

CANADA / JUDGMENT

Lamb v. Berube

2020 BCSC 1467

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1467 Lamb v. Berube

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lamb v. Berube,

2020 BCSC 1467

Date: 20201005

Docket: S0831502

Registry: Prince George

Between:

Valerie Margaret Lamb, Executor of the Estate of Douglas James Lamb

Plaintiff

And

Clem Sebastien Joseph Berube, Administrator of the Estate of

Vincent Charles Joseph Berube, Deceased

Defendant

The text of the judgment was corrected at paragraph 121 on October 9, 2020

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

T.P. Matte

Counsel for the Defendant:

D.A. Hobbs

Place and Dates of Trial:

Prince George, B.C.

September 25, November 23, December 7, 2018;

April 30, May 28, June 3, September 10, November 28, 2019

Place and Date of Judgment:

Prince George, B.C.

October 05, 2020

Introduction

- [1] In this summary trial the plaintiff Valerie Lamb, the executor of the estate of her late husband Douglas Lamb, seeks specific performance of an option, which she says Mr. Lamb exercised in 2005, to purchase an interest in a 640-acre property in the Fort St. John area from Vincent Berube for \$40,000.
- [2] Mr. Berube died in 2006, and the defendant Clem Berube, his brother and the administrator of his estate, argues that the option is not enforceable. (To avoid confusion with his brother, from this point on I will refer to Clem Berube as "the defendant".)
- [3] This action has a lengthy history. Mr. Lamb began it in 2008. The first summary trial date was not set until June 2014, and was then adjourned.
- [4] In October of that year Mr. Lamb, who was in ill health, underwent a detailed video deposition, which forms the factual foundation of the application.
- [5] Mr. Lamb died in January 2016. A further summary trial date was set for August 16 and 17 of that year. At the hearing, an order was made substituting Mrs. Lamb as the plaintiff (from this point on I will refer to her by that role in the litigation).
- [6] On August 16, following preliminary submissions on the summary trial, Justice Verhoeven excluded an appraisal report that was being tendered by the defendant because, on the evidence that had been provided to that point, the appraiser was not properly qualified to give the opinions in it[1]. The defendant's counsel then sought an adjournment to the next day to obtain instructions on how to proceed with his case without that report.
- [7] The recording of the proceedings on August 17 is unavailable, but the resulting order provides that the summary trial was adjourned generally, and that the "costs of the Defendant's application to adjourn the summary trial shall be costs in the cause." I infer from this that the exclusion of the report necessitated the adjournment.

- [8] I began hearing this matter on the next summary trial date of September 25, 2018. This time the defendant appeared on his own behalf. He had not provided an affidavit that responded to the actual merits of the application, although he referred to unfiled material in his possession that he said addressed them. His only filed affidavit to that point dealt with the expenses he had incurred to maintain the disputed property. To deal with this deficiency, I heard the plaintiff's submissions on the application and then granted the defendant an adjournment so that he could put the evidence that he wanted to rely on in an affidavit.
- [9] His resulting affidavit depended mainly on hearsay and its factual assertions were not really helpful to his position. Fortunately, he eventually retained his current counsel, who in June 2019 successfully applied to amend the response to civil claim and application response to better reflect his position with respect to the option, and to provide an affidavit of Eleanor Steffensen, who was involved in the drafting of the option.
- [10] The plaintiff's counsel then applied to cross-examine Ms. Steffensen on her affidavit. After some scheduling delays resulting from medical treatment that she was undergoing, we were able to complete her cross-examination and the rest of the hearing of this application in November 2019.
- [11] It is common ground that the matter is suitable for resolution by a summary trial. Although there are some conflicts in the evidence, they can be resolved on the basis of the material that has been filed and the cross-examination of two of the most important witnesses. The main issue is the legal effect of the document that Mr. Lamb and Mr. Berube unquestionably created and signed.

Evidence

- [12] Mr. Lamb and Mr. Berube were both owners of agricultural properties. Mr. Lamb said that until a physical altercation between them in December 2005, they were very good friends, and engaged in activities together such as hunting, fishing and playing cards. Mr. Lamb also performed various tasks to assist Mr. Berube with his farming.
- [13] According to Mr. Lamb, Mr. Berube had a problem with gambling, in particular on the lottery game Keno, and would incur significant debts to finance his habit. In cross-examination during his deposition, Mr. Lamb offered the "guess" that Mr. Berube had \$20-\$30,000 in credit card debt as a result of gambling, and agreed with the suggestion that Mr. Berube "was always a little hard up for money".
- [14] He also described Mr. Berube, who was 74 years old when these events occurred, as "a somewhat timid man" and agreed with the suggestion that he was "not aggressive".

- [15] Until May 2003, Mr. Berube owned three properties, which were described in the evidence as "Block A" (56 acres), the "Home Quarter" (160 acres) and the "Common Property" (640 acres). He owned the Common Property, which is the subject of this litigation, as tenants in common with Helen Shoaf, another resident of the area. It actually consists of three individual properties: a half-section and two quarter-sections.
- [16] Mr. Lamb said that in May 2003 he agreed to buy Block A from Mr. Berube for \$13,500. Mr. Berube wanted to sell the property because he needed money to fund the planting of crops. Mr. Lamb paid the money immediately (his bank records show the withdrawal of a corresponding amount on May 21) but the sale was not formalized in a transfer until October. This informality was a reflection of the level of trust between them, Mr. Lamb explained.
- [17] When they carried out the transfer in October, Mr. Berube asked that a purchase amount of \$3,950 be used on the transfer documents, instead of \$13,500, because he had not been paying his taxes and did not want to alert the tax authorities to the amount he had actually received.
- [18] Until 2005, Mr. Lamb allowed Mr. Berube to continue to use Block A and take the hay from it.
- [19] Before they agreed on the sale of Block A by itself, they had discussed Mr. Lamb buying it and the Home Quarter together, for a total of \$66,000.
- [20] During the winter of 2004-2005, Mr. Berube offered to sell him the Common Property for \$30,000. He said no at that point, because buying the Home Quarter was his priority.
- [21] Mr. Berube had told Mr. Lamb that there were other prospective purchasers for the Home Quarter, and that he had been offered significant amounts for it. In June 2005, he advised that those other possibilities had not come through, so he would be dealing with Mr. Lamb with respect to it. Based on their previous discussions about a total price of \$66,000 for it and Block A, they agreed on a price of \$52,500 for the Home Quarter.
- [22] Certain items were to be exempted from the purchase: fuel tanks, a greenhouse belonging to their mutual friend, Mr. Berube's tools, and his equipment.
- [23] Mr. Berube asked for some money immediately, because his phone and other services were being cut off and he had credit card debts. Mr. Lamb gave him \$700 in cash and then went to the bank, withdrew more cash and obtained some "official" cheques. He then gave Mr. Berube \$4300 in cash and three cheques for \$5000 each. (His bank records show an amount of cash slightly exceeding \$4300 being withdrawn on June 8.) As a result, he had paid \$20,000 for the Home Quarter by this point.
- [24] Part of the agreement was that Mr. Berube could have a life estate in the Home Quarter. Mr. Lamb said that although Mr. Berube had a house "in town", he "loved his farm" and enjoyed spending time at the Home Quarter.

