2020 VT 8

No. 2019-003

Ian McLaren	Supreme Court
v.	On Appeal from Superior Court, Lamoille Unit, Civil Division
Patricia Gabel	September Term, 2019

Alden T. Bryan, J. (Ret.), Specially Assigned

Mary G. Kirkpatrick and Jennifer E. Agnew (On the Brief) of Kirkpatrick & Goldsborough, PLLC, South Burlington, for Plaintiff-Appellee.

Bridget C. Asay of Stris & Maher LLP, Montpelier, and Erin Miller Heins of Langrock Sperry & Wool, LLP, Burlington, for Defendant-Appellant.

PRESENT: Pearson, Acting C.J., Wesley, Manley, DiMauro and Howard, Supr. JJ. (Ret.), Specially Assigned

¶ 1. **PER CURIAM**. Patricia Gabel, defendant below, appeals the trial court's judgment in favor of plaintiff Ian McLaren, awarding him restitution in the amount of $553,534.88[1] for sums he contributed to the purchase and renovation of real property located on Logging Hill Road in Stowe, Vermont. She argues that the trial court erred as a matter of law in

[1] This number represents the final award as amended by the trial court's February 1, 2019 decision on plaintiff's motion to alter or amend under Vermont Rule of Civil Procedure 59(e). In granting plaintiff's motion, the trial court increased the amount of plaintiff's expenditures for renovations from $242,959.00 to $268,751.08, increasing the total award from $527,742.80 to what would be $553,534.88 (although that latter number is never explicitly stated by the court, see infra, note 6).

applying the factors underlying his claim for unjust enrichment pursuant to § 28 of the Restatement (Third) of Restitution and Unjust Enrichment (2011) [hereinafter Restatement], specifically whether plaintiff's expectations were justifiable, and abused its discretion in finding that plaintiff's expectations were justifiable given the facts as found by the court. Defendant also asserts the statute of limitations as a defense to plaintiff's claim for unjust enrichment. She further contends that even if plaintiff has a valid claim for restitution, the trial court abused its discretion in awarding the full amount of the money plaintiff contributed to the purchase and renovation of the property, and by structuring its final award with an extended payout schedule despite no record evidence to support such an award. We affirm in part, and reverse and remand in part.

¶ 2. In sum, we conclude that the court correctly applied § 28 of the Restatement and that the record supports its finding that defendant has been unjustly enriched. We affirm the court's determination that the statute of limitations does not bar plaintiff's claim. However, we reverse as error the court's determination of the amount of restitution owed and its structuring of the award, as a matter of law and an abuse of discretion with regard to the restitution amount, and for lack of record evidence to support crucial findings as to the extended payout structure of the award. We remand for recalculation of the amount of restitution owed as well as reconsideration of the nature of the final remedy.

I. Facts

¶ 3. Following a bench trial, the court found the following. After dating for around three years, the parties began a long-term domestic relationship in 1993 that effectively lasted until November 2015, except for a relatively brief hiatus from 1996 to 1998. During the course of this relationship, the parties resided together, first in plaintiff's home in Montreal, Quebec, in Canada, then in a residence they purchased together on Redpath Crescent in Montreal, and finally at the

property on Logging Hill Road in Stowe, Vermont. It is this last residence in Stowe, wholly owned by defendant, that is the subject of this appeal.

¶ 4. While the parties lived together in Montreal, defendant contributed to the household expenses, both at plaintiff's residence and then at the property they bought together. She also shared in the expenses to purchase and renovate the Redpath Crescent home. Plaintiff was an independent film producer and director in Montreal. Defendant worked as an attorney, first as the managing partner of the Montreal office of a Burlington law firm, and then out of her own law office in Burlington and affiliated consulting firm in Montreal. When defendant was in Vermont during this period, she lived in furnished rental apartments.

¶ 5. The Redpath Crescent home was purchased jointly in 1997, and the parties began residing in it together shortly thereafter. Towards the end of 2004, the expenses associated with Redpath had become a concern. Defendant drafted and the parties signed two agreements with respect to the Redpath home: one titled "Joint Ownership Agreement" that addressed the parties' responsibilities for various expenses concerning the home, and which also anticipated the sale of the home and how the proceeds and personal property contained therein would be divided; and the other called "Joint Debts and Expenses Agreement" that detailed various financial arrangements not having to do with the home itself.

¶ 6. In 2006, defendant closed her Montreal and Burlington law practice and began working for the Vermont Judiciary in Montpelier, Vermont. With defendant no longer residing full time in Montreal, the parties decided to sell the Redpath Crescent home. The home sold in 2007, and the proceeds from the sale were used to pay off the parties' joint and separate debts, after which each party was left with $611,513. They did not divide their personal property at that time, but rather put most of it in storage.

¶ 7. By 2007, the parties were living apart a majority of the time. Defendant still resided in Vermont in furnished apartments, and plaintiff rented his own apartment in Montreal. They no longer shared household expenses. However, the parties continued to maintain a "marriage-like, domestic relationship," spending the majority of their free time together, traveling together, and holding themselves out to friends as a couple.[2]

¶ 8. In 2008, the parties began looking together at homes in Stowe for defendant to live in full time. The house on Logging Hill Road was the only home both agreed on, and defendant purchased it in her own name in late May 2008 for $770,000. Defendant paid $465,216.20 plus the down payment of $50,000, and plaintiff contributed $284,783.80 towards the purchase price. These funds, except for the down payment, were deposited into and withdrawn out of a Vermont account set up at defendant's bank, which the parties called their "House Renovation Account."

¶ 9. Extensive renovations were made to the house and grounds. Both parties communicated with the various contractors to ensure the work met their joint expectations. Between August 8, 2008, and May 22, 2009, plaintiff and defendant each deposited additional money into the House Renovation Account to fund the renovations. Plaintiff acted as the primary bookkeeper and created a spreadsheet for the project, and kept track of all contributions and payments. The court ultimately found that plaintiff's additional financial contributions to the Stowe property came to $268,751.08, resulting in a total cash contribution by plaintiff to the Stowe residence of $553,534.88 (see supra, note 1), which left him a balance (not including any interest or investment earnings) of $57,978.12 from the $611,513 he had netted from the sale of the Redpath Crescent home in 2007.

[2] Defendant disputes the evidentiary basis for this finding in her brief, and the court's characterization of their relationship after 2009, but for purposes of this appeal she does not expressly challenge the finding itself.

¶ 10. The court did not make a specific finding as to the additional amount contributed by defendant, although it stated that the total amount spent from the account by September 2012 was $1,325,000.[3] However, not all of the funds disbursed were actually spent on renovation expenses. Plaintiff did not make any significant financial contribution to any renovations or capital improvements after August 2009, although he did perform some small tasks around the home, including refinishing the deck and maintaining extensive gardens.

¶ 11. The Stowe home on Logging Hill Road thereafter served as defendant's primary residence. Plaintiff traveled from his apartment in Montreal and stayed at the house on weekends and holidays. Plaintiff brought several valuable pieces of his personal property to the house as decoration and furnishings. The parties entertained mutual friends in the home, continued to engage in recreational activities together, and otherwise behaved (at least outwardly) in the manner of two people in a long-term domestic relationship, for a number of years after 2008.

