

CITATION: Bank of Nova Scotia Trust Company v. James, et al., 2025 ONSC 7226
COURT FILE NO.: CV-23-00693982-0000
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE BANK OF NOVA SCOTIA TRUST COMPANY, Plaintiff

AND:

GEORGE ANDREW JAMES and SHELIAGH GERAINE FLYNN, Defendants

BEFORE: Akazaki J.

COUNSEL: Robert B. MacDonald, for the Plaintiff

Joan Kasozi, for the Defendant Sheliagh Flynn

HEARD: November 21, 2025

REASONS FOR DECISION

OVERVIEW

[1] The summary judgment motion in this mortgage enforcement action followed a conventional format, invoking a default to obtain an order for possession to sell the property. The motion also sought summary dismissal of a counterclaim based on the issues raised in the defence. However, the non-commercial mortgage and the atypical nature of the default required the court to consider the lender’s summary judgment motion through an intensely fact-specific analysis.

[2] Until an accident rendered it uninhabitable in 2015, George James and his wife Sheliagh Flynn lived with their children at their previous family home on Brookdale Avenue. George’s late father William then allowed them to stay at an investment condo unit on Harbour Square. The couple started litigation for recovery of the property damage losses. That lawsuit remained ongoing.

[3] Throughout the marriage, George had suffered severe bouts of mental illness, including propensity for violence and for abandoning the family for stretches of time. His inability to maintain employment and to control his debts, as well as Sheliagh’s lack of income, now left them insufficient funds and credit after the sale to fund a replacement home purchase. In 2016, William had the foresight to set George up with an income trust fund managed by the BNS Trust Company (“Scotiustrust”). The trust deed named George as the life beneficiary with Sheliagh and the children as successive beneficiaries in the event of George’s death. However, if the couple were to separate with no reasonable prospect of reconciliation, Sheliagh was deemed to have died on the date of separation. The deed also excluded the fund from net family property under the *Family Law Act*, R.S.O. 1990, c. F.3 (“FLA”).

[4] By 2021, George and Sheliagh concluded they could not fund the repairs or the purchase of a replacement home. Settlement of the lawsuit was nowhere in sight. They had no choice but to sell the unrepaired Brookdale home for less than an amount allowing them to buy a new home. George persuaded Scotiatrust to grant an interest-free mortgage in the principal amount of \$1,300,000, to allow the couple to buy a condo at 55 Harbour Square, at a repayment cost of \$52,000 per annum returned to George's fund. To honour the family law provisions of the trust, the trustee inserted the following clause in the mortgage:

PROVIDED THAT in the event of the death of the Chargor George Andrew James or in the event that the Chargor George Andrew James becomes unwilling or unable to continue to live at the property secured by this Charge, at the option of the Chargee the full balance of principal then owing hereunder shall become due and payable or at the option of the Chargee this Charge shall be amended to include the current commercial terms of the Chargee.

[5] Sheliagh recalled advice from the trustee's representative that this clause would not be invoked unless the couple were to divorce. The trustee denied having told her that divorce was the only instance when it could invoke the clause.

[6] The Harbour Square purchase and mortgage registration closed on June 24, 2021. The couple retained a real estate lawyer to act on the purchase and on the mortgage. (Scotiatrust relied on the lawyer's involvement to rebut Sheliagh's defence that she had consented to the mortgage without independent legal advice.)

[7] In September 2021, George's mental health problems resurfaced. The police charged him with various domestic violence charges, and his bail conditions required him to stay at least 100 metres away from Sheliagh and the children. He failed to comply on several occasions, and now he wears an ankle monitor. In July 2022, George informed the trustee that he was no longer living at the property. This triggered the trustee's determination that the mortgage fell in default. Shortly thereafter, it called the principal owed on the mortgage. George also closed the joint account into which the biweekly trust funds were deposited. He has not supported the family and has not contributed to condominium upkeep ever since.

[8] The default was therefore not a missed payment or other issue typical to mortgage enforcement actions. The beneficiary of the mortgagee fund was George. His status relative to the trust was different from that of the deceased settlor, William. However, because the loan was from the capital of his income trust, George was not only a borrower but also a lender-in-fact with discretion to cause a default which Sheliagh, as the other borrower, had no means to cure.

