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Brother messes up with email scam

Back in 1998, brothers Faheem, Shaun and Narool Samad decided to purchase a house in Toronto for the three of them and their parents to occupy. At the time, they signed an agreement that set out the terms of the ownership, use, occupation and eventual sale of their interests.

Things seemed to be operating smoothly until Shaun became involved in what is known as a "Nigerian letter scam" in 2001. He was duped into thinking that there was unclaimed money in a bank account in Nigeria, which he and any partners he recruited could claim.

Shaun pitched the scheme to his "circle of influence," and eventually raised more than $700,000, which was transferred to the engineers of the scam.

The following year Shaun realized he had been defrauded. He met with a lawyer who advised him he was potentially liable to civil lawsuits by some of the individuals he had recruited into the Nigerian "investment."

Shaun's one-third interest in the house was his only major asset. In order to protect it from being attacked by creditors whose investments he had personally guaranteed, Shaun sold it back to his two brothers in 2003 for $60,000.

After the title transfer, Shaun remained in the house. He continued to pay $500 a month as his share of the property expenses to his brother Faheem, who eventually became the sole owner. He stopped making payments in February 2005, but continued to live in the house.

The relationship between the brothers deteriorated. Eventually, Faheem sued Shaun to evict him from the house and force him to pay "rent" for occupying the house starting in February 2005. Shaun refused to leave, claiming he was still a part owner of the house.

When the case got to court, Shaun claimed that there was a secret, oral agreement that he would still be entitled to a one-third ownership. The $60,000 proceeds, he said, was not for the sale of the home but was instead a loan to put him back on his feet financially, and to pay back some of his creditors in the Nigerian scam.

He testified that the release, which gave up his claims to the house, was a fabrication designed to dupe creditors into thinking that he no longer had any interest in the property.

Justice Todd Archibald presided over a three-day trial in June. After hearing the evidence, the judge wrote in his decision that Shaun was "very sophisticated, intelligent and resourceful," and "crafty and clever," but that his evidence was "not remotely credible or believable."

The judge noted that Shaun "admitted, several times on the stand, that he removed his name from the title and entered into the oral agreement in order to defraud his creditors in the Nigerian scheme."

An important part of the judge's decision dealt with the doctrine of clean hands. That doctrine, Archibald noted, would not allow the court to enforce an oral contract that Shaun "clearly entered into for the purpose of defrauding his creditors."

"In light of the defendant's fraudulent conduct," the judge wrote, Shaun's "fabrication" of the paperwork "in order to defraud his creditors would prevent me from ...(ruling) in his favour...I do, however, conclude that the defendant sold his interest in the house."

The judge ordered Shaun to pay his brother $20,500 in rent and $5,000 in costs. As well, he was ordered to vacate the house.

Three lessons are apparent from the Samad brothers case:

If you're ever involved in a lawsuit, make sure you come to court with clean hands. Courts tend to have no sympathy for litigants who admit fraud.

If an ownership interest in a house is going to be held in trust by a third party, make sure the arrangement is fully documented.

Never get involved in a scheme to obtain money. There is no pot of gold at the end of the email rainbow.

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Samad v. Samad, 2008 CanLII 31424 (ON S.C.)

Date:	2008-06-30
Docket:	07-CV-339027SR
URL:	http://www.canlii.org/en/on/onsc/doc/2008/2008canlii31424/2008canlii31424.html
Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Decisions cited

- Carvery v. Fletcher, reflex (1987), 76 N.S.R. (2d) 307 (1987), 34 D.L.R. (4th) 739
- Prinzo v. Baycrest Centre for Geriatric Care, 2002 CanLII 45005 (ON C.A.) (2002), 60 O.R. (3d) 474 (2002), 215 D.L.R. (4th) 31 (2002), 17 C.C.E.L. (3d) 207 (2002), 161 O.A.C. 302
- St. Lawrence Cement Inc. v. Wakeham & Sons Ltd., 1995 CanLII 2482 (ON C.A.) (1995), 26 O.R. (3d) 321 (1995), 23 B.L.R. (2d) 1 (1995), 86 O.A.C. 182

COURT FILE NO.: 07-CV-339027SR

DATE: 20080630

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FAHEEM MOHAMED SAMAD	)	Morris A. Singer, for the Plaintiff
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
SHAUN SHAHABUDEEN MOHAMED SAMAD	)	Shaun Samad, in person
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	**Heard:** June 10 13, 2008

Archibald J.

A. Introduction

[1] The plaintiff and the defendant are brothers. 10 years ago they, along with a third brother, bought a home in which their families could live. The plaintiff s and defendant s relationship over the years steadily deteriorated. Eventually, the plaintiff became the sole registered owner of the property. The plaintiff seeks the removal of the defendant from the property and payment of occupation rent from February 2005. The defendant refuses to leave, submitting that while his name is no longer on title, he is still a part owner of the property. The defendant also counterclaims against the plaintiff for intentional infliction of mental suffering.

