IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 177 of 2020

BETWEEN

(1) CHESTER WAIDE WATLER
(2) CARIDAD MAITE MIGUEL RAMOS

Plaintiffs

(1) OMELIN CAMPBELL
(2) PETER CAMPBELL
(3) PATRICK CAMPBELL
(4) DON CAMPBELL

Defendants

IN CHAMBERS

Appearances:	Mr. Colm Flanagan and Ms. Alice Carver of Nelsons for the Plaintiffs Mr. Clyde Allen, Attorney-at-law for the Defendants
Before:	Hon. Mme Justice Margaret Ramsay-Hale
Heard:	12 January 2021
Draft circulated:	30 March 2021
Judgment Delivered:	1 April 2021

HEADNOTE

Land law - contract of sale- summary judgment - specific performance – vendor seeking to avoid sale on ground of unilateral mistake and hardship – financial hardship not a defence to specific performance - personal hardship may in extraordinary and persuasive circumstances supply an excuse for resisting performance of a contract for the sale of real property.

JUDGMENT

Introduction

1. This is the decision on an application for summary judgment and specific performance of an agreement by the Plaintiffs Chester Watler ("Mr. Watler") and Caridad Ramos (collectively "the Purchasers"), entered into with the Defendants Mrs. Omelin Campbell ("Mrs. Campbell") and her sons, Peter Campbell ("Peter"), Patrick Campbell ("Patrick") and Don Campbell ("Don") (collectively

"the Vendors"), for the sale and purchase of Registration Section South Sound, Block 15B, Parcel 232 commonly known as #58 Webster's Estate, ("the Property").

Background

2. The following facts are taken from the Statement of Claim and are not in issue.

3. The Vendors are registered as proprietors in common of the Property. Each owns one quarter share. By a contract in writing made on 17th July 2020 between the Vendors and the Purchasers, (the "Agreement"), each of the Vendors agreed to sell the Property to the Plaintiffs.

4. The terms of the Purchase Agreement are set out in the Statement of Claim and are not in dispute. They include *inter alia* that:

    a. The Purchasers would purchase the Property for a purchase price of CI$1,050,000 (the "Purchase Price").

    b. The Purchasers would pay a deposit towards the Purchase Price of CI$75,000.

    c. The balance of the Purchase Price was to be paid to the Vendors by the Purchasers at completion, as defined by Clause 4 ("Completion").

    d. Completion was to take place at or before 2 pm on 1st September 2020.

    e. At Completion, in exchange for payment of the balance of the Purchase Price, the Vendors agreed to deliver to the Purchasers a duly executed transfer of absolute title to the Property and vacant possession of the Property.

    f. The Purchasers were entitled to lodge a caution and/or stay of registration on the land register relating to the Property.

5. In accordance with their obligations under the Agreement, the Purchasers paid the Deposit. At the request of the Vendors, the Completion date was varied to 1 October 2020.

6. Completion did not take place on the agreed Completion date. Instead, on 26 October 2020 the Vendors informed their authorised agent that they no longer wished to proceed with the sale of the Property. In the email written by their attorney on their behalf, they advised that *"various*

issues [had] arisen and things discovered which were not known or understood at the time." The email identified the following issues for seeking to rescind the agreement:

(i) The Vendors had understood that they held the Property as joint tenants when in fact they were tenants in common;

(ii) Certain of the Vendors could not sell their share as *"that sale will impact the other party"*, and

(iii) The sale price was substantially below that which the Vendors requested.

7. They indicated a willingness to pay damages to the Purchasers for the breach of contract.

8. The Purchasers by letter and service of Notice to Complete dated 27 October 2020 required the Vendors to complete by 3rd November 2020. Notwithstanding this demand, the Vendors have not complied with the Purchase Agreement, and have refused to take steps to complete on the purchase.

9. The Purchasers filed a Writ of Summons and Statement of Claim on 10 November 2020 seeking specific performance of the Purchase Agreement, together with damages and/or compensation for breach of the Purchase Agreement and compensation for reasonable legal expenses, interest and indemnity costs.

