SUPREME COURT OF NOVA SCOTIA

Citation: Doucette v. Dauphinee and Mulder, 2022 NSSC 268

Date: 20220524
Docket: Syd. No. 416222
Registry: Sydney

Between:

Richard Doucette

Plaintiff

v.

Allan Dauphinee and Corneilia Mulder

Defendants

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	August 26, August 27, September 7, September 8, October 5, and October 22, 2021, in Sydney, Nova Scotia
Written Decision:	May 24, 2022
Subject:	Property (real estate) Matter, Statute of Frauds of Nova Scotia, *R.S., c. 442, s. 1.*, Doctrine of part performance.
Facts:	[1] This is a dispute about the ownership of land located at 38845 Cabot Trail, Ingonish Ferry, Nova Scotia (3 parcels). The property was purchased on November 1, 2018. The Deed was placed in the names of the Defendants, Allan Dauphinee and Corneilia Mulder. [2] The Plaintiff, Richard Doucette, claimed 50% ownership of the lands with the Defendants owning the other 50% interest in title to the lands. [3] The Plaintiff argued he had a verbal agreement with the Defendants to purchase a one- half undivided interest in the lands with them owning the other undivided half interest. This required him to pay one half the ongoing expenses relating to the ownership, including his one-half of the mortgage payment monthly. [4] The Plaintiff claimed the Defendants wrongfully terminated the verbal agreement between the parties, which agreement, he says, is

exempted from the *Statute of Frauds* due to "part performance" by him throughout the transaction. The Plaintiff argued, according to law, the agreement did not have to be in writing.

[5] The Defendants submit they were told by the Plaintiff that he would obtain mortgage financing for his share, and this was their understanding right up to the closing. After the closing they learned from him that, "no bank would touch him".

[6] The Defendants state when they learned this, they could not continue to be liable for the mortgage and other expenses without the Plaintiff assuming his share of the risk. The Defendants claim they lost trust in Mr. Doucette as a partner and had no choice but to return the deposit and down payment to him.

Issue: What were the terms of that agreement and whether those terms were breached, resulting in a remedy being available to the Plaintiff.?

Result: [7] The Court found the agreement was unenforceable by the Plaintiff , but also found retention of the property by the Defendants, without some recognition of the services provided by the Plaintiff, would be unjust.

[8] The Court awarded the Plaintiff the sum of $50,000 ($150,000 x 33%) on a quantum meruit basis.

[9] The Court concluded:

1. The action by the Plaintiff against the Defendants is dismissed.
2. The Plaintiff is awarded the sum of $50,000 on a quantum meruit basis.
3. My decision on costs is reserved.

Caselaw: ***Deglman v. Brunet Estate***, [1954] S.C.R. 725 ; ***Dartmouth (City) v. Turf Masters Landscaping Ltd.***, 1995 NSCA 108; ***Self v. Brignoli Estate***, 2012 NSSC 81; ***Steadman v. Steadman***, 1974 2 A1ll E.R. 977; ***Kang Corporation v. KRTT Group Ltd***, 2007 CanLii 13362 (OnSc).

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Counsel:	Sean MacDonald for the Plaintiff, Mr. Doucette Tony Mozvik for the Defendants, Mr. Dauphinee and Ms. Mulder

By the Court:

Introduction

[1] This is a dispute about the ownership of land located at 38845 Cabot Trail, Ingonish Ferry, Nova Scotia. The property was purchased on November 1, 2018. The Deed was placed in the names of the Defendants, Allan Dauphinee and Corneilia Mulder.

[2] The Plaintiff, Richard Doucette, claims 50% ownership of the lands with the Defendants owning the other 50% of the title to the lands.

[3] The subject land includes three (3) parcels; land located on the waterside (South Harbour); another lot on the located mountain side; a third parcel is a water lot. (the Property)

[4] A Warranty Deed was conveyed to the Purchasers for the two land parcels. A Quit Claim Deed was given for the water lot. There is an easement to a stream on the mountain side for the benefit of the land on the shore.

Overview

[5] The Plaintiff contends he had a verbal agreement with the Defendants to purchase a one half undivided interest in the lands with them owning the other undivided half interest. This agreement, he says, required him to pay one half the ongoing expenses relating to the ownership, including his half of the mortgage payment monthly.

