APPEARANCES:

Mr. Terrence M. Kulasa
for the Plaintiffs

Mr. Ihor Broda
for the Defendants

[1] I heard this trial between April 22-25, 2003, and rendered my decision on June 6, 2003. I decided at para. 204 on p. 25 of those written Reasons now reported at *2003 ABQB 512* that there would be an Eviction Order issued against Mr. and Mrs. Dobosz effective thirty (30) days from the date of those Reasons, namely July 6, 2003. Mr. and Mrs. Dobosz were also specifically directed not to remove any attached fixtures or appliances and not to damage any part of the condominium upon moving out.

[2] Counsel for Mr. and Mrs. Dobosz now submits that the tenancy period runs from the 15th of each month to the 15th of the following month. He further requests that Mr. and Mrs. Dobosz be given until the end of July 2003 to move out of the condominium due to the tight rental market in Edmonton.

[3] Counsel for Mr. Jusza's position has been that the residential tenancy agreement stated that the rent was due on the 15th of the month, but the rental period was for that particular month and did not extend o the future month. Mr. Jusza has been trying to obtain possession of the condominium since serving an eviction notice on December 16, 2002, and he wants Mr. and Mrs. Dobosz out of the property so that he can rent the condominium again to new tenants.

[4] In that regard Mr. Jusza indicates that most residential properties are rented at the end of the month or at the beginning of a month, and he requires a few weeks to upgrade and clean the property in order to properly show it and rent it as soon as possible. If Mr. and Mrs. Dobosz do not move out until the end of July, effectively Mr. Jusza will not be able to rent the condominium until the end of August or the beginning of September perhaps.

[5] As this is obviously an important matter for Mr. Jusza, and Mr. and Mrs. Dobosz, I have decided to follow the strict terms of the tenancy agreement between these parties with respect to the term of tenancy. I require Mr. and Mrs. Dobosz to move out of the condominium on or before July 15, 2003. No extension is granted to Mr. and Mrs. Dobosz past July 15, 2003 due to the rental market.

HEARD on the 25th day of June, 2003.

DATED at Edmonton, Alberta this 30th day of June, 2003.

____

J.C.Q.B.A.

Jusza v. Dobosz, 2003 ABQB 512

Date: 20030606
Action No. 0303 01278

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

ROBERT JUSZA AND ELZBIETA JUSZA

Plaintiffs

- and -

MIROSLAWA DOBOSZ AND MIROSLAW DOBOSZ

Defendants

Action No.: 0303 03358

MIROSLAWA DOBOSZ AND MIROSLAW DOBOSZ

Plaintiffs by
Counterclaim

- and -

JOSEF ROBERT JUSZA AND ELZBIETA JUSZA

Defendants by
Counterclaim

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE DONALD LEE

APPEARANCES:

Mr. Terrence M. Kulasa
Kulasa Campbell Kawulka
for the Plaintiffs

Mr. Ihor Broda
Broda and Company
for the Defendants

BACKGROUND

[1] This is a claim by Mr. and Mrs. Dobosz ("Dobosz") that Mr. Jusza ("Jusza") and Dobosz formed an oral agreement that Jusza would buy a condominium for Dobosz and hold it indefinitely for them at a fixed purchase price of $50,000.00.

[2] Dobosz asks the Court to enforce this oral agreement and order the transfer of title from Jusza to Dobosz, and to specify the terms of the alleged agreement.

[3] There is no sale agreement in writing, and as such the oral agreement for the sale of this condominium contravenes the Statute of Frauds. The Court must find whether Dobosz can establish that there was an oral agreement for sale and/or an oral agreement that Jusza would hold the condominium in trust and specify what were those terms.

[4] Dobosz also pleads civil fraud on Jusza for the tort of deceit.

[5] Jusza claims there never was an agreement for sale or in trust. Jusza claims that Dobosz at first wanted to buy a condominium, but could not do so because of their poor credit. They then could not buy a condominium and assume an existing mortgage because they did not have enough funds to make up the cash balance to close.

[6] Jusza alleges that he purchased this condominium as an investment property, and rented it to Dobosz. When Dobosz wished to buy it, they would make him an offer and he would sell it to them at the market rate. Until then Dobosz was just a tenant. Jusza's position is that this was no more than an agreement to agree. Jusza says that he was prepared to sell the condominium to Dobosz at $50,000.00 if they came up with the money within a few months of his purchase of the condominium.

[7] There was a written tenancy agreement signed on June 25, 1998 for a period of two years. Dobosz claims that this written tenancy agreement was a sham to enable Jusza to obtain mortgage financing from the Bank.

[8] Once Jusza knew that Dobosz had bad credit, Jusza says that he demanded a large security deposit of $3,000.00 from Dobosz.

[9] Jusza also asked for a large security deposit as a gesture of goodwill from Dobosz to show that they were serious about buying this condominium, and that they could raise some money to purchase the condominium.

[10] There is a dispute over this money as Jusza acknowledges receiving $3,000.00 in cash, but Dobosz claims that they paid $4,000.00 in cash. There are no written receipts in any event.

[11] Dobosz alleges that they paid $4,000.00, and that it was paid as a down payment towards a fixed total purchase price of $50,000.00, with no fixed closing date specified.

[12] Dobosz also claims that she paid Jusza four more cash payments of $500.00 in December of 1998; and in January, March and May of 1999. Again, these alleged payments were each in cash and there are no receipts. Jusza denies receiving any of these four payments. Dobosz claims that these four additional payments were further acts proving the oral contract.

[13] Jusza alleges that Dobosz defaulted on the rental payments, and was so irregular in the payments that Jusza applied the $3,000.00 security deposit towards the defaulted rental payments.

[14] The evidence shows that Jusza declared the monies received from the condominium as rental income in this 1998 tax return.

[15] In September 2000, Dobosz declared bankruptcy. Dobosz did not list Jusza as a creditor in their assignment into bankruptcy, nor did they list this condominium as an asset.

[16] Jusza alternatively claims that if there was an oral agreement for sale, it was for a short term only, and that the oral agreement was breached. If Dobosz came up with the cash to close within three months of Jusza's purchase, Jusza would have sold the condominium to Dobosz for $50,000.00. However Dobosz never came up with the money.

[17] Dobosz alleges that in December 2001 she had funds to pay off Jusza, but that Jusza refused to sell the property for $50,000.00.

[18] In December 2001, Jusza received a warning letter from the Condominium Association that Dobosz had installed a satellite dish contrary to condominium bylaws. Jusza provided the letter to Dobosz. In June 2002, a further letter was received from counsel for the Condominium Association which was also copied to the condominium address occupied by Dobosz.

[19] On December 9, 2002, a Notice of Motion was served on Jusza by the Condominium Association. On December 10, 2002 Jusza took down the satellite dish himself. Dobosz then called the police to complain about this.

[20] On December 20, 2002 Clackson J. ordered Jusza to pay solicitor and own client indemnity costs to the Condominium Association because of the satellite dish. Total costs are approximately $3,573.66, and there is a taxation hearing scheduled. Jusza has counterclaimed that these costs are the responsibility of Dobosz.

[21] Dobosz acknowledges they put up the satellite dish. However they deny any responsibility to pay any of the costs to the Condominium Association, on the basis that Jusza did not notify Dobosz of the problem. Jusza's evidence is that he provided all the notice he could.

