SUPREME COURT OF NOVA SCOTIA
Citation: Silver v. Fulton, 2011 NSSC 127

Date: 20110330
Docket: BWT 294754
Registry: Bridgewater

Between:

Kenneth M. Silver

Plaintiff

- and -

Mark Douglas Fulton

Defendant

Judge:	The Honourable Justice Kevin Coady
Heard:	December 3, 2010, in Halifax, Nova Scotia
Written Decision:	March 30, 2011
Counsel:	Rubin Dexter, for the [plaintiff] Gavin Giles, QC, for the [defendant]

By the Court:

BACKGROUND:

[1] Kenneth Silver is a businessman in the Bridgewater Community. He owns and operates a successful truck sales and repair shop. Mr. Fulton is a long-standing employee of Mr. Silver. All indications suggest that he has been, and continues to be, a valued employee. The litigation between the parties involves a piece of property known as 327 LaHave Islands Road, Bell Island, Lunenburg County.

[2] This dispute was the subject of a three day civil jury trial at Bridgewater on May 17-19, 2010. This proceeding involves an analysis of whether the jury's verdict survives the rule against perpetuities.

[3] The subject property is idyllic in that it is located on one of Nova Scotia's most beautiful and desirable coasts. It is a relatively large lot with a deep and sheltered anchorage. While the structures and services are minimal, it has development potential. This property was owned by Greg and Gary Tumblin but they were generally absentee owners.

[4] The evidence before the jury establishes that Mr. Fulton had a longstanding relationship with the Tumblins. They permitted Mr. Fulton to access and utilize the property unfettered. He carried out some limited improvements on the structure and provided a very rudimentary power source. The evidence suggests that Mr. Fulton's use of the property was primarily recreational. There was no evidence to suggest the Tumblins ever limited Mr. Fulton's access or use. Further, it is undisputed that Mr. Silver had no connection with the Tumblins or the subject property prior to 1998.

[5] The Tumblins decided that they had no further interest in retaining the property. Recognizing Mr. Fulton's long-term attachment to the property, it was their collective intention to sell the property to Mr. Fulton. Eventually a purchase price of $80,000 was set. This was beyond Mr. Fulton's financial capacity in that his income was modest and he had just built his own family home. It was at this point that Mr. Silver became involved.

[6] The jury heard evidence that Messrs Silver and Fulton discussed the situation at their workplace. Mr. Fulton knew that Mr. Silver had been involved in

previous land transactions and had the resources to purchase the subject property. These discussions led the parties to an oral agreement that was never reduced to writing. In June 1998 Mr. Silver purchased the property for $80,000. The evidence indicates that Mr. Fulton continued to use the property, as before, and without interference from Mr. Silver.

[7] On August 27, 1999, Mr. Fulton registered a Notice of Claim against the property pursuant to the **Marketable Titles Act**, SNS 1995-96, c.9. On April 16, 2008, Mr. Silver filed a Notice of Action seeking a declaration that the oral agreement was for an option to purchase the property and that this option agreement was void because Mr. Fulton violated its terms. Mr. Fulton countered that the oral agreement established a constructive trust whereby Mr. Silver held the property in trust for Mr. Fulton until he could afford the purchase price. The existence and the terms of the oral agreement were left to the jury to determine.

[8] Mr. Silver alleges in his Statement of Claim that the agreement provided as follows:

1. Mr. Fulton was given the option to purchase the property from Mr. Silver, if and when the funds to do so became available to Mr. Fulton.

2. If such option to purchase was exercised by Mr. Fulton, he would pay Mr. Silver the fair market value of the property existing at the time of the exercise of the option to purchase.

3. In addition to paying Mr. Silver the existing fair market value of the property, as aforesaid, Mr. Fulton would also fully reimburse Mr. Silver for any and all costs and expenses incurred by Mr. Silver for and in connection with the property, including all survey, legal and other costs associated with Mr. Silver's initial purchase of the property, as well as all taxes, maintenance and any upgrades to the property.

