

CITATION: Seif v. Hamilton, 2023 ONSC 5489
COURT FILE NO.: CV-23-00698903-0000
DATE: 20230929

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
 ADAM SEIF) *James Quigley and Juliana Kotsopoulos for*
 Plaintiff) the Plaintiff
)
 - and -)
)
 JUDITH HAMILTON)
 Defendant) *Patrick Healy for the Defendant*
) **HEARD:** August 31, 2023
)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This motion is for: (a) a preservation order pursuant to rule 45.01 of the *Rules of Civil Procedure*;¹ or (b) for a certificate of pending litigation pursuant to s. 103 of the *Courts of Justice Act*² and rule 42.01 of the *Rules of Civil Procedure*.

[2] On this motion, the Plaintiff Adam Seif seeks to prevent a conveyance of the Defendant Dr. Judith Hamilton’s home at 21 Donwoods Dr. The home is in the fashionable Hoggs Hollow neighbourhood of Toronto, where there are small bungalows and also large mansions and where the real estate listing prices for homes range up to \$13.8 million. Mr. Seif has an agreement to purchase Dr. Hamilton’s two-bedroom bungalow for \$2,050,000. Mr. Seif seeks a preservation order (rule 45.01) or a certificate of pending litigation (rule 42.01) to prevent Dr. Hamilton from selling her property to a third party.

[3] At this very early stage of this acrimonious action, subject to the affirmative defences of the defendant Dr. Hamilton, who is a retired psychiatrist, Mr. Seif, who is a lawyer, has a reasonably strong *prima facie* claim for breach of contract and a reasonably strong claim for the remedy of specific performance. Dr. Hamilton’s affirmative defence, which is also reasonably strong, is that the agreement of purchase and sale is an unconscionable agreement. She also has arguments that the agreement of sale lacks the certainty necessary to constitute an enforceable contract or that there was no *consensus ad item* about the terms of the agreement. By way of defences to the claim for specific performance, Dr. Hamilton says that the equities stand against a

¹ R.R.O. 1990, Reg. 194.

² R.S.O. 1990, c. C.43.

court making this decree in favour of Mr. Seif. However, as the discussion below will reveal, a court of equity would have difficulty favouring either party in this acrimonious dispute.

[4] As I shall explain below, resort to a preservation order is peculiar, anomalous, and unnecessary in a specific performance action where the conventional approach is to obtain a certificate of pending litigation. In the immediate case, I shall not grant a preservation order. However, I shall grant a certificate of pending litigation. The parties agreed that the successful party on this motion should have costs of \$18,000. Order accordingly.

B. Legal Background

[5] Before describing the factual background, it is helpful to keep in mind that there are three major legal issues that underlie Mr. Seif’s action and motion and Dr. Hamilton’s defence to both the action and the motion.

[6] The first major legal issue is the law associated with the availability of the remedy of specific performance. The second major legal issue is the doctrine of unconscionable contracts. The third major issue is the law about the availability and the discharge of certificates of pending litigation, which is a well settled area of the law of civil procedure.

[7] The availability of specific performance was transformed in 1996 by the Supreme Court of Canada’s decision in *Semelhago v. Paramadevan*.³ Unconscionability doctrine was substantially transformed by the Supreme Court of Canada’s 2020 decision in *Uber Technologies Inc. v. Heller*.⁴

[8] Beginning with the transformation of the law about the availability of specific performance, before the *Semelhago* decision, the general principle of equity was that specific performance would not be awarded as a remedy for breach of contract unless the common law’s remedy of damages was inadequate. Since every parcel of land was presumed to be unique, specific performance was awarded as a matter of course as a remedy for an abortive real estate transaction. Justice Sopinka’s judgment in *Semelhago* effected a paradigm shift.

[9] Justice Sopinka stated that in future cases, it would not be assumed that damages are an inadequate remedy justifying the remedy of specific performance in contracts involving the sale of land.⁵ He stated that it was no longer the case that every property was unique since “residential, business and industrial properties are all mass produced much in the same way as other consumer products.”⁶ He stated that in future cases, under similar circumstances, a trial judge would not be constrained to find that specific performance was an appropriate remedy.⁷ He concluded: “Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.” What counted for uniqueness in a legal sense has been the subject matter of numerous cases,⁸ and a critical issue in the immediate case is whether 21 Donwoods Dr. is unique in the requisite sense to justify the

³ *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415.

⁴ *Uber Technology Inc. v. Heller*, 2020 SCC 16.

⁵ [1996] 2 S.C.R. 415 at para. 21.

⁶ [1996] 2 S.C.R. 415 at para. 20.

⁷ [1996] 2 S.C.R. 415 at para. 19–20, 23.

⁸ *Canada Inc. v. Vijayakumar*, 2023 ONCA 466; *Ahmad v. Ashask*, 2022 ONSC 1348; *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52; *Datta v. Eze*, 2020 ONSC 4796; *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.), aff’d (2003), 63 O.R. (3d) 304 (C.A.).

remedy of specific performance.

[10] Turning to the doctrine of unconscionable contracts. Historically, there was a two-branched analysis about the availability of the remedy of rescission for an unconscionable contract. The essential elements for rescission of the contract were: (a) a pronounced inequality of bargaining power; and (b) a substantially improvident or unfair bargain; both factors must be present.⁹ Equity would not intervene merely because a party, acting foolishly, immoderately, or under ordinary bargaining pressure has made a very bad bargain. There must be a stronger party who takes an unfair advantage of the circumstances that hamper the weaker party. Those circumstances may be age, impaired mental health or ability, recklessness, a weak or submissive personality, intimidation, lack of representation, ignorance, illiteracy, poverty, need, or distress. If the circumstances of inequality existed, the court would set the transaction aside unless the stronger party seeking to uphold the transaction demonstrated that it was a fair and not an improvident transaction.¹⁰

[11] In *Uber Technologies Inc. v. Heller*, in a judgment jointly written by Justices Abella and Rowe for a seven member majority,¹¹ the Supreme Court reaffirmed the traditional two-part test of (a) inequality of bargaining power and (b) a resulting improvident transaction.¹²

[12] The majority's approach to the second branch of the test was conventional; however, the majority approach to the first branch transformed the law. The majority adopted an expansive approach to the inequality of bargaining power part of the test. Justices Abella and Rowe stated that there were no rigid limitations on the types of inequality in bargaining power and that differences in wealth, knowledge, or experience, while relevant, did not encompass what might constitute an inequality of bargaining power. Inequality of bargaining power might arise from the personal characteristics of the parties bargaining, or it might arise from the particular circumstances of the bargaining in the sense of vulnerabilities arising from the circumstances which compromised a party's ability to understand or appreciate the meaning and/or significance of the contract.¹³

[13] The majority of the court in *Uber Technologies Inc. v. Heller* also dispensed with any requirement of intentional exploitation on the part of the stronger party. The doctrine of unconscionability was not limited to cases where the stronger party knowingly took advantage of the vulnerability of the weaker party; the court explained:¹⁴

Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker [...] One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of

⁹ *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2019 ONCA 201; *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); affd. [1970] S.C.R. vi; *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Vanzant v. Coates* (1917), 40 O.L.R. 566 (C.A.).

¹⁰ *Syed v. McArthur* (1984), 46 O.R. (2d) 593 (H.C.J.); *Laderoute v. Laderoute* (1978), 17 O.R. (2d) 700 (H.C.J.); *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.), affd. [1970] S.C.R. vi; *Brock v. Gronbach*, [1953] 1 S.C.R. 207; *Calmusky v. Karaloff*, [1947] S.C.R. 110; *Vanzant v. Coates* (1917), 40 O.L.R. 566 (C.A.); *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. D.).

¹¹ Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe, Martin and Kasirer JJ. Justice Brown concurring on different grounds. Justice Côté dissenting.

¹² 2020 SCC 16 at para. 65.

¹³ 2020 SCC 16 at paras. 67-68.