B. Facts

[2] In 1998, Faheem Mohamed Samad (the plaintiff), Shaun Shahabudeen Mohamed Samad (the defendant) and Mohamed Narool Samad (Narool) decided to purchase a house located at 31 Cedar Drive in Toronto. They took title in all three of their names as tenants in common, with each owning a one third interest in the property. Around the time they purchased the property, the brothers signed a Property Purchase Agreement. It was an all encompassing contract that covered ownership, occupation, and sale of the brothers interest. The brothers and their families, including their parents, moved into the home.

[3] Things seemed to be operating relatively smoothly until the defendant became involved in what is commonly known as a Nigerian letter scam in September 2001. The defendant was duped into thinking that there was unclaimed money in a bank account in Nigeria, which he and any partners he recruited could claim. The defendant, who is a Certified General Accountant, pitched the scheme to his circle of influence , which included one of his brothers, and eventually raised over $700,000. That money was transferred to the engineers of the scam.

[4] Sometime in 2002, the defendant realized that he has been defrauded. The defendant claims to have met with a lawyer, Mr. Sheppard, in November 2002. According to the defendant, Mr. Sheppard informed him that he was potentially liable to civil lawsuits by some of the individuals who invested in the scam because the defendant had not provided them with material information regarding the investment. Mr. Samad testified that Mr. Sheppard advised him to do two things to protect himself: one was to declare bankruptcy, and the other was to remove his name from any assets he owned in order to make himself judgment proof. The defendant did not want to declare bankruptcy. But he did decide to remove his name from the only major asset he owned: his one-third interest in the house.

[5] Subsequent to the defendant s meeting with Mr. Sheppard, a family meeting was called and the defendant s predicament was discussed. The defendant claims that the plaintiff attended this meeting but both the plaintiff and his uncle, Aftab Ahmad, who attended this meeting, deny this. The defendant claims that the family jointly decided that he should take his name off title in order to prevent a lien from being put on the property. According to him, the family worried that a lien would prejudice the other owners and family members currently living in the home.

[6] The owners retained a lawyer, Mr. Oudit Rai, to transfer the defendant s interest to the plaintiff and Narool. The transfer was completed and registered on November 22, 2002. On the transfer document, consideration of $59,000 was given for the sale. The defendant received a cheque from Mr. Rai for $60,000 on January 2, 2003, about six weeks after the transfer of title was registered. On the same day, the defendant signed a release that was witnessed by Mr. Rai.

[7] I will reproduce the wording of the release, since it will become important later on:

I hereby acknowledge receipt of the original of the above cheque for $60,000 and hereby forever release any interest, claim, right or equity in the property known as 31 Cedar Drive, Scarborough, Ontario, and against Mohamed Narool Samad and Faheem Mohamed Samad, with respect to the said property.

Dated at Courtice this 2nd day of January, 2003.

[8] The $60,000 which the defendant received came from secured lines of credit registered against the property. Both the plaintiff and Narool took out a line of credit. They then advanced $30,000 each.

[9] The defendant claims, however, that despite the appearance of a sale, he never sold his interest in the home to his brothers. The transfer was on paper only. At the time of the transfer, the defendant submits that the brothers entered into a secret, verbal agreement that he would still be the equitable owner of his one-third interest. The $60,000 which he received was not for the sale of the home but was rather a loan to allow him to become financially stable and to pay back some of his creditors in the Nigerian scam. As for the release, which relinquishes any claim he might have in the home, the defendant testified that it was a fabrication that was designed to dupe creditors into thinking that he no longer had an interest in the house. According to the defendant, the plaintiff insisted that he should sign the release in order to protect the property from victims of the Nigerian scam.

[10] After the transfer of the home, the defendant continued to live in the residence. According to him, he also continued to pay his share of the mortgage. In 2004, Narool sold his share in the home to the plaintiff. The plaintiff became the only person on title. After Narool sold his share, the defendant paid $500/month to the plaintiff. The defendant claimed that the payments represented his contribution to the mortgage. The plaintiff denied this and stated that they were rent payments or contributions to food costs and other common expenses. The defendant also testified that he contributed to the property taxes for the home. Then in February 2005, the defendant stopped paying the plaintiff $500/month. Since that date, the defendant has not paid the plaintiff any money for living in the house. But he continues to reside there to this day.

