

SUPREME COURT OF NOVA SCOTIA

Citation: *Estate of Rector v. Estate of Guest*, 2022 NSSC 300

Date: 20221024

Docket: Tru. 481984

Registry: Truro

Between:

Lloyd Rector and Lloyd Rector, Personal Representative
for the Estate of Doris Isabella Rector

Plaintiffs

And

Lois Kember, Personal Representative for the Estate
of Shirley Wanford Guest

Defendant

And

Paul Graham and Sandra Graham

Defendants

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: May 19 & 20, 2022, in Truro, Nova Scotia

**Written
Decision:** October 24, 2022

Counsel: Bradford Yuill, Solicitor for the Plaintiffs
Adam Harris, Solicitor for the Defendants

By the Court:

Background

[1] Beginning in 1995, Doris Rector paid on a rent-to-own agreement for 139 Guest Drive in Bible Hill, Colchester County. She was a lady of modest means, and the home was modest as well. Its 2020 municipal assessment was in the amount of \$24,400.00.

[2] Under the 1995 agreement, Mrs. Rector was supposed to have made the required number of monthly payments by November 2007. The document provided that, on completion of the payments, she was to receive a deed from the landlords, Shirley and Helen Guest. (I will refer to both Mr. and Mrs. Guest as the landlords, although only Mr. Shirley Guest was on title).

[3] When November 2007 was reached, there were still a number of payments outstanding. Courts can sometimes be faced with landlords using rent-to-own arrangements and engaging in practices which have predatory aspects. This is not one of those cases. The Guests were extremely fair throughout all their dealings with Mrs. Rector.

[4] When the original finish date was reached, Mr. and Mrs. Guest exercised forbearance and did not invoke the right under the agreement to treat the payments as rent and forfeit the opportunity to receive a deed.

[5] After November 2007, the parties continued to treat the arrangement as ongoing. There was a waiver of the termination date. Mrs. Rector continued to make payments and the Guests continued to accept them. Furthermore, it was confirmed in various written communications between the parties that a deed would be delivered upon completion of the payments.

[6] Sadly, Mrs. Rector died in September 2011, with \$1,808.00 still owing. At that point the Guests told Mrs. Rector's son (the current Plaintiff, Lloyd Rector) that the deed would still be provided when the balance was paid. This should have been a very simple matter to conclude, especially when Lloyd Rector moved into the home at 139 Guest Drive.

[7] Despite more than once indicating he would pay, Mr. Rector dragged his heels. The Defendants now say the Plaintiff has lost the opportunity to complete the purchase.

[8] At the time of trial, both Mr. Guest and Mrs. Rector were deceased. Helen Guest, who handled much of the paperwork for the business, was incapacitated by

advanced age and ill health. Consequently, the main witnesses at the trial were drawn from the next generation of these families. Lloyd Rector testified, as did Lois Kember, who is the daughter and personal representative of the estate of Shirley Guest.

[9] The property at issue in this case sits within a small subdivision developed by the Guests beginning in the 1980s. The other named Defendants, Paul and Sandra Graham, are involved in this proceeding as the Shirley Guest estate sold to them, in August 2018, the Guests' remaining interest in the subdivision. Three months later, this proceeding was commenced by Lloyd Rector on his own behalf and as personal representative of the estate of Doris Rector.

[10] In this decision I will refer to Mr. Rector as the Plaintiff. I am obviously aware that he is bringing action in two different capacities. He is suing in his personal capacity as well as in the role of personal representative of his deceased mother. At times I may refer to the Plaintiff or Plaintiffs.

[11] I am also aware that Helen Guest is not a named party in this proceeding. The land in the subdivision developed by Mr. and Mrs. Guest was held solely in the name of Shirley Guest. Helen Guest was, however, fully involved in the development of the subdivision and in the associated property rental business.

Position of Lloyd Rector

[12] Mr. Rector, on behalf of the Plaintiffs, has advanced a number of alternative arguments.

[13] First, he says that prior to her death, his mother paid off the rent-to-own agreement. He argues that a deed should be ordered on this basis alone.

