**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Chisholm v. Yuille, 2012 NSSC 297

**Date:** 20120802
**Docket:** Hfx No. 311195
**Registry:** Halifax

**Between:**

John Chisholm and Trevor Chisholm

Plaintiffs

v.

Robert Yuille and Charlene Yuille

Defendants

v.

Thomas O. Boyne

Defendant by Third Party

| | |
|---|---|
| **Judge:** | The Honourable Justice Michael J. Wood |
| **Heard:** | July 24, 2012, in Halifax, Nova Scotia |
| **Written Decision:** | August 2, 2012 |
| **Counsel:** | Amy E. MacGregor and James Green, for the plaintiffs<br>G. Michael Owen, for the defendant, Robert Yuille<br>Kevin A. MacDonald, for the defendant, Charlene Yuille<br>S. Bruce Outhouse, Q.C. (watching brief), for the third party |

**By the Court**:

## OVERVIEW

[1] There are four equal partners in Chisholm/Yuille Realty which owns properties at 339 Prince Albert Road and 2 Bartlin Road, in Dartmouth, Nova Scotia (the "Property"). The partners are John Chisholm, Trevor Chisholm, Robert Yuille and Charlene Yuille.

[2] Robert and Charlene Yuille were spouses; however, they separated in 2005 and divorce proceedings were commenced in 2008. A divorce was granted in November, 2011. Charlene is now known as Charlene Thomas, and I will refer to her as Ms. Thomas in this decision.

[3] This litigation was commenced by the Chisholms in 2009, seeking an order under the *Partition Act* severing the joint ownership of the Property and vesting title in them. They also asked the Court to determine the amount of compensation to be paid to Mr. Yuille and Ms. Thomas for their interests in the Property.

[4] Mr. Yuille did not contest the Chisholms' claim, but Ms. Thomas filed a defence, counterclaim and cross-claim. In her pleadings, she alleges that an agreement was reached in February, 2008 for Mr. Yuille to buy her interest in the Property for One Hundred and Seventy-five Thousand Dollars. Mr. Yuille denied the existence of such an agreement and joined his lawyer, Thomas O. Boyne, Q.C., as third party, seeking indemnity in the event that an agreement was found to exist.

[5] In the spring of 2012, the Chisholms and Mr. Yuille agreed to sell the Property so that it could be incorporated into a residential real estate development project. Subsequently, counsel for Mr. Yuille and Ms. Thomas began negotiations to settle this litigation and transfer Ms. Thomas' interest in the Property to Mr. Yuille.

[6] Mr. Yuille alleges that a settlement agreement was reached in May, 2012 and Ms. Thomas denies this. She says that the negotiations between counsel never came to fruition.

[7] Mr. Yuille has brought a motion pursuant to *Civil Procedure Rule 10.04* for an order enforcing the terms of the alleged settlement agreement. This is my decision on that motion.

**PROCEDURE HISTORY OF THE MOTION**

[8] In June, 2012, counsel for Mr. Yuille and for the Chisholms made requests for the hearing of two motions on an emergency basis, pursuant to *Civil Procedure Rule 28*. The motion being advanced by Mr. Yuille was for enforcement of the alleged settlement agreement. The motion of the Chisholms was also to enforce the terms of the alleged settlement, as well as for an order approving the sale of the Property and payment of the proceeds into court.

[9] After reviewing the materials filed, I was not satisfied that either motion met the requirements for an emergency hearing under *CPR 28*. After a further conference call with all counsel, I agreed to hear the motion brought by Mr. Yuille on an expedited basis, and this hearing took place July 24, 2012.

[10] Affidavits were filed by Mr. Yuille, Ms. Thomas and Trevor Chisholm, and all deponents were cross-examined at the hearing. Counsel for the third party, Mr. Boyne, observed a portion of the hearing but did not otherwise participate.

[11] At the hearing, Mr. Owen, on behalf of Mr. Yuille, made a motion to strike significant portions of the affidavit of Ms. Thomas on the basis that they were irrelevant. Ms. MacGregor, on behalf of the Chisholms, also raised concerns with respect to expressions of opinion and inclusion of hearsay in the Thomas affidavit. Mr. MacDonald, on behalf of Ms. Thomas, agreed with many of the points raised by Ms. MacGregor and suggested alternative wording for portions of the affidavit. He opposed the position put forward by Mr. Owen.

[12] After hearing from counsel, I advised that I would consider their submissions but not go through the exercise of reviewing each of the identified paragraphs in the Thomas affidavit during the hearing.

[13] I agree with Mr. Owen that significant portions of Ms. Thomas' affidavit are not relevant to the question of whether a settlement agreement was reached and should be enforced. In particular, I do not believe it is necessary to decide whether there was an earlier agreement to buy Ms. Thomas' interest for One Hundred and

Seventy-five Thousand Dollars. Similarly, her opinions with respect to the fairness of her treatment and the various offers made to her are not relevant.

[14] For purposes of this motion, I have ignored as irrelevant, paras. 9 to 12, 17, 19 to 79, 84 to 89, 93 to 95, 111 to 112, 116 to 118, 120 and 123 to 145 of Ms. Thomas' affidavit.

[15] In Mr. Yuille's notice of motion, he included requests for alternative relief under s. 4 of the *Vendors and Purchasers Act* and *Civil Procedure Rule 46.05*. These were withdrawn by Mr. Owen at the hearing, leaving the settlement agreement as the sole point of contention.