[11] The defendant testified that the reason he stopped making payments was because he overheard the plaintiff inform their mother that the defendant was a renter and not a co-owner in the home. The defendant stopped making payments to force the plaintiff to deliver the mortgage documents, which, he testified, would allow him to calculate his share of the mortgage. After the defendant refused to make any more payments towards the home, the brothers relationship deteriorated to such an extent that in May 2007, they had an altercation which resulted in the laying of criminal charges against the plaintiff. The charges were eventually withdrawn but during the interim, the plaintiff was not allowed to communicate with the defendant. The plaintiff moved out of the home until the charges were dealt with.

[12] The plaintiff initiated this application. He seeks an Order from me directing the defendant to vacate the home and granting him a writ of possession. The plaintiff also requests occupation rent from February 2005 to June 2008 for $500/month ($20,500). That is the period in which the defendant has resided in the home without making any payments.

[13] The plaintiff denies that there was any secret, verbal agreement that the defendant would be an unregistered one-third owner in the home. According to the plaintiff, after the Nigerian scam became evident, the defendant desperately needed money and his only option was to sell his one-third share. The plaintiff and Narool paid him $60,000 for his interest in the home. That payment, which was made approximately six weeks after the transfer was registered, is undisputed.

[14] The defendant asks for an Order declaring him as the one-third owner of 31 Cedar Drive. He also brings a counterclaim for the intentional infliction of mental suffering against the plaintiff. He asks for damages in the amount of $20,500 to offset his missed payments towards the home.

[15] I will now deal with the legal issues that arise in this case.

C. Issues

1) Is the defendant a one-third owner of 31 Cedar Drive?

2) If the defendant is not a one-third owner of the home, is the plaintiff entitled to occupation rent and a writ of possession?

3) Do the plaintiff s actions towards the defendant meet the test for the tort of intentional infliction of mental suffering?

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D. Analysis

(I) Credibility of the parties

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[16] Many of the legal issues in this case turn on the credibility of the parties. I have concluded that the plaintiff was reasonably credible in his testimony. On the other hand, I have concluded that the defendant is not remotely credible or believable. Where the evidence of the plaintiff differs from the defendant s, I prefer and accept the evidence of the plaintiff.

[17] The plaintiff gave his evidence in a clear, cogent manner. His evidence was direct and to the point. The plaintiff also did not overstate his evidence. There was one issue, however, on which I did not believe the plaintiff: his recollection of the partnership agreement that the brothers entered into when they bought the home. The plaintiff only acknowledged the last page of that document on which his signature is clearly visible. His evidence was that he could not recognize the rest of the partnership agreement. However, nothing turns on the plaintiff s lack of acknowledgment of the partnership agreement. While I found his credibility to be tarnished by his unwillingness to acknowledge the partnership agreement, I found the plaintiff, on the whole, to be much more credible than the defendant.

[18] I found the defendant to be a very sophisticated, intelligent and resourceful businessman. He is a Certified General Accountant. Notwithstanding the fact that he was duped through his own avarice to enter into the Nigerian scheme, I found him overall to be a crafty and clever individual. He is, however, not at all remotely credible. His evidence is entirely unworthy of belief.

[19] He stated, several times during his testimony, that his intention all along was to repay his creditors and not to defraud them. However, he admitted on the stand, that he did not provide all of the investors in the Nigerian scheme with all of the information necessary to determine whether they should contribute money. When the fraud was discovered, in order to prevent these creditors from recouping some of their money, he deliberately took his name off the only asset that they could come after in court. The defendant also admitted to fabricating promissory notes that purported to transfer his equity in the home to his brother, Narool, and another family member, Joe Sewram. The purpose of these fabricated promissory notes was to defeat the possible enforcement of an existing promissory note that the defendant had entered into with a third party creditor. That note guaranteed the defendant s assets as security for the loan.

[20] When faced with the release, which relinquishes his interest in the home, the defendant resorted to accusing a lawyer of deliberately fabricating and distorting the significance of that legal document. The defendant retracted his statements when I requested the lawyer to attend court to detail the real estate transaction. He also accused the plaintiff of setting him up by having him sign the release. The defendant refused to accept any responsibility for his misconduct, insisting throughout his testimony that his actions were either done at the direction of others or to benefit them. It is important to emphasize that the defendant is an Accountant by training and occupation. His attempts at deflecting the responsibility for his own misconduct rang hollow. In conclusion, I found the defendant s evidence to be unbelievable.

(II) Parol evidence rule

[21] Dubin, C.J.O, for our Court of Appeal in *St. Lawrence Cement Inc. v. Wakeham & Sons Limited et al* 1995 CanLII 2482 (ON C.A.), (1995), 26 O.R. (3d) 321 (C.A.) held that the general rule with respect to the admissibility of parol evidence was stated by Tindal L.C.J in *Shore v. Wilson* (1842), 9 Cl. & Fin. 355 at pp. 565-66 (H.L.):

The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for purposes of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.

