In The Supreme Court of Bermuda

CIVIL JURISDICTION

2003: 439

IN THE MATTER OF THE PARTITION ACT 1855 AND THE PARTITION ACT 1914

AND IN THE MATTER OF AN APPLICATION BY KINGSLEY OWEN YOUNG

BETWEEN:

KINGSLEY OWEN YOUNG

Petitioner

-v-

LIONEL HUBERT YOUNG

Respondent

JUDGMENT

(in Court)

Date of hearing: January 14, 2013
Date of Judgment: January 31, 2013

Mr David Cooper, Cox Hallett Wilkinson Ltd, for the Petitioner
Mr Rick Woolridge, Phoenix Law Chambers, for the Respondent

Introductory

1. The Petitioner and the Respondent are brothers. They acquired the property in dispute ("the Property") as tenants in common in equal shares under a conveyance dated September 29, 2000.

2. The Petition in this partition action was presented on October 28, 2003, supported by an even-dated Affidavit, over nine years ago. On June 3, 2004, Warner J (Acting) gave directions for the filing of further evidence by both parties in an Order which contemplated that the present action might be consolidated with a Writ action to be commenced by the Respondent against the Petitioner.

3. The Petitioner's 2nd Affidavit was sworn on or about June 17, 2004[1] and filed on June 18, 2004. The Respondent's Affidavit in Reply was sworn on September 1, 2004. The Petition seeks an order for sale and a division of proceeds in equal shares.

4. The principal dispute from the outset and at trial was whether the Plaintiff is bound by a sale agreement he admits he signed dated January 11, 2004 and modified on January 14, 2004 according to which he agreed to limit his claim to the sum of $45,000 less the legal costs of transferring his interest in the property to the Respondent (the "Sale Agreement"). In 2006 the Property was valued at $900,000; it is now likely worth far less than that.

5. It was common ground at trial that if the Sale Agreement was not enforceable the disparity in contributions made by the parties to the equity in the Property was such that the Respondent was entitled (in net terms) to more than a 50% share in net terms. It was also self-evident that the Respondent never commenced a Writ action against the Petitioner to enforce the Sale Agreement as appears to have been contemplated by the June 4, 2004 Order.

6. At the end of the trial, it being clear that the financial detail had not been addressed in sufficient detail in evidence, counsel sensibly agreed to seek the Court's determination of two broad issues only:

    (a) the enforceability of the Sale Agreement;

    (b) the legal principles according to which the parties' respective shares in the Property ought to be calculated.

Findings: the enforceability of the Sale Agreement

<u>The Agreement</u>

7. Mr Cooper for the Petitioner took no point on the absence of stamp duty being paid on the Agreement. Had the point been taken for the first time at this late stage, Mr

[1] The jurat is dated "16th day of June 2003" and the Exhibit coversheet is dated "17th day of June 2004".

Woolridge could fairly have sought an adjournment and paid the requisite duty rendering the Sale Agreement formally admissible.

8. The Agreement witnessed by the parties' sister and signed as of January 14, 2004 provided as follows:

> "*January 12, 2003*
>
> *To Whom It May Concern:*
>
> *Please be advise [sic] that I Kingsley Owen Young agree to sell my portion of property located at #64 Tribe Road No.5 Paget, PG04, for the sum of $45,000 (Four Five Thousand Dollars) to Lionel Hubert Young.*
>
> *I further agree that the legal fees and stamp duty incurred in this transaction will be deducted from the above sum. The above payment to be made in installments* [sic] *on sale of the property in question.*"

Consideration

9. In the course of argument I raised with the Petitioner's counsel the question whether there was on the face of the Sale Agreement any consideration. Mr. Cooper suggested that the purchase price met the consideration requirement and Mr Woolridge saw no need to address this issue as I did not press my concerns. Having taken time to reflect upon this point further, this issue merits brief consideration even though, on balance, I am satisfied that the Agreement is not unenforceable for want of consideration.

