COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2015/CLE/gen/01782

B E T W E E N

SHANIQUE MOSS

Claimant

AND

FISK BURROWS

AND

GWEN BURROWS

Defendants

Before: **The Honourable Madam Senior Justice Deborah E. Fraser**

Appearances: **Travette Pyfrom of Pyfrom, Farrington & Co for the Claimant**

Akiera Martin , Sharon Wilson & Co for the Defendants

Hearing Date: 10th June 2024

Civil Law – Contract– Breach of Contract – The Construction of an Agreement - Whether the 10th June 2024 Agreement is uncertain in its terms –- The Equitable Remedy of Specific Performance – Waiver by Forbearance – Waiver by Election- Special Damages

JUDGMENT

FRASER, SNR. J:

[1.] This is a trial of an action brought on behalf of the Claimant, Shanique Moss ("**Ms. Moss**") alleging breach of contract against the Defendants, Fisk Burrows ("**Mr. Burrows**") and Gwen Burrows ("**Mrs. Burrows**").

BACKGROUND

[2.] Ms. Moss is a citizen of The Commonwealth of The Bahamas.

[3.] Mr. Burrows is the principal of Quick Builders Construction Ltd.

[4.] Mrs. Burrows is a citizen of The Commonwealth of The Bahamas.

[5.] The Claimant, as a tenant, and the Defendants , as landlords, executed two successive lease agreements on 1st May 2014 and 10th October 2014 ("**The Agreement**") over the demised property referred to as Unit No.4 ("**The Unit**") located at #11 Millers Close in the Venice Bay Subdivision on the Island of New Providence.

[6.] On 9th November 2015, the Claimant filed a Writ of Summons seeking the following relief: (i) Specific Performance of the sale of The Unit; (ii) and damages for breach of contract.

[7.] In the alternative, the Claimant seeks the following; (i) A declaration of relief from any liability arising from the further performance of her obligations under the contract; (ii) Special Damages in the amount of the deposit and lease payments paid over a year; (iii) and a declaration that the Claimant has a lien on the property.

[8.] On the following dates, pleadings & ancillary documents were filed by both parties; On the 20th November 2017, the Defendants filed a Defence & Counterclaim that was amended on 6th December 2023; The Claimant then filed a Reply & Defence to Counterclaim on 30th September 2022; The Defendants filed their Statement of Facts & Issues on 25th March 2024 and on 26th January 2024 filed the Witness Statement of Fisk Burrows; and the Claimants filed their Statement of Facts & Issues on 20th March 2024.

[9.] On 9th November 2015, the Claimant filed a Statement of Claim alleging that the Defendants expressed their desire not to execute an agreement for sale of The Unit in accordance with clause two (2) of The Agreement. The agreement for sale stipulated a future conversion of The Unit into a Condominium in adherence to the Law of Property and Conveyancing (Condominium) Act 1965.

ISSUES

[10.] The central issues are:

a) **What is the true construction of The Agreement?**

b) **Is The Agreement uncertain in its terms?**

c) **Did the parties breach The Agreement**?

EVIDENCE

The Evidence of Shanique Moss

[11.] On 26th January 2024, Ms. Moss filed her Witness Statement which stood as her evidence in chief at trial (10th June 2024).