¹⁴ 2020 SCC 16 at paras. 84-85.

mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

[14] With respect to the second branch of the test for unconscionability, the improvident transaction branch of the test, the majority observed that a bargain would be considered improvident if it unduly advantages a stronger party or unduly disadvantages the vulnerable party and that improvidence must be assessed contextually.¹⁵

[15] The essential prerequisite for a certificate of pending litigation is that the plaintiff be advancing a claim for an interest in land, which is an element easily satisfied in cases where a plaintiff is suing for specific performance because of an abortive real estate transaction. Usually, the motion for an order for the issuance of a certificate is made without notice. If the motion is brought on notice to the defendant, which is the situation in the immediate case, then the test for granting or refusing to grant the certificate of pending litigation is the test used as if the certificate had been granted and then the defendant moved to have it vacated.¹⁶

[16] In *572383 Ontario Inc. v. Dhunna*,¹⁷ the court provided a non-exhaustive list of factors to consider in determining whether it would be just to discharge a certificate or pending litigation; namely: (1) whether the plaintiff is, or is not, a shell corporation; (2) whether the land is, or is not, unique; (3) the intent of the parties in acquiring the land; (4) whether there is an alternative claim for damages; (5) the ease or difficulty of calculating damages; (6) whether damages would be a satisfactory remedy; (7) the presence or absence of another willing purchaser; and (8) the harm done to the defendant if the certificate is allowed to remain, or to the plaintiff if the certificate is removed, with or without the requirements of alternative security.¹⁸ The factors are not a code, and whether a certificate of pending litigation should be granted or vacated is an exercise of the court's discretion having regard to the factors that are relevant in the circumstances of the particular case.¹⁹

[17] In abortive real estate transaction cases, having regard to the law reshaped by the Supreme Court of Canada in *Semelhago v. Paramadevan*, *supra*, where a court concludes that the claim for specific performance is unlikely to succeed, the court may vacate the certificate of pending litigation.²⁰

¹⁵ 2020 SCC 16 at paras. 74-75.

¹⁶ *Halliday v. Bromley*, 2019 ONSC 1670; *Access Self Storage Inc. v. 1321645 Ontario Ltd.*, 2017 ONSC 6037 (Div. Ct.).

¹⁷ *572383 Ontario Inc. v. Dhunna*, [1987] O.J. No. 1073 (Master).

¹⁸ *Tibollo v. Robinson*, 2023 ONSC 3492 (Div. Ct.); *Xie v. Gross*, 2022 ONSC 7344 (Assoc. J.); *Rajakumar v. Marydel Homes (Beaverton) Inc.*, 2022 ONSC 4121 (Assoc. J.); *2676547 Ontario Inc. v. Elle Mortgage Corporation*, 2020 ONSC 4463 (Master), aff'd 2020 ONSC 4595, leave to appeal to Div. Ct. ref'd 2020 ONSC 6130 (Div. Ct.); *Bains v. Khatri*, 2019 ONSC 1401; *Jodi L. Feldman Professional Corporation v. Foulidis*, 2018 ONSC 7766; *2511899 Ontario Inc. v. 221465 Ontario Inc.*, 2017 ONSC 5363 (Master); *Smith v. Vankoughnet and Rasmussen*, 2017 ONSC 4293; *Perruzza v. Spatone*, 2010 ONSC 841 (Master).

¹⁹ *Hassanzadeh v. Davoodi*, 2022 ONSC 6977 (Assoc. J.); *BMO v. Iskenderov*, 2021 ONSC 5723; *Can-China Real Capital Inc. v. Askar*, 2021 ONSC 5043 (Master); *Carttera Management Inc. v. Palm Holdings Canada Inc.*, 2011 ONSC 4573 (S.C.J.).

²⁰ *Smith v. Vankoughnet*, 2017 ONSC 4293; *Toll v. Marjanovic*, [2001] O.J. No. 1308 (S.C.J.); *Starwood Acquisitions Inc. v. 267 O'Connor Ltd.*, 2014 ONSC 4400 (Master).

C. Facts

[18] This is a very bitterly contested action and motion. The following findings of fact are made exclusively for the purpose of deciding Mr. Seif's interlocutory motion. They do not create any issue estoppels in Mr. Seif's action for specific purposes or with respect to Dr. Hamilton's unconscionability or contract formation defences.

[19] A judge on a more fulsome record may draw different conclusions from my own. Dr. Hamilton was not cross-examined for the motion, nor did she provide any medical evidence to back up her allegation that Mr. Seif took advantage of her fragile emotional state when she sold 21 Donwoods Dr. to him for \$2,050,000 with a one-year \$800,000 vendor take back mortgage with interest at 3.912% *per annum*. As I shall explain further below, there is no admissible or reliable evidence from either party about the fair market value of 21 Donwoods Dr. in 2023. It is presently impossible to determine whether the sale of 21 Donwoods Dr. is an improvident sale.

[20] The heart of the litigation is whether the sales transaction between Mr. Seif and Dr. Hamilton was an unconscionable contract. For the purposes of Mr. Seif's interlocutory motion, I need not make a determination of that issue. For present purposes, all that I need do is describe the events and to point out the strengths and weaknesses of the opposing arguments. As the discussion of the facts will reveal, both parties have some good facts to rely on but both parties also have some bad facts, for which explanations are necessary if they are ultimately going to succeed.

[21] Dr. Hamilton is a now retired physician who practised psychiatry from 1976 until February 23, 2023 (over 46 years) when she resigned her licence from the College of Physicians and Surgeons. Before her retirement, Ms. Hamilton was a Fellow of the Royal College of Physicians, a member of the Toronto Psychoanalytic Society, the Canadian Psychoanalytic Society, the International Medical Association, the Ontario Psychiatric Association, and the Canadian Psychiatric Association. She taught at the Toronto Institute of Psychoanalysis and the Toronto Psychoanalytic Society.

[22] Dr. Hamilton's evidence is that the circumstances of her resignation were causing her considerable emotional stress and anxiety. On ethical and ideological grounds, she opposed the regulatory policies of the College of Physicians and Surgeons about a physician's public health responsibilities to encourage vaccinations to prevent the spread and the consequences of the Covid 19 pandemic. In her affidavit dated July 18, 2023, Dr. Hamilton stated:

7. I decided to resign my medical license from the CPSO because of the then-recent policy of the College of Physicians and Surgeons of Ontario ("CPSO") that doctors could only have one professional view when it came to the vaccine: that they were to actively promote the vaccine, not give exemptions, and not use medications that have been used successfully to treat Covid-19.

8. I was uncomfortable with and opposed to such a policy, which in my view deprives physicians of all professional judgment and discretion when it comes to the treatment of Covid-19. As a result of my position regarding that policy, I was threatened with a disciplinary hearing before the CPSO.

9. This is the context of my decision to resign my medical licence in late January, 2023. It was an extremely difficult and upsetting time for me: the practice of medicine has been an essential part of my life for nearly fifty years. In that time, I have treated and helped thousands of patients with problems ranging from depression to anxiety disorders of various kinds, including borderline and narcissistic disorders, bipolar disorder and schizophrenia.

10. Resigning my medical license caused me severe stress, alarm and panic, not least because of my uncertain financial future thereafter. My income was due to stop in six weeks. I was the sole provider for myself and my husband, Robert Grant (“Robert”) and now have no source of employment income. Robert has no source of income other than his social insurance pension, which only began to accrue in 2014.

[23] In her action and on this motion, Dr. Hamilton makes much of her emotional state. However, on this motion, in an action that she saw coming six months ago, she presented no medical records and no medical evidence, not even from a family physician. In her factum, Dr. Hamilton feebly submitted that she was not to be criticized for failing to provide an expert medical report because the motion was only scheduled by Justice Dow on June 30, 2023 and she only had until July 19, 2023 to prepare her materials. She submitted that there was not enough time to retain an expert and for an expert to complete a report. On this motion, Dr. Hamilton does not depose that her emotional distress impaired her cognitive capacity, nor her capacity to contract. There is, however, no requirement that medical evidence be submitted to support a plea of an unconscionable contract. This said, the absence of medical evidence is a bad fact for Dr. Hamilton. The fact that she is 78 years old is a neutral fact, as an elderly age is by itself not categorically proof of vulnerability. The elderly are not *per se* vulnerable or of diminished capacity. For present purposes, all that can be said is that for the exclusive purposes of this motion, Dr. Hamilton has not proven that she was vulnerable. She has not demonstrated that she was making irrational decisions about selling her home because of her mental state. In this regard, it is also to be noted that Dr. Hamilton was not alone. Her husband had a career in the U.S. Navy and Coast Guard and there was no suggestion that he was incompetent or incapable of assisting Dr. Hamilton in making decisions about 21 Donwoods Dr.

[24] Dr. Hamilton has lived at and is the registered owner of 21 Donwoods Dr. in Toronto, which she purchased in March 1995 for \$564,700. In 2009, she married Robert Grant, and he moved into the home. After a career in the U.S. Navy and Coast Guard, Mr. Grant is also now retired. Dr. Hamilton and Mr. Grant live on Dr. Hamilton’s income.