## FACTS

[16] In the notice of motion, proposed form of order, pre-hearing brief and oral submissions, counsel for Mr. Yuille says that a binding and enforceable settlement agreement was reached with Ms. Thomas on May 18, 2012. The terms of this agreement are alleged to be set out in three letters, the full text of which are as follows:

> **Correspondence from Kevin A. MacDonald to G. Michael Owen of May 14, 2012:**
>
> Further to our several without prejudice discussions and emails, I hereby confirm that my client is prepared to settle the outstanding litigation above referenced in consideration of the payment of $200,000.00 representing $175,000 towards the value of the land, and $25,000.00 towards costs, interests, disbursements and other expenses.
>
> I confirm that in exchange for this, she is prepared to have me sign an order dismissing the outstanding litigation against all parties without costs (or such other form as Mr. Yuille may require) and that the within payment is made without prejudice to Mr. (sic) Thomas' right to claim that the land was always matrimonial asset that should have been dealt with on the divorce, along with other properties. In addition, she reserves the right to so maintain in the present appeal and any re-trials or other hearings that may flow therefrom, and any other collateral proceedings that may be required, arising from those circumstances.
>
> My client is prepared to sign off on any deeds or documentation necessary to effect the transfer of the land to whatever party stipulated by Mr. Yuille in

consideration of all the aforegoing and such payment will constitute a partial release, to the extent of the payment but without prejudice to Ms. Thomas' matrimonial claim as set out above.

I trust this is acceptable, but if you have any questions or concerns, please do not hesitate to contact me.

**Correspondence from G. Michael Owen to Kevin A. MacDonald of May 15, 2012**:

Thank you for your correspondence of May 14th, 2012 with respect to the above matter.

I have reviewed your correspondence with Mr. Yuille, in particular the second paragraph. There needs to be more clarity with respect to the second paragraph such that it can be reduced to an order or an agreement. Upon reading the second paragraph and based upon our previous discussions it is my understanding that:

- Upon payment of $200,000.00 by Mr. Yuille:

    i) you shall consent to an order dismissing the litigation against all parties without costs (or such other form of order as Mr. Yuille may require).

    ii) That the agreement and dismissal order arising from the agreement shall not prejudice our respective clients' position in any other litigation. The agreement and the dismissal order cannot be used by our respective clients to prevent a claim or prevent a defence being put forth by our respective clients. In short, the agreement and consent order cannot be used as the basis of any estoppel argument to prevent a claim or prevent a defence to a claim advanced by our respective clients in any litigation between the parties or associated litigation;

    iii) That neither party may raise the agreement or consent order in the divorce appeal (C.A. No. 390815) currently before the Court of Appeal.

iv) Should Ms. Thomas's (Yuille's) appeal be successful the agreement is without prejudice to Ms. Thomas's claim that the land was a matrimonial asset and should be dealt with on that basis along with the other properties and, Mr. Yuille shall have the right to claim the land in question and other properties were and are business assets (not matrimonial).

v) that should Ms. Thomas's (Yuille's) appeal not be successful the proposed agreement/order will not effect Mr. Yuille's right to rely on the corollary relief judgment in any future litigation between the parties, i.e., Mr. Yuille shall have every right to rely upon the corollary relief judgment in any proceedings between Mr. (sic) Thomas (Yuille) and Mr. Yuille.

In summary, the agreement and order cannot be used by either party to restrict a party's claim or to restrict a party's full answer and defence to any claim advanced.

Mr. Yuille advises that he has the funds.

Ms. Thomas (Yuille), as you stated, will of course sign such documents as are necessary to effect the transfer of the land as stipulated by Mr. Yuille, as per your letter and will assign her interest in Chisholm/Yuille to Mr. Yuille.

I would ask you to prepare a draft agreement and forward same as soon as possible.

**Correspondence from Kevin A. MacDonald to G. Michael Owen - May 18, 2012**:

I acknowledge with thanks your without prejudice letter of May 15, 2012 in follow up to my letter of May 14, 2012.

I have reviewed this matter in detail with Ms. Thomas and we are agreeable, subject to the following clarifications arising from my letter of May 14, 2012 and your letter of May 15, 2012. I would kindly ask that you circulate the form of Order and Agreement and documents required to be signed by Mr. Yuille for final review and will have this effected early next week.

I confirm that, in relation to the amount of payment, $175,000.00 relates to consideration for the transfer of the land and the balance of $25,000.00 relates to disbursements, interest and costs. We will consent to an Order dismissing litigation against all parties without costs on the understanding that all claims against Ms. Thomas are also being dismissed and a mutual release will be signed as between her and the Chisholms and Bob confirming that the litigation resolved, subject to the within Agreement between Mr. Yuille and Ms. Thomas (which has no bearing on the Chisholms), and the balance of the terms set out in your letter of May 15, 2012, mainly bulleted points 2, 3, 4, and 5.

I confirm that you will forward the funds, together with the documents to be agreed, and I will hold the funds in escrow pending execution of the required documents.

I trust this is satisfactory for now.

[17] On May 24, 2012, Mr. MacDonald sent a draft Agreement and Release to Mr. Owen, which attached the three letters. The Agreement was to be signed by Mr. Yuille and Ms. Thomas, and provided as follows:

**Agreement and Release**

1. We, Charlene Thomas (Yuille) and Robert Yuille do hereby agree to resolve the above styled litigation based on the terms and condition set out in the correspondence between our Lawyers dated May 14, 15 & 18th and attached hereto as Schedule "A" hereto and adopted by incorporation and Reference.

2. The Parties confirm and acknowledge that the within Agreement constitutes the Full Agreement between them on these issues and also amounts to a Full and Binding Final Release (which Binds them and their Heirs and Assigns) to the extent so acknowledged herein and in consideration of the payment ($175,000.00 allocated as the consideration for the Land Transfer to Robert Yuille by Charlene Thomas (Yuille) and $25,000 Costs & Disbursements).

3. All Parties (including the Chisholms) agree that they have no further right of action nor any right to bring action against anyone who may claim contribution, indemnity, or setoff from claim on the that all parties are release any claims to right to from Charlene Thomas (Yuille).

> 4. The Parties acknowledge they had the opportunity to seek independent legal advise and make this Agreement voluntarily, knowing the full scope adn(sic) effect as set-out herein.