- [25] To reflect the purchase, Mr. Lamb and Mr. Berube signed a document titled "Offer to Purchase and Agreement of Purchase and Sale", dated June 14. It was a standard form pre-printed document, and appears to be a typical one for transactions of this kind. The details were filled in by hand by Ms. Steffensen, whom Mr. Lamb described as "the conveyer lady" at a local law office. It was signed at the Home Quarter and witnessed by Ms. Steffensen's husband, who was Mr. Lamb and Mr. Berube's friend.
- [26] The purchase price was listed as \$52,500 and the deposit as \$20,000, which corresponded to the amount that Mr. Lamb had already paid. To reflect this previous payment, the standard provision that the deposit would be paid to the vendor by the purchaser's solicitor when the transaction was completed was deleted. The completion date was to be July 8, "or sooner".
- [27] At the same time they were signing the sale documents for the Home Quarter they discussed Mr. Lamb having an option to purchase the Common Property. The idea of an option came up because Mr. Berube wanted to sell him the land, but he needed to get rid of some other debts first, so he asked for three years in which to buy it.
- [28] Other conditions of the sale of the Home Quarter were that Mr. Lamb would provide \$30,000 worth of haying equipment for Mr. Berube's use and that Mr. Berube would receive 50% of the proceeds of the hay crops from the property. The resulting expenses also inhibited Mr. Lamb's ability to buy the Common Property immediately.
- [29] The price for the Common Property was briefly to be \$30,000. Then Mr. Berube said, "But if you're gonna buy it in three years, it's gonna be worth \$40,000. I'm gonna sell it to you for 40, not 30. That's too cheap." Mr. Lamb explained that the price was relatively low because one would have to be tenants in common with Ms. Shoaf, with whom he had a long-standing antagonistic relationship and who had behaved badly towards Mr. Berube as her co-tenant.
- [30] In addition to the purchase and sale document, the purchaser's and vendor's conditions to the agreement were completed by Ms. Steffensen based on their discussions and, according to Mr. Lamb, were signed on a different date at Ms. Steffensen's house. He said that it may have been "a day or two later" that those documents were signed.
- [31] The purchaser's conditions, contained in what was described as Schedule A, were that the agreement was subject to Mr. Lamb obtaining a \$40,000 mortgage from a local credit union, and to Mr. Berube "mak[ing] & sign[ing] a legal will". The third condition was the purported option that is at the heart of this case:

The purchaser will have the right of first option to purchase the vendor's half interest in [legal description of the Common Property] within the next 3 yrs for \$40,000.00 which can be renegotiated July 2008".

[Spelling and punctuation in the original]

- [32] Mr. Lamb maintained in cross-examination that he told Ms. Steffensen at the time of signing that he had an option, not a right of first option, but "that's what she put down". She then told him to sign it, which he did.
- [33] His explanation for the purchaser's condition that Mr. Berube make a will was not very clear. He said that he had discussed it with Ms. Steffensen. Mr. Berube did not have a will, but had told him that if something happened to him, "he was going to give that land to his nieces". One can perhaps infer that it was intended to preserve Mr. Lamb's right to exercise the option even if Mr. Berube died, although it is difficult to see how the situation would have been any different, in terms of its continuing validity, if he died without a will.
- [34] The vendor's conditions, in Schedule B, were the ones I have previously described - a life estate in the Home Quarter, the haying equipment being provided by Mr. Lamb, and Mr. Berube's right to 50% of the proceeds of the hay crops from the property.
- [35] In her affidavit, Ms. Steffensen confirmed her role in the drafting of the agreement in question, and described her background at that time as that of a legal assistant and conveyancer in a law office. She added in cross-examination that she had taken some legal training courses, and had also received training from the lawyer she worked for. Her duties included conveyancing and drafting contracts. She currently works as a conveyancer for a notary.
- [36] She deposed that Mr. Lamb and Mr. Berube contacted her a few days before June 14 and asked her to prepare a written contract to record an agreement they had reached. She then did so, based on their instructions.
- [37] In her recollection, the entire agreement (I understood her to mean including the purchaser and vendor's conditions) was signed on June 14, at Mr. Berube's farm. She remembered purchasing take-out food and travelling out there for the signing, accompanied by her husband, who witnessed it. She elaborated in cross-examination that the only things on the document that had been filled out in advance (she did not say by whom) were the names of the parties, the legal descriptions and the price. Everything else, including everything that was "agreed or disagreed to" was completed on that day. She then took the completed agreement to her office and made copies for everyone.
- [38] The plaintiff's counsel pointed out certain features of the documents to her that he suggested meant they had been prepared at different times. On the first page of the purchaser's conditions Mr. Lamb's initials appear twice, inside circles drawn in black ink. His initials, and Mr. Berube's beside each circle, are in blue ink. Above them the word "INITIAL" is printed in black. Ms. Steffensen agreed that was her printing. When asked why she had written that even though Mr. Lamb was present, she said that the procedure in her office was to draw a circle and put the word there. She also advised that she was required (as the conveyancer, I took it) to write in black ink, otherwise the Land Title Office and "the legal community" would not accept it. However, on the signature page of the main purchase and sale agreement both sets of initials are contained within a single circle drawn in blue ink,

and there is no printed "INITIAL" on the page, although Ms. Steffensen had printed their names below the preprinted lines that say "Purchaser Print Name" and "Vendor Print Name" respectively. She was unable to say who had drawn the circle in blue, but that "obviously" she had not done it. She also did not know why the deletion of the deposit clause, which was crossed out in black ink, had not been initialled, citing the fact that "this had all happened 13 years ago".

- [39] There are no discrepancies between the instructions that she described and the language of the agreement with respect to the purchase and sale of the Home Quarter. Like Mr. Lamb, she described the sale of the Home Quarter being motivated by Mr. Berube's need for money to address his gambling debts, and confirmed his "gambling problem". In cross-examination she seemed to soften her characterization of this habit somewhat, noting only that "he liked to gamble", and adding that "he was lucky enough to win enough to keep farming".
- [40] On the provisions dealing with the Common Property however, she claimed to have imperfectly captured their instructions in several respects.
- [41] Despite having used the word "option", what she was actually intending to describe was Mr. Lamb's "conditional right to purchase" this property, which she later described as him having "the first right to purchase" it. She could not remember why she had used the term "option", and agreed with the suggestion from the plaintiff's counsel that there is no other situation that arises in conveyancing in which that term would be used.
- [42] The plaintiff's counsel showed her a copy of what appears to be a continuing legal education glossary of real estate terms that Mr. Lamb had in his possession. She agreed with its definition of "option to purchase" as "a contract by which an owner of real estate agrees with another to sell a specified property at a specified price within a specified time, and which may be registered as a charge." This definition was highlighted in yellow and there was a large handwritten asterisk beside it. Above it on the next page, the definition of joint tenants was also highlighted in yellow. On the next page, the definition of tenants in common is highlighted, and next to it are two handwritten circles, one containing the words "Vince & Helen" and the other "can be sold". Ms. Steffensen maintained that she had not given this document to Mr. Lamb, that the writing in the circles was not hers, and that she could not recall doing the yellow highlighting.
- [43] She added that this "first right to purchase was conditional on whether [Mr. Berube] wanted to retire and sell which [he] had not yet decided to as of [the date of the agreement] ". According to her, Mr. Berube "was looking towards retirement in the next few years". It was an agreement "that hopefully would happen", but there was nothing written that Mr. Lamb could exercise it at his discretion. If the property was not purchased within three years, the price would have to be renegotiated. In cross-examination, she confirmed that she had also neglected to include this retirement condition.