4. The exercise by Mr. Fulton of the option to purchase was conditional upon:

> I. Mr. Fulton paying Mr. Silver a monthly rent for the property in an amount to be agreed upon by the parties, which rent was payable by Mr. Fulton until such time as the property was sold to him. The monthly rent paid by Mr. Fulton would be credited to the purchase price otherwise payable by Mr. Fulton for the property;
>
> II. Mr. Fulton was to keep the agreement with Mr. Silver strictly confidential.

[9] Mr. Fulton alleges in his defence that Mr. Silver volunteered to undertake the purchase on the following terms:

> 1. Mr. Silver would purchase the property on Mr. Fulton's behalf and hold the property in trust for him until such time as Mr. Fulton's financial circumstances would permit him to assume legal title to the property.

2. At such time, Mr. Silver would convey legal title to the property to Mr. Fulton at the same price at which Mr. Silver had purchased the property.

[10] Mr. Silver alleged that Mr. Fulton breached the agreement by failing to comply with the conditions precedent for the exercise of the option to purchase in that Mr. Fulton:

- Failed or refused to negotiate a monthly rent for the property.

- Failed or refused to pay Mr. Silver a monthly rent for the property.

- Failed to keep the agreement strictly confidential.

[11] Mr. Fulton elected to proceed with a judge and jury trial. On June 12, 2009, Mr. Silver brought a motion to dispense with a jury. The motion judge rejected Mr. Silver's motion and ordered that the matter proceed as a judge and jury trial. The parties collaborated in preparing the 10 questions that were put to the jury. The following are the questions followed by the jury's decision: [In brackets]

1. First Question:

Did the Plaintiff, Mr. Silver, and the Defendant, Mr. Fulton, enter into an oral agreement ("the Agreement") in 1998 with respect to the purchase of the property known as 327 LaHave Islands Road, Bell Island, Lunenburg County, Nova Scotia ("the Property")?

[Yes]

2. Second Question:

If your answer to Question 1 is "yes"

(A) As a term of the Agreement, did Mr. Silver and Mr. Fulton agree that Mr. Silver would purchase the property and hold the property in trust for Mr. Fulton until such time as Mr. Fulton's financial circumstances would permit him to acquire the legal title to the property from Mr. Silver at the same price as Mr. Silver had purchased the property?

or

(B) As a term of the Agreement, did Mr. Silver and Mr. Fulton agree that Mr. Silver would purchase the property and then give Mr. Fulton an option to purchase the property at a time in the future when Mr. Fulton could afford it by paying Mr. Silver the property's fair market value at that future time and by compensating Mr. Silver for his expenses in connection with the original purchase of the property as well as in owning the property, such as taxes, maintenance and up-grades to the property.

[2 (B)]

3. Third Question:

Regardless of whether you answered 2(A) or 2(B) to the Second Question, was it Mr. Fulton's expectation at the time of the Agreement that it would take him a minimum of 10 to 20 years before his financial circumstances would permit him to assume legal title to the property?

[Yes]

4. Fourth Question:

Regardless of whether your answer to Question 2 is 2(A) or 2(B), was it a term of the Agreement that Mr. Fulton could continue to use the property until such time as he was able to afford to purchase the property from Mr. Silver?

[Yes]

5. Fifth Question:

If your answer to Question 4 is "Yes":

Has Mr. Fulton continued to use the property since 1998?

[Yes]

6. Sixth Question:

If your Answer to Question 5 is "Yes":

Has Mr. Fulton continued to use the property since 1998 with the knowledge and consent of Mr. Silver?

[Yes]

7. Seventh Question:

If your answer to Question 2 is 2(B), was it a term of the Agreement that Mr. Fulton's exercise of the option to purchase the property was conditional upon Mr. Fulton paying Mr. Silver a monthly rent for the use of the property, in an amount to be agreed upon, until the property was sold to Mr. Fulton, with such monthly rent to be credited to the purchase price payable by Mr. Fulton for the property.