¶ 12. The relationship, however, was in fact deteriorating and came to an end in November 2015, at least in part as a result of medical issues involving defendant.[4] At the time of the separation, defendant drafted and the parties signed an agreement, dated November 15, 2015,

---

[3] The actual number when the last disbursement was made from the renovation account on September 7, 2012, was $1,324,023.52. The initial entries in plaintiff's spreadsheet for the account indicate that defendant's entire initial contribution, including the $50,000 down payment, was included in the running total of deposits, credits, and expenditures. Thus, given plaintiff's eventual contribution of $553,534.88, and defendant's initial contribution of $515,216.20—a total of $1,068,751.08—it would appear that an additional $255,272.44 was added to the account. Of that, it appears that $45,968 was specifically earmarked as "Advance from PG [defendant]," with another $81,000 coming from a "Chittenden Bank loan" attributed to both parties ("IM [plaintiff] & PG [defendant]") and the rest from other miscellaneous credits. A few minor expenses were actually paid by individual credit card but included in the house account running total. The total contributions made by both parties, particularly by defendant, to the acquisition of and capital improvements to the Stowe property is a key missing fact on this record, and a principal reason why this case must be remanded to the trial court. See infra, ¶¶ 49-53.

[4] The trial court's findings and the record evidence relating to this issue are a part of the sealed record in this case. They play no significant role in our determination of this appeal, and we do not refer to or rely on them.

which attempted to unwind the parties' financial and legal entanglements. The opening paragraph of this agreement states:

> The parties own personal property, either jointly or severally, and they have each expended certain funds related to [defendant's] home [on] Logging Hill Road. Over time, they expect to reach certain final agreements related to these matters or to have these matters resolved through one or more private dispute resolution processes or by a court of competent jurisdiction . . . .

The parties signed a second agreement on February 14, 2016, relating to plaintiff's responsibility to repair a wall on which had hung a decorative carpet owned by him that he removed from the residence. Finally, the court found that the fair market value of the Stowe property on Logging Hill Road, at the time of the final hearing in June 2018, was in the neighborhood of $880,000 to $890,000 based on competing appraisals, the court's assessment of each appraiser's credibility at the final hearing, and a site view conducted by the court. Neither party challenges this finding on appeal.

¶ 13. Plaintiff filed suit on February 22, 2017, alleging unjust enrichment and breach of an implied contract, seeking to recover the money he had advanced for the Stowe property, the return of his separate personal property, and an accounting and division of joint personal property; in the alternative, plaintiff requested the imposition of a constructive trust on both the Logging Hill Road home and any jointly owned personal property. Defendant answered, raising various counterclaims, including breach of contract concerning the agreements of 2015 and 2016.

¶ 14. The court held a bench trial over five days in June 2018. In late November 2018, it ultimately ruled in favor of plaintiff on his claim of unjust enrichment for his financial contributions to the purchase and renovation of the Stowe property owned by defendant, and also awarded him his own personal items from the Stowe home plus all jointly purchased items located

at his Montreal apartment.[5] As a remedy, the court declined to impose a constructive trust, but awarded plaintiff the full amount claimed as his financial contributions to the property as equitable restitution. The court denied defendant's statute-of-limitations defense to these claims, finding that the action in equity did not accrue until the termination of the relationship between the parties, which the court found to have occurred in November 2015.

¶ 15. The court reached its conclusions as to the amount owed in restitution based not on any consideration of the fair market value of the Stowe property, but solely on the actual sums effectively given by the plaintiff to defendant. In weighing the equities to determine if restitution was necessary to achieve justice, the court found and then also considered that plaintiff owned no real property or other significant assets, and at the time of the final hearing, plaintiff was retired and living on approximately 5000 Canadian dollars per month from a "small pension and income from modest investments." That finding, based on record evidence, is not contested on appeal. As to defendant, the court considered that she would likely continue working until age seventy-five, and that "she should be able to afford a substantial mortgage on her [real] property" in Stowe based on her statutory income and retirement benefits as a Judiciary employee, even though there was no actual record evidence on those points (see infra, ¶¶ 61-64).

¶ 16. The court established a payment schedule for the restitution award that anticipated defendant's remaining at the property at least until she retired at the age of seventy-five, even though there was no record evidence of any such plan or intention by defendant. Nor had defendant expressly requested that the court impose an extended repayment plan if there was an award to plaintiff. The court dismissed defendant's counterclaims for breach of contract and specific

[5] Conversely, defendant was awarded all of her solely owned personal items still at plaintiff's Montreal apartment or in storage, as well as any jointly purchased items located in the Stowe home.

performance, save for ordering plaintiff to pay defendant $100 to repaint the wall where the decorative carpet had hung before its removal by plaintiff.

¶ 17. Defendant appealed the court's decision on the issue of unjust enrichment and the award of restitution, including the basis of and manner in which payoff of the award was structured by the court. She did not appeal the court's determinations regarding any of the personal property or the dismissal of her counterclaims; those issues are now closed. Plaintiff did not cross-appeal from the court's final orders, including dismissal of the claim for a constructive trust; that issue is now also closed.[6]

II. Unjust Enrichment

(A) Restatement § 28 Analysis

¶ 18. Defendant first argues that she was not unjustly enriched because plaintiff provided the funds for the purchase and renovation of the property voluntarily as a gift, and that he therefore has no claim for restitution of those funds. However, "[t]he question whether, on the facts, there was a gift is one of mixed law and fact," and "[a]s such it will stand if it is factually supported." Colby's Ex'r v. Poor, 115 Vt. 147, 152, 55 A.2d 605, 608 (1947). Here, the trial court found that the parties were engaged in a long-term ("more than 20-year") domestic relationship at the time that plaintiff gave defendant the funds used to purchase and renovate her home, findings that

[6] It does not appear from the docket entries (or the items included in either party's printed case) that the court entered a separate final judgment incorporating its final order and decree, as required in civil actions by Vermont Rule of Civil Procedure 58(a). Nor do we have before us a single document, or an amended final judgment, that clearly states the court's monetary award after it granted the plaintiff's motion to alter or amend to increase the amount of his additional financial contributions to $268,751.08. However, it is clear that it was the court's intention to make a final award in the full amount of all funds advanced by plaintiff, in what would be the total amount of $553,534.88 (instead of $527,742.80 as stated in its final order and decree). Neither party raises any issue regarding the absence of a separate final judgment. Because this case is a civil action, and not a domestic action subject to the Vermont Rules for Family Proceedings (where Rule 4.0(a)(2)(C) omits the requirement of a separate final judgment when the court enters a final order and decree), we expect that Rule 58(a) will be complied with on remand.

defendant does not ultimately contest. It is true that the court did not expressly state that it rejected defendant's characterization of plaintiff's contributions as a gift, or specifically state that his cash advances were not a gift.[7] However, that factual finding is inherent in its determination that § 28 of the Restatement applies, and that defendant was unjustly enriched pursuant to the principles stated in § 28. See Trombly Plumbing & Heating v. Quinn, 2011 VT 70, ¶ 10, 190 Vt. 552, 25 A.3d 565 (mem.) ("Even though the trial court did not make specific findings regarding homeowners' good faith claims and the amount withheld, we presume that a general finding in favor of one party is a finding of every fact necessary to sustain it.").

¶ 19. As the commentary to § 28 of the Restatement explains:

> Cases involving former cohabitants repeatedly allow restitution to claimants who—had they been dealing with someone else—might have been found either to have acted gratuitously or to have assumed the risk that the expenditures in question would ultimately be of primary benefit to someone other than themselves. A transaction that might appear to be purely donative if judged at the time may thus (in effect) be recharacterized, after the fact, as an interrupted exchange or a conditional gift. A standard objection to restitution in related contexts—the argument that the asserted obligation should properly have been the subject of a contract between the parties—is ordinarily disregarded when restitution is allowed between former cohabitants. This treatment of transactions between former cohabitants stands in notable contrast, not only to the rules applied to any form of arm's-length dealing, but to the law's treatment of claims between many other persons whose personal relationship might be characterized as confidential.