[6] The Plaintiff claims the Defendants wrongfully terminated the verbal agreement between the parties, which agreement, he says, is exempted from the *Statute of Frauds* due to "part performance" by him throughout the transaction. Thus, he submits, according to law, the agreement did not have to be in writing.

[7] The Defendants submit they were told by the Plaintiff that he would obtain mortgage financing for his share, and this was their understanding right up to the closing. However, within a short time after the closing they learned from him that, "no bank would touch him".

[8] The Defendants state when they learned this, they could not continue to be liable for the mortgage and other expenses without the Plaintiff assuming his share of the risk. The Defendants claim they lost trust in Mr. Doucette as a partner and had no choice but to return the deposit and down payment to him.

Background

[9] In the late summer of 2018 the Property was listed by James and Sharon Gunn through Minerva MacInnis from Park Place Realty.

[10] The Plaintiff, Mr. Richard Doucette, made an offer for the Property on September 7, 2018 for $299,000.

[11] On September 10, 2018 the Plaintiff emailed his nephew, David Walker, indicating he could not afford to buy the Property himself and will need "partners or shareholders".

[12] The Plaintiff's nephew, David Walker, responded by email on September 11, 2018 indicating he was not able to be involved in the Property.

[13] On or about September 17, 2018 the Plaintiff was refused by his bank for a mortgage on the Property. Mr. Doucette owned other properties and it appeared one or more would need to be sold before he could obtain a mortgage.

[14] On September 21, 2018 a new offer is made by the Plaintiff for $289,000. This offer asked for a $10,000 reduction in the price because a new well was needed.

[15] At or about mid-September, the Defendants became involved in the negotiations for the Property by the Plaintiff. The evidence suggests the intent was for the Plaintiff and the Defendants to have a half interest in the Property.

[16] On October 3, 2018 the Plaintiff sent an email to his legal counsel, Andrew Trider, indicating the Defendants will be on the Deed and "if I can swing it I will be on for half".

[17] On October 3, 2018, Mr. Trider, by email, advised the Plaintiff he will lose his $5,000 deposit and could incur further damages if the transaction did not go through.

[18] On October 9, 2018 the Plaintiff sent an email to Jenise Walker of RBC, copied to the Defendants**,** and Mr. Trider indicating he was the "Agent" for the Defendants involving negotiations and mortgaging of the Property.

[19] On October 9, 2018 an Agreement was prepared at the direction of the Plaintiff to assign the Agreement and Purchase and Sale from him to the Defendants unconditionally.

[20] On October 11, 2018, Real Estate Agent, Minerva MacInnis, advised the Plaintiff and the Defendants that Mr. O'Leary would be preparing a new Agreement of Purchase and Sale to be signed by the Defendants as purchasers and by the Plaintiff (to transfer his deposit).

[21] The new Agreement was signed by all the parties, including Mr. Doucette on October 23, 2018.

[22] The Defendant, Cornelia Mulder, informed Mr. Doucette that the closing costs are $67,389.38 and Mr. Doucette's share would be $31,194.69, reflecting his contribution of the $5,000 toward the deposit on the Property.

[23] On or about October 26, 2018, the Plaintiff emailed the Defendant, Cornelia Mulder, confirming his share of closing costs are $31,194.99 and he was going to e-transfer those monies within one (1) day.

[24] On October 26, 2018, the Plaintiff emailed his lawyer, Andrew Trider, indicating the Property "will be closing next week". He asked Mr. Trider to prepare a written Agreement between him and the "other purchasers and mortgage holder". This Agreement was never completed.

[25] On November 1, 2018 the Property closed with the Defendants being on title.

[26] On November 2, 2018 Mr. Doucette sent an email to Mr. Trider requesting that he prepare an agreement between the parties. The Defendants were not copied with that email.

[27] A meeting subsequently took place at the property on or about November 12-14, 2018 (the November meeting). At that meeting the parties were at odds with respect to moving forward. Each party has asserted the other breached the agreement they had reached, whatever its terms.