[18] On June 1, 2012, Mr. Owen sent a package of documents to Mr. MacDonald, which included:

1) Deed to be executed by Ms. Thomas.

2) Documents to be signed by Ms. Thomas relating to migration under the *Land Registration Act*.

3) Transfer of partnership interest.

4) Consent order dismissing the proceedings without costs signed by Ms. MacGregor and Mr. Owen.

5) Release signed by Mr. Yuille.

[19] Mr. Owen's letter also enclosed a bank draft in the amount of Two Hundred Thousand Dollars and an agreement to be signed by Ms. Thomas (Mr. Yuille had already signed it) which provided as follows:

> RECITALS
>
> WHEREAS Charlene and Robert are parties to proceedings in the Supreme Court of Nova Scotia having prothonotary's file number Hfx. No. 311195;
>
> AND WHEREAS the subject matter of the litigation are lands having civic address 339 Prince Albert Road and 2 Bartlin Road, both in Dartmouth, in the Halifax Regional Municipality, Province of Nova Scotia, more particularly described in Schedule 'A' attached hereto and hereinafter simply referred to as the 'Lands' which are also known as the Chisholm/Yuille Realty properties;
>
> AND WHEREAS Charlene and Robert have reached an agreement with respect to proceedings having number Hfx. No. 311195;
>
> AND WHEREAS Charlene is aware the Lands (Chisholm/Yuille Realty properties) shall be sold or otherwise conveyed by Robert and partners to a third party for future development;

The parties hereto covenant and agree with each other under seal and for good and valuable consideration agree as follows:

1. Robert shall pay Charlene the sum of One Hundred Seventy-Five Thousand Dollars ($175,000.00) as consideration for Charlene to convey by way of a Warranty Deed all of Charlene's title and interest in the Lands to Robert;

2. Robert shall further pay Charlene the sum of Twenty-five Thousand Dollars ($25,000.00) as full satisfaction of all costs, disbursements, interest and all other claims Charlene has sought in proceeding Hfx. No. 311195 against Robert;

3. That the funds payable to Charlene by Robert pursuant to clauses 1 and 2 of this Agreement shall be payable by way of a chartered bank draft payable to Crowe Dillon Robinson in Trust in the total amount of Two Hundred Thousand Dollars ($200,000.00) hereinafter referred to as the Funds;

4. That Charlene shall execute and deliver the Warranty Deed and such other documents as are necessary to migrate the title of the Lands to the Land Registry System and as are necessary to convey the Lands to Robert upon payment of the funds to Crowe Dillon Robinson in Trust;

5. That Charlene and Robert covenant and agree, one with the other, that each of them shall execute and deliver all such necessary documents as are required for Charlene's interest in a partnership known as Chisholm/Yuille Realty to be conveyed to Robert including but not limited to:

    i) transfer of partnership interest;

    ii) release of Charlene's interest in Chisholm/Yuille Realty;

    iii) release releasing Charlene of all past, present and future obligations in Chisholm/Yuille Realty;

    iv) notice of change in partners under the *Partnerships Registration Names Registration Act* and such other applicable legislation;

6. Charlene and Robert (or the parties' respective counsel) shall consent to an order dismissing the litigation without costs involving John Chisholm, Trevor Chisholm, Charlene Yuille (Thomas) and Robert Yuille inclusive of all claims, counter-claims and cross-claims in proceeding Hfx. No. 311195;

7. That this agreement and dismissal order arising from this agreement shall not prejudice the parties' position in any other litigation. This agreement and the dismissal order cannot be used by the parties to prevent a claim or prevent a defence being put forth by the parties. This agreement and consent order cannot be used as the basis of any estoppel argument to prevent a claim or prevent a defence to a claim advanced by the respective parties in any litigation between the parties or associated litigation except as specifically stated herein;

8. The parties shall not use, attempt to introduce or otherwise raise this Agreement, aspects thereof or the associated consent order in the parties' divorce appeal proceedings (CA No. 390815) currently before the Nova Scotia Court of Appeal;

9. Should Ms. Thomas's (Yuille's) appeal be successful and the divorce matter is returned to the Nova Scotia Supreme Court for a re-trial or a re-trial is ordered this Agreement is without prejudice to Ms. Thomas's claim that the Lands (or the moneys arising from the sale of the Lands/properties) was a matrimonial asset and should be dealt with on that basis along with the other properties (or the moneys arising from the sale of the Lands/properties) and, Mr. Yuille shall have the right to claim the Lands in question and other properties (or the monies arising from the sale of the Lands/properties) were and are business assets (not matrimonial);

10. That should Ms. Thomas's (Yuille's) appeal not be successful and the divorce matter is not returned to the Nova Scotia Supreme Court for a re-trial or a re-trial is not ordered this agreement/and associated consent order shall not effect Mr. Yuille's right to rely on the corollary relief judgment issued in the parties' divorce proceedings 1201-062404 (56923) in any future litigation between the parties. Mr. Yuille shall have every right to rely upon the corollary relief judgment in any proceedings between Ms. Thomas (Yuille) and Mr. Yuille;

11. Charlene and Robert covenant and agree, one with the other, to execute all such further documents and do all such acts so as to give full force and effect to this Agreement.

12. The parties covenant and agree that this Agreement shall be binding upon the parties heirs, successors and assigns.

13. The parties acknowledge that each of the parties herein has had the benefit of independent legal advice.

[20] On June 5, 2012, Ms. MacGregor sent Mr. MacDonald a release signed by John Chisholm, Trevor Chisholm and Robert Yuille.

[21] On June 8, 2012, Mr. MacDonald sent the following letter to Mr. Owen and copied it to Ms. MacGregor and Mr. Outhouse (counsel to Mr. Boyne).

