

CANADA / JUDGMENT

Munro v. James

2020 BCSC 1348

COURT

Supreme Court of British Columbia

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2020 BCSC 1348 Munro v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Munro v. James,

2020 BCSC 1348

Date: 20200911

Docket: S83820

Registry: Nanaimo

Between:

Fonda Diane Munro and Bruce William Boughey

Plaintiffs

And

Jessie Patricia James and Leslie Anna Brown

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page on March 15, 2021.

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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(February 3, 2020)

Place and Date of Trial/Hearing:

Nanaimo, B.C.

February 3-7, 10-14, and 20,

and June 23-24, 2020

Place and Date of Judgment:

Nanaimo, B.C.

September 11, 2020

Table of Contents

I. Introduction. 4

II. Issues. 4

III. Background Facts. 5

A. The parties. 5

B. The Agreement 6

C. Leslie Brown. 11

D. Termination of the Agreement 12

IV. Analysis. 13

A. Issue 1: Was Ms. James entitled to terminate the Agreement?. 13

1. Is there an express term allowing for the termination of the Agreement prior to Ms. James' death?. 13
2. Is there an implied term allowing for early termination of the Agreement?. 16
 - a) Was the Agreement a contract of service or employment?. 17

b) Does the Agreement contain an implied notice requirement?. 19

B. Issue 2: Did Ms. Munro and Mr. Boughey fundamentally breach the Agreement?. 21

1. Credibility. 22

a) Mr. Boughey and Ms. Munro. 22

b) Ms. James. 23

c) Ms. Brown. 25

2. Operation of farm and care of ponies. 27

a) State of Property before the plaintiffs arrived. 27

b) Improvements made by the plaintiffs. 28

c) Ongoing maintenance. 28

i. Weed management 29

ii. Pasture management 31

iii. Manure management 34

iv. Care of ponies. 35

v. Pony breeding. 37

3. Quiet enjoyment 38

a) Confrontation with Carmen Tshritter 39

b) Confrontation in the arena. 41

4. Other pleaded bases for ending the Agreement 42

5. Conclusion re: Whether the plaintiffs breached the Agreement 43

C. Issue 3: Defendant's counterclaim.. 43

D. Issue 4: What is the appropriate remedy?. 44

1. Anticipatory breach. 44

2. Specific performance generally. 47

3. Specific performance in land contracts. 47

4. Specific performance as a remedy in service contract cases. 48

5. Specific performance in contract to make will cases. 49

6. What does specific performance entail in this case?. 50

- a) Are the plaintiffs entitled to receive the Property or the residue of Ms. James' estate?. 51
- b) Value of Ms. James' estate on her death. 54
- 7. Mutuality and partial specific performance. 54
- 8. Damages. 58
- 9. Alternative relief sought 59
- 10. Conclusion on remedy. 59

I. Introduction

- [1] In July 2007, Jessie Patricia James entered into a contract with Fonda Munro and Bruce Boughey that would govern the future management of Ms. James' farm and the disposition of her estate. The parties, long term acquaintances through the equestrian community on Vancouver Island, agreed that Ms. Munro and Mr. Boughey would move onto Ms. James' farm, build a home and reside there, and look after Ms. James' ponies for the remainder of her life. In exchange, Ms. Munro and Mr. Boughey would inherit Ms. James' estate when she died (the "Agreement").
- [2] In January 2018, Ms. James sought to terminate the Agreement on three months notice. Shortly thereafter, Mr. Boughey and Ms. Munro commenced this action.