[14] In the alternative, he argues that even if his mother did not complete the purchase, he had a side agreement with Shirley Guest that allowed him to work off the balance of the debt, acting as an *ad hoc* property manager within the subdivision being developed by the Guests.

[15] Finally, he says if any balance remains owing, it is a *di minimis* amount and the Court ought to order the Guest estate to produce a deed for the property.

[16] As a side issue, Mr. Rector argues that Paul Graham has been harassing him since his purchase of the remaining Guest estate interest in the subdivision. He seeks damages for these alleged actions, including cutting off his water.

Position of the Defendant – Lois Kember

[17] Mrs. Kember represents her father's estate as personal representative.

[18] Her position is that Doris Rector's agreement to purchase was not paid off during her lifetime. Mrs. Kember says the documentary evidence makes this entirely clear.

[19] After the passing of Mrs. Rector, there were repeated efforts to have Lloyd Rector finish the payments on behalf of the estate. He was offered the deed on completion of the payments. Ultimately, he failed or refused to do so.

[20] Mrs. Kember submits that the window for the Plaintiffs to finalize this deal has closed. She says she had to wrap up her father's estate. To accomplish this, a deal was reached to sell all the remaining interest to Paul and Sandra Graham. There were multiple properties transferred. These included 139 Guest Drive. The conveyance of this particular property to the Grahams was via a quit claim deed.

[21] Mrs. Kember asks that the claims of the Plaintiff against her father's estate be dismissed.

Position of the Defendants - Paul and Sandra Graham

[22] The Grahams say they are innocent third parties in this matter. They purchased properties from the estate of Shirley Guest and simply want what they bargained for.

[23] Mr. Graham denies that he has harassed Lloyd Rector. He says that any water supply issues were due to failure of the aging infrastructure and challenges with repair. He asks that all claims of the Plaintiff be dismissed.

Issues

- 1. Did Doris Rector become entitled to a deed to the property during her lifetime?**
- 2. If the answer above is no, did the estate of Doris Rector become entitled to a deed to the property, following her death, by virtue of any steps taken by Lloyd Rector or otherwise?**
- 3. If the answer above is no, is either Plaintiff now entitled to pay out any remaining balance and receive a deed to the property?**
- 4. Has Lloyd Rector established a claim in damages against Paul Graham?**

Witness Testimony

[24] Six witnesses testified at the trial. Four were called by the Plaintiff and two by Defence. The most helpful evidence was the documentary material found in the Joint Exhibit Book.

[25] I intend to set out below a summary of the evidence at trial. I will not be attempting to summarize or comment on every point raised by the witnesses. Some was of limited relevance.

[26] I will touch on those elements that I find to be relevant or necessary to put the Court's findings and conclusions in context. I have however considered all the testimony and submissions in arriving at my conclusions in the matter.

Plaintiff Witnesses

Lloyd Rector

[27] Mr. Rector is a 61-year-old sanitation worker. He testified as to his formal education, work and family history.

[28] He has lived in the Guest Drive subdivision since as far back as 1984/85. He and his then spouse entered into a rent to own agreement with Shirley Guest with respect to a property at 136 Guest Drive. His mother, Doris, moved into the neighbourhood as well, a couple of months later. She entered into a rent to own arrangement for 139 Guest Drive, which is the disputed property in this case. The arrangement was originally to run from November 1995 with a stated completion date of November 2007. If all payments were paid on schedule, the total paid would have been 144 payments of \$396.94 for a total of \$32,000.00.

[29] Mr. Rector developed a personal relationship with Mr. Guest and eventually started to help him with some maintenance and other work in connection with properties in the subdivision.

[30] With respect to the property his mother was residing in, Mr. Rector testified that he believed she paid off the debt owing by the original date for completion (November 1, 2007). Mr. Rector stated his belief that all she would have owed after that point would have been water charges.

[31] When shown documentation between his mother and the Guests that clearly showed his mother accepting that there remained a balance on the agreement after November 2007, he claimed not to accept this, or to suggest it meant something else.