- [44] When she was asked about a term that options typically contain, she was unable to answer, explaining that she had only seen a few of them "in [her] time."
- [45] She also deposed that the \$40,000 purchase price was intended to apply to each of the three individual lots that make up the Common Property, for a total cost of \$120,000. It was not \$40,000 for the Common Property as a whole, although she conceded that the language that had been used could be interpreted in that way. She explained in cross-examination that the price for each lot was to be the same, even though one was larger, because there was "a lot of bush on one" and the others were cultivated land. She was unable to say how much bush was present because she was "not a surveyor". She also maintained that \$40,000 was not an adequate price for a section of land (which the Common Property was in total), "or a half-section for that matter".
- [46] She added that "[n]o consideration was paid by [Mr. Lamb] to [Mr. Berube] for the first right to purchase of the three properties and no option agreement was prepared" (I took her to be saying that no separate option agreement was prepared, besides the condition contained in the contract for the Home Quarter). When she was asked how she knew that no consideration had been provided, she said that Mr. Lamb did not pay anything through her office, that Mr. Lamb had "never decided he would pay for that", and that if money had been paid "something different would have happened". She was adamant that the life estate that Mr. Lamb granted over the Home Quarter was "a different entity" and was not the consideration, and that in any case, Mr. Lamb did not honour it.
- [47] In cross-examination she said that that both Mr. Lamb and Mr. Berube told her that the option was not to be registered. When pressed about why they had given her that instruction, she explained that one "could call it a gentleman's agreement" to have something in place so that Ms. Shoaf "could not get her hands on the property."
- [48] At various points in the cross-examination, Ms. Steffensen made comments about the character and effect of the option, which were not completely clear. She described it as "a condition of purchase" but that it was "never enacted on"; "a subject-to that wasn't enacted", adding that once the contract was not completed "it was not valid at any rate"; and an "invalid clause" that was not "enacted on" - that is, "a subject-to clause that was never completed".
- [49] She did not consult the lawyer for whom she worked about any of this drafting.
- [50] According to Mr. Lamb, after signing the vendor's conditions, Mr. Berube decided that he would not conduct haying operations on the property, but would instead allow another neighbour, Hartley Blatz, to do so, in return for a share of the proceeds. To reflect this, he deleted the vendor's conditions related to the haying equipment and sharing the proceeds of haying with Mr. Lamb. A copy of Schedule B, with those conditions crossed out and initialled by Mr. Berube, was part of the evidence. Mr. Lamb said that Mr. Berube was at the credit union with him when he deleted these conditions. Mr. Lamb asked him to do it there to demonstrate to the credit union that the haying equipment no longer had to be provided.

- [51] As a result, Mr. Lamb also no longer needed to borrow \$40,000 for the purchase of the Home Quarter - the amount was \$32,500 instead. He did not testify about the date on which this visit to the credit union occurred, but the commitment letter for \$32,500 to him from the credit union in evidence was dated June 27, so I infer that it took place before that.
- [52] Mr. Lamb said that during the same visit he asked if the credit union would lend him \$40,000 to buy the Common Property. An official of the credit union confirmed that it would. He said that he told Mr. Berube that he wanted to exercise the option, but "I didn't do anything about it right then. I had three years."
- [53] Mr. Berube signed the transfer document for the Home Quarter in front of a notary on July 13. Mr. Lamb paid for that notary. On the same date, Mr. Lamb entered into the mortgage for that property and signed the transfer document granting Mr. Berube the life estate in it.
- [54] Ms. Steffensen's description of the preparation, execution and registration of the resulting transfer, life estate and mortgage do not conflict with Mr. Lamb's.
- [55] Mr. Lamb said that on July 26, now intending to exercise the option, he obtained a blank "Offer to Purchase and Agreement of Sale" from Ms. Steffensen. He said that she asked him why he was buying the Common Property "so early". He told her about having freed up the money (because he no longer had to supply the haying equipment) and that he "wanted to get it started now."
- [56] Ms. Steffensen's version of this interaction, provided in cross-examination, was that when Mr. Lamb approached her with this request "very directly after the sale of the Home Quarter", she told him that what he was attempting to do "was not the agreement" that had been reached with Mr. Berube, who had not yet indicated that he wanted to retire and sell the property. Although she provided Mr. Lamb with the blank document, as he described, she refused to help him further with the transaction and told him to leave the office.
- [57] While she agreed that she was "probably" the person who had performed title searches on July 19 of the three properties that comprised the Common Property, she denied that this meant that she had already been advised by then that Mr. Lamb wished to exercise the option to buy it.
- [58] Mr. Lamb said that when he brought the document to Mr. Berube, the response he received was that Mr. Berube did not want to sign it "right now". Mr. Lamb tried to explain to him that "[i]t's already signed up" (I infer referring to the granting of the option) and that Mr. Berube was going to have to sign eventually, but he still refused. A "couple of times" (I infer on separate dates after that) Mr. Berube told him that they were "going to get it done later", but could not do it at those particular times because no witnesses to the signing were available.
- [59] In September an incident occurred that the plaintiff relies on to demonstrate Mr. Berube's implicit affirmation of the option and the fact that it had been exercised. Mr. Lamb, along with the plaintiff and some other friends had been riding quads on the Common Property. They stopped to talk with Mr. Berube, who was working on his tractor in one of the fields.

Ms. Shoaf arrived and inserted herself into the conversation uninvited - demanding to know where the "paperwork" was for her to sign in relation to Mr. Lamb's purchase of "the land [he had] bought off of Vince, the [C]ommon [P]roperty." Mr. Lamb explained to her that she was not involved in that transaction and that Mr. Berube could do whatever he wanted with his interest in the property. Ms. Shoaf became angry, shoved Mr. Lamb, and left. From the plaintiff's perspective, the important point is that during this conversation with Ms. Shoaf, Mr. Berube "didn't say much about it [h]e was pretty quiet through the whole thing."

- [60] Mr. Blatz deposed that after the Home Quarter was sold, Mr. Berube, in response to a suggestion that Ms. Shoaf would be unhappy that he "had agreed to sell his interest in the Common Property" to Mr. Lamb, responded that Ms. Shoaf "probably would be unhappy", and for that reason "he probably should not have agreed to sell his interest."
- [61] Mr. Lamb had a heart attack in November and after receiving treatment in Vancouver, returned in December. The altercation that ended his friendship with Mr. Berube took place in early December.
- [62] According to him, he went to the Home Quarter to visit Mr. Berube and found that some granary buildings, seed, posts and fuel, that were his property under their agreement, were missing. Mr. Berube said he had moved them and accused Mr. Lamb of not having paid him "for the house". Mr. Lamb became angry, saying that he should "slap [Mr. Berube's] lips off for what [he was] saying" and kicked the slop bucket that Mr. Berube was carrying, causing him to stumble and fall in the snow. Mr. Berube then punched Mr. Lamb in the right eye, after which Mr. Lamb flung him to the ground.
- [63] Mr. Berube reported the incident to the police and Mr. Lamb was required to sign an undertaking to have no contact with him. They did not speak again.
- [64] Ms. Steffensen expressed the view that Mr. Lamb "chose to attempt not to honour the registered life estate in favour of [Mr. Berube] and assaulted [Mr. Berube] to pressure him to leave his house." She described Mr. Lamb trying to "exercise what he described as his option, but [Mr. Berube] had not decided to sell or retire yet." She explained that he "would only sell when he was ready to retire and after the assault he and [Mr. Lamb] were not friendly". Her affidavit does not include the basis of any of this knowledge. In cross-examination she elaborated that Mr. Lamb bragged on two occasions in her presence that he had forced Mr. Berube off the Home Quarter. She said that at one point Mr. Berube had to live in a tent near Ms. Shoaf's house as a result.
- [65] Ms. Steffensen also quoted Mr. Lamb telling her directly that he did not need to honour the life estate. She accused him of trying to intimidate her by following her around, after she told him he was wrong about not having to honour it.

- [66] She deposed to Mr. Lamb having "a troubled past with the law" due to illegal hunting, and described his "vision" as being to use Mr. Berube's house and properties as a hunting lodge for him and his friends. When she was asked why she had added his hunting problems to her affidavit, she said that it was to show that Mr. Lamb "wasn't the bright and shining star" that one might otherwise view him as.
- [67] More generally, she added that although she, her husband, Mr. Lamb and Mr. Berube "all used to be friends", that situation changed in response to these events. She agreed with a description of Mr. Lamb that her husband had provided to the plaintiff's counsel - as someone who was nice when things were going his way, but "a real asshole" when they were not. She later elaborated that Mr. Lamb was "not a bad guy, but he did what he thought he could get away with." Her view as the dispute progressed was that Mr. Lamb was "a terrible person" and that she disliked him because he was "an opportunist who beat up an old man."
- [68] In contrast, she and her husband had been "close and friendly" with Mr. Berube for many years, right up until his death.
- [69] Mr. Lamb explained that he particularly wanted to purchase the Common Property because it was adjacent to his other property, and would allow him to collect a higher rent for the combined area. It would also allow him access as of right to Block A, and the Home Quarter, rather than having to cross Mr. Blatz's property with his permission. He conceded however, that such a route through the Common Property would be difficult to construct, although he could access the other properties through it by means of a "winter road".
- [70] He intended to seek Ms. Shoaf's agreement to divide the Common Property, and if she did not agree to force her to do so by tilling the property to make it unsuitable for pasturing her horses.
- [71] He revealed that he had discussed selling Block A and the Home Quarter to Mr. Blatz for \$86,000, and that they had general discussions, without discussing a price, about also selling the Common Property if Mr. Lamb succeeded in the lawsuit.