[9] For the motion, I agree with Scotiatrust's argument that, whatever current Sheliagh's status may be, the deed of trust did not render her or the children present beneficiaries of the trust beyond the trustee's duty of prudent financial management. This reality rendered tenuous the various aspects of the defence framed as breaches of fiduciary duties owed to the whole family, as well as the corresponding issues raised in the counterclaim. (Sheliagh and the children did serve an important role in the trust, in that their roles as residual survivors defeated the rule in *Saunders v Vauthier* (1841), 41 ER 482, Cr & Ph 240, to prevent any attempt by George to terminate the trust

and claim the whole funds.) I qualify this concurrence with the possibility that the combined effect of George's ability to trigger the default and of Scotiatrust's options in the event of default could, on a full trial record, give rise to a finding of fiduciary duty to Sheliagh as *mortgagor*.

[10] A point that surfaced from these unusual facts was whether Sheliagh appreciated, by joining in the mortgage transaction under s. 21 of the *Family Law Act*, she was transferring and/or subordinating her equalized interest in the matrimonial home to a trust in which her husband was the life beneficiary. To evaluate whether the mortgage was a valid alienation of the home, the court must consider the family law context, including Sheliagh's complaints that the trustee's representative misled her and that she did not receive independent legal advice.

[11] In dismissing the motion, I have found that the circumstances in which Sheliagh consented to be a joint borrower and mortgagor gave rise to a genuine issue requiring trial. Both the trustee's position that Sheliagh misunderstood the trustee's intentions and Sheliagh's position that she ought to have received independent legal advice have the potential to nullify the mortgage instrument. Because of this outcome, I need not consider in detail the defence that the trustee's fiduciary obligations extended to Sheliagh and the children. However, the defences based on lack of independent advice and the unenforceable nature of the residency covenant sufficiently dovetail with the counterclaim for declaratory relief that the counterclaim cannot be dismissed summarily. I categorize these points as follows:

- a) duties owed to Sheliagh and the children
- b) encumbrance of matrimonial home and absence of independent legal advice
- c) the counterclaim

[12] Before I address these three points, I will outline the procedure on this motion.

SUMMARY JUDGMENT PROCEDURE

[13] Rule 20 of the *Rules of Civil Procedure* govern summary judgment motions. Para. 20.04(2)(a) requires the court to grant summary judgment if satisfied there is *no* genuine issue requiring a trial with respect to a claim or defence. In *Hryniak v. Mauldin*, [2014] 1 SCR 87, at paras. 49-50, the Supreme Court of Canada's guidance was that there will be no such genuine issue, if the court can (1) make the necessary findings of fact, (2) apply the law to the facts, and (3) be satisfied that the process is a proportionate, more expeditious, and less expensive means to achieve a just result compared to a full trial. These principles are necessarily interconnected.

[14] If the court cannot determine whether a genuine issue requiring trial exists after these three considerations, subrules (2.1) and (2.2) permit the use of additional fact-finding powers. These additional fact-finding powers are the weighing of evidence, evaluating credibility of a deponent, drawing reasonable inferences, and the direction of a mini trial of limited *viva voce* evidence: *Hryniak*, at para. 66. For the reason below, I conclude I cannot be satisfied there is no genuine issue requiring a trial with respect to the defence and counterclaim. These issues require a trial and

are not suitable for invocation of the additional summary judgment powers to grant judgment in Scotiatrust's favour.

a) DUTIES OWED TO SHELIAGH AND THE CHILDREN

[15] Sheliagh's defence of the motion included references to herself and to her children as beneficiaries under the trust. Scotiatrust disagreed, pointing out that their interests were at best contingent on George's death prior to theirs. Further, the current likelihood of a permanent separation could mean that Sheliagh is deemed to have died for the purposes of the trust. It remained to be seen how permanent the separation is. George's absence was described as his longest. However, there is a history of reconciliation, and the impetus for his conduct has been mental illness. As of the hearing of the motion, it was unclear whether Sheliagh was alive or dead for the purposes of the trust deed.

[16] This defence to the mortgage enforcement action certainly appears weak, at least as pleaded and argued before me. Nevertheless, I need not consider it further, because of my conclusion that Sheliagh's lack of independent legal advice gives rise to a genuine issue, requiring trial, whether the mortgage should be declared null and void.