> I acknowledge, with thanks, your couriered package of June 1, 2012 and our several conversations and emails since.
>
> I confirm that I have now had an opportunity to review this matter in its entirety with Ms. Thomas (Yuille) and based on her review and the concerns that she has arising from the documentation that has been presented, she is not prepared to accept the offer that has been put forward in various forms and subject to various discussions.
>
> When Mr. Yuille originally pressured her into agreeing to a sale of her interest to him ($175,000), it was on his representations as to what lands were included.
>
> Now that she has had a chance to look at the Deed that you propose, along with the partnership agreement, etc. and as result of a search that I have done, she is determined that once more she has been misled as to what was under discussion.
>
> In any event, as you are aware, it is Ms. Thomas' position that Mr. Yuille did not even honour the original agreement as she was not maintained as an employee at Yuille Auto at her existing salary, nor did he cooperate in terms of the divorce (just the opposite).
>
> In the result, Ms. Thomas is not prepared to settle save and except by payment of the full amount for her one quarter interest in the lands without prejudice to her rights in relation to the present appeal or fresh action(s) that will be commenced.
>
> In particular, her wrongful dismissal claim against Yuille Auto and claims against Mr. Yuille for Tortious Interference and Intentional Infliction of Nervous Shock and Intimidation, which claims have not yet been advanced, nor adjudicated upon.

Therefore, I will be amending the present Action (to claim dissolution of the partnership and partition of the properties) and issuing fresh pleadings to deal with the balance of the outstanding claims.

Please advise whether or not you have authority to accept service of those claims as they relate to Yuille Auto and Mr. Yuille.

Additionally, I anticipate taking over conduct of the outstanding appeal and making an application to rely upon fresh evidence in that context.

As you can appreciate, given that it is Ms. Thomas' position that she has been taken advantage of by Mr. Yuille at every turn by bring (sic) misled as to the state of affairs leading to settlements that may or may not have been affected by various counsel, and given the fresh causes of action that we will be asserting, and given your statement that your client proposes to try to insist that there has been a settlement here, it is obvious to me that this matter (with all of its complexities and twists and turns) will take a significant amount of time to work its way through the Courts.

In light of all of that, and given that I now have a sense of what my client will be entitled to an overall basis, I am not opposed to a medication/binding arbitration process utilizing Mr. Craig Garson, Q.C.

I make this offer solely on the understanding that your client, if agreeable to this process, would agree to pay the upfront costs at the time they are incurred to be deducted from the amount otherwise determined by settlement or the binding decision of Mr. Garson, Q.C.

I would only be agreeable to this if all claims as presently outstanding as alleged or otherwise are dealt with. This would include Ms. Thomas' matrimonial claims that are under appeal, her 1/4 interest in Chisholm Yuille Realty, what she would be entitled to by way of damages in tort against Mr. Yuille and Yuille Auto.

In light of the foregoing, and given that Ms. MacGregor kindly forwarded to me original documentation, I am advising her of my instructions and returning the release that she forwarded to me to be held in escrow. I am copying Bruce Outhouse, Q.C. as a courtesy too, as these decisions bear on his client as well.

I trust my client's position in all of the above matters is clear, but if there are any questions or concerns that I may clarify, please do not hesitate to contact me.

> In the meantime, I look forward to hearing from you as to whether or not your client would be agreeable to the suggested mediation/binding arbitration to bring all of the outstanding and pending matters to a conclusion.

[22] This letter carries the heading "Without Prejudice", although it is attached to the affidavits filed by each of the parties and no counsel took issue with its inclusion in the documents. It is clear from its contents that the letter is not part of on-going negotiations towards settlement, but rather a disclaimer that any settlement had been reached.

## POSITIONS OF THE PARTIES

### Yuille and Chisholm

[23] Mr. Owen, on behalf of Mr. Yuille, submits that this motion raises a narrow issue and that is whether a settlement agreement was reached through the exchange of letters between counsel on May 14, 15 and 18, 2012. He also says that the correspondence clearly sets out a concluded agreement and contains all of the essential terms.

[24] Ms. MacGregor, on behalf of the Chisholms, supports Mr. Owens' submissions.

### Thomas

[25] Mr. MacDonald submits that there never was a concluded agreement, because not all of the required terms were settled on May 18, 2012 or at any time thereafter. The negotiations were simply never concluded.

[26] Mr. MacDonald goes on to say that if an agreement was reached, it was simply an agreement to agree and, therefore, not enforceable.

[27] Alternatively, Mr. MacDonald argues that the alleged agreement was for the sale of land and does not satisfy the *Statute of Frauds* which requires that such a contract be in writing and signed by the party to be bound.

[28] Finally, Mr. MacDonald says that the alleged agreement ought to be set aside on the basis of duress or unconscionable conduct, or should not be enforced

due to the lack of evidence indicating that damages would not be an adequate remedy.

## ISSUES

[29] There are two issues:

1) Did the parties reach an agreement to settle this litigation and, if so, on what terms?

2) If a settlement agreement was reached, should the Court enforce it?

## ANALYSIS

### Did the parties reach an agreement to settle this litigation and, if so, on what terms?

[30] The evidence indicates that the acquisition of Ms. Thomas' interest in the property had been a matter of discussion for several years. In fact, this proceeding itself includes a claim by Ms. Thomas that Mr. Yuille had agreed to purchase her interest in February, 2008.

[31] Discussions between counsel for Ms. Thomas and Mr. Yuille with respect to the potential settlement of the litigation took place over a number of weeks in April and May, 2012.

[32] In his letter of May 14, 2012, Mr. MacDonald presented an offer on behalf of Ms. Thomas to settle the litigation on the following terms:

1) Payment of $200,000.00 to Ms. Thomas, consisting of $175,000.00 for her interest in the Property and $25,000.00 for costs.

2) Dismissal of the claims in the litigation without costs to any party.

3) Ms. Thomas would sign "any deeds or documentation" required to effect transfer of the Property.