Positions

Plaintiff

- [72] The plaintiff's counsel submits that the evidence establishes all of the necessary elements of a valid option for Mr. Lamb to purchase the Common Property for \$40,000 within three years. He argues that the option should be interpreted according to its plain language and, since it does not seek to impose an agreement on Mr. Berube's estate that Mr. Berube himself did not make, that it should be enforced.
- [73] In reaching that conclusion, I am asked to find that Mr. Lamb was a credible and reliable witness in his deposition, and that Ms. Steffensen's evidence should be rejected.

- [74] Counsel describes her as clearly partisan in the dispute, and hostile to Mr. Lamb. The length of time since her involvement in the relevant events adds concerns about her reliability.
- [75] In counsel's submission, it makes no sense that she would draft detailed conditions that track Mr. Lamb's version of the agreement, yet omit Mr. Berube's supposedly crucial conditions about him only having to sell if he retired and wished to sell (which would have rendered the option meaningless), or the significant detail that each of the constituent lots would cost \$40,000. At 74, Mr. Berube was already effectively retired and no longer actively farming. As to \$40,000 being charged for each lot, this ignores their differing sizes and amounts of usable land that each contained, as opposed to bush or swamp (Mr. Blatz deposed that the swamps on the Common Property contained water all year round, and would not be suitable for animals unless the owner was prepared to make "a sizable investment"). Crucially, there is no other evidence that Mr. Berube ever sought to value the lots in this manner.
- [76] In addition, Ms. Steffensen's own actions of searching the three titles on July 19 and giving Mr. Berube a blank purchase and sale form on July 26 tend to confirm her awareness that Mr. Lamb had given notice of his intention to exercise the option. His evidence that she asked him why he was exercising it "so early" is said to be very telling in that regard.
- [77] There is also the concern that Mr. Lamb was never confronted with Ms. Steffensen's version of events, contrary to the rule in *Browne v. Dunn*, (1893), 6 R. 87 (H.L. (Eng.)). As a result it is open to me to give that version less weight.
- [78] Turning to the substance of the option, counsel argues that the requirement of consideration for it was fulfilled, because it was part of the purchase and sale agreement for the transfer of the Home Quarter. Rather than forming a separate agreement that required its own consideration, the vendor's and purchaser's conditions, including the option, were integral to the overall agreement. For Mr. Berube, they were the important conditions granting him a life estate and, until they were waived, the use of Mr. Lamb's haying equipment and a share of the hay revenue.
- [79] An alternative view is that these conditions, which were signed a day or two after the main agreement on June 14, was that Mr. Berube granted the option in return for the consideration of the life estate and the haying concessions.
- [80] Even if no consideration is found, counsel submits that the language used to describe the option in the agreement was effectively an offer by Mr. Berube to sell the Common Property at a specific price within a specific period, which Mr. Lamb accepted on July 26, before it had been revoked.
- [81] Addressing the potential argument that the option condition merged in the resulting conveyance of the Home Quarter and had no continuing validity (which he points out was neither pleaded by the defendant nor referred to in the application response), counsel argues that the conditions can be seen as a separate agreement which survived the

completion of that contract. Even if the doctrine of merger is potentially applicable, he says it is clear that Mr. Lamb and Berube never intended for that to occur with these conditions, which is a recognized exception to the application of the so-called doctrine of merger.

- [82] The somewhat informal manner in which the option was exercised on July 26 is said to have been sufficient, because Mr. Berube clearly understood, as shown by his response, that the exercise had occurred. A term permitting it to be exercised verbally should be implied in order to give business efficacy to it, according to the intentions of the parties, who clearly expected that that was how matters would proceed.
- [83] As to the quality of the agreement generally, I am asked to keep in mind that Ms. Steffensen was the expert as far as Mr. Lamb was concerned, and that the terms used in the agreement only mean that the parties were unsophisticated, not that they did not reach an agreement that can be discerned from what was written. In the same way, the only significance of Mr. Lamb attempting to exercise the option by means of the blank agreement form is that that was what Ms. Steffensen gave him.
- [84] There was also no obligation on Mr. Lamb to tender documents or the purchase price to enforce the option, counsel submits. Mr. Berube's refusal to sign the documents that Mr. Lamb understood were needed to carry out the transfer of the Common Property amounted to an anticipatory breach of the option, which relieved Mr. Lamb from having to take that further step.
- [85] His failure to pursue the option while Mr. Berube was alive was initially attributable to their manner of doing business, in which money would change hands well in advance of any formal documentation. After their physical confrontation, Mr. Lamb was on an undertaking not to contact Mr. Berube, and once his serious health problems became acute, as he described in his deposition, he was understandably focused on them.
- [86] The plaintiff's counsel rejects any suggestion that this was an unconscionable agreement. A review of the circumstances shows that there was no inequality of bargaining power in reaching it, and that the outcome was fair to Mr. Berube.
- [87] Since Mr. Lamb had already paid \$20,000 with no written agreement to show for it, it was actually Mr. Berube who had the advantage before the agreement for him to sell the Home Quarter was executed. Mr. Berube was also the one who insisted on the increase in the price of the Common Property under the option and requested the life estate. He had recourse to the notary for any legal advice he might have required. The initial \$20,000 he received would have relieved any immediate financial pressure and he had the expectation of receiving a further \$32,500 shortly.

- [88] There is no indication that his age, lack of formal education or general timidity put him at any disadvantage in the negotiations. According to Mr. Lamb, he was the aggressor in their physical confrontation, in which Mr. Lamb avoided striking any blows. Nor can Mr. Lamb's plans for forcing Ms. Shoaf to divide the property once he had purchased an interest in it be seen as an indication of aggressiveness in dealing with the property - he and Ms. Shoaf had a long history of mutual hostility.
- [89] As to the agreement itself, the plaintiff's counsel submits that it was not unfair in any respect. As I have mentioned, it ended up with a higher purchase price than was initially discussed, and the concurrent benefits of a life estate in the Home Quarter and the ability to earn revenue from hay farming made the deal worth much more than \$40,000 to Mr. Berube. One must also keep in mind, when assessing fairness, the problematic nature of being tenants in common with Ms. Shoaf, which would require forcing an agreement with her or a partition application to resolve.
- [90] Once a breach of the option agreement has been found, it is necessary to consider the appropriate remedy for it. Counsel submits that because its location would have allowed Mr. Lamb to put together a larger block of properties to rent, at a higher price, and given him potential direct access to Block A and the Home Quarter, the Common Property should be characterized as unique. This entitles the plaintiff to specific performance of the option.
- [91] Mr. Berube's initial refusal to honour it, followed by the defendant's in the ensuing years, deprived Mr. Lamb and then the plaintiff of the ongoing use of the Common Property to which they were entitled. The plaintiff provided evidence in support of the submission that income would have been earned from it if the option had been honored. Mr. Blatz rented Block A and the Home Quarter from 2005 to 2014, and provided and deposed that he would have made use of the Common Property on the same basis, if Mr. Lamb could have come to an agreement with Ms. Shoaf to prevent her interference. Further, since 2009 a portion of the property has been leased from Mr. Berube's estate and Ms. Shoaf by an oil company, which has installed a well on it. Therefore, in addition to specific performance, the plaintiff's counsel says there should be damages for the loss of these payments.