[25] 21 Donwoods Dr. is a two-bedroom 1,691 square foot bungalow on a ravine lot on a cul-de-sac road. It has a 672 square foot finished walk-out basement. The lot has a frontage of 56.6 feet and a depth of 200.2 feet on table land and a ravine. The home was built in 1953. It was renovated in 1990. The house is not dilapidated but its improvements are now tired and out of date.

[26] As noted in the introduction to these Reasons for Decision, and in the circumstances described below, Dr. Hamilton sold 21 Donwoods Dr. to Mr. Seif for \$2,050,000 with a one-year \$800,000 vendor take back mortgage with interest at 3.912% *per annum*. There is no admissible or reliable evidence from either party about the fair market value of 21 Donwoods Dr. in 2023. No expert appraiser and no real estate agent with the qualifications to opine about market values testified. Dr. Hamilton relied on her own evidence and on the inadmissible, hearsay evidence of Alyshia Godding, a paralegal law clerk with no expert qualifications, to submit that 21 Donwoods Dr. is worth more than \$3.0 million.

[27] Dr. Hamilton said that her bungalow at 21 Donwoods Dr. was comparable to the bungalow at 6 Donwoods Grove, which had recently sold for \$3.55 million. However, without major value adjustments to the comparable, 6 Donwoods Grove is not a comparable bungalow to the two-bedroom bungalow at 21 Donwoods Dr. The adjustments include the fact that 6 Donwoods Grove is a four-bedroom bungalow with three bathrooms on a different street on a more attractive lot. I have seen the photos of the two properties and the modern improvements on 6 Donwoods Grove

are not comparable to Dr. Hamilton's tired bungalow home.

[28] For present purposes how much, if any, above a selling price of \$2,050,000 is the fair market value of 21 Donwoods Dr. is unknown. It may be that \$2,050,000 is a fair price having regard to the fact Dr. Hamilton would not have to pay any real estate commission on her private sale. However, my suspicion, and it is just a suspicion, is that Mr. Seif would be getting a very good bargain if the court granted him specific performance of his agreement with Dr. Hamilton. I suspect that Mr. Seif intentionally did not provide appraisal evidence for this motion because it would be a bad fact for his case and a good fact for Dr. Hamilton. For the purposes of Mr. Seif's motion, I am, however, left with the quandary that there is equivocal evidence on whether Mr. Seif took advantage of a vulnerable Dr. Hamilton and on whether it was an improvident sale.

[29] Returning to the narrative and the circumstances of the sale, Mr. Seif is a practising real estate lawyer. Dr. Hamilton makes much of the fact that early in his career, and a decade before the transaction with Dr. Hamilton, Mr. Seif was suspended by the Law Society of Ontario for six months for failing to supervise an associate lawyer who had defrauded Mr. Seif's client in real estate transactions. In my opinion, Dr. Hamilton's argument that Mr. Seif is a serial opportunistic exploiter of the financial and mental weakness of clients was irrelevant and unfairly prejudicial; the evidence's probative value was minimal compared to its prejudicial value. Dr. Hamilton's argument was designed to embarrass Mr. Seif. I do not admit the evidence. Evidence may be excluded if its probative value is overborne by its prejudicial effect, including the tendencies: to yield irrational conclusions; to confuse, mislead, or distract the trier of fact's attention from the main issues; to unduly occupy the trier of fact's time; and to surprise the opponent unfairly and to impair a fair trial.²¹ The evidence of Mr. Seif's disciplinary record at the Law Society of Ontario is irrelevant to this interlocutory motion which focuses on whether Dr. Hamilton was vulnerable and entered into an improvident sales transaction. The courts of equity are concerned about a litigant's conduct with respect to the transaction that is before the court and courts of equity do not deny equitable relief because the litigant had a disreputable character or did unrelated evil deeds. For present purposes, I shall not discuss further the matter of Mr. Seif's regulatory history with the Law Society of Ontario and focus on his relationship and behaviour in his dealing with Dr. Hamilton.

[30] To the extent that the Law Society's discipline proceedings have any relevance to Mr. Seif's action for specific performance, it is only as his explanation of why he secretly recorded on his cellphone, the conversation at the meeting where the parties signed the Agreement of Purchase and Sale. Mr. Seif's clandestine manoeuvre is an optically bad fact for him, but the transcript and the recording themselves are ultimately equivocal on the issue of the conscionability of the real estate transaction.

[31] Mr. Seif and his son live at 51 McKelvey Drive in Thornhill along with Mr. Seif's mother Sharifer Tabatabai. Mr. Seif also owns a rental property at 17 Pleasant Avenue in Toronto, a condominium apartment at 2885 Bayview Avenue, which he owns with his sister, and a house in Collingwood, Ontario. Notwithstanding Dr. Hamilton's arguments to the contrary, there is nothing to be taken or inferred from Mr. Seif's ownership of other properties insofar as his agreement with Dr. Hamilton is concerned. I believe Mr. Seif's evidence that he planned to live in 21 Donwoods with his son and his mother. He planned to renovate the property to upgrade and improve its amenities. He liked the neighbourhood and its proximity to his son's school. In other words, for

²¹ *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Potvin*, [1989] 1 S.C.R. 525.

the purposes of this motion, I do not find that Mr. Seif was a developer attracted to 21 Donwoods Dr. as an investment vehicle. Also, for the purposes of this motion, I am satisfied that if after a trial and a better evidentiary record, Mr. Seif were to succeed in rebutting Dr. Hamilton's defences that she was justified in repudiating her agreement to sell 21 Donwoods Dr., then Mr. Seif has a reasonably strong claim to the remedy of specific performance. For the purposes of this motion, the subjective and objective evidence about the nature of 21 Donwoods Dr. and the uses and plans that Mr. Seif has for the property are such that he might be entitled to specific performance because damages are not an adequate remedy in the particular circumstances. In other words, for the present purposes of obtaining a certificate of pending litigation, I am satisfied that 21 Donwoods Dr. is unique in the requisite sense that would justify the equitable remedy of specific performance.

[32] I repeat that this is a finding only for the purposes of Mr. Seif's motion for a certificate of pending litigation. For the purposes of the motion, I am not satisfied that damages are an adequate remedy should Mr. Seif succeed in his breach of contract claim. I also repeat that this interlocutory motion is not determinative of Dr. Hamilton's defence that relies on the doctrine of unconscionability, which defence may negate Mr. Seif's claim for specific performance.

[33] Returning to the factual background, Mr. Seif's mother, Ms. Tabatabai, owns 23 Donwoods Dr., which abuts 21 Donwoods Dr. She purchased 23 Donwoods Dr. in 2009 as a revenue property. 23 Donwoods Dr. has a main house and a coach house. From time to time, Ms. Tabatabai uses the coach house as a resale property. She leases the main house to tenants.

[34] It may be that Mr. Seif and Dr. Hamilton became acquainted because of 23 Donwoods Dr. It is not entirely clear how Mr. Seif and Dr. Hamilton became acquainted. Mr. Seif lived in the main house at 23 Donwoods Dr. for one year, and that may be the origin of their acquaintanceship. I understand from Mr. Grant's evidence that in 2018, Mr. Seif suffered a marriage crisis. According to Mr. Grant, he and Dr. Hamilton came to Mr. Seif's emotional aid. Mr. Grant deposed that Dr. Hamilton connected Mr. Seif to a marriage and family counselling colleague. For present purposes, all that needs be said is that Dr. Hamilton had a pre-existing cordial relationship with Mr. Seif when on **January 23, 2023**, she sent him the following email message at his law firm's email address:

Subject: a question

Hi Adam, I believe that I am going to take a big hit to my income soon and will not be able to keep the house unless I come up with a plan to save it. At the moment, my monthly payments from my RISP (about \$730T) [thousand] pays the mortgage of about \$450T. I'm wondering about the possibility of selling the bottom half of the property (that faces Donwoods Drive), if you think that might be feasible. Would you think about this and suggest a time for a conversation? Thanks, Judy

[35] In the evening of January 23, 2023, there was a phone conversation. Mr. Seif told Dr. Hamilton that he was not a planning law lawyer and that he could not advise her about a severance. He said, however, that he might be interested in purchasing 21 Donwoods Dr. They decided to meet to discuss that possibility.