4) The settlement would be without prejudice to Ms. Thomas' right to claim that the Property was a matrimonial asset in the divorce proceeding.

[33] On May 15, Mr. Owen responded on behalf of Mr. Yuille, requesting clarification of the offer and reciting his understanding that upon payment of the $200,000.00 Ms. Thomas would:

(i) Authorize Mr. MacDonald to execute the consent dismissal order.

(ii) Sign the necessary documents to transfer the Property and her interest in the Chisholm/Yuille partnership.

[34] Mr. Owen confirmed that the agreement and dismissal order would be without prejudice to either party's position in any other litigation, and that these documents could not be raised in the current appeal in the divorce proceeding. He requested that Mr. MacDonald prepare a draft agreement.

[35] By letter dated May 18, 2012, Mr. MacDonald confirmed Ms. Thomas' agreement "subject to clarification". He repeated the breakdown of the $200,000.00 payment referred to in his letter of May 14. He confirmed that he would sign a consent dismissal order and that a mutual release would be signed among all parties confirming that the litigation was resolved. He requested that Mr. Owen circulate the order, agreement and documents for final review.

[36] It is clear from this correspondence that a consensus had developed between Mr. Owen and Mr. MacDonald with respect to the basis on which the dispute between Ms. Thomas and Mr. Yuille would be resolved. She was to receive $200,000.00 allocated as indicated by Mr. MacDonald in exchange for transferring her interest in the Property and the partnership. The litigation would be dismissed without costs to any party, and this would include mutual releases. Finally, this resolution would not affect any of the issues in the divorce proceeding and, in particular, Ms. Thomas' claim that the Property was a matrimonial asset.

[37] The question for determination is whether this consensus is sufficient to give rise to a binding and enforceable agreement. Mr. MacDonald says that it does not for a number of reasons. First, is the necessity for further documentation and, in particular, the agreement referenced in the correspondence. In addition, he says

that essential terms were missing, including a closing date and provisions relating to migration of the Property, closing adjustments, etc. He also says that without participation of counsel for the Chisholms, there could be no agreement to settle the litigation.

[38] Whether the parties entered into an enforceable contract or simply an agreement to agree will depend upon the Court's assessment of their mutual intent. The basic principle is summarized by Geoff R. Hall in *Canadian Contractual Interpretation Law,* (2nd ed.) (LexisNexis, 2012) at p. 164:

> There is no enforceable contract if it is the intention of the parties not to be bound until a formal contract document is executed. The parties' intention in this regard is a question of contractual interpretation. The issue is whether the execution of a formal contract document is a condition or term of the bargain (in which case there is no enforceable contract either because the condition is unfulfilled or because a contract to enter into a contract is unenforceable), or whether it evinces the parties' desire as to the manner in which a transaction which is already agreed will proceed (in which case there is an enforceable contract).

[39] The Nova Scotia Court of Appeal had occasion to consider this issue in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al.*, 2000 NSCA 95 involving a memorandum of understanding negotiated to resolve a disagreement over compensation to be paid on a large and complex construction project. The memorandum was negotiated in the middle of the project and set out a number of points of agreement. The document concluded with the following provision:

> No time has been set for the completion of the necessary contract review and preparation of the change order to accomplish this memorandum of understanding. However, both parties agreed to do their best to develop a suitable change order in a timely fashion.

[40] The issue for determination was whether this memorandum created a binding contract. Writing for the Court, Cromwell, J.A. (as he then was) set out the principles as follows:

> [67] An agreement is not incomplete simply because it calls for some further agreement between the parties (H. G. Beale et al., **Chitty on Contracts** (28th ed. 1999) at 2-119) or because it provides for the execution of a further formal document (G. H. Trietel, **The Law of Contract, supra** at 51 - 2). The question is whether the further agreement or documentation is a condition of the bargain, or

> whether it is simply an indication of the manner in which the contract already made will be implemented. This is a matter of the proper construction of the agreement: see **Calvan Consolidated Oil & Gas Co. Ltd. v. Manning**, [1959] S.C.R. 253 at 261 citing with approval **Von Hatzfeldt-Wildenburg v. Alexander**, [1912] 1 Ch. 284 at 288 - 9; see also G. H. Trietel, **supra**, at 52. This exercise of interpretation must take account of the document as a whole as well as of the 'genesis and aim of the transaction' of which it forms part: see, for example, **Hillas & Co. Ltd. v. Arco Ltd.** (1932), 43 Lloyd's L. Rep. 359 (H.L.) per Lord Wright at 368 and I. N. Duncan Wallace, **Hudson's Building and Engineering Contracts** (11th ed. 1995) at 114. As noted earlier, where, as here, the parties intended to be bound, the courts will tend to favour a construction that the agreement is not conditional.
>
> [68] The submission that the MOU was conditional on future agreements and a change order, in my view, finds no support in the text of the MOU. None of the traditional language (such as "subject to contract", or "subject to the parties reaching further agreement") was used to show the intent that the MOU was not to be binding pending the signing of further documentation.

[41] The Court concluded that, in the circumstances, the parties intended the memorandum of understanding to be binding even though a further change order was contemplated and required in order to give it effect.

[42] The Nova Scotia Court of Appeal again considered the issue in *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71. That case involved a complex arrangement for development of a real estate project. Justice Cromwell wrote on behalf of the Court and summarized the principles to be applied as follows:

> [75] Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented. Professor Waddams, in **The Law of Contracts**, 5th ed. (Toronto: Canada Law Book, 2005) puts the question well:
>
> > Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? ... [T]he test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of

> discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the latter there is none." (section 51 page 36,)

[76] This is a matter of the proper construction of the agreement, viewed as a whole and in light of its origins and purposes: **Calvan Consolidated Oil & Gas Co. Ltd. v. Manning,** [1959] S.C.R. 253 at 260-61; **Bawitko Investments Ltd. v. Kernels Popcorn Ltd.** (1991), 53 O.A.C. 314, 79 D.L.R. (4th) 97 (C.A.) at 103-04; **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co., supra** at para. 67.