[22] On December 16, 2002, Jusza served an Eviction Notice on Dobosz.

[23] A few days later on December 19, 2002, Dobosz then signed a caveat and filed it January 6, 2003 against the condominium alleging the agreement to purchase made with Jusza.

[24] Jusza's Provincial Court action has been transferred into this court, and Dobosz has since commenced their own action for the tort of deceit.

[25] Jusza submits that everything in writing establishes that this relationship was a tenancy, and not a sale. Jusza argues that Dobosz did not protest when he referred to the monthly payments as "rent".

[26] Jusza says that the monthly payments always provided him with a profit over and above the condominium mortgage, condominium fee and property taxes, so that he was collecting maximum rent as any reasonable landlord would from Dobosz.

[27] Dobosz did make improvements to the condominium property, which Jusza alleges he was never consulted about. Dobosz acknowledges that they did not consult with Jusza before making these improvements.

[28] The Court will have to decide if these improvements do anything to establish a contract. If I find for Dobosz, they keep the benefit of these improvements.

[29] If I find for Jusza, then the Court will have to further decide whether Dobosz is entitled to be repaid anything for these improvements. If that is the Court's direction, and the parties cannot agree on the amount, a further hearing would be necessary to value the amount of the compensation.

[30] A Special Chambers application was held before Master Quinn on February 24, 2003. He held that Dobosz could stay in the condominium until this trial, and directed that they pay $8,000.00 into court by March 17, 2003 as security for costs.

[31] Dobosz did not pay the $8,000.00 into court. On a further application to evict Dobosz by Jusza, Master Quinn directed that Dobosz could pay $3,000.00, but that they had to be evicted and vacate the condominium by April 30, 2003 unless after this trial, I ruled that they can remain in the condominium. After all of the evidence in this case was completed on April 25, 2003, I extended this eviction date indefinitely until after my present Reasons for Judgment were issued.

[32] Jusza called Robert Jusza, Elzbieta Jusza, Milena Jusza (daughter), Fabiola Reffo, an employee at the daycare, and William Kerr from the Condominium Association. Mrs. Jusza runs a daycare.

[33] Mr. Dobosz and some other of the Defendants' witnesses required a Polish interpreter.

[34] Counsel have agreed on the Agreed Exhibit Book, but not necessarily for the truth of their contents.

[35] Counsel have agreed on some Admitted Facts which are as follows: -

1. That the Real Estate purchase contract for the purchase of this condominium was dated June 11, 1998 for the purchase of the condominium in the sum of $50,000.00 with a $1,000.00 deposit, new mortgage of $42,500.00 and an $1,800.00 credit to Robert Jusza as a Real Estate agent for real estate commission and Cash to Close estimated to be $4,700.00, Plaintiff's documents 340-342.

2. That Robert Jusza was member of the Edmonton Real Estate Board from May 2, 1995 to April 3, 2001. #250.

3. That the Real Estate purchase contract for this condominium (Plaintiff's document 351- 352), had an original completion date of June 30, 1998.

4. That the Real Estate purchase contract had a Subject To "Buyer will apply and be approved for new financing", which was extended on June 17 to June 22, and was extended on June 22, 1998 to June 24, 1998, Plaintiff's documents 344, 345, 339.

5. That the appraisal done July 3, 1998, by Independent Appraisals Ltd. was properly done and is accurate and can be admitted without calling the author and gave a value of $52,000.00 for the condominium. It listed comments as follows: "The appearance of the complex is similar to other developments in the area

offering a comparable utility. The subject itself has newer flooring on the main floor and upgraded kitchen. Overall condition is average! good and was observed to require some minor maintenance to some areas of the interior and deck."

6. That the Alberta Treasury Branch mortgage of $42,500.00 was registered on the condominium property on July 28, 1998 in the sum of $43,350.00 being mortgage proceeds of $42,500.00 and $850.00 for insurance fee.

7. That the interest rate on the mortgage on the condominium was 6.45% per annum and the monthly mortgage payment was $289.06 with the first payment date being September 1, 1998 for the month of August 1998. The mortgage was signed July 17, 1998 (Plaintiff's documents 353-364).

8. That the City property taxes for the condominium for 1998 were $907.98 and the amount payable by the purchaser from July 30, 1998 to December 1998 was $383.10.

9. That the total legal account for Mr. Jusza to purchase the condominium was $569.50. Plaintiff's document 291.

10. That a request was made to take possession of the condominium earlier on July 23, 1998 and additional interest on the Cash to Close of $160.00 was paid.

11. The Statement of Adjustments and Summary of monies received and disbursed reflect the monies paid on the condominium purchase in Agreed Exhibit Book under tab #13.

12. The yearly and monthly property taxes on the condominium to the City of Edmonton were:

    a. 1998 - $907.98 - $75.66 monthly
    b. 1999 - $661.55 - $55.12 monthly
    c. 2000 - $691.55 - $55.12 monthly
    d. 2001 - $694.59 - $57.88 monthly
    e. 2002 - $707.66 - $58.97 monthly
    f. 2003 - $715 (assumed)

13. That the monthly Condominium Association fees on the condominium were:

    a. 1998 - $85.00
    b. 1999 - January 1 to June 1, $105.00
    c. 1999 - July 1 and after - $146
    d. 2000 - $146.10
    e. 2001 - $146.10
    f. 2002 - $146.10
    g. 2003 - $147.24

14. Therefore the monthly amounts of mortgage payment ($289.06), condominium fees and property taxes for the years were as follows:

    a. 1998 - $449.72
    b. 1999 - $449.19 first 6 months
    c. 1999 - $490.19 second 6 months
    d. 2000 - $492.79
    e. 2001 - $493.04
    f. 2002 - $494.13
    g. 2003 - $49.5.88

15. The initial application brought by Robert Jusza in the Provincial Court of Alberta, was transferred to Queen's Bench by order of Judge Ingram and is Action 0303 01278. This action and the action commenced by Dobosz were directed by Master Quinn to be tried together at this time.

16. Master Quinn also ordered that Mr. & Mrs. Dobosz be evicted from the property on April 30, 2003 unless this trial court suspends the Order.

THE LAW

A. Statute of Frauds

[36] The *Statute of Frauds,* 1677 has been adopted in almost every Canadian common law jurisdiction, including Alberta - *The Introduction of English Law Into Alberta,* J.E. Coté (1964) 3 Alberta Law Review 262; *The Law of Contracts 4th Edition,* S.M. Waddams Canada Law Book 157.

[37] The purpose of the *Statute of Frauds* 1677, (29 Car. 2) c.3 is to prevent the fraudulent allegations of promises that had never been made by requiring a formality in certain classes of agreement for a written memorandum. If there are no written memoranda, the *Statute of Frauds* does not make the contract void, but only unenforceable.

[38] The *Statute of Frauds* requires a written contract for the sale of land, or a finding of an oral agreement confirmed with some memorandum evidencing the agreement. The memorandum must be in writing and must contain all of the essential terms of the contract and that the parties have agreed to those terms. The memorandum can be anything in writing - it does not have to be an agreement for sale. It could be a Will, letters between the parties or some other writing evidencing that there was an agreement.

