to Ms. Shand, to use only \$25,000 for her business and/or the property, with the rest being to buy things for him.

[58] I have further considered the evidence that the land, surveying and subdivision cost Ms. Shand \$25,000. In addition, she paid Billy Gillis \$3,000 to move the two buildings she had in Nictaux to the Melvern Square property. Plus, she had a new building built at that property at a cost of approximately \$8,000, including materials and wages for the two “kids”

who constructed it, as she said she had most of the lumber and she had shingles already.

[59] Ms. Shand added that she sold a smaller building to Billy Gillis for \$2,000 and had another one built for the same price.

[60] Ms. Shand did provide some evidence relevant to the examination of her bank account information. She testified that point-of-sale purchases at Fraser's Supplies were for things that she and Mr. Gibson were working on. There was clear evidence that what Mr. Gibson and her worked on were projects to produce items she could sell in her shop. Therefore, those would be business related expenditures. As that is a hardware store, more likely than not, some of the items were also for use in developing the property in question, such as nails and other materials or supplies. There was no evidence from Ms. Shand that anything was purchased there for Mr. Gibson personally.

[61] She first stated that all of the Canadian Tire purchases were Mr. Gibson's because he used welding rods and blades. She agreed that some of them were for work on items from which she would be making crafts to sell. She did not give a breakdown of what percentage would have been for

his personal use. She indicated that it was hard to know and added that one year they took money out to buy trees. She did not specify whether the trees were purchased at Canadian Tire or somewhere else. She did not specify whether the money was taken from her account or from Mr. Gibson's. She also added that some of the Canadian Tire purchases would have been for her, despite her earlier statement that they were all for Mr. Gibson.

[62] She indicated that the fuel purchases were for both her and Mr. Gibson.

[63] She indicated that the purchases at the dentist, Walmart and Superstore were all for Mr. Gibson.

[64] She said that \$1,200 worth of cash withdrawals were for a microbrewery tour for Mr. Gibson. However, she did not point to the specific withdrawal or purchase reflecting that tour.

[65] She made a general comment that most of the amounts were for Mr. Gibson.

[66] She also testified that she brought him to a place where he got a suit for \$600. However, she was unable to pinpoint that on her account statement.

[67] She testified that Mr. Gibson was not a big spender. However, if they went out on an “adventure” together and had lunch, he would pay for both of them.

[68] The Account History shows that the \$12,000 bank draft deposit on July 8, 2013 raised Ms. Shand’s account balance from \$.13 to \$12,000.13. Therefore, Ms. Shand had essentially nothing in her account. She immediately withdrew \$600 that same day, then \$161.75 the following day. That appears to have been a \$160 withdrawal plus a withdrawal fee. Also on July 9, she made purchases at Sobeys Fast Fuel and Kingston Superstore.

[69] On July 10, she wrote cheques for \$3,000 and \$5,000 respectively. She indicated that she did not know what those cheques were written for. She was asked whether it was possible that one of them was for moving her store to the new property. She could not recall whether she paid that by cash or cheque. She said that she “assumed” that Trimper Construction charged her \$5,000 to install her driveway, even though they kept some of the trees that they cut down. The buildings were not moved until October. Therefore, more likely than not, that \$3,000 cheque would have been for some other expense related to the business or development of the property.

[70] That brought the account down to \$3,113.99. In my view, the \$600 withdrawal and the two cheques totaling \$8,000 are more consistent with use for her property and/or business, than for the benefit of Mr. Gibson. With Ms. Shand's account having been down to essentially zero, the remaining purchases or withdrawals, at least up to July 18, 2013, are more likely to have been for her personal use, than for that of Mr. Gibson. At that point her account was reduced again to almost nothing, i.e. \$19.75

[71] That is consistent with her own evidence that she did not start paying for things for Mr. Gibson until July 18, 2013, after the \$50,000 was deposited.

[72] She agreed that, by October 12, 2013, her account was at a negative balance, even though a further \$15,000 had been deposited on August 30 (i.e. the third bank draft). [It actually became a negative balance on October 22. However, it had reduced to \$3.24 by October 15.]

[73] She said she had spent all of that amount on Mr. Gibson. That, obviously, does not make sense. It is unfathomable that she would spend roughly \$65,000 on Mr. Gibson's personal expenses in less than 3 months. It is also inconsistent with her other evidence.

[74] Ms. Shand's Scotiabank Statement shows a \$20,000 debit on July 29, 2013 for "Cheque 185". A copy of that cheque shows it was from Ms. Shand to Stanley and Janet Boates, the vendors of the property in question, and the memo line states "Property – Purchase". Ms. Shand clearly did not mean that that \$20,000 was spent for Mr. Gibson.

[75] She also, at one point, stated that she took the \$25,000 loan out of that \$50,000, with the rest being to hold for Mr. Gibson's use. If that was the case, and her evidence of that \$25,000 being a loan and her evidence that she only started paying for things for Mr. Gibson on July 18 is correct, then the initial \$12,000 she received on July 8 would also, by her own admission, have been used for her own purposes, resulting in a total loan of \$37,000.

[76] Even deducting that full \$25,000 loan portion from the July 18 deposit, still leaves roughly \$40,000 she said she spent on Mr. Gibson's personal expenses in the less than 3 months starting July 18. Considering that Mr. Gibson did not have an extravagant lifestyle, that amount also defies common sense.

[77] Statements of Ms. Shand's Scotiabank transactions from July 2, 2013 to October 15, 2013, and later, were in evidence. From July 2 to 17, she

made total point-of-sale purchases of \$228.79 (average \$14.30 per day) at Walmart, and \$213.86 (average \$13.37 per day) at Superstore. From July 18 to October 15, she made total point-of-sale purchases of \$694.15 (average \$7.63 per day) at Walmart, and \$1,543.79 (average \$16.96 per day) at Superstore. These figures show purchases at these locations before and after July 18, with relatively little change in average spending. The biggest change is the reduction in average daily spending at Walmart, which runs contrary to her assertion that all Walmart purchases were for Mr. Gibson. The same statements show payments at Park Street Dental before and after July 18. Therefore, these records are inconsistent with Ms. Shand's evidence that all payments for dental and all payments at Walmart and Superstore were for Mr. Gibson. More likely than not, they were for Ms. Shand.

[78] These records also show total point-of-sale purchases, at places noted as being fuel or service centre locations, of \$469.05 (average \$29.32 per day) from July 2 to 17, and of \$2,948.72 (average \$32.40 per day) from July 18 to October 15. Again, there was very little change in average spending. I also note numerous payments at these locations in the exact amount of \$15.82. That is indicative of repeated purchases of the same non-fuel item.