II. Issues

- [3] The plaintiffs primarily frame their case as a claim to enforce a contract. They claim that they have an entitlement under the Agreement and they ask the court to make an order to enforce their expectation of the Agreement being fulfilled. In the alternative, the plaintiffs plead the equitable doctrines of proprietary estoppel and unjust enrichment in seeking a remedy against the defendant.
- [4] The defendant, Ms. James, does not challenge the binding nature of the Agreement. She argues that the Agreement was a personal service contract, and as such it could be terminated at any time with notice. She also argues that the plaintiffs fundamentally breached the Agreement by failing to perform their contractual obligations. Ms. James counterclaims for damages equivalent to expenses she claims to have incurred as a result of the poor performance of the plaintiffs under the Agreement.
- [5] It is therefore necessary to determine the following issues:
 - a) Was Ms. James entitled to terminate the Agreement because an express or, alternatively, an implied term of the Agreement provided that either party could terminate the Agreement at any time?
 - b) If not, did the plaintiffs commit a fundamental breach of the agreement such that Ms. James was relieved of her obligations under the Agreement?

- c) Is Ms. James entitled to damages for expenses she has incurred as a result of the poor performance of the plaintiffs?
- d) If Ms. James was not entitled to terminate the Agreement, what remedy is available to the plaintiffs for her breach?

III. Background Facts

A. The parties

- [6] The plaintiffs are a married couple who were both in their early 60s at the time of trial. Ms. Munro, a certified equestrian coach, has made her living by coaching students and hosting clinics teaching various equestrian skills and topics, including, amongst others, western and English riding, stable management, horse health care, and horse nutrition. She has been providing care and training for horses and ponies for most of her life.
- [7] Mr. Boughey is a journeyman electrician and Transport Canada certified marine engineer. Since 1999, he has worked full time for BC Ferries. While not professionally involved in the horse and pony world, he enjoys equestrian pursuits, particularly driving ponies, as a hobby.
- [8] From 1985 until 2008, Mr. Boughey and Ms. Munro lived on a 6.5-acre farm in Cobble Hill, B.C. (the "Cobble Hill Farm"). They raised ponies and horses on the Cobble Hill Farm and Ms. Munro used it as a base for her lessons and clinics.
- [9] Ms. James was 95 years old at the time of trial. She has had a very eventful life. She served in the Canadian Women's Army Corps during World War II, and later obtained a B.A and a Master's degree in Educational Psychology. She spent a large part of her life living on Mayne Island, where she worked for the Gulf Island School District. In 1980, she became a realtor and moved to Salt Spring Island where she had a successful business as a realtor until she decided to retire in 2009. Throughout her life and career, Ms. James has driven and rode ponies as a pastime and, since the 1980s, she has bred and sold Welsh ponies as a business.
- [10] In 2001, Ms. James purchased a 63-acre property located at 1470 White Road, Nanaimo, in the Cedar neighbourhood (the "Property"). Her long term plan was to move to the Property, where she would continue to breed ponies after she had retired from her realtor business.
- [11] Ms. James met Ms. Munro and Mr. Boughey through the Welsh Pony Club of Vancouver Island. They participated in a number of pony shows and events together and over time became friends. The plaintiffs made social visits to Ms. James' farm on Salt Spring Island, and later to the Property.
- [12] In addition to their social relationship, Ms. James had a professional relationship with Mr. Boughey and Ms. Munro prior to the Agreement. In the early 1990s, Mr. Boughey and Ms. Munro bred one of their mares with one of Ms. James' stallions. Ms. Munro trained one of Ms. James' ponies, Talli, to drive carriages and to be ridden. In 2006 and 2007, Ms. James sent one of her stallions to breed with one of Ms. Munro's mares at the Cobble Hill Farm.