[36] On **January 29, 2023**, Mr. Seif, Dr. Hamilton, and Mr. Grant met at the Aroma Coffee Shop on Yonge Street in Toronto. At the coffee shop meeting, Dr. Hamilton said that 21 Donwoods was worth \$3.0 million. Mr. Seif disagreed, but he offered to buy the property for \$2,050,000, which he said was all he could afford to pay. At the coffee shop meeting Mr. Seif pointed out that if Dr. Hamilton accepted his offer, she would avoid paying a real estate commission (approximately \$100,000) and avoid having to make repairs to ready the property for sale. He

compared 21 Donwoods to the nearby 11 Donwoods Dr. property, which was on a bigger lot with a larger home in better condition and that had sold for \$2.87 million.

[37] At the January 29, 2023 coffee shop meeting, Dr. Hamilton did not agree to sell 21 Donwoods Dr., but after the meeting later in the day, she texted Mr. Seif and advised him that she was inclined to accept the offer. Her text stated:

Adam, we are back from walking the dogs and I have made up my mind to accept your offer. I do not need the \$100T [thousand] up front so you should keep that for the moment. What I would need is \$20T a month starting April 1, until the final sale, probably in late summer to mid Fall. I am delighted to think you would occupy the house and nurture the garden. I think your mother would like that too. In the meantime, I will of course continue to cover all the costs. I have no time for getting together until next Friday evening or anytime on Saturday. But you should feel free to prepare the documents. Thanks so much for your support and imagination and kindness.

[38] Dr. Hamilton's email message reveals some bad facts for Dr. Hamilton. It reveals that it was her voluntary decision to accept the offer and it was her decision to have Mr. Seif prepare the documents. As a minor bad fact, that will become clearer below, it is Dr. Hamilton who brings up Ms. Tabatabai's interest in favouring the transaction.

[39] The email message also reveals some bad facts for Mr. Seif. Dr. Hamilton submits that because of her communications with Mr. Seif between January 23, 2023 until mid-March 2023, when she retained an independent lawyer, Mr. Seif had a lawyer and client relationship with Dr. Hamilton. She submits that because of this relationship he breached his professional responsibilities to her. Dr. Hamilton's argument is not a fanciful argument because the Law Society of Ontario's *Rules of Professional Conduct*,²² defines "client" to include a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf. The commentary to this definition states that a lawyer and client relationship may be established without formality.

[40] The test to determine whether a lawyer-client relationship exists is an objective test that asks whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for the alleged client.²³ In the immediate case, there are no clear indicia, such as a retainer agreement, an office file being opened, an invoice for legal services, a reporting letter *etc.*, but as the narrative below will reveal, Mr. Seif was contacted for legal advice, he drafted the subject agreement and two amendments to it, and he did this while Dr. Hamilton was not represented by a lawyer. At the meeting discussed below, Mr. Seif also gratuitously offered some tax advice about Dr. Hamilton making a gift to her son from the closing proceeds. These are bad facts for Mr. Seif in the sense that they support Dr. Hamilton's argument that he breached his professional responsibilities as a lawyer.

[41] Mr. Seif objected to Dr. Hamilton's assertion that he was her lawyer on the technical ground that this allegation is not to be found in her Statement of Defence and that she has not brought a motion to amend her pleading. Dr. Hamilton will undoubtedly amend her pleading so this technical objection may be ignored for present purposes. For present purposes, in any event, I cannot and I need not determine whether Mr. Seif had a lawyer and client relationship or a quasi-

²² *Law Society Act*, R.S.O. 1990, c.L.8

²³ *Jeffers v. Calico Compression Systems*, 2002 ABQB 72; *Guardian Insurance Co. of Canada v. 379227 Alberta Ltd.*, 1999 ABQB 637.

lawyer and client relationship with Dr. Hamilton nor whether he breached his professional responsibilities, if any, to her. What legal consequences, if any, flow from Mr. Seif, possibly having a lawyer-client relationship until Dr. Hamilton retained an independent lawyer also remain to be determined later in the context of Dr. Hamilton's unconscionability allegations. It remains to be determined whether Dr. Hamilton may have been fully capable to act on her own behalf in negotiating with Mr. Seif without a lawyer, and as will be seen from the narrative below, she had a lawyer for a period of time before she repudiated the agreement. These are issues that ultimately will require a trial and a cross-examination of Dr. Hamilton to determine.

[42] Returning to the narrative, on **February 4, 2023**, Mr. Seif, Dr. Hamilton, and Mr. Grant met again at the coffee shop. Mr. Seif secretly recorded the meeting on his cell phone. This is a bad fact for Mr. Seif. It is not a criminal offence to secretly record one's own conversations, but it is a suspicious circumstance that Mr. Seif had the foresight to plan to protect himself from accusations that he had taken advantage of Dr. Hamilton. It would have been far better for Mr. Seif to have insisted that Dr. Hamilton retain an independent lawyer before she signed the agreement. That said, this bad fact for Mr. Seif is matched with the bad fact for Dr. Hamilton that once she did retain an independent lawyer, for approximately a month, there was no hue and cry that she had been taken advantage of.

[43] The second meeting at the coffee shop lasted 45 minutes and during the meeting Mr. Seif explained the agreement. He did provide legal advice. Whether he provided that advice in the context of a lawyer-client relationship is, as I have already said, a contentious point that I cannot at present resolve.

[44] Another contentious point is that Dr. Hamilton submits that this covert recording demonstrates that she did not understand the key terms of the agreement, "including a highly prejudicial vendor take-back mortgage that Mr. Seif sprang on her at the last minute, to his own advantage." Another judge will have to decide whether this rhetoric is true, but the bad facts for Dr. Hamilton are that she obviously is a highly educated and intelligent person in a cerebral profession and she knew the key terms of the purchase price days before the meeting on February 4, 2023. Further, as the narrative below will reveal, even if Dr. Hamilton did not understand what a vendor take-back mortgage was on February 4, 2023, she did not object to the agreement as being unconscionable, until after she had an independent lawyer, who would have understood the key terms of the agreement.

[45] Returning to the narrative, by the end of the meeting, Mr. Seif and Dr. Hamilton signed an Agreement of Purchase and Sale using the Ontario Real Estate Board (OREA) standard form. Mr. Seif's and Dr. Hamilton's signatures were witnessed by Mr. Grant.

[46] Mr. Grant did not sign the spousal waiver of family law rights in the matrimonial home. Mr. Seif provided Dr. Hamilton with his \$100,000 deposit cheque at the meeting. At the end of the meeting, Mr. Seif photographed Dr. Hamilton and Mr. Grant holding the cheque and smiling broadly. The reason for the photograph was that it would be sent to Ms. Tabatabai who would be happy for her son and herself. Mr. Seif relies on the photograph as evidence that Dr. Hamilton was acting without compulsion. Dr. Hamilton says that the photograph was part of Mr. Seif's contrived plot to deceive her to sell her property at an undervalue. These are issues to be resolved later in this action.

[47] There is no doubt that the Agreement was prepared by Mr. Seif. For present purposes, it contained the following pertinent terms:

PURCHASE PRICE: \$2,050,000 [...]

DEPOSIT: Buyer submits upon acceptance \$100,000 by negotiable cheque payable to Judith Hamilton "Deposit Holder" to be held in trust pending completion of other termination of the Agreement. [...]

Buyer agrees to pay the balance as more particularly set out in Schedule A attached.

[...]

COMPLETION DATE: This Agreement shall be completed by no later than 6:00 p.m. on the 30th day of September 2023.

[...]

22. FAMILY LAW ACT: Seller warrants that spousal consent is not necessary to this transaction under the provisions of the *Family Law Act*, R.S.O. 1990 unless the spouse of the Seller has executed the consent hereinafter provided.

[...]

SCHEDULE A

[...]

Buyer agrees to pay the balance as follows:

The initial deposit of \$100,000 shall be given directly to Judith Hamilton by Bank Draft upon execution of this Agreement of Purchase and Sale and she can use the funds immediately.

[...]

The Buyer shall have the right at any time prior to closing, to assign the within Offer to any person, persons or corporation, either existing or to be incorporated, and upon delivery to the Seller of notice of such assignment, together with the assignee's covenant in favour of the Seller to be bound hereby as Buyer, the Buyer hereinbefore named shall stand released from all further liability hereunder.

The Buyer shall provide further deposits by postdated cheques, payable to Seller, Judith Hamilton, commencing on April 1, 2023 to September 1, 2023 to the Seller in the amount of \$20,000.00. These further deposits shall be adjusted as a credit to the Buyer from the purchase price. The Buyer shall provide post dated cheques to the Seller by March 15th, 2023, via registered mail, courier or hand delivered at the subject property.