[12.] It provides that: (i) Ms. Moss entered into an agreement with Mr. Burrows with a realtor named Ricardo Adderley acting as the broker; (ii) Ms. Moss then executed The Agreement and instructed her attorney to pay the $5,000 deposit stipulated in The Agreement to Mr. Burrows; (iii) Ms. Moss was then given the key to The Unit by Mr. Burrows and occupied said property; (iv) Ms. Moss paid her rent initially to Mr. Burrows at the end of every month; (v) After a year, Mr. Burrows offered to terminate The Agreement; (vi) Ms. Moss then left The Unit; (vii) The relationship between Ms. Moss and Mr. Burrows deteriorated thereafter with the latter's attempt to force Ms. Moss out of The Unit by issuing eviction notices, frustrating Ms. Moss's attempts to pay rent, withholding the Unit keys, disconnecting utilities to The Unit and refusing to make repairs to The Unit ; (viii) Mr. Burrows would lead Ms. Moss to believe that The Unit was in the process of being converted into a condominium; (ix) Ms. Moss allowed a Johnell Meadows to occupy The Unit but avers that the latter was not a sub-tenant; (x) Ms Moss. refused to execute an agreement for sale on 21st October 2019 because of discrepancies within it; and (xi) Ms. Moss paid a total of $103,100 excluding late fees toward the purchase price.

The Evidence of Fisk Burrows

[13.] On 26th January 2024, Mr. Burrows filed his Witness Statement which stood as his evidence in chief at trial (Held on 10th June 2024).

[14.] It provides that: (i) Mr Burrows is the one part owner of The Unit; (ii) Mr. Burrows entered into a lease agreement with the Claimant on 10th October 2015; (iii) The Agreement to sell The Unit was conditional on the conversion of The Unit into a condominium being effected; (iv) Ms. Moss left The Unit and returned the keys after a year residing in the demised premises; (v) In early November 2015, Ms. Moss conveyed her disinterest in effecting an agreement for sale with Mr. Burrows; (vi) On the advice of previous counsel, Mr. Burrows initiated steps to convert The Unit into a condominium and returned the Unit keys to Ms. Moss; (vii) Mr. Burrows prepared a draft agreement for sale , however Ms. Moss did not sign it; (viii) Mr. Burrows would have to renovate The Unit because of Ms. Moss's poor stewardship of the demised premises and was made aware that Ms. Moss was subletting The Unit; (ix) Mr. Burrows would throughout this period send eviction notices to Ms. Moss for her breaches of clause 4 in The Agreement ;(x) Mr. Burrows retained new counsel; and (xi) In December 2024, Mr. Burrows instructed his bank to flag all payments sent to his account by Ms. Moss's attorney.

Findings of Fact

[15.] I have considered the testimony of the witnesses. I shall provide my summary of their oral evidence and findings of fact based on such evidence, along with written evidence before

me. The only witnesses called were the Claimant and the Defendants'. The witnesses had differing accounts of what transpired between them in relation to The Unit.

Ms. Shanique Moss

[16.] The Claimant began her testimony by amending her Witness Statement as it concerned the number of children that was present with her when she moved into The Unit in 2015. The number of children being two as opposed to one.

[17.] Then, the Claimant expressed that she understood the nature of The Agreement to be of a lease with an option to purchase imbedded once The Unit was converted into a condominium. She then said that she paid the deposit in full to the Defendants. However, she can only provide circumstantial evidence that she paid $2,300 of the deposit because the only document admitted into evidence that speaks to her paying the full deposit is a 23rd December 2019 Letter between her and her attorney. In response, she asserted that Mr. Burrows through a previous counsel he had retained received the full deposit. She did so without proof that Mr. Burrows' previous counsel did receive the monies. Therefore on a balance of probabilities, I am minded to not come to the conclusion that she did satisfy the full deposit.

[18.] Ms. Moss in her testimony would assert that she paid her rent on time. However, she would attach a caveat to said assertion, which I am minded on a balance of probabilities to interpret as an inconsistent qualification to what should've been a simple yes or no response to the question of whether she paid her rent on time.

[19.] Ms. Moss would then state that she never abandoned The Unit, despite Ms. Moss residing on the Island of Mayaguana.

[20.] Ms. Moss in her testimony stated that she never received an agreement for sale. However, a Letter dated 21st October 2019 from Mr. Burrows' previous counsel Arnold Simmons to Ms. Moss's counsel was admitted into evidence. The letter referred to an agreement for sale that in its original form was attached. In lieu of Ms. Moss's statement with an eye to the implication emanating from said correspondence being attached to an agreement for sale, I am minded on a balance of probabilities to deem her statement of not receiving the agreement for sale as unlikely.