[28] Following this, further communication broke down with the Plaintiff expressing "shock" at the Defendants wanting out of the Agreement (because Mr. Doucette's wife was a U.S. citizen) and the Defendants alleging the Plaintiff of not living up to his end, which was to obtain financing within a week or so after the closing. (Tab 105, email sent Nov. 14th by Plaintiff)

Position of the Parties (as referenced in the pre-trial briefs**)**

Plaintiff's Position

[29] The Plaintiff expended his efforts based on an agreement he had with the Defendants that the parties would contribute equally to the cost of owning the Property. The Plaintiff was not in a position to obtain financing by November 1, 2018 but had agreed to pay half of the mortgage payments until such time as he could obtain financing, at which time title to the Property would be transferred to the name(s) of both the Plaintiff and the Defendants. Based on this agreement, the Plaintiff held up his end and paid half of the closing costs for the purchase of the Property, being $31,194.69.

[30] Despite the parties' agreement, and the Plaintiff's reliance on it, the Defendants ultimately and unilaterally terminated such agreement by refusing to accept any further payment from the Plaintiff or otherwise permit him to be involved in the operations of the Property. To that end, the Plaintiff says that apart from the rental agreement that the Plaintiff arranged in November of 2018, the evidence shows the Property has not been rented to anyone else, and the Property has been used by the Defendants for personal use.

[31] The Defendants have refused to communicate any further with the Plaintiff, despite his repeated efforts to discuss the matter with them. As a result, on March 8, 2019, the Plaintiff, through his then-counsel, commenced the Action that is now before this Honourable Court. It is the hope of the Plaintiff to have the Defendants live up to the terms of the agreement that they had reached with the Plaintiff, upon which he acted in good faith in the timeframe leading up to the purchase of the Property in November of 2018.

[32] The Plaintiff gave evidence that he expected the Defendants to honour the verbal agreement they had, and that his actions constitute part performance of the contract, so as to exempt it from the requirements of the *Statute of Frauds*.

Defendants' Position

[33] The nature of the agreement between the Plaintiff and Defendants is in dispute. The Defendants state they were prepared to own the Property with the Plaintiff on the condition the Plaintiff arranged for half of the mortgage shortly after the closing.

[34] The Plaintiff and the Defendants had a conversation at the November meeting at the Property. During this conversation, the Defendants asked the Plaintiff when he was going to provide the mortgage monies for his half of the value of the Property. The Plaintiff laughed at the Defendants and said "No bank will ever touch me". At no point did the Plaintiff ever provide the Defendants with his half of the mortgage monies.

[35] The Defendants respectfully submit that Mr. Doucette gave up all his rights when he "assigned" the deal to the Defendants. He was represented by Counsel at the time and certainly knew the importance of agreements being in writing in property transactions.

[36] Mr. Doucette relinquished his rights to the Property by giving it to the Defendants. Once the Agreement of Purchase and Sale was put into the Defendants' names, the *Statute of Frauds* takes effect and the Plaintiff has no further claim to the Property. To that end, the Defendants submit whatever arrangement was subsequently agreed to by the parties is immaterial because it was not put in writing as required by the *Statute of Frauds*.

Analysis

[37] From a review of the evidence, I am satisfied the parties had a common intention to share ownership of the property on a 50-50 basis, and to also share in the closing costs. Another issue was the monthly mortgage payment, and other expenses related to the property "going forward".

[38] From the documentation provided, Mr. Doucette paid one half of the down payment and was prepared to pay one half of the mortgage payment. Both of these amounts were forwarded to him by the Defendants as shown in Exhibit # 3, at Tabs 82, and Tab 92. In the former the Mr. Doucette asked, "please provide a list of the payment for my half ". In the latter, he indicates their "math is the same" and after the credit for the deposit of $5,000. "Richard owes $31,194.69" which was paid by him on October 26, 2018. (Tab 94 and Tab 110 Page 4)

[39] What is not as clear, is what the Plaintiff's obligation was in terms of ***when*** he would be required to obtain a mortgage or arrange for financing, and if so, when?

[40] The evidence indicated Mr. Doucette was highly leveraged and would be required to sell certain other properties owned by him, in both Newfoundland and Ontario. Following the sale of the Newfoundland property, he was still unable to obtain a mortgage for his "one half" interest.

[41] In his communication with his legal counsel, Mr. Trider, Mr. Doucette stated with respect to ownership, “I will be on for half if I can swing it”. In other emails he refers to one of the Defendants as “My partner A.D.”.

[42] There are aspects of this agreement that are unusual compared to a standard real estate transaction. Several aspects of this includes a statement by Mr. Doucette to the mortgage broker for the Defendants that “under my agency”, the Defendants would be purchasing.