B. The Agreement

- [13] In 2007, Mr. Boughey and Ms. Munro began the process of looking for a new place to live. They felt they needed a property larger than the Cobble Hill Farm to accommodate themselves, their four horses and their five ponies. They began to look at other farm properties around the province.
- [14] In the meantime, Ms. James was living alone on the Property. She was 83 years old and looking for some help with managing her 35 ponies. Ms. James was aware that Ms. Munro and Mr. Boughey were planning to move from the Cobble Hill Farm and, in July 2007, she visited them at the Cobble Hill Farm and presented them with an offer. That offer was accepted by Ms. Munro and Mr. Boughey almost immediately, and the Agreement was formed.
- [15] There is no dispute between the parties as to what they agreed to orally during their conversation at the Cobble Hill Farm in July 2007, although the terms of the Agreement were not reduced to written form until April 2008. In July 2007, the Agreement included the following broad terms:
- a) the plaintiffs would move to the Property and would build a home there;
 - b) the plaintiffs would pay Ms. James \$100,000;
 - c) the plaintiffs would look after the Property and Ms. James' ponies; and
 - d) on Ms. James' death, the plaintiffs would inherit her entire estate.
- [16] On July 12, 2007, shortly after the visit at which the Agreement was discussed, Ms. James forwarded an email to the plaintiffs that she had sent to her lawyer. In that email she expressed her preference for giving the plaintiffs "two options" for receiving the Property when she died. She would make a new will naming the plaintiffs as her sole beneficiaries. She also proposed preparing a contract of purchase and sale with respect to the Property that would close after her death. This would enable the plaintiffs to purchase the Property on her death as an alternative to inheriting it. In the email she stated:

In addition to this, I will give B & F a second mortgage equal to the down payment and any funds they invest in the farm property, including building their house. This will secure their investment until they take over the farm.

This gives them two options and they can decide when the time comes which one works best. They can either exercise the Contract or tear it up and inherit my estate.

- [17] Sometime in July 2007, Ms. James prepared a contract of purchase and sale which contemplates the sale of the Property from her to the plaintiffs for a sale price of \$950,000 with a \$100,000 down payment. The closing date is the date of Ms. James' death. This document was never signed by Ms. James or anyone else.

- [18] Ms. James picked a site on the Property for the home that Ms. Munro and Mr. Boughey would build. In September 2007, work commenced on construction of a modular home on the Property. The plaintiffs moved onto the Property in March 2008.
- [19] On April 27, 2008, the parties signed a contract, drafted by Ms. James, which reduced the terms of the Agreement to writing. Under the written Agreement, the plaintiffs are defined as the "Managers" and Ms. James is defined as the "Owner". The written terms of the agreement are reproduced in their entirety below:
1. The Managers will build a home on West Abbey Farm at their own expense.
 2. The Managers will pay the Owner the sum of One Hundred Thousand Dollars (\$100,000.) upon the completion of the sale of their home in Cobble Hill, B.C.
 3. Upon receipt of this money, the Owner will register a mortgage in favour of the Managers for the total cost of their home plus One Hundred Thousand Dollars. This mortgage will be without interest or payments for the Owner's lifetime.
 4. The Owner will have exclusive use of her home and garage and immediate surroundings for the rest of her lifetime.
 5. The Managers will have full use of the farm, all existing buildings and equipment.
 6. The Managers shall keep as many animals on the farm as they wish.
 7. The Managers will operate the farm and care for the Owner's animals as they would for their own.
 8. Each party will be responsible for the cost of feed, farrier, veterinarians, medications, etc. for their own animals.
 9. The cost of diesel fuel and bedding will be divided according to use.
 10. Property taxes will be shared on a 50/50 basis.
 11. Each party will be responsible for insurance on their home and any buildings for their own use exclusively.
 12. The Managers may build any facilities they require for their own or general farm use.
 13. Each party will have quiet enjoyment of their homes and of the farm and facilities in general.
 14. Upon the death of the Owner, the Managers will inherit her entire estate.
- [20] Notwithstanding the fact that the Agreement expressly refers to Ms. James' estate, neither of the plaintiffs appear to have turned their minds to what Ms. James' estate might consist of on her death and Ms. James did not discuss her assets (other than the Property), or any liabilities she may have had, with them.