The Seller agrees to take back a First Charge/Mortgage in the amount of \$800,000.00 monthly payments of (\$3500.00), and to run for a term of 1 year from the date of completion of this transaction.

This charge shall be registered on title and discharged only once full payment has been received by the Seller on the maturity date of September 31, 2024. This take back mortgage may decline and Buyer may provide the full balance due on closing date. [...]

[...]

Buyer can payback the vendor take back anytime in full anytime before the maturity date. Monthly payments including principal and interest.

[48] For Mr. Seif, there are several bad facts associated with this agreement in addition to his lack of wisdom in not insisting that Dr. Hamilton obtain independent legal advice before she signed

it. The agreement is poor lawyering - for himself.

[49] The standard form agreement is clear enough, but Mr. Seif's drafting and orchestration of the signing of the Agreement leaves something to be desired. A significant defect is that Mr. Seif did not obtain a *Family Law Act*²⁴ spousal consent from Mr. Grant, who may have rights to have the agreement set aside. Under s. 21 (1) of the *Family Law Act*, no spouse shall dispose of or encumber an interest in a matrimonial home unless one of four preconditions are satisfied.

[50] The two-bedroom at 21 Donwoods Dr. was a matrimonial home. The four preconditions to the sale of a matrimonial home by a spouse are: (a) the other spouse joins in the instrument or consents to the transaction; (b) the other spouse has released all rights by a separation agreement; (c) a court order has authorized the transaction or has released the property; or (d) the property is not designated by both spouses as a matrimonial home and a designation of another property as a matrimonial home, made by both spouses, is registered and not cancelled. In the immediate case, Mr. Seif knew or ought to have known or ought to have made inquiries about Mr. Grant's marital status with Dr. Hamilton. It is a bad fact for Mr. Seif that s. 21 of the *Family Law Act* appears to have been breached.

[51] A transaction that contravenes s.21(1) of the *Family Law Act* may be set aside, and the court may revest all or any part of the interest conveyed upon such terms and subject to such conditions as the court considers appropriate, unless the person holding the interest or encumbrance acquired it for value, in good faith, and without notice, that the property at the time of acquiring it or making an agreement to acquire it, was a matrimonial home.²⁵ In the immediate case, Mr. Grant is not a party to the litigation, and he has not yet sought to enforce his rights under the *Family Law Act* and it is presently unknown what the court's ruling would be on any such application. Thus, for present purposes, this bad fact for Mr. Seif does not impede his motion for a certificate of pending litigation but it may ultimately complicate or comprise his action for specific performance.

[52] Still dealing with the agreement signed on February 4, 2023, it is poorly drafted. But for the events following where the agreement was amended twice and Dr. Hamilton obtained independent legal advice, Dr. Hamilton would have had a reasonably strong argument that there was no meeting of the minds and that the agreement was too uncertain to be enforced. I shall return to these matters below, but while they reflect badly on Mr. Seif's acting - for himself - they provide weak contract formation defence arguments for Dr. Hamilton that for present purposes do not get in the way of Mr. Seif's motion for a certificate of pending litigation.

[53] After the meeting of February 4, 2023, Dr. Hamilton moved forward with plans to find a new home. Around **February 15, 2023**, this time with the assistance of a real estate agent, she signed an agreement to purchase a residential property in Hespeler, Ontario. On February 15, 2023, Dr. Hamilton sent the following email message to Mr. Seif:

Hi Adam, I wanted to let you know what I'm doing - I spent the last two weekends hunting for a house in a town in the country and found one that I like a lot. It's in Hespeler, a duplex that can be converted to a single family home, listed at \$774,900 with a downpayment of \$30T. Robert agrees with it as workable. It is currently empty, and they would prefer an early closing. I have been saying September 30, hoping that you might be able to come forward a month or two, say to July 31 for

²⁴ R.S.O. 1990, s. F.3.

²⁵ *Roby v. Roby (Trustee of)*, [2003] O.J. No. 3122 (S.C.J.); *Parker v. Parker*, [1997] O.J. No. 3690 (Gen. Div.); *McCaskie v. McCaskie*, [2002] O.J. No. 1273 (S.C.J.); *Stoimenov v. Stoimenov* (1985), 50 O.R. (2d) 1 (C.A.).

our closing, giving me at least enough money then to be able to close on this new house. I have now applied to the bank, BMO, to see if I could qualify for a bridging loan, which he thinks is likely because you are paying me \$20T a month until my house closes. So today we have put in an offer of \$750,000 with a three-month closing, subject to conditions of financing and inspection (which I've already had Omar, my own contractor, do), hoping for the best. Here is the listing - about half the size and one-third the quality of what we now have, but with a great garden space, fenced, just minutes off the highway, not very far from where my son lives, close to the downtown and lots of parks, and an arrangement such that Robert and I can divide it between us. It's bright, fresh and sunny, on a nice street, set apart a bit from the other houses, which I like. What do you think? Might this be possible from your side? All the best,

[54] Pausing here to comment, this email message presents some bad facts for Dr. Hamilton. It is a bad fact that undermines her credibility that Dr. Hamilton says that Mr. Grant was supportive of the move to Hespeler. This is a bad fact because on this motion, Dr. Hamilton said that Mr. Grant was not prepared to move from Toronto and that was an aspect in her decision to change her mind about selling 21 Donwoods Dr. Further, it is a bad fact for Dr. Hamilton that she seems to be making deliberate and rational decisions to sell 21 Donwoods Dr. and to move closer to her family. It is a bad fact that Dr. Hamilton seems satisfied with the price being paid for 21 Donwoods. She only sought an adjustment of the closing date to make it more compatible with the purchase of the Hespeler property.

[55] In mid-February, Dr. Hamilton retains Evan Lunney as her conveyancing lawyer for the 21 Donwoods Dr. transaction. However, she continues to deal directly with Mr. Seif. On **February 18, 2023**, Mr. Seif and Dr. Hamilton sign an amendment to the agreement to advance the closing date from September 30, 2023 to July 31, 2023 and to require Mr. Seif to “provide a further deposit of \$100,000 to the Seller’s lawyer, Evan Lunney ... by no later than May 29, 2023.” This amendment is evidenced by Mr. Seif’s email message that day to Dr. Hamilton, which stated:

Hi. Judy. I just sent the docusign for you to sign the Agreement that we had signed and the amendment is attached as well. Please review and docusign all and once you do then it will be coming to me to sign and once I sign you will get an email with the completed set that you can send to your Evan Lunney. [...]

[56] Recalling that Mr. Seif had already paid a deposit of \$100,000, it appears that the amendment to the agreement was designed for Dr. Hamilton’s benefit to facilitate her purchase of the Hespeler property by introducing an additional \$100,000 deposit. This additional money, however, was not sufficient, and on **February 22, 2023**, in the morning Mr. Seif sent Dr. Hamilton the following email message.

Hi Judy, [...] I checked my financials, and I am able to give your lawyer, Evan Lunney, no later than May 29th, 2023 \$150,000.00, instead of the \$100,000.00. I believe this will help you further to get a smaller mortgage for your purchase on May 31, 2023.

[57] In the afternoon of February 22, 2023 after communicating with her bank, BMO, Dr. Hamilton sent the following email message to Mr. Seif:

You will be glad to hear that I have been approved for an increase in my HRLC that will cover my purchase of the house in Hespeler at the end of May. It is certainly a result of your being able to include the extra \$50T [thousand] and is a great relief to have it settled with just details to follow. I will contact Evan tomorrow to engage his services for the purchase of the new house. Thank-you so much for your support, emotional and financial.

[58] On **March 1, 2023**, Mr. Seif sent the following email message to Evan Lunney:

I spoke to Judy and she has agreed to extend the closing to August 31, 2023. She has accepted to give me a credit on closing for \$2,500.00 towards the extension she's requiring. As per the APS, I will deliver to you additional deposits towards the purchase price by post-dated cheques in the amount of \$20,000 each. April 1, 2023, June 1, 2023, July 1, 2021 & August 1, 2023. I will further provide you a bank draft/certified cheque towards her purchase for \$150,000.00 by May 29, 2023, towards her new purchase. If you have any questions please let me know. Yours very truly,

[59] Later in the day of March 1, 2023, Mr. Lunney sent the following email message to Mr. Seif.