Defendant

- [92] In overview, the defendant's counsel made two main arguments about the nature of the condition granting the option.
- [93] First, a review of the surrounding circumstances shows that Mr. Lamb knew that the purchaser's conditions were only conditions to the sale of the Home Quarter, not a separate agreement independent of it. The normal procedure would have been for him to obtain a separate option agreement, and I can infer that he received that advice when he went to his lawyer to complete the conveyance, because he then obtained the blank agreement form from Ms. Steffensen on July 26, which he was unable to get Mr. Berube to sign. Counsel argues that the fact that he received a blank form supports Ms. Steffensen's evidence that she refused to help him, for the reasons that that she described in her evidence, and his

request to Mr. Berube shows that he knew he needed a new agreement.

- [94] In contrast, nothing can reasonably be inferred from Mr. Berube's silence during Mr. Lamb's argument with Ms. Shoaf.
- [95] If Mr. Lamb believed he had a valid option, it is argued, he would simply have tendered the option price to Mr. Berube, along with a property transfer form. In the same vein, his explanation about why he did not act immediately upon learning that he could afford the purchase ("I had three years") is inconsistent with a belief that he had the right to exercise the option without a separate agreement. Telling Mr. Berube "someday you're gonna have to do this" when Mr. Berube hesitated to sign the blank agreement form raises the same concerns.
- [96] Second, the option was part of the purchaser's conditions, which Mr. Lamb had the right to waive under the agreement. The submission is that he cannot have enjoyed the contractual right to waive the conditions and yet now argue that they were a separate stand-alone agreement that could not be waived. The fact that the conditions were dealt with by attached schedules indicates that he and Mr. Berube put thought into what was to be included in them, and the express language of the agreement required the party who benefitted from each to declare that they had been waived or fulfilled, or the agreement would be terminated (this was to be done by written notice "on or before the date specified", although none of the conditions specifies a removal date). The completed conveyance permits me to infer that the option was waived, and Mr. Lamb's satisfaction with the conveyance in that regard means that the option has been merged in it. It was not a condition precedent to the agreement or that could not be waived, or a collateral agreement to it, it is submitted.
- [97] Even if the condition amounted to an agreement, counsel says that it is unenforceable because it lacks a number of essential requirements.
- [98] Its language, in particular the use of the term "first option", would make it uncertain to an objective onlooker whether it purported to grant an option or a right of first refusal with respect to the Common Property. The concepts are completely inconsistent with each other - the former is a unilateral right that can be exercised by the holder upon performing the required actions, and the latter does not arise unless the person who has granted it decides to sell. Of course, the burden is on the plaintiff to establish that Mr. Lamb was granted the former.
- [99] It is significant that Mr. Lamb admitted agreeing to this term despite having previously envisioned something different - it shows him knowingly approving the use of language that did not clearly convey an option. The reality is that Ms. Steffensen, despite her experience as a conveyancer, did not draft the agreement in the manner that a lawyer would have, and it is the objective meaning of the terms used that must prevail.
- [100] The use of "will have" to describe the granting of the option, rather than "has" or "is hereby granted" also raises the question of when Mr. Lamb would actually have such a right.

- [101] The other purchaser's condition - that Mr. Berube make a will - contemplates a situation in which he still owned the property at the time of his death, and the requirement of renegotiation of the price after three years similarly spoke of things that potentially needed to be done in the future, before the property could be purchased.
- [102] Although they were later deleted, the vendor's conditions providing haying equipment and share of the hay proceeds to Mr. Berube are also argued to be inconsistent with the unilateral right to purchase the property that would have been provided by an option.
- [103] In counsel's submission, the only interpretation that can make sense of these various deficiencies is Ms. Steffensen's evidence that Mr. Berube agreed to sell the Common Property only if he decided to retire.
- [104] Further, there was no consideration for what was granted, as an agreement that was independent from the purchase and sale agreement would have required. Nothing in the language of the agreement suggests that the \$52,500 or any portion of it was consideration for the option, and in fact the surrounding circumstances show clearly that this money was to complete the purchase of Block A and the Home Quarter for a total of \$52,500.
- [105] There were also no mechanisms directing how the option was to be exercised, such as when it became effective, how notice of its exercise was to be given and how the tender of the purchase money was to be made. (Despite having obtained the blank agreement form, Mr. Lamb made no actual tender in that respect.) Counsel argues that it makes no sense that Mr. Lamb would have been granted the unrestricted right to buy the Common Property the day after the conveyance, leaving Mr. Berube with only the life estate.
- [106] At a more technical level, the agreement failed to include the option in its definition of "property".
- [107] Counsel concedes that it is a difficult question whether the instructions that Ms. Steffensen received from Mr. Lamb and Mr. Berube (assuming I accept her evidence) are admissible as part of the surrounding circumstances that form a legitimate aspect of contractual interpretation, or are evidence of their subjective intentions, which cannot be resorted to in that process.
- [108] To the extent that the plaintiff relies on the evidence of Mr. Lamb to support the claim, counsel asks me to keep in mind the difficulties with memory that he displayed during his deposition, and the number of times that his counsel had to resort to leading questions, even on important disputed matters.
- [109] A relevant consideration on the question of whether the granting of the option was an unconscionable bargain, which Mr. Berube's counsel frankly acknowledged was a more difficult argument, was Mr. Lamb's role as the only person to whom Mr. Berube could turn to get money when he was under financial pressure. To this economic dependence were added the vulnerabilities of his gambling addiction and the resulting debts, age and timidity. The notary who assisted Mr. Berube with the conveyance had no involvement with

the option to purchase, and dealt only with the transfer document and the life estate, so he received no assistance from her in protecting his own interests in relation to the option.

[110] In contrast, Mr. Lamb was clearly willing to take aggressive action to achieve his goals, as demonstrated by his plan for forcing Ms. Shoaf to divide the Common Property, and Ms. Steffensen characterized him as being adept at getting what he wanted by whatever means necessary. One could also infer that he structured the negotiation and signing process of the agreement containing the option to ensure that Mr. Berube was relaxed and cooperative.

[111] When considering the fairness of the option price of \$40,000, the defendant's counsel suggests that it is helpful to consider how Mr. Lamb and Mr. Berube had priced the two previous properties that had changed hands. In his deposition Mr. Lamb said that for Block A they had priced the land at \$325 per acre for hay land and \$175 per acre for bush. The \$52,500 Mr. Lamb paid for the Home Quarter averages out to \$328 per acre, but the evidence was that it was 50% bush, which suggests a higher price for the usable land. The 400 acres of the Common Property that Mr. Lamb estimated were useable, at the price that he and Mr. Lamb had agreed to for the previous transactions, would have cost \$130,000, without giving Mr. Berube anything for the bush portion. The \$40,000 payable under the option was therefore "below bush value". (Counsel was unaware at the time of these submissions, as I was, of the exclusion of the appraisal report, and so he argued that its estimate of a value of \$91,000 for the Common Property should also be given some weight in this analysis).

General Principles

Interpretation of Written Contracts

[112] The correct approach to this process was set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633:

47 [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement

50 [I]t is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement ... The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule [the rule prohibiting extrinsic evidence to modify the language of a written contract] discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man"... Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[Internal citation omitted]

[113] As Sattva makes clear, no ambiguity is required before the surrounding circumstances can be considered. Crucially, the circumstances it envisions do not include the subjective intentions of the parties to the contract.

Admissibility of Subsequent Conduct

[114] Evidence of such conduct is not part of the surrounding circumstances envisioned in Sattva, which are considered only as of the time of the execution of a contract. It should be resorted to only if the contract remains ambiguous after considering its language and those circumstances: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at paras. 41, 46, cited with approval in *Wade Estate v. Duck*, 2018 BCCA 176 at para.28. As the Court in *Shewchuk* explained:

48 [E]vidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions at the time they made their agreement

50 However the parties' subsequent conduct is relevant only to inferentially establishing their intentions at the time they executed their contract. Like evidence of post-offence conduct in criminal matters, it is a kind of circumstantial evidence that "invokes a retrospectant chain of reasoning"; the trier of fact is invited to infer the parties' prior intentions from their later conduct

Waiver of Conditions

[115] If the non-occurrence of a condition excuses one party, that party may waive the condition and demand full performance. It is only when the parties have agreed that they will both be excused by the non-occurrence that they are not free to waive it unilaterally. It is then known as "a true condition precedent": Waddams, *The Law of Contract* (7th ed.) (Toronto: Thomson Reuters, 2017).