[43] The evidence further shows that despite his inability to qualify for a mortgage, it was the Plaintiff who was slated to be the purchaser of the property. Not surprisingly, when he was able to secure “partners”, the bank requested that the Agreement of Purchase and Sale reflect the actual buyers, being the Defendants.

[44] To that end, Mr. Doucette, had at one point, assigned the Agreement of Purchase and Sale to them, which included a simple amendment to reflect totally new purchasers.

[45] The Vendors, having none of that, instructed their Counsel to draft a new agreement with the proper names of the parties to the Agreement. This was coupled with a request that all conditions which were required to be met by October 27, 2018, be deemed satisfied.

[46] It is clear that Mr. Dauphinee and Ms. Mulder were able to obtain mortgage financing through Jenise Walker, Mortgage Broker, at RBC.

[47] It is also clear that the Plaintiff was turned down for mortgage financing. However, according to the Plaintiff, the Defendants were aware of his inability to obtain a mortgage, at least up to October 9 or 10, 2018.

[48] Mr. Dauphinee testified the Defendants had negotiated for a mortgage they could get out of quickly with minimum penalty. (Switch 48 and 49)

[49] This suggests that the Defendants recognized that Mr. Doucette would not be in a position to pay his half of the purchase price on closing, notwithstanding that the Plaintiff paid his half of the down payment.

[50] On November 2, 2018 Ms. Mulder also sent an email to Mr. Doucette informing him of the amount of the monthly mortgage payment. She stated this was the “mortgage only” and not the “other costs”, words to that effect. (Tab 100)

[51] The closing of the transaction occurred on November 2, 2018. On that date, the Defendant, Corneilia Mulder, sent an email to the Plaintiff regarding the “rental” which read, “we are good to go” and “all the paperwork is done”. (Tab 102)

[52] Nothing in that email mentioned that Mr. Doucette would be required to obtain mortgage financing “within a week or so”, which is the evidence of Mr. Dauphinee and Ms. Mulder.

[53] From the evidence, it is reasonably clear that Mr. Doucette would be on the Deed, if and when he obtained his own financing.

[54] Was this a tolerable situation for the Defendants, that the Plaintiff would be permitted to have the benefit of ownership, with none of the risks, including financing. More to the point, what had the parties agreed upon as it pertained to the Plaintiff putting up his half.

[55] From the Defendants perspective, this was not a situation they were prepared to accept. They testified that some additional time frame would be permitted, but that would not be indefinite, as suggested by the Plaintiff.

[56] By the Plaintiff's own admission, this was a verbal agreement, which he intended to have placed in writing. The terms of that agreement were outlined in an email to Mr. Trider sent the day after the closing on November 2, 2018. (See Exhibit No. 4)

[57] Notably, the proposed terms are silent with respect to when Mr. Doucette would be required to obtain a mortgage, if at all.

[58] Turning to the critical meeting at the Property after the closing in November, it is reasonable in the circumstances to ask: 1) Was the Plaintiff, Richard Doucette, "cut out" of the agreement by the Defendants, for no valid reason? or 2) Did the Plaintiff make statements to the Defendants in which he effectively "cut himself out" of the agreement, due to a lack of trust in him by the Defendants resulting from those statements?

[59] At this stage, I repeat, the Plaintiff is adamant that he would be a 50% partner, owning 50% of the assets and be responsible for 50% of the liabilities, as contained in his November 2, 2018 email to Mr. Trider.

[60] The Defendants state the Plaintiff is simply asking the Court to read far too much into the agreement, which was not in writing. They state this agreement was required to be in writing to avoid the very confusion that has resulted between the parties.

[61] The Defendants submit the *Statute of Frauds* is intended prevent a party from placing their own interpretation on the terms of an agreement, as the Plaintiff is doing here. To avoid that, they say, the law requires that agreements respecting land not be oral, but placed in writing.

Statute Of Frauds

[62] Having closely considered the evidence and the Exhibits, it is clear there was an agreement between the Plaintiff, Mr. Doucette, and the Defendants, Mr. Dauphinee and Ms. Mulder, to own the property in question, with ownership/title being held on a 50/50 basis as between the Plaintiff and the Defendants, with each having a one half interest.