Restatement § 28 cmt. b (citation omitted). Further, the commentary notes that

> [e]ven when a transfer between cohabitants is essentially gratuitous, it may be made in the expectation that the donor will share, directly or indirectly, in the resulting benefits. Decisions allowing restitution under § 28 involve an implicit determination that the contributions at issue were made on that basis—thereby

[7] As with the issue of plaintiff's "justifiable expectations," see infra, ¶¶ 19, 22, 26-31, of course it would have been helpful for the court to spell out in more detail how the record supported its conclusion that this element of the restitution analysis was met. But the evidence does support these determinations, and so we do have sufficient indication here of "what was decided and how the decision was reached." In re Derby GLC Solar, LLC, 2019 VT 77, ¶ 19, __ Vt. __, __ A.3d __ (quotation omitted).

> distinguishing them from ordinary gifts—and that the claimant's expectation was justifiable. They rest, moreover, on an implicit determination that the claimant should not be held to have assumed the risk that things would turn out as they did; in short, that the transaction is not one that the parties should have regulated by contract.

Id. § 28 cmt. c (citations omitted). Thus, we must consider whether the elements of an unjust enrichment claim have been met—in particular whether plaintiff's expectations were "justifiable" given the totality of the circumstances—to determine whether the restitution award by the court can stand.

¶ 20. "The existence of unjust enrichment, given a certain set of facts, is a question of law that we review de novo." Kellogg v. Shushereba, 2013 VT 76, ¶ 32, 194 Vt. 446, 82 A.3d 1121; see also Morris Pumps v. Centerline Piping, Inc., 729 N.W.2d 898, 903 (Mich. Ct. App. 2006) (noting that "[w]hether a specific party has been unjustly enriched is generally a question of fact," but "whether a claim for unjust enrichment can be maintained is a question of law, which we review de novo"). Plaintiff, as the party asserting the claim, bears the burden of proof on his claim for unjust enrichment. Kellogg, 2013 VT 76, ¶ 36.

¶ 21. However, "we give deference to the trial court's decision to grant or withhold equitable remedies." Id. ¶ 13. Specifically, we review the trial court's decision to grant or withhold equitable remedies for abuse of discretion. Weed v. Weed, 2008 VT 121, ¶ 16, 185 Vt. 83, 968 A.2d 310. "This standard requires a showing that the court withheld its discretion entirely or exercised it on 'clearly untenable' grounds." Shattuck v. Peck, 2013 VT 1, ¶ 10, 193 Vt. 123, 70 A.3d 922 (quoting Weed, 2008 VT 121, ¶ 16).

¶ 22. Defendant contests the trial court's application of the Restatement. She argues that the court erred as a matter of law by not expressly discussing the factors that underlie any claim brought under § 28, specifically, whether plaintiff actually expected that his cash advances would be returned in the event the parties separated, and, if so, whether any such expectations were

"justifiable." Defendant further contends that the trial court abused its discretion in essentially concluding that plaintiff's implicit expectations were justifiable given the facts explicitly found by the court.

¶ 23. Section 28 is located in the chapter of the Restatement entitled "Unrequested Intervention" and under Topic 3 within that chapter, "Self-Interested Intervention." The introductory note to this topic explains that "[t]he focus of the analysis is on the position of the recipient." Restatement pt. II, ch. 3, topic 3, intro. note. This primary focus on the person unjustly receiving or retaining a benefit, and only secondarily on the claimant's circumstances, is entirely consistent with our settled law on unjust enrichment. See, e.g., JW, LLC v. Ayer, 2014 VT 71, ¶ 22, 197 Vt. 118, 101 A.3d 906 ("To demonstrate unjust enrichment, tenant must show that a benefit was conferred on landlord, landlord accepted the benefit, and it would be inequitable for landlord not to compensate tenant for its value.").

¶ 24. Section 28 concerns "Unmarried Cohabitants" and states as follows:

> If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.

Restatement § 28(1). This Court has expressly adopted § 28 of the Restatement. Wynkoop v. Stratthaus, 2016 VT 5, ¶ 24, 201 Vt. 158, 136 A.3d 1180.

¶ 25. In determining whether § 28 should be applied to a given set of circumstances, the trial court must still consider whether the long-recognized elements of unjust enrichment have also been met: "whether (1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value." Reed v. Zurn, 2010 VT 14, ¶ 11, 187 Vt. 613, 992 A.2d 1061 (mem.); see also Shattuck, 2013 VT 1, ¶ 38 (Robinson, J., dissenting). "Unjust

enrichment is present if, in light of the totality of the circumstances, equity and good conscience demand that the benefitted party return that which was given." Mueller v. Mueller, 2012 VT 59, ¶ 28, 192 Vt. 85, 54 A.3d 168 (quotation omitted). "[W]hether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic determination based on a broad view of the human setting involved." Legault v. Legault, 142 Vt. 525, 531, 459 A.2d 980, 984 (1983) (quotation omitted).

¶ 26. Here, there is no dispute as to the first two elements of the three-part test stated in Reed, 2010 VT 14; the only remaining issue is whether it would be inequitable for defendant to retain the substantial financial benefit conferred on her by plaintiff. As concerns this element, the special circumstances which support a cause of action for unjust enrichment pursuant to § 28 must be taken into account. In the context of § 28,

> [u]njust enrichment . . . is based on the "claimant's frustrated expectations." Recovery is allowed because the claimant would not have conferred the benefit, "except in the expectation that the parties' subsequent relationship would be something other than it proved to be."

Bonina v. Sheppard, 78 N.E.3d 128, 132-33 (Mass. App. Ct. 2017); see Restatement § 28 cmt. c; see also Shattuck, 2013 VT 1, ¶ 34 (Robinson, J., dissenting) ("The Restatement posits that most of these cases can be explained with reference to a party's frustrated expectations when a party confers a benefit in the expectation that the relationship would be something other than it ultimately proved to be."). A successful unjust enrichment claim in this context therefore depends on a determination that it was justified by the circumstances for plaintiff to expect that by giving defendant the money to purchase and renovate her home, he would share, directly or indirectly, in the resulting benefits—here, some semblance of virtual co-ownership of the property on Logging

Hill Road, including the financial value that entailed[8]—as a part of their ongoing domestic relationship.

¶ 27. As noted, the trial court did not make explicit findings that, at the time he made his financial contributions in 2008 and 2009, plaintiff in fact expected, and that he was justified in expecting, that by contributing to the purchase and renovation of the home he would share in all the various attributes of the property consistent with the parties' ongoing relationship, including some degree of security for the substantial cash advances he had made. However, as also noted above, "[a] general finding in favor of one party or another is a finding of every special fact necessary to sustain it and is conclusive as to such facts, if there is evidence to support a finding of their existence." In re Heath, 128 Vt. 519, 523, 266 A.2d 812, 815 (1970). Here, the general finding in favor of plaintiff as to defendant's unjust enrichment pursuant to § 28 necessarily includes a positive finding that plaintiff's expectation was "justifiable" given the circumstances. Restatement § 28 cmt. c. There is more than adequate evidence in the record to support such a finding. See id. (explaining that "[d]ecisions allowing restitution under § 28 involve an implicit determination that the contributions at issue were made" based on "expectation that the donor will share . . . in the resulting benefits" and "that the claimant's expectation was justifiable" (emphasis added)).