[No]

8. Eighth Question:

If your answer to Question 7 is "Yes":

Did Mr. Fulton pay rent to Mr. Silver for Mr. Fulton's use of the property?

[No]

9. <u>Ninth Question</u>:

Was Mr. Fulton's exercise of the option to purchase the property also conditional upon Mr. Fulton keeping the agreement with Mr. Silver strictly confidential?

[No]

10. <u>Tenth Question</u>:

If your answer to Question 9 is "Yes":

Did Mr. Fulton fail to keep the Agreement confidential?

[Did not answer]

[12] The jury found by a 5-2 majority that the parties had an option to purchase agreement, at a time in the future, for fair market value, along with compensation for expenses related to the original purchase as well as carrying costs. The jury, also determined that it was Mr. Fulton's expectation at the time of the agreement that it would take him a minimum of 10 to 20 years before his financial circumstances would permit him to assume legal title to the property. The jury did not determine whether this time frame was a term of the agreement.

[13] The jury also determined that the agreement foresaw Mr. Fulton continuing to use the property without paying rent with the full knowledge of Mr. Silver. The jury also found there was no term of confidentiality.

[14] The difficulty in this case arises from the fact that the jury's findings are not determinative of the cause of action. The jury found that there was an option to purchase agreement but did not consider whether this option was invalidated by the rule against perpetuities. This omission is appropriate given that the jury's responsibility is to make findings of facts and not findings of law.

ISSUES:

[15] The parties argued the following general question:

1. Whether the option to purchase agreement is void because it offends the rule against perpetuities?

[16] In my view, the following sub-issues must be addressed in order to answer the general question:

2. Whether the rule against perpetuities applies to an option to purchase agreement?

3. If the rule applies, what is the relevant perpetuities period?

4. Whether it is possible that the option to purchase may vest outside this period?

[17] There is also an issue to be addressed which is raised by the defendant's alternative argument:

5. Whether the court should take a wait and see approach notwithstanding that it is possible that the interest may vest outside the perpetuity period?

THE RULE AGAINST PERPETUITIES:

[18] For many lawyers and judges, the rule against perpetuities is like a trip down Alice's rabbit hole to a land where things are not always what they seem. The rule is simple enough to state:

> No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest (John Chipman Gray, *The Rule Against Perpetuities*, 4th ed by Roland Gray (Boston: Little, Brown and Company, 1942) §201).

[19] A more modern version of the rule has been put as follows:

> [A]n interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years (Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 276.

[20] While simple enough to state, the rule against perpetuities is harder to apply. Perhaps one of the more vexing aspects of the rule is that it can invalidate a gift or interest even where the parties' intentions are clear and even if it is highly probable that the transfer will occur within the perpetuities period.

THE POSITION OF THE PARTIES:

[21] The plaintiff Silver cites *Politzer v. Metropolitan Homes Limited*, [1976] 1 S.C.R. 363 and *Halifax (County) v. Giles* [1993], N.S. J. No. 252 for the proposition that an option to purchase real property creates an equitable interest in the land that must comply with the rule against perpetuities or be declared void *ab initio*. The plaintiff further submits that the oral agreement specified no "life in being" to define the period in which the option must vest. He cites *Harris v.*

Minister of National Revenue, [1966] 1 S.C.R. 489 for the proposition that where no life is specified, the perpetuity period is 21 years.

[22] The plaintiff Silver points to the jury's finding that the parties expected that it would take the defendant Fulton a minimum of 10-20 years to acquire the necessary funds to purchase the property. Mr. Silver contends that the jury made no finding that exercising of the option within a certain time period was a term of the agreement. He further contends that the agreement included no such term. On this basis, the plaintiff argues that the option offends the rule because there is no requirement that the interest must vest within the perpetuities period.