[63] There are numerous documents in the three (3) volumes of Exhibits to support that finding. Two of the more obvious examples are contained at Tab 100 and in Tab 82 tendered at the trial.

[64] In the email from Ms. Mulder to Mr. Doucette on the November 1, 2018 closing date, she attaches a page from the mortgage document containing the "Payment Provisions" in section 2.4. Item 4 is the first payment date of December 1, 2018. This item contains the monthly payment amount of $1,109.24.

[65] In the email (Tab 100) Ms. Mulder states that "for his records", this is just the mortgage and not other costs, which have not been calculated, but "will let you know".

[66] In the email (Tab 82) sent by the Plaintiff nine (9) days prior, October 22, 2018, he asked Ms. Mulder to provide "a list of the payment for my half of the down payment and closing cost".

[67] This property transaction began on September 7, 2018 when Mr. Doucette placed an offer for $299,000 that was accepted by the Vendors. As he indicated in a text message to Allan Dauphinee, he had "tied up" the property for a couple of weeks.

[68] The Plaintiff was fully involved in the negotiations and financing of the purchase. For example, he negotiated a reduction of $10,000 being the cost of a well, and settled on half at $294,000.

[69] Mr. Doucette had several roles, which evolved as the transaction continued. He was the original purchaser and made it known he was seeking "investors and shareholders". (Tab 9)

[70] The Plaintiff was also heavily leveraged with other properties, and his equity and ability to obtain financing was apparent from the start. For example, on September 17, 2018 Mr. Doucette was denied financing by a senior financial advisor at Scotiabank. (Tab 29)

[71] It became apparent he would have to sell properties owned by him in Newfoundland and Ontario if he was to be able to finance the purchase.

[72] The evidence indicates Mr. Doucette knew this, having stated to his brother, "I can't swing it myself til I sell Cobourg". (Tab 9)

[73] In an email, his Counsel, Andrew Trider, on October 3, 2018 and copied to Mr. Dauphinee he stated, "My associates will be on the Deed and if I can swing it I will be on for half". (Tab 58)

[74] The *Statute of Frauds* requires that an agreement respecting an interest in land be placed in writing and signed by the persons sought to be charged or some other person lawfully authorized.

[75] As noted by Coady, J. in ***Self v. Brignoli Estate***, 2012 NSSC 81, the purpose of the statute is to protect against perjured evidence to support a conveyance of land.

[76] In ***Self***, the Court ruled that the plaintiff must first prove acts of part performance before it can "let in" evidence of the agreement in questions.

[77] There are two lines of authority, one in ***Deglman v. Brunt Estate***, [1954] SCC 725, referenced to as the traditional test, and the second in ***Steadman v. Steadman***, 1974 2 A1ll E.R. 977, referred to as the less stringent test. In ***Steadman***, the acts of past performance need only be consistent with an alleged oral agreement. The law in Nova Scotia was set out in ***Self***, where Coady, J. further stated:

> (19) I submit that the law in Nova Scotia follows the more traditional test set out in *Deglman* and applied by Hallett, J. in *Carvey*. In order to avoid the *Statute of Frauds* a plaintiff must show acts of part performance that are unequivocally referable to the contract for land asserted by the plaintiff.

[78] Referring to the approach that should be taken to the evidence, the court in ***Self*** stated:

> (25) Di Castri discusses "marshalling the evidence"" at page 4:19;
>
> > There must be clear and satisfactory evidence of the existence of the contract, and the proper order for marshalling of this evidence, oral or otherwise, is first to prove the acts of part performance in order to let in the evidence of the contract which is sought to be enforced.
>
> This approach was confirmed by Hallett, J. in *Carvery v Fletcher, supra*, at page 4.

[79] In this case, the Defendants submit they alone were the buyers mentioned in the Agreement of Purchase and Sale. Following that, they submit the only acts of performance by the Plaintiff was the payment of money. That, itself, is not sufficient acts of part performance for Mr. Doucette to bring himself within the exception to the Rule, stating it does not demonstrate part performance of the agreement he seeks to enforce.