¶ 28. In reviewing the trial court's decision, "[f]indings of fact shall not be set aside unless clearly erroneous." V.R.C.P. 52(a)(2); see also Mann v. Levin, 2004 VT 100, ¶ 17, 177 Vt. 261, 861 A.2d 1138 ("[W]e will uphold the court's factual findings unless, taking the evidence in

[8] Although many of the same attributes of a de facto "joint venture" are present, with the property acquisition and renovation being the mutually contemplated project, it is not necessary that plaintiff alternatively pursue such a claim or prove its elements to succeed on a claim for unjust enrichment under § 28 of the Restatement. And, although there may be similar factors to be considered, claims under § 28 are not limited to situations where equitable partition may be available. Cf. infra, ¶¶ 42, 52, note 11.

the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them."). "Due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses and the weight of the evidence." V.R.C.P. 52(a)(2). "Findings, even those contradicted by substantial evidence, will be affirmed unless there is no credible evidence to support the finding." Soon Kwon v. Edson, 2019 VT 59, ¶ 23, __ Vt. __, 217 A.3d 935 (quotation omitted).

¶ 29. The trial court found that the parties continued to engage in a long-distance relationship after defendant relocated full time to Vermont in 2006 and after the sale of their jointly owned Montreal home in 2007, and that they maintained this relationship based on close domestic companionship for several years after the acquisition of the Stowe property in 2008. They spent the majority of their free time together, traveled together, shared the home in Stowe on weekends when plaintiff was there, and held themselves out to friends as a couple. The court clearly credited plaintiff's testimony concerning the nature of the ongoing relationship from 2006 until "suddenly, their relationship deteriorated . . . and it all came to an end in November 2015." The court is "entrusted with the responsibility of weighing the evidence and assessing the credibility of witnesses." Nystrom v. Hafford, 2012 VT 60, ¶ 12, 192 Vt. 300, 59 A.3d 736.

¶ 30. The evidence supports the trial court's findings on this point. When defendant began looking for her home in Stowe, she looked at properties with plaintiff and selected a home that they both agreed upon. When she began renovations on the property, she did so with plaintiff's active participation in the project. The tradespeople working on the home believed them to be a couple, and understood that plaintiff spoke on defendant's behalf concerning the renovation work being done. The parties opened a separate bank account—in defendant's name, at her bank—into which they both deposited money and out of which were paid the expenses for the purchase and renovation of the property. Even after 2009, when plaintiff no longer contributed financially to

the renovation or upkeep of the property, he continued to work on landscaping and other projects designed to benefit the house and grounds. And, at the time he contributed $553,534.88 (90% of his net proceeds from the Redpath Crescent sale) to and for defendant's Stowe property, plaintiff owned no real estate himself, had no other significant assets, and was anticipating retirement based on a "small pension and income from modest investments" in the amount of approximately 5000 Canadian dollars per month.

¶ 31. These undisputed facts, together with the court's express findings, establish that plaintiff's contribution of such a large sum to defendant's home occurred only within the context of the parties' long-term relationship and was not simply an unrestricted gift between people who were "just friends." The payments were voluntary, as they almost always are in this scenario. However, that is not inconsistent with the implicit finding that plaintiff simultaneously held a justifiable expectation that his financial contributions were for his own long-term benefit as well. The further inference that he expected continuation of both the relationship and his right to use and enjoy the home, and also to benefit financially from the substantial asset he had helped to create, and that this expectation was justified by the circumstances, is obvious from the court's conclusions. See Restatement § 28 cmt. c. Indeed, defendant also recognized the reasonableness of plaintiff's expectations as to his right to the continued use and enjoyment of the property as a part of their relationship and as a result of his financial contributions. For example, when she later requested that he change the times that he stayed at the home and he refused, she acquiesced to his continued weekend and holiday visitation and continued to behave as a couple (at least outwardly) in her interactions with him. The agreement she drafted in November 2015 (see supra, ¶ 12) also expressly recognized that their respective interests in the property still had to be resolved, an acknowledgment that she did not truly believe his financial contributions were really all just a gift.

¶ 32. Defendant argues that the lack of plaintiff's name on the property title, as well as the absence of any contemporaneous agreements between the parties memorializing their rights in the Stowe property, overcomes the evidence supporting any inference concerning plaintiff's expectations. We disagree. First, neither the absence of plaintiff's name on the deed nor the lack of a written agreement governing their financial relationship to the property is controlling, as "an unjust enrichment theory does not require any agreement." Shattuck, 2013 VT 1, ¶ 32 (Robinson, J., dissenting); see, e.g., Thibeault v. Brackett, 2007 ME 154, ¶¶ 15-17, 938 A.2d 27 (affirming trial court's finding of unjust enrichment between unmarried cohabitants despite property being held in defendant's name alone); Mitchell v. Oksienik, 880 A.2d 1194, 1199 (N.J. Super. Ct. App. Div. 2005) ("It is clear . . . that the purchase of property under one unmarried cohabitant's name is essentially irrelevant to an equitable action." (quotation omitted)). Again, the scenario contemplated by § 28 arises precisely because one or both parties do not exercise the foresight to reduce their expectations and respective legal obligations to writing, or (for whatever reason) choose not to acquire the property jointly.

¶ 33. Second, the fact that plaintiff did not insist on any agreement contemporaneous with the purchase of the Stowe property cuts in both directions: defendant, an accomplished attorney before becoming a Judiciary employee, could just as well have insisted at the outset on documenting their financial relationship concerning the property, just as she had done previously with regard to the Redpath Crescent home. Further, the trial court found that the parties did not formalize their respective financial interests vis-à-vis the Redpath home until nearly seven years after the purchase of the property, when they anticipated its having to be sold. The fact that they similarly did not memorialize their obligations concerning the Logging Hill Road home until their personal relationship was nearing its conclusion is consistent with their prior practice, and thus

does not undercut the implicit finding that plaintiff's expectations were justified.[9] Cf. Massey v. Hrostek, 2009 VT 70, ¶ 16, 186 Vt. 211, 980 A.2d 768, overruled on other grounds by Whippie v. O'Connor, 2011 VT 97, ¶¶ 16-17, 190 Vt. 600, 30 A.3d 1292 (mem.) (noting that it may be "impossible to reconcile" seemingly inconsistent facts regarding one party's expectations versus other party's actual conduct in titling property).

¶ 34. Considering all of the above, the trial court's general findings are supported by the evidence, and as a result the elements necessary to support an unjust enrichment claim under § 28 were established as a matter of law. We further affirm the trial court's discretionary decision that equity in this instance demands relief and that defendant has been unjustly enriched by plaintiff's monetary contributions to her home both in its purchase and in the first fourteen months of its renovation. As a result, given the evidence at trial, the trial court's obviously implicit determination that plaintiff's contributions were not a gift is affirmed.

(B) Statute of Limitations Analysis

¶ 35. Defendant also raises the statute of limitations as a defense to plaintiff's claim for unjust enrichment. There is no dispute as to what limitations period applies,[10] but rather as to when plaintiff's cause of action for unjust enrichment accrued. "A cause of action does not accrue until each element of the cause of action exists." Benson v. MVP Health Plan, Inc., 2009 VT 57, ¶ 5, 186 Vt. 97, 978 A.2d 33. "The discovery rule provides that the limitations clock does not

[9] To be sure, the Redpath Crescent home was owned jointly by both of them, whereas the Stowe property was titled solely in defendant's name. But that difference, while important, does not substantially diminish the reasonableness of plaintiff's expectations regarding the Stowe property. Indeed, the November 2015 agreement drafted by defendant, see supra, ¶ 12, expressly recognizes that "these matters" would still have to be "resolved" through one means or another; this suit was ultimately the chosen route to final resolution after the parties failed to arrive at any mutual agreement or to successfully mediate the dispute.