- [21] On June 8, 2008, the plaintiffs paid Ms. James \$100,000.
- [22] On June 17, 2008, Ms. James signed a mortgage document (the "Mortgage") that she had prepared. Under the Mortgage, Mr. Boughey and Ms. Munro are the lenders and Ms. James is the borrower. The principal amount of the loan secured by the Mortgage is \$350,000. The loan amount consisted of the \$100,000 advanced by the plaintiffs to Ms. James, plus Mr. Boughey's estimate for the cost of building the plaintiff's home on the Property, which was \$250,000 (as it turned out, the total expense incurred by the plaintiffs to purchase and build their home on the Property was \$304,517).
- [23] The Mortgage states "this mortgage represents the value added to the property by the lenders and the cash loaned by them". The Mortgage was never registered against title to the Property. Ms. James testified that she and the plaintiffs agreed not to register the Mortgage on the Property. The plaintiffs say they had assumed all along that the Mortgage had been registered by Ms. James.
- [24] In or around the same time that Ms. James gave the Mortgage to the plaintiffs, she also gave them an unsigned copy of her will (the "Unsigned Will"). The Unsigned Will is not dated, although it refers to the year 2007. The Unsigned Will appoints Mr. Boughey as executor of the will and trustee of Ms. James' estate. The only dispositive provision in the Unsigned Will states:

The residue of my estate to be transferred to Bruce William Boughey and Fonda Diane Munro for their use absolutely.

- [25] In 2012, Ms. James made a new will that appointed Ms. Munro executor and left her entire estate to Ms. Munro. She testified that she changed her will in 2012 for two reasons. First, she wished to minimize the costs to Mr. Boughey and Ms. Munro that would arise on her death and she believed that if she made Ms. Munro executor and sole beneficiary, there may be some associated tax savings. Second, she testified that by 2012 she was "getting a little bit tired and annoyed" with Mr. Boughey so she preferred to see her estate pass only to Ms. Munro.
- [26] From March 2008 until January 2018, the parties lived and worked together on the Property. Ms. Munro fed, groomed and tended to the animals on the Property while also running her business providing lessons and clinics from the Property. Mr. Boughey worked full time for BC Ferries, but spent time outside of work hours on repairs and maintenance to the Property.
- [27] In or around late 2008, Ms. James approached the plaintiffs and asked them about their financial circumstances. They told her that they needed a loan but, not having any property to act as security, they did not expect a bank to lend them money. Ms. James offered to take out a loan in her own name, secured on the Property, which would be serviced by the plaintiffs. The plaintiffs agreed, and Ms. James borrowed \$125,000 from HSBC, secured by a mortgage on the Property (the "HSBC Mortgage"). The loan secured by the HSBC Mortgage

has fluctuated over time and its balance at the time of trial was approximately \$150,000. All parties agree that the outstanding loan secured by the HSBC Mortgage is payable by the plaintiffs, and not payable by Ms. James.

- [28] Ms. James and Ms. Munro frequently communicated via email, even though they lived on the same property. Ms. James regularly emailed Ms. Munro to discuss the care of the ponies, to invite the plaintiffs to her house for meals, and to request assistance. On the basis of this written communication, the relationship between Ms. James and Ms. Munro appears to have remained warm and friendly until December 2017.
- [29] At some point, tensions surfaced in the relationship between Ms. James and the plaintiffs. The plaintiffs testified that they were mostly unaware of any dissatisfaction with them on Ms. James' part. Ms. Munro testified that while she began to sense some tension with Ms. James in late 2017, she did not know precisely what it was about. Ms. James on the other hand testified that she had spent years being disappointed, angry and annoyed at the poor performance of the plaintiffs as farm managers and that certain events in late 2017 were the last straw for her in wishing to terminate the relationship.
- [30] When Mr. Boughey was asked at trial whether he had ever turned his mind to the Agreement ending, he testified that he did not. He said "we were all in and we thought we were all in until the end." Mr. Boughey, a number of times in his testimony, referred to the Agreement as one in which he and Ms. Munro "bought in" to the farm or became "partners" with Ms. James. I accept that this is how the plaintiffs understood their rights and obligations under the Agreement. I also accept their evidence that they were completely taken by surprise when Ms. James served them with termination notices in January 2018.