[21.] Further in her testimony, Ms. Moss confirmed that Ms. Johnell Meadows was occupying The Unit and that Ms. Moss was being compensated for her gesture. The Affidavit of Johnell Meadows was not admitted into evidence on the ground that the affiant was not before the Court to be tested on the statements she made during a cross-examination. Though taking into consideration the testimony of Mr. Burrows, I agree with Ms. Moss's statement that she allowed Ms. Johnell Meadows to occupy The Unit.

[22.] In her testimony, there was an unsuccessful attempt by counsel for the Defendants to admit the Whatsapp messages dated 5th November to 9th November 2015 because the actual exhibits of the messages were not exhibited properly.

[23.] Moreover, she confirms receiving an Eviction Notice dated 15th December 2017 from Mr and Mrs Burrows. She denies the notice's contents but could not offer a clear answer to Ms.

Martin's question of whether Ms. Johnell Meadows was staying in The Unit and in what capacity. This ambiguity in her response puts into question the validity of her previous statement that while Ms Meadows was in The Unit she was not paying rent. She further admits to receiving more eviction notices from Mr and Mrs. Burrows.

[24.] In her testimony, she would deny any responsibility for the instances of disrepair in The Unit. However her answer "no , not really , ma'am" to Ms Martin's question "Did you ever cause damage to the unit," instead of a simple denial puts into question her claim that she was not responsible. On a balance of probabilities, it is more likely that she was inconsistent in her response to Ms. Martin.

[25.] Her testimony contained conflicting statements regarding key details of fact concerning what occurred between her, Mr and Mrs Burrows and The Unit. These inconsistencies raise too many questions on the reliability and credibility of her account.

Mr. Fisk Burrows

Mr. Burrows relies on his Witness Statement of 26th January 2024 as his evidence in chief.

[26.] As Mr. Burrows' testimony progressed, I found his response as to whether he received the full deposit from Ms. Moss to be inconsistent because he initially says that he received the deposit only to qualify near the end of his testimony that he only received a portion of the deposit.

[27.] In his testimony, Mr. Burrows said that he had no intention to interpret clause 2 of The Agreement to mean that he had an optional duty to convert The Unit into a condominium.

[28.] Further in his testimony, he states if The Unit was never converted to a condominium, all of Ms. Moss's payments would be considered rental payments and not payments that can be deducted from the purchase price of a future agreement for sale of The Unit.

[29.] Moreover, he gives a history of his efforts to convert The Unit into a condominium between 2017 and 2018. However, he is inconsistent on what his rationale for ceasing to convert The Unit into a condominium was during his testimony. Mr. Burrows' presented three rationales in the following: That he did not have the mental wherewithal to convert The Unit into a condominium; He didn't complete the process to convert The Unit into a condominium because Ms. Moss showed no interest in purchasing The Unit; and that he didn't complete the process to convert The Unit into a condominium because of prior experience he had with previous counsel to convert The Unit into a condominium.

[30.] In Mr. Burrows' testimony, the 2nd March 2020 Letter was admitted into evidence, but was not in the Defendants' Bundle of Documents. The letter from Arnold Simmons to Travette Pyfrom states that the Declaration of Condominium was filed. Mr. Burrows disputes that said document was filed. Mr. Burrows then claims that he did in fact get the Declaration of Condominium approved but he has no evidence to substantiate this assertion.

[31.] In his testimony Mr. Burrow says that he fired Arnold Simmons in early 2020 and changed attorney. Mr. Burrows then instructed his new attorney from Sharon Wilson & Co to retrieve a Certified Copy of the Declaration of Condominium but the latter was unsuccessful.