[32] His mother passed away in September 2011. In June 2012 he moved into her former home at 139 Guest.

[33] Mr. Rector was shown letters sent to him from Helen Guest in which she confirmed there was a balance still owing on the property. He initially suggested that he maybe did not receive the letters. His denials were weak, unconvincing, and at odds with other parts of the record. Later he acknowledged receiving some written communication that contained clear reference to a remaining balance.

[34] Also in evidence were examples of written communications from Mr. Rector to the Guests where he accepts that a written balance exists, indicates that money is tight, and states he will give priority to paying the balance. The Guests were offering the deed to 139 Guest upon this payment.

[35] Mr. Rector gave his account of his dealings with Helen Guest, and then Lois Kember, after the passing of Mr. Guest. His account did not fully line up with the written record.

[36] He went on in his evidence to also discuss his interactions with Paul Graham after the Grahams purchased the remaining interest of the Shirley Guest estate.

[37] Clearly, he and Paul Graham clashed. At one point, in a dispute over the water supply, the RCMP were called. Mr. Rector believed that Mr. Graham was deliberately interfering with the water supply.

[38] The police declined to get involved and told the men it was a civil matter.

Victor Peterson

[39] Mr. Peterson was called by the Plaintiffs. He is a resident of the Guest Drive Subdivision and has been for a number of years. He is somewhere between a friend and an acquaintance of Mr. Rector.

[40] He testified that in the past he did see Mr. Rector doing work in the subdivision. Mr. Peterson assumed he was doing this on behalf of Shirley Guest. He acknowledged that he had no direct knowledge of any dealings between Mr. Guest and Mr. Rector.

[41] Mr. Peterson noted that, at one point in the past, Shirley Guest had offered him the chance to work off some debt by assisting him with work on a cabin Mr. Guest was building. While he declined this offer, it led him to believe that Mr. Guest might have made the same sort of offer to others.

Jeffrey Hines

[42] Mr. Hines was another resident of the subdivision called in the Plaintiff's case. He testified that, when he moved into the park, Mr. Rector had a role helping with things like tenant problems. He first moved in about 10 years ago. He did not have any knowledge of what the financial arrangements may have been between Mr. Rector and Mr. Guest.

[43] He was also called because he witnessed parts of the dispute between Mr. Rector and Mr. Graham when the police were called in their ongoing dispute. He acknowledged that he did not actually hear any of the back and forth between the men on that occasion.

Doug Carter

[44] Mr. Carter was called for very brief evidence. He too is a resident of the subdivision and a long-time acquaintance of the Rector family. It was apparent that he was supportive of Mr. Rector, but his actual material evidence was very limited.

Defence Witnesses

Lois Kember

[45] Mrs. Kember was called in the Defence case. She is the daughter of Shirley and Helen Guest. She is her father's executrix and has acted as the personal representative of his estate throughout this litigation. She testified that her mother, who was a full partner in the development of the subdivision, is now incapacitated.

[46] She testified on the history of the subdivision development. She explained how her parents worked partly with outright sales but also with rent to own agreements where the financial circumstances of the buyer required it. When it was being developed the subdivision catered largely to lower income households.

[47] She indicated that her parents divided responsibilities within the development. Her mother was responsible for most of the paperwork. Mr. Guest largely handled 'on the ground' work.

[48] Mrs. Kember agreed that Mr. Rector assisted her father with tasks in the subdivision. The Guests lived in Bridgewater and for this reason they did have an arrangement with him that covered a number of things that might arise from time to time. It was primarily maintenance work but could involve other projects, as directed by Mr. Guest.

[49] She testified that Mr. Rector eventually became increasingly unreliable. The things he was to assist with were not getting done. Her parents replaced him and had others assume the tasks he had been doing previously. She said this occurred in 2010-2012. Her father passed away in November 2014.

[50] Lois Kember was directed to various documents in the Exhibit Book. These included communications between Helen Guest and Mrs. Rector prior to the death of Mrs. Rector. These reveal that the property was not paid off by the original completion date, but the parties continued to pay and accept payments. The balance continued to be paid down slowly.