[39] The written memorandum must contain all of the material terms: parties, property and price.

[40] If there is no written memorandum but the Court does find an oral agreement from the evidence, then the agreement can be enforced through the doctrine of part performance. The conduct of part performance that is required must be conduct "unequivocally referable" to the contract alleged.

[41] The acts of the person proving the alleged oral agreement for the sale of land must be found to be *unequivocally referable* to the alleged oral sale agreement and nothing less. By their own nature the conduct must be referable to the alleged contract. The acts must speak for themselves and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing less: ***Booth v. Knibb Developments*** 2002 ABCA 180.

[42] In the ***Booth*** case, the Booths used to own the land, but faced foreclosure. It was a quarter section of land used to store heavy equipment and as a landing strip. The Booths lived on it in a mobile home. They asked their friend Knibb to buy the land in foreclosure, and alleged they made an agreement that when they had money, they would buy the land back from Knibb. They allowed Knibb to move an office and equipment onto the land. The Booths remained on the land in their trailer and paid taxes, water rates and utilities. Mrs. Booth settled a personal injury claim and made an offer to buy it back, but Knibb refused the offer.

[43] Our Alberta Court of Appeal held that the facts were not sufficient to establish part performance. Payment of the water, utilities and taxes and remaining on the land are acts that could be equally consistent with a tenancy. Making an offer to purchase when Booth had the money demonstrated her desire to buy, but did not unequivocally indicate that a sale of land existed.

[44] The Booths also made some improvements to the land, however making such improvements could have been a mistake. It shows they *believed* they were the owners, but not that they had an agreement in place to buy.

[45] The Booths were also found to have exhibited conduct contrary to the alleged oral contract. Mrs. Booth resisted a Court declaration that her mobile home was a fixture on the lands. She also swore an Affidavit in the foreclosure action that the purchaser Knibb had given her one year to remove her personal belongings.

[46] Our Alberta Court of Appeal found that both acts were contrary to the alleged contract. If Mrs. Booth was going to be able to repurchase the land at any time, it would be in her interest to have the mobile home declared a fixture. These inconsistent acts to the alleged oral agreement had been ignored by the trial Judge, but were determinative in the Court of Appeal who allowed the appeal by Knibb. It was held that there was no sale agreement proved, and Knibb remained the owner.

[47] The acts of part performance and reliance being done in reference to the alleged contract must show that the contract really was made. There must be *convincing proof* since a signed document is lacking. The acts of part performance must consist of acts that tend to corroborate proof of the agreement. Acts cannot constitute part performance unless they "unequivocally" tended to prove the contract alleged.

[48] In the Alberta Supreme Court decision of ***Shillabeer Estate*** (1979), 100 D.L.R. (3d) 279, the payment of taxes, monthly payments, insurance premiums and repair costs were also insufficient to constitute part performance of an alleged oral sale agreement.

B. Trusts

[49] Section 9 of the *Statute of Frauds* declares that trusts of land must be created in writing, unless they arise by "implication or construction of law".

[50] In ***Bannister v. Bannister,*** [1948] 2 All E.R. 133 C.A., the Plaintiff gave an undertaking to the Defendant that she would be allowed to live in a cottage rent free for as long as she desired, and in exchange the Defendant agreed to sell to him the cottage. The Plaintiff moved into the cottage with the exception of one room, which the Defendant continued to occupy. The undertaking given by the Plaintiff created a life interest in the cottage in favour of the Defendant, and a constructive trust was imposed.

[51] In ***Vaselenak v. Vaselenak,*** [1921] 57 D.L.R. 370 [Alta. C.A.], property was purchased in the name of another and a trust arose out of the proven facts and circumstances in the agreement and negotiations between the parties. The trust resulted since the facts pointed irresistibly to the conclusion that the land was bought by the Plaintiff and Defendant brothers on a joint account, and the Plaintiff made the only payment against the land.

[52] In ***Brownscombe v. Public Trustee of Alberta,*** [1969] S.C.R. 658, the Plaintiff worked on a farm without real wages for 26 years and even built a house, pursuant to an oral agreement that the farmer would give him the farm when he died. The Supreme Court of Canada said that not all of the acts by the Plaintiff could be regarded as unequivocally referable in their own nature to some dealing with the land, but the building of a house on the lands in question at the suggestion of the deceased farmer, even if not wholly at the Plaintiff's expense, was found to be unequivocally referable to the agreement and as such was part performance of the contract.

[53] In ***Deglman v. Guarantee Trust,*** [1954] 3 D.L.R. 785 (S.C.C.), an oral contract was alleged in which "A" was to perform certain personal services for "B" and in consideration "B" would devolve a certain house to "A". "A" performed the services which consisted of odd jobs around that house, and on another house owned by "B", doing errands and taking her on trips and pleasure drives. It was held by the Supreme Court of Canada that these acts were not unequivocally referable to any contract or dealing with the house in question, but since these services were not given gratuitously, there was an obligation imposed to pay for them and to prevent an unjust enrichment.

[54] In ***Lensen v. Lensen,*** [1988] 1 W.W.R. 481 (S.C.C.), the Plaintiff and his wife lived with his parents on the family farm until 1963 when his parents moved to the city. In 1964 he purchased the farm machinery from his father, and from 1964 until 1980 he leased the quarter sections under crop sharing agreements. The son alleged that the father agreed to transfer the home quarter and to sell the remaining quarters for $100,000.00. During this period the Plaintiff made substantial improvements to the farm. In 1980, differences arose and the Defendant terminated the lease arrangements.

[55] The trial Judge accepted the evidence of the father and his witnesses, finding that there was no agreement that the land was to be sold, and further that the Plaintiff's acts of part performance were insufficient to displace the *Statute of Frauds.* The Supreme Court of Canada restored the trial judgment, since the trial Judge had made a finding that there was not an oral contract, and there was evidence in which he could properly make that finding. The son's improvements were to install a sewage system, an underground gasoline storage tank and

pump, two granaries, and a cattle shelter; and to rewire the house. He also testified that he refrained from seeking a low interest loan from the Government to purchase the land from his father, because the father assured him that it would be his in any event.

[56] The father denied ever having such discussions with the son about selling the land, or selling the farm to him, and submitted that the improvements and additions were meant to decrease the deficiencies of the farming operations, to reduce or illuminate manual labour, or were simply done for the comfort of the son.

[57] In ***Austie v. Aksnowicz***, [1999] 70 Alta. L.R. (3d) 154 [Alta. C.A.], the vendor leased land to the purchaser. The purchaser made an offer in writing to purchase the land. The offer was signed to acknowledge its receipt, and the vendor advised by telephone that he was prepared to sell. The parties agreed on a deposit and a closing date, but the purchaser then added a provision that the offer was subject to mortgage approval. The vendor did not sign the amended offer and he subsequently sold the property to a third party.

[58] Our Court of Appeal found that there was not a binding agreement for sale as the *Statute of Frauds* had not been met. Any memorandum under Section 4 of the *Statute of Frauds* must contain all of the essential elements of the contract and must show that the parties have agreed to those terms: ***McKenzie v. Walsh***, [1920] 1 W.W.R. 1017 (S.C.C.). If there was an oral contract first and then a written memorandum later, then this postulates that first that there was an oral event that occurred, and then someone wrote out an oral record of the prior event.