In my view, this is inconsistent with Ms. Shand's evidence that half of the fuel purchases were for Mr. Gibson. I find that the purchases made at these locations were, more likely than not, for her own use.

[79] From July 18 to October 15, 2013 there is a total of \$24, 219.55 in cash withdrawals from Ms. Shand's account. That is an average of \$266.15 per day. Numerous withdrawals are in larger quantities, ranging from \$200 to \$4500. Especially those amounts, in Ms. Shand's circumstances, are more consistent with use to develop the property than personal use. At the time, Ms. Shand was earning about \$13,000 per year, and receiving child support of \$388 per month. The smaller withdrawals are not inconsistent with personal use. However, it was more likely to have been for Ms. Shand's personal use than for that of Mr. Gibson.

[80] Also, during that same period of time, in addition to the \$20,000 cheque mentioned earlier, she wrote cheques of \$3,900 and \$5,173.50, for a total of \$9,073.00. Two other cheques of \$388 each appear likely to somehow relate to issues with her child support as that is the exact amount of her then monthly child support payments, and at one location it shows both a credit and a debit in that amount, in consecutive entries.

[81] Just these amounts for Walmart, Superstore, fuel locations, withdrawals and cheques, make up about \$38,480 of the roughly \$40,000 Ms. Shand alleged having paid for Mr. Gibson from July 18 to October 15. Adding her payment to Park Street Dental of \$194 on July 22, 2013, brings it to about \$38, 670.

[82] There are also a number of smaller amounts at hardware type stores which is consistent with use by her to pick up items needed in the development of the property, or for her business of converting discarded items to usable arts and crafts.

[83] The remaining payments are to places like a drug store, a hair salon, restaurants, and local country stores or grocers. The hair salon payment would clearly not be for Mr. Gibson as Ms. Shand testified she cut his hair herself. I find that these other payments were for Ms. Shand as well.

[84] A caveat to these findings is that there are likely times when Ms. Shand did buy something for Mr. Gibson at Walmart, Superstore or somewhere else, and there are likely times when she drove him places using gas she had purchased. However, more likely than not, she was more than

compensated for these amounts by the things Mr. Gibson bought for her, including food and fuel, and excluding the \$1,000 birthday gift he gave her.

[85] In arriving at these findings I have found Ms. Shand's evidence of the purpose for, and use of, the \$77,000 in bank draft transfers to be either not credible or not reliable. She either was deliberately misleading the Court by saying whatever came to mind, or, in her own mind believed or convinced herself that the arrangement was as she described. Therefore, I have rejected her evidence on those points.

[86] In my view, the only reasonable inference to be drawn from the circumstances of the advancement of the funds and surrounding documentation, is that the full \$77,000 was advanced as a loan. To her credit, Ms. Shand did acknowledge that \$25,000 of it was a loan. However, given the surrounding documentation, her low level of income and the indisputable fact of her having purchased and developed the property, it would have seemed even more unbelievable if she had alleged that the entire \$77,000 was to be used for Mr. Gibson.

## **ISSUE 2: HOW MUCH DID MS. SHAND REPAY?**

[87] Ms. Shand says she has paid back all but \$2,700 of the \$25,000.

[88] She takes the position that, upon payment by her of the \$2,700 she alleges remain owing, the land should be deeded to her in accordance with the arrangement she had with Mr. Gibson. In these circumstances, in my view, she is the one asserting the amount that has been repaid and the right to reconveyance of the property to her upon repayment of the balance. Therefore, in my view, she bears the burden of establishing the amount repaid.

[89] None of the banking records show amounts transferred to Mr. Gibson by Ms. Shand.

[90] Ms. Shand acknowledged that, on March 14, 2014, \$25,126.67 in settlement funds were deposited into her account. However, she also acknowledged that her statements do not show any amounts taken out to pay back Mr. Gibson. Instead, she says that she paid him with cash from her own money.

[91] Despite that acknowledgment, her agent argued that her bank records showed that she withdrew a total of \$14,700, in small withdrawals, from when she received her settlement, and gave Mr. Gibson amounts from those withdrawals, in addition to the alleged \$10,000 from her own cash float.

Therefore, I take it that she was arguing that the bank records show that she gave Mr. Gibson a further \$12,300 from those withdrawals, to make up the full \$22,300. However, her argument was not completely clear.

[92] If that was her argument, in my view, the banking records do not support it. The total cash withdrawals, from March 14, 2014, when she deposited the settlement funds, until May 12, 2014, when they were exhausted, were \$10,920, exclusive of withdrawal fees. By March 14, 2014, Ms. Shand had already been with limited funds in her account since October 15, 2013. During that time, her balance ranged from an overdraft of \$384.76, to a positive balance of \$488.73. The bulk of the deposits appear to have been her child support payments, along with two other deposits of \$200 each. Given that lengthy period of time with little funds in her account, more likely than not, she was running in short supply of necessities. Starting March 14, 2014, one sees a resurgence of multiple point-of-sale purchases at the same locations or same types of locations, and following a similar pattern, as between July 8, 2013, and October 15, 2013, when she had money in her account from the bank drafts Mr. Gibson provided her. In my view, the bank records support her returning to her same spending habits, not withdrawing money to pay Mr. Gibson. If she

had been withdrawing money to repay Mr. Gibson, in my view, larger quantities, such as amounts of \$2,000 or \$3000 to \$5000, or more, would have been shown as withdrawn. That would have been more consistent with the types of payments she indicated she made to him. No such large withdrawals are shown.

[93] Ms. Shand also explained that she and Mr. Gibson knew for themselves what the transaction arrangement between them was. Part of paying him back would, according to her, be effected by her buying things for him if they were in a store and Mr. Gibson asked her to pay for an item he wanted. She also indicated that there were times when he would buy things for her if she needed something. She testified that she and Mr. Gibson continuously had money transactions back and forth. Despite that state of affairs, she indicated that she was able to keep track in her head of what had been repaid on the loan and what remained owing.

[94] Ms. Shand did provide Mr. Gibson with seven post-dated cheques. They are attached as Exhibit F to the Affidavit of the Applicant. They are dated for the months of June through to December of 2014. They are each in the amount of \$300. They are all endorsed on the back by a signature appearing to be that of Mr. Gibson. It is not disputed that it is his signature.

However, only the first one is stamped as having been submitted to the bank. It was returned due to insufficient funds.