[51] Mrs. Kember also identified various items of correspondence which had been forwarded to Mr. Rector after the death of his mother. This included communication confirming there was a remaining balance on his mother's lot in February, 2012 of \$1808.00. He was told a deed would be supplied upon payment. In one letter Helen Guest wrote that she wanted this done before it had to be done by her and her husband's estates.

[52] The letters and emails also dealt with the fact that the Guests were acknowledging that Mr. Rector was entitled to a deed to Mr. Rector's own property at 136 Guest Drive. For reasons touched upon later in this decision, he had opted not to accept and record the deed to 136 Guest Drive. This lot is not to be confused with his mother's parcel at 139 Guest.

[53] In a February 2012 email, Mr. Rector stated that he would be sending cheques to Mrs. Guest. This was clearly in reference to the property at 139 Guest Drive. It was clearly a reference to the balance on the debt. There can be no confusion on this point because there is separate and distinct discussion in the email of the other property owned by Mr. Rector at 136 Guest Drive.

Paul Graham

[54] Mr. Graham did not have truly relevant evidence on the central dispute with respect to 139 Guest Drive. The most important dealings between the Guests and the Rectors had occurred in the years prior to the purchase by the Grahams.

[55] Mr. Graham did speak directly to the issue of the post-purchase dispute with Mr. Rector. It was clear that the two men did clash. He acknowledged that there was a disruption in the water supply to 139 Guest Drive. He said it was the result of decaying or aging infrastructure. He testified that any excavator work carried out at his request was directed at trying to solve the problem.

[56] He acknowledged that the police were called on one occasion by Mr. Rector. He agreed that there had been an interim motion in the Supreme Court prompted by the dispute.

[57] He denied harassing or otherwise committing any acts of nuisance against Lloyd Rector.

Discussion and Findings

Findings Regarding Evidence of Lloyd Rector

[58] Mr. Rector was not a great witness. His recollection on various matters proved to be unreliable when tested against the written record. I could not tell if he

was being deliberately difficult on various issues of recollection or if he was merely confused.

[59] In either case, the result is the same. I was unable to rely on his recollection except where it was confirmed by other evidence that I accepted. Most importantly, I have relied on a review and application of the written documentation.

[60] There are specific issues that require findings by the Court. Mr. Rector's first position is that he has a recollection of his mother having paid off this purchase agreement by the original completion date in November 2007. I have no difficulty rejecting this suggestion.

[61] The written record between the Guests and Mrs. Rector leaves me in absolutely no doubt that Mrs. Rector experienced trouble making all the payments on the schedule. It was completely normal for arrangements between the Guests and their tenants/buyers to be handled flexibly and for deadlines to be extended.

[62] The deadline for Mrs. Rector was waived. I find that Lloyd Rector knew all this. None of this was a surprise to him. When his mother died, he received written communication from the Guests setting out the amount still owing. The amount

raised with him was entirely consistent with the amount the Guests and Mrs. Rector had been discussing prior to Mrs. Rector's death.

[63] Lloyd Rector attempted in his evidence to obfuscate on the issue of whether he received the multiple written communications from the Guests respecting the still outstanding debt on 139 Guest Drive.

[64] I specifically reject his suggestion that he did not receive these letters and emails. He received them all, including the letter of May 13, 2014.

[65] The May 13, 2014, letter said the property was almost, but not fully paid for. It asked him to finish the payments in exchange for the deed.

[66] This was one of at least five written pieces of communication between the Guests and Lloyd Rector that included reference to the balance that remained outstanding.

[67] These letters and emails include the following:

| | |
|-------------------|---|
| February 16, 2012 | “The balance owing to be paid on the land and dwelling at 139 Guest Drive...” |
| April 4, 2013 | “...that bit of money owing on your mother's house” |
| November 7, 2013 | “...balance owing” |

May 13, 2014 “...almost paid for”

December 15, 2014 “...back payments”.

[68] On none of these occasions did Lloyd Rector disagree or assert that the balance was paid, and a deed owed to him.