[59] Coté J.A. stated that Alberta has not varied Section 4 of the *Statute of Frauds*, and that the trend of modern legislation is to call for more writing in contracts and in commercial transactions: -

> In my view, the trend of modern legislation is actually to call for more writing in contracts and commercial transactions. The idea that one can validly sell a valuable piece of land entirely by oral discussions runs contrary to the expectations of most lay people. One can almost say that absence of a writing casts into doubt intention to create binding legal relations. So I feel no compulsion to undermine the statute. (p. 165 of ***Austie***, *supra*).

ANALYSIS

1. Statute of Frauds

[60] There is no sale agreement in writing in the case at bar, and as such the oral agreement for the sale of this condominium or to hold this condominium in trust, contravenes the Statute of Frauds.

[61] The Court must then find whether Dobosz can establish that there was an oral agreement for sale and/or for trust, and specify what the terms of that agreement or trust are. Such proof of an oral agreement in the absence of anything in writing must be "clear and convincing".

[62] There is no memorandum in writing that supports the allegation of the oral agreement(s). No letters were written by Dobosz to Jusza confirming their arrangement over the four-and-a-half year period of time in question.

[63] Sylvia Borzuk was the only witness called by Dobosz who had met with Jusza. She travelled in the same car with Jusza and Dobosz to see the condominium. Ms. Borzuk said nothing regarding any admissions against interest made by Jusza. There was no evidence from this witness that Jusza had admitted there was a sale or a trust agreement, or that Dobosz were in fact the real buyers of this condominium.

[64] There is no written contact here, nor is there any memorandum evidencing an oral contract of sale or an oral contract of trust. Such a memorandum of a sale must be signed by the person (Jusza) to be charged with the sale in this case, and the written memorandum must contain all of the material terms.

[65] The Residential Tenancy Agreement cannot act as a memorandum of a sale as it contains no terms of sale. It contains the parties, but lists no purchase price or no date for closing, and specifies no interest rate.

[66] The creation of an oral trust without any written agreement also requires clear proof under the *Statute of Frauds.* The requirements for a trust are higher than that required for an agreement for sale. Trusts usually arise or result by implication or construction of law. Parole evidence may be admitted to prove the trust notwithstanding the *Statute of Frauds*, however, considering the credibility of Dobosz and their conduct which is contradictory to a contract herein, I conclude that a trust agreement has also not been established.

[67] The *Statute of Frauds* is an evidentiary prohibition. The law of contracts still applies to any oral agreement for sale. Even if Dobosz could establish there had been an oral agreement, the terms as alleged are so imprecise and contradictory, that the Court could not find the terms to enforce: Even if the Court could find enough essential terms to enforce the agreement, it is clear that Dobosz failed to complete those essential terms.

2. Jusza was the real Purchaser

[68] The evidence generally establishes Jusza's main contention that he was first buying this condominium as an investment property for his wife and himself, and that he would be renting it to Dobosz.

[69] Jusza had almost $14,000.00 in his bank account on June 15, 1998, and did not seem to need any money from Dobosz. He would not likely have stated as alleged by Dobosz that "he [Jusza] had only $3,500.00 and that Dobosz would have to come up with $4,000.00."

[70] Jusza made all the offers on the condominium, and did not consult with Dobosz as to how much to offer or with regard to any of the other terms of the offer. I conclude that Jusza was trying to get a good deal for himself, not for Dobosz.

[71] Jusza made all the payments of the cash to close from his own account. Jusza did all the work applying for the ATB mortgage which consisted of a full review of his properties, his debts and his sources of income, including his daycare income and debts.

[72] Jusza told his lawyer in a confidential solicitor client communication on July 15, 1998 that the property was going to be a rental. Nothing was said about an option to buy given to Dobosz, or that he was holding the condominium in trust. Although the lawyer, Mr. Campbell, did the ATB mortgage as well, the ATB originally was going to send it to a different lawyer. Jusza specifically asked the ATB to send the mortgage to Campbell, who was his lawyer.

[73] Jusza already owned three properties and he was planning to rent the 97th Street property at the same time as this condominium, when he moved into 19 Hamilton Crescent. Later on in 1998 he did indeed rent the 97th Street property, but was stuck with very difficult renters for the balance of 1998 in that property.

[74] Jusza declared the $1,800.00 sales commission received in the purchase of the condominium involved in the case at bar as income and he paid the income tax on it. However he appealed the Revenue Canada assessment on the basis that as he was really the client, the $1,800.00 was not a cash payment.

[75] Jusza made prompt payments to the Condominium Association in August 1998 and forwarded them post-dated cheques, even though he had not received any payments from Dobosz in August 1998. He had been warned that Mrs. Dobosz had received a speeding ticket, and would be unable to pay Jusza those payments.

[76] Jusza declared the rental income from this condominium on his 1998 tax return.

[77] In the Comparative Market Analysis of June 19, 2002, Jusza asked in writing: "What is your offer? Robert" [Dobosz]. Dobosz never protested this document in writing, or hired a lawyer to put forward their claim.

3. Dobosz were not the Purchasers

[78] It was highly improbable that Dobosz could have been the real purchasers of this condominium.

[79] On June 18, 1998 Dobosz had no funds in their bank account.

[80] Dobosz said the bank was offering the condominium at a great price of $50,000.00 when the listing was in fact for $53,900.00.

[81] Dobosz had to borrow every cent of the $4,000.00 amount that they claim they paid Jusza.

[82] In her Affidavit sworn January 6, 2003 in opposition to the Landlord's Application, Mrs. Dobosz swore at paragraph 5 that in June of 1998: "We were not in great financial shape and had significant debts and were contemplating that we may have to go bankrupt in the future."

[83] In that same Affidavit at paragraph 6, she said "We didn't have enough money to cover all of our bills and often had to borrow money and run up our charge cards to even pay for food and diapers."

[84] Dobosz admits that no interest rate was discussed with Jusza, and states there was no time limit for them to tender the balance of the money, leaving Jusza in the unenviable position of receiving no interest on a loan that he could never call in or claim was in default. This is very improbable, and would only make sense if Jusza expected Dobosz to buy the condominium from him within a few months. Jusza denies that there was any firm offer to purchase, or any loan agreed to between him and Dobosz.

[85] Mrs. Dobosz's notes of the meeting of August 1998 contain various errors. The mortgage interest rate was 6.45% not the 5.49% she wrote. The insurance fee was $850.00 and added to the mortgage, not the $743.75 that she wrote. Jusza would not likely have told her that incorrect amount, as he had signed a form to add $850.00 to the mortgage amount. The $383.10 was an adjustment for property taxes at Tab 13 for the balance of 1998, and was already included in Jusza's cash to close amount of $6,800.00. It did not have to be added in twice, as Dobosz did.

[86] In Mrs. Dobosz's notes at Tab 9, there is a lot of "rounding up" of numbers. If someone was the real buyer and short of cash, they would not likely agree to a rounding up that amounted to $800.00 differences, especially if they were paying Jusza a $1,500.00 service fee for his work.