[95] Ms. Shand explained that the reason there were insufficient funds was that, unbeknownst to her, her daughter had been taking money out of her account. Therefore, she closed the account. However, her account was down to \$1.69 by May 12, 2014, and, despite a Government of Canada CRA refund cheque in the amount of \$734.26 having been deposited on May 15, her account had been overdrawn by May 23, 2014. Then, there was a another Government of Canada CRA return cheque in the amount of \$984 deposited on June 5, 2014, with the balance being shown as overdrawn as of June 23, 2014. Therefore, unless she paid no attention to her account, she should have known, prior to Mr. Gibson attempting to cash her June 30, 2014 cheque, that there was a significant risk that there would not be sufficient funds to cover it, and that it was unlikely that there would be sufficient funds to cover the subsequent postdated checks.

[96] Either way, it is agreed that no payment was effected by those cheques.

[97] Ms. Shand argues that the existence of those cheques is evidence corroborating her claim that only \$2,700 remains owing. I disagree with that submission for two reasons. First of all, the amounts total \$2,100, not \$2,700. Secondly, and more importantly, it would not be reasonable to infer from the existence of such post-dated cheques that they constituted the full amount remaining owing. It would only be reasonable to infer that they reflected that at least those amounts remained owing.

[98] Ms. Shand also testified that, on one occasion, when she was at Mr. Gibson's home with him and Ms. Gibson, in response to a question, she informed Ms. Gibson that she still owed approximately \$2,700 on the loan. Ms. Gibson did not confirm that. Therefore, it remains an uncorroborated statement by Ms. Shand.

[99] Ms. Shand indicates that she made payments to Mr. Gibson in cash from March 2014 until June 2015. She said she gave him \$10,000 as soon as she got her settlement. She added that "the first year she did okay" such that, if she "made \$3000 on a weekend it went to" Mr. Gibson. However, there was no evidence corroborating such payments. Even though Ms. Shand testified that there were people who had seen her give money to Mr. Gibson, none of them were produced as witnesses. She explained that she

tried to track them down but could not find them. That is unfortunate as, if her assertions are true, they could have provided corroborating evidence.

[100] Ms. Shand also provided evidence that Mr. Gibson made many cash transactions, such that his banking records would not fully reflect his financial dealings. She noted that he kept a safe in the house. She said he did not like to go to the bank, and used his safe to access funds as required.

[101] As discussed in the previous section, Ms. Shand testified that she saw Mr. Gibson give money to various organizations and to Ms. Gould for her phone bill.

[102] I also discussed her un-corroborated evidence of withdrawing money to pay for activities and food for Mr. Gibson.

[103] There is additional evidence from Linda Gould corroborating use of cash by Mr. Gibson. She testified that he paid her \$15 per hour, as well as her gas for running errands, in cash. She testified that she saw Mr. Gibson give Ms. Shand cash to pay a bill when they went to the Digby Courthouse and the Department Of Transportation Office. However, Exhibit 12 also contains cheques from Mr. Gibson to Ms. Gould, which were cashed, dated February 25 and April 6, 2015, in amounts of \$300 and \$800 respectively.

Ms. Gould testified that Mr. Gibson wrote her a cheque in an amount of which she was uncertain, ranging from \$100 to \$300, which she cashed to give money to Ms. Shand. She indicated that she did give the money to Ms. Shand at the same time as she gave Ms. Shand the key to Mr. Gibson's home so that she could go feed his animals. In addition, Ms. Gould testified that Mr. Gibson gave her a cheque in the amount of \$800 ("and some") which she cashed, then used the cash to buy his wheelchair and walker. On redirect examination she confirmed that it was the April 6, 2015 cheque in the amount of \$800. She indicated it happened that way because she was going to Halifax while her daughter played hockey, which provided her the opportunity to go to Costco to buy the wheelchair.

[104] Ms. Gibson acknowledged that her father did use both cash and cheques.

[105] It is clear that he did use both cash and cheques.

[106] Ms. Gould specified that Mr. Gibson would get the cash from the bank. That is inconsistent with him getting it from Ms. Shand or from the safe.

[107] The comments I made earlier in relation to the credibility and reliability of Ms. Shand's evidence are also applicable to this issue regarding determining the amount repaid.

[108] I also make the following comments on the credibility and reliability of Ms. Shand's evidence.

[109] She readily acknowledged when she did not remember things. Having said that, she appeared to not remember more things than one would expect. She admitted, even volunteered, points against interest. She generally gave her evidence without hesitation. These points, except the excessive forgetfulness, support credibility and reliability.

[110] However, there are significant points which detract from the credibility and reliability of her evidence.

[111] She has a personal interest in the outcome of the proceeding. However, that personal interest is, to some extent, tempered by the fact she had resigned herself to simply walking away from the property until her agent, Ms. Fowler, convinced her to "fight" for it.

[112] At times, she was: evasive, not answering the questions asked; flippant; and, argumentative, even stating to the questioner that he was picky and, asking questions instead of providing an answer.

[113] For example, when she was being questioned about her income tax returns showing that she only made \$10,000, she attempted to evade that clear question by saying she did not know what the questioner was talking about. When she was shown her income tax returns, she confirmed the income levels shown, then proceeded to state, in a flippant tone: “Does it state I had cash on me? No.” As a follow-up question, she was asked whether she made more or less money than the income tax returns show. She proceeded to talk about who had assisted her in preparing her income tax returns, and that she still had to straighten things out with Revenue Canada, but did not answer the question. She simply stated that the income tax returns had nothing to do with the amount of cash she had. When it was pointed out to her that her bank statements did not show large cash withdrawals which would have been used to repay Mr. Gibson she answered “so”, in a flippant manner.

[114] When she was asked to look at page 1 of Exhibit 13, she flippantly stated: “What about it?”

[115] When it was suggested to her that she did not have the money to pay Mr. Gibson, she responded by flippantly stating: “You can suggest what you want.”

[116] When she was questioned about the statements not showing much money spent on gas, she responded that the questioner was being “picky”.

[117] While testifying, Ms. Shand made denigrating and crude comments in relation to Ms. Gibson, which were irrelevant to the real issues before the Court and/or totally unrelated to the question asked. This, in my view, revealed that she harbored animosity towards Ms. Gibson. Examples include her testimony that: she found Ms. Gibson to be “cold and snotty” when she met her, and getting more snotty each time; Mr. Gibson referred to Ms. Gibson as “what’s her name”; a neighbor of Mr. Gibson commented that Ms. Gibson was only coming around for his money; and, Ms. Gould had referred to Ms. Gibson as “the Cunt”.

[118] There were also significant inconsistencies in her evidence.

[119] She provided evidence that the \$50,000 in the July 17, 2013 bank draft was used to replenish the safe. That was inconsistent with the points attached as Schedule A to her Notice of Contest, and her oral evidence at

the hearing, where, she indicated that \$25,000 of that amount was for the loan, with the remaining \$25,000 being for her to take care of things for him such as driving him around.