[22] There are two documents, which clearly indicate that the defendant sold his interest in the home to his brothers: the transfer and the release. Both documents are

unambiguous, straightforward, and clear in their meaning. The defendant transferred his interest in the home to his brothers for proper and valuable consideration. He released any claim he had in the home. Both the transfer and release are binding on the defendant. As a result, evidence of an oral agreement that the defendant would remain a part owner in the home, which directly contradicts the transfer and release, would be inadmissible.

(III) Statute of Frauds

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[23] Even if I were to allow into evidence parol evidence to establish the alleged oral agreement, this agreement would violate the *Statute of Frauds*. Section 4 of the Statute states the following:

> No action shall be brought to charge any executor or administrator upon any special promise to answer damages out of the executor s or administrator s own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of any other person, or to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning `them, unless the agreement upon which the action is brought, or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto lawfully authorized by the party.

[24] Section 4 is clear: agreements concerning an interest in land must be evidenced by a writing. There is no written document or note confirming the defendant s agreement with his brothers that he will continue to have a one-third interest in the home. The oral agreement is in direct conflict with the wording of the transfer.

[25] In addition, section 9 of the *Statute of Frauds* requires all declarations or creations of trusts in lands to be evidenced by a writing:

> Subject to section 10, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect.

(IV) Knowledge of the Plaintiff

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[26] The defendant argues that despite the language of sections 4 and 9, courts have been willing to enforce verbal agreements relating to land if one of the parties attempts to avoid a trust obligation by relying on the *Statute of Frauds*. The rationale behind this exception is to prevent the statute from being used as an engine of fraud. The leading case is *Rochefoucauld v. Boustead,* [1897] 1 Ch. 196 (C.A.), where Lindley L.J. said at 206:

> It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

[27] However, as D.W.M. Waters notes in *Law of Trusts in Canada*, 3rd Ed. (Toronto: Carswell, 2005) at 256, in order for the principle in *Rochefoucauld v. Boustead* to apply it must be established that the transferee knew or had notice at the time of the conveyance that he was to hold for another. The defendant has not established that the plaintiff knew at the time of the transfer that he was to hold his brother s interest in trust for him. I will elaborate further on this point.

[28] The defendant acknowledged that he never included the plaintiff in the Nigerian scheme and that the plaintiff did not know anything about this business venture. The defendant also testified that when he discovered that he was defrauded, he was not sure if he had informed the plaintiff of this key fact. It is clear that the brothers did not have an easy relationship. Even before the home was purchased, the defendant testified that he did not trust the plaintiff and was not happy about the decision to include him in the plan to purchase the home. When the plaintiff came on board to purchase the home, the defendant testified that he drew up the partnership agreement in order to avoid the problems that he believed would be created by the plaintiff s involvement.

[29] The defendant submits that even if the plaintiff was not initially aware of his troubles, the plaintiff attended the family meeting where the decision was made that the defendant would transfer his share in order to avoid investors in the Nigerian scheme. However, the plaintiff denies that he ever attended this meeting. One of the attendees, Aftab Ahmad, who is the uncle of the parties, testified at this trial and confirmed that the plaintiff never attended this meeting. I accept the evidence of the plaintiff and his uncle that the plaintiff did not attend that meeting. Aftab Ahmad has no interest in this litigation. I found him to be objective and impartial. I find that at the time of the transfer, the plaintiff did not know about the defendant s intention to defraud his creditors. I accept his testimony that he believed that the defendant was selling his share in order to pay his debts.

[30] The defendant s relationship with the other co-owner in the home, Narool, would also have been strained during this period. The defendant had taken a leadership role in attracting investors to the Nigerian scheme. One of the first people he contacted was his brother Narool who invested and lost a good deal of money in this scheme. On his evidence, he lost roughly $47,000. As a result, the relationship between the defendant and Narool would have been understandably tense, an impression which is supported by Narool s testimony. Both the plaintiff and Narool are currently estranged from the defendant. It does not seem plausible to me, in light of the difficult relationship between the brothers, that the plaintiff and Narool would have taken out a loan against the house for $60,000 in order to loan that money to the defendant. The plaintiff testified that his brother s interest was sold to both himself and Narool. I accept his evidence.

[31] The defendant called several members of his family to testify during the trial. Not one of them verified the defendant s evidence that the plaintiff knew that he was holding an interest in the home in trust for him. Only Narool testified that he thought that the $60,000 was given to the defendant as some kind of loan. His evidence was unclear as to whether the plaintiff was a party to this loan, or if he even knew about it. I will talk more about the reliability of Narool s evidence later on in this judgment. Suffice it to say that given the defendant s dislike of the plaintiff and his unwillingness to do business with him, it is my considered view, based on the entirety of the evidence, that the plaintiff was not involved in these discussions about loaning the defendant money or about the defendant s fraudulent intentions.