Merger

[116] The applicable principles are helpfully summarized in DiCatri, *The Law of Vendor and Purchaser* (3d ed.) (Toronto: Thomson Reuters, 2020):

744 The most common instance of the doctrine of merger is a contract for the sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should be performed in the conveyance are merged in it, and all the rights of the parties in relation thereto are thereby satisfied. However, merger depends upon the intention of the parties, and such intention is a question of fact to be determined in the light of contract and conveyance and from the facts and circumstances surrounding their execution. When a covenant or stipulation in a contract is intended as an independent collateral agreement, to remain in full force and effect notwithstanding the execution of the conveyance, there is no merger.

So, it is not every case where a contract for the sale of land is followed by a conveyance that there is a merger of the disputed covenant or provision. The question for determination by the court is: what was the contract according to the true intentions of the parties? For example, "Who would enter into a contract containing an express warranty that the building he was purchasing complied with all applicable building regulations and, at the same time, intend the extinction of that warranty upon taking possession of the building? Is the cause of action extinguished at the moment it is created? The law does not fashion such a trap for the unwary." Thus, the doctrine of merger is not followed slavishly.

[Footnotes omitted]

Options, Rights of First Refusal, Notice of Intention to Exercise, and Consideration

[117] These principles are also helpfully summarized in DiCatri:

211 An option is a right acquired ex contractu to accept or reject a present offer within a limited, or, as the case may be, a reasonable time in the future, and, when otherwise validly constituted, vests in the optionee an interest in land, i.e., forthwith upon the granting of the option, the optionee, upon the occurrence of certain events solely within his control, can compel a conveyance of the land to him. However, this interest is contingent upon the optionee's election to exercise the option.

213 A right of pre-emption, or a "right of first refusal" is not an absolute option but one which is conditional and contingent upon the will or desire of the owner to sell. Accordingly, it does not impede the owner's right to alienate the land; the sole right of the quasi-optionee being to accept or reject as a preferred purchaser when the owner is ready to sell

214 An option is ordinarily exercised by a simple notification.

Where the contract is silent as to the mode of exercise, the general rule is that any manifestation, either oral or written, indicating an acceptance by the optionee, is sufficient.

215 Absent an agreement to the contrary, a valid notice of acceptance of an offer does not have to be accompanied by payment or tender of the purchase money.

219 An option is itself a contract and unless under seal requires consideration. The consideration must be legal. In general, the Court does not inquire into the adequacy of the consideration

As an option is distinct from a sale of lands, or an agreement to sell lands, so the consideration for the option must be distinct. Thus, where the only consideration for the option is the obligation of the optionee to pay the agreed purchase price in the event he elects to exercise the option, the requirement of consideration to support the option is not met. But, of course, there is no objection to the parties agreeing that the consideration for the option is, in the event of its exercise, to be applied on the purchase price.

[The author then cites the exception in the case of a lease with option to purchase, in which the payment of rent under the lease has been found to constitute consideration for the option]

But neither a seal nor a mere receipt in the contract of a consideration will supply the lack of the real consideration essential to obtain specific performance. The lack of consideration for an independent option not under seal is not remedied by reason only of being included in the same document as a distinct agreement for valuable consideration relating to other property.

[Footnotes omitted]

Unconscionability

[118] A well-known authority on this issue is *Morrison v. Coast Finance Ltd.*, (1965) 54 W.W.R. (B.C.C.A.) at 259:

[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need

or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable . . . or perhaps by showing that no advantage was taken.

[Emphasis added]

Discussion

[119] It will be useful to begin by determining the factual basis for the application of these principles.

[120] On the whole I found Mr. Lamb to be a credible witness and, on issues for which it is admissible, I accept his evidence. The video recording of his deposition puts me in a position that is almost analogous to hearing him in person and his demeanour as a witness, to the limited extent that it weighs on credibility, supports my general conclusion. His admission about his illness affecting his short-term memory and his ability to recall matters with prompting were borne out by the nature of his testimony, and for the most part his counsel's manner of questioning him was leading only by directing him to a specific matter or assisting him when he had become confused. The overall narrative he provided was quite coherent, contained various seemingly random and idiosyncratic details that would be heard to invent if they had not occurred, was not particularly self-serving, and was also not overtly hostile to Mr. Berube, despite their falling out. He readily conceded points that did not show him in a flattering light, such as his statements and actions towards Mr. Berube in their altercation and his plan to rid himself of Ms. Shoaf as a co-tenant. Looked at in totality, it sounded like a narrative of actual events, with minimal skewing towards his position in the litigation.

[121] Ms. Steffensen on the other hand, demonstrated overt bias in favour of Mr. Berube and hostility towards Mr. Lamb in her evidence. She was unhelpful and rather hostile in cross-examination, and wasted no opportunity to slip in aspersions on Mr. Lamb's character, whether or not they were relevant to the subject matter at hand. I also agree with the plaintiff's counsel that her version of events is not believable. It makes no sense that she would record the relatively detailed points relating to the option that are present in the agreement yet inexplicably omit the absolutely critical ones about Mr. Berube selling the Common Property only upon his decision to retire and each of the lots forming the overall property being individually priced. It is similarly unlikely that the parties would have agreed to identical pricing for lots of differing sizes and attributes. She was coy on the seemingly obvious inference that she searched these properties on July 19, and could not satisfactorily explain the markings for initials on various parts of the agreement, even though she appears to have been the one who made them. As a result of these concerns, I am unable to accept her evidence and where it differs with Mr. Lamb's, I prefer his.

- [122] This conclusion makes it unnecessary to consider whether Ms. Steffensen's version of events should have less weight because Mr. Lamb did not have an opportunity to respond to it in his deposition.
- [123] I think that the facts that legitimately form part of the surrounding circumstances here are: Mr. Lamb and Mr. Berube's previous relationship; Mr. Berube's gambling problem and ongoing need for money, the purchase of Block A and the manner in which it was carried out, including the delay in registering it despite the money having been paid; the discussions leading up to the purchase and sale agreement for the Home Quarter; the further discussions, on the date that the main agreement was signed, about what would go in the purchaser's and vendor's conditions; and the subsequent amendments to some of those conditions at the credit union. Excluded from consideration is Mr. Lamb's evidence about what he subjectively intended by the language that was used, and Ms. Steffensen's about how she purported to channel the parties' instructions in her drafting, which I think is just an indirect way of describing those same subjective intentions.
- [124] Viewed in light of those surrounding circumstances, I am satisfied that the language used in the condition in question would have conveyed to the reasonable observer the intention to provide an option, rather than a right of first refusal. The parties' previous discussions, including Mr. Berube's original offer to sell the property, which Mr. Lamb declined, his indication that he had numerous prospective buyers for it, and his modification of the price based on its expected increase of value at the time of its expected sale, show that he was definitely intending to part with it, not mulling the possibility in the event of retirement. The deletion of the haying conditions after the original signing of the schedules but before the conveyance, also tends to support the interpretation that the option was in place to protect a purchase and sale that the parties wished to carry out.
- [125] I also find that Mr. Lamb's early attempts to exercise the option relative to the deletion of the haying conditions and conveyance of the Home Quarter is one of those situations in which the parties' conduct subsequent to the agreement can provide reliable circumstantial evidence of their objective intentions in arriving at the language of it. This conduct tends to support an objective interpretation of the condition as an option that existed only because of immediate financing difficulties and was intended to be exercised once those difficulties have been overcome, not a possibility driven by Mr. Berube's decision to sell. Similarly, Mr. Berube's comment to Mr. Blatz that he probably should not have agreed to sell his interest supports the inference that the parties thought they had agreed to do so, although of course that tells us nothing about the enforceability of any such agreement. However, I agree with the defendant's counsel that no clear inference can be drawn from Mr. Lamb's silence in the face of the argument between Mr. Lamb and Ms. Shoaf about his agreement to sell Mr. Lamb his interest.