[120] At one point she testified that she made two \$5,000 payments one day after the other because the bank did not have the full \$10,000 in cash on the first day. At another point she testified that she paid two separate \$5,000 payments one day after the other from her business cash float. She explained that she always replenished her cash float to at least \$15,000. She provided a further hybrid explanation on cross examination. She testified that she had gone to the bank. They did not have enough cash. Therefore, she gave him the cash she had on hand.

[121] In addition to being inconsistent, the second and third explanations do not appear to make sense. It does not seem plausible, absent a reasonable explanation, that she would take out the two \$5,000 amounts on consecutive days from her cash float or cash on hand, instead of taking the full \$10,000 on one day. She did not explain why her perception of what she could take from her cash changed so dramatically from one day to the next.

[122] In addition, her 2013 Income Tax Return shows a gross business income of \$21,690, with a net business income of \$13,061, which is shown as her total income for that year. It does not appear reasonable that a business with that low level of gross income, and even lower level of net income, would have a \$15,000 float. In addition, she testified that the items used to create her works of art were salvaged items which she collected mostly twice per year during special garbage times. There was no evidence to establish the need for such a large float.

[123] Further, she testified that she did not start repayment of the loan until March of 2014, and her income tax returns for 2014 and 2015 show a total income of \$10,000 and \$8,849 respectively. Those are even lower than her 2013 total income of \$13,061. With such low levels of income, it would appear almost impossible for her to have had access to \$10,000 cash from her business float or income.

[124] On direct examination she testified that she made “a little more than” what her income tax returns say. However, she did not specify how much more.

[125] She did testify that when she moved to Melvern Square she still had about \$15,000 left from the \$60,000 she had received from the sale of her home in West Dalhousie. The remainder had been spent as a \$20,000 down payment to Stephen Legard related to the business premises she had set up in Nictaux and to live off of. However, at one point she also testified that, up to about three years before she testified, which would have been up to about 2013, she was not living on anything and went down to 80 pounds. That makes it less likely that she would have actually retained the \$15,000. In addition, her account was down to essentially zero when she received the first bank draft from Mr. Gibson. Then it went down to zero again by a mid-October, 2013. It was replenished again in March, 2014, when she received the settlement amount of around \$25,000. However, it once again reduced to zero by May 12. It was partly replenished by a \$734.26 cheque on May 15, only to be overdrawn by May 23. It was once again replenished by a check in the amount of \$984 on June 5, again only to be overdrawn by June 23. This shows a recurring pattern of living off amounts that were, to her, given her income level, bulk amounts, and exhausting them relatively quickly. Therefore, more likely than not, the \$15,000 left over from the sale of her home was used up in the same fashion.

[126] She confirmed having received roughly \$25,000 from a lawsuit settlement related to a home she had in West Dalhousie. The bank statements confirm it was deposited in March 2014. In the course of talking about her cash float, she said she took it out, suggesting she used that to replenish her float. That may have provided a more reasonable explanation for the existence of a float. However, the bank records reveal that, instead, the \$25,000 was used up over time in a series of point-of-sale purchases and withdrawals. Also, it still would not explain why she would have to give him \$5,000 on each of two consecutive days, instead of \$10,000 on one day.

[127] She testified that she gave Mr. Gibson the \$10,000 “right after”, then \$3000, then \$2000. She did not specify when she purportedly made those subsequent payments. However, she explained that “the first year” she did well and then the Legards sabotaged her business and she lost everything. According to her income tax returns, her best year while at the Melvern Square location would have been 2013. She indicated that she only started repaying Mr. Gibson after receiving her settlement funds in 2014. At that point, by her own admission, her business had deteriorated due to Legards. That made it less likely that she would be able to repay Mr. Gibson from her

business cash, and more likely that, instead, she had to use her settlement funds to support herself.

[128] Ms. Shand, was asked how she could tell she was using Mr. Gibson's money as opposed to her own, when it all went through the same account. Her answer was that: it was because in the last two years she did not have any money; and, if she needed something Mr. Gibson would get it for her. She agreed she spent some of the money on herself and that Mr. Gibson allowed it because he knew of her situation. Given her financial circumstances as revealed by her income tax returns, that state of affairs is more likely to have occurred than a situation where she was paying for things for Mr. Gibson as part of paying him back on his loan. It also demonstrates a further inconsistency.

[129] Exhibit 12 contains a cheque from Mr. Gibson to Ms. Shand dated July 3, 2014, in the amount of \$800. It is signed on the back as having been cashed by Ms. Shand the same day. That happens to be only a few days after Mr. Gibson tried to cash Ms. Shand's June 30, 2014 cheque and had discovered there were insufficient funds. Therefore, he would have known that she was in need of money.

[130] Ms. Shand was asked about that cheque. She responded by stating that Mr. Gibson brought her food and asking why he would bring her food if she took money. That was an evasive answer. In my view, she failed to make a reasonable concession that she had received that money from Mr. Gibson. I find that she did. In my view, the fact that Mr. Gibson provided Ms. Shand with a cheque in the amount of \$800 in July 2014 is inconsistent with her evidence that he had put a large amount of cash in her account to use for him, which amount had allegedly been exhausted just shortly before his death in June 2015, and is inconsistent with her evidence that she was paying him back in cash on an intermittent basis. If she was in the process of paying him back, it begs the question as to why he would still be providing her with funds. The most reasonable explanation is that she was still in financial difficulty and still needed his financial assistance.

[131] She conceded that Mr. Gibson did bring her food. She also testified that, for an unspecified two-year period, she had no insurance on her truck and lived off of tomatoes and bread. That is obviously consistent with her complaints of living in poverty. However, it is inconsistent with her assertions that she had sufficient spare cash to repay \$22,300 to Mr. Gibson.

[132] Ms. Gould testified that there was construction going on at the property occupied by Ms. Shand in the fall of 2014. She recalled trees being chopped and wood piled up. She agreed that it could have been for firewood. Ms. Shand testified that there was no construction going on during either of the two times that Ms. Gould came to her place. Therefore, more likely than not, the activity related to firewood. Either way, Ms. Gould indicated that Mr. Gibson had said that he needed to give Ms. Shand money for her workers. If she was mistaken about the timing, and it was actually in July 2014, that would provide an alternate explanation for the \$800 cheque made out to Ms. Shand in that month. Alternatively, if she was not mistaken about the timing, and the money was actually provided to Ms. Shand in the fall of 2014, that is evidence of Mr. Gibson providing Ms. Shand with still further monies. On the other hand, Ms. Gould agreed that there were no workers whatsoever on Ms. Shand's property. However, that was only on the one day that she was there.