. . . .

[80] The judge properly instructed himself on the law; no issue is taken with the three legal propositions he set out at para. 34 of his reasons:

> [34] I accept that the applicable law provides that there will be no binding contract when:
>
> 1. Essential provisions intended to govern the contractual relationship have not been settled or agreed upon.
>
> 2. Where the contract is too general or uncertain to be valid in itself and is dependant upon the making of a formal contract.
>
> 3. The understanding or intentions of the parties is that their legal obligations are to be deferred until a formal contract has been approved and executed.

[81] The judge did not, in my view, give any weight to the subjective intentions of the parties. He did not rely on any evidence that contradicted the express terms of the written document. He did not ignore the evidence about the conduct of the parties after the signing of the November 12th document.

[82] The judge sought, as he should, to determine from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty: see G.H.L. Fridman, **The Law of Contract in Canada**, 5th ed. (Toronto: Thomson Carswell, 2006) at p. 15. While evidence of one party's subjective intent has no independent place in this interpretative exercise, it has long been settled that whether the legal effect of a document is conditional on future agreements must be decided having regard, not only to the terms of the document, but to the "genesis and aims of the

> transaction."; **Hillas & Co., Ltd. v. Arcos, Ltd.,** [1932] All E.R. Rep. 494 (H.L.) *per* Lord Wright at 502; **Canada Square Corp. v. Services Ltd.** (1982), 34 O.R. (2d) 250 at 258.

[43] The Court of Appeal concluded that there were a number of significant issues concerning the project that had yet to be resolved and, for that reason, the preliminary memorandum was not a binding contract. The Court was influenced by the fact that shortly after the memorandum was signed, the parties began negotiating with respect to the outstanding substantive issues.

[44] In situations where it is necessary to determine whether the parties intended to create a legal relationship pending further documentation, it is appropriate to consider their behaviour subsequent to the alleged agreement. The rationale for doing so is outlined by Hall in *Canadian Contractual Interpretation Law*, *supra* at pp. 164-165:

> Whether the parties acted as if they had a binding agreement after entering into an understanding is given great weight by the courts in determining whether there is an unenforceable agreement or a binding contract. The parties' subsequent conduct transcends all three of the categories of unenforceable agreements to agree, such that conduct indicating a belief that one is bound will reinforce a conclusion that essential terms have been agreed or that the agreed terms are sufficiently certain or that there was no intention to delay the creation of binding obligations until execution of a formal contract document. As expressed in one case, where parties have "acted as if the deal were done" it is highly indicative of the fact that there was a binding contract. This approach is consistent with the principle that the parties' intentions should be given effect - it is sensible to treat parties as legally bound if they intended themselves to be - but it is somewhat inconsistent with the rather limited scope for consideration of subsequent contact in other areas of contractual interpretation, in which consideration of subsequent conduct is generally limited to cases of ambiguity in the written contract.

[45] In applying these principles to the present situation, I will first consider whether, on an objective analysis, the parties intended to create a legally binding agreement through the exchange of correspondence in May, 2012. I note the absence of any express language in the letters deferring the imposition of legal liability to a future date. Terms such as "subject to contract" are nowhere to be found. The future documentation contemplated is easy to identify and essentially administrative in nature. Deeds, releases and consent dismissal orders are not documents on which one would anticipate significant disagreement or negotiation.

[46] It is true that Mr. Owen's letter of May 15 and Mr. MacDonald's of May 18 both refer to preparation of an agreement, however neither specifies the purpose for that document. If it was simply intended to provide a more formal record of the agreement reached, then it is not likely that the parties expected to defer creation of legal obligations until it was signed. In reviewing the letters, I am satisfied that the proper interpretation is that the parties wanted to create a binding settlement agreement by the exchange of letters. Any future documents were intended to implement and record the arrangement. I find support in this position by examining the draft documents prepared by Messrs. Owen and MacDonald. In both cases, the agreements do not add any new terms, although they do provide some additional detail and clarification. Both are attempts to record the terms of a preexisting agreement.

[47] Before concluding my analysis on whether a binding settlement agreement was reached, I must consider Mr. MacDonald's submissions concerning the absence of essential terms and the lack of involvement of counsel for the Chisholms.

[48] A determination that the parties intended to create legal relations affects the assessment of what terms should be considered essential to the agreement. This interpretive approach is discussed at paras. 63 and 64 of the *Mitsui & Co. (Point Aconi) Ltd.* decision:

> [63] The parties' intention to create legal obligations is also relevant to the question of certainty. As stated by Lord Wright in **Scammell v. Ouston, supra**, the court, if satisfied that the intention to contract existed, will do its best to give effect to that intention.
>
> [64] The same principle applies to the issue of completeness. To be enforceable, an agreement must contain all essential terms. The determination of what terms are essential, however, varies with the nature of the transaction and the context in which the agreement is made. As Morden, J.A. said in **Canada Square Corp. et al. VS Services Ltd. et al.** (1981), 34 O.R. (2d) 250 (C.A.) at 262, where the parties intended to create a binding relationship and were represented by experienced businessmen, ".. a court should not be too astute to hold that thee is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

[49] In this case, Mr. MacDonald suggests that the settlement agreement should be treated as an agreement of purchase and sale for real estate, and that responsibility for migration of the Property and closing adjustments are essential terms to be included. I do not agree that the settlement agreement should be viewed as an agreement of purchase and sale for land but, even if it is, the terms identified by Mr. MacDonald are not essential. It is true that most transaction agreements allocate responsibility for migration and provide for adjustments such as taxes on closing. These are purely matters of negotiation and agreement and are not essential to completion of the conveyance. The absence of such provisions will in no way impede the parties' ability to complete the terms of settlement.