[10] Section 511 of Title 12 applies to actions for unjust enrichment. Stankiewicz v. Estate of LaRose, 151 Vt. 453, 456, 561 A.2d 400, 402 (1989).

begin running until the plaintiff knows or should know of the injury and [its] cause . . . ." State v. Atl. Richfield Co., 2016 VT 61, ¶ 32, 202 Vt. 212, 148 A.3d 559. "The discovery rule . . . applies to actions under 12 V.S.A. § 511." Vt. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 165 Vt. 629, 630, 687 A.2d 1256, 1257 (1996) (mem.). "Determination of the date of accrual under the discovery rule is a factual issue," Pike v. Chuck's Willoughby Pub, Inc., 2006 VT 54, ¶ 18, 180 Vt. 25, 904 A.2d 1133, and thus the trial court's determination of this issue is subject to limited review by this court.

¶ 36. Here, as noted in the Restatement commentary quoted above, a cause of action for unjust enrichment under § 28 does not accrue until the domestic partnership ends. This is because it is only once the relationship terminates that the allegedly aggrieved party suffers some loss or injury; that party's expectations can then be judged in hindsight, and it can be determined whether the party should be held to have assumed the "risk that things would turn out as they did." Restatement § 28 cmt. c; see Watts v. Watts, 405 N.W.2d 303, 314 (Wis. 1987) (Watts I) ("[U]nmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships . . . ."); Restatement § 28 reporter's note a (citing Watts I, 405 N.W.2d 303)); see also Watts v. Watts, 448 N.W.2d 292, 298 (Wis. Ct. App. 1989) (Watts II) ("The Watts I-type claim for unjust enrichment that [the plaintiff] asserts accrues when the relationship has terminated, and not before, because termination of the relationship without disgorgement of the benefit conferred and improperly retained is the injury for which Watts I permits recovery." (citation omitted)).

¶ 37. This is consistent with Vermont precedent concerning when an unjust enrichment claim becomes ripe. See Kellogg, 2013 VT 76, ¶ 31 (considering similar unmarried cohabitation situation and stating that "defendant's unjust-enrichment claim was not yet ripe at the time of the first decision, for she was still living on the land, and it was not yet clear either if defendant was

going to follow through with the agreement to purchase the land or if plaintiff was going to take any action to eject her from the land"). Because the trial court found that the relationship between the parties lasted until November 2015, and neither party challenges that finding, we affirm the trial court's determination that the statute of limitations had not run on plaintiff's cause of action at the time of the filing of the complaint.

III. Restitution Amount

¶ 38. Defendant next argues that the trial court abused its discretion in effectively awarding plaintiff the full amount it found he had contributed to the purchase and renovation of the Stowe property ($553,534.88). Defendant argues that the court abused its discretion by failing to take into account her substantial contributions to the property in calculating its award. She also argues that the court erred as a matter of law in applying the principles of restitution under § 49 of the Restatement, specifically as to the measure of the damages, and that any calculation of the benefit conferred must be tied to the property's fair market value. Defendant further claims that any restitution award must account for—i.e., be reduced by—the benefit received by plaintiff through his continued use and enjoyment of the property.

¶ 39. As a preliminary matter, we affirm the trial court's decision generally to impose an equitable remedy. The court appropriately exercised its discretion in choosing to compensate plaintiff for defendant's unjust enrichment by awarding him restitution in the form of a specific sum of money. Neither party has appealed that aspect of the decision below, and we hold that the issue is now closed in this case.

¶ 40. The crux of defendant's appeal is focused on the trial court's calculation of the amount owed in restitution. In considering plaintiff's restitution claim, the trial court correctly cited our statement that "[t]he measure of damages is the amount of the benefit received." JW, LLC, 2014 VT 71, ¶ 22. However, the court then appears to have veered from that path in two

different directions. First, in considering plaintiff's money transfers to defendant, the trial court did not limit itself to only those expenditures made on defendant's home, but also weighed plaintiff's contributions to her son's college tuition and to a life insurance policy. Though the court did not award plaintiff recovery for these other expenses, and only awarded him his contributions to the purchase and renovation of the Stowe property itself, the fact that the court even considered those other transfers reveals the expansive nature of the trial court's assessment of the restitutionary damages. Second, the trial court then failed to determine the actual benefit retained by defendant through her 100% ownership of the property as improved, and also concluded that defendant was benefited on a dollar-for-dollar basis in the full and exact amount plaintiff expended on the property. Each of those was error and requires correction.

¶ 41. Where the dollar amount credited to a party as part of an equitable remedy is challenged, "we will 'uphold the trial court's findings as long as they are supported by any credible evidence in the record.' " Wynkoop, 2016 VT 5, ¶ 30 (quoting Currie v. Jané, 2014 VT 106, ¶ 19, 197 Vt. 599, 109 A.3d 876). However, the broad discretion allowed the trial court "does not excuse the court from making the concrete mathematical calculations that are possible under [the] facts" presented. Massey, 2009 VT 70, ¶ 26. While we recognize that "[t]he chief remedial problem of restitution is perhaps its measurement," D. Dobbs, Law of Remedies § 4.1(4), at 379 (2d ed. abr. 1993), that difficulty does not exempt the trial court from applying the appropriate measure of restitution to determine the amount of the award.

¶ 42. In its precedent discussing § 28, this Court has not elaborated upon the proper measurement of money damages or whether a specific form of equitable relief is mandatory.[11] However, in each case, the discussion of what may be recovered in equity pursuant to an unjust

[11] In Shattuck, this Court affirmed the denial of equitable relief because of plaintiff's unclean hands. 2013 VT 1, ¶ 17. In Wynkoop, a determination that the relevant property was subject to equitable partition was affirmed. 2016 VT 5, ¶ 26.

enrichment claim founded on § 28 has been limited to the money, services, and materials contributed to the property that is the subject of the claim, or to the equitable division of the property itself. See, e.g., Wynkoop, 2016 VT 5, ¶¶ 25, 27-34, 38-39 (discussing amounts relevant to calculating parties' equitable interests in equitable partition of property pursuant to principles underlying § 28). Indeed, the commentary to § 28 explicitly limits claims made under its umbrella: "Restitution will be allowed for salient contributions made by the claimant to identifiable assets owned by the defendant . . . ." Restatement § 28 cmt. d. This reflects the general principle that "restitution should be measured to reflect the substantive law purpose that calls for restitution in the first place." Dobbs, supra, § 4.5(1), at 424 ("Some measurement problems can be resolved simply by respecting not only the general policy against unjust enrichment but the narrower situational policies that apply [to a] particular set of facts.").

¶ 43. Thus, in measuring the degree to which defendant was unjustly enriched by plaintiff's contributions, the trial court should have limited itself to consideration of the benefits to defendant specifically related to the Stowe property. See, e.g., Tummelson v. White, 2015 IL App (4th) 150151, ¶ 39, 47 N.E.3d 579 (allowing equitable recovery under § 28 for monies contributed to purchase of property owned solely by defendant); Bonina, 78 N.E.3d at 133-34 (discussing proper measure of restitution in context of § 28 unjust-enrichment claim and limiting recovery to cost of materials used to renovate defendant's property); see also Thibeault, 2007 ME 154, ¶ 23 (holding trial court erred by including costs for personal property as part of unjust-enrichment money judgment based on unmarried cohabitant's contributions to defendant's real property).

¶ 44. However, the trial court did not limit its evaluation of the benefit conferred on defendant to solely those contributions made to the property on Logging Hill Road. The court also discussed plaintiff's financial contributions to defendant's son's education and payments on a life

insurance policy as possible benefits unjustly conferred on defendant. Though the court did not award plaintiff restitution for these amounts, even its secondary discussion of them falls outside the limited basis for granting equitable relief as provided by § 28. Cf. Begin v. Benoit, 2006 VT 130, ¶ 9, 181 Vt. 553, 915 A.2d 786 (mem.) (discussing equities in statutory partition action between unmarried cohabitants, and noting that "[c]ertainly, debt incurred on the home, the subject of partition, was relevant to determining the equities here," while other debts unrelated to home, such as defendant's child-support arrears, were inappropriately considered by court and warranted reversal of that portion of judgment).