[69] One example of this is found in an email of April 4, 2013. Mrs. Guest wrote Mr. Rector with respect to the balance owing on his mother’s home. Mr. Rector wrote her back – not to disagree – but to tell her that funds were tight, but he would be sending money “...as soon as I can”. There are additional examples.

[70] While Lloyd Rector was not a great witness, that does not end the matter. The Court must still consider how it came to be that the property at 139 Guest Drive was sold without notice to the Plaintiffs, and how this impacts the legal issues to be determined.

Findings Regarding Evidence of Lois Kember

[71] Mrs. Kember was a good witness. Her explanations made sense. Very importantly, her account aligned logically with the available documentary evidence.

[72] There were aspects of her evidence on which I have chosen not to put any weight. These were her thoughts as to her parents' intentions and motivations on various issues. She could well be right. But I will not weigh those opinions.

[73] I have also considered s. 45 of the Nova Scotia *Evidence Act*, R.S.N.S. 1989, c. 154, and am satisfied that any statements attributed to a deceased person, on which I will rely in these reasons, is corroborated by other material evidence, in keeping with the statute.

[74] I find that Mrs. Kember had a good memory of her dealings with respect to the property. I accept entirely her account that there was a balance owing and that it was never paid. I accept her account that Mr. Rector was asked to pay the balance on the deal. More than once he said he would pay, but for whatever reason it did not happen.

[75] Clearly, Mrs. Kember formed the view that she had no further obligation to Mr. Rector. As Executrix, she negotiated with and eventually sold to the Grahams. No notice was given to Mr. Rector until after the sale.

[76] The critical issue for the Court is whether there was a need to clearly communicate to Lloyd Rector that, notwithstanding the minimal balance owing, the property was about to be sold out from under him.

[77] I will now turn to a consideration of the four specific issues set out above.

Issue 1 – Did Doris Rector become entitled to a deed in her lifetime?

[78] Despite Mr. Rector’s efforts to raise questions on this point, this issue is not seriously in dispute. On the basis of all the evidence presented at the hearing, I have reached the following conclusions:

- The original rent to own agreement had an anticipated finish date in it. However, when that date was reached, the payments were not complete. I reject Mr. Rector’s position on this question.
- Notwithstanding the failure to complete by the expected date, the parties continued to treat the arrangement as if it continued. Mrs. Rector continued to slowly pay the balance and the Guests continued to collect.
- The Guests continued to make clear that the deed was still available to Mrs. Rector. Both sides made it clear that they continued to treat the arrangement as ongoing. There is ample written record of these dealings and clear intention.
- The parties continued to discuss the ongoing payments and the fact that when full payment was reached, the deed would follow.
- There was evidence in this case that makes it very clear that the Guests operated the business with a lot of flexibility with respect to the tenants.
- Their general approach to money problems for the tenants was to exercise forbearance – knowing that “life happens”.
- While Mrs. Rector had not finished paying off her property by the time she passed on, she was extremely close. After having paid for nearly 16 years, she had the amount down to \$1,808.00 at the time of her death.

[79] Accordingly, the answer to the question of whether Mrs. Rector became entitled to a deed in her lifetime is no. Doris Rector died with a modest balance still outstanding on the property.

[80] This should have been an easy matter for her son to remedy. The Guests repeatedly invited him to do so. Likely due to limited financial means, he did not do so, and consequently the situation continued to get more complicated.

Issue 2 – Did the estate of Doris Rector become entitled to a deed to the property, following her death, by virtue of any steps taken by Lloyd Rector or otherwise?

[81] Following the death of Mrs. Rector, the Guests told Lloyd Rector that a balance was owing and encouraged him to pay so that the deed could be completed.

[82] As noted above, Mr. Rector's response was to indicate that his finances were strained, but he would take some steps and pay the amount owing.

[83] I have reached the following conclusions with respect to events following the death of Mrs. Rector:

- Lloyd Rector was correctly advised there was a balance owing on the sale arrangement for the property. The Guests made clear that a deed was available at that time on payment of the balance.