[87] Jusza received an $1,800.00 credit on the price for realtor commission. His closing costs were less because of this. He would not likely be inclined to give this to Dobosz free of charge. If Dobosz had bought from him, Jusza was going to charge Dobosz another 3% commission on the $50,000.00, which explains the $1,500.00 entry. Therefore, writing down his closing costs and ignoring the $1,800.00 discount is consistent with Jusza's version that he was just educating her about what the condominium cost him, and does not represent an explanation of what the condominium cost her.

[88] Throughout the pleadings, the Affidavits, and their testimony, Dobosz persist in their allegation that they were only paying the net amount of the mortgage, the condominium fees and the taxes. Yet there is no evidence before me of one payment for this specific amount ever being made in four-and-a-half years.

[89] It appears that Mrs. Dobosz paid the monthly payments whenever it suited her, leaving Jusza to deal with the risks. Common sense dictates that a real owner would take responsibility for the payments so as to avoid going into default.

[90] Mr. Jusza would have been foolish to agree to hold the condominium in trust on the terms as alleged, for people he knew had terrible credit and who had to borrow every dime of the deposit. It is more reasonable to accept Jusza's contention that the $3,000.00 was a security deposit against possible default in rent, and as proof that Dobosz could raise some money to show they were serious about possibly buying the condominium.

[91] When Dobosz finally had money in their bank account in November 2001, they did not leave the sum of $5,000.00 in their bank account to pay to Jusza. When they received the settlement on the personal injury claim, Dobosz did not want to spend it on defending their alleged claim to the condominium, and they proceeded essentially to spend it all within five weeks.

[92] Dobosz never filed a caveat until served with a Notice of Eviction by Jusza, even though they allege Jusza laughed at her suggestion to transfer title one year earlier around Christmas 2001.

[93] Jusza admits that he was prepared to sell the condominium to them for $50,000.00 plus his 3% sales commission, if Dobosz came up with the cash to close within a few months. There was therefore no more than an agreement to agree, or a three-month option which had in this case long expired. In hindsight, Jusza might have extended the deadline period of time if Dobosz had come up with the rest of the money, but since Dobosz were problem tenants from the very beginning with missed and late payments, Jusza's patience and willingness to help Dobosz out quickly evaporated.

[94] By the February 1999 N.S.F. cheque, Jusza terminated any possibility of selling to Dobosz at $51,500.00, but he kept the door open if Dobosz later made him a "market" offer. He was even prepared in the summer of 2002 to give them a credit against the selling price for their improvements, but they would first have to make him an offer in writing before he could discuss the value of any such discount for improvements made.

[95] In the Dobosz's bankruptcy in September 2000, they did not disclose the condominium as an asset either under "Real Estate or Other Assets". Since there is an exemption of up to $40,000.00 available for each of them for equity in a home, there was no reason for Dobosz to hide this asset.

[96] Dobosz did not disclose Jusza as a creditor in the bankruptcy documents. Since he held the title, Jusza could have been characterized as an equitable mortgagee, and he would have therefore been a secured creditor.

[97] Dobosz's explanation is that they did disclose all of this to Mr. Huncza, their Polish bankruptcy consultant. They felt that this disclosure was sufficient notwithstanding two oaths arguably to the contrary given to Mr. McCullough, the actual bankruptcy trustee. Dobosz swore that they reviewed the pamphlet on the responsibilities and obligations of a Bankrupt, yet they never asked Mr. McCullough any questions for clarification.

4. Mr. and Mrs. Dobosz were Tenants

[98] The evidence reasonably supports Jusza's contention that Dobosz were meant to be, and remained, his tenants throughout the time in question.

[99] There is a signed Residential Tenancy Agreement. Paragraph 28 of that Agreement was completed before Mrs. Dobosz signed it, as it was in that agreement when it was faxed to the ATB at 11:43 p.m. that same night, and the same paragraph was in the Choros agreement signed the same day.

[100] Jusza declared the rental income from the condominium on his 1998 tax return.

[101] Jusza represented throughout to the Condominium Association that he was the owner, and that Dobosz were his tenants. The Condominium Association had a form stating this information, and this blank form was faxed to Mrs. Dobosz in December 1998 [Tab 12].

[102] Although Mrs. Dobosz denies filling the form in and providing it to the Condominium Association, she admits receiving it, and never protested that she was being characterized as the tenant in the condominium. The Condominium Association had the form which stated that Dobosz were the tenants.

[103] Dobosz never talked with the Condominium Association, or attended a Condominium Association meeting in more than four-and-a-half years they lived there. They never told the Condominium Association that they were really the owners.

[104] Dobosz has not produced into evidence one cancelled cheque with respect to the monthly payments made to Jusza. I ascribe an adverse inference against Dobosz for this lack of evidence, as some of these cancelled monthly cheques could have had "rent'' written on them by Dobosz.

[105] Jusza's daughter Milena testified that in August 2000 she saw and heard Mrs. Dobosz describe herself in Polish generically as a "tenant", declare the monthly payment to be rent, and heard her mother threaten to evict Mrs. Dobosz if she continued to default in the rent payments.

[106] In September 2000, Dobosz declared bankruptcy. Dobosz did not list the condominium as an "Asset", or "Other Asset", or as a "Contingent Asset", nor did they list Jusza as a Creditor. Their explanation that they made full disclosure to Alex Huncza their Polish bankruptcy consultant who they thought worked for Mr. McCullough, is not credible. Any full disclosure to Mr. Huncza, if it was made, should still have been confirmed with Mr. McCullough, the actual bankruptcy trustee.

[107] In the bankruptcy questionnaire, "Mortgage" is stroked off, leaving "Rent (listed as) $546". Mr. McCullough testified that this was done outside of his office, so it was done by the Dobosz with Mr. Huncza, and possibly represents a statement by Dobosz that they were paying rent.

[108] Jusza raised the rental amount several times, and Dobosz paid whatever Jusza said they should pay.

[109] Even though Mrs. Dobosz had all the figures by mid-August 1998 to independently check what the net monthly cost really was on the condominium mortgage, the condominium fee and the property taxes, Dobosz always paid more than that net cost to Jusza. Dobosz never complained that they were paying too much to Jusza, and her explanation that she did not want to offend Jusza is not credible.

[110] Dobosz could have verified the net cost easily, but did not do so.

[111] Jusza made a profit on every monthly payment with the exception of the missed and defaulted payments. When he applied the $3,000.00 security deposit on the arrears, Jusza still made a profit.

[112] In 2002 Jusza raised the rent and threatened Dobosz on several occasions with eviction if they did not pay the higher rent of $650.00. Dobosz paid the higher rent without any protest, question or complaint.

[113] In Christmas 2001, Jusza allegedly laughed at Dobosz's suggestion that a payment of the $5,000.00 should justify a transfer of title to them, yet Dobosz never consulted a lawyer on a timely basis, or took any other action to protest.

5. Points of Contention in the Evidence

a. No Written Receipts for the $3,000.00 or the $4,000.00 Payments

[114] Although Mr. Jusza was a licensed realtor and broker, he was a welder full time and a realtor part time. Although Jusza was self-taught to do agreements in writing as a realtor, this was his own tenant and he [mistakenly] thought they were his friends.

[115] If Mrs. Dobosz had used a money order or a certified cheque, these disputed payments would also not exist.

[116] Mrs. Dobosz was familiar with certified cheques as she had gone to the bank of Marius Grewal, certified his cheque on June 16, 1998, and later cashed it.