[32.] Then Mr. Burrows stated in his testimony that he was left to satisfy the bill when it came to repairing The Unit's plumbing issues. Taking Ms. Moss's testimony into account, there is great ambiguity as to which party upon discovering the plumbing issue in The Unit notified the other. Though, in favour of Mr. Burrows being the diligent and astute steward of The Unit, I do accept his evidence that he communicated with Ms. Moss and her attorney that he did the repairs in the month of February 2022 and that he most likely notified Ms. Moss of the plumbing issue beforehand.

[33.] His testimony, barring inconsistencies arising from his understanding of clause 3 in The Agreement, his rationale for not converting The Unit and if he notified Ms. Moss of the needed repairs to The Unit, is credible and reliable on a balance of probabilities.

SUBMISSIONS

The Claimant

[34.] The Claimant's counsel Travette Pyfrom submits that The Agreement should be interpreted as an agreement for sale and not a leasehold agreement and refers to the $106,000 purchase price expressed within The Agreement.

[35.] The Claimant contends that Mr. Burrows acknowledged while giving oral evidence that The Agreement was an agreement for sale.

[36.] The Claimant contends that a trial was unncessary if the answer to the issue of whether there is a valid agreement for the sale of The Unit which can be enforced by an order for specific performance is answered in the affirmative.

[37.] In conclusion, Ms. Pyfrom posits that Ms. Moss has proven her case and that the Court should compel Mr and Mrs Burrows to honour the execution of an agreement for sale in lieu of compensating Ms. Moss for damages emanating from the Defendants' breach.

The Defendants

[38.] The Defendants' counsel Akeira Martin submit the following; That The Agreement is void because its terms create uncertainty; In the alternative, that the condition to convert The Unit into a condominium was a precondition to the option to purchase The Unit; and in the alternative, that the Claimant should not be granted relief under equity because she did not have clean hands throughout the period in which the parties were in dispute.

[39.] Accordingly, the Court should dismiss the Claimant's action, award the Defendants' damages and compel the Claimant to vacate the premises.

LAW

[40.] In civil law, the old Latin adage "onus probandi actori incumbit" is central to the Claimant's case; he who asserts must prove. This principle is known as the burden of proof.

The burden in civil law was expressed in **Larry Ferguson v RBC Royal Bank (Bahamas) Limited SCCiv App No 79 of 2023** , where Charles JA reaffirmed that a Claimant bringing his/her case before the Court must ensure that said case is furnished suitably with evidence:

"102. The burden of proof often lies with the plaintiff/appellant because he is the party asserting the claim ....."

[41.] In my consideration of this issue I found the authority cited by counsel for the Defendants instructive even if the facts upon which it turns is distinguished from the matter before the Court presently.

[42.] Moreover, with the burden of proof established squarely on the Claimant, the level of probability that the Claimant's assertions are correct as opposed to mere fiction is set out by Charles J, as she then was, in **Claudia Edwards Bethel v The Attorney General of The Bahamas et al No. 2015/CLE/gen/00245** quoting a hypothetical conjured by Lord Denning:

"[108] if the evidence is such that the tribunal can say we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not ....."

[43.] In contemplation of this issue, I find the authority cited by counsel for the Defendants to be instructive even if the authority is distinguished in its facts. That being about tort as opposed to breach of contract in the present matter before this Court.

[44.] Furthermore, in apprehension of the Claimant's desire to be in the friendly company of the equitable remedy named specific performance, the Claimant should greet specific performance with a firm clean handshake. The Claimant must approach any equitable remedy with clean hands. A legal principle reiterated by Isaacs JA , as he then was, in **Eugene Smith et al v Clifford Dean SCCivApp No 66 of 2014**:

"[53] There is a fundamental principle in equity expressed in the maxim: he who comes to equity must come with clean hands."