[50] Ms. Thomas had already agreed to sign any necessary documents to complete the transaction which would include, in my view, documents such as the necessary consent to migration under the *Land Registration Act*.

[51] Mr. MacDonald also says that a specific "closing date" is essential and its absence makes the agreement unenforceable. That may be true in the context of a formal agreement of purchase and sale for real estate; however, we are dealing with a settlement agreement negotiated by correspondence between counsel. In keeping with the principles outlined by the Court of Appeal, I need to determine whether this is an essential term in light of the nature of the agreement and the context in which it was made.

[52] I can take judicial notice of the fact that most agreements settling litigation are negotiated between counsel, and are frequently documented by an exchange of correspondence. Such agreements are sometimes reached on the eve of court hearings and in circumstances where the parties are not in a position to know with certainty when the terms of settlement will be completed. For example, it may not be clear how quickly the settlement funds can be paid or a release signed.

[53] Settlement is one of the underlying objectives of the *Civil Procedure Rules* and our judicial system generally. To suggest that agreements negotiated between counsel are not enforceable simply because a date for completion of the terms of settlement is not specified would be inconsistent with those objectives and contrary to public policy.

[54] In the present case, I am satisfied that the proper interpretation of the agreement between the parties is that the settlement funds were to be paid to

counsel for Ms. Thomas as quickly as possible, to be held in escrow pending the execution of the transfer documents, consent dismissal order and releases. This process was to be completed within a reasonable period of time. I do not find the absence of the specific closing date renders the settlement reached unenforceable.

[55] The final issue concerning whether a binding agreement came into existence is the lack of participation of counsel for the Chisholms. Mr. MacDonald submits that there could be no agreement to settle the litigation without participation of the Chisholms as they were the plaintiffs. I would note that the settlement correspondence was initiated by a letter from Mr. MacDonald to Mr. Owen of May 14, 2012. It was not addressed to counsel for the Chisholms, nor copied to her, although it did propose settlement of the entire litigation.

[56] My interpretation of the agreement is that neither Mr. MacDonald nor Mr. Owen considered the Chisholms essential parties, although it was recognized that they would have to agree to dismissal of the proceeding without costs and sign a release. It is important to remember the context of the agreement which was that the Chisholms and Mr. Yuille had already agreed to sell the Property for development purposes. It was clearly in all of their interests that Mr. Yuille succeed in obtaining a conveyance from Ms. Thomas in order to complete that transaction.

[57] In my view, Ms. Thomas and Mr. Yuille understood and agreed that the consent of the Chisholms would be needed in order to complete the settlement, and that Mr. Yuille would be responsible for obtaining it. Although this would be a condition precedent to completion of the settlement terms, the lack of their participation as parties in the first instance does not mean that the agreement otherwise reached was unenforceable.

[58] In summary, I am satisfied that a binding settlement agreement was reached between Ms. Thomas and Mr. Yuille by the exchange of correspondence between counsel in May, 2012. In coming to this conclusion, I have considered the language used in that correspondence, the context of the agreement and the subsequent conduct of the parties.

**If a settlement agreement was reached, should the Court enforce it?**

[59] Having determined that the exchange of correspondence in May, 2012 created a binding settlement agreement, I must consider the other arguments presented on behalf of Ms. Thomas as to why it should not be enforced. In his pre-hearing brief, counsel for Ms. Thomas described the issues for consideration as follows:

> 1) Has the applicant met the burden of proving that this case falls outside the *Statute of Frauds*?
>
> 2) If so, or in any event, is the land so unique as to entitle the applicants to specific performance?
>
> 3) Are solicitor and client costs warranted?

[60] In addition, during oral submissions, counsel for Ms. Thomas suggested that any agreement should not be enforced on the basis that it was "improvident" or was entered into under duress. It appeared from counsel's submissions that Ms. Thomas alleges that she entered into an unfair deal as a result of pressure put on her by Mr. Yuille.

[61] I will consider each of the arguments advanced on behalf of Ms. Thomas.

**STATUTE OF FRAUDS**

[62] The relevant provision of the *Statute of Frauds*, R.S.N.S. 1989, c. 442 is s. 7(d) which provides as follows:

> **7** No action shall be brought
>
> . . . .
>
> (d) upon any contract or sale of land or any interest therein; or
>
> . . . .

> unless the promise, agreement or contract upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person sought to be charged therewith or by some other person thereunto by him lawfully authorized.

[63] Ms. Thomas submits that the May letters do not amount to a sufficient note or memorandum of the agreement and also says that none of them were signed by her.

[64] With respect to the first portion of Ms. Thomas' argument, I have already concluded that the exchange of letters creates a binding settlement agreement. They contain the essential terms of the contract and this satisfies the requirement for a written memorandum or a note.

[65] What is sufficient to satisfy the requirement for signing was discussed by S. M. Waddams in *The Law of Contracts*, (5th ed.) (Canada Law Book, 2005) at p. 165:

> The statute also requires that the memorandum be signed. This stipulation has been interpreted liberally by the courts. Only the person sued on the contract need have signed the note. A name printed on top of an invoice or written as a letter heading may be sufficient signature. In *Leeman v. Stocks*, the defendant instructed an auctioneer to offer his house for sale. Before the sale, the auctioneer partially filled in the printed form by inserting the defendant's name as vendor. The plaintiff signed the agreement but the defendant did not. It was held that the insertion of the defendant's name by his agent was a sufficient signature.

[66] In this case, the correspondence was signed by counsel for Ms. Thomas. In her cross-examination, Ms. Thomas confirmed that Mr. MacDonald was authorized to send these letters on her behalf. As a result, he had both the express and implied authority of Ms. Thomas to do so.