- Mr. Rector told the Guests that he was going to make arrangements to pay. He failed however to make this happen.
- Following the death of her father, Lois Kember remained open to Lloyd Rector finally paying off the balance and receiving the deed. Her patience however was clearly wearing thin. When Mr. Rector failed to conclude matters, she considered herself absolved of any obligation to him. Mrs. Kember had received some direction from her father, prior to his death, about the situation with Mr. Rector. Later in these reasons this will be discussed further.
- Following her father's death, Lois Kember included a Quit Claim for this property when she otherwise sold all the family's remaining interest in the subdivision to the Grahams. Mr. Rector launched this action three months after this sale to the Grahams.
- It is clear that, both before and after his mother's passing, Mr. Rector did work for Mr. Guest in the subdivision. This waxed and waned over the years depending on situational factors. It became less as the years went on.
- Mr. Guest had various arrangements with Mr. Rector around compensation. There was, in prior years, a system where Lloyd Rector did work, and Mr. Guest tracked this and gave Mr. Rector credit or compensation. I am satisfied that Mr. Rector always received his compensation. I am not satisfied there were ever any credits towards the unpaid amount on 139 Guest Drive. Mr. Rector had the burden of proving such a thing. He has failed to do so.
- Finally, Mr. Rector argued that a reference in a document of February 2012 from Helen Guest to himself which contained the phrase "...you are safe from old claims after so many years..." meant that the Guests were forgiving old debts owed to them from Mr. Rector. This is not what the reference pertains to. Mrs. Guest was suggesting that the passage of time meant that Mr. Rector was then safe from old claims of his former creditors or former spouse. This issue had prevented him from previously accepting the deed to 136 Guest Drive. Mrs. Guest was expressing her belief that he was finally safe to have property in his

name. In the very same message, she made a separate reference to the money still owing on 139 Guest Drive.

[84] Accordingly, the answer to the question of whether Mr. Rector took steps following his mother's death that entitled her estate to a deed is no.

[85] The balance of the debt, being \$1,808.00, remained outstanding.

[86] I considered the limited evidence presented on the issue of whether there were additional amounts owing by the Plaintiff, on 139 Guest Drive, for other amounts such as unpaid water charges or municipal taxes. I was not satisfied there was sufficient evidence on these points to reach any determinations.

[87] The issue is whether Lloyd Rector is now entitled to a chance to pay the balance, or whether his non-action and obstinacy has cost him (or more precisely his mother's estate) that opportunity.

Issue 3 – Is either Plaintiff now entitled to pay out any remaining balance and receive a deed to the property?

[88] Is the estate of Doris Rector entitled to an opportunity to pay out the remaining balance and receive a deed?

[89] The answer to this question requires a discussion of the law of contractual waiver and notice of withdrawal of waiver.

[90] Did the Guests waive strict compliance with elements of the 1995 agreement? If this was the case, was notice given that the waiver was being withdrawn?

[91] There is a substantial amount of caselaw dealing with these issues. In the case of *North Elgin Center Inc. v. McDonald's Restaurants of Canada Ltd*, 2018 ONCA 71 the Ontario Court of Appeal addressed the essential elements of contractual waiver in these terms, at para. 8:

- (a) If one party leads another party to believe that its legal rights under a contract will not be insisted upon;
- (b) That the first party intends that the other party will act upon that belief;
- (c) That the other party does so; and
- (d) Then the first party may not afterwards insist on its strict legal rights when it would be inequitable to do so.

[92] With respect to the issue of withdrawal of waiver, the Court continued:

10 For the revocation of a waiver to be effective it must provide reasonable notice to the receiving party; see *Petridis*, at para 20. To qualify as reasonable, the notice must make clear that the party who granted the waiver will insist upon the strict enforcement of its legal rights. The notice must also afford the opposite party an opportunity to cure any defect resulting from its reliance on the waiver.

[93] The court in *Chan v. Lorman Developments Ltd.*, 2007 SKQB 173, discussed the retraction of a waiver in these terms:

45 While waiver can be retracted, reasonable notice must be given to the party in whose favor the waiver operates (see: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 SCR 490, at paragraph 27, and *Hrynenko v. Hrynenko* (1980), 168 DLR (4th) 437 (BCCA)).