10. In a final contract for the sale of goods, the purchaser agrees to pay the purchase price in consideration for the seller transferring title to the relevant goods. Under a conveyance of land for valuable consideration, the vendor transfers his interest in the land in consideration for the purchase price paid by the purchaser. An executory contract for the sale of land made in contemplation of a subsequent conveyance is ordinarily made in consideration for the vendor agreeing (conditionally) to sell to the purchaser and no other person and the purchaser not simply agreeing (conditionally) to buy the relevant property. The purchaser also ordinarily tenders a deposit which he will lose if he wrongfully fails to complete the proposed sale. The deposit compensates the vendor from the risk that he might lose the opportunity to sell to a third party during the currency of the sale agreement in the event that the purchaser wrongfully fails to complete the sale.

11. The Sale Agreement, according to the Respondent's implicit case, constituted an agreement restricting the Petitioner's right to dispose of his interest in the Property in

return for the Respondent's unconditional commitment to complete the purchase for the agreed price within a reasonable time (in the absence of any express completion date). In my judgment the consideration exchanged consisted of reciprocal unconditional promises to complete the sale within a reasonable time; the purchase price (apparently tendered at a later date) would have been the consideration for the actual conveyance assuming all the express and implied conditions for completion had been satisfied.

Undue influence

12. The Petitioner complained that he concluded the Sale Agreement without seeking legal advice under pressure of criminal proceedings commenced against him which were distressing to his family and created a need for him to rapidly distance himself from any connection with the Property upon which his mother resided. The unusually acute distress caused by his arrest also derived from the fact that at the material time his brother and (now) sister-in-law were senior Corrections and Police officers respectively. In his Skeleton Argument, Mr Cooper submitted simply: "*Such agreement can be considered to be tainted by undue influence.*"

13. The Respondent in his evidence denied explicitly pressuring the Petitioner to sell his share. But he admitted that he drafted the Sale Agreement. It seemed to be common ground that not long before the Sale Agreement was consummated the Petitioner was proposing to acquire the Respondent's interest in the Property. On January 6, 2003 the Petitioner was arrested at his place of employment on suspicion of being concerned in the importation of cannabis in Bermuda and a search warrant was subsequently executed at the family home. The Sale Agreement was initially signed on January 11, 2003, less than a week after the Petitioner's arrest.

14. I find that the Petitioner signed the Sale Agreement under extraordinary circumstances in which he felt morally culpable for jeopardizing the reputation of a respectable family, putting the security of the Property at risk (through possible forfeiture proceedings under the Proceeds of Crime Act 1997 were he to be convicted), distressing his mother and potentially damaging the careers of his sibling and the latter's fiancé. It is impossible to believe that the Respondent, the drafter of the Sale Agreement, did not use these circumstances to encourage the Petitioner to consummate the transaction as quickly as possible. In the event the Petitioner was subsequently cleared of the criminal allegations for which he was arrested.

15. The Petitioner's brother would not have perceived of the pressure he asserted as illegitimate pressure because the Respondent was quite justified in being outraged at the fact the Petitioner had, by accident or design, embroiled the family Property in a highly embarrassing criminal investigation. In any event, the Petitioner himself gave the distinct impression in his oral evidence that he signed the Agreement primarily out of concern for his mother. I am bound to find that the Sale Agreement was not

concluded as a result of an ordinary arms' length negotiation. In addition the Petitioner has satisfied me that the Sale Agreement reflected disadvantageous terms in that:

(a) the Petitioner agreed the consideration of $45,000 (gross) based on his contributions to the mortgage alone;

(b) although the Petitioner contributed approximately 1/6th to the deposit advanced in connection with the acquisition of the Property, his legal interest was half. According to a September 2003 valuation of the Property, the Petitioner was potentially entitled to 50% share of $420,000;

(c) even if the Petitioner's equitable interest was only 1/6th , $70,000 was substantially more than the price agreed under the Sale Agreement.