[23] The defendant Fulton cites *Re Nuport Holdings Ltd. And Michael Duff Estate: Re Quieting of Titles Act*, 2003 NLSCTD 63 for the proposition that the rule only invalidates an option to purchase real property if it is possible that it may vest too remotely, and that it does not invalidate an option that simply lasts for a long time.

[24] The defendant argues that the rule does not apply because the option to purchase agreement is a personal contract between the parties that must vest in the

lifetime of the parties, if at all. He cites *Allen Heights Development Ltd. v. Ralph Mitchell Ltd.,* [1974] N.S.J. No. 352 and *Re Kennedy & Beaucage Mines Ltd.* (1959), 20 D.L.R. (2d) 1 (Ont.C.A.) for the proposition that the rule against perpetuities does not invalidate a personal contract for the purchase, or option to purchase, land.

[25] The defendant Fulton acknowledges that the Supreme Court of Canada decision in *Politzer, supra*, is contrary to the Ontario Court of Appeal's decision in *Kennedy, supra*. Notwithstanding, he argues that the *Politzer, supra*, decision should not be applied because it is distinguishable. In the alternative, the defendant submits that this court should not follow *Politzer, supra,* because (1) it was a decision rendered with only a five member panel (2) only a bare majority of three judges discussed the rule against perpetuities, (3) the concurring decision did not discuss the rule, (4) the remarks of the majority concerning the rule were *obiter,* and (5) the decision was rendered at a time when the rule was not the subject of significant legislative amendment.

[26] The defendant Fulton further argues that if the rule against perpetuities is found to apply to the agreement, the court should adopt a "wait and see" approach

where the agreement would only be invalidated if, in fact, the interest did not vest within the perpetuity period.

WHETHER THE RULE APPLIES TO AN OPTION AGREEMENT:

[27] I find that the rule against perpetuities applies to an option to purchase agreement.

[28] In *London and South Western Rail Co v. Gomm*, [1882] C.C.S. No. 116 the plaintiff, who no longer needed a specific piece of land for its railway, conveyed that land to an individual with a covenant allowing the plaintiff an option to repurchase the land for a specified price should a need arise at a later date. The land was then conveyed to the defendant with knowledge of the covenant. The plaintiff then sought to exercise its option to repurchase the land. The defendant refused and argued that the covenant was not binding on him. The issue before the Court was whether the option to purchase covenant created an interest in the land and whether it violated the rule against perpetuities. The Court held that an option to purchase real property created an equitable interest in the land, and commented as follows at page 1193:

> The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary cases, where it is a contract for purchase, there is no doubt about it, but an option to purchase in its nature does not differ. It is only one step further back, i.e., a person exercising the option has to do two things, he has to give notice of his intention to purchase, as well as pay the purchase money; but, as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, must give that other an interest in the land:

[29] The Court rejected the submission that the rule against perpetuities had no application to a case of contract, and concluded that there was no distinction between a contract for purchase and an option for purchase.

[30] The decision in *Gomm*, *supra*, would appear to settle the issue of whether the rule applies to an option to purchase agreement. However, a series of cases respecting personal contracts and the rule against perpetuities appear to challenge the authority in *Gomm*, *supra.* In *South Eastern Railway Company v. Associated Portland Cement Manufacturers* (1900) Ltd., [1910] C.C.S. No. 173 the court held that personal covenants do not fall within any rule of perpetuities. In this case a landowner conveyed a strip of land to a railway company while reserving himself the right to make a tunnel at his own expense to join the separated lands severed by the strip he conveyed to the railway. When the landowner sought to exercise his

right, the railway company brought an action to restrain the landowner from making a tunnel under the railway company's line without their consent.