C. Leslie Brown

- [31] Ms. Munro and Mr. Boughey became friends with a couple named Leslie and Dave Brown in the late 1980s. They met through various horse related clubs and events and socialized together frequently until the Browns moved from Vancouver Island to Alberta in 2006. Mr. Brown died in 2013 and after his death, Ms. Brown began to discuss with Mr. Boughey and Ms. Munro the possibility of her moving back to Vancouver Island. In 2014, Mr. Boughey and Ms. Munro hosted a celebration of life for Mr. Brown at their home on the Property. In 2015, Mr. Boughey and Ms. Munro helped Ms. Brown to find a place to live in the Nanaimo area and she began boarding her horse on the Property.
- [32] Between 2015 and 2017, Ms. Brown spent a considerable amount of time on the Property. She visited her horse every second day, she often rode with Ms. Munro, and she assisted Ms. Munro with clinics and with the day to day running of the Property. Emails and text messages suggest that Ms. Munro and Ms. Brown were very close friends who communicated regularly and spent much of their time together.

- [33] Over time, Ms. Brown and Ms. James also became friendly. Ms. Brown described a growing friendship between her and Ms. James that arose from their mutual love of ponies, dogs and politics.
- [34] On December 7, 2017, Ms. Brown drove Ms. James to see a lawyer to make a new will. Ms. James made a will that appointed Ms. Brown as her executor and left her entire estate to Ms. Brown (the "December 2017 Will").

D. Termination of the Agreement

- [35] On January 9, 2018, Ms. James gave written notice of termination of the Agreement to Ms. Munro and Mr. Boughey (the "Notice"). The Notice in its entirety states as follows:

Notice to Bruce Boughey and Fonda Munro, Farm Managers

This is to inform you that your tenure as Farm Managers on West Abbey Farm terminates on April 30, 2018.

Please make arrangements to vacate the premises by that date.

Your performance as managers has been sadly inadequate. Most of your activities have devalued the property and done nothing to restore wear and tear.

Your treatment of my visitors is unacceptable. Your continuous bullying and invasive and dangerous behavior is shocking and in no way represents the farm.

In order to facilitate your move, I am prepared to make an offer on your house.

Signed: J James Date: Jan. 9, 2018

- [36] Shortly after receiving the Notice, the plaintiffs commenced this action seeking, among other things, an interest in the Property in accordance with their entitlement under the Agreement.
- [37] Although the Notice refers to Ms. James possibly making an offer on the plaintiff's house, no such offer was made and the matter was not discussed further prior to the commencement of litigation.

IV. Analysis

A. Issue 1: Was Ms. James entitled to terminate the Agreement?

1. Is there an express term allowing for the termination of the Agreement prior to Ms. James' death?
- [38] If the Agreement bound Ms. James to leave her estate to the plaintiffs on her death, it is axiomatic that she would not be entitled to terminate the Agreement during her lifetime and avoid that obligation.