[94] I have also reviewed and relied on the treatment of these issues by Justice Moir in the case of *Jones v. Laurie*, 2004 NSSC 164. In this case, the Court commented, in part:

14 ... waiver seems very much like promissory estoppel applied in the context of an apparent representation, by words or conduct, that one would not insist on some contracted term or, in the specific instance of waiver, words or conduct amounting to an effective promise not to insist on some terms of a contract. ... in the context of forbearing a right of termination, one cannot revert to the contracted terms except on adequate notice.

[95] These comments by Justice Moir accord with the observations made in a number of other authorities respecting waiver of contractual terms by conduct. For instance, in the case of *Coffee Time Donuts Inc. v. 2197938 Ontario Inc.*, 2022 ONCA 435, the Ontario Court of Appeal commented:

7 We see no error in the motion judge's finding that the agreement between the appellants and the respondent was continued by the conduct of both parties after the term of the written agreement expired. ... In the circumstances, we see no basis to interfere with the finding by the motion judge that the agreement was continued by the conduct of the parties after the expiration of the written agreement: *Saint John Tugboat Company Ltd. v. Irving Refinery Ltd.*, [1964] SCR 614.

[96] Finally with respect to the applicable law, I want to add a note with respect to the *Statute of Frauds*. Various authorities, including *G.H.L. Fridman, The Law of Contract (Fifth Edition)*, comment that the *Statute* does not apply to contractual waiver. In his text, at page 563, Fridman discussed when a contractual amendment

must comply with the *Statute of Frauds*. He then contrasts this with waiver, stating as follows:

The situation is different, however, where what is alleged is not a variation but a waiver. Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party.

At common law, a waiver of rights created by or under a contract, not being itself an agreement, did not have to be supported by consideration; nor would it have to be in writing or evidenced by a note or memorandum in writing, if the original contract were within, for example, the Statute of Frauds . . . The intention of the party relinquishing the right to rely on the deficiency may be expressed in a formal legal document or in some informal fashion or inferred from conduct.

[97] I accept this is an accurate statement of the law that applies to the present situation. (See also *Crosby v. Temple*, [1940] 2 DLR 554 (N.S.C.A)). This case was referred to in *Petridis v. Shabinsky*, 1982 CarswellOnt 631, para 22, as authority for the proposition that “...the *Statute of Frauds* is no bar to an action based on waiver”.

[98] On the issues of waiver, waiver tolling limitation periods and notice of revocation of waiver generally, I have considered and relied on the discussion in the Fridman text and cases noted above, together with additional authorities, including the following:

Ford v. Kennie, [2002] NSJ No. 477 (N.S.C.A.);

Yoshikawa v. Dilon, 2022 BCCA 180;

Brown v. Boon, 2018 MBCA 14;

Go Ha & Associates Ltd. v. 611414 B.C Ltd., 2018 BCSC 2118;

Kypriaki Taverna Ltd. v. 610428 B.C. Ltd., 2021 BCSC 1711.

[99] I have reached the following conclusions with respect to the issues of waiver and notice of intention to return to strict compliance:

- The Guests waived strict compliance by Mrs. Rector with the payment terms and finish date of the 1995 agreement. This was not unusual for the Guests, who had a history of flexibility in their dealings with residents in the subdivision.
- Mrs. Rector continued to pay. The Guests continued to collect. A deed was still agreed to be available on full payment. Both parties shared this understanding. Mrs. Rector acted in reliance on the waiver of strict compliance.
- When Mrs. Rector passed, the Guests treated Lloyd Rector as the successor to his mother. They proceeded on the basis that his mother's entitlement passed to him. They indicated that the deed was still available and would be delivered on payment of the balance. While they were clearly asking for payment, no deadline was given.
- No indication or notice was given of a possible or pending sale.
- The Grahams were aware of the unresolved issue respecting 139 Guest drive when they took the Quit Claim deed.
- Following the sale to the Grahams, notice was given to Mr. Rector that this transaction had occurred.

