**COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION**

**2018/CLE/gen/01397**

**BETWEEN**

**ANTOINETTE D. CHISHOLM**

**Plaintiff**

**AND**

**DANNY GIBSON**

**Defendant**

**Before:** The Honourable Madam Justice Tara Cooper Burnside (Ag)

**Appearances:** Charles Mackay for the Plaintiff

Anthony Thompson for the Defendant

**Hearing Date:** 25 January 2021

## RULING

**[1]** There are two applications before this Court: (i) an application by the Plaintiff pursuant to RSC Order 75 for judgment against the Defendant and (ii) an application by the Defendant for leave to file a defence and counterclaim out of time.

**Background**

**[2]** The following is a summary of the procedural background.

**[3]** On 28 November 2018, the Plaintiff commenced these proceedings by a Writ of Summons specially indorsed as follows:

> "1. The Plaintiff is a citizen of The Bahamas and resides in the Island of New Providence one of the Islands of the Commonwealth of The

Bahamas and the Defendant is also a citizen of The Bahamas and resides in the Island of New Providence aforesaid.

2. On or about 30th October, 2012 Westfall Investments Limited conveyed to the Plaintiff and the Defendant as joint tenants all that Condominium unit No. 4 in the Development known as "Providence" situated in the Western District of the Island of New Providence aforesaid (hereinafter referred to as the "said Unit"). This conveyance is recorded in the Registry of Records in the City of Nassau in the island of New Providence aforesaid in Book 11815 at pages 594 to 609.

3. In order to complete the sale of the said Unit the Plaintiff and the Defendant on 31st October, 2012 executed a mortgage over the said Unit in favour of Scotiabank Bahamas Limited and thereunder obtained an advance of $151,200.00. This mortgage is recorded in the Registry of Records in the City of Nassau in the island of New Providence aforesaid in Book 11815 at pages 610 to 625.

4. On or about May 2017 unhappy differences arose between the Plaintiff and the Defendant with respect to their relationship and the Defendant removed himself from the said Unit in November 2016 and stopped paying towards the said mortgage in December 2016 thereby leaving the Plaintiff in sole occupation of the same with the attendant expenses and the liability of paying the mortgage and the condominium fees which together total prior to May 2018 $1,200 and thereafter $1,350.00.

5. By a written agreement (the "said Agreement") dated May, 2017, the Defendant agreed to sell all of his interest comprising of one-half undivided share or interest in the said Unit to the Plaintiff for the sum of $1.00 the sufficiency whereof was recognized by the Defendant and the Plaintiff agreed to purchase the said interest of the Defendant with all of the attendant expenses totaling some $14,496.45 as itemized in the in a pro-forma invoice issued by Michelle Y. Campbell & Co. A copy of the agreement and the invoice will be produced at the trial for its full terms and effect.

6. The said agreement provided for:-

   (i) the Defendant to provide the Plaintiff with a duly executed conveyance of the said Unit
   (ii) the Plaintiff would be responsible for all costs connected with the transfer of the said Unit.
   (iii) completion to take place in August 2017.

7. Concomitant with the execution of the above agreement on 22nd May 2017 the Defendant wrote a letter to the said Scotiabank Bahamas Limited which holds the mortgage over the said Unit confirming the following:-

   (i) He and the Plaintiff purchased the said Unit as joint tenants and subsequently obtained a mortgage from Scotiabank (Bahamas) Limited;

   (ii) The amount of the current balance on the mortgage;

   (iii) He wished to convey his one-half undivided Share or interest in the said Unit to the Plaintiff at no charge to her provided she takes over the mortgage with the Bank in her sole name and pay all legal fees and other costs attendant upon such transfer.

   (iv) To this end he has executed the agreement of sale referred to above.

8. Since May 2017 the Plaintiff has arranged for law firm of Michelle Campbell & Co. to prepare the conveyance to be executed by the Defendant to transfer his interest in the said Unit to the Plaintiff but he has refused to sign without any reasonable explanation and continues to neglect and refuse to take any steps towards the completion of the said agreement.

9. The Plaintiff (sic) at all material times been and is now ready and willing to fulfill all of her obligations under the said agreement and as expressed in the Defendant's letter of 22nd May 2017.