[31] The railway company cited the decision in *Gomm, supra,* and argued that the agreement was void because it violated the rule against perpetuities. The Court rejected this argument on the basis that the rule against perpetuities did not apply to personal contracts. The Court distinguished *Gomm, supra,* on the grounds that the covenant in that case created a future interest in the land that was being contested by an assignee of the original covenantor, whereas the covenant in *Portland Cement, supra,* was an immediate interest held by one of the contracting parties. The Court stated at page 25:

> In the present case the plaintiffs themselves entered into the contract to grant and granted the easement of tunneling, and they are the very parties who now wish to restrain the defendants from exercising that easement. There is no question here as to the validity of the grant of an easement in future. There was an immediate right to make the tunnel directly [once] the conveyance was executed, and the plaintiffs accepted the conveyance subject to that right. Again I wholly fail to appreciate why the plaintiffs are not bound by their own personal contract, which has nothing whatever to do with the rule against perpetuities.

[32] In *Hutton v. Watling*, [1948] 1 Ch 26 the vendors sold to the purchaser a dairy business, with a clause allowing the purchaser an option to purchase the property where the business was located, at an unspecified future date, for a

specified price. When the purchaser attempted to exercise this option, the vendors refused, and the purchaser brought an action seeking specific performance. The Court ordered specific performance on the basis that the binding decision in *Portland Cement, supra,* stood for the following proposition:

> . . . an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such as case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement.

[33] This line of authority was cited, with approval, in both of the decisions that the defendant relies on for the argument that the rule against perpetuities does not apply to the parties' agreement.

[34] In *Kennedy*, *supra,* the parties entered into a 99 year lease agreement concerning a mining property. The lease stipulated that the lessee would spend a certain amount of money each year on development work on the property, and that if this amount was not spent, the lessor had the right to re-enter on three-months notice, so long as the breach was not rectified in that period. The lease also included an option to purchase clause allowing the lessee (its successors or

assigns) to purchase the property at any time during the lease for a fixed price. The lessee did not spend the stipulated amount on development work in a given year, and the lessor gave notice of his intention to exercise the right of re-entry. The lessor then brought an application for a declaration that the lessee could not exercise the option to purchase clause in the lease. The lessor argued that the option to purchase clause was void because of the rule against perpetuities and/or because the lessee had breached the terms of the lease. The trial judge relied on *Portland Cement, supra,* and *Hutton, supra,* and held that the lessee could exercise the option to purchase. The lessor appealed.

[35] The Ontario Court of Appeal dismissed the appeal and stated at page 5:

> The rule against perpetuities does not in terms relate or apply to rights or obligations of a personal character, nor to the validity or enforcement of any such rights or obligations. Moreover, it does not appear from a statement of the rule that it has any relevancy or application of that character, even though the subject of such rights or obligations may be an interest in land.

[36] The court followed *Portland Cement, supra,* and *Hutton, supra,* finding that the rule against perpetuities did not apply to the option to purchase clause in the lease and that the clause was enforceable.

[37] In *Allen Heights, supra,* the vendor and purchaser entered into an agreement to buy and sell a certain lot in St. Margaret's Bay, Nova Scotia. The agreement was contingent on the vendor receiving approval of the lot from the county planning board. The purchaser paid a deposit that was held in trust by his real estate agent. The vendor was unable to obtain approval, and it attempted to repudiate the agreement by having the real estate agent return the purchaser's deposit. The purchaser refused to accept return of the deposit and instead asked that the agreement remain in force pending the possibility of future approval by the planning board. At this point, the land had increased substantially in value over the original agreed upon price. The vendor then brought an application to set aside the agreement on the basis that it violated the rule against perpetuities.

[38] Morrison J. rejected the vendor's argument and stated:

> The evidence of both parties is that the clause 'Delivery of a warranty deed within thirty days after approval by the country planning board' was inserted for the protection of [the purchaser]. [The purchaser] indicated that he still wished to rely upon the agreement and was prepared to carry out his end of the contract. In these circumstances, and relying upon the reasoning Kennedy and Shaw v. Beaucage Mines Ltd. (supra), I do not feel that the rule against perpetuities applies.

[39] Instead, Morrison J. gave the purchaser “a further two-year period to try and obtain” approval from the planning board. Morrison J. held that if approval could not be obtained by that time, the contract could be considered frustrated and no longer binding on the vendor.