- [39] Paragraph 14 of the Agreement, which states "upon the death of the Owner, the Managers will inherit her entire estate," appears on its face to be clear.
- [40] The defendant argues that the Agreement, notwithstanding its ultimate provision, did not bind Ms. James to leave her estate to the plaintiffs on her death. The defendant argues that the Agreement contemplates that it may be terminated in one of two ways: the death of Ms. James, or the termination of the Agreement by either party. If the Agreement were terminated in some manner prior to the death of Ms. James, she would not be bound to leave her estate to the plaintiffs on her death.
- [41] The defendant's interpretation is grounded in paragraphs 2 and 3 of the Agreement, which require the plaintiffs to pay Ms. James \$100,000, and which entitle them to the Mortgage. The defendant argues that the Mortgage was intended to operate as security for the plaintiffs "in case the contract did not run to James' death."
- [42] The defendant argues that the only reasonable explanation for the Mortgage is that the parties intended to provide an additional mechanism other than Ms. James' death by which the Agreement could be terminated. The Mortgage ensures that the plaintiffs would not be empty handed if the Agreement were terminated during Ms. James' lifetime and, as a consequence, the plaintiffs did not receive Ms. James' estate on her death.
- [43] Words in a contract must be construed in their ordinary and natural sense. The intention of the parties with respect to the meaning of words in a contract must be determined objectively with reference to the surrounding circumstances at the time of signing the contract: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273, [1993] 2 W.W.R. 127, 98 D.L.R. (4th) 492 (B.C.C.A.) at para. 30 [MacMillan Bloedel].
- [44] In *Singh v. British Columbia Hydro and Power Authority*, 2001 BCCA 695 at para. 32 our Court of Appeal cited with approval the following statement of law from *The Law of Contracts*, 4th ed., by Waddams:

The principle function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to protect the expectation of the promisee. This is not, however, to say that the will of the promisor is irrelevant. Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee. [Emphasis added.]

- [45] Looking at the terms of the Agreement and the conduct of the parties, would a reasonable person infer that the parties intended that the Agreement could be terminated in advance of Ms. James' death?

[46] In this case, the literal meaning of paragraph 14 is unambiguous. It is a term of the contract that the plaintiffs will inherit Ms. James' estate when she dies: "[u]pon the death of the Owner, the Managers will inherit her entire estate."

[47] While the defendant submits that the purpose of the Mortgage is to provide a mechanism by which the Agreement may be terminated, the ordinary and natural language used in paragraph 3 provides no basis for such an interpretation:

Upon receipt of [\$100,000 from the plaintiffs], the Owner will register a mortgage in favour of the Managers for the total cost of their home plus One Hundred Thousand Dollars. This mortgage will be without interest or payments for the Owner's lifetime. [Emphasis added]

[48] Paragraph 3 does not refer to the termination of the Agreement and it does not indicate that the Mortgage is payable on termination of the Agreement. Indeed, it says the opposite and mandates that the Mortgage is not payable during Ms. James' lifetime.

[49] Had the parties contemplated the possibility of early termination of the Agreement, and intended paragraph 3 to provide security in the event of an early termination, the Agreement would have to mandate payment of that security upon termination. The fact that the Agreement contains the opposite provision, and says that the Mortgage is not payable during Ms. James' lifetime, is fatal to the defendant's argument.

[50] The surrounding circumstances at the time of signing the contract support an interpretation consistent with the ordinary meaning. Ms. James' evidence was that the parties intended the Agreement to provide for the plaintiffs to inherit Ms. James' estate on her death, and that this was the only scenario for the termination of the Agreement that was in her mind at the time the Agreement was made. The interpretation now advanced by her counsel, that the parties intended the mortgage to serve as an alternative means of paying out the plaintiffs in the event of early termination of the Agreement, finds no support from Ms. James' own evidence.

[51] When asked on direct examination by her counsel what the purpose of the Mortgage was, Ms. James' answer was confused:

...Well, it is a little confusing because I did that, so that they it didn't tie them into any specific action when I died. That they could either use that, or tear it up and simply inherit my assets. Because if they had a mortgage then they inherited the asset. Who is paying the mortgage? So that is why it was left that way, to leave as many possibilities open to them as possible.

[52] In her July 12, 2007 email to her lawyer, Ms. James characterized the Mortgage somewhat differently:

In addition to this, I will give B & F a second mortgage equal to the down payment and any funds they invest in the farm property, including building their house. This will secure their investment until they take over the farm.