[80] On this point, I have found the case of ***Kang Corporation v. KRTT Group Ltd***, 2007 CanLii 13362 (OnSc) to be instructive as it is in some respects similar to the case before me, and in particular the following:

> (20) While under the "strict" approach established in *Deglman* mere payments of money cannot amount to part performance, these payments are different: they were directed to the lawyer handling the purchase of the subject property just days before the closing, and one of the cheques by its notation, was earmarked specifically for this property. It defies logic to suggest this was merely coincidence, or, as defence counsel suggest, that these payments could be referable to some other business arrangement between the parties. The context and timing surrounding the payments suggest to me they were unequivocally referable to this transaction, and therefore constitute further ats of part performance.

[81] The three (3) volumes of exhibits in evidence document the involvement of the Plaintiff in the beginning of September to the closing in November. While the payment of money alone may not be indicative of part performance, I find there is ample evidence that unequivocally refers to this transaction, including the payment of money, that constitute acts of part performance.

[82] In addition, although there was no "memorandum or note" signed by the parties, there are numerous references in the documentation to the Plaintiff and Defendants being 50/50 partners, or that they intended to be. A number of these have already been referenced in this decision.

[83] Mr. Doucette's email in Exhibit 4 is perhaps the most obvious example, although it should be noted this was not copied to the Defendants and was sent subsequent to the closing date.

[84] I find there is sufficient evidence of part performance to "let in" evidence of the contract sought to be enforced.

[85] The real issue is, what were the terms of that agreement and whether those terms were breached, resulting in a remedy being available to the Plaintiff.

Terms of Agreement

[86] Although it is clear there was a breakdown in the relationship, at the November meeting, the Court must address what had been agreed to up to that point.

[87] Credibility is an important issue and can be difficult to determine without a signed agreement, thus the purpose of the statute as earlier mentioned.

[88] My impression of the evidence is that both parties would contribute financially to the transaction and if they were to be equal partners it would be expected they would each make an equal contribution.

[89] It is equally clear that Mr. Doucette was heavily leveraged from the start and would need to sell some of his properties to qualify for a mortgage. Mr. Doucette attempted to obtain mortgage financing and had also sold some of his property in order to obtain financing for this transaction.

[90] The Plaintiff gave evidence that the agreement broke down before it could be prepared and signed in accordance with the terms in Exhibit 4.

[91] According to those terms, Mr. Doucette stated, "I paid half the loan payment. I will pay half the expenses." He also stated, "I am not registered on the property deed. This may change if I sell a couple of more properties, and if we re-finance."

[92] Financing, therefore even after the closing date was an issue, "this may change" and so was the Plaintiff's name being on the "property deed".

[93] Mr. Dauphinee, in his evidence, was adamant that the November meeting was based on this very issue, Mr. Doucette's financing, given that the property had closed.

[94] Both Defendants gave evidence that they negotiated a mortgage they could "get rid" of quickly and with minimum penalty. They testified that Mr. Doucette would be responsible for that penalty.

[95] By his own admission, Mr. Dauphinee was "not good" with dates and times, stating he relied on Ms. Mulder to confirm details.

[96] Ms. Mulder's evidence as given in a straightforward manner and she did provide detailed evidence.

[97] She testified it was clear from the start that "he would pay half, and we pay half." She testified at some point after mid-September they found out Mr. Doucette could not get a mortgage. He informed them he could not come up with his half of the money, and would have to sell some property first, and then he would be "fine."

[98] The Defendants had a decision to make, she said, either "to pull out and let go" or give Mr. Doucette time to finance and sell property. They chose "option B" she said, which was for "him to come in with us and pay half when his property was sold".

[99] Mr. Doucette testified he did sell his property on October 2, 2018, but was still unable to qualify for a mortgage. He testified the Defendants knew that as early as October 9 or 10, 2018.

[100] Ms. Mulder's evidence is they went ahead with allowing him to sell and when he still did not have a mortgage for the closing, they made a further decision to give him a "grace period" in order to obtain a mortgage within a week or so after the closing.

[101] In re-direct, Ms. Mulder was questioned by Mr. Mozvik and cross-examined a second time by Counsel for the Plaintiff Mr. MacDonald, with leave of the Court:

> Q: "So do I have it right, then that the agreement that you spoke about with my friend, Mr. Mozvik, was that he could pay, and when I say he, Mr. Doucette, could pay half of the monthly mortgage payment until he could get his own financing?
> A: Up to a certain point right.
> Q: Right
> A: Yes, because, yes.
> Q: And that point was either one to two weeks after the closing
> A: Right.
> Q: Okay.
> Court: Thank you.