[17] Before leaving this point, I observe it was Scotiatrust who relied on *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 SCR 271, at para. 186, for the proposition that Scotiatrust's wearing of 'two hats' as mortgagee and trustee of George's fund was not a conflict that made it prone to commit a breach of fiduciary duty. The Supreme Court's majority in *Sun Indalex* rejected the Court of Appeal's analysis of the fiduciary issue by focusing on the framework of the *Pension Benefits Act*, RSO 1990, c P.8. The dissenting opinion of LeBel J. remains authoritative outside this framework. In para. 268, he cited *Galambos v. Perez*, 2009 SCC 48, [2009] 3 SCR 247, at para. 68, as authority for the proposition that a relationship that features one party's inherent vulnerability of one party to another's conduct or decision can create a fiduciary duty. I will return to this point in my analysis of the counterclaim.

b) ENCUMBRANCE OF MATRIMONIAL HOME AND ABSENCE OF INDEPENDENT LEGAL ADVICE

[18] Sheliagh Flynn deposed that, prior to agreeing to the mortgage, there was a discussion among her, George, their daughter Arlyne, and Erin Deveraux of Scotiatrust. Sheliagh expressed her concern that George's history of disappearances and family abandonment could make it hard to abide by the mortgage condition requiring him to reside at the home. According to Sheliagh, Ms. Deveraux told her that the trustee would enforce the condition only if the couple divorced. Based on this representation, she agreed to the term without having consulted with a lawyer.

[19] Ms. Deveraux' response to this point was as follows:

11. I did speak with Ms. Flynn about the terms of Scotiatrust's mortgage. I recall discussing with her circumstances in which Scotiatrust's mortgage may be called. I recall discussing the possibility that Mr. James would pass away and explaining

that such a circumstance would represent a situation in which the Mortgage may be called. I do not have a specific recollection of discussing the possibility of a divorce with Ms. Flynn. However, it is possible that I did. That said, a divorce is also a situation in which the Mortgage may be called if Mr. James were no longer residing in the Property.

12. I did not tell Ms. Flynn that divorce was the only circumstance in which the Mortgage may be called. Scotiatrust does not agree to advance loans from trusts secured by mortgages on such terms. In my experience, as a condition of granting such loans from a trust, Scotiatrust's commitments and security always provide that the mortgage loan will become due and payable if the beneficiary is unable or unwilling to continue to live at the mortgaged property.

[20] Kneaded into the logic of Ms. Devereaux's advice to Sheliagh and Sheliagh's reception of it could be a different communication than Ms. Devereaux's straightforward interpretation of the discussion. The trust deed provided for Sheliagh's succession of George as beneficiary on his death. Divorce could result permutations short of the current calamity, because there would have to be a division of property and/or a support obligation. Ms. Devereaux's advice on the potential consequences did not obviate the need for fully considered independent legal advice. Her comment about the standard practice of Scotiatrust regarding the beneficiary's residence appeared to have been designed to prevent abuses such as borrowing from the fund to buy investment properties. In any event, the standard practice did not necessarily allow for the consequences of George's mental illness and history of family abandonment. If only to protect Scotiatrust from defences against enforcement, Ms. Devereaux likely ought to have required Sheliagh to submit a certificate of independent legal advice.

[21] The reason why the situation called for independent professional advice separate from George's presence was that the interests of the trust and George aligned in several dimensions and opposed Sheliagh's, including the fact that he could unilaterally provoke a mortgage default and protect his trust fund. This outcome could also have escaped Ms. Devereaux's contemplation. She deposed that Scotiatrust did not have independent knowledge of the couple's circumstances, including the problems with the Brookdale Property. I found that evidence strained credibility, if only because a prudent trustee should have asked some questions before allowing George to borrow such a substantial amount from the trust. Whatever the additional evidence at trial could produce on this subject, George later provoked a domestic altercation, ended up on the wrong side of bail conditions requiring him to leave the home, and called the trustee to exact retribution from his wife and children.