- [53] On the basis of this somewhat confusing evidence, I am not able to discern a coherent purpose behind the Mortgage, although it appears most likely to have been conceived as some form of security to ensure that the plaintiffs had a charge on title, and therefore a proprietary interest, in the property they were to inherit. However, I am able to find without hesitation that the interpretation advanced by Ms. James' counsel is not consistent with any of the evidence about the intention of the parties at the time the Agreement was made. Specifically, it was not in the reasonable contemplation of Ms. James, or the plaintiffs, that the Mortgage's purpose was to secure funds to pay out the plaintiffs in the event of an early termination of the Agreement. All of Ms. James' evidence supports the conclusion that she intended that the Agreement could only be terminated in one way, by her death, at which point the plaintiffs would, one way or another, become the owners of all of her assets.
- [54] While it is unusual that the parties would include a term under which the plaintiffs would have a charge on title to property that ultimately was going to be held by the plaintiffs on Ms. James' death, the terms of the Agreement support the conclusion that this is indeed what the parties agreed to.
2. Is there an implied term allowing for early termination of the Agreement?
- [55] The defendant also argues that the Agreement was a personal service contract, akin to an employment contract and, like any contract for service, it contained an implied term that it could be terminated with notice. As such, the defendant has framed her defence in a way that is analogous to a defence in a wrongful dismissal case. She has argued that there was just cause to terminate the Agreement without notice and, in the alternative, she has argued that adequate notice of the termination of the Agreement was given to the plaintiffs in the circumstances.
- [56] "Personal service contract" is not a term of art. Most contracts of service, such as employment contracts, are by their very nature personal to the individuals or corporations involved, insofar as they are not assignable to others. There are other contracts which are not contracts of service per se, but which explicitly or implicitly require personal performance by a party of the terms of the contract. I understand the defendant to be using the term "personal service contract" to refer to a contract that is a contract of service, akin to an employment contract, that is personal to the parties and not assignable to others.
- [57] The defendant's characterization of the Agreement as a contract of service is important to her defence because a contract of service or employment will generally not be specifically enforced at the suit of either party, on the basis that enforcement of such an agreement would be undesirable or impractical: Chitty on Contracts, 32nd Ed (London: 2015), p. 1978.

- [58] The reluctance of courts to enforce a contract of service such as an employment contract in the face of a breach arises from the widely held view that it would undermine human dignity and freedom of choice to enforce an employment relationship against the wishes of one of the parties: *Philip v. Expo 86 Corporation*, (1987), 19 B.C.L.R. (2d) 88, 45 DLR (4th) 449 (C.A.) at para. 45.
- [59] It is therefore necessary to first characterize the Agreement in order to evaluate three of the defendant's defences to the plaintiffs' breach of contract claim, namely: 1) she was entitled to terminate the Agreement for cause; 2) she was entitled to terminate the Agreement on reasonable notice without cause; and 3) even if she was not entitled to terminate the Agreement, specific performance is not an available remedy to the plaintiffs.
- a) Was the Agreement a contract of service or employment?
- [60] The defendant argues that where a contract of employment is silent as to notice of termination, the parties will be bound by an implied term that absent just cause the employer must give reasonable notice to the employee of a decision to terminate the contract. In support of this approach the defendant relies on case authorities involving contracts of employment, such as *Glimhagen v. GWR Resources Inc.*, 2017 BCSC 761, *Leung v. Doppler Industries*, (1995), 10 C.C.E.L. (2d) 147 (B.C.S.C.), and *Philip*.
- [61] The defendant's analysis of the law as it relates to employment contracts is sound, but it depends on a finding that the Agreement is analogous to an employment contract. In her written argument, the defendant argues that the Agreement "was a commercial agreement for the employment and residency of the plaintiffs." The defendant was unable to provide the court with case authorities in which the court has held that a contract that included the disposition of the estate of one of the contracting parties was an employment contract.
- [62] The Agreement contemplates much more than the provision of services by the plaintiffs in exchange for housing. I must look at the contract as a whole in order to determine whether it can be characterized as an employment or service contract such that the law relied on by the defendant is applicable in this case.
- [63] The defendant argues that the essence of the Agreement was the provision of services by Mr. Boughey and Ms. Munro to Ms. James, and that the only unusual factor that makes the Agreement unlike an employment contract is the plaintiffs' delayed compensation. This is not an accurate characterization of the whole of the Agreement. While the plaintiffs are required to pay \$100,000 and fund the building of their own house on the Property (an amount which is secured by way of a mortgage on the Property that cannot be collected on until Ms. James' death), they are nonetheless responsible for sharing equally in the costs of running the Property for the duration of the Agreement. Property taxes are to be split equally between the parties and other farm costs (diesel, bedding, and costs of animal care) are split according to use. Further, the Agreement allows the plaintiffs to keep their animals on the Property and to have full use of the Property. At paragraph 12 of the Agreement, the plaintiffs are entitled to build any facilities on the Property that they require for their own or