16. Did these circumstances amount to undue influence? The Bermudian courts do not appear to have extensively considered the scope of the doctrine of undue influence in the contractual context. No authority was cited by either counsel on this point. Riihiluoma J (Acting) on behalf of this Court considered this topic in the context of a summary judgment application involving a different factual matrix in *Dunkley-v-Clarke*[2004] Bda LR 43 and opined (at page 8) that the relevant law was adequately summarised in *Royal Bank of Scotland plc-v-Etridge* [2002] 2 AC 773 (House of Lords). Lord Nicholls delivering the leading judgment in that case lucidly summarised the doctrine of undue influence as follows:

> "*6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.*
>
> *7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (Huguenin v Baseley 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be*

more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. An example from the 19th century, when much of this law developed, is a case where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts: see Bainbrigge v Browne (1881) 18 Ch D 188.

9. In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired. In Allcard v Skinner (1887) 36 Ch D 145, a case well known to every law student, Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In Zamet v Hyman [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

10. The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. Sir Guenter Treitel QC has rightly noted that the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see Treitel, The Law of Contract, 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see National Westminster Bank Plc v Morgan [1985] AC 686, 707-709.

11. Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

12. In CIBC Mortgages Plc v Pitt [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out….

20. Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case. " [emphasis added]

17. I adopt the above statement as reflecting the Bermudian law position on the doctrine of undue influence as it arises in the contractual context. I find that having regard to all the evidence adduced at trial, the Petitioner has satisfied me that the Sale Agreement is tainted by undue influence on the following grounds:

(a) the present case is not a case of actual or presumed undue influence based on the unequal power relations between the parties generally such as occurs in cases such as parent and child or lawyer and client;

(b) the present case is one where the impugned Agreement was entered into a time when the Petitioner was extremely emotionally vulnerable because he wished to quickly dispose of his interest in the Property to avoid causing distress and embarrassment to, *inter alia*, his mother as well as the Respondent;

(c) the Respondent drafted the Agreement and encouraged the Petitioner to execute it as soon as possible in the immediate aftermath of the Petitioner's arrest on suspicion of serious criminal charges in circumstances where:

(i) the Property in which the parties and their mother resided had been searched by the Police,

(ii) the Petitioner received no legal advice and the Sale Agreement itself was not professionally drafted nor in standard market terms, and

(iii) the financial terms of the Agreement were disadvantageous to the Petitioner;

(d) while the Respondent in all likelihood subjectively believed that the pressure he applied to the Petitioner was entirely legitimate, the emotionally vulnerable position the Petitioner was in makes it clear in objective terms that his free will would have been sapped by even gentle encouragement to bring his interest in the Property to an expeditious end.

18. I find that the Respondent ought not to be permitted enforce the Sale Agreement by way of specific performance because the Agreement is tainted by undue influence.

Equitable Delay

19. The Petitioner raised the argument that it would be inequitable to permit the Respondent to specifically enforce the Sale Agreement by reason of delay in paragraph 4 of the Petitioner's Supplementary Affidavit sworn on July 16, 2010. It seems that reliance was first formally placed on the Sale Agreement by the Respondent in his Affidavit in Reply dated September 1, 2004 and that he has never even tendered for execution any deed of conveyance based on the Sale Agreement.

20. I find that the Petitioner at an early stage received advice that any attempt to dispose of his interest in the Property while drugs charges were pending would likely be of no legal effect by virtue of the Proceeds of Crime Act 1997. Support for this may be found in paragraph 15 of his Affidavit filed on June 18, 2004. Prior to this date in or about March 2003, the Respondent's then attorneys tendered a conveyance which admittedly did not conform to the Sale Agreement[2] which the Petitioner's then attorneys said he would not sign until he took independent legal advice upon it.

[2] Mr Cooper's assertion to this effect was not challenged and, in any event, no reliance was placed by the Respondent on the tender of the deed of conveyance in March 2003 which was not produced in evidence. The Respondent's counsel merely submitted that this point was not previously taken.