Determination

[102] From the outset it was clear that Mr. Doucette would be on the Deed if he could "swing it". As it turned out he could not. He applied for a mortgage but was unable to obtain one. He sold his Newfoundland property but still could not arrange to finance his half. However, Mr.

Doucette testified he told this to his "partners" well before closing date of November 1, 2018. I have considered what this meant for the verbal arrangement.

[103] On the one hand, Richard Doucette, knew all along he was too heavily leveraged to qualify, unless he sold some properties and even then he was not certain he would qualify for a mortgage. On the other hand, there was no mention in the documentation about Mr. Doucette obtaining a mortgage within a week as maintained by the Defendants.

[104] A dispute such as this is the reason *Statute of Frauds* exists.

[105] Even if such an agreement was in writing, it is not clear what the terms would have been in their entirety. In cross-examination, Mr. Doucette was asked why not put a date in for refinancing in Exhibit 4. His answer was, this was just to get Mr. Trider started, words to that effect, and he was waiting to hear back from him. The evidence of Mr. Trider is that he never got started. He testified he did not have a specific recollection of speaking to Mr. Doucette about his lack of financing, but did state Mr. Doucette told him about being a silent partner in the venture.

[106] In terms of credibility it is difficult to accept that the Plaintiff would remain a silent partner in both ownership (not on Deed) and liability (not on mortgage), for an indefinite period of time.

[107] Did the Defendants agree to allow him to be a "silent partner"? They say no. They were not copied on the email in Exbibit 4. Would it have said "until he could get financing" as had been suggested by the Plaintiff or within week or two after closing, as suggested by the Defendants.

[108] At the end of the day the type of agreement contemplated was not commonly seen and most unusual. It was a loose arrangement that was fraught with risk and almost certain to result in litigation.

[109] As stated, the proposed terms in Exhibit 4 lack consideration of the various components needed to protect his investment/interests. True it may have been presumed that 50/50 meant just that, but the lack of concern and clarity as to these essential terms raise serious questions as to what the agreement contained. In terms of getting Mr. Trider "started", this email was sent the day after the closing. Time is considered to be of the essence in real estate transactions.

[110] The problem with an oral agreement is that it can lend itself to its terms not always being clear. This case is an example of that. Some things are more clear than others.

[111] It was clear from the start that the Plaintiff needed partners. Ms. Mulder said in her evidence which was basically unshaken in cross-examination:

> Q: Just one final question or maybe two, my friend asked you about discussions you had with Mr. Doucette about him paying half of the monthly mortgage, what were the results of that discussion?

A: We never got there.

Q: Okay and what do you mean by that?

A: Because before that the deal fell through already because he, he was coming up with half of that mortgage and that's what we, that's the whole thought behind it.

[112] I accept the evidence of the Defendants that they took out a mortgage that they could be relieved from with minimum penalty. This is corroborative of their evidence they were prepared to allow him some additional time. This is also where the parties evidence diverged.

[113] I find as a fact, that the agreement was always contingent on the Plaintiff, Mr. Doucette, getting his own mortgage. He stated that he was "sourcing out", which meant pursuing financing only weeks before closing.

[114] Like the situation in ***Self***, whether that was going to happen was a moving target. I find there is little or no evidence to make clear the agreement changed from one in which the Plaintiff would obtain financing to make his contribution equal to his 50% share in the property, as was the case with the down payment, to one where he would not have to come up with his share of the purchase price but simply make his half of the monthly mortgage payment going forward. I find such a term was never "nailed down" between the parties.

[115] In the result, I find the Plaintiff has not proven on a balance of probabilities, that the terms set out in Exhibit 4 were in fact the terms agreed upon between the parties. I find the terms of the agreement were unclear on the issue in dispute, and as a result the Plaintiff has not met the burden upon him to establish a valid and enforceable contract.

[116] I turn now to consider whether the Plaintiff is entitled to any further remedy.

Remedy

[117] The Plaintiff inputted time and effort over the span of 2.5 months. The actions taken by the Plaintiff and the services he performed were made in anticipation of a contract between the parties. Both parties expected to derive a benefit from that contract, which this Court found to be unenforceable.

[118] Because of the Court's ruling, the Defendants are left with sole ownership of the property as it was they who were able to meet their obligation of providing funding.