[117] Jusza explained he grew up in Communist Poland where the underground economy used U.S. dollars only, and no receipts were the practice. Jusza testified that he still deals in cash, and has lent money on the strength of only a handshake.

[118] Dobosz presents evidence that had she borrowed, or had received as a gift, $4,200.00 during the period June 9 to June 16, 1998. This is equally consistent with Jusza's version of the facts that he told them to get some money together as a security deposit to guarantee the rental payments, and to prove to him that they can raise money towards an eventual purchase from him.

[119] In any event, raising the money does not establish that there was a contract to purchase the condominium by Dobosz.

b. Was the $3,000.00 or $4,000.00 Paid to Mr. Jusza or Mrs. Jusza?

[120] Mrs. Dobosz at first states in her Affidavit that she gave the money to Mr. Jusza.

[121] Mrs. Jusza and Fabiola, her daycare employee, were likely correct in their version of the crying episode in July 1998 when Mrs. Dobosz explained she had received a speeding ticket, and was not going to be able to pay the first month's payment.

[122] Mrs. Dobosz admitted that this was possible, and that there was no payment other than possibly "some cash" paid in August 2000, thereby verifying the version given by Mrs. Jusza and Fabiola.

[123] Mrs. Dobosz should have remembered a bright red French half door in the office of the daycare, if she had been in that office at that time, as this would seem to be a hard thing to ignore or forget.

[124] Both Fabiola and Mrs. Jusza described the episode in August 2000 with respect to the cash payment and the accusation of theft against Fabiola, which logically they would likely remember. This accusation had later been retracted that evening by Mrs. Dobosz.

[125] Both Mr. Jusza and Mrs. Dobosz agree that she came to his garage at 19 Hamilton Crescent with her stroller to pick up the key to the condominium.

[126] Dobosz had no money at the time, and all Dobosz proved at trial was that they managed to borrow, or received as a gift, $4,200.00. Dobosz needed money to purchase a fridge and stove, and given that they were moving from a one bedroom to a three bedroom residence, they likely spent some of the $4,200.00 on additional furniture.

[127] Dobosz also made improvements to the condominium in July 1998 such as painting and repairing, added oak baseboards and made a decorative hole through the kitchen wall. This must have cost Dobosz additional money, and they likely had only $3,000.00 left to give as a security deposit to Jusza, as Jusza alleges.

[128] As I believe the evidence of Fabiola and Mrs. Jusza on the speeding ticket and the red French door in the daycare, I conclude that Mrs. Jusza did not receive this money at the daycare, and that the sum received was only $3,000.00.

c. The Alleged Four $500.00 Payments

[129] The entries in Dobosz bank account do not corroborate the alleged four $500.00 payments. Dobosz's explanation that she had the cash in her home at all times is not credible, when around the same time she had little or no money in her bank account(s).

[130] Why would Mrs. Dobosz make these payments in cash, when she was already making monthly payments by cheque?

[131] How could Mrs. Dobosz have cash on December 15,1998, when in August 1998 she had no money in her bank account, and later paid for appliances and improvements to the condominium?

[132] How could she have cash in January 1999, when she testified that she was involved in a serious accident December 26, 1998, and did not work for at least a month because she had back problems that prevented her from doing heavy cleaning work?

[133] The absence of her bank records from March 31,1999 to November 1, 2001 leads to an adverse inference from the Court. The cancelled cheques could have had "Rent" written on them by Dobosz, and in any event, these records were promised in the January 6, 2003 Affidavit, yet they were never produced in court.

d. The Replacement of the N.S.F. Cheques with Cash

[134] Jusza wrote on the N.S.F. cheques that they were later made good. This is a statement against his interest, and supports his version with respect to the cheques he says "were not made good". In one case the replacement cheque amount was $600.00, even more than the N.S.F. cheque amount.

[135] Jusza possessed a $3,000.00 security deposit to use against the cheques "that were not made good". He did not have to chase Dobosz "to make them good".

[136] Mrs. Dobosz says she gave envelopes of cash to Mrs. Jusza or to Fabiola. She stated she would never leave cash in the mail box, only envelopes with a cheque in them.

[137] Fabiola admits to receiving only two or three envelopes delivered by hand by Mrs. Dobosz.

[138] Mrs. Dobosz's version of these cash payments cannot be accepted as there is no independent written memoranda to support any aspect of her version of events. Sylvia Borzuk's evidence is the only additional evidence on this point, and she is Mrs. Dobosz's best friend. Also Ms. Borzuk would have the Court believe that her younger sister, educated in Canada, would have written a backdated May 5, 1998 cheque in June of 1998 for no apparent reason.

e. Credibility

[139] There are numerous instances where Mrs. Dobosz's credibility was challenged successfully.

[140] She swore in her Affidavit of February 13, 2003, that they never made a mortgage application. This was before she saw Jusza's documents. Once confronted with the May 5, 1998 mortgage pre-approval form, she stated that she never actually applied for a mortgage.

[141] Mr. Dobosz still did not acknowledge his signature on the mortgage pre-approval form, when it obviously should have been his signature. He did not recognize his signature on the bankruptcy statement of affairs, when it was obviously his signature.

[142] The Borzuk cheque dated May 5, 1998 is consistent with the mortgage application form as Jusza likely told Dobosz to get their money together, when the Dobosz's poor credit history was revealed. Jusza also likely told Dobosz that they had no chance of getting a mortgage, so Mrs. Dobosz did not cash the Borzuk cheque.

[143] Dobosz could not have seen the condominium in May 1998 as she stated, as the listing is printed May 30,1998.

[144] Also Mrs. Dobosz initially testified that they first started to look at condominiums in July 1998, not in April of 1998.

[145] Mrs. Dobosz stated in direct evidence that paragraph 28 was not filled in when she signed the Residential Tenancy Agreement. In cross examination, she wavered on this point when shown that it likely had been there.

[146] Mrs. Dobosz says that she cleaned houses for cash, and did not disclose this income to Revenue Canada when filing her income tax return.

[147] Mrs. Dobosz apparently accumulated considerable cash in her house from her housecleaning activities, yet never told her bankruptcy trustee about this cash.

[148] Mrs. Dobosz also did not disclose her personal injury claim to the trustee in bankruptcy. Mrs. Dobosz knew she was going to be collecting a large cash settlement in a matter in which her husband was at fault. Mrs. Dobosz had car insurance, and she had a verifiable injury to her vertebrae affecting her back.

[149] It appears plausible then that Mrs. Dobosz knew that she was going to collect her insurance settlement eventually, so Dobosz decided to go bankrupt and clear off all their creditors, so that when they received the settlement monies they could spend all of it on themselves, and not need to pay anything to their creditors.

[150] Dobosz both swore in their Statement of Affairs that it was "a full, true and complete statement of my affairs on the 26 day of September 2000 and fully discloses all property of every description that is in my possession or that may devolve on me ..." Both swore that they had read the duties and obligations and offences of a bankrupt, which mentions it is an offense when one "makes a false entry knowingly makes a material omission in a statement or accounting,". Both swore an Affidavit of Exempt Property. There was no reason not to hide the condominium if indeed they thought they were the owners.

[151] Mrs. Dobosz swore that she gave the $4,000.00 to Mr. Jusza, then later claimed it was given to Mrs. Jusza.