- [126] In reaching this conclusion, I have kept in mind the potential ambiguity caused by the words "right of first" before "option to purchase". A term of an agreement that described the right that was being conferred as a "first option to purchase" has been held not to be determinative that what was granted was a right of first refusal, in light of the entire agreement and the parties' subsequent conduct: 2123201 Ontario Inc. v. Israel Estate, 2016 ONCA 409. That is the situation I find myself in here.
- [127] Similarly, the language used sufficiently described what was to occur with regard to the purchase of the Common Property, and within what timeframe. The basic requirements of notice of intention to exercise an option mean that nothing turns on the omission of such a mechanism from the condition. (Jumping ahead to the purported exercise of the option, absent an agreement to the contrary, a valid notice of acceptance of an offer does not have to be accompanied by payment or tender of the purchase money: Union Carbide Canada Ltd. v. Scott-Foster Ltd. (1965) 53 D.L.R. (2d) 407 (B.C.C.A.) at para.44.).
- [128] I am not persuaded that the inference that should be drawn from Mr. Lamb obtaining a blank purchase and sale agreement from Ms. Steffensen is that he had been given legal advice that he did not have a valid option, and was now seeking to create one. Nor am I satisfied that if he believed that he did he would simply have tendered the purchase money. First of all, such subsequent advice would have no bearing on the objective intentions of the parties at the time of the agreement. More importantly, I agree with the plaintiff's counsel that this credits Mr. Lamb and Ms. Steffensen with much more sophistication than they actually demonstrated in their handling of these transactions. Leaving aside whether an objective intention can still be discerned from the language in question, the agreement was drafted without a deep understanding of how the parties' respective legal responsibilities were to be expressed and carried out in a legally effective way, and it is clear that Mr. Lamb was reliant on Ms. Steffensen with respect to both. I find it much more likely that Mr. Lamb sought to use the blank purchase and sale agreement to carry out his intention to exercise the option simply because that was what Ms. Steffensen gave him, before refusing to help him further.
- [129] I am also not persuaded that the option condition must either have been waived or deemed satisfied by Mr. Lamb in a manner that barred its continued existence, or that it merged in the conveyance. In my opinion, such a characterization of the process of dealing with conditions to a property transaction is too categorical. By their conduct, the parties obviously mutually intended not to rely on the provision of the agreement that immediately terminated it in the absence of written notice that each condition had been waived or declared fulfilled. No such notice was ever given and in fact, the conditions contained no dates by which that was to occur, yet the conveyance proceeded to completion. And it would have been absurd, given the objective intention expressed by the option that I have found, for the parties to have structured the agreement so that it was extinguished with the conveyance, since the very point of its existence was to survive that event and confer a right to exercise it in the future. The parties' decision to situate the option in the purchaser's

conditions for the purchase and sale of the Home Quarter, while ill-advised and potentially problematic for other reasons, does not support the inference sought by the defendant, in light of all of the circumstances.

[130] The real question in this case, in my estimation, is whether there was consideration for the option. The first stage in answering that question is to determine the nature of the option in relation to the purchase and sale agreement. As we know from the authorities that have been cited, an option is a contract that requires its own consideration, and the source of such consideration will be different depending on whether it is part of a reciprocal exchange of conditions or is a stand-alone agreement.

[131] A factually very similar case is *Davis v. Shaw*, [1910] O.J. No. 151 (Ont. Div. Ct.). There, the defendant had sold a house to the plaintiff, and in the same document granted him an option to purchase an adjoining lot, to be exercised within a year. During that year, the defendant sold part of that lot to someone else. The plaintiff then sued for specific performance. Chief Justice Falconbridge held:

21 But it is contended that the offer [to sell the vacant lot] is an integral part of the agreement for the sale of the land and premises referred to in the first part of the memorandum so as to supply a consideration sufficient to support the "promise" made in the latter part.

22 I am unable to accede to this view. The transaction relating to the brick house and premises was a matter by itself. It was carried out by the payment of the purchase money and delivery and registration of the conveyance.

23 I cannot consider the option granted to have been a part of the other contract in such a manner as to justify our regarding the consideration of the latter as supporting the option.

Falconbridge C.J.K.B. distinguished this situation from those lease cases, which I referred to in my summary of general principles, in which the rent paid by the tenant was characterized as consideration for an option to purchase.

[132] Justice Britton, in a concurring judgment, analyzed the situation in this way:

30 If one agreement, although evidenced by two separate writings in reference to what is really the same transaction, I see no reason why one may not supply the consideration of the other.

31 There is no doubt or difficulty in applying the law, if this one paper, in two parts, is to be considered as if relating to two distinct matters, having no connection, one with the other.

34 My difficulty in this case is in not being able to treat the document as one transaction constituting an agreement on the part of the defendant not only to sell the brick house and one parcel of land for \$2,850, but with that sale to give the option to the plaintiff to purchase at any time within 12 months the other parcel of land for \$1,000.

37 There seems nothing in the writing itself from which it can be inferred that the plaintiff would not have purchased the brick house without the option as to the vacant lot.

38 Each part of the agreement seems absolutely complete in itself. Neither seems to depend on the other. Plaintiff says, "I agree to purchase from James Shaw the brick house, . . . the price being \$2,850." Defendant says, "I agree to sell the above property for the above stated sum." That is all, complete in itself. Then upon the same paper, but as something additional, and not connected, the defendant promised to give to the purchaser the option of purchasing the vacant lot for \$1,000, "providing that this offer be accepted within one year from date." That of course is a clear-cut option, but unfortunately it lacks consideration to support it. Before acceptance the defendant rescinded the offer to sell.

[Emphasis added.]

[133] An example of this analysis leading to a different result on the specific facts before the court is found in *Lucas v. WeiHING*, [1977] 1 W.W.R. 718 (B.C.S.C.). There the evidence established that the plaintiff would not have entered into an agreement to purchase two properties from the defendant unless the defendant had granted her an option to purchase a third lot at the same time, and that "the defendant must be taken to have understood and accepted this term as part of the total agreement with the plaintiff" (para.46). As a result Justice Legg concluded that:

48 [i]n the case at bar there is clear evidence to show that the agreements to purchase Lot 1 and Lot 3 and the option agreement on Lot 4 were all connected one with the other. There was therefore consideration for the option."

[134] In *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, a case cited by the plaintiff's counsel, the Supreme Court of Canada dealt with the question of when an option forms part of the contract between the parties in which it is contained, and when it stands alone as its own form of contract. The Court's analysis was concisely distilled in *Jesan Real Estate Ltd. v. Doyle*, 2019 ONSC 6448:

55 As noted in *Sail*, while options are often considered to be unilateral contracts, this is not always the case; an option may be an element of a bilateral contract in which it is contained, rather than an independent, unilateral contract: *Sail* at paras. 34-40. This determination is a matter of construction which involves a review of the text of the contract and the context surrounding it in order to determine the intentions of the parties: *Sail* at para. 41.

56 In *Sail*, there were two agreements. One was a charter agreement by which one party agreed to pay the other monthly amounts to use a vessel. The agreement contained an option to purchase the vessel after a five-year period for a fixed amount. Based on a review of the facts, the Court found the lease and the option formed a single bilateral contract. This finding was based on three broad categories that demonstrated an intimate connection between the two agreements which was indicative of a bilateral contract:

- i) Same consideration for both agreements-- the same rent payments functioned as consideration for both the charter party and the option to purchase: *Sail* at para. 42.

ii) A dependent relationship between the two agreements-- the ability to exercise the option was made dependent on performing the terms of the underlying agreement: *Sail* at para. 44.

iii) Both agreements involved the same property-- the charter party and the option to purchase related to the same vessel: *Sail* at para. 45.