Thank you for that clarification. Some of what you said, answered a number of my questions (i.e., post-dated cheques, etc.). I've copied Judy, as I just gave her a summary of my observations of the Agreement. I left out some of the technical issues/questions, in my response (to her); because I thought it would be best to bring them up here. Perhaps we can eventually create an Amendment to addresses them. They are as follows: 1. The VTB terms state that the \$3,500.00 monthly payments would consist of principal and interest. What is the proposed interest rate and Amortization of this mortgage? This will obviously affect the Principal at Maturity. 2. Speaking of Maturity — should the VTB still mature on September 30th, 2023, even though the closing date is changing? 3. Speaking of the closing date — let's add the official change to a closing date of August 31st, 2023 to this list. [...] As I said — we can clean all of this up, with an eventual Amendment; if we're all on the same page. Let me know your thoughts!

[60] As appears, from Mr. Lunney's email message, he is suggesting that the ambiguities and infelicities in the original agreement of purchase and sale can be resolved by another amendment to the agreement. On **March 7, 2023**, a second amendment to the Agreement of Purchase and Sale is signed. Strictly and properly speaking, Mr. Seif ought to have followed up directly with Mr. Lunney. However, imprudently, he dealt directly with Dr. Hamilton.

[61] On March 7, 2023, Mr. Seif with his mother visit 21 Donwoods Dr. On this visit, Mr. Seif and Dr. Hamilton signed a second amendment to the Agreement of Purchase and Sale. Mr. Seif gave Dr. Hamilton, three \$20,000 postdated cheques dated April 1, 2023, June 1, 2023, and July 1, 2023. At Mr. Seif's request, Ms. Tabatabai took a photograph of Dr. Hamilton holding the three additional deposit cheques. The second amendment stated:

The Buyer and Seller herein agree to the following amendment(s) to the aforementioned Agreement:

Delete: 1. Title Search Date of September 15, 2023. 2. Closing date of July 31st, 2023. 3. The Buyer shall provide further deposits by postdated cheques, payable to Seller, Judith Hamilton, commencing on April 1, 2023 to September 1, 2023 to the Seller In the amount of \$20,000.00. These further deposits shall be adjusted as a credit to the Buyer from the purchase price. The Buyer shall provide postdated cheques to the Seller by March 15th, 2023 [...] 4. Buyer shall provide a further deposit of \$100,000.00 to the Seller's lawyer, Evan Lunney, towards the purchase price by not later than May 29th, 2023. 5. The Seller agrees to take back a First Charge/Mortgage in the amount of \$800,000.00 (\$800,000.00), monthly payments of (\$3,500.00), and to run for a term of 1 year from the date of completion of this transaction.

Insert: 1. Title Search Date of July 20th, 2023. 2. Closing Date of July 31st, 2023. 3. The Buyer shall provide further deposits by postdated cheques, payable to Seller, Judith Hamilton, for April 1, 2023, June 1, 2023, July 1, 2023, each in the amount of \$20,000.00. These further deposits shall be adjusted as a credit to the Buyer from the purchase price. The Buyer shall provide post dated cheques to the Seller by March 15th, 2023 [...]. 4. Buyer shall provide a further deposit of \$150,000.00 to the Seller's lawyer, Evan Lunney, towards the purchase price by not later than May 29th, 2023. 5. The Buyer and Seller have mutually agreed on specific Appliances that are to be included in this transaction. 6. The Seller agrees to provide a take-back First Charge/Mortgage in the amount of

\$800,000.00, amortized over 35 years, at an interest rate of 3.912%, with monthly payments of \$3,500.00 due on the 1st day of each and every month, and the maturity Date of August 31st, 2024.

[62] On **March 8, 2023**, Mr. Seif sent Mr. Lunney, the following email message:

Re Second Amendment 21 Donwoods

Good morning Evan. Please see attached. We signed in person yesterday while visiting Judy. I also gave her the 3 post dated cheques as per the amendment. Yours very truly, Seif Law Firm, Adam Seif.

[63] The same day, Mr. Lunney responded by email. The email stated:

Hi Adam. I just spoke with Judy. Two questions/comments: 1. Should we not correct/change the maturity date of the VTB to July 31, 2024? 2. What is your expected amount of remaining Principal when you pay off the VTB (i.e., after one year)? I want to make sure that both you and Judy are expecting the same amount of Principal to come off the 800k (after one year).

[64] Pausing here, these amendments beg the question of whether Mr. Seif was taking advantage of Dr. Hamilton, but I have set them out along with the accompanying correspondence in some detail because they weaken Dr. Hamilton's alternative arguments based on contract formation. The amendment makes it clear that the mortgage is amortized over 35 years, at an interest rate of 3.912%, with monthly payments of \$3,500.00 due on the 1st day of each and every month. An amortization table would reveal how much principal was outstanding at the termination of the one-year mortgage. The circumstances of how these amendments came about with or without the involvement of Dr. Hamilton's lawyer are also obviously relevant to her unconscionability arguments.

[65] Returning to the narrative, it seems that by mid-March, Dr. Hamilton begins to have doubts about her decision to sell to Mr. Seif. Several days after the execution of the second amendment Mr. Lunney contacted Mr. Seif and said that Dr. Hamilton wanted "to discuss the sale". On **March 13, 2023**, Dr. Hamilton emailed the Plaintiff and requested a conference and then early in the morning of **March 15, 2023**, Dr. Hamilton sent Mr. Seif the following email message:

I've wakened with a good idea for discussion. I know now what I need from you and why. I do want to sell the house and have a fresh start, but I need to do it comfortably for us and our future. And to get decent value for this house, as this is my one "asset" and our financial future. I could call this afternoon, sometime between 2 and 3 or between 3:30 and 5:00 if that would be OK for you. I do appreciate how cooperative with me you've been. I just didn't realize what the value of the house actually is. All the best,

[66] Mr. Seif's response to this email message was to have a conversation with Dr. Hamilton and then to retain legal counsel. On **March 17, 2023**, Jordon Shael Green, of Green Law Professional Corporation sent Mr. Lunney the following letter:

I write regarding the above transaction, and the Agreement of Purchase and Sale. I understand that earlier this week that your client told mine that she does not intend to complete the transaction. Among other things your client has told mine that she will not sell the property unless mine pays her more than what is provided for in the Agreement of Purchase and Sale. I confirm that your client is in anticipatory breach of the Agreement. If I am mistaken, and your client is willing and able to complete the Agreement according to its terms, you are hereby required to confirm same in writing, no later than March 24, 2023 at 5:00 p.m. Failing your written confirmation that your client has remedied its breach and is willing and able to complete the Agreement according to its terms, I confirm that your client shall remain in breach of the Agreement, thereby relieving mine of further performance. I hereby reserve all rights on behalf of my client. They will take all actions they deem

prudent, the costs of which will remain your client's responsibility. Nothing in this letter is intended to or shall be deemed to be a waiver of any of my clients rights.

[67] On **March 22, 2023**, Mr. Seif registered a caution against the title of 21 Donwoods Dr. He paid \$75,519 in land transfer tax. The caution is scheduled to expire on September 30, 2023.

[68] On **March 25, 2023**, Dr. Hamilton sent the following email message to Mr. Seif.

Hi Adam, Thank-you for getting in touch. I too would like to work it out between us if possible. I assumed when we discussed the sale that day in Aroma that you were offering to pay what you considered to be the market value of the house. I agreed to the take-back mortgage to make it more possible for you. However, I realize now that I had never seen an appraisal of the house nor the city's assessment of the value of the house. How about we each get a professional appraisal of the house and the city's assessment value and go from there. All the best,

[69] Dr. Hamilton deposed that because of a conversation with an unnamed friend she had checked the assessed value of 21 Donwoods and made inquiries about Mr. Seif's disciplinary record at the Law Society of Ontario. I believe that Dr. Hamilton, who paid the realty taxes on her home knew its assessed value of \$2,401,000 as of 2016 and that is why she said it was worth \$3.0 million in her conversations with Mr. Seif in late January and early February 2023. As I have already explained above, it may be the case and I suspect that it is the case that the property is worth more than \$2,050,000 but neither party on this motion proffered admissible evidence about the fair market value of the property. It is not possible at this time to determine whether Mr. Seif was taking advantage of Dr. Hamilton's professed ignorance of the value of her home nor is it possible to determine whether both elements of an unconscionability plea have been satisfied.

[70] After March 25, 2023, an exchange of self-serving lawyers' letters followed. On **March 27, 2027**, Sara Erskine of Weintraub Erskine Huang LLP sent the following letter to Jordan S. Green, of J. Green Law Offices.