[152] It is not a reasonable scenario to make payments of $500.00 four times in cash, when at the same time they are paying the rent by cheque each month. Most people would document their payments by using a money order or certified cheque, and not make purchase payments on real property in cash.

6. Part Performance

[153] To attempt to prove their allegations of an oral agreement for sale and/ or trust, there must be proof of acts of part performance of the contract that are unequivocally referable to the contract. The acts of Dobosz must be found to be *unequivocally referable* to the alleged oral sale agreement and nothing less. By their own nature they must be referable to the alleged contract. The acts must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing less.

[154] In ***Booth v Knibb Developments***, *supra*, the trial Judge had two witnesses independently confirm that there was an oral agreement for sale. There is no independent confirmation in the case at bar. Even though there was independent evidence of the agreement, the Court of Appeal in ***Booth*** still refused to confirm a sale because of the Statute of Frauds and because of the contradictory conduct of Mrs. Booth, finding that acts inconsistent with the alleged oral agreement for sale prevented the oral agreement from being performed, notwithstanding that the trial Judge found that such a contract existed.

[155] In the ***Booth*** case, our Court of Appeal held the facts were not sufficient to establish part performance. The payment of the water utilities and taxes and remaining on the land could be equally consistent with a tenancy. Making an offer to buy when Booth had money demonstrated her desire to buy, but did not unequivocally indicate that a sale of land existed. The Booths also made some improvements to the land, however making improvements could

be a mistake which showed that they believed that they were the owners, but not that they had an agreement in place to buy.

[156] The Booth case also shows that the payment of money alone is not sufficient to meet the test of part performance.

[157] Comparing the case at bar to the Booth case, it is clear that the acts of part performance of Dobosz such as making improvements to the condominium, and paying $3,000.00 (or even $4,000.00) are not sufficient to establish part performance.

[158] There were various acts that contradicted a contract for sale of the condominium. The conduct in this case that is inconsistent with the alleged oral agreement includes: -

a. Dobosz paying more than the combination of the mortgage, property taxes and condominium fees at all times.

b. Dobosz voluntarily paying the penalty for N.S.F. cheques given to Jusza, meaning that Dobosz was complying with the terms of the Residential Tenancy Agreement in this regard.

c. Dobosz permitting their registration as a "tenant" with the Condominium Association.

d. Dobosz describing their monthly payments as "rent" to Jusza to the bankruptcy trustee.

e. Dobosz begging forgiveness and relief from being evicted in August 2000, when Mrs. Dobosz was confused over the N.S.F. payments.

f. Dobosz paying increased rent of $650.00 in 2002, after supposedly being denied their tender offer to pay the amount owed to Jusza to complete the condominium purchase.

g. Dobosz paying <u>increased</u> rent, even after receiving written warnings that they either pay up or be evicted - arguably something an "owner" would not do.

h. Dobosz not retaining a lawyer for over a year, after their offer to purchase is spurned by Jusza in December 2001.

i. Dobosz writes and reads English and Polish, yet in four-and-a-half years there is not one letter or anything else in writing to state that the Dobosz are purchasers and not tenants.

j. In four-and-a-half years Dobosz never demanded to pay the condominium fees directly, or to pay the mortgage directly, or to pay the property taxes directly.

k. Dobosz never demanded to attend the Condominium Association meetings, and they never told the Condominium Association that they were the real owners.

l. Jusza claimed rental income on his 1998 income taxes from this condominium.

m. Jusza delivering a Comparative Market Analysis, and asked Dobosz for a "market" offer in June 2002.

n. Mrs. Jusza told Dobosz in August 2000 that she was going to ask her husband to evict her.

o. The September 2000 bankruptcy did not claim the property as an asset.

[159] There is some conduct which could be consistent with the alleged oral agreement. However when Dobosz made the improvements to the condominium, this could have been a "mistake" on their part, or simply represent a desire on their part for a nicer residence. The improvements to the condominium and the land would be effective part performance in law if Mr. Jusza knew about them and acquiesced in them.

7. Improvements

[160] If the Court had found for Dobosz, they would keep the benefit of these improvements, however the Court finds for Jusza.

[161] With the exception of the condominium painting, Dobosz has acknowledged that these improvements were performed without notice to Jusza and without his permission. Dobosz acknowledges that they took a risk, when they made these improvements without yet being named on title as the owners.

[162] Dobosz further admits that they made many of these improvements after Jusza's rejection of their request for title. They no longer could be under any illusions by that point that they were the owners, yet they continued to put money into improvements.

[163] Even though the deck was rebuilt in May 2002 for $2,500.00, Jusza's demanded to be paid increased rent or he would evict Dobosz. The explanation that the invoice is one year out of date is not credible.

[164] There can be no "unjust enrichment" in this case as Jusza did not know of all of these improvements, nor did he consent to them or turn a blind eye to them, authorizing only the painting. Even though Jusza met with Mrs. Dobosz in mid-August 1998 in the condominium, he apparently never noticed the things they had done to the condominium at that point in time. Jusza was in a rush, had just stopped in, and had previously authorized painting, so he would not have been surprised by new paint. There was no evidence that he was aware of anything more than that, and he testified that he never was inside the condominium again until the inspection on March 11, 2003.

[165] If Dobosz took the risk of putting money and sweat equity into this condominium without first obtaining title, even after there is an acknowledged disagreement over the terms of ownership, Jusza should not be equitably or legally obligated to reimburse Dobosz for these improvements.

[166] The improvements do not prove part performance of the alleged oral contract. They only prove that Dobosz may have believed that they were the owners at some point, or that they did not care about ownership and simply wanted to live in a nicer condominium.

[167] Improvements to the land were not accepted as part performance in ***Booth v Knibb Developments***, *supra.*

8. Satellite Dish

[168] The evidence is clear that Jusza provided timely notice of the two letters he received from the Condominium Association and Melnyk & Company, the Condominium Association's lawyer.

[169] Dobosz admitted receiving at least one call in December 2001 from Jusza telling her to take the satellite dish down. Dobosz however continued to resist taking the satellite dish down.

[170] Jusza received the Condominium Association's Notice of Motion on December 9, 2002, and attended at the condominium to cut the satellite cable and remove the dish himself on December 10, 2002. Rather than accept the bylaws of the Condominium Association, and the several written notices, Mrs. Dobosz's response to this was to call the police and complain about Jusza's actions.

[171] Clackson J.'s Order of December 20, 2002 is clear that the dish must be removed from the condominium unit, and from the common property.

[172] On March 19, 2003, Melnyk & Company faxed that the dish was again in use under the deck, which Dobosz denied. On April 2, 2003 the condominium management company's Mr. Kerr took more pictures which showed the satellite dish on the condominium premises.

[173] Dobosz's explanation that the dish was not in use is not credible considering Mr. Kerr sees no security tether as alleged by Dobosz, but rather a 30-foot cable running into the condominium unit with the dish pointing south, and the lattice cover not installed over the dish. The lattice work would presumably interfere with reception. The dish was apparently not harmed by Mr. Jusza's removal of it from the post.

[174] Mr. Kerr testified that all Canadian satellite dish providers require the dish to point south, and Dobosz acknowledged that they were using a Canadian satellite dish provider.