**AND THE PLAINTIFF CLAIMS:-**

(i) Specific performance of the said agreement
(ii) Costs
(iii) In the event an order for specific performance is made and the Defendant refuses to execute the conveyance of the said Unit in favour of the Plaintiff that there be an order that the said conveyance be executed by the Registrar of the Supreme Court.
(iv) Further and other relief."

**[4]** The Defendant entered an appearance to the action on 1 March 2019 and on 25 November 2019, the Plaintiff filed a Summons (the "**Plaintiff's Summons**") for judgment against the Defendant under RSC Order 75 in the following terms:

> "**LET ALL PARTIES CONCERNED** attend before a Judge of the Supreme Court…on the hearing of an application on the part of the Plaintiff for an

Order pursuant to **ORDER 75** of the Rules of the Supreme Court for the following relief:

1. An Order pursuant to Order 75 of the Rules of the Supreme Court for specific performance of the agreement dated 22nd day of May, 2017 referred to in the writ in this action in terms of the minutes hereunto annexed.

2. In the event an order for specific performance is made and the Defendant refuses to execute the Conveyance of the condominium Unit No. 4 in the Development known as "Providence" in favour of the Plaintiff that there be an order that the said conveyance be executed by the Registrar of the Supreme Court

**AND TH**AT the Defendant be ordered to pay the cost of the Plaintiff to be taxed if not agreed."

**[5]** On 6 October 2019, the Defendant filed a Defence and Counterclaim which states:

"**DEFENCE**

1. Paragraph 1 of the Statement of Claim is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is neither admitted nor denied.

5. The written agreement referred to in Paragraph 5 is admitted but the terms and effect of same denied.

6. The stated provisions in Paragraph 6 are admitted.

7. The contents of Paragraph 7 are neither admitted nor denied.

8. Paragraph 8 is neither admitted nor denied.

9. The Defendant cannot comment on Paragraph 9.

10. Save as is hereinbefore expressly admitted, or not admitted, the Defendant denies each and every allegation contained in the Plaintiff's Statement of Claim as if the same were herein set out and specifically traversed.

**COUNTERCLAIM**

11. The Defendant confirms paragraphs 1 through 10 above.

12. The Agreement dated May 2017 was signed by the Defendant in circumstances that left him with no real meaningful choice which will be fully explained at the trial.

13. As the parties equally contributed to the purchase and upkeep of the Unit, it was initially agreed that they would sell and divide the proceeds equally. Then the Plaintiff later changed her mind. And so it is unconscionable for the Plaintiff to exclude the Defendant without any compensation for his contributions to the Unit over the years.

14. As a result of the actions of the Plaintiff, the Defendant has suffered loss and damage.

**PARTICULARS OF LOSS AND DAMAGE**

Sums paid in improvements to and on the mortgage over the Unit

**AND THE DEFENDANT CLAIMS:**

1. A Declaration that the Agreement is unenforceable or void;
2. An Order that the Unit be sold and the net proceeds divided equally between the parties;
3. Costs;
4. Such further and other relief."

**[6]** And subsequently, the Defendant filed a Summons (the "**Defendant's Summons**") in the following terms:

> "**LET ALL PARTIES CONCERNED** attend before a Judge of the Supreme Court…on the hearing of an application on the part of the Plaintiff (sic) for an Order pursuant to **ORDER 75** of the Rules of the Supreme Court for the following relief:
>
> 1. That leave be granted to file a Defence and Counterclaim out of time and
>
> 2. That the cost so this application be costs in the cause."

**[7]** The Plaintiff's Summons and the Defendant's Summons were heard together.

**Order 75 procedure**

**[8]** The relevant provisions of Order 75 state:

> "**1.** (1) In any action begun by writ indorsed with a claim —
>
> (a) for a specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or
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> (b) for recission of such an agreement; or
>
> (c) for the forfeiture or return of any deposit made under such an agreement,
>
> the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.
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> …
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> **3.** Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason be a trial of the action, the Court may give judgment for the plaintiff in the action.
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> **4.** (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.
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> (2) The Court may give a defendant against whom such an application is made leave to defend the action either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

**[9]** The principal objective of the procedure under Order 75 is to avoid delay in cases where there is no defence and no other reason for the plaintiff to await a trial. When the procedure is invoked, unless the application is dismissed outright, presumably for technical reasons, the Court may grant judgment unless it is satisfied by the defendant that there is an issue or question in dispute which ought to be tried or some other reason why a trial should take place.