[22] In her statement of defence, Sheliagh pleaded the mortgage condition regarding George's residence as unenforceable, because the advice about divorce raised an estoppel and because she did not receive independent legal advice. She also pleaded that the mortgage was not in default, because it would be unconscionable to require her to accept him back into the home, and because for him to do so would breach his bail conditions. Despite the pleading of these facts, she did not specifically plead an equal right of possession under s. 19 of the FLA or relief against alienation under s. 21. Instead, it was Scotiatrust who pleaded *George's* equal right to possession under the FLA. Sheliagh's rights to the matrimonial home appeared to have surfaced for the first time during

argument of the motion. The lack of independent legal advice generally does not invalidate a mortgage in the absence of other circumstances necessitating the advice: *Royal Bank of Canada v. Aero Surveys Inc.*, 2002 CanLII 28714 (ON SC), at para. 14; *Bank of Montreal v. Featherstone* (1989), 68 O.R. (2d) 541 (C.A.), at pp. 546-47. It would have been preferable for the circumstances requiring independent advice to have been pleaded more purposively and more particularly.

[23] Because Scotiatrust did raise the status of the home in its pleading and because the facts regarding the lack of independent legal advice formed a major thrust of the defence, I was prepared to consider the issue. While it would be inappropriate to grant final judgment on a claim or defence in the absence of a specific pleading, I would not preclude the availability of grounds for a claim or defence as a response to a summary judgment motion. The courts have generally guarded against an overly technical stance on the sufficiency of pleadings: *Cashbloom Canada, ULC v Ridgeway Design Centre Inc.*, 2017 ONSC 2994, at para. 6; and *Leslie v. Mississauga (City)*, 2006 CanLII 63743 (Ont. Div. Ct.), at para. 14.

[24] It also did not escape my notice that, despite the pleading of facts attacking the validity of Scotiatrust's reliance on the default of the covenant requiring George's residency, the statement of defence did not specifically invoke the *Mortgages Act*, RSO 1990, c. M.40, s. 22(1), which could override the agreement by relieving a mortgagor of the consequences of a "default ... in the observance of any covenant" by allowing her to "perform such covenant" prior to the sale or the commencement of an action. This subsection could call into question the equity, lawfulness, or non-severability of a provision in a mortgage for a default that the co-mortgagor cannot cure through performance after notice of the default. Because it was not pleaded and not argued on this motion, I do not rely on s. 22(1) beyond citing it as one of the important topics that a competent and independent solicitor could have discussed with Sheliagh prior to agreeing to the inclusion of the clause requiring George's residency.

[25] Under s. 21(1)(a) of the FLA, a spouse's consent to a disposition or encumbrance can validate the transaction. Sheliagh's consent as cosignatory to the mortgage would ordinarily protect the bank, because the normal commercial lending operation cannot give rise to a fiduciary duty, even though loans give rise to inherent conflicts of interest: *Scavarelli v. Bank of Montreal*, 2004 CanLII 11412 (ON SC), at paras. 27-38. Cases citing the importance of independent legal advice tend to arise when a spouse has forged the signature of the other or when the lender registers a mortgage without the borrower's spouse's consent: *Iori v. Village Building Supplies (1977) Ltd.*, 2005 CanLII 23122 (ON SC), at para. 17, and *Sayward Investments Inc. v Da Silva*, 2024 ONSC 7031, at paras. 75-76. In such instances, s. 21 offers protection when the spouses' interests diverge or conflict.

[26] It follows from the above propositions that a lender whose interests align even partly with one of the borrower spouses cannot encumber a matrimonial home without ensuring that both spouses obtained independent legal advice, because of the inherent conflict of interest between the spouses. The purpose of s. 21 is to protect against the other spouse's alienation of the matrimonial home. Its statutory protection is not specific to mortgages.

[27] In *Sayward*, the coventurers' business loan could not be secured against the matrimonial home of one of them, in the absence of such advice to the borrower's spouse. Here, Scotiatrust

was not acting in its self-interest but, rather, as trustee. Scotiatrust's duty to implement the settlor's intentions to maintain a life income benefit to his son was not identical to George's, but these interests were aligned to an even greater extent than in *Sayward*. Unlike *Sayward*, involving a triangular relationship among lender, borrower, and borrower's spouse, George's interests in fact at the time he notified Scotiatrust that he no longer resided at the home had shifted from those of George as borrower to George as fund beneficiary. George committed an intentional mortgage default to the prejudice of his wife and children. I draw no inference from George's failure to defend the action and being noted in default. However, these procedural facts are consistent with alignment of interest with the mortgagee and adversity of interest with his co-mortgagor.