[40] While the decision in *Allen Heights, supra*, is not binding on this court, the principle of judicial comity requires that I follow the decision of another justice of the Supreme Court of Nova Scotia, which dealt with similar facts and issues, as long as that decision was not manifestly wrong or doing so would create an injustice (See generally *Almrei v. Canada (Citizenship and Immigration)*, 2007 FC 1025 at paras 61-62).

[41] In my view, the facts and issues in *Allen Heights, supra*, are sufficiently similar to the present case to warrant following *Allen Heights, supra*. However, I am also of the view that the decision is manifestly wrong and should not be followed. The decision is manifestly wrong because of two Supreme Court of Canada decisions that are germane to the application of the rule against perpetuities in these circumstances. One of these decisions was rendered long before the decision in *Allen Heights, supra*, but does not appear to have been brought to the

Court's attention. The other decision was rendered shortly after the decision in *Allen Heights, supra*. Both decisions explicitly contravene the authorities relied on by Morrison, J. in *Allen Heights, supra*. Had Morrison J. been presented with the binding Supreme Court of Canada decision that was available, he would, in all likelihood, have decided that case differently.

[42] The first SCC case is *Harris, supra*. In *Harris, supra*, the appellant obtained a concurrent 200 year lease on a piece of property that included an option to purchase the property during the lease. The appellant became embroiled with Revenue Canada over the appropriate capital cost allowance accounting for this transaction. The respondent argued that a provision in the *Income Tax Act*, RSC 1952, c 148 had no application to the appellant's lease because, *inter alia*, the option to purchase in the lease violated the rule against perpetuities and was void.

[43] The Court determined that the option to purchase offended the rule against perpetuities because it was not certain that it would vest within the perpetuity period. The Court then considered the appellant's contention that the option was specifically enforceable, as a personal contract, even though it was bad for perpetuity. This argument was based chiefly on *Portland Cement, supra,* and

Kennedy, supra. The Court noted that *Portland Cement, supra* had been the topic of much adverse criticism. The Court stated that it preferred the law as outlined in *Gomm, supra*, and found that there was nothing in that decision that limited the application of the rule against perpetuities to an assignee rather than to the original covenantor. The Court stated:

> It is not necessary to express an opinion as to whether the actual result reached in the [*Portland Cement*] was correct. It may well be supported on the ground on which Swinfen Eady J. proceeded, but, with respect, it does appear to me that *Hutton v. Watling supra*, and *Kennedy v. Beaucage Mines Limited, supra*, which followed it, were wrongly decided and ought not to be followed.

[44] The second SCC decision is *Politzer, supra*. In *Politzer, supra*, the Supreme Court of Canada had to determine whether an agreement between the parties was for the purchase and sale of land or merely for an option to purchase land. A majority of the Court also determined that it was necessary to consider, if an option was found, whether the option violated the rule against perpetuities. Having found that the agreement was an option to purchase agreement, the majority stated at page 371:

> that an option to purchase land for a named consideration gives rise to an equitable interest in land. The interest is not, however, so vested as to be immune from the rule against perpetuities if the option can be exercised beyond the perpetuity period.

[45] The majority noted the controversy created by *Portland Cement, supra* and the cases that followed its line of reasoning. The majority also noted that *Harris, supra*, had settled this controversy. The majority held that once an equitable interest in land is found to be void it cannot at the same time be enforceable as a personal contract. The court stated at pages 374-375:

> The central difficulty, it would seem, is that a single contract cannot readily be regarded as 'merely personal' and at the same time as creating an equitable interest in land. Once an option clause creating a land interest is found to be void as infringing the rule against perpetuities, there is really nothing left in the agreement in the nature of a personal contract that can be specifically enforced. As Cartwright J. observed [in *Harris*], the phrase 'an agreement merely personal' in the sense in which it is used by Farwell L.J. in [*Portland Cement*] means simply an agreement which does not create an interest in land. In short, the option agreement before us is an agreement creating an interest in land and is void as infringing the rule against perpetuities.