**[10]** The terms of Order 75, rule 3 are substantially the same as those under Order 14, rule 3(1); moreover, Order 75, rule 4 and Order 14, rules 4(1) and (3) are identical. Consequently, the general principles which apply to an application under Order 14 for judgment or leave to defend equally apply to an application for such relief under Order 75.

**General principles**

**[11]** The general principles which apply to an application for summary judgment are well known and established.

**[12]** Those principles were summarised in ***Barclays Bank PLC v Clarke*** 1998 BHS J. No. 111 by Dunkley J (Ag) (at paragraph 8) as follows:

> "The purpose of RSC Order 14 is to enable a Plaintiff to obtain summary judgment without a trial, if he can prove his case clearly, and if the defendants are unable to set up a bona fide defence or raise an issue or question which ought to be tried, or there exists some other reason for the matter to proceed to trial. Accordingly, apart from technical objections, the defendants ought to be granted leave to defend if they can demonstrate that they can set up a bona fide defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to facts which ought to be tried or any other circumstances showing reasonable grounds of a bona fide defence.
>
> But the defendants must condescend upon particulars in their evidence and should deal specifically with the plaintiffs claim and affidavits and state clearly and concisely what facts are relied upon in support of their defence. A general denial will not suffice. Sufficient facts and particulars must be given in the affidavit evidence of the defendants to show that there is a triable issue."

**[13]** Recently, in ***Higgs Construction Company v Patrick Devon Roberts and another*** [2020] 1 BHS J. No. 9, Charles J explained (at paragraphs 26 – 27):

> "The test to be applied by the Court is whether there is any "triable issue or question" or whether "for some other reason there ought to be a trial". If a plaintiff's application is properly constituted and there is no triable issue or question, nor any other reason why there ought to be a trial, the Court may give summary judgment for the plaintiff. The Court ought to be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others."

**[14]** Where a defendant seeks leave to defend an action, the evidence presented on his behalf must demonstrate grounds upon which it may be reasonably said that he has a real or bona fide defence. As Ackner LJ in ***Banque de Paris et des Pays-Bas (Suisse) S.A. v Costa de Naray*** [1984] 1 Lloyd's Rep. 21 put it (at page 23):

> "The mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."

**[15]** This test was considered in ***National Westminster Bank plc v Daniel*** [1993] 1 WLR 1453. In delivering the judgment of the English Court of Appeal Glidewell LJ stated (at page 1457):

> "I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, "Is there a fair or reasonable probability of the defendants having a real or bona fide defence?" The test posed by Lloyd L.J. in the *Standard Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 "Is what the defendant says credible?," amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence."

**[16]** Applying the above principles to the present case where no technical objections have been raised, the first question to be considered is whether the Plaintiff has clearly proved her case.

**Has the Plaintiff proved her case clearly?**

**[17]** The Plaintiff's Application is supported by an affidavit sworn by the Plaintiff on 25 November 2019 (the "**Plaintiff's Affidavit**") which restates and verifies the facts pleaded in the Statement of Claim and exhibits several documents.

**[18]** Those documents comprise a copy of the conveyance by which the Plaintiff and Defendant purchased the Condominium for the price of $186,000.00 and also a copy of the mortgage (the "**Mortgage**") dated 31 October 2012 between the parties and Scotiabank (Bahamas) Ltd. (the "**Bank**") and a copy of the written agreement (the "**Agreement**") entered into between the parties. Importantly, the Agreement is executed by both the Plaintiff and Defendant and contains the terms pleaded by the Plaintiff in her Writ.

**[19]** At paragraph 6 , the Plaintiff's Affidavit states:

"6. Concomitant with the execution of the above the above agreement on 22nd May 2017 the Defendant wrote a letter to the said Scotiabank (Bahamas) Limited which holds the mortgage over the said Unit confirming the following:-

(i) He and I purchased the said Unit as joint tenants and subsequently obtained a mortgage from Scotiabank ( Bahamas) Limited;

(ii) The amount of the current balance on the mortgage;

(iii) He wished to convey his one-half undivided Share or interest in the said Unit to me at no charge provided I take over the mortgage with the Bank in my sole name and pay all legal fees and other costs attendant upon such transfer.