¶ 45. Further, the court's assessment of the extent of the benefit conferred was an error of law, and its calculation of the amount thereof a clearly erroneous finding. Recovery in restitution differs from that awarded as damages: while damages represent the loss to the plaintiff, restitutionary recoveries are based on the defendant's unjust gain. Dobbs, supra, § 4.5(1), at 423; see In re Estate of Elliott, 149 Vt. 248, 253 n.2, 542 A.2d 282, 285 n.2 (1988) ("Unjust enrichment focuses on the value of the benefit actually conferred upon the defendant."). Section 49 of the Restatement covers the measure of unjust enrichment where restitution is to be made in the form of a money judgment: "[Unjust e]nrichment from a money payment is measured by the amount of the payment or the resulting increase in the defendant's net assets, whichever is less." Restatement § 49(2) (emphasis added). Here, the trial court never determined the net increase in defendant's assets—specifically, the property on Logging Hill Road—that actually resulted from plaintiff's financial contributions.

¶ 46. Instead, by awarding plaintiff the total sum of $553,534.88, the court appears to have simply concluded that defendant benefited in the exact amount, on a dollar-for-dollar basis, that it found plaintiff had contributed toward the purchase and renovation of the Stowe property. That conclusion is unsupported by the record evidence, is contrary to the Restatement principles

discussed above, and is clearly erroneous. The uncontroverted evidence shows that plaintiff acknowledged and understood that (1) when buying the property it required extensive renovations; (2) all the money the parties put into acquiring and then renovating the house and grounds (in excess of $1.25 million) would likely never be recovered in any later sale of the home; (3) he would lose money on his "investment" in the property; and (4) defendant, as sole owner of the home, accordingly did not receive (and will not retain) a dollar-for-dollar benefit from his monetary contributions. The last point is indisputably true, independent of plaintiff's acceptance of the fact, because even though the parties collectively contributed over $1.25 million to the purchase and renovation of the property, its fair market value after all that work and expense was at most $890,000.[12]

¶ 47. Plaintiff argues that it was within the trial court's discretion to find that he is owed the full amount of his payments. Plaintiff relies on the commentary to § 49, which states that "[u]njust enrichment resulting from a direct payment by the claimant to the recipient ordinarily leads to a prima facie liability in the amount of the payment." Restatement § 49 cmt. c. However, plaintiff did not simply give defendant money for any purpose; he specifically advanced funds to buy and renovate the house and grounds on Logging Hill Road. Thus, Restatement § 49(2) itself controls and not its illustrative comment c. His recovery in equity is not the damages (or monetary

[12] A panel of this Court recently affirmed a trial court's denial of the plaintiffs' unjust enrichment claims where the defendants put more money into the subject property than it was worth, finding that in that circumstance, "no benefit was conferred on, or retained by," the defendants. Pawlick v. Apgar, No. 2018-195, 2019 WL 2005780, *3 & n.* (Vt. May 6, 2019) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo18-195_1.pdf [https://perma.cc/U6BY-AUAH]. See also Cimaglia v. Moore, 724 Fed. Appx. 695, 698-99 (11th Cir. 2018) (per curiam) (considering § 28 claim under Florida law and stating "unjust enrichment is not an appropriate vehicle for recovery when there has been no return whatsoever on an investment"); Prey v. Kruse, No. 2:08-cv-287, 2010 WL 3780991, at *2 (S.D. Ohio Sept. 23, 2010) (adopting magistrate report and recommendation granting defendant's motion for summary judgment, stating that where defendant sold subject property for loss, as matter of law there was no benefit retained and thus no viable claim for unjust enrichment).

loss) he incurred, but the benefit unjustly retained by defendant, and it must be the lesser of (a) his total contributions or (b) "the resulting increase in the defendant's net assets." Restatement § 49(2).

¶ 48. Here, that unjust benefit must be the latter. Moreover, if the property is conceptually viewed as a mutual investment, the increase in defendant's net assets could be no more than one-half the fair market value of defendant's wholly owned Stowe property, or a maximum of $445,000—and not the full amount ($553,534.88) of his monetary contributions as awarded by the trial court. But the amount of the benefit unjustly retained by Defendant, on this record and given undisputed evidence, see infra, ¶¶ 49-53 and notes 14-15, could well be even less than that after the necessary assessment of both of their proportionate capital contributions to the property. Defendant is unjustly enriched only to the extent that she is otherwise allowed to walk away with an increase in her net worth comprised of what is essentially plaintiff's proportionate contribution to the fair market value of the property, i.e., that share of the property's value that was created by his monetary advances and his own work on and around the property. Here, the proper restitutionary amount may well be substantially less than what the trial court awarded, see infra, notes 14-15, even though that may result in a significant reduction in plaintiff's financial resources derived from the Redpath Crescent sale. Again, the touchstone is not the loss to plaintiff but the benefit unjustly retained by defendant. Equity and the principles of unjust enrichment can remediate some but not necessarily all of the consequences flowing from decisions and actions that in hindsight might have been different.

¶ 49. Defendant argues that plaintiff's equitable share should indeed be something less than a fifty-fifty split of the property's fair market value proven at trial. She contends that his share should be further reduced by, among other things, items for which the trial court did not make discrete findings: the monetary (or "rental") value of the weekend and holiday time he spent

at the property; additional amounts she put into the property after 2009 (when plaintiff stopped any further financial contributions), such as the $50,000 she claims to have spent on legal and engineering fees to address stormwater runoff from the neighbor's property; and the almost $250,000 paid by her—from acquisition in 2008 until the demise of the parties' relationship in late 2015—for property taxes, utilities, insurance, and snow removal and routine grounds maintenance.[13]

¶ 50. As for the first item, although this Court has reversed in previous cases where the claimant was excluded from jointly owned property and not compensated for the "rental value" of the right to equitable enjoyment of the property, see, e.g., Massey, 2009 VT 70, ¶ 24 (discussing recovery for ouster of cotenant in partition action), the reverse proposition—that restitution should be reduced by a debit for the time the claimant did actually use and enjoy the property he or she helped to pay for—does not necessarily follow as a matter of law in this case premised on unjust enrichment and not partition. This is particularly so given plaintiff's substantial contributions not only to the purchase, but also renovation and improvement of the property, thus factually distinguishing this situation from that presented in Massey. Id. ¶¶ 3, 9. On appeal, defendant does not present a compelling argument for inclusion of this item, and thus it was not error in this case to omit plaintiff's own use of the property as a factor reducing his equitable recovery.