[133] I have already discussed, in the previous section, the incongruous evidence of Ms. Shand in relation to Mr. Gibson not wanting cash around the house, but her repaying him in cash because he had a safe he could keep it in, and her inability to explain the incongruity, other than to say there was

“a mess going on”. Obviously, that does not make sense and has a significant negative impact on her credibility and reliability on this issue as well.

[134] I also discussed the nonsensical nature of her evidence that she spent around \$50,000 on Mr. Gibson in about 3 months.

[135] Ms. Shand testified that she did not keep any record of payments made; but, was able to keep track in her head of the balance owing, which was based in part on things she paid for Mr. Gibson, while taking into consideration things that he paid for her. For instance, she said that, when they drove around and participated in various activities, such as whale watching, and trips to the cemetery, he bought the gas, but sometimes she would pay for meals out, while at other times he did. She also testified that she would get his groceries, costing \$75-\$150 per week. (At another point in her evidence she narrowed it to between \$100 and \$120.) She said she would also buy his clothes. These purchases were discussed as part of explaining why he had put money into her account for her to use to buy and pay for things for him. She blurred that with what she purportedly paid from her own money. Yet, when questioned about amounts on the bank statements, she could provide very little information explaining them, even

though she was purportedly involved. It does not make sense that her mind and memory would be sharp enough to handle such a convoluted accounting, without any kind of written record, but not sharp enough to provide meaningful explanations of the bank record entries.

[136] In addition, she was inconsistent in the information that she did provide in relation to the bank records, and much of it did not make sense. An example, for reasons previously discussed, was that all of the purchases at Walmart and at the Superstore were for Mr. Gibson.

[137] At one point she testified that she had no reason to keep track of what they did and bought. That appears to be more consistent with the relationship between her and Mr. Gibson and with their the bank records.

[138] Some of the apparent lack of sense in Ms. Shand's evidence might have been explained as being part of the symptoms of the mental health issues from which she suffered. However, there is no admissible expert evidence of what those mental health issues were and how they could be expected to impact her evidence. Her agent attempted to introduce further health related documentation with her post-hearing written submissions. However, those were not admissible as part of the Application.

[139] Mr. Gibson's Last Will and Testament, dated June 25, 2015, i.e. only five days before his death, does not mention anything about the loan arrangement with Ms. Shand. It also does not mention anything about transferring the property to her on payment of the small amount allegedly owing. If there had only been \$2,700 owing, it would be reasonable for him to have mentioned that in his will, particularly given the friendship that had developed between them.

[140] Ms. Shand testified that: when she visited Mr. Gibson in the hospital after his second heart attack, he told her he needed to get a hold of Heidi Foshay-Kimball and Bronson Rafuse to put the deed to the property in her name; but, she told him not to worry about it for the moment. Unfortunately, there was no corroboration of that conversation either.

[141] I do not find Ms. Shand's evidence of having repaid \$22,300 in cash credible and reliable. Even if I did, there is no evidence corroborating it, or any lesser amount. Therefore, given the directions in Section 45 of the *Evidence* Act, I would be unable to find that she did repay that, or any amount, in any event.

[142] Consequently, I find that she has failed to establish that she has repaid any portion of the loan.

**ISSUE 3: DID MR. GIBSON TAKING THE LAND IN HIS NAME  
CREATE AN EQUITABLE MORTGAGE?**

[143] On June 25, 2013, Ms. Shand entered into an Agreement with Stanley and Janet Boates to purchase the one acre property in question at 642 Stronach Mountain Road in Melvern Square, Nova Scotia, being a portion of the property bearing PID # 5020094. On July 3, she paid them \$5,000 by cheque # 165 drawn on her account, in accordance with the written Agreement of Purchase and Sale, as the amount described as a deposit, but with the handwritten direction that it be used to pay for surveying and subdividing the property, rather than held in trust. On July 29, 2013, she paid them the \$20,000 purchase price with cheque # 185 drawn on her account.

[144] In October 2013 she had her buildings moved from Nictaux to the property in question.

[145] It was not until November 20, 2013, that Stanley and Janet Boates signed the Warranty Deed conveying the property in question to Mr. Gibson.

[146] Ms. Shand indicated the understanding between she and Mr. Gibson was that she would repay him the amount loaned to her over time. Then, once it was paid in full, the land would be conveyed to her.

[147] A letter dated December 9, 2013, from John Armstrong Law Office Inc., to Mr. Gibson and Ms. Shand, attached a draft agreement labelled as an agreement for sale, with the price and payment particulars left blank. However, it also noted that if the purchaser fell in arrears of payments, or breached her obligation to pay all expenses relating to the land and keep the buildings in good repair, and failed to remedy such breach within 30 days, the land would be forfeited to the vendor.

[148] In my view, that agreement, though labelled as an agreement for sale, in the circumstances which existed, was in effect a draft loan agreement with the land as security.

[149] The Agreement remained uncompleted and unsigned. However, it is corroborative of the existence of such a loan arrangement.

[150] In addition, it appears that in October 2012, Mr. Gibson consulted his financial advisor, Bronson Rafuse, regarding borrowing money to be secured by a mortgage on his home. Mr. Rafuse responded by providing his advice to Mr. Gibson in writing. That writing was entered as part of Exhibit 7. It contains references to discussions between Mr. Gibson and Mr. Rafuse which are also corroborative of such a loan arrangement. Under the heading “THINGS TO CONSIDER” Mr. Rafuse wrote:

“Because the monies would be used to essentially fund a small business, there is great financial risk and as I understand the arrangement, the only trade off security is that you would hold title to the property being constructed by Lynn Shand.

As you told me the other day, you would probably not foreclose on Lynn were she to default on payment. This in essence removes the only debt security you have.”

[151] This clearly indicates that Mr. Gibson would be taking title to the property in his name as security for the monies he would be lending to Ms. Shand to fund her small business. The reference to foreclosing indicates that he would be taking title as part of an equitable mortgage arrangement, even though, with Mr. Gibson being the grantee of a warranty deed to the property, the foreclosure process associated with a regular mortgage would not be required.

[152] At the beginning of the Application the parties indicated that they were in agreement on the following. Ms. Shand is entitled to the value of the property less the amount she owes the estate after deducting the value of the items belonging to Ms. Shand left in the shed and disposed of by Ms. Gibson, or to the land itself if she pays out the amount owing.

[153] Ms. Shand, in her initial Affidavit described Mr. Gibson as holding the property “in trust” for her. However, she did so from the perspective of a person without legal expertise. Thus, this does not necessarily reflect the existence of a trust in its strict legal sense. On cross examination, Ms. Shand was asked why the deed was put in Mr. Gibson’s name. She responded that it was “for security”.