[32] The defendant also relies on a letter drafted by his solicitor to the plaintiff s lawyer, when the plaintiff was buying Narool s share in the home. On February 16, 2004, the defendant had his solicitor, Mr. Andrew Fortis, draft a direction to the plaintiff s lawyer, Mr. Abbott. This direction requested that the proceeds of the plaintiff s unregistered one third interest in the home, which is listed as being worth $14,834, should be forwarded to the plaintiff to be held in trust. This letter, the defendant submits, is evidence of an oral contract that the plaintiff was to hold the defendant s share in the home in trust for him, after he removed his name from the title.

[33] Mr. Andrew Fortis testified during the trial. Mr. Fortis stated that he was acting under the defendant s direction when he drafted this direction. He did not have any personal knowledge whether the content of the direction was true or not. Mr. Fortis also admitted that the plaintiff s solicitor, Mr. Abbott, never responded in writing to his letter. He also testified that he does not know if the defendant s alleged equity in the home was ever transferred to the plaintiff. This direction is not proof of the plaintiff s agreement to hold the land in trust for the defendant. It is an entirely self serving document. It does not assist in any way in determining whether the trust existed.

[34] I find that the defendant has not established that the plaintiff knew at the time of the transfer that he was required to hold the defendant s interest in the land in trust for him. The *Statute of Frauds* applies and the alleged oral agreement cannot be enforced.

(V) Doctrine of part performance

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[35] The defendant also relies on the doctrine of part performance to demonstrate that there is an oral agreement. The doctrine of part performance is an equitable doctrine. It may allow an individual to enforce an oral contract relating to land, if it has been partly performed: *Carvery v. Fletcher* reflex, (1987), 34 D.L.R. (4th) 739 (NSTD) at para. 10. As Victor Di Castri notes in his book *The Law of Vendor and Purchaser* , looseleaf (Toronto: Carswell, 2007) at 4-14:

> The doctrine is an invention of the Court of Chancery to ensure equity being done where the defendant has stood by and allowed the plaintiff, *to his detriment,* to fulfil his part of the oral contract, and where it would be unconscionable for the defendant to set up the statute by asserting that the contract is unenforceable so that he might retain benefits which have accrued to him from that contract.

[36] In order to attempt to rely on the doctrine of part performance, an individual must have engaged in actions that can only be explained on the basis of the oral contract. Examples of relevant actions include possession of the land in question, improvements to the land, and the payment of mortgage moneys. Actions which the defendant points to as being examples of part performance of the verbal agreement include:

- Alleged mortgage and property tax contributions made by him;
- His payment of the legal fees associated with the transfer of the home to his two brothers;
- Interest payments made by him towards the plaintiff s and Narool s line of credit;
- An appraisal of the home, conducted on his behalf, after the transfer of his interest in the home;
- His renovation work on his office in 2005;
- Various housekeeping tasks done by him around the home; and
- His continued possession of the home.

[37] The defendant submits that he continued to pay his share of the mortgage after he legally transferred his share to his brothers. He submits that this is proof that he continued to hold an equitable interest in the home. The plaintiff denies that the defendant made mortgage payments after the transfer. He simply made rental payments, which he stopped remitting in February 2005.

[38] At first blush, the defendant s version seemed to have received some corroboration from his brother Narool. Narool testified that there was a secret, verbal agreement and that after the transfer, the defendant continued to give him his share of the mortgage. I found Narool to be a reasonably credible witness. However, I found some of his evidence to be inconsistent, and unreliable. For example, during his testimony, he stated at least twice that he believed that the defendant had sold his share of the house in November 2002 for $60,000. Later in his testimony, he stated that the defendant had not sold his share and the $60,000 which he received was a loan.

[39] When Narool decided to sell his interest in the home in 2003, he initially approached both the plaintiff and the defendant. However, when he realized that the defendant was no longer on title, he began to negotiate exclusively with the plaintiff. He stated that he stopped negotiating with the defendant because he no longer had an interest in the home. Narool s evidence and his conduct are inconsistent on the issue of whether the defendant continued to have an interest in the home. As a result, I give his evidence limited weight. In addition, while Narool confirmed that there was a secret, verbal agreement, his evidence was unclear as to whether the plaintiff was aware of this agreement.

[40] Another witness who testified that the defendant continued to have an interest in the home after the transfer is Bibi Nasira Amin, the defendant s sister. While I found Ms. Amin to be an impartial and credible witness, her testimony did not indicate that she was privy to any of the details of the transfer.