¶ 51. As for the last (or third) type of expense, those ongoing costs are the ordinary incidents and obligations of home ownership (i.e., "operating" or "carrying costs") which

[13] Defendant also argues that the maximum fair market value of the property, $890,000, should be further reduced by another $12,000 for repairs that plaintiff "agreed" at trial were needed "before the house could be listed" for sale, and by a "typical 6%" broker's commission (which, at a sale price of $890,000, would be $53,400). Whether these expenses would actually be incurred is speculative on this record, even if plaintiff agreed the amounts were reasonable. If plaintiff is simply awarded a final money judgment with no other strings attached, see infra, ¶¶ 65-66, a sale of the property is only one possible means of satisfying the judgment. It is not error to omit these items from a restitution calculation that is based on the unjust increase to defendant's net worth that was apparent at the time of the final hearing in June 2018.

defendant would have incurred in any event. Defendant does not advance a compelling argument or legal theory as to why these types of expenses must be included in the calculation of appropriate restitution in every § 28 case, or at least in this one, where plaintiff substantially reduced his own net worth by more than $500,000, and advanced those funds to make possible defendant's acquisition solely in her own name of a major asset that significantly increased her net worth (even if the fair market value turned out to be substantially less than the total investment cost). However, we are also cognizant that in much of the reported case law applying § 28, and in two unpublished decisions by different panels of this Court, the cohabitating parties did in fact share the expenses of the home. See Aldermann v. Camley, No. 2017-045, 2017 WL 4418238, at *3 (October 2, 2017), https://www.vermontjudiciary.org/sites/default/files/documents/eo17-045_1.pdf [https://perma.cc/XKM5-UH7A] (noting that "the parties paid the costs of ownership and improvement of the home essentially equally, or at least jointly without separate accounting"); Darling v. Crow, No. 2014-431, 2015 WL 2383835, at *3 (May 14, 2015), http://www.vermontjudiciary.org/sites/default/files/documents/eo14-431.pdf [https://perma.cc/R5DG-A3L9] (noting plaintiff's contribution to household expenses, but affirming denial of compensation for same as such costs represented "normal expenditures characteristic of a cohabitation relationship"). See also, e.g., Thibeault, 2007 ME 154, ¶ 17 (finding unjust enrichment as to improvements, but noting that rent-free accommodation for plaintiff was accounted for by fact that she contributed to household expenses); Bonina, 78 N.E.2d at 133-34 (same); Restatement § 28 cmt. e, illus. 12-13.

¶ 52. Plaintiff's lack of contribution to such expenses in this matter stands in contrast. Indeed, such expenses are expressly acknowledged in this Court's equitable partition jurisprudence as a factor to be considered in assessing the parties' fractional shares. See, e.g., Currie, 2014 VT 106, ¶ 29; Massey, 2009 VT 70, ¶ 22 (stating explicitly that party that pays "necessary maintenance

costs associated with jointly owned property is entitled to a setoff for the other tenant's portion of those costs in a partition action," identifying maintenance costs in that record as "property taxes, necessary utilities, house cleaning, insurance, maintenance, and pest control"). Though this is not an equitable partition action, there are similarities between those cases and this, and the trial court may on remand decide that equity ought to capture (or assign) some value to plaintiff's use of the Logging Hill Road home while not contributing to the carrying costs. As a result, if justice so requires, and if there is sufficient record evidence concerning their respective use of the property and of defendant's expenses in order to make such an allocation, the trial court may consider whether to include at least some portion (if not all) of those ongoing expenses in determining the parties' equitable shares, and thus the appropriate restitutionary amount to be awarded to plaintiff.

¶ 53. The second type of expense which defendant further asserts must be accounted for in determining each party's proportionate share of the fair market value of the Stowe property—the $50,000 she purportedly spent on legal and engineering fees to address stormwater runoff from the neighbor's property—is, however, the kind of contribution to the property that should be considered in determining equitable restitution and the amount by which defendant was unjustly enriched. It is arguably an expense that was necessary to protect, if not enhance, the fair market value of the property, and thus a contribution to capital. The trial court did not make any specific findings on this or any similar items, or make any determination of defendant's total monetary outlay to acquire, renovate, and improve the property as a capital asset. Accordingly, the court did not include or consider her total expenditures in order to determine the benefit unjustly retained

by defendant.[14] This was error and requires a remand for further findings and redetermination of the restitutionary award.[15]

¶ 54. In arguing that the full amount ($553,534.88, as determined by the trial court) of his monetary contributions to the property should be the measure of restitution, plaintiff relies heavily on the Massachusetts case Bonina v. Shepard, 78 N.E.3d 128. There, the plaintiff spent more than twice as much as the defendant on improvements to the real property that was acquired solely in the defendant's name; further, as a building contractor, the plaintiff in Bonina did the majority of the remodeling work on the home, which needed to be gutted. The appellate court affirmed the trial court's judgment for unjust enrichment pursuant to Section 28, concluding that the defendant had been unjustly enriched by the plaintiff's contributions to improve the defendant's home. Id. at 132-33, 135. The court also held that the trial court did not abuse its discretion in basing its award primarily on the plaintiff's out-of-pocket costs, recognizing that normally "restitution cannot be measured by the plaintiff's losses, but only by the defendant's gains," but that in the case before it (1) the plaintiff's expenses represented the best available

[14] At trial, plaintiff's own expert acknowledged that defendant's contributions came to $782,553, compared to a total of $576,354 by plaintiff, resulting in proportionate contributions to the value of the property of 58% to 42%. Those figures do not include defendant's additional claims for carrying costs—which we hold may be considered on remand, see supra, ¶ 52—or the costs associated with remedying run-off from the neighbor's property—which we hold was error not to at least consider, see supra, ¶ 53. Moreover, the total of plaintiff's contributions given this evidence ($576,354) is different (i.e., greater) than the amount finally determined by the court ($553,534.88). The trial court stated that it did not find the expert presentations to be "particularly helpful in resolving the question of how much restitution is required in this case," but that observation may well have been influenced by its overall approach that "whatever the real estate is worth today . . . is irrelevant," an error of law we hold today is fundamental and necessitates a remand for reconsideration. There are other omissions which should also be clarified on remand. See, e.g., supra, ¶ 10 and note 3.

[15] Based on plaintiff's own expert evidence at trial, see supra, note 14, defendant argues that his maximum recovery should not exceed, as an outer limit, 42% of the fair market value of the property ($890,000), or $373,800. However, we are constrained not to engage in appellate factfinding, and so it is for the trial court on remand to address all of these issues in the first instance, in light of this opinion.

measure of the benefit conferred as those costs represented only construction materials and fixtures for the defendant's home, and (2) "neither the plaintiff nor the defendant presented evidence regarding other possible measures of unjust enrichment, such as the increased value of the home resulting from the materials and the services." Id. at 133-34 (alteration and quotation omitted).

¶ 55. This case is distinguishable from Bonina in that, first, plaintiff here does not seek recovery for the actual cost of materials supplied for the improvement of defendant's property; he seeks repayment of money contributed to an account from which funds were then disbursed for the purchase and improvement of the property. Indeed, part of the appellate court's rationale for upholding the award in Bonina was that by measuring the plaintiff's recovery in terms of his out-of-pocket costs, the trial court likely undervalued the benefit received by the defendant, which included the plaintiff's free labor in renovating the defendant's property, id. at 135, meaning the trial court's award was consistent with § 49's requirement that restitution be the lesser of the plaintiff's contribution or the defendant's benefit. See Restatement § 49(2); see also Thibeault, 2007 ME 154, ¶ 19 (noting trial court's determination that plaintiff was "entitled to the money she put into the home, but not to any increase in value due to market changes").

¶ 56. Second, the court in Bonina found that where the plaintiff's contribution consisted of construction materials and fixtures for the defendant's home, she did receive (and would unjustly retain) a dollar-for-dollar benefit from the plaintiff's contributions. 78 N.E.3d at 134. Here, the evidence clearly shows that defendant did not ultimately benefit on a dollar-for-dollar basis from plaintiff's financial contributions.

¶ 57. In sum, the court's conclusion here as to the amount of restitution owed is clearly erroneous, as well as an abuse of its equitable discretion, and must be reversed. As stated, the trial court committed an error of law in considering (even though it did not actually include) non-property-related expenses in analyzing plaintiff's recovery in restitution pursuant to § 28.