(iv) To this end he has executed the agreement of sale referred to above."

**[20]** A copy of the Defendant's letter to the Bank, which is duly executed, is exhibited to the Plaintiff's Affidavit. It states:

"**DANNY GIBSON**
**Nassau, Bahamas**

Ms Barnett
Loan Officer
Scotiabank (Bahamas) Ltd.
Nassau, Bahamas

Dear Mrs. Barnett:

**RE: Antoinette Denise Chisholm and Danny Gibson**
**Condominium Unit No. 4 in the Providence Development**

I write this letter to confirm the following:

1. Antoinette Chisholm and I purchased the captioned property as Joint Tenants on the 30th day of October A.D., 2012 at the purchase price of $168,000.00. The Conveyance is recorded at Vol. 11815 at pages 594 to 609 and we subsequently obtained a Mortgage with Scotiabank (Bahamas_ Ltd. over the said property in the amount of $152,000.00. The Mortgage is recorded at Vol. 11815 at pages 610 to 625.

2. Ms Chisholm and I currently have a balance on our Mortgage with Scotiabank (Bahamas) Ltd. of approximately $144,000.00.

3. I wish to convey my one-half undivided Share or interest in the said Condominium Unit 4, Providence Development to Ms. Chisholm at no charge to her provided

that she takes over the Mortgage of this property with Scotiabank (Bahamas) Limited in her sole name and pays in full for all legal fees, bank charges, stamp duty and vat charges, etc. involved in the transfer of the said Unit to her. Ms Chisholm will also need to be responsible for any fees or costs associated with the transfer of the captioned property from this date forward.

4. I have also executed the attached Agreement for Sale of my one-half undivided share or interest in Condominium Unit No. 4, Providence Development from myself to Ms. Chisolm for the consideration of $1.00.

Signature"

**[21]** Then the Plaintiff's Affidavit continues:

"7. After the receipt of the said Agreement and letter, I approach (sic) the Bank and obtained approval for the loan to herself (sic) in terms of the letter written to Scotiabank (Bahamas) Limited by the Defendant and it then on 14th November, 2017 instructed Michelle Y Campbell & Co. to carry out the legal work in connection with my becoming the sole owner of the said Unit and at the same time prepare a mortgage whereby I will be the sole borrower. A copy of this letter is now produced and shown to me marked as **Exhibit 5**.

I have arranged for law firm of Michelle Campbell & Co. to prepare the conveyance to be executed by the Defendant to transfer his interest in the said Unit to me but he has refused to sign without any reasonable explanation and continues to refuse to take any steps towards the completion of the said Agreement. A copy of the conveyance is now produced and shown to me marked as **Exhibit 6**.

8. I have at all material times been and is now ready and willing to fulfil all of my obligations under the said Agreement and as expressed in the Defendant's letter of 22nd May 2017.

9. The Defendant has filed appearance in this action but no defence has been filed.

10. My attorneys have carefully considered all the facts relevant to this action and I am advised by them and verily believe there is no defence thereto."

**[22]** The Plaintiff's Affidavit produces, as Exhibit 5, a letter of instruction dated 14 November 2017 issued by the Bank to Michelle Y. Campbell & Co. According to that letter, a First Demand Legal Mortgage by the Plaintiff to the Bank in respect of the Condominium was approved and Michelle Y. Campbell & Co. was instructed to prepare the security documents.

**[23]** The evidence of the Plaintiff is compelling. In my view, it proves the Agreement and that the Plaintiff acted on its terms and took steps to obtain approval for a mortgage over the Condominium in her sole name. Accordingly, pursuant to Order 75, rule 4, the burden is on the Defendant to satisfy the Court that there is an issue or question in dispute which ought to be tried or some other reason for a trial to take place.

**Has the Defendant raised an issue or question in dispute which ought to be tried or some other reason why a trial should take place?**

**[24]** In the Defence and Counterclaim the Defendant admits that he entered into the Agreement in the terms pleaded by the Plaintiff in her Writ. However, the Defendant appears to contend the Agreement is unconscionable and he executed it under duress.

**[25]** The Defendant's Application is supported by an affidavit of Gemma Butler (the "**Defendant's Affidavit**") sworn on 18 November 2020. Ms Butler is an individual employed at the Chambers of the Defendant's Counsel.