[46] The defendant submits that the decision in *Politzer, supra,* is distinguishable, and should not be followed, on the grounds that the option there was exercisable only upon the decision of a third-party municipality. In my view, this is not a sufficient ground with which to distinguish *Politzer, supra*. I note that in *Harris, supra*, there was no third-party condition precedent for the option to be exercised. In any event, the Court is concerned with whether an agreement creates an equitable interest in land that must vest within the perpetuity period, and not with

the intricacies of what must happen for the interest to vest. It matters not how many steps must take place for an interest to vest, but whether it is certain those steps will transpire within the perpetuity period.

[47] The defendant further submits that this court should not follow *Politzer, supra,* because 1) it was a decision rendered with only a five-member panel of the Supreme Court of Canada, 2) only a bare majority of three judges discussed the rule against perpetuities, 3) the concurring decision did not discuss the rule, 4) the remarks of the majority concerning the rule were *obiter*, and 5) the decision was rendered at a time when the rule was not the subject of significant legislative amendment. These submissions are without merit.

[48] The defendant cites no authority for the proposition that a decision of the Supreme Court of Canada is any less binding on a subordinate court simply because the Supreme Court of Canada decision was a split decision or a decision made without the full complement of the Court. In my view, neither of these factors is relevant in applying the principle of *stare decisis*. It is also not relevant that the concurring opinion failed to discuss the rule against perpetuities; the application of *stare decisis* is concerned with the majority opinion and not with

concurring or dissenting opinions. It is true that *obiter* remarks are not technically binding from the perspective of *stare decisis*. With that said, relevant *obiter* remarks from appellate courts, and in particular, the Supreme Court of Canada, will be highly persuasive on trial courts. Regardless, the remarks in *Harris, supra*, explicitly stating that the decisions the defendant relies on should not be followed in Canada, are not *obiter*. *Politzer, supra*, merely reiterates what was already the law in Canada concerning option to purchase agreements and the rule against perpetuities. Finally, the fact that other jurisdictions have altered the rule against perpetuities does not change the binding nature of the common law as described by the Supreme Court of Canada. The change in the legislative landscape *outside* Nova Scotia is not a sufficient ground for ignoring binding Supreme Court of Canada precedent. In short, I am not convinced that this Court can ignore *Harris, supra* and *Politzer, supra.*

[49] Both *Harris, supra* and *Politzer, supra* stand for the proposition that an option to purchase agreement creates an equitable interest in land, and that if this interest is not certain to vest within the relevant period, it is void. The fact that the option agreement is a "personal contract" between the parties is irrelevant. A personal contract may only avoid the rule against perpetuities if it does not create

an interest in land. Once an agreement between two parties creates an interest in land, the rule against perpetuities applies. In this case, the jury found that the parties' agreement was an option to purchase the property, therefore, the rule against perpetuities applies to the agreement.

THE RELEVANT PERPETUITY PERIOD:

[50] The relevant perpetuities period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years. An agreement can specify any life or lives in being to constrain the time frame within which the future interest must vest. The life in being specified does not have to be one of the parties to the agreement. However, where no life in being is specified, the perpetuities period is 21 years from the date of the agreement. (*Harris* at page 497; *Politzer* at page 371).

[51] The agreement between the parties was an oral agreement. The jury made no finding that the agreement was for a specified period. The jury made no finding that the agreement specified a "life in being" to constrain the time frame within

which the future interest may vest. This leaves the Court in the unenviable position of construing the terms of an oral agreement.

[52] It could be argued that the lives of each contracting party were impliedly specified as a life in being. If this were the case, the relevant perpetuities period would be the longer of Mr. Fulton or Mr. Silver's lives plus 21 years. As will be seen below, this determination is irrelevant to the result. In my view, there is no factual evidence to support a conclusion that a life in being was specified. This leaves me to conclude that the relevant perpetuity period is 21 years from the date of the agreement.