21. Mr Woolridge invited the Court to have regard for the familial context of the present litigation and to reject the delay complaints on this ground. It is true that the first effective hearing of the Petition fixed for December 20, 2004 was adjourned by consent to enable the parties to pursue a settlement. However, the Petitioner issued a Summons for Directions on March 14, 2007 with fresh lawyers and thereafter consistently made the running in terms of advancing the present action. I ordered fresh directions on November 1, 2010. The Respondent failed to comply with those directions.

22. Although Ground CJ ordered the matter to be set down for trial forthwith on the Petitioner's application on January 1, 2008, the Respondent's lawyers came off the record on April 10, 2008. After the Petitioner was unable to agree fresh dates with the Respondent or his new attorneys, a fresh trial date was set. This was adjourned by consent with further directions ordered on June 9, 2008. On March 2, 2010 the Petitioner sought and obtained an adjournment of the effective hearing date. Thereafter discovery was belatedly given by the Respondent, with specific discovery being ordered by Ground CJ on August 11, 2010. Further directions were ordered by consent on April 12, 2012 which the Respondent did not comply with until the Petitioner issued a Summons seeking an "unless order" on May 9, 2012. The matter was entered for trial in October.

23. The overall picture presented by the record is that the Respondent has demonstrated no enthusiasm for prosecuting his specific enforcement claim since he first raised it as a shield against the Petitioner before Warner J (Acting) on June 3, 2004 who ordered by consent that the Petitioner's claim should be consolidated with any Wit that might be filed by the Respondent against the Petitioner. No Writ was ever filed and the Petitioner took the initiative of seeking directions for the Respondent to plead his case in the present action. The Respondent ignored several directions orders and his specific performance claim has only been heard 8 ½ years later as a result of the Petitioner driving the present action forward-despite the fact that the Petitioner explicitly complained of the delay in July 2010.

24. Hanbury and Martin's '*Modern Equity*', 14th edition, was cited on the scope of the Court's jurisdiction to decline to grant specific performance on the grounds of, *inter alia*, delay (the doctrine of *laches)*. The relevant passage highlights the need to have regard to whether or not a breach of contract has occurred and notes that even where a breach of contract has occurred the Court retains an equitable discretion to grant specific performance. I am also guided by the following statement of the law found in the Judgment of Richard Ground CJ (as he then was) in *Richardson-v-Tuzo* [2007] Bda LR 1 at pages 6-7:

"*29. To the extent that the defendant relies upon the plaintiff's delay in enforcing her rights, I have taken the relevant law from the following extracts from Spry's 'The Principles of Equitable Remedies', 4th ed. 1990:*

> *'The term "laches" has commonly been used in two senses. In the first sense it refers simply to delay of the plaintiff in pursuing relief; and here it should be noted that delay by itself can no longer be thought to give rise to an equitable defence. In the second sense, which is the only sense in which it is now relevant in courts of equity, it refers to a position that the delay of the plaintiff in pursuing relief has brought about, and here it is the position caused by the delay, and especially its effects on the defendant himself, rather than the delay itself, which causes the court to deny relief.*
>
> *…*
>
> *Laches is established when two conditions are fulfilled. In the first place, there must be unreasonable delay in the commencement or prosecution of proceedings; in the second place, in all the circumstances the consequences of delay must render the grant of relief unjust. These two conditions will be considered in turn.*
>
> *…*
>
> *The point of time as from which the reasonableness of delay is determined is, prima facie, the time at which the plaintiff came to know of the facts that had given rise to the ground of equitable intervention in question. So it has been said that it is "if not universally at all events ordinarily" necessary that there should be "sufficient knowledge of the facts constituting the title to relief". Hence ordinarily it does not matter whether the plaintiff was then aware that he was entitled as a matter of law to equitable intervention. It has been said, "Generally, when the facts are known from which a right arises, the right is presumed to be known."*
>
> *…*
>
> *Ultimately these matters depend on the particular circumstances and the justice and reasonableness of granting the particular relief in question. The governing consideration in regard to matters of notice, and that to which general rules must be subordinated, is that there must be "such notice or knowledge as to make it inequitable to lie by" in regard to the particular discretionary relief that is subsequently sought, in the light of all the relevant considerations tending for and against the grant of that relief.*
>
> *…*
>
> *There are many ways in which the delay of the plaintiff may give rise to a substantial prejudice to the defendant. A common case is found*