10. An Acknowledgement of Service was filed on 25 November 2020 on behalf of the Vendors by their attorney, Mr. Clyde Allen, indicating their intention to defend the claim. On 30 November 2020 the Purchasers filed a summons seeking the following order:

> *"1. That Summary Judgment be granted in favour of the Plaintiffs in the form specified in the Draft Order annexed hereto for specific performance of the Purchase Agreement dated 17 July 2020 made between the Plaintiffs and Defendants referred to in the Writ of Summons and Statement of Claim filed herein on the ground that the Defendants have no defence to the action.*
>
> *2. Such further or other Orders as the Court may deem just."*

11. Exhibited thereto is a Draft Order in terms and, in addition to specific performance, the Purchasers seek an order for their legal expenses to the date of filing of the Writ and that the Purchasers be at liberty to hold back of $20,000 of the Purchase Price on account of the Purchasers' costs of the

action including the costs of the Order for Summary Judgment, pending taxation should costs not be agreed.

The Evidence

12. At the date set down for hearing, Mr. Allen, who appeared on behalf of the Vendors, produced sworn but unfiled Affidavits made by Mrs. Campbell and Patrick and sought an adjournment to file further evidence on behalf of Mrs. Campbell. Mr. Flanagan objected to the adjournment on the ground that the Vendors had notice of the application since November 2020. The Court invited Mr. Allen to state the nature of the further evidence he would wish to adduce and the Court would consider it *de bene esse* when ruling on the Purchasers' application.

13. In their affidavits, sworn in response to the Purchasers' application for summary judgment, Mrs. Campbell and Patrick elucidated the difficulties to which their attorney alluded in his email of 27 October 2020.

14. Mrs. Campbell's evidence is that she had intended to sell the Property for the list price of $1.35 million and was unaware that she had, in fact, executed a sale agreement in the sum of $1.05 million. This is set out in para 5 of her affidavit :

> *"I was unaware that I signed another contract in which the sale price had been reduced to CI$1,050,000.00. I genuinely did not know that the realtor... had reduced the sale price and was made to sign the documents I thought as a matter of form."*

15. She states that, had she known the sale price was only $1.05 million, she would not have signed the Agreement as other properties in Webster's Estate are selling for substantially more. She suggests that the realtor acted improperly in *"causing"* the sale to be at that price.[1] She also asserts that she did not seek independent legal advice and so did not fully understand the documents that she signed but had placed trust and confidence in the realtor on whom she relied to provide her with the correct information and advice.

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1 Affidavit of Omelin Campbell at para 12: *"The realtor has acted improperly and **but for** his action that sale would never have taken place of $1,050,000.000 ..."*

16. Mrs. Campbell says further that her quarter share of the sale proceeds will not permit her to purchase a suitable home for herself, large enough to accommodate a caretaker which she says will be necessary given her advanced age and the fact that she suffers from hypertension and diabetes. Both conditions she says were controlled, until she realised she could not buy a new property for herself, and she may now be starting to suffer from Parkinson's.

17. If allowed to file further evidence, Mr. Allen said that Mrs. Campbell would assert that she also has very poor eyesight which prevented her from being able to read the document and to understand that she was agreeing to sell the Property for the sum of $1.05 million. Were he given time, he would provide a medical report to support that contention.

18. Mr. Allen said further that, if the Vendors were given leave to defend, Mrs. Campbell would rely on the defence of *non est factum* as the price achieved in the sale was substantially less than she thought it would be.

19. In his affidavit, Patrick says he was aware that the Property was being sold to the Purchasers for $1.05 million. He asserts, however, that he was persuaded to sell at this price by the realtor who told him the Purchasers' offer was a great price and a great opportunity that might be lost if the sale agreement was not signed within a few days. He asserts that he later discovered that Mr. Watler and the realtor were very good friends and now believes the realtor breached a fiduciary duty owed to them as the Vendors, by selling their Property to the Purchasers at an undervalue.

20. More telling, in terms of Patrick's reluctance to conclude the sale, is his evidence that he needed his share of the proceeds of the sale to assist his mother to purchase a new property where they would both live and discovered after the Agreement was signed, that that First Caribbean International Bank (the "Bank") had a charge over his interest in the Property which exceeded his share of the sale proceeds.