ISSUE OF VESTING:

[53] The rule against perpetuities is not concerned with the probability of an interest vesting within the perpetuity period, but rather, with the possibility, however remote, that the interest will not vest within the perpetuity period. It must be certain that the interest will vest, if it vests at all, within the perpetuity period. If there is the slightest possibility that the interest will not vest within the perpetuity period, the interest will offend the rule against perpetuities and be void.

[54] In the present case, the jury found that it would take the defendant a minimum of 10 to 20 years before his financial circumstances would permit him to assume legal title to the property. However, the jury made no finding that the defendant was required, by the terms of the agreement, to purchase the property in this period or lose his option. If the perpetuity period is set at 21 years from the date of the agreement, not only is it possible that the interest will not vest within the period, it is quite likely that it will not vest within the period. Therefore the agreement violates the rule against perpetuities and is void *ab initio*.

[55] If the perpetuity period is not 21 years, and is in fact either of the lives in being of the contracting parties, plus 21 years, then the perpetuities analysis changes significantly. If this is the case, then the determinative issue is whether the option to purchase agreement was exclusive to the parties or whether it could be transferred to an executor, administrator, successor or assignee. If the agreement could be transferred, then it violates the rule against perpetuities because it is possible that it could be transferred to someone who will outlive both of the parties plus 21 years and that the interest will not vest. Put another way, there is no guarantee or requirement that the executor, administrator, successor or

assignee would exercise the option within the perpetuity period, therefore, the agreement would violate the rule against perpetuities. By contrast, if the agreement was not transferable then it would have to be exercised within the lifetimes of the contracting parties, i.e. within the perpetuity period. However, there is nothing on the record to suggest that the agreement was limited to the two parties. There is no evidence to rebut the general rule that contingent interests are transmissible.

[56] Thus, regardless of how the perpetuities period is calculated, the agreement violates the rule because it is possible that it will vest outside the perpetuity period, and therefore be void *ab initio*.

THE WAIT AND SEE APPROACH:

[57] The defendant Fulton argues, in the alternative, that the court should take a "wait and see" approach even though the agreement violates the rule against perpetuities. Under this approach the agreement would only be invalidated if it, in fact, was not exercised within the perpetuities period.

[58] I respectfully disagree with this approach. The defendant has cited no authority for the proposition that the wait and see approach applies in Nova Scotia. In *Politzer*, *supra*, at page 372, the Supreme Court of Canada held that there is no wait and see rule in Canada:

> Although it was very likely that the development agreement would be executed at some time within two to fifteen years from the signing of the option agreement, the rule against perpetuities is concerned with the certainty of vesting, not with the likelihood of vesting. It is elementary that in Canada there is no wait-and-see rule: the interest must be good in its creation.

[59] Thus, under the common law, as applied in Canada, there is no wait and see approach to the rule against perpetuities. With that said, I acknowledge that there have been reforms to the rule in some jurisdictions and that some of those reforms have adopted a wait and see approach. However, those reforms have been legislative and not court initiated.

CONCLUSION:

[60] An option to purchase agreement creates an equitable interest in land. That interest must vest, if it is going to vest al all, within the perpetuity period, otherwise the interest is invalid because of the rule against perpetuities.

[61] Binding Supreme Court of Canada authority states that the rule against perpetuities applies to contracts that create an interest in land, such as the agreement in the present case even though they are personal as between the parties. There is no reason not to apply these authorities to the present case.

[62] The relevant perpetuities period is 21 years from the date of the agreement because no life in being was specified by the parties. It is possible (and likely) that the option to purchase will not be exercised within this period, therefore, the rule against perpetuities applies and the agreement is void.

[63] There is no “wait and see” approach to the rule against perpetuities under the common law in Canada. Any reform towards a “wait and see” is best left to the Legislature.

[64] I grant the plaintiff's request for a declaration that the agreement between the parties is void *ab initio*.

J.