[154] In my view, in the circumstances which existed, even though the property was never put in the name of Ms. Shand prior to being put in the name of Mr. Gibson, an equitable mortgage was created. The clear intention for putting the property in Mr. Gibson’s name was to provide security for repayment of the loan.

[155] I am of this view despite no written Agreement having been signed.

[156] An equitable mortgage may be created by the deposit of a title deed irrespective of the Statute of Frauds: *Banks v. Elliott* [1988] N.S.J. No. 41 (S.C., T.D.).

[157] In addition, the existence of an equitable mortgage created by delivery of a title deed can be established by oral evidence alone: *Budzyk v. Thunder Bay Ventures*, 1997 CarswellOnt 383 (O.C.J., G.D.).

[158] The hallmark of an equitable mortgage is a common intention to make property security for a debt. In my view, that common intention clearly existed in the case at hand.

[159] Deposit of the deed to the land to be held as security creates a presumption of intention to create an equitable mortgage: *Smirnow v. Charles*, 1995 CarswellBC 2418 (S.C.).

[160] In the case at hand, the Deed was deposited with Mr. Gibson directly from the Boates', with the Agreement of Purchase and Sale and all money transactions having taken place between them and Ms. Shand, and with her having moved her buildings to the property. In those circumstances in my view, it is clear that the direct transfer was instituted for the sake of convenience, to avoid what appeared to the parties to be the unnecessary

step of first putting it in the name of Ms. Shand. Ms. Shand testified that she is the one who asked that the property be put in Mr. Gibson's name until she "paid off the security".

[161] Ms. Gibson provided evidence that, following her father's death, his Will, which transferred his property to her, was recorded in the land registration system. It had the effect of transferring the property in question to her. She has continued to pay taxes on the land. However, in my view, and as it appears to be agreed upon, the mere registration of that Will does not foreclose the relief Ms. Shand was seeking in this matter. Ms. Gibson, according to her own evidence, already knew of the loan arrangement. Therefore, she was not in the position of a *bona fide* purchaser for value without notice.

[162] Ms. Gibson gave evidence that her father told her he had no intention of transferring the land to Ms. Shand. This was hearsay evidence. Its admissibility was opposed by Ms. Shand. Clearly, necessity is made out. However, in my view, it is not of sufficient reliability to admit. There is far too much danger that: Ms. Gibson misinterpreted his comments in her own interests or because of the bias arising from her own self-interest; or, Mr. Gibson would simply have told her that to appease her. There was evidence

from Ms. Shand that Mr. Gibson, in order to appease her insistence that he see a doctor for his hernia problem, pretended to have gone for a doctor's appointment, when, in fact, he had simply waited on the side of the road. In addition, Ms. Shand testified that Mr. Gibson did not want Ms. Gibson to know about the loan because Ms. Gibson thought that it was her money. However, that purported statement from Mr. Gibson is not corroborated and is inconsistent with Ms. Shand's evidence that she and Mr. Gibson discussed the loan in Ms. Gibson's presence. Nevertheless, there is sufficient concern over the reliability of Mr. Gibson's purported statement to Ms. Gibson that I rule it to be inadmissible.

[163] Further, since the equitable mortgage had already been created, a change of intention by Mr. Gibson would not eliminate Ms. Shand's right of redemption.

**ISSUE 4: ARE THE BUILDINGS ON THE LAND FIXTURES OR CHATTELS?**

[164] In *Messenger (Re)*, 2014 NSSC 4, Registrar Cregan, dealt with the issue of whether a mini-home was a fixture or chattel. He concluded that it remained a chattel as it had not effectively been attached to the land. It had

I-beams with tiedown tabs to secure it to a flatbed trailer for transport. It was simply resting, by its own weight, on concrete cinder blocks. It had a vinyl skirting on a wooden frame which was easily removed. A power line and a telephone line were attached to the power mast. There were three ground rods. Water and sewer lines were connected to the home. Conduits from all of these had to be detached to move the mini-home. Front and back wooden steps had to be unscrewed from the sill. It was on a gravel yard with no significant landscaping and little attempt to make it look permanent, even though it had been there for over a decade. The skirting and conduits could be easily removed and the home transported by flatbed trailer, without disturbing the land. He found that it remained very portable and easily transferrable to another site. He compared it to temporary facilities on construction sites that are moved from project to project.

[165] At paragraphs 11 to 15, he canvassed relevant authorities. The following can be extracted from those authorities. Buildings only resting on the land by their own weight, such that they can be removed without damaging the land, are generally not considered fixtures. However, in exceptional situations, where it can be determined from surrounding circumstances, which are patent for all to see, that they were intended to be

a permanent part of the land, they will be considered fixtures. The length of time the buildings have been on the property, and the ease of movement, are factors to consider. The court should look at whether the appearance of the buildings indicates permanence or mobility.

[166] I have the benefit of evidence, including photographs, of the buildings in question in the case at hand.

[167] They have no foundation. They all rest, by their own weight only, on cement cinder blocks. None of them are bolted down in any way. There is no plumbing, water source or phone line attached. Ms. Shand did indicate that she had power, through a powerline that was run underground. The photographs show it as entering the “shop” from a conduit coming out of the ground. That can easily be disconnected without damaging the land.

[168] There is no landscaping at all. The cinder blocks, upon which the buildings sit, simply rest upon a flat graveled area.

[169] The building Ms. Shand is living in was supposed to have been her workshop. She referred to it as her cabin. It was built on-site. She obtained a building permit for it, indicating that it is large enough to require a building permit. There is also a piece built on to the back of the cabin which houses

her water tanks. The whole building cost her at least \$8,000 to build. It is not insulated. The inside is closed in with unfinished drywall.

[170] The store she had moved from Nictaux. The roof of the store had to be cut off to bring it onto the new property, then put back on. The store building is insulated and wired. She has built an exterior set of stairs going up to the loft area, under which there is a closed-in, rudimentary shed-like area. There is also a set of stairs, with a wide landing, leading into the front of the store. All of those add-ons can be easily removed. Ms. Shand testified that the store is 16' x 21' and cost approximately \$15,000-\$20,000 to build.

[171] The other building, which Ms. Shand referred to as the second workshop, is 11' x 11'. She initially indicated it was also moved from Nictaux. Then she testified that the building on that former site was sold to Billy Gillis for \$2,000, and another one, the same size, was built on the property in question for the same amount.