[28] If the home were sold under power of sale, George's half interest in the home would be more than secured by the mortgage, leaving Sheliagh with a half interest in the net value after discharge of the mortgage and sale expenses. The gross incongruity between such an outcome and Sheliagh's family property interests derived from the sale of the Brookdale home could result in the trust unintentionally defeating Sheliagh's statutory right to equal property division. The mortgage enforcement could subordinate the family property interest to the interests of the fund and of George.

[29] I need not continue the above analysis beyond what is necessary to point out the divergence of the spouses' interests and the alignment, apparent in George's conduct, between the interests of the trustee and its immediate beneficiary. Precisely how these interests align, and to what extent, will require more evidence, possibly including evidence of the family law outcomes for division of property and support. Whether the evidence supports nullification of the mortgage instrument is also not for me to decide. For now, I find there was enough at play in the situation and in Ms. Devereaux and Sheliagh's interaction at the time of the mortgage registration to establish a genuine issue requiring trial, questioning whether the advice from the couple's joint real estate lawyer sufficed to validate Sheliagh's consent under s. 21 of the FLA. This conclusion also applies to the possible estoppel raised by Ms. Devereaux's advice regarding the invocation of the residency requirement only if the couple divorced. Even if she did not say this to Sheliagh or if the parole evidence rule applies, a misunderstanding by Sheliagh remained wrapped up in the same factual and legal matrix as the need for independent legal advice to avoid such misunderstandings.

[30] The potential for the mortgage to be nullified after trial could require resolution of the underlying loan transaction. That issue was not before me, and the legal permutations require a full evidentiary record of a trial to resolve.

c) THE COUNTERCLAIM

[31] Sheliagh's counterclaim consisted of a demand for damages, a declaration of Scotiatrust's breach of fiduciary duty, a declaration of the nullity or unenforceable nature of the residency covenant, and injunctive relief against mortgage enforcement. Scotiatrust maintained there was no merit to the counterclaim.

[32] Because I am not prepared to find that Sheliagh's statement of defence raised no triable issue requiring a trial, the counterclaim substantially based on the same pleadings should not be dismissed. Despite doing so, I do concur with Scotiatrust's submission that Sheliagh and the children's successor status under the deed did not, by itself, give rise to a fiduciary duty beyond the trustee's duty to manage the fund for the benefit of survivors.

[33] The pleading of Scotiatrust's fiduciary duty was underdeveloped, although not wholly deficient, in the statement of defence and counterclaim. As I stated previously in the aside regarding *Sun Indalex* and *Galambos*, much of the Canadian law of fiduciary duty has focused on equitable protection of parties vulnerable to another's unilateral conduct or decisions within an existing legal relation. In this instance, the residency covenant placed Sheliagh's status at the mercy of George ("unwilling ... to continue to live at the property") and of Scotiatrust to call the loan instead of converting it to the bank's standard commercial terms.

[34] I cannot be satisfied that the record raises no genuine issue requiring a trial about Scotiatrust's duty to Sheliagh in the event of George moving out and maliciously triggering the trustee's option at a time of his choosing. The trial judge can determine whether these circumstances gave rise to a fiduciary duty. I appreciate that, by pointing out some deficiencies in the defence and counterclaim as pleaded, the defendant may have benefitted from the hearing and from these reasons. That has long been a risk associated with motions for summary dismissal, either under rule 20 or under rule 21.

[35] I will also decline to fetter the remedies available to the court, in the event of a finding of a fiduciary duty. While I cannot currently imagine what Sheliagh's damages might be, I would not foreclose the possibility that the mortgage brought the loaned capital outside the trust exemption from inclusion in net family property under the FLA, to nullify her half of the mortgage debt or to entitle her to equitable monetary relief.

CONCLUSION

[36] Scotiatrust's motion for summary judgment is therefore dismissed, with costs. My reasons for dismissing the motion logically preclude my use of additional summary judgment powers to resolve the triable issues in Scotiatrust's favour.

[37] The parties' bills of costs reflected roughly comparable claims for partial indemnity costs. Scotiatrust claimed \$49,461, although some of it was for the pleadings stage of the claim. The bill of costs filed by Sheliagh claimed \$56,073. An award of \$50,000 in costs to Sheliagh would therefore fall into the expected range of both sides. I therefore award \$50,000 to Sheliagh, inclusive of fees, disbursements, and HST.

Akazaki J.

Date: December 24, 2025