Weintraub Erskine Huang LLP has been retained by Judith Hamilton regarding the Agreement of Purchase and Sale dated February 4, 2023 between Ms. Hamilton and Mr. Seif ("APS") for the property at 21 Donwoods Drive, North York, Ontario M4N 2E9 ("Property"). We are also in receipt of your letter dated March 17, 2023 to Mr. Evan Lunney. We have also done a title search on the Property and it appears that your client has registered a caution against the Property.

We have reviewed the circumstances surrounding Ms. Hamilton entering into the APS, and for the reasons set out in this letter it appears that the APS is void and/or voidable. First, at the time the APS was presented to Ms. Hamilton, Mr. Seif was aware that: (a) the offer was a grossly unfair and improvident transaction; (b) Ms. Hamilton lacked suitable advice in respect of the offer; (c) Ms. Hamilton was in vulnerable situation, both financially and mentally; and (d) he was knowingly taking advantage of Ms. Hamilton's vulnerability.

The offer is more than a million dollars below the fair market value of the Property. Further, the proposed vendor-take back mortgage of \$800,000 at an interest rate of 3.912% is significantly below the current mortgage lending rates. All of which points to Mr. Seif, a real estate lawyer, taking advantage of Ms. Hamilton's vulnerability to extract a grossly unfair and improvident transaction for the purchase of the property.

Second, we have been advised that Ms. Hamilton's spouse, Robert Grant, does not consent to the conveyance of the matrimonial home. As their neighbour, Mr. Seif was aware that Ms. Hamilton was married to Mr. Grant and that they resided in the Property as their matrimonial home. As an experienced real estate lawyer, Mr. Seif was fully aware that as Ms. Hamilton's spouse that Mr. Grant's consent was required for the sale of the matrimonial home. Given that Mr. Grant has not

consented to the transaction, it can be set aside on an application by Mr. Grant pursuant to section 21 (2) of the *Family Law Act*, R.S.O. 1990, c. F.3.

Given the above issues, it is Ms. Hamilton's position that the APS is void or voidable. In the circumstances, Ms. Hamilton is prepared to resolve these issues on the basis of the following: (1) Ms. Hamilton and Mr. Seif will agree to the termination of the APS and to execute mutual releases; (2) Ms. Hamilton will return the \$100,000 deposit paid by Mr. Seif under the APS; and (3) Mr. Seif will remove the caution he registered against the Property. Or alternatively: (1) Ms. Hamilton and Mr. Seif will agree to the termination of the APS and to execute mutual releases; (2) Ms. Hamilton and Mr. Seif can entered into a new APS based on market value of the Property as assessed by an independent real estate agent or broker familiar with Properties in the area; and (3) The new APS will not contain any vendor-takeback mortgage.

Please confirm that Mr. Seif agrees to the above terms to termination the APS and resolve this matter by April 3, 2023, failing which Ms. Hamilton will pursue her remedies to have the APS set aside.

[71] Mr. Green did not reply to Ms. Erskine's letter, but on **April 3, 2023**, Sean Zeitz of Lipman, Zener & Waxman PC sent the following letter to Ms. Erskine:

We are litigation counsel to Mr. Adam Seif and have been provided with a copy of yours dated March 27, 2023 for attention and reply. Our client takes great exception to Ms. Hamilton's unfounded and self-serving allegations against him with a view to repudiating the APS. Mr. Seif denies the APS is void and/or voidable and demands that Ms. Hamilton close the transaction as contemplated therein.

Ms. Hamilton was of sound mind and fully cognizant of the terms and conditions in the APS at the time she executed it. Negotiations ensued; the APS was not signed 'overnight' or in haste. Attached please find two photographs Mr. Seif took of Ms. Hamilton and Mr. Grant at the time the APS was executed and/or when his \$100,000 deposit was delivered. Mr. Grant was the witness to each Ms. Hamilton's and Mr. Seif's signatures. It is bizarre how either he and/or Ms. Hamilton now allege that he did not consent to the transaction. The smile on his face in the photographs clearly suggests otherwise.

Please confirm by April 11, 2023 that your client will close the APS as contemplated. If your client fails or refuses to do so, we are in receipt of instructions to issue a Statement of Claim seeking, *inter alia*, a decree for specific performance and such other incidental relief as we deem appropriate. If litigation is necessary, please confirm your client will consent to a certificate of pending litigation ("CPL") without prejudice to any position she may wish to take on the merits of the main action. In the absence of that consent our instructions are to move for a CPL noting the registered caution expires. We look forward to your client's positive reply and remain, Yours very truly,

[72] On **April 13, 2023**, Ms. Erskine sent by email the following letter to Mr. Zeitz:

We are in receipt of your letter dated April 3, 2023. For the reasons set out in my letter of March 27, 2023 to Mr. Seif's former counsel, Mr. Green, we confirm that Ms. Hamilton's position that the Agreement of Purchase and Sale dated February 4, 2023 ("APS") for the property at 21 Donwoods Drive, North York, Ontario M4N 2E9 ("Property") is void or voidable.

As set out in my March 27, 2023 letter, at the time the APS was presented to Ms. Hamilton, Mr. Seif was aware that: (a) the offer was a grossly unfair and improvident transaction; (b) Ms. Hamilton lacked suitable advice in respect of the offer; (c) Ms. Hamilton was in vulnerable situation, both financially and mentally; and (d) he was knowingly taking advantage of Ms. Hamilton's vulnerability.

Mr. Seif is an experienced real estate lawyer whose mother owns the residence adjacent to the Property. As such, Mr. Seif was aware that the offer he made to Ms. Hamilton was more than a million dollars below the fair market value of the Property. Then when Ms. Hamilton told Mr. Seif

that she thought the Property was worth approximately \$3 million, Mr. Seif told Ms. Hamilton that she was wrong and that it was only worth \$2 million. Mr. Seif knew this was untrue when he made the statement to Ms. Hamilton.

Further, the proposed vendor-take back mortgage of \$800,000 at an interest rate of 3.912% is significantly below the current mortgage lending rates. All of which points to Mr. Seif, a real estate lawyer, taking advantage of Ms. Hamilton's vulnerability to extract a grossly unfair and improvident transaction for the purchase of the Property. The fact that Mr. Seif requested to take photographs of Ms. Hamilton on February 4, 2023 when he presented the APS and the \$100,000 deposit, appears to have been to garner evidence against such a claim.

In addition, as set out in my March 27, 2023 letter, we have been advised that Ms. Hamilton's spouse, Robert Grant, does not consent to the conveyance of the matrimonial home. Mr. Grant is a former resident of the United States who came to live with Ms. Hamilton in the house she previously owned when they got married in April, 2009. Mr. Grant was not aware at the time that he witnessed Ms. Hamilton's signature on the APS that since the Property was the marital home that his consent was required to sell the Property. However, as an experienced real estate lawyer, Mr. Seif was fully aware that as Ms. Hamilton's spouse that Mr. Grant's consent was required for the sale of the matrimonial home. Given that Mr. Grant has not consented to the transaction, it can be set aside on an application by Mr. Grant pursuant to section 21 (2) of the *Family Law Act*, R.S.O. 1990, c. F.3.

Given the above issues, it is Ms. Hamilton's position that the APS is void or voidable. In the circumstances, Ms. Hamilton is prepared to resolve these issues on the basis of the following: (1) Ms. Hamilton and Mr. Seif will agree to the termination of the APS and to execute mutual releases; (2) Ms. Hamilton will return the \$100,000 deposit paid by Mr. Seif under the APS; and (3) Mr. Seif will remove the caution he registered against the Property. I confirm that I have the \$100,000 deposit in trust to be returned to Mr. Seif immediately. Please confirm whether the funds should be paid to Mr. Seif directly or to your firm trust account.

Finally, should Mr. Seif not agree to termination of the APS and commence a Statement of Claim against Ms. Hamilton, Ms. Hamilton will defend the claim and rely upon the circumstances surrounding the execution of the APS as set out in my letters in support of her position that the APS is void or voidable. Further, we do not see the basis upon which Ms. Seif would be entitled to a specific performance or a Certificate of Pending Litigation. The Property is not unique. This is supported by the terms of the APS that permit Mr. Seif to assign the APS to "any person, persons or corporation, either existing or to be incorporated" at any time prior to closing which would release Mr. Seif from all liability under the APS to close the transaction. As a result of the forgoing, Ms. Hamilton will not consent to a Certificate of Pending Litigation.