where the defendant loses meanwhile access to documents or other evidence that affects substantially his ability to defend himself. A further common example arises where, during the period of unreasonable delay, dispositions are made either by the defendant or by a third party and it would be inequitable to disturb them. This is so especially if later interests are acquired for value, but even if there are merely voluntary dispositions it is sometimes found to be unjust to disturb them."

25. In summary, the Court can in its discretion decline to grant equitable relief such as specific performance to which a claimant would otherwise be entitled on the grounds of the claimant's delay where:

    (a) the claimant has been guilty of unreasonable delay in the commencement or prosecution of his claim; and

    (b) the delay has occasioned substantial prejudice to the respondent to the claim.

26. In the present case the Petitioner has made out a case of unreasonable delay but not a case of substantial prejudice. No specific or sufficient prejudice was identified which was capable of meeting this element of a *laches* plea, being prejudice which would justify refusing altogether an otherwise meritorious specific performance claim. This ground for refusing to enforce the Sale Agreement fails as a freestanding basis for refusing enforcement.

Contractual delay

27. Mr Cooper complained that the Respondent had never even tendered a conveyance between the Petitioner and himself for signature by way of an initial attempt to enforce the Sale Agreement. This gives rise to the need to consider, as an alternative to the question of equitable delay, whether the Respondent's right to enforce the Agreement has lapsed on other contractual grounds. Identifying the correct lens through which to view the specific enforcement claim is difficult because the claim was never formally pleaded in the way that it ought to have been and was contemplated would happen in the early stages of this action.

28. Nevertheless, it appears to me to be essential to analyse what time requirements the parties must be deemed to have incorporated into the Sale Agreement and to analyse, with reference to what would ordinarily happen in a contract for the sale of land, whether the Respondent's delay in prosecuting his cross-claim was fatal to his legal entitlement to pursue it in accordance with the terms of the Agreement itself.

29. I have already found that the Sale Agreement can only sensibly be read as incorporating an implied term that the sale be completed within a reasonable time and

that although the Sale Agreement was executed as of January 14, 2003 the Respondent first placed formal reliance upon it in his September 1, 2004 Affidavit in Reply in the present action commenced by the Petitioner against him. Was it still open to the Respondent, almost 20 months after the execution of the Agreement, to seek to enforce it?

30. In the context in which the Sale Agreement was executed, in my judgment it is obvious that the parties did not contemplate completion taking place by such a late stage. The entire rationale for the transaction was to distance the Petitioner from the Property as quickly as possible. In ordinary arms' length contracts for the sale of land, the completion date may be as long as six months away, with some flexibility built in for the parties by mutual consent to extend the completion date even further. An example of such contractual terms may be found in *Paynter-v-Holder* [1986] Bda LR 10 (Court of Appeal).

31. Had the parties applied their minds to it and in order to give efficacy to the contract, a shorter period would have been contemplated here. In fact it is clear that a deed of some description (seemingly contemplating a conveyance from the Petitioner to the Respondent and the Respondent's then fiancé) was tendered before March 20, 2003 when the Petitioner's attorney indicated without any apparent response that his client was not prepared to sign it at that stage. There is no or no sufficient evidence of any conduct on the Petitioner's part capable of giving rise to an estoppel in the Respondent's favour. I reject Mr. Woolridge's submission that because the Respondent paid the agreed purchase price to the parties' then joint lawyers and the Respondent purchased no other property in reliance upon the Agreement, the Petitioner is estopped from refusing to complete the sale. There is no credible evidence of any representation by the Petitioner after he signed the Agreement that he accepted its validity or intended to be bound by, let alone evidence of detrimental reliance on the Respondent's part.