21. He acknowledges that he had *"a Court dispute"* with the Bank some 15 years earlier with respect to an overdrawn account, but maintains that he was unaware that the Bank had charged his interest in the Property. He states further that the charge against his interest was not clear on the face of the Registered Title and the only charge he saw reflected on the Title was a charge on his brother Peter's interest. He sought to clarify with the realtor whether there was a charge over his

interest. Having been assured by the realtor there was no charge against his interest, he decided to proceed with the sale.

22. It is his evidence that he had intended to negotiate with the Bank with respect to the outstanding debt but the existence of the Charge meant that the proceeds of the sale of his share would be paid out to the Bank automatically. Had he known of the existence of the Charge, he would not have agreed to sell the Property for the listed price of $1.395 million, let alone the sale price of $1.05 million.

23. Dealing first with the assertion in the email of 30 October 2020, that the Vendors had understood that they held the Property as joint tenants, Mr. Flanagan submitted in response that it was clear from the affidavits filed by Mrs. Campbell and Patrick that they both knew how the Property was held. Patrick had perused the Title to see if his interest was charged and Mrs. Campbell acknowledged in her affidavit that she was entitled to a quarter share of the sale proceeds, having stated in her affidavit at para 5,

> *"... before the final document was signed, I began searching for a house to purchase as I thought the contract that I signed was the agreement to sell the property for CI $ 1.395. Therefore, I would have received ¼ of this sale price..."*

24. In any event, Mr. Flanagan submits that, it is clear on the face of the Land Register how the land is held.

25. As to not wishing to complete because the sale price was substantially below that which the Vendors requested, Mr. Flanagan points out that the Property was listed on the Vendors instructions and that the Purchasers made an offer to purchase on the standard CIREBA form. The form sets out the offer price as well as the terms on which the parties would agree, if the offer were accepted. The offer was accepted by each party signing their acceptance of the terms. The signature of each was witnessed, Mrs. Campbells' by her son Peter. Each party initialed each page signifying that they had read and understood it.

26. Mr. Flanagan pointed out that the agreement includes a provision at clause 5 requiring the Vendors to provide a list of chattels, which they did, demonstrating that they were aware of the terms of the agreement. The offer to purchase was subject to two further conditions for the benefit of the Purchasers, which were waived when the Vendors executed a stay of registration pursuant to

clause 13, to ensure there was no *"gazumping"* that is to say, a sale of the Property to a higher bidder after the offer had been accepted. Counsel noted that no complaint was made about the Purchase Price or any reservations about the sale expressed either then or on 31 August 2020 when the Vendors asked that the completion date be extended.

27. He submitted that it was plain from that that the reason Mrs. Campbell and Patrick no longer wished to sell the Property, as stated in the email, was that Patrick would receive nothing from the sale because of the charge over his interest and Mrs. Campbell would be unable to purchase a home for herself with her share of the proceeds.

28. Turning to Patrick's plea of ignorance about the existence of the charging order, Mr. Flanagan submitted that a Notice to Show Cause why a charging order *nisi* made against a judgment debtor should not be made absolute has to be served on the judgment debtor under the Grand Court Rules ("GCR"), and the Court has to be satisfied that he has been served, before a Charging Order absolute is granted. Turning to the Order *nisi* over Patrick's interest, exhibited by Mr. Watler, Mr. Flanagan observed that Patrick acknowledged being in a Court dispute with the Bank in 2008, the Notice to Show Cause was issued on 7 August 2008 and ordered by the Court to be served on Patrick's Attorney who, then as now, was Mr. Allen. The extract from the Land Register also exhibited by Mr. Watler shows that the Charging Order, of which Patrick had notice, was entered on the Title shortly thereafter, on the 1 October 2008.

29. With respect to the assertion made by both Mrs. Campbell and Patrick that the Property was sold at an undervalue, Mr. Flanagan relied on the valuation which was prepared by DDL Studios on the instructions of the Purchasers' bank, exhibited by Mr. Watler, to refute that proposition. The valuer valued the Property at $1.085 million which Mr. Flanagan submits, demonstrates that the offer price of $1.05 which was accepted, was, at $35,000 less than the valuation, well within the ballpark.