[67] Assuming that the settlement agreement could be characterized as a contract for the sale of land, I am satisfied that the requirements under the *Statute of Frauds* for a written memorandum signed by or on behalf of the party has been met in this case.

**DURESS AND UNCONSCIONABLE DEALINGS**

[68] I am not aware of any principle which would allow a party to set aside a contract simply because it was improvident or unfair. I interpret the submissions made orally on behalf of Ms. Thomas to suggest that she was subject to some sort of pressure brought to bear by Mr. Yuille. If there is any basis to this allegation, it would fall within the scope of the doctrines of duress and unconscionable dealings.

[69] The applicable principles were discussed in detail by Nelson Enonchong in *Duress, Undue Influence and Unconscionable Dealing*, (Sweet and Maxwell, 2006). Professor Enonchong outlines the underlying rationale for a defence of duress at p. 9:

> **Rationale.** The rationale for relief on the ground of duress is that the apparent consent of the victim was induced by pressure which the law does not regard as legitimate with the consequence that the consent is treated in law as revocable. It is a rationale similar to that which underlies relief on the ground of undue influence. Duress is not based on the idea that the party seeking to void the contract which he entered into did not know the nature or precise terms of the contract at the time he entered into it, as is the case with relief on the ground of *non est factum*. Very often the party under duress knows what he is doing. And, as discussed below, relief on the ground of duress is not based on the notion that duress destroys the will. Duress does not destroy the will of the contracting party; it deflects it.

[70] With respect to an allegation of unconscionable dealings, he set out the following three prerequisites at p. 240:

> **Three prerequisites.** The authorities indicate that for a transaction to be set aside on the ground of unconscionable dealing three requirements must be satisfied (i) the party seek relief must have been under some special disadvantage or disability (such as poverty or ignorance), (ii) the stronger party must have acted in a way which is unconscientious in taking advantage of the weaker party's disability (that is to say, there must be impropriety in the defendant's conduct) and (iii) there must be a significant imbalance in the substance of the transaction to the disadvantage of the weaker party...

[71] I have carefully reviewed the affidavit of Ms. Thomas with these principles in mind. The affidavit does not contain any assertions that Ms. Thomas was subject to any pressure or influence by Mr. Yuille, or any other party to the

litigation, over the months leading up to the settlement correspondence in May, 2012. The first reference to any pressure being put on her in 2012 is found in para. 109 of the affidavit, which reads as follows:

> 109. The pressure exerted by Mr. Owen to settle this matter can be seen in numerous e-mails and documents he sent and the involvement of Ms. MacGregor, also sending over releases to Mr. MacDonald, to have me sign as soon as possible. True copies of which are attached as Exhibit "P" hereto.

[72] The documents at exhibit P consist of e-mails sent between May 17 and June 1, 2012 directed towards implementation of the settlement agreement. There is simply no factual basis for an allegation of duress or unconscionable dealings which would undermine the negotiations or the agreement itself.

[73] As final matter, I would note that the essential terms of the settlement agreement are found in Mr. MacDonald's initial letter of May 14, 2012. It is difficult to see how a party can complain about the fairness of an agreement when the terms were first proposed by their own legal counsel.

## SPECIFIC PERFORMANCE

[74] Ms. Thomas suggests that the order sought by Mr. Yuille is essentially for the equitable remedy of specific performance. She submits that it should only be granted where the party seeking the order has satisfied the court that damages are not a satisfactory alternative.

[75] This motion is brought pursuant to *Civil Procedure Rule 10.04* which provides, in part:

> **Enforcement of settlement agreement or arbitration award**
>
> **10.04** (1) A party who alleges that, after a proceeding was started, the parties reached agreement for settlement of the proceeding or of a claim in the proceeding may make a motion for an order giving effect to the agreement.
>
> (2) The judge who hears the motion may do any of the following:

> (a) declare that an agreement was, or was not, made and is, or is not, enforceable;
>
> (b) declare the terms of an agreement;
>
> (c) grant an order enforcing an agreement according to its terms;
>
> (d) order a trial under Rule 4 - Action or a hearing under Rule 5, Application and give directions about the issues to be determined.

[76] In my view, enforcement of a settlement agreement under this provision of the *Civil Procedure Rules* is not the same as seeking an order for specific performance. The court may well decide to apply different considerations when enforcement of a settlement agreement is at issue.

[77] In this case, I believe it is premature to consider granting an enforcement order under *CPR 10.04(2)(c)*. The primary issue in dispute on the motion was whether the exchange of correspondence between counsel gave rise to a binding and enforceable agreement. I have concluded that it does and will issue a declaration to that effect as contemplated by *CPR 10.04(2)(a)* and *(b)*. At this point, I have no evidence to indicate that Ms. Thomas will not abide by the terms of the settlement agreement as determined by the Court.

**CONCLUSION**

[78] For the reasons outlined above, I am satisfied that a binding and enforceable settlement agreement was entered into between Ms. Thomas and Mr. Yuille on the following terms:

1) Payment to Ms. Thomas of $200,000.00, with $175,000.00 allocated to her interest in the Property and $25,000.00 to her costs and expenses.

2) This litigation will be dismissed without costs to either party.

3) Ms. Thomas will exchange mutual releases with Mr. Yuille and the Chisholms.

4) Ms. Thomas will execute any necessary documents to convey her interest in the Property and the Chisholm/Yuille Realty partnership to Mr. Yuille.

5) Completion of the settlement will take place within a reasonable period of time. Ms. Thomas will provide the executed transfer documents, release and consent dismissal order promptly upon receipt by her or her counsel of the $200,000.00 payment and releases from Mr. Yuille and the Chisholms.

[79] I will retain jurisdiction to hear a further motion for an enforcement order pursuant to *Rule 10.04(2)(c*) in the event that any party fails to complete their obligations under the agreement.

[80] If the parties cannot resolve the issue of the costs of this motion, I am prepared to receive written submissions from them.

**Wood, J.**