32. The March 20, 2003 letter sent by Peniston & Co on behalf of the Petitioner contained no basis for inferring that the Petitioner intended to honour the Agreement. His then attorney most pertinently wrote:

> "*We have discussed this matter with our client, and have instructed him not to execute the proposed Agreement, without our perusal and/or Consent*."

33. Had the Respondent wished to keep the Agreement alive, his then attorneys ought to have responded to the March 20, 2003 letter demanding completion within a specific time. Alternatively, the Respondent's attorneys ought have at some stage within the next couple of months have signified in some way that the Respondent reserved his right to enforce the Agreement despite the Petitioner's failure to confirm that he was willing (having taken advice) to be bound by the Agreement.

34. Instead, the Petitioner never signed and the Respondent never insisted upon completion save by way of response to the present partition Petition 18 months later. The Respondent's reticence about seeking to formally enforce the Agreement may well have been informed by advice which he himself ought at some point to have received casting doubt on the validity of the Sale Agreement in Proceeds of Crime Act 1997 terms[3].

35. In my judgment the only sensible way to view what occurred is that the Sale Agreement was repudiated by the Petitioner at some point in 2003 after March 20, 2003 when he sought advice on it and failed to confirm his willingness to proceed with the sale. That repudiation was accepted by the Respondent who took no documented steps to enforce the Agreement within a reasonable time after its execution and/or the Petitioner signifying on March 20, 2003 that he was seeking advice as to whether he should complete the Agreement.

36. The time for completing the Sale Agreement had clearly lapsed by the time the Respondent first unambiguously signified his intention to enforce it in September 2004. There are no or no sufficient equitable considerations which would justify this Court granting equitable relief to 'cure' the absence of any contractual right to enforce the Agreement. For instance, the Respondent did not take possession of the property pursuant to the Sale Agreement. He was already jointly in possession of the property with the Petitioner before the Agreement was concluded. On this alternative ground, specific enforcement of the Sale Agreement is refused.

Summary: enforceability of the Sale Agreement

37. In summary, the Sale Agreement is unenforceable because it is tainted with undue influence and/or because the Respondent failed to enforce the Agreement before the right to do so expired in accordance with its implied terms.

Principles applicable to determining the parties' respective equitable interests in the Property

General principles

38. In paragraph 10 of the Respondent's submissions, Mr Woolridge made the following submission under the heading "*WHERE THE LAW AND EQUITY COLLIDE*":

> "*It is respectfully submitted that equity must prevail and with this discretionary remedy open to the Respondent to apply to the Honourable Court for relief…equity must look at the Parties' contributions as their legal*

[3] A transfer of property made by a convicted person at any time after the commission of an offence may be considered an impermissible "gift" if the value of the property disposed of by the defendant is substantially greater than the consideration he receives: section 6. Further, section 43 prohibits converting property with a view to avoiding, *inter alia*, a confiscation order.

> *interests are in conflict with their equitable contributions and that any share of the equity in the property must be divided in accordance with the Parties' equitable contributions; see* ***HASSELL-v-FURBERT & FURBERT [2005] Bda LR 22*** *per Bell PJ…*"

39. I accept this submission which in the final analysis was uncontroversial in broad terms. The parties' legal interests are equal; but, as Mr Cooper was compelled to concede, some 10 years after the Petitioner ceased residing in and contributing to the Property, the Respondent's ultimate net equitable interest had to be more than his brother's share. However, the present case is distinguishable from *Hassell-v-Furbert* where the co-owners acquired the joint property as joint tenants; here the parties acquired their respective interests as tenants in common in equal shares.