30. Mr. Watler in his Second Affidavit stresses the independence of the valuer. He states that the valuation method adopted by his bank, RBC, is known as the "NAS system" which allows Banks to request a valuation via the NAS platform. The request is sent to various firms on Island, a valuer accepts the request and then undertakes the valuation. Throughout the process, the person seeking financing remains unaware of the identity of the valuer carrying out the valuation exercise.

31. Given that there was no evidence to support the allegation that the Property had been sold at an undervalue, Mr. Flanagan submitted there was no evidence to support the allegations of improper conduct and collusion between the realtor and Mr. Watler made by Mrs. Campbell and Patrick, as those relied entirely on the proposition that the Property had been sold at an undervalue and on the assertion that the realtor and Mr. Watler were friends.

Summary Judgment GCR ORDER 86

32. The Purchasers' application is made pursuant to O. 86, r 1 of the GCR. This rule provides that in any action begun by writ indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of any property, the plaintiff may apply for judgment on the ground that the defendant has no defence to the action.

33. Although the applications differ procedurally, the principles governing the grant of summary judgment under Order 86 are the same as in Order 14. The principle is set out in the White Book where the learned authors states as follows:

> *"The purpose of O 14 is to enable a Plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried...*

> *"When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff (per Jessel MR Anglo-Italian Bank v Wells (1878) 38 L.T 197, p 202 C.A.)*
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> *The policy of Order 14 is to prevent delay in cases where there is no defence (per Robert Goff L.J in European Asian Bank AG v Punjab and Sind Bank (No 2) [1983] 1 W.L.R. 642 at 654 and therefore notwithstanding the use of the word 'may' in r. 3(1) once the Court concludes there is no triable issue or question that for some or other reason there ought to be a trial, it will give judgment for the plaintiff": note 14/4/2*

34. The defendant may show cause against the grant of summary judgment on the merits, if he can show *"he has a good defence to the claim, or that a difficult point of law is involved or there is a dispute as to the facts which ought to be tried...or any circumstances showing reasonable grounds of a bona fide defence*": note 14/4/

Specific Performance

35. Both Counsel referred the Court to the decision of the Court of Appeal in *Condoco Grand Cayman Resort Limited v Micro Industries Incorporated* [2003] CILR 1 an appeal against a decision of Sanderson J giving a developer leave to defend a purchaser's application for summary judgment. Sanderson J held that the developer's unilateral mistake might amount to a defence to an equitable claim for specific performance and that the financial hardship which the developer would suffer would outweigh the benefit to the purchaser in obtaining specific performance.

36. On appeal, Collett JA, giving the judgment of the Court, set out the following principles which are applicable to this case:

> *"9... in regard to the sale and purchase of real [property, damages are seldom, if ever regarded as sufficient remedy for breach of the obligations to deliver the property concerned..."* and further, *"although specific performance is available as an equitable remedy in the discretion of the Court, it would normally be granted in such cases ex debito justitiae, the reason being the unique character if such property..."*

37. With respect to the defence of mistake and hardship, the learned Judge of Appeal said this:

> *"12...As to unilateral mistake we were referred to a passage in Chitty on Contracts 28th ed. Para 5-063 at 323 (1999) to the effect that mistake can be a defence in equity if the plaintiff has in some way contributed even unwittingly to the mistake. But a mistake entirely the product of the defendant's own carelessness will afford no ground for relief except where there is considerable hardship: see Tamplin v James (2) (15 Ch. D. at 221). It would seem therefore that in regarding pure unilateral mistake, standing alone, as a possible defence, in equity the learned Judge misdirected himself.*
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> *"13. Finally, as to hardship, it was submitted that pure financial hardship is never sufficient to afford a defence to specific performance in real property cases. Here the hardship relied upon seems to us to be purely financial in that it will be more expensive for the defendant to provide the condominium which it contracted to provide than had been anticipated.*
>
> *...*
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> *"15.... we find ourselves obliged to hold that the learned Judge was wrong to regard any financial hardship which could appear from the evidence before him as sufficient to justify a trial on the issue of specific performance."*