**[26]** In the first 15 paragraphs, the Defendant's Affidavit seeks to explain why the Defence and Counterclaim was filed out of time. A plethora of reasons is provided. Those reasons include (i) the need to obtain a copy of the Agreement from the Plaintiff's Counsel in order to take instructions and draft a defence, (ii) the disruption of the Defendant's Counsel's office operations due to Hurricane Dorian and subsequently, issues related to the Defendant's Counsel office premises, (iii) the Defendant's attendance to his wife's illness in North Carolina over a period of some four months and (iv) the COVID pandemic.

**[27]** In the final paragraph, i.e. paragraph 16, the Defendant's Affidavit seeks to identify an issue or question in dispute which ought to be tried. Paragraph 16 states:

> "That nevertheless the core issue is whether or not in the circumstances the Agreement for Sale of the Defendant's half share is unconscionable or reasonable for lack of consent or consideration, and this needs to be determined."

**Counsel's submissions and analysis**

**[28]** On behalf of the Defendant, Mr Thompson made several submissions on why the Defendant should be permitted to defend the Plaintiff's claim. His arguments fall under three heads.

**[29]** First, Mr Thompson contended that, pursuant to RSC Order 2, the late filing of the Defence and Counterclaim did not nullify the proceedings but constituted a mere irregularity which could be corrected if leave to defend the action is granted by the Court.

**[30]** Second, he contended that the Plaintiff should not be granted judgment for the following reasons: (i) where an unmarried couple jointly owns property there is a common intention that they should have equal shares in that property, (ii) the Agreement is unenforceable because it is unconscionable and (iii) it is not supported by consideration.

**[31]** Third, Mr Thompson argued that specific performance is not an appropriate remedy for the Plaintiff and referred the Court to the following passages in Snell's Equity, 28th Edition:

> "(b) Damages. Jurisdiction in specific performance is based on the inadequacy of the remedy at law, and so it follows as a general principle that equity will not interfere where damages at law will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed (at page 569).
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> …
>
> 4. **Specific performance a discretionary remedy**. Although the court will not order specific performance where damages would fully compensate the plaintiff, the converse of this proposition is not true. There are many cases in which the court will not grant specific performance even if the remedy in damages is insufficient; for specific performance is a discretionary remedy (at page 72).
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> …
>
> "2. **Agreements without consideration**. Equity will not specifically enforce an agreement which is merely voluntary, even it if is contained in a deed (at page 575).
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> …
>
> 8. Trickiness.
>
> (a) *Refusal of specific performance*. Specific performance will be refused where the contract is tainted with fraud, even if it is not a fraud on the other party to the contract, but on the public, or where the plaintiff has made some positive misrepresentation, or has been guilty of fraudulent suppression, or if the particulars or conditions of sale are misleading; indeed, in such cases the contract will be rescinded, and cannot be enforced even at law (at page 594)
>
> …
>
> "9. **Great hardship**. As the remedy of specific performance is equitable and discretionary, the court will not grant it where it would inflict great hardship on the defendant (at page 595)."

**[32]** He submitted that:

> "In light of the above statements of the law pertaining to how the Courts view applications for specific performance…damages would be

> a sufficient remedy for the Plaintiff. Also the court should not make a determination on the Plaintiff's application until the evidence is presented. The Court needs to know what were the circumstances which caused the Defendant to sign the Agreement For Sale then refuse to sign the Conveyance. Only then will justice be done."

**[33]** On behalf of the Plaintiff Mr Mackay argued, a mere assertion that the Agreement is unenforceable is insufficient to demonstrate that the Defendant should be permitted to defend the action. He also contended that the Defendant's letter to the Bank demonstrated that the Defendant executed the Agreement with full understanding of the transaction, and on the basis that the Plaintiff would be responsible for discharging the Mortgage and all expenses related to the Condominium and the transfer of the Defendant's interest in the Condominium to her.

**[34]** Mr Mackay also pointed out that based on the evidence, the Plaintiff proceeded to act on the terms of the Agreement and it was not until the conveyance was delivered some months later that the Defendant reneged and refused to sign the conveyance. And this was despite the fact that the Plaintiff was discharging the liability under the Mortgage and paying all of the expenses related to the Condominium.