[175] Jusza has counterclaimed that these costs are the responsibility of Dobosz. Since Jusza owns the condominium, the Condominium Association's legal fees will be registered against the condominium title until they are paid. The $3,000.00 paid into court pursuant to Master Quinn's Order will probably not even be sufficient to pay these legal fees.

[176] I hold Dobosz responsible for solicitor and own client indemnity costs with respect to the satellite dish matter.

[177] On April 30, 2003 the Condominium Association's lawyer faxed their final account in the sum of $3,573.66.

9. Eviction Order

[178] On December 16,2002, Jusza served an Eviction Notice on Dobosz.

[179] On March 26,2003, Master Quinn ordered Dobosz to be evicted by April 30, 2003. This Court stayed that Order until these Reasons were issued.

[180] I now grant Jusza an Eviction Order effective within 30 days from the date of these Reasons [June 6, 2003], and specifically order that Dobosz refrain from damaging the condominium when moving out.

10. Caveat

[181] Jusza submits that Mr. Broda allowed a caveat to be filed against the condominium title without properly checking to ensure there was in fact an agreement in writing dated July 31, 1998 for the sale of the condominium, or to hold the condominium in trust. The caveat was signed December 19, 2002, but could not be filed because of the Christmas break until January 6, 2003

[182] Jusza argues that wrongfully filing a caveat is a slander of his title, and that damages should be awarded against Mr. Broda personally. Jusza asks that these damages be assessed personally against Mr. Broda as the solicitor who carelessly created this caveat, and then fought to keep it on title in two Chambers applications in front of Master Quinn.

[183] I conclude however that given the uncertainty at the time of the filing of the caveat, and the fact that there was some leeway before the trial of this matter with respect to the merits of the caveat, that such a sanction on Mr. Broda should not be imposed.

L. Attempt to Obtain Property by False Pretenses

[184] Dobosz has acknowledged that her version of the agreement would have required her to conspire together with Jusza to obtain a mortgage from the Alberta Treasury Branch by false pretenses as she could not have qualified for a mortgage, given that they had no money and poor credit.

[185] Jusza denies this arrangement, stating that his request for a large security deposit was to establish that Dobosz could obtain sufficient funds to not only guarantee the rent, but to make the down payment on the cash to close on the condominium. Within the first month, Dobosz missed the first month's payment.

[186] Dobosz has also tried to obtain the condominium title from Jusza through this litigation. Jusza says that Dobosz's counsel attempted to intimidate him into selling, or else he could be reported to the Real Estate Association and/or thrown into jail.

[187] It is submitted that this conduct of Dobosz in this matter is of the worst sort based on lies, deception, and improper motives without caring for the repercussions to the Treasury Branch, or caring about following the bylaws of the Condominium Association.

[188] The Dobosz have filed bankruptcy once before. They could not even come up with $8,000.00 for the deposit ordered by Master Quinn for this trial. It is submitted that they likely will file bankruptcy again to cheat Jusza of obtaining any court costs in defending their claims.

[189] Considering their conduct in this matter, I agree, and I grant a declaration under Section 178(l)(e) of the *Bankruptcy Act* that any damages and costs awarded to Jusza are a "debt or liability for attempting to obtain property by false pretenses", and will survive any future bankruptcy proceedings.

12. Dobosz's Civil Fraud and Deceit Action

[190] Jusza has testified how he has lost sleep over these allegations of fraud and deceit, and that he was threatened by Mr. Broda with being sent to jail.

[191] Mr. Broda alleged that Mr. Jusza was suspended from his real estate practice for shady dealings forcing Mr. Jusza to obtain the January 23, 2003 letter from the Real Estate Council at Tab 14.

[192] Some cases say that an allegation of civil fraud is presumed to damage a person's reputation, and that actual damage does not have to be proved.

[193] In any event, the essential elements of civil fraud have not been established by Dobosz.

[194] ***Kelemen v El-Homeira,*** [1999] ABCA 315; A.J. No. 1279 [Alta. C.A.], establishes that the elements of the tort of deceit require the following: -

a. There must be a false representation of fact;

b. The representation must be made with knowledge of its falsity;

c. It must be made with the intention that it should be acted upon by the plaintiff, ... , in a manner which resulted in damage to him;

d. It must be proved that the plaintiff acted upon the false statement.

[195] There has not been any proof of the first essential element other than some allegations by Mrs. Dobosz. There has been no written confirmation or evidence from any independent witness. Sylvia Borzuk said nothing about any representations from Jusza in her presence when they were viewing the condominium.

[196] Dobosz never provided her bank statements in a timely fashion. She undertook as of January 6, 2003 to get them in a few weeks. She further undertook again in discoveries on March 24, 2003 to get all of them. On April 9, 2003 her counsel only provided the bank statements, and there were no cancelled cheques produced.

[197] I conclude that the allegations of civil fraud have not been proven. Accordingly there will be a $2,000.00 penalty in costs against Dobosz for making these unproven allegations.

CONCLUSION

[198] I order that Jusza is entitled to an award of party and party costs, and G.S.T. on the fee column in the Bill of Costs. The new regulation under Rule 605(9) and (10) adding G.S.T. to costs is found in Order in Council 66/2003, which states that unless the Court orders otherwise, Jusza is entitled to claim G.S.T. on the fee portion of the Bill of Costs.

[199] However there will be a costs penalty imposed by the Court against the successful party Jusza, because of his deemed complicity in the attempt to mislead the Court as to the time necessary to complete this trial.

[200] It is apparent to me that both counsel deliberately set this matter down for a two-and-a-half day trial knowing that it would likely take four days to complete. Both counsel did this to avoid scheduling a Pre-trial Conference which is required for all trials taking more than two-and-a-half days, which would have had the affect of delaying the hearing of the case.

[201] As a result I concluded that whichever party was successful in this matter, that party should be limited to two-and-a-half days of trial time costs notwithstanding the matter essentially took four days to complete.

[202] With regard to the Special Chambers in front of Master Quinn, counsel for Jusza drafted a written argument and is entitled to costs for that.

[203] Counsel for Jusza prepared the Admitted Facts and should get costs for that as well.

[204] There will be an Eviction Order issued against Dobosz effective 30 days from the date of these Reasons. Mr. and Mrs. Dobosz are specifically directed not to remove any attached fixtures or appliances, and not to damage any part of the condominium on moving out.

[205] I grant a Judgment for the arrears of rent, with interest in favour of Jusza.

[206] Solicitor-client costs owing to the Condominium Corporation in the amount of $3,573.66, or such further amount reached after the taxation, arising out of the satellite dish problem are awarded also to Jusza.

[207] I issue a declaration that any damages and costs awarded here in are "any debt or liability for obtaining property by false pretenses" under Section 178 (1) (e) of the *Bankruptcy Act* R.S.C. 1985.

[208] I make an order that before and after the Judgment and until moving out, Dobosz will pay $750.00 a month rent, and if they do not pay by the 15th of each month, that they can be evicted by the end of that month.

[209] Finally I award $2,000.00 in additional costs against Dobosz for their failure to prove the alleged civil fraud and deceit.

HEARD on the 22nd to 25th days of April, 2003.
DATED at Edmonton, Alberta this 6th day of June, 2003.

J.C.Q.B.A.