[172] The draft agreement between Mr. Gibson and Ms. Shand, which remained unsigned, imposed a duty upon Ms. Shand to keep the buildings in good repair. That is an indication that the buildings were to be considered part of the security. However, the agreement remained unsigned, and only

those buildings which are considered part of the land were being held by Mr. Gibson as security for repayment of the loan under the equitable mortgage.

[173] At least the store was transported to the property. The other buildings were either built on-site, or the smallest one may have been transported there as well. Little has been done to give them a look of permanence. Except for what appears to be a board nailed to the bottom of the cabin, which is easily removable, there is not even any skirting around the buildings. They are simply open underneath. Except for the store, they give the appearance of being still under construction.

[174] The buildings have only been on the land since 2013. In my view, that is a relatively short time.

[175] In my view, the buildings in the case at hand have fewer elements of attachment to the land than did the mobile home in the *Messenger* case. In addition, except for the store, they have an even more temporary appearance than construction site buildings.

[176] The mobile home in that case had tiedown attachments to facilitate transport, and it was manufactured to be portable. There was no evidence of

any such tiedown attachments in the case at hand, and there is no direct evidence that the buildings were constructed to be portable. The height of the store suggests otherwise. However, the fact that they have always simply rested on blocks, and that at least the store has been moved, indicates lack of permanence and portability.

[177] Further, the two smaller buildings are easily movable. It simply involves picking them up and putting them on a flatbed trailer. They can be tied down by running straps over them.

[178] The store requires the roof to be removed prior to transport. However, that is what was done to bring it onto the property. That requirement did not eliminate its portability at that time, nor does it at this time. In fact, it would be easier to move it at this time. The roof cutting has already taken place. It would now simply be a matter of removing that which has been used to re-fasten the roof to the building. The photographs show that the roof trim that had to be cut off has not even been replaced. Therefore, no removal of that part is now required.

[179] Like Registrar Cregan, in *Messenger*, I conclude that the buildings are not fixtures, as they have been not been attached to the land and the

circumstances are not such as to show they were intended to be a permanent part of the land.

**ISSUE 5: WHAT IS THE VALUE OF THE ITEMS BELONGING TO MS. SHAND THAT MS. GIBSON DISPOSED OF?**

[180] Ms. Shand's business involved creating and selling usable art and/or decor created from discarded items, most of which she picked up along the side of the road during special garbage collection times. Mr. Gibson, because he enjoyed it as a hobby, assisted her by accompanying her during collection, and dismantling and/or cleaning up some of the items in preparation for Ms. Shand to use them in her work.

[181] Ms. Shand indicated that, when Mr. Gibson passed, he still had some of those items and some of her tools in his shed. Ms. Gibson acknowledges that she disposed of some of those items. She also agrees that Ms. Shand should be reimbursed for their value. However, she disputes the amount Ms. Shand submits they were worth.

[182] Ms. Shand argued that she would have made approximately \$4,000 from the sale of completed products created from the items Ms. Gibson disposed of. She acknowledged that she would have incurred expenses to

create that income, such that she would have lost a net amount of approximately \$2,000. However, she had already expended the effort and expense of collecting the items. Therefore, she suggests that a total compensation of \$2,700 would be appropriate and would appropriately be offset against the \$2,700 she says remains owing on the loan.

[183] Ms. Gibson provided the following evidence on the issue. The shed contained many items which she recognized as belonging to her father. However, there were three or four items, such as a window frame and a bed frame, which may have belonged to Ms. Shand. They appeared to have been collected as salvage items.

[184] Ms. Shand is the one claiming compensation or credit for those items. Therefore, the onus is upon her to establish their existence and value. She has not provided specifics of the items, nor their value. The only corroboration is the evidence of Ms. Gibson that there were three or four items, such as a window frame and a bed frame, that she did not recognize as belonging to her father. More likely than not, they were salvage items.

[185] Being salvage items, not yet converted into one of the items which Ms. Shand would sell in her shop, their value cannot be based on that potential sale price. In my view, they are of relatively minimal value.

[186] At most, in my view, they would be worth \$200.

**ISSUE 6: WHAT, IF ANY, REMEDIES SHOULD BE GRANTED?**

[187] I agree with counsel for Ms. Gibson that the notice of application herein is an equitable and adequate substitute for prior notice to pay. The notice of application was filed April 19, 2016. It was served at May 3, 2016. Therefore, Ms. Shand has had ample notice of demand for payment.

[188] Ms. Gibson has established that the full amount of the loan was \$77,000. She was not specifically requesting a deficiency judgement. Therefore, she did not have the onus of proving a negative, i.e. that no payments were made. The onus of establishing payments made fell upon Ms. Shand as she is the one who was seeking a finding that only \$2,700 remained owing and that, upon payment of that amount, she was entitled to have the property transferred to her name. Unfortunately, she was unable to discharge that onus. She was unable to establish a right to redeem the property for \$2,700, nor that any payments were made.

[189] Even though Ms. Gibson was not seeking a deficiency judgment, in the sense of being part of a foreclosure proceeding, she was seeking, as an alternative remedy, “an order for repayment of \$77,000 loaned by Philip Gibson to Lynda Shand, and interest at 5 percent per annum”.

[190] That was as an alternative to vacant possession of the land and buildings, or sale of the land, with the proceeds going to pay the \$77,000 loan plus interest, and any balance going to Ms. Shand. I have found the buildings to be chattels not secured by the equitable mortgage, and, more likely than not, the sale of the property would not produce enough funds to pay the amount owing. Therefore, the question of an order for repayment remains alive.

[191] The difficulty is that there has been no accounting of repayments, either by Mr. Gibson or by Ms. Shand. Therefore, it is impossible for Ms. Gibson to establish that no amounts at all were repaid, nor the exact amount that may have been repaid. Therefore, the Court is left having to take a rudimentary approach to calculation of a remaining repayment amount that errs in favour of Ms. Shand.

[192] There is some evidence regarding the value of the property in question. Ms. Shand testified that, a few years before the hearing, she obtained an estimate indicating that the land and buildings were valued at \$42,800. She also agreed that, based on the Exit Realty pricing assessment for 642 Stronach Mountain Road, entered as Exhibit 13, the current value of the bare land is around \$11,000. If the buildings cost her roughly \$30,000, plus the materials and supplies she already had on hand, it would make the \$11,000 estimate not unreasonably low. On the other hand, she did pay a total of \$25,000 for it in 2013. Therefore, it would not be unreasonable to assign it that value either.

[193] Assuming the bare land is worth \$25,000, and assuming no repayments at all had been made, ordering that Ms. Gibson obtain vacant possession of the land, without the buildings, would still leave \$52,000 of the \$77,000 loan principal, plus all interest, unpaid.