[73] On **April 17, 2023**, Ms. Erskine sent Mr. Zeitz the following letter and the following email message:

I write further to my letter of April 13, 2023. Please advise whether Mr. Seif agrees to the termination of the Agreement of Purchase and Sale dated February 4, 2023 ("APS") and to remove the Caution registered against 21 Donwoods Drive, North York, Ontario M4N 2E9 ("Property"), failing which Ms. Hamilton will be bringing an urgent application to the Court. I look forward to hearing from you. Yours very truly,

{...}

Mr. Zeitz,

I received your April 3, 2023 letter after 8 pm. I sent you an email approximately an hour later asking that since you were the third lawyer that has purported to act for Mr. Seif in the span of two weeks, for you to confirm that the other two lawyers were no longer acting before I sought instructions concerning your letter. You replied to my email the following morning. After receiving your email, I sought instructions from my client. Because of the Easter Holidays – Good Friday on

April 7th and Easter Monday on April 10th – I did not receive instructions until end of day April 12th. I then sent you a letter at 12:23 pm the following day, April 13, 2023. So to be fair, it took 5 business days to obtain instructions and respond to your letter. But in any event, there is no point in debating timing of the letters and their contents. The letters speak for themselves. What is more important is getting an urgent motion date. I can have someone in my office available to argue the motion next week if necessary. I will also make sure that someone is available to attend the first case conference date that is available. Can you please advise what the first available case conference date is?

[74] On **April 18, 2023**, Ms. Erskine and Mr. Zeitz exchanged the following email messages:

Hi Sean, in order to book a case conference, there has to be a proceeding. Since you have not commenced a claim and there is no claim for a CPL, we will issue a notice of application and proceed. We will also contact the court to about securing a urgent case conference.

Hi Sara, An Application is an inappropriate originating process for this type of dispute. Substantially all the facts are in dispute. We propose the appropriate process is for your client to issue a Notice of Action which gets over the procedural hurdle to book a case conference. That is also less work than preparing a full Notice of Application. Please copy us on your correspondence to the court.

Sean, We disagree that a Notice of Action is appropriate for our client's claim to require the removal of a caution. We will copy you on our correspondence with the Court.

[75] On **May 3, 2023**, Mr. Seif's action was commenced by Notice of Action.

[76] On **May 5, 2023**, Dr. Hamilton backed out of the Hespeler purchase and she forfeited her \$30,000 deposit.

[77] On **May 19, 2023**, Mr. Seif delivered his Statement of Claim.

[78] On **June 14, 2023**, there was an attendance in Civil Practice Court, and Mr. Seif sought to schedule an emergency interlocutory injunction motion to restrain the sale of 21 Donwoods Dr. Justice Merritt adjourned the matter to a case conference which was scheduled for June 30, 2023.

[79] On **June 16, 2023**, Dr. Hamilton delivered her Statement of Defence.

[80] On **June 26, 2023**, Mr. Seif delivered his Reply.

[81] On **June 30, 2023**, Justice Dow scheduled Mr. Seif's motion to be heard on August 31, 2023.

[82] On **July 5, 2023**, Mr. Seif delivered a Motion Record comprised of his affidavit dated July 5, 2023.

[83] On **July 19, 2023**, Dr. Hamilton delivered a Responding Motion Record comprised of: (a) the affidavit dated July 14, 2023, of Alyshia Godding who is a paralegal with Dr. Hamilton's lawyers; (b) Mr. Grant's affidavit of July 18, 2023; and (c) Dr. Hamilton's affidavit dated July 18, 2023.

[84] On **July 28, 2023**, Mr. Seif delivered a Reply Motion Record comprised of his affidavit dated July 28, 2023.

[85] On **July 31, 2023**, Dr. Hamilton delivered a Responding Motion Record comprised of her affidavit dated July 31, 2023.

[86] On **August 1, 2023**, Mr. Seif provided another affidavit and he was cross-examined; Ms. Tabatabai was cross-examined on her affidavit dated August 1, 2023; and Mr. Grant was cross-

examined.

[87] On **August 14, 2023**, Mr. Seif served a Factum and Supplementary Motion Record comprised of: (a) his affidavit dated August 1, 2023; and (b) Ms. Tabatabai's affidavit dated August 1, 2023.

[88] On **August 21, 2023**, Dr. Hamilton served a Responding Factum.

[89] On **August 24, 2023**, Mr. Seif served a Reply Factum.

[90] On **August 31, 2023**, the motion was argued.

D. Discussion and Analysis

[91] Mr. Seif's motion is for: (a) a preservation order pursuant to rule 45.01 of the *Rules of Civil Procedure*;²⁶ or (b) for a certificate of pending litigation pursuant to s. 103 of the *Courts of Justice Act*²⁷ and rule 42.01 of the *Rules of Civil Procedure*. Rules 42.01 and 45.01 are set out below.

RULE 42 CERTIFICATE OF PENDING LITIGATION

Issuing of Certificate Court Order Required

42.01 (1) A certificate of pending litigation (Form 42A) under section 103 of the *Courts of Justice Act* may be issued by a registrar only under an order of the court.

Discharge of Certificate

42.02 (1) An order discharging a certificate of pending litigation under subsection 103 (6) of the *Courts of Justice Act* may be obtained on motion to the court.

{...}

RULE 45 INTERIM PRESERVATION OF PROPERTY

Interim Order for Preservation or Sale

45.01 (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.

(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.

[92] I dismiss the request for an interim order pursuant to rule 45.01. In the circumstances of the immediate case, the request is a *non sequitur*.

[93] The property in question is 21 Donwoods Dr., which is not personal property that could be the subject of a custody or preservation order. Real property does not perish and save for example, mines and quarries, land does not dissipate. In the immediate case, the improvements on the property (the bungalow) are being maintained by Dr. Hamilton.

[94] The test under Rule 45.01 for a preservation order sets a high bar and the test is akin to the test for a *Mareva* injunction. In the immediate case, the idea of custody of land is another *non sequitur* and Mr. Seif is not yet entitled to possession nor entitled to pre-judgment execution over

²⁶ R.R.O. 1990, Reg. 194.

²⁷ R.S.O. 1990, c. C.43.

Dr. Hamilton's assets. Dr. Hamilton is not dissipating 21 Donwoods Dr., and she is not leaving the jurisdiction. The rule 45.01 test is inappropriate and inconsistent with the circumstances of an abortive real estate transaction where all that is required is a certificate of pending litigation, which has the practical effect of an injunction²⁸ but which has its own test for availability, as described above.

[95] When there is an abortive real estate transaction, the conventional remedy for the allegedly innocent purchaser who seeks specific performance is not a preservation order under rule 45.01 but a certificate of pending litigation pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01 of the *Rules of Civil Procedure*. As foreshadowed in the Introduction to these Reasons for Decision, I shall not grant a preservation order, but I shall grant a certificate of pending litigation.

[96] Applying the test for granting leave to issue a certificate of pending litigation, I am satisfied that Mr. Seif is entitled to a certificate. By his action for specific performance, he has a viable claim for specific performance and I am satisfied that 21 Donwoods Dr. is unique in the requisite legal sense which involves some subjective and some objective factors.

[97] For the purposes of this motion, I believe that damages are not an adequate substitute remedy assuming that his action for specific performance should succeed. There is no doubt that Dr. Hamilton has anticipatorily breached the agreement of purchase and sale, but it remains to be determined whether she has the defence of an unconscionable contract or some other defence that would deny Mr. Seif an equitable remedy. A certificate of pending litigation simply conserves the *status quo* and is not prejudicial to Dr. Hamilton who no longer wishes to sell 21 Donwoods Dr.

E. Conclusion

[98] For the above reasons, a certification of pending litigation may issue. Mr. Seif shall have his costs of this motion fixed at \$18,000, all inclusive.

Perell, J.

Released: September 29, 2023.

²⁸ *Greenfield Pioneer Inc. v. Moore* (2002), 58 O.R. (3d) 87 (C.A.); *Chippewas of Kettle & Stoney Point v. Canada* (1994), 17 O.R. (3d) 831 (Gen. Div.); *Queen's Court Developments v. Duquette*, [1989] O.J. No. 3039 (H.C.J.).

CITATION: Seif v. Hamilton, 2023 ONSC 5489
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ADAM SEIF

Plaintiff

- and -

JUDITH HAMILTON

Defendant

REASONS FOR DECISION

PERELL J.

Released: September 29, 2023.