[45.] The Claimant seeks the equitable remedy of specific performance however the authority cited by the Claimant, **Mungalsingh v Juman [2015] UKPC 38**, is not as instructive as other caselaw. While the judgment of **Mungalsing [2015]** was rendered by the Board of the Privy Council in Trinidad and Tobago and is thus highly persuasive due to jurisdictional disparity between The Bahamas and Trinidad and Tobago, the Claimant fails in her closing submission to direct this Court to **paragraphs 32 and 33** of **Mungalsingh [2015].** The paragraphs discuss the principle of specific performance. As it concerns the remedy's limitations and to keep this Court's judgement within the jurisdictional context of The Bahamas, I refer to Isaacs JA in the case of **Eugene Smith [2017]** who sought the guidance of the learned authors of **Chitty on Contracts: General Principles 26th Edition:**

"[38] The court may refuse to order specific performance on [numerous grounds]; such as conduct of the plaintiff , impossibility and undue influence."

[46.] For further discussion on contractual interpretation, I found the authority cited by counsel for the Claimant instructive even if the facts upon which it turns is distinguished from the matter

before the Court presently. The authority being **Rainy Skies S.A et al v Kookmin Bank [2011] UKSC 50** where Lord Clarke set out the approach to take for contractual interpretation:

"[14] I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract , especially a commercial contract, is to determine what the parties meant by the language used , which involves ascertaining what a reasonable person would have understood the parties to have meant."

[47.] As it concerns the issue of uncertainties in contracts with preconditional terms, the authority cited by counsel for the Defendants is instructive even if the facts upon which the Board of the Privy Council rendered its judgment is distinguished from the matter before the Court presently. The authority being **Aberfoyle Plantations Ltd v Cheng [1959] 3 ALL ER 916** where Lord Jenkins sets out when said conditions of should be fulfilled:

"[Paragraph 2 on page 914] "The answer to that question must plainly depend on the true construction of the agreement, or in other words on the intention of the parties as expressed in, or to be implied from, the language they have used . . . (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to , and the time allowed is not to be extended by reference to equitable principles."

[48.] As it concerns waiver by election and waiver by forbearance, Justice Strachan in paragraphs 44 and 45 in the Supreme Court case of **Nelson McFall et al v Scotiabank (Bahamas) Ltd et al [2024] Claim No. 1767 of 2022** provide good law on said concepts. It is noted that like the Justice, the Claimant refers to the Board of Privy Council decision of **Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation [2020] UKPC** to highlight the legal principle of waiver by election.

[49.] On the issue of special damages, the authority cited by counsel for the Defendants is **Little Bay Partners LLC v Besing Shares Ltd [SCCiv App. No. 54 of 2023] (6th February 2024).** Where Smith JA referred to Charles J's (as she was then) statement in the case of **Charlene Rahming v Bahamas Ferries Ltd. BS 2018 SC 18:**

"[58] It is trite law that special damages must be strictly proved . . . what amounts to strict proof is to be determined by the court in the particular circumstances of each case."

Discussion & Analysis

What is the true construction of the 10th October 2014 Agreement?

[50.] After reviewing the submissions of both counsels, the relevant law and the evidence presented, the Court must determine whether The Agreement in its true construction is a lease or an agreement for sale?

[51.] The legal principle relied on is set out by Lord Clarke in **Rainy Skies [2011],** where he states that a contract is interpreted using the standard of the reasonable person and what that

person would have understood the parties to be in actual agreement on. That reasonable person would have access to the same information that the Claimant and the Defendants had prior to and on 10th October 2014. This legal principle is reiterated by Lord Jenkins in **Aberfoyl [1959]** in paragraph 2 on page 914; **"The answer to that question must plainly depend on the true construction of the agreement, or in other words on the intention of the parties as expressed in, or to be implied from, the language they have used."**

[52.] From the facts, it is evident that both parties understood The Agreement to be a placeholder in the interim until the Defendants' converted The Unit into a condominium. Clause 2 of The Agreement, is distinguished from a regular purchase price clause in an agreement for sale because clause 2 only establishes an expectation of what the future purchase price would be and what the Claimant can rely on when that agreement for sale is eventually executed. The Claimant's reliance on clause 2 in her closing submissions at paragraph 2 , having interpreted the clause erroneously, would not satisfy the standard of proof she has to meet to succeed in her claim that The Agreement was an agreement for sale just by stating that clause 2 has a purchase price embedded within.