[41] The defendant testified that after the transfer, he occasionally remitted his mortgage payments to his parents to deliver to the plaintiff. His mother is now deceased. When the father testified before me, he could not remember whether he had ever received mortgage money from the defendant.

[42] It is also important to note that the defendant stopped making payments towards the home in February 2005. It is incomprehensible that someone who is claiming to have an interest in a property would not financially contribute to that property for nearly three and a half years. His justification for his failure to contribute was that he was using his non-payment as leverage to obtain the mortgage documents from the plaintiff. He testified that the documents would allow him to calculate his share of the mortgage. I fail to see how the defendant s access to the mortgage documents would have advanced his position as a co-owner.

[43] I do not find the defendant s explanation of why he ceased paying his share of the mortgage credible. Furthermore, I find his refusal to financially contribute to the home strong evidence that he no longer had an interest in the home, and no longer felt that he had an obligation to keep making payments towards it.

[44] The defendant also testified that he made property tax contributions, after he transferred his interest in the home, up to February 2005. However, he presented no evidence, other than handwritten papers drafted by him, to corroborate his alleged contribution to property taxes.

[45] The defendant submits that he paid the legal costs and the land transfer tax associated with the transfer of his interest. He stated that this is evidence that there was an oral contract allowing him to continue to retain his interest in the home. The legal costs of the transfer, however, were part of the purchase price. The defendant testified that he requested and received additional money from his brothers in order to pay for the legal fees associated with the transfer.

[46] Another act that the defendant argues is evidence of the oral contract is his interest and principal payments to the line of credit, which was ostensibly used by his brothers to purchase his interest in the home. These payments, the defendant argues, are evidence that the $60,000 he received was a loan. As evidence of these payments, the defendant submits working papers drafted by him which list alleged payments he made towards the plaintiff and Narool s respective lines of credit. He also points to three money orders made out to Narool, with the subject line of the bank drafts stating that they are interest payments towards Narool s line of credit. Narool, during his testimony, confirmed that for a period of time, he received interest payments from the defendant towards his line of credit. Narool also testified that the defendant contributed to the plaintiff s line of credit.

[47] With reference to the defendant s hand-drafted papers indicating the payments he made to the plaintiff s line of credit, there is no evidence that the plaintiff ever received any payments. There are no cheques or money orders made out to the plaintiff, or any acknowledgement by the plaintiff of the receipt of interest and principal payments. Narool s testimony that the defendant paid the interest on the plaintiff s line of credit is simply a bald assertion on which he did not elaborate. There was no evidence that Narool was present when the defendant made these payments to the plaintiff or that he was given money by the defendant to give to the plaintiff. Furthermore, the fact that the defendant paid Narool s line of interest is not determinative of whether he also made contributions towards the plaintiff s line of credit. The two brothers could have reached an agreement to which the plaintiff was not privy. In conclusion, the evidence does not support the defendant s assertion that he made principal and interest payments on the plaintiff s line of credit.

[48] The defendant also submits that when Narool was negotiating the purchase price for his interest in the home, an appraisal was done on his behalf by his uncle as per the original partnership agreement. The partnership agreement allowed each co-owner to appoint one appraiser to determine the fair market value of the home. The fair market value would be the mathematical average of these three figures. According to the defendant, the fact that three appraisals were done demonstrates that there were three owners and that he continued to have an interest in the home. The evidence indicates that the appraisals were requested by Narool. Furthermore, the testimony of the witnesses who attended the meeting when the three appraisals were discussed stated that the plaintiff and Narool had a disagreement over the appraisals, while the defendant was relatively passive on this issue. I conclude that there is no significance to the evidence of the appraisals.

[49] Furthermore, several of the acts that the defendant points to as evidencing part performance of the oral contract are consistent with a landlord tenant relationship. For example, he claims that he did work around the house including housekeeping and yard work. However, these are common activities that are engaged in by tenants as well as owners. His claim of continued possession of the house is also not strong evidence of the part performance of the contract since he could have stayed on as a lessee.

[50] Finally, his claim that he renovated his office in 2005 does not demonstrate that he has an interest in the home. The defendant acknowledged that his office is his place of business. Therefore, it was presumably not a space shared by the other members of the household. It was designed for his business use only. In addition, this renovation is not inconsistent with a landlord tenant relationship.

[51] Even if the defendant s actions were evidence of part performance of the alleged oral contract, (which I have concluded that they are not) the doctrine would not apply. The doctrine of part performance is an equitable doctrine. Equity requires clean hands on the part of the defendant.

(VI) Clean hands doctrine

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[52] The defendant does not come to court with clean hands. The defendant admitted, several times on the stand, that he removed his name from the title, and entered into the oral agreement, in order to defraud his creditors in the Nigerian scheme.