38. In *Patel v Ali*, specific performance was refused in the circumstances where the Court was of the

view that, requiring the defendant to complete the sale would inflict on her

> *"a hardship amounting to an injustice and that, provided the plaintiffs had an effective remedy in damages, it would be just to discharge the order for specific performance."*

39. In the course of the judgment, Goulding J observed that,

> *"It is not in dispute that, like other equitable relief, the specific performance of contracts is a discretionary remedy; but in the ordinary case of a sale of land or buildings the court normally grants it as of course and withholds it* ***only on proof of special facts.*** *"*

40. Rejecting the proposition that a personal hardship of the defendant could not be relied on to excuse the performance of a contract for sale of land, the learned Judge stated that

> *"The important and true principle in my view, is that* ***only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property.*** *A person of full capacity, who sells or buys a house, takes the risk of hardship to himself and his dependents, whether arising from existing facts or unexpectedly supervening in the interval before completion."*[2]

41. He observed that on the facts of the case in front of him, the immense and unpredictable delay of 4 years in seeking specific performance, to which the defendant had not contributed was a matter of *"great importance"* and said further, that

> *"Equitable relief may... be refused because of an unforeseen change of circumstances not amounting to legal frustration."*

42. It is instructive to consider the principle enunciated in Ali's case and the decision of the court to refuse to grant the remedy in light its particular facts which I take from 935 as follows:

> *"The writ in this action was issued on 11 August 1980, the application for summary judgment not until 4 July 1983.*
>
> *"Meanwhile, the circumstances of the defendant had changed disastrously. At the date of the contract she had one child who was still a baby; and, so far as she knew, she was in good health. She was about 23 years old. She spoke and still speaks, in the words of her solicitor's affidavit, "virtually no English at all." In the summer of 1980 she was found to have a bone cancer in her right thigh. On 24 July 1980...her right leg was amputated at the hip joint. She was then in an advanced state of pregnancy and gave birth to her second child on 31 August*

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2 *Patel and another v Ali and another* [1984] 1 All ER 978 at 980

1980. In the spring of 1981 her husband went to prison and remained there until mid-summer 1982. After his release she became pregnant again and her third child was born in August 1983.

The defendant has been fitted with an artificial leg. She is able to walk about the house and dress herself, but not to do shopping, and she needs help with household duties and with the children. She is greatly dependent on friends and relations to enable her to keep her home going and to look after her children, especially on her sister who, I was told, lives only a few doors away, and on a friendly neighbour."

43. These were the *special facts* of that case which persuaded the Court that the hardship the defendant would experience would justify the Court refusing to order specific performance.

44. The principles to be distilled from the cases is that while the Court's power to grant specific performance is discretionary, because of the unique property of real estate, specific performance of a valid contract for the sale and purchase of land will ordinarily be granted. A unilateral mistake is not a defence to the claim and hardship will not, save in exceptional circumstances, provide a reason for refusing to grant the remedy.

Submissions

45. Mr. Allen conceded that, in the circumstances where Patrick had made no mistake as to the price at which the Property would be sold, and would only suffer financial hardship if the contract were performed and the sale concluded, there were no arguable grounds on which he could defend the claim.

46. The question remained whether Mrs. Campbell had shown on the evidence that she had an arguable defence to the claim. Mr. Allen submitted that Mrs. Campbell had a fair probability of establishing that she had made a mistake as to the sale price of the Property because she had not been told by the realtor that the sale price had been reduced and she was unable, because of her failing eyesight, to read the document she signed.

47. Mr. Allen submitted further that there was a triable issue that an Order for specific performance would inflict hardship amounting to injustice on her in the circumstances where she was of advanced years, suffered from several chronic medical issues and would be unable to purchase

suitable alternative accommodation for herself with her share of the proceeds of the sale and had no other means.

48. Mr. Flanagan submitted that the evidence before the Court demonstrated that Mrs. Campbell had made no mistake as to the price at which the Property was being sold but was simply suffering from seller's remorse arising from the realisation that her share of the proceeds would not be enough to purchase another property outright. Even were a Court to find that she had made such a mistake, Mrs. Campbell's ill-heath existed at the time the agreement was signed and the only hardship disclosed by the evidence was that she could not purchase a property for herself with her share of the proceeds, which was purely financial hardship.