[194] Even if I had found that Ms. Shand had established having repaid \$22,300, that would still have left \$54,700 owing on the principal alone, not counting interest, before deducting the value of the land.

[195] Section 3 of the Canada *Interest Act* states: “Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.” Mr. Gibson was paying interest on the line of credit funds he borrowed to advance the \$77,000 to Ms. Shand. Therefore, it is equitable that Ms. Shand would pay interest on the loan, and, given those circumstances, the most reasonable inference is that it was understood between them that she would do so.

[196] I have found that Ms. Shand has failed to establish she repaid any amount. However, if the onus of establishing lack of repayment had been on Ms. Gibson, she could not have established that no amount was repaid, and could not have established the exact amount repaid. Therefore, I cannot assess interest as though no amount had been paid.

[197] However, even if Ms. Shand had paid the entire \$22,300 she said she paid, there would have been interest accruing of at least 5% of \$77,000, which is \$3,850. Then there would have been interest on the remaining \$54,700 of 5% for at least another 2 years, which is a further \$5,470 in interest. That is a total of \$9,320 interest. In my view, Ms. Gibson could at least have established that Ms. Shand did not pay the full \$22,300 alleged.

Consequently, an appropriate rough, rounded-up estimate of unpaid interest, up to the date of judgment, is \$10,000.

[198] Adding \$10,000 to the \$54,700 amount that would remain owing on the loan, based on Ms. Shand's own assertion of what she repaid, produces a total amount still owing of at least \$64,700.

[199] Even if one deducts \$25,000 as the value of the land, it still leaves Ms. Shand owing \$39,700 on the loan, after a declaration that Ms. Gibson is to have vacant possession of the land, free of any claim of ownership by Ms. Shand.

[200] The photographs of the property show a great deal of salvage items in plain view on the property. That would make the property less attractive to a potential purchaser. Further, it is uncertain whether Ms. Shand would cooperate with "showings" of the property. Therefore, in my view, it is likely more beneficial to both parties to order vacant possession, and leave it up to Ms. Gibson to determine what she does in relation to the sale of the property, than to order the sale of the property.

[201] In my view, given that Ms. Shand still owes a lot of money on the loan, even considering the minimum amount it must be, it is appropriate and

equitable that Ms. Shand not recover the value of the items she had in Mr. Gibson's shed from Ms. Gibson. However, it is appropriate to deduct it from that minimum amount left owing on the loan, with interest, leaving \$39,500 owing.

[202] That amount is, in my view, at least equal to the value of the buildings. Therefore, it would make sense that Ms. Shand would simply leave the buildings on the land as repayment for the rest of the loan.

[203] However, I have determined that they are not fixtures and, for that reason, do not form part of the security for the loan. In addition, there is an agreement between Ms. Shand and her agent in this proceeding, Laura Fowler, regarding those buildings. They have agreed that Ms. Fowler can become owner of those buildings in exchange for \$5,000 and forgiveness of the \$2,000 loan that Ms. Fowler has made to Ms. Shand.

[204] Consequently, that leaves Ms. Gibson in a position where she may have to seek an execution order against the buildings to collect the at least \$39,500 remaining owing on the loan from her father to Ms. Shand. Any competing interest held by Ms. Fowler may have to be determined if raised. However, having been Ms. Shand's agent in these proceedings, and in the

related probate proceedings, Ms. Fowler was well aware of Ms. Gibson's claim. Therefore, it may be that the issue can be resolved between the parties, without the need for court proceedings. In any event, it is not an issue to be determined in this proceeding.

### **CONCLUSION**

[205] Based on the forgoing I conclude and order that which follows.

[206] Ms. Gibson shall have vacant possession of the land at 642 Stronach Mountain Road, Melvern Square, Nova Scotia, free of any claim of ownership or other interest by Ms. Shand.

[207] Ms. Gibson shall not be required to pay any amount to Ms. Shand.

[208] Ms. Shand shall, on or before May 5, 2017, vacate the property and remove all items of personal property, except that she may choose to leave the buildings in satisfaction, or partial satisfaction, of amounts left owing on the loan, as may be agreed upon between the parties.

[209] The amount left owing by Ms. Shand on the loan, after deducting \$25,000 for the value of the land being retained by Ms. Gibson, and after

deducting the value of the items Ms. Shand had left in Mr. Gibson's shed, is \$39,500.

[210] The parties are encouraged to consider and discuss the possibility of the buildings being left on the property to satisfy the amount left owing on the loan.

### **COSTS**

[211] During oral argument, at the end of the hearing, counsel for Ms. Gibson, recognizing that Ms. Shand would have no ability to pay costs, submitted that he would not be seeking costs from her, even if completely successful.

[212] He also argued that, even if Ms. Shand was successful, there should be no order for costs against Ms. Gibson because Ms. Shand unnecessarily caused Ms. Gibson to have to travel from New York or Ontario, at great expense to her, to come back to be questioned on bank statements. He explained that it was unnecessary because only one question was asked based on the bank statements; and, that was only following inquiry by the Court as to why there had been no questions on the bank statements when that was the purpose for bringing Ms. Gibson back.

[213] Despite the fact that Ms. Shand did not incur any legal expenses, her agent submitted that she should be awarded costs as she had not been able to participate in the junk season because she was preparing for the hearing. She first suggested an astronomical figure in the \$10,000 to \$20,000 range. Then she indicated that she did not know what a proper figure was. In her post-hearing submissions, she repeated the request for an unspecified amount of costs and “damages”; but, added that it was a minor issue and “should be pursued by someone qualified to do so”.

[214] She appeared to be confounding the question of costs with that of damages. There was no notice of claim made in this proceeding for damages, and the issue did not form part of the proceeding, apart from that related to the items belonging to Ms. Shand left in Mr. Gibson’s shed. Therefore, there can be no award for any such other damages.

[215] It does not seem credible that Ms. Shand would have had to miss the entire “junk season” to prepare for the hearing. It did not appear from the nature of her evidence that she spent any great deal of time preparing, as she was unable to provide much in the way of meaningful answers to most questions, particularly those emanating from the banking records. It appeared that her agent is the one who did most of the preparatory work.

There was no indication that her agent abandoned enumerated employment for that purpose. Consequently, even if completely successful, there would appear to be little basis for an award of costs to Ms. Shand.

[216] Ms. Gibson had the greater level of success in this application.

However, she was not seeking costs even if completely successful. Success is divided between the parties. Therefore, in my view, it would best do justice between the parties that they each bear their own costs; and, I so order.

**ORDER**

[217] I ask counsel for Ms. Gibson to prepare the order.

Pierre Muise, J.