[100] I have reviewed the caselaw touching on what is required to give notice of an intention return to strict compliance with contractual terms following a period

of waiver. What is deemed reasonable will depend on the facts, taken together with the nature and extent of the past dealings and waiver.

[101] In this case, where the debt came within \$1,808.00 of being cleared, I find that it was necessary to give an unambiguous indication that the waiver was ending, that there was a set period to cure the defect, and barring this, a sale was possible or contemplated. This would not have been onerous.

[102] To sell a property with so little still owing, without such notice, was problematic. As the caselaw indicates, clear notice of the intention was required. (See: *North Elgin Center Inc.*, supra., para 10). For whatever reason, this did not take place.

[103] I believe that part of what happened here may stem from the fact that, prior to his death, Shirley Guest told his daughter to let Mr. Rector live in the property rent free for a time. This was confirmed by Lois Kember in writing after the sale and in her testimony. It appears to me that confusion around his unusual status may have contributed to the failure to consider what notice might be required.

[104] Accordingly, I conclude that the Court is required to provide for a notice period. This ought to be to the estate of Doris Rector. The personal representative of the estate of Doris Rector will have the period of 90 days from this decision to

pay the remaining balance of \$1,808.00, plus interest at the rate of 3.5% after March 1, 2012.

[105] I am not satisfied that the evidentiary record is clear enough to permit any findings with respect to additional charges or other amounts owing.

[106] If the personal representative opts to tender payment in accordance with these terms, they will then be entitled to a deed.

[107] In the Statement of Claim in this matter, Lloyd Rector indicated that his desired relief was an order deeding 139 Guest Drive directly over to him.

[108] Even if the Court had concluded that an immediate deed was to be ordered pursuant to Issues 1 or 2, it would not have been possible to order such a deed directly into Lloyd Rector's name. The only possible recipient is the estate of Doris Rector, through its personal representative. The information the Court has is that Mrs. Rector died intestate, and that she had three daughters in addition to her son, Lloyd Rector.

[109] It will be the responsibility of the personal representative of the estate of Doris Rector to take whatever steps may be necessary to allow the estate to take these steps.

Issue 4 - Has Lloyd Rector established claim in damages against Paul Graham?

[110] The Plaintiff had the burden of proving this claim on a balance of probabilities. I am not satisfied he was successful in carrying this burden.

[111] Mr. Rector complained that he had his water maliciously cut off by Paul Graham. Mr. Graham gave evidence about the aging infrastructure and a break that prevented water supply. While I have suspicions, I cannot conclude that the evidence as presented allows me to resolve this in favour of the Plaintiff, on a balance of probabilities.

[112] It was pointed out as well that Mr. Rector was not paying anything for water charges.

[113] I am not satisfied that the record in this case would allow me to make findings on this matter to the required burden of proof. This component of the claim is dismissed.

[114] Both parties will be free to argue at the costs stage that the actions of the other party, while the proceeding was ongoing, is in some way relevant to the settling of costs.

Conclusion

[115] Mr. Rector has, through obstinacy and poor decision making, very nearly lost his chance to attempt to conclude this arrangement on behalf of his mother's estate.

[116] The personal representative of the estate of Doris Rector will have 90 days following this decision to make payment in the amount of \$1,808.00, plus simple interest at the rate of 3.5% from March 1, 2012. The estate will then be entitled to a deed in accordance with the agreement.

[117] The Court will reserve jurisdiction to address any implementational issues arising from this decision. This would include truncating or extending deadlines, as may be justified, or making orders with respect to the *Land Registration Act*, R.S. 2001, c. 6. See: *Miller v. Hartlen*, 2014 NSSC 296.

[118] I ask that counsel attempt to resolve the issue of costs. Too much money has already been expended on court proceedings. I hope counsel can resolve this economically, in light of the practicalities.

[119] If this is not possible, each side will provide written submissions to the Court within 30 days of this decision.

[120] Finally, I direct that counsel for the Plaintiffs prepare a draft order within seven days, for consideration first by counsel for the Defendants.

Hunt, J.