[53] The maxim that one who comes to equity must come with clean hands is a familiar one. This maxim does not mean that the moral character of the individual will be scrutinized before the court will lend him its aid. Rather, the wrongful act of the defendant must have an immediate and necessary relation to the equity sued for : *Dering v. Earl of Winchelsea* (1787), 1 Cox 318 at pp. 319-20. In other words, no court of equity will aid a man to derive advantage from his own wrong : *Myers v. Casey* (1913), 17 C.L.R. 90 at p. 124.

[54] The doctrine of clean hands prevents the granting of any equitable relief to the defendant to determine that there is an enforceable oral contract that he possesses a one third

interest in the home. The defendant is in essence asking the court to enforce an oral contract, which he clearly entered into for the purpose of defrauding his creditors.

[55] On June 18, 2002, the defendant entered into a promissory note with one of the investors in the Nigerian scheme, Faroek Hanif. The defendant, who acknowledged the authenticity of the promissory note, guaranteed that he would repay Mr. Hanif the amount of $30,150. This repayment was guaranteed against the defendant s assets. At the time that the Nigerian scheme was discovered to be a fraud, the only asset that the defendant s creditors could come after was his interest in the home. The defendant then fabricated two promissory notes to Narool and another family member, Joe Sewran, which purports to transfer his equity in the home if he defaulted on a fake loan that was never advanced. These promissory notes were backdated to precede the Hasif promissory note. Narool confirmed that the defendant asked him to sign the backdated promissory note in order to shield the house against claims by investors in the Nigerian scheme.

[56] The defendant insisted that the decision to take his name off title was done on the advice of his solicitor and his family. Even if I were to believe that he received this advice, the decision was his alone to make.

[57] The defendant also submits that his actions were motivated by a desire to protect his family. He stated that he did not want his parents and his handicapped brother to lose their home, if the home was sold pursuant to a lien obtained by one of his creditors. He also did not want his brothers to lose their investment in the house. Even if I were to accept this evidence, his motivation does not excuse his fraudulent intention.

[58] The defendant also justifies his behaviour by stating that none of his creditors were actually defrauded. This is because none of his creditors ever sued him and therefore they were not prejudiced by the removal of his name from title. He relies on the following passage from *Goodfriend v. Goodfriend*, [1971] 1 O.R. 411 where the court held at paragraph 18:

> In the present case the appellant has demonstrated that no creditor was actually prejudiced in consequence of the conveyance in question being made to his wife and he is, in reality, repudiating the transaction before any part of its purpose could take effect in delaying an actual creditor or a remotely potential one

[59] This case is distinguishable from *Goodfriend* for several reasons. Firstly, the plaintiff in *Goodfriend* had only fraudulently transferred one of several assets to his wife. He still had in his possession several assets, which would be available to a creditor who received a judgment against him. The plaintiff in that case also repudiated the transaction before any part of its purpose could take effect. The defendant, Mr. Samad, had transferred the only asset that a creditor could use to satisfy a judgment in their favour. In addition, in *Goodfriend,* the creditor whom the plaintiff was trying to avoid had no cause of action in law. In contrast, the defendant admitted that some of his creditors did have a cause of action against him in the Nigerian scheme because he had not provided them with material information concerning the source of the transaction.

[60] In *Goodfriend,* it was essential to the court s finding that no creditor had been prejudiced by the fraudulent transfer. I do not find that to be the case here, despite the fact that no creditor has, on the defendant s evidence, initiated legal action against him. The defendant fabricated and backdated two promissory notes to demonstrate that he no longer held equity in his home. He fabricated these notes to defeat his creditors, particularly Faroek Hanif who had loaned the defendant a substantial amount of money.

[61] In conclusion, in light of the defendant s fraudulent conduct, even if I were to find that the defendant had not sold his interest in the home, his fabrication of the transfer and release in order to defraud his creditors would prevent me from applying the doctrine of part performance or any other equitable doctrine in his favour such as resulting or constructive trust. I do, however, conclude that the defendant sold his interest in the house.

(E) Conclusion on Ownership

[62] Based upon the unambiguous wording of the transfer which transfers the defendant s interest in the home to his brothers, in addition to the release, which relinquishes any interest which the defendant has in the home, I find that the defendant is not an owner in 31 Cedar Drive. He has sold his interest in the home for valuable consideration.

[63] This leaves two issues to be determined 1) whether the plaintiff is entitled to occupation rent for the period in which the defendant lived in the home without making a financial contribution and 2) whether the plaintiff is entitled to a writ of possession.