[53.] As elucidated from the hearing, multiple agreements for sale were sent to the Claimant by the Defendants for the Claimant's execution. For example, the agreement for sale sent to the Claimant as evidenced by a 21st October 2019 letter from Arnold Simmons , acting on behalf of the First Defendant, to Travette Pyfrom. If the Claimant was of the belief that The Agreement itself was an agreement for sale , then that would be the reason she provided for not signing the agreement for sale as referenced in the above and not "we were still waiting for Mr. Burrows to turn the stuff over to condominium." Similarly, the Claimant would not have even considered signing an earlier draft agreement for sale sent to her on the basis that "[she] disputed the price listed in the draft agreement" (paragraphs 9-10 of Claimant's Closing Submission) which is referenced in a Letter from Phoenix Associates Ltd to Ms. Travette Pyfrom dated 6th June 2019.

[54.] Furthermore, the Claimant in her testimony stated that she understood The Agreement to be a rent-to-own. The First Defendant, likewise understood that The Agreement was a lease which can be shown in his response to a question in his testimony; "Q. Do you recognise that document Mr Burrows? A. Yes ma'am. Q. What is this, please? A. This is the lease agreement between tenant and renter."

[55.] More so, both parties at the time of executing The Agreement was aware that in order for a conveyance to occur , The Unit must first be converted into a condominium in line with clause 1 of The Agreement. That's why both parties were invested, as shown in their testimony to verifying the existence of a Declaration of Condominium because the document would support the premise that the Defendants' were in the process of converting The Unit into a condominium .

[56.] In all, to interpret The Agreement as an agreement for sale considering the above would be erroneous. Thus, the Claimant's application for relief fails on this issue.

Is The Agreement uncertain in its terms?

[57.] After reviewing the submissions of both counsels, the relevant law and the evidence presented, the Court must satisfy the following uncertainties; the most salient being that there is no deadline fixed to the Defendant's obligation to convert The Unit into a condominium.

[58.] The Court may find a resolution to the aforementioned uncertainty by referring to Lord Jenkins' statement in **Aberfoyle [1959] ,** that **"where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time"** Lord Jenkins' principle is applied in analogy because in **Aberfoyle [2015]** there is no deadline fixed to the completion of the sale of a rubber plantation as opposed to the present matter where there's no deadline to convert The Unit expressed.

[59.] The legal principle expressed in **Aberfoyle [1959]**, when applied to the present matter, does not favor the Defendants because they unilaterally decided to not convert The Unit. This is shown in the First Defendant's testimony. Even if the Court is not certain of the First Defendant's reason to not convert The Unit, the Defendants had an obligation to fulfill the condition to convert The Unit into a condominium in a reasonable amount of time; in this case, the period between 2014 to 2019 was a reasonable amount of time for the Defendants' to fulfill their duty under The Agreement though they chose not to. Despite the First Defendant's understanding that his obligation to convert The Unit, which he admits in his own testimony, was not optional.

[60.] The ambiguity surrounding the timeline in which the Defendants have to fulfill their duty under The Agreement to convert The Unit into a condominium created uncertainty between the parties as to when they should expect The Agreement to come to an end.

Furthermore, The Agreement is deemed to be uncertain in its language and construction on the basis that neither party to the contract expressed in their testimonies a clear understanding of the material terms of The Agreement. The Defendants state in their closing submission , at paragraphs 20 and 23, that the First Defendant misunderstood material terms to The Agreement as summated in the following: The First Defendant erroneously told the Claimant , that clause 3 of The Agreement only allows rental payments in the first year of the operation of The Agreement to be a deductible of the purchase price once the conveyance is executed; and the First Defendant admitted that he lacked the understanding to convert The Unit into a condominium.