Decision

49. Having considered the evidence in the round, I consider it improbable, to say the least, that Mrs. Campbell, who was selling the Property with her sons, did not know that the Property was being sold for $1.05 million and not the list price. Even more improbable is her assertion that she was relying on the realtor, and not her sons, or any of them, to tell her what the sale price was. In any event, she does not say she was misled by any of them but rather, that she mistakenly believed the Property was being sold for the price at which it had been listed for sale.

50. That said, I am not required in this application to find any facts but simply to ask the question whether Mrs. Campbell has an arguable case that she made a unilateral mistake as to the price at which the Property was being sold. In my view, that is a triable issue, as the actual or subjective state of Mrs. Campbell's knowledge or belief as to the facts, is a matter for the tribunal of fact to decide.

51. Not so hardship, which must also be present, as unilateral mistake is by itself not a reason to refuse to order specific performance. In my judgment, Mrs. Campbell does not have a case for defending the claim on that ground as the evidence she would rely on at trial is of pure financial hardship. The principle, reiterated by Goulding J in *Patel v Ali* is that a person of full capacity who contracted to buy or sell immovable property bore the risk of hardship to himself or his dependents, whether the hardship arose from existing facts or unexpectedly in the interval before completion of the

contract. It is only where there are *'extraordinary and persuasive circumstances'* that refusal of claim for specific performance would be justified.

52. No special facts or extraordinary circumstances are present in this case.

Non est factum

53. I turn to consider Mr. Allen's submission that, if given leave to defend, Mrs. Campbell would rely on a plea of *non est factum* on the grounds that she did not know that she was accepting an offer substantially less than the list price because her eyesight is severely diminished and nobody informed her that the sale price for the Property was not the same as the list price. In my view, the defence would not be available to her.

54. Mr. Allen, who came prepared only to seek an adjournment, did not seek to demonstrate by reference to authority how the plea could avail his client but the plea is easily stated as "*I signed this contract by mistake*." It is a plea, in the words of Justice Byles, in *Foster v Makinnon*, that

> *"...the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in the contemplation of the law never did sign the contract to which his name is appended."*

55. In Chitty on Contracts, the learned authors put it this way:,

> *"a party of full age and understanding is normally bound by his signature to the document, whether he reads or understands it or not. If however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. In most of the cases in which non est factum had been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is not a necessary factor."*

56. *In Saunders v Anglia Building Society* [1971] A.C. 1004 the House of Lords stressed that a defence of *non est factum* was not lightly to be allowed where a person of full age and capacity signed a written document embodying contractual terms. The plea of *non est factum* should only be allowed, exceptionally, when the person signing the document made a fundamental mistake as to the character or effect of the document. The disparity between the effect of the document

actually signed, and the document as it was believed to be must be, in the words of the House of Lords, *"radical", "essential", "fundamental"* or very "*substantial."*

57. Mrs. Campbell is neither unlettered nor unsophisticated. She is a retired teacher of some 30 years. She is of full age and capacity and, whatever the diminution in her eyesight, she has not been the victim of compulsion or undue influence or fraud. Despite the assertion in her affidavit that that she was *" made to sign the documents,"* in his oral submissions, Mr. Allen made it clear that Mrs. Campbell was not asserting that the realtor who left the offer documents with her to be signed, misled her as to the Purchase Price or forced her to sign the documents. Rather, her evidence is that she signed because she believed that the sale price was the CI$1.395 million at which the Property was listed for sale and he failed to inform her that it was not.

58. Even if her evidence were accepted, the fact is that Mrs. Campbell made no mistake as to the character or effect of the document she was signing which was an agreement to sell her Property. In my view, she has no defence to the claim, as she cannot avoid the bargain she made by pleading *non est factum* where the plea cannot be maintained.

59. There is no triable issue requiring a trial of this action and the Purchasers' application for summary judgment is granted. I will hear Counsel on the form of order and any further and consequential relief.

DATED THE 1st APRIL 2021

RAMSAY-HALE J