(F) Occupation rent

[64] The defendant acknowledged that he stopped making payments to the plaintiff in February 2005. Prior to that time, the defendant paid the plaintiff $500/month. The general principle regarding occupation rent was stated by my colleague Karakatsanis J. in *Dagarsho Holdings Ltd. v. Blue Stone*, [2004] O.J. No. 2654 (S.C.J.) at paragraph 26:

> Occupation rent is an equitable remedy. The often cited general principle of occupation rent is that "if a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord or a reasonable amount for the use and occupation of his land": Young v. Bank of Nova Scotia (1915), 34 O.L.R. 176, 23 D.L.R. 854 (Ont. C.A.). The principle is based upon the presumption that the parties have agreed to reasonable compensation. That presumption can be rebutted by evidence that the parties intended that the occupation be without compensation.

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[65] The presumption of reasonable compensation is not rebutted in this case. I found that the defendant had been making rental payments to the plaintiff after he sold his share in the home. I rejected the defendant s explanation as to why he stopped paying rent, to obtain the mortgage documents, as not credible. The plaintiff expected rental payments from the defendant. Both the plaintiff and defendant agreed that when the defendant stopped paying rent, their relationship deteriorated. I find that the plaintiff is entitled to reasonable compensation from the defendant for his use and occupation of a bedroom and an office in the home. Prior to February 2005, the defendant had been paying $500/month. I find that amount to be reasonable for the occupation rent for two rooms in the home. Therefore, I find that the defendant must pay the plaintiff $20,500: $500 multiplied by the 41 months in which he has made no contribution to the home.

(G) Writ of possession

[66] My authority to grant a writ of possession is governed by Rule 60.10 of the Rules of Civil Procedure which reads:

> **60.10(1)**
> A writ of possession (Form 60C) may be issued only with leave of the court, obtained on motion without notice or at the time an order entitling a party to possession is made.
>
> **60.10(2)**
> The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.
>
> **60.10(3)**
> A writ of possession remains in force for one year from the date of the order authorizing its issue, and may, before its expiry, be renewed by order for a period of one year from each renewal.

[67] I have found that the defendant does not have an interest in the property. The plaintiff is the sole registered owner of the property. Title vests in the plaintiff completely. As the sole owner of the home, the plaintiff is entitled to its exclusive possession. He is entitled to ask the defendant to leave. The defendant has acknowledged that the plaintiff asked him to vacate the premises. The defendant does not have a legal reason to remain on the premises. He has not signed a lease with the plaintiff. Therefore, for all of these reasons, I grant the plaintiff s request to order a writ of possession.

(H) Intentional infliction of mental suffering

[68] The defendant counterclaims against the plaintiff for intentional infliction of mental suffering. Our Court of Appeal in *Prinzo v. Baycrest Centre for Geriatric Care* 2002 CanLII 45005 (ON C.A.), (2002), 60 O.R. (3d) 474 (Ont. C.A.) held at paragraph 48 that the tort of intentional infliction of mental suffering is comprised of the following elements:

(1) flagrant or outrageous conduct;

(2) the conduct is calculated to produce harm; and

(3) the conduct results in a visible and provable illness.

[69] The defendant submits that he has been the subject of the plaintiff s bullying, which culminated in the May 2007 incident in which the plaintiff was criminally charged. This charge was later withdrawn by the Crown. The defendant also claims that the plaintiff interfered with the defendant s enjoyment of the property. The defendant claims that the plaintiff prevented him from planting in the garden and from having guests visit him at the property. The defendant submits that the plaintiff s actions have caused him sleep troubles, sinus problems, back pain, and other medical issues.

[70] There is no evidence to corroborate the defendant s allegations against the plaintiff, other than his own testimony. From my observation of the defendant during the trial, I have discovered that he is a combative individual. Anyone who crosses him is in for a full score battle. These brothers do not have an ideal relationship but a significant part of the problem is the defendant s own irascible and self-righteous temperament. He must bear responsibility for being the cause of a good portion of the conflict and friction in that household. In addition, I simply do not accept the defendant s evidence concerning his portrayal of these allegations.

[71] In addition, even if I were to find (which I do not) that the plaintiff s conduct was flagrant or outrageous, and calculated to produce harm, the defendant has not demonstrated that the plaintiff s conduct has resulted in a visible and provable illness. I dismiss his counterclaim.

(I) Costs

[72] The plaintiff and defendant were in agreement that the successful party should receive $5,000 in costs from this court. This is a reasonable amount for a three and a half day trial. Therefore, on the basis of the foregoing, the plaintiff is entitled to costs of this action in the amount of $5,000 payable by the defendant.

Archibald J.

Released: June 30, 2008

COURT FILE NO.: 07-CV-339027SR

DATE: 20080630

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FAHEEM MOHAMED SAMAD

Plaintiff

- and -

SHAUN SHAHABUDEEN MOHAMED SAMAD

Defendant

REASONS FOR JUDGMENT

Archibald J.

Released: June 30, 2008