**[35]** I have considered the submissions of both Counsel.

**[36]** I agree with Mr Thompson that the late filing of the Defence and Counterclaim does not nullify the proceedings. In my view, however, that is irrelevant. The essential question to be determined for the present purposes is whether the defence proffered by the Defendant raises an issue or question in dispute which ought to be tried.

**[37]** Having reviewed the Defendant's Defence and Counterclaim and the Defendant's Affidavit, I note that the Defendant does not dispute that he has entered into the Agreement. He says, however, that for reasons "which will be fully explained at trial" he signed the Agreement in circumstances that left him with no real meaningful choice and further, that the core issue is whether or not the Agreement is unconscionable or unreasonable for lack of consent or consideration.

**[38]** In my view, what the Defendant has presented is insufficient to successfully defend an application for judgment under Order 75. The Defendant was required to condescend upon particulars to satisfy this Court that there are reasonable grounds for saying what he says. It is only after this is done that the Court may make an assessment of the bona fides and credibility of his defence. It is palpably wrong for the Defendant to consider that a bald assertion that the Agreement is "unconscionable or unreasonable for lack of consent" is sufficient to meet the threshold required under Order 75.

**[39]** In his skeleton arguments delivered to the Court, Mr Thompson, in effect, admitted that there is no material before the Court to support such assertion. His arguments stated:

> "It would appear that the Plaintiff after agreeing to divide the proceeds of sale had a change of heart. For reasons **not in evidence before the Court** [the] Defendant was prevailed upon to sign the agreement. He may have done this as a result of the undue influence and unconscionable conduct of the Plaintiff.
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> …
>
> The case also raises the issue of whether or not the Defendant sought legal advice before or after he signed the agreement and was the Plaintiff aware of this advice.
>
> The Defendant most likely was influenced by the Plaintiff into signing the agreement without proper advice. **The evidence is not before the court**."
>
> (my emphasis)

**[40]** In ***Wallingford v Mutual Society*** (1880) 5 AC 685, the House of Lords considered an appeal from an order granting summary judgment. The facts in ***Wallingford*** involved a claim by the Mutual Society against one of its members for a considerable sum of money alleged to be the accumulation of loans, interest, and subscriptions. After the defendant entered an appearance to the writ, the Mutual Society applied for summary judgment under Order 14. In an effort to resist the application the defendant alleged generally that he had by fraud and misrepresentation been induced to enter the Society; however, he did not give particular instances of the alleged fraud. He later withdrew this charge and alleged disputed accounts and counterclaims, and insisted that he had a good defence to the action. The order granting judgment to the Mutual Society was upheld by the House of Lords and in the judgment of Lord Blackburn, that court helpfully explained the type of evidence required by a defendant who seeks to resist such an application. Lord Blackburn stated (at 704):

> "'I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing." Doubtless, if it was true … that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so … It is difficult to define it, but you must give such an extent of definite facts … as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence."

**[41]** In reviewing the Defence and Counterclaim and the Defendant's Affidavit, I am of the view that the Defendant has not discharged the burden that was cast upon him. The Defendant's Affidavit states the Agreement is unconscionable or unreasonable for lack of consent, but nowhere does it condescend upon *any* particulars to demonstrate the Defendant should be permitted to defend the Plaintiff's claim on that basis. The evidence presented by the Defendant amounts to nothing but general and vague allegations. Not

one single material fact has been condescended upon in a manner which would enable any Court to understand why the Defendant says what he says. The bald assertions and general and vague allegations seem to be a desperate attempt to set up a defence when there appears to be none.

**[42]** Additionally, I am not satisfied that whether or not the Agreement is supported by consideration is a question in dispute which ought to be tried. First, it is obvious on its face that the Agreement is for the consideration of $1.00 and is executed under seal. Second, the evidence demonstrates that the Agreement is supported by *valuable* consideration as the Plaintiff has taken full responsibility for paying the Mortgage and all expenses related to the Condominium since the year 2017. That is this stated in paragraph 4 of the Plaintiff's Affidavit and it is corroborated by the Defendant's Affidavit, which exhibits a list setting out all of the Defendant's costs and contributions towards the Condominium. According to that list, the Defendant made payments under the Mortgage, which was granted by the parties to Scotiabank in October 2012, for a period of only four years in the aggregate sum of $28,800.00.