Additionally, the court erred by failing to base its award on the net benefit unjustly conferred upon defendant, which necessarily must be tied in this case to the fair market value of the Stowe property. On remand, the court must still grapple with the appropriate measure of restitution in money damages for a § 28 unjust-enrichment claim, as that is a fact-bound exercise which must be performed by the trial court in the first instance.

¶ 58. To reiterate, given the specialized nature of recovery under § 28, the trial court must measure the net benefit to defendant and the amount of the unjust increase to her net worth that was made possible by the funds contributed by plaintiff. See Restatement § 28 cmt. b ("Cases involving former cohabitants repeatedly allow restitution to claimants who—had they been dealing with someone else—might have been found either to have acted gratuitously or to have assumed the risk that the expenditures in question would ultimately be of primary benefit to someone other than themselves."). The illustrations to § 28 provide guidance in determining the appropriate measure of restitution in this context; illustrations 1, 10, and 12 seem to offer the most relevant comparisons to the facts presented in this case. Id. § 28 cmt. c, illus. 1, cmt. d, illus. 10, cmt. 3, illus. 12. In those illustrations, the claimant is allowed to recover, but recovery is limited to the claimant's proportional interest in the property based on the fractional share of the claimant's contributions to the purchase price and capital enhancements and improvements. Id.

¶ 59. Here, plaintiff and defendant both put on substantial evidence as to their respective contributions to the purchase and renovation of the property. The trial court, however, did not make detailed findings on these issues. Further, while the court made some limited findings as to the appropriate set-offs to consider in making such an assessment, it did not make any specific findings as to defendant's additional expenditures beyond the initial purchase price. The court will, therefore, need to make additional findings on the details of the renovation-related deposits, credits, and expenditures shown on the House Renovation Account spreadsheet, and as to any

appropriate set-offs in valuing each party's fractional share in order to arrive ultimately at the net benefit unjustly conferred on the defendant. As already noted, the trial court may find helpful this Court's precedent concerning consideration of equitable factors in valuing fractional shares in equitable partition. See, e.g., Currie, 2014 VT 106, ¶ 29.

¶ 60. Thus, the case must be remanded for the trial court to make necessary findings and to again exercise its discretion in correctly measuring the amount of plaintiff's recovery. See Whippie v. O'Connor, 2010 VT 32, ¶ 30, 187 Vt. 523, 996 A.2d 1154 ("[A]llocating costs is a matter left to the discretion of the court . . . ."). As the trial court heard testimony and considered detailed submissions from experts produced by both parties on the matter of total expenditures for the Logging Hill Road property, see supra, note 14, and has the renovation account spreadsheet already before it, there may be no need for the court to take additional evidence on remand. But the starting point for the trial court in any of its further calculations must be its finding on the present record of the highest fair market value of the Stowe property at $890,000, and a maximum recovery by plaintiff of his proportionate share of the asset it would be unjust for defendant to retain without compensation to plaintiff. Cf. supra, notes 14-15.

IV. Final Remedy

¶ 61. Lastly, defendant contends that the court erred as a matter of law and also abused its equitable discretion in considering the respective financial situation of the parties in fashioning the details of its restitution award and imposing a structured payout as its final remedy. Defendant further argues that the trial court made clearly erroneous findings as to defendant's expected retirement benefits, her ability to continue at her present employment for "half a dozen" years, and her consequent ability to take on a "substantial mortgage" to pay off the award. Plaintiff concedes that these latter findings are not supported by any record evidence, and that the court took it upon

itself to go outside the record in an effort, however well-intended, to craft what it believed was a fair award.

¶ 62. The trial court itself acknowledged the tenuous nature of its findings in this regard. As to defendant's pension and retirement benefits, after apparently consulting on its own initiative relevant parts of V.S.A. Titles 3 and 32 governing the Judiciary, the court stated that "presumably [she] has the same retirement benefits" as a Superior Court judge. (Emphasis added.) As to whether defendant (now age seventy) had the physical ability to remain employed and thus take out a "substantial mortgage", the court crafted its remedy based in part on its own speculation: "should her [medical] condition remain stable, she has perhaps upwards of half a dozen years left at her present job." (Emphases added.)

¶ 63. Those findings are clearly erroneous. No evidence was submitted into the record supporting the court's conclusions as to defendant's retirement benefits. To the extent the court took judicial notice of defendant's current salary, which is publicly available, this does not support its further inference as to her likely retirement benefits or whether her pension is indeed fully vested.[16] The court also heard no evidence supporting its inference about the likelihood of defendant's medical condition remaining stable for the next six (now five) years, or whether she even anticipated remaining employed until age seventy-five. These findings, which were necessary to support the final structured payout award, cannot be upheld.

¶ 64. We also hold that these findings were not harmless error. See V.R.C.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). The trial court directly relied on these findings in structuring its final award, specifically in crafting relief in the form of an up-front lump-

[16] See V.R.E. 201. At the very least, the parties were then entitled to a further opportunity to be heard, and possibly even present additional evidence. See V.R.E. 201(e).

sum payment of $80,000; a note and second mortgage to plaintiff for the remaining balance to be paid over five years, but amortized as if it were for thirty years at 5%, resulting in a monthly payment to plaintiff of $2568; and finally, payment in full of the unpaid balance of the restitution award (calculated by the court to be approximately $412,000 even after five years) upon any sale or by December 31 of the year when defendant turns seventy-five.[17] The substantial rights of the parties were clearly affected by these erroneous findings. On remand, the court shall not consider any such facts in recrafting its award and final remedy, unless requested to do so by either party and, after notice, evidence is presented in support of any such contentions.

¶ 65. Although we hold that both the amount and the structured payout nature of this particular award of restitution cannot stand and must be reconsidered on remand, we do not necessarily prohibit the trial court, in exercising its equitable powers and discretion, from crafting a restructured award in an appropriate amount and with some extended payment features, so long as it is consistent with this opinion and supported by record evidence. However, we also emphasize that justice will best be served by a restitution award and resulting final judgment that resolves all issues between the parties as expeditiously as possible, and in that respect entry of a simple money judgment for a sum certain—the result requested by defendant at oral argument—may well be both simpler and more efficient.

¶ 66. With a money judgment for a sum certain, defendant will have options of her own choosing as to how to pay it off, whether by refinancing, by sale, or some other means. Conversely, plaintiff will have significant leverage to get paid in full perhaps sooner than the court below

[17] Indeed, it appears that the court itself created the amortization schedule attached to and incorporated into its final award, using the "mortgage calculator" found at Zillow.com, again without prior notice to the parties or offering them a further opportunity to be heard. Finally, because (as previously noted) there was no actual, separate final judgment, and then no amended judgment after the court granted plaintiff's motion to amend and the amount of the award increased substantially, the appended amortization schedule is no longer accurate.

provided, by highlighting the availability of, and if necessary pursuing foreclosure on, the judgment, even as interest accrues at the statutory legal rate (rather than the 5% somewhat arbitrarily selected by the trial court). See V.R.C.P. 80.1(*l*). It is for the court to decide in the first instance how best to achieve fairness, equity, and justice.

Affirmed as to the finding of unjust enrichment. The restitution award to plaintiff Ian McLaren is reversed as to the amount and structure thereof, and this matter is remanded to the court below for further proceedings, and entry of a revised award and separate final judgment, all in accordance with this opinion.

BY THE COURT:

_____
Dennis R. Pearson, Superior Judge (Ret.),
Acting Chief Justice, Specially Assigned

_____
John P. Wesley, Superior Judge (Ret.),
Specially Assigned

_____
M. Kathleen Manley, Superior Judge (Ret.),
Specially Assigned

_____
Theresa S. DiMauro, Superior Judge (Ret.),
Specially Assigned

_____
David A. Howard, Superior Judge (Ret.),
Specially Assigned