40. The Petitioner's counsel placed a number of authorities before the Court which were of assistance in illuminating the approach this Court should take to determining the parties' beneficial interests. I take as my starting point the following observation by Anne Barlow, '*Cohabitants and the Law*' (Butterworths: London, 1997) at page 259 to which Mr Cooper wryly referred:

> "*There seems to be no single correct approach, as much will depend on whether or not the parties contributed to the deposit and/or mortgage equally, with the result that legal advisers need to press for the method which is most advantageous for their client, or that which can be recommended as the fairest in all the circumstances.*"

Respective beneficial interests when the property was purchased

41. Mr Woolridge submitted with reference to any authority that, before adjustments for post-purchase contributions were taken into account, the parties' respective shares in the Property should be determined by reference to their initial capital contributions to the original purchase. This approach might well be appropriate where the Property was acquired legally by two joint tenants with no express or implied regard to the equitable shares. But why should the Court ignore the fact that the Property was conveyed to the parties as tenants in common not simply with separate ownership interests but expressly on terms that those interests were in equal proportions?

42. According to Barlow: "*An express declaration as to beneficial ownership is conclusive in the absence of fraud or mistake.*" No evidence was advanced by the Respondent to the effect that by virtue of a collateral agreement or understanding between the parties, the express terms upon which they originally purchased the property did not reflect the intended equitable position. I find that there is no material before me which can justify a finding that the parties beneficially acquired the Property at the outset in shares other than those expressed in the deed pleaded in paragraph 1 of the Petition.

43. Authority not referred to in argument further serves to illustrate the soundness of this analysis. Even where parties acquire property as tenants in common in equal shares in circumstances where one party wholly funds the acquisition, a subsequent falling out between the parties cannot undermine the original acquisition of equal interests. In *Potter-v-Potter* [2004] UKPC 41, Lord Scott delivering the Judgment of the Judicial Committee concluded as follows:

> "*17. Their Lordships take the same view of the Agreement as was taken by Chambers J and by the Court of Appeal. Inlet Road, once purchased, was to be held by the appellant and respondent as tenants in common in equal shares, at law and beneficially. The whole purchase price was to be provided by the appellant. The appellant was to establish a family trust for the benefit of the two of them and their children and the property, subject to a lease to them for their joint lives, was to be transferred to this trust. In return for the interests she was to get under the Agreement the respondent was to give up all domestic property claims against the appellant that she otherwise might have had. This was a clear, understandable and sensible arrangement. The breakdown of their relationship led to the frustration of their intentions regarding the joint lease and the transfer to the new family trust. But that is no reason to put into reverse the parts of the Agreement that had been implemented. And it is worthy of note that Mr Carruthers, while arguing that the respondent's beneficial interest in Inlet Road and its proceeds of sale had been terminated by the frustration of the provisions regarding the joint lives lease and the transfer to the new family trust, made clear that the appellant regarded the paragraph 13 bar on the respondent's right to bring "domestic property claims" against him as continuing to be contractually binding.*"

44. While the latter case concerned an agreement read with a deed of conveyance as opposed to a bare conveyance, it demonstrates the simple point that positive evidence is required to support even an arguable case for undermining the ownership terms upon which a property was expressly acquired.

Equitable adjustments to take into account post-acquisition contributions

45. The remaining issues may be summarised as follows. What account ought to be taken of:

(a) the fact that the Respondent paid more than half of the deposit;

(b) any unequal contributions between 2000 and 2003;

(c) the fact that the Petitioner made no contributions to the mortgage or maintenance of the Property after early 2003 when he vacated the property following his arrest;

(d) the fact that the Respondent alone received the benefit of living in the Property post 2003 while the Petitioner did not?

46. It was common ground that the Petitioner was not entitled to claim credit for an "occupation rent" unless he left the Property involuntarily or was excluded: Barlow, '*Cohabitants and the Law*', at page 261. There is no credible evidence that the Petitioner was excluded by the Respondent at the time he vacated the property or subsequently. Clearly the Petitioner left the Property in circumstances which were not in a general sense of his own choosing. I find that the Petitioner is not entitled to receive credit for a notional occupation rent for the period he did not reside at the Property.