**[43]** I also do not agree with the Mr Thompson's assertion that specific performance is not an appropriate relief for the Plaintiff. In ***Mountford v Scott*** [1975] 2 WLR 114 it was established by the English Court of Appeal that in a court will not be concerned with the *adequacy* of consideration when considering whether to grant an order for specific performance and will, if appropriate, enforce a contract which has been entered into for a nominal or "token consideration".

**[44]** The facts in ***Mountford*** involved an option agreement for the purchase of the defendant's property where the consideration for the option was £1. The defendant argued that the option agreement was unenforceable for lack of consideration and the plaintiff's remedy should be limited to an award of damages in any event. In considering these arguments on appeal, Russell LJ stated (at pages 115 - 116):

> "The third ground of attack on the validity of the option agreement was that the consideration for the grant of the option, stated and paid, namely £1, was a sum which the law would not regard as valuable consideration: therefore there was no consideration in the eye of the law to support the obligation on the defendant not to withdraw his offer for six months. **This I found a startling proposition.** The industry of Mr. Narayan has not been able to find any support for it in English authority; and his reliance on a Canadian case, *Gilchrist Vending Ltd. v. Sedley Hotel Ltd.* (1967) 66 D.L.R. (2d) 24, was based on a misreading, in my view, of the decision in that case, which appears to me to suggest only that possible future obligations which could be avoided by payment of £1 were illusory as consideration.
>
> The final contention for the defendant was that that contract should not be specifically enforced, but that the purchaser should have only been awarded damages. I see no justification for that contention. If the owner

> of a house contracts with his eyes open, as the judge held that the defendant did, it cannot, in my view, be right to deny specific performance to the purchaser because the vendor then finds it difficult to find a house to buy that suits him and his family on the basis of the amount of money in the proceeds of sale.
>
> …
>
> I wish to add a comment on the judge's approach to that last point. As I have said, a valid option to purchase constitutes an offer to sell irrevocable during the period stated, and a purported withdrawal of the offer is ineffective. When therefore the offer is accepted by the exercise of the option, a contract for sale and purchase is thereupon constituted, just as if there were then constituted a perfectly ordinary contract for sale and purchase without a prior option agreement. The court is asked to order specific performance of that contract of sale and purchase, not to order specific performance of a contract not to withdraw the offer: provided that the option be valid and for valuable consideration and duly exercised, it appears to me to be irrelevant to the question of remedy under the contract for sale and purchase that the valuable consideration can be described as a token payment: and so also if the option agreement be under seal with no payment, which is what I take the judge to be referring to when he refers to a gratuitous option in his judgment."

**[45]** Following the approach of the English Court of Appeal in Mountford, I find that the Agreement constitutes a binding contract that may be specifically enforced. Not only is it for the stated consideration of $1.00, which may be regarded as a "token consideration", but it is executed under seal. Moreover, the evidence demonstrates that the Plaintiff has taken on the Mortgage and the expenses related to the Condominium since 2017 even though those are liabilities of both parties.

**[46]** I agree with Mr Thompson that the remedy of specific performance is a discretionary one. However, it is granted in accordance with well-established principles, one of which is that a contract for the grant of an interest in land will normally be specifically enforced. And in the present case, there is no material before this Court to demonstrate that the general rule should not apply.

**[47]** Having considered the evidence and the arguments, I am of the view that the Defendant has not demonstrated an issue or question which ought to be tried within the contemplation of Order 75, rule 3 or any other reason why a trial should take place. On balance, I find that the Plaintiff has clearly proved her case and to grant leave to defend to the Defendant would only serve to unnecessarily delay the proceedings in the circumstances. Pursuant to the Agreement, the Defendant should convey his interest in the Condominium to the Plaintiff and the Plaintiff should pay all fees associated with such transfer and take over the Mortgage in her sole name.

**[48]** The Defendant's application for leave to defend this action and file his Defence out of time is therefore dismissed. And the Plaintiff is granted judgment against the Defendant for specific performance of the Agreement, with liberty to apply.

**[49]** The Defendant shall pay to the Plaintiff the costs of this action, taxed if not agreed.

**DATED** this 14th day of May, 2021

**TARA COOPER BURNSIDE**
**JUSTICE (AG)**