[61.] In all, I am in agreement with the Defendants that The Agreement is uncertain though it is evident that the Defendants made no effort to convert The Unit into a condominium within a reasonable period of time. Like the Board in **Aberfoyle [1959],** I posit that the party beholden to the uncertain term must satisfy their duty under that term in a reasonable amount of time. However, the Defendants' breach is offset by The Claimant's conduct. If not for her earlier breaches to The Agreement before the Defendants would decide to not convert the Unit, she could have relied on the Defendants' breach of The Agreement.

[62.] The Agreement is uncertain and is therefore void.

The Conversion of The Unit into a Condominium is a Precondition.

[63.] The Agreement established a precondition that the Defendants' had to convert The Unit into a condominium before the parties can execute a conveyance because both parties understood that cause and effect to be central to The Agreement by their testimony rendered at the hearing. The authority relied on have been set out in paragraph 51 of this decision.

[64.] However, the Defendants' alternative argument that the Claimant cannot effect an agreement for sale over The Unit because the precondition of converting The Unit into a condominium has not been met falls away because The Agreement between parties is void on the basis of uncertainty. The consequence is that The Agreement is no longer enforceable and that the Defendants' cannot use the precondition to convert to frustrate the Claimant.

Did the parties breach The Agreement?

[65.] The Court must determine whether the parties breached The Agreement. The Court having reviewed the parties' submissions and the evidence presented at the hearing is of the view that the Claimant and the Defendants breached covenants within The Agreement.

[66.] The Court having reviewed the Claimant's submission and more importantly witnessed the Claimant's testimony is of the opinion that the Claimant breached the following covenants: Breaching clause 4(a) , by damaging The Unit's plumbing on 30th April 2020; Breaching clause 4(i),by habitually missing payments and in many instances failing to pay rent altogether; Breaching clause 4(m), by subletting The Unit to Johnell Meadows; Breaching clause 4(u) , when the Claimant allowed a leakage in The Unit to interfere with the peaceful and quiet enjoyment of the neighbouring units; and Breaching clause 4(v), when the Claimant failed to inform the landlord of the water leakage in The Unit on 30th April 2020. The Defendants' closing submission from paragraphs 52 to 53 are instructive in providing the details of the above breaches.

[67.] The Claimant relies on the defense of waiver by election in response to the Defendants' counterclaim that the Claimant breached material terms to The Agreement. The Court finds, to the contrary, that the Claimant in her closing submission presents evidence that would support the defence of waiver by forbearance and not the defense of waiver by election. To bring clarity to the difference between the differing forms of waiver, legal principles cited by Strachan J in **McFall [2024]** at paragraphs 44 and 45 are instructive and summarised in the following:

Waiver by Conduct arises in a sitiation where Party A to a contract agrees expressly (or by conduct) to allow Party B to deviate from his/her/it's rights and liabilities to a term in the contract without the fear of Party A holding Party B liable for the deviation.

Waiver by Election arises in a situation where Party A to a contract, aware of a breach by Party B, is presented with remedies inconsistent with each other. Once Party A chooses one remedy, the other remedies are waived.

[68.] The Claimant cannot invoke the defence of waiver by election on the basis that the Defendants elected to continue to perform their obligations under The Agreement in late 2015 when they could have repudiated The Agreement because the Claimant has not provided the Court evidence that the Defendants were given that election; The whatsapp messages between

the Claimant and the First Defendant between 5th and 9th of November 2015 were not admitted into evidence as shown during the Claimant's testimony.