47. On the other hand, the Petitioner is entitled to receive credit for 50% of any rent received by the Respondent during the period of his sole occupancy of the Property.

48. I find that the Respondent is entitled to be given credit for the difference (if any) between 50% and the contribution made by the Petitioner to:

(a) the initial deposit;

(b) capital and interest mortgage payments and any other maintenance expenses paid by the Respondent prior to the date the Petitioner vacating the Property until judgment <u>without</u> the deduction of the amount specified in sub-paragraph (d);

(c) capital and interest mortgage payments and any other maintenance expenses[4] paid by the Respondent for the period after the Petitioner's vacation of the Property until judgment, <u>subject to</u> deducting the amount described in sub-paragraph (d);

(d) however, the Respondent must give the Petitioner credit for an occupation rent of his own in respect of the period referred to in sub-paragraph (c) above. Since for much of the period in question the parties' mother was by agreement staying there rent free, the occupation rent for these purposes should be 1/3rd of the occupation rent for the entire

[4] I.e. maintenance expenses which a landlord of unfurnished residential premises would ordinarily bear, such as land tax and external and/or other structural maintenance costs.

Property and only raised to ½ the occupation rent for the period of approximately one year when the Respondent assumed occupation of the entire Property.

49. In *Dennis-v- McDonald* [1982] 1 All ER590, the English Court of Appeal suggested that the fair rent one co-owner should give the other owner credit for should be calculated by reference to the Rent Act 1977 (UK). The starting point in Bermuda for determining what a fair rent is appears to me, without deciding this issue, to be the annual rental value ("ARV") fixed under the Land Valuation and Tax Act 1967.

Date of valuation of equal shares in Property's equity

50. According to Anne Barlow in '*Cohabitants and the Law*' at page 261:

> "*If the approach in Turton-v-Turton…is followed, and the respective interests are valued at the date of realisation, adverse effects of house price interests are valued at the date of realisation, adverse effects of house price increases or decreases will be minimised for both parties...*"

51. Although this did not appear to me to be in dispute, I find for the avoidance doubt that the relevant date for determining the gross equitable value of the Property is the Property's current value, assuming that the parties propose to determine their joint ownership forthwith.

Conclusion

52. The Respondent is not entitled to specific enforcement of the Sale Agreement pursuant to which the Petitioner, a few days after his arrest on drug charges of which he was subsequently cleared, purported to see to sell his 50% interest in the property to the Respondent for "a song". The relevant Agreement is unenforceable in equity because it is tainted by undue influence. Further and alternatively the Agreement contained an implied term that completion would take place within a reasonable time, which period had lapsed by the time the Responded first sought to enforce the contract.

53. I find no basis for displacing the presumption that, in accordance with the terms upon which the Property was conveyed to the parties as tenants in common, the two co-owners are beneficially entitled to equal shares in the equity in the Property. The Petitioner is entitled to an Order for sale or, alternatively, to have his share purchased by the Respondent based on the current market value of the Property.

54. However, the Respondent is entitled to be given credit for the extent to which he has contributed more than his 50% share to the purchase price (by way of the initial deposit) and to the mortgage capital and interest and other maintenance expenses. For the period after the Petitioner vacated the Property, the Respondent must account to him for a notional occupation rent on the basis explained above.

55. The parties shall have liberty to apply in respect of the actual calculations of the various sums due (which they sought an opportunity to agree) and as regards costs. To assist a resolution on the issue of costs, I would merely add that there is no obvious reason why each party ought not to bear his own costs. I will also hear counsel if necessary to settle the terms of the Order drawn up to give effect to the present Judgment and/or the final Order.

Dated this 31st day of January, 2013 _____

IAN RC KAWALEY CJ