[135] In *Sail* the Court also sought to reconcile *Davis* with *Daku v. Daku* (1964) 49 W.W.R. 552 (Sask. C.A.), a case in which a lease with an option to purchase had been treated as a single agreement:

48 The apparent inconsistency between the cases of *Davis* and *Daku* can be reconciled by the fact that in one case the underlying contract and the option applied to two separate parcels of land, while in the other the underlying contract and the option applied to the same property. Thus, in *Davis*, where the underlying contract and the option applied to two separate parcels of land, the court found two separate contracts, though contained in the same document. In *Daku*, where the underlying contract and the option applied to the same property, the court found a single contract.

[136] The Court also emphasized that:

42 Without consideration, an option [as a unilateral contract] is treated like a simple offer. In such a case, the offeror can withdraw the option at any time prior to acceptance, a power clearly running contrary to the very nature of the option

43 The option in this case requires consideration to be binding on both parties

[137] Applying the analysis in *Sail* here, it is difficult to identify any factors that weigh in favour of the option condition forming part of the bilateral purchase and sale agreement for the Home Quarter, other than that it involved the same parties. The property involved in the agreement and the options was different; we know from Mr. Lamb's evidence that the entire consideration for the Home Quarter was the difference between the \$66,000 that was originally to have been paid for it and Block A and the \$13,500 that had already been paid for Block A, leaving nothing to allocate to the option; other than the condition that Mr. Berube execute a will, which may have been intended to preserve the viability of the option in the event of his death (although that is not clear), all of the other conditions clearly relate to purchase of the Home Quarter; and there is an entire absence of evidence that the Home Quarter transaction depended to any extent on the granting of the option for the Common Property - it was something else that Mr. Lamb intended to do once he had the money. In fact, the history of the discussions between the parties showed that Mr. Berube had originally offered the Common Property for sale first, only to have Mr. Lamb decline in favour of the Home Quarter, which was his priority.

- [138] In my opinion, the option was clearly a separate agreement, despite being situated as a condition to the Home Quarter agreement - a decision I attribute to Ms. Steffensen's deficient skills as a legal draftsman rather than any objective intention of the parties that it should be part of that bilateral agreement. It seems most likely that it was simply stuck in that location for want of any deeper understanding of how an option could have been achieved.
- [139] As a result, this situation is indistinguishable from the outcome in *Davis*, and I conclude that there was a lack of consideration for the option as a separate agreement.
- [140] I think it is clear that Mr. Lamb gave notice of his intention to exercise the option before it was revoked. As I have previously summarized, in the absence of specific notice requirements in an option, it is exercised by simple notification, and unless the terms of the option require it, there is no obligation to tender the purchase price at the same time: *Smith v. Gurnett* (1921), 58 D.L.R. 462 (Ont. S.C.). There is no evidence of an explicit revocation of the offer to sell the Common Property by Mr. Berube, but even if one applies the interpretation most favourable to him and treats his repeated evasions when he was asked to sign the blank purchase and sale agreement as an implicit revocation, it is still clear that Mr. Lamb indicated that he was intending to carry it out before Mr. Lamb's initial expression of reluctance. As I have previously found, Mr. Lamb used a purchase and sale agreement to effect this purpose because that is what he received from Ms. Steffensen, not because he thought he needed a new, valid option.
- [141] The problem that the plaintiff faces however, is that at that point Mr. Lamb was not proceeding under the reasonable implied notice provisions of a bargained-for option agreement supported by consideration. He was simply responding to an offer to sell the Common Property within three years that had not yet been revoked. In those circumstances, he was seeking to bring to fruition a unilateral contract which, as *Sail* explains, receives its consideration and is rendered binding by the performance of the action stipulated in the offer:

33 A bilateral contract is a contract in which both parties undertake obligations through an exchange of promises. Acceptance of a bilateral contract, as a general rule, occurs when the offeree communicates its counter-promise to the offeror. In contrast, a unilateral contract is one in which a party makes a promise in return for the performance or forbearance of an act. There is no counter-promise to perform this act or forbearance. In this way, a unilateral contract is a contract in which only one party undertakes a promise. This promise takes the form of an offer which can only be accepted by performance of the required act or forbearance. Such performance provides the other party's consideration, allowing it to enforce the original promise

- [142] In this case, the "required act" was the payment of \$40,000. In other words, what remained once there was no consideration was Mr. Berube's offer, which amounted to saying, "If you pay me \$40,000 in the next three years, I will transfer you the Common Property". To place Mr. Berube under an enforceable obligation to do so, Mr. Lamb would have had to pay, or attempt to pay, the money stipulated in the offer. Of course he did not do this.
- [143] The authorities relied on by the plaintiff's counsel to show that there was no requirement to tender the purchase price once Mr. Berube indicated he would not sign the proffered documents (*Pompeani v. Bonik Inc.* (1997), 35 O.R. (3d) 417 (C.A.) and *Lam v. Sumner Estate*, 2006 BCCA 427) do not assist here. They deal with anticipatory breaches of contract, which relieve the innocent party from further performance of the obligations under the contract. Because this was simply an offer, that conduct by Mr. Berube revoked it, and Mr. Lamb's efforts before that revocation was communicated did not fulfil his part of the unilateral contract.
- [144] Accordingly, I conclude that the option is unenforceable, either as a standalone agreement or a revocable offer.
- [145] If I had found an otherwise enforceable option agreement, I would not have set it aside on the basis of unconscionability.
- [146] Even allowing for Mr. Berube's age, financial vulnerability and timidity, the reliable evidence here is that he drove the sale and option-granting processes for all three properties throughout, entirely for his own purposes, and that Mr. Lamb's role was no more than that of a willing buyer. It is important to note that the sinister and predatory overtones attributed to Mr. Lamb in their relationship come mainly from Ms. Steffensen, whose evidence I do not accept, and the submissions of the defendant's counsel. The only reliable evidence of an aggressive or calculating posture on his part was his plan to rid himself of Ms. Shoaf as a co-tenant if he successfully obtained an interest in the Common Property. But it is too big a stretch to impute that mindset to the negotiations with Mr. Berube without any reliable evidence that he acted the same way in that context.
- [147] Nor could I find that the deal for the option itself was deficient in any way in terms of fairness to Mr. Berube. Despite the resourceful submissions of his counsel, it is really not possible to measure the value of the interest as a tenant in common in the Common Property, particularly with the apparently troublesome Ms. Shoaf, solely on the basis of what had been paid for the other two properties. A simple calculation of the price per useable acre versus bush also does not translate well across the different properties, especially in view of Mr. Blatz's evidence about the issues with the swampland on the Common Property. Most important of all, Mr. Berube proposed this price, and I have already found that at the time he did so, he was not operating under any pressure or domination brought to bear by Mr. Lamb. At the end of the day, no reliable substitute for an admissible historical appraisal of the property is available.

Conclusion

[148] The plaintiff's claim must therefore be dismissed.

[149] With respect to costs, my tentative view is that it would be unfair to require the plaintiff to pay costs in relation to those hearings that would not have been required if the defendant had been properly prepared to proceed with this summary trial application in September of 2018, either by having retained new counsel or having taken effective steps himself to present his case. I will therefore provisionally order that the defendant will receive his costs of this matter at Scale B, except that he will not receive any costs in relation to the appearances on September 25, November 23 and December 7, 2018, and April 30, May 28 and June 3, 2019.

[150] If counsel wish to address this issue, or there are any other matters affecting costs that I have not yet been informed of, they may make written submissions according to whatever schedule for exchanging and submitting their material is most convenient to them.

"Schultes J."

[1] In his submissions, the plaintiff's counsel fairly referred to the "vague recollection" of the defendant's former counsel that Verhoeven J. had only indicated that he "expected" to make such a ruling if the summary trial proceeded, but I have listened to the recording of the proceedings and the report was unambiguously excluded.

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