[119] It must be stated, the Defendants made no promise to pay the Plaintiff anything for his services, and as the successful litigants, may be entitled to costs.

[120] On the other hand, equitable remedies such as restitution sometimes call upon a party or litigant to meet obligations imposed by law that are dictated by reason and justice. (Paton, **Jurisprudence**, 2nd Ed.; **Blacks Law Dictionary**, 7th Ed.)

[121] In the leading case of ***Deglman v. Brunet Estate***, [1954] S.C.R. 725, it was held that the deceased aunt's Estate was obligated to pay her nephew fair value for the services he rendered, even though the oral promise she made to leave him a certain piece of land, was held to be unenforceable. The Court stated:

> There remains the question of recovery for the services rendered on the basis of a *quantum meruit.* On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

[122] In the case of ***Dartmouth (City) v. Turf Masters Landscaping Ltd.***, 1995 NSCA 108, Chipman, J.A., speaking for the Nova Scotia Court of Appeal stated at page 8:

> As G. H. L. Fridman points out in **Restitution**, (2nd Ed. Carswell) at p. 286, recovery in **quantum meruit** may be had for work and services performed by one person for another in the absence of a valid enforceable contract between them. A number of situations have been recognized by the courts as warranting recovery and are reviewed by the author at pp. 300 - 349. Instances discussed by the author include work done under contracts that are unenforceable, void, voidable, affected by incapacity, illegal, and work which has been done after a contract has been frustrated or work done outside the scope of the contract or extrinsic to it.

[123] There are similarities between cases such as ***Deglman*** and this case. Both were framed in contract; both resulted in the contracts being unenforceable; both involved significant services being provided; and both resulted in the Defendant retaining the land and involved the benefits being received solely by the Defendants.

[124] In ***Smith v. Strickland***, this Court held that the Plaintiffs should be paid the sum of $40,000 representing a 25% share of the sale proceeds, less certain credit and other benefits received by them. The basis for the award was in unjust enrichment based on the contribution made to the business. The restaurant business had been sold and title to the property had been held by the Plaintiffs.

[125] There are also differences between this case and others that have entertained compensation based on quantum meruit. As stated there was no promise to pay for these services in exchange for the transfer of any land. Also, while the Defendants may be considered to have been enriched by the services provided by the Plaintiff, the doctrine of unjust enrichment, is unavailable to the Plaintiff because there is arguably a juristic reason for the enrichment and the corresponding deprivation, that being the Plaintiff being unable to meet his financial obligations.

[126] That said, remedies in the nature of restitution are generally considered flexible enough to allow a Court to arrive at a just result. In terms of recovery, such cases refer to there being "some underlying measure of agreement, although not sufficient to constitute a valid,

enforceable contract, in virtue of which the plaintiff performs the work or provides the services that are at issue". (G.H.L. Fridman, **Restitution**, 2nd Ed.)

[127] Plaintiff's Counsel, Mr. MacDonald made submissions as to the significant services provide by his client in the negotiation, purchase and to some extent, the financing of the purchase. He referred the Court to numerous Exhibits contained in the Joint Exhibit Book which are Exhibits 1, 2, and 3.

[128] Briefly, Mr. Doucette was the contact person for the Real Estate Agent, Minerva MacInnis, who testified of the many amendments and issues dealt with through the negotiations. He investigated the well and negotiated a price reduction; he investigated renting the property and set up a contract with Dexter construction. Among other things, he attended the property and prepared drawings for re-design of the buildings.

Decision on Quantum Meruit

[129] Notwithstanding I have found the contract unenforceable, I find retention of the property by the Defendants, without some recognition of the services provided by the Plaintiff, would be unjust.

[130] The difficulty in such circumstances is valuing such services. The Court must attempt to take into account a reasonable sum, in relation to the amount of work, its complexity, and also its importance.

[131] It is my estimation that one third of what the Plaintiff's interest might have been would be considered fair value for his efforts, which proved to be successful for the Defendants.

[132] The Plaintiff is awarded the sum of $50,000 ($150,000 x 33%) on a quantum meruit basis.

Conclusion

[133] For all of the above reasons, the Court concludes:

4. The action by the Plaintiff against the Defendants is dismissed.
5. The Plaintiff is awarded the sum of $50,000 on a quantum meruit basis.
6. My decision on costs is reserved.

Murray, J.