[69.] The Court would have been minded to accept the defense of waiver by forbearance if the Claimant sought the relief in their submissions. This is because the Claimant provided correspondence between the Defendants' previous attorney Arnold Simmons and the Claimant's counsel, set out in the Claimant's closing submission at paragraphs 37.1 to 37.5, which evidence the Defendants' desire to continue operating under The Agreement with the knowledge that the Claimant previously breached covenants to The Agreement. The First Defendant waives his right to repudiate The Agreement on the basis that the Claimant breached the covenant to not sublet when the First Defendant instructed Arnold Simmons to communicate to the Claimant that he wished to execute an agreement for sale on 6th June 2019. The First Defendant in his testimony does allege that his previous counsel was acting outside the ambit of his instructions. Thus bringing into question the weight of those correspondences as an accurate indication of the First Defendant's true intention to waive the prior breaches of the Claimant. The First Defendant in his testimony also asserts that his previous attorney misrepresented the fiscal reality of converting a property into a condominium. The First Defendant however provides no evidence before the Court to substantiate his allegations other than the fact that he retained new counsel in response to how he perceived his previous counsel's conduct. If the Claimant had sought the defense of waiver by forbearance, that defense would protect the Claimant from liability for some of her past breach of covenants to the Agreement.

[70.] The Court having reviewed the Defendants' submission and the First Defendant's testimony is of the opinion that the Defendants' breached the covenant in The Agreement to convert The Unit into a condominium. See paragraph 61 of this judgment.

[71.] The Court must now be satisfied that the Claimant can successfully seek the equitable relief of specific performance. For the Claimant to receive said relief, the Court must be certain that there's no reason to refuse said relief. This Court will, like Isaacs JA in **Eugene Smith [2015**] refer to the learned authors of **Chitty on Contracts (General Principles 26th Edition):**

"The court may refuse to order specific performance on [numerous grounds]; such as conduct of the plaintiff , impossibility and undue influence."

[72.] The Claimant, cannot receive the equitable remedy of specific performance because her conduct as a tenant of The Unit under The Agreement is substandard. Paragraph 66 of this judgment sets out the Claimant's poor conduct. Thus, the Court is in agreement with the Defendants that the Claimant's have arrived to the Court, seeking equity, with unclean hands.

Damages

[73.] After coming to the decision that the Claimant and Defendants both breached covenants of The Agreement, the matter of who receives damages must be resolved. That matter is easy to dispel. The sheer volume of the Claimant's breaches to The Agreement from 2015 to present, compels this Court to not award damages to the Claimant for the Defendants' breach. In contrast, the Defendants are awarded special damages to satisfy the cost of repairing The Unit.

[74.] The Court is minded to use Smith JA' dicta in **Little Bay Partners LLC [2023],** where he reaffirms the law guiding special damages:

"It is trite law that special damages must be strictly proved . . . what amounts to strict proof is to be determined by the court in the particular circumstances of each case."

[75.] The Defendants through Mr. Burrows' testimony, who the Court deemed credible and reliable, and the invoices exhibited in the Defendants' Bundle of Documents dated 25th January 2024 prove upon a balance of probabilities that the Defendants did suffer injury that can be remedied with an award of damages. Furthermore, the testimony of Ms. Moss and her response "No, not really" to being questioned on if she damaged The Unit further grounds the Court's decision. The Court asserts that this award of special damages will properly remunerate the Defendants and place them in the same position they would have been had The Unit not been damaged by the Claimant.

Conclusion

[76.] The Court makes the following order -

[77.] The Claimant's Writ of Summons is hereby dismissed.

[78.] The 10th October 2014 agreement is declared void due to uncertainty.

[79.] The Claimant shall vacate Unit No. 4 at #11 Millers Close.

[80.] The Claimant shall pay damages in the amount of $2,612.00.

[81.] Interest pursuant to the Civil Procedure (Award of Interest) Act.

[82.] The Claimant shall pay the Defendants' costs to be taxed if not agreed.

Senior Justice Deborah E. Fraser

Dated this 26TH day of February 2025