general farm use. The Agreement clearly contemplates a level of economic integration between the parties that goes far beyond any typical employment relationship.

- [64] I find that Mr. Boughey and Ms. Munro's characterization of themselves as "investors" or "partners" with Ms. James in the operation of the Property is closer to the reality of the relationship created by the Agreement than the characterization of Ms. James as an employer and the plaintiffs as employees. Under the Agreement, the plaintiffs are required to invest money and labour in exchange for an uncertain result. It was and remains unknown what the size of Ms. James' estate will be on her death. It is unknown how many years the plaintiffs would have performed services under the Agreement had it not been terminated. As sole beneficiaries of Ms. James' estate, the plaintiffs would participate in any growth in the value of her assets and would bear the risk of any decline.
- [65] The analogy between the Agreement and an employment contract fails to withstand scrutiny when considered in light of the financial contribution required of the plaintiffs, the mutual control of the running of the farm, the economic integration between the parties in the running of the Property, the lack of any compensation paid to the plaintiffs for their services, and the expectation of the plaintiffs inheriting Ms. James' estate on her death at an uncertain time and in an uncertain amount. As such, I decline to find that the Agreement is, or is analogous to, an employment contract or a contract for service.
- b) Does the Agreement contain an implied notice requirement?
- [66] Even if the Agreement is not an employment contract, it could still contain an implied notice requirement if the defendant were able to establish on the evidence that the Agreement ought to include such an implied term in order to properly reflect the intentions of the parties.
- [67] In considering implied terms, the court must start with the presumption that the parties have expressed every material term in the contract itself. An implied term will only be read into a contract where such a term is necessary to give effect to the intention of the parties: *Luxor (Eastbourne) Ltd. v. Cooper*, [1941] 1 All E.R. 33 (H.L.) at 52.
- [68] In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1990), 45 B.C.L.R. (2d) 1 (C.A.), our Court of Appeal cited with approval the following statement of Lord Simon of Glaisdale in *B.P. Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977), 16 A.L.R. 363 (P.C.) [B.P.]:

Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

[69] In considering whether a contractual term may be implied on the basis of presumed intentions, the court must be careful not to fall into a consideration of the intentions of reasonable parties. It is the actual intention of the parties that matters. As such, if either party is found to have had a contrary intention, an implied term may not be found: *M.J.B. Enterprises Ltd v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 29.

[70] Each of the parties to the Agreement gave evidence about their subjective intentions with respect to whether the Agreement could be terminated prior to Ms. James' death. Mr. Boughey testified that "we were all in we didn't think the Agreement could be terminated or would be terminated." Ms. Munro was asked on cross-examination whether she was required under the Agreement to stay on the Property for the rest of Ms. James' life and the following exchange took place:

Q: It also wasn't part of the agreement between you that you were required to stay on that property for the rest of Ms. James' life was it?

A: We had given our word.

Q: But you've never agreed that you couldn't leave if you wanted to leave?

A: It never came up.

Q: It never would have occurred to you that you were bound to stay there forever until Ms. James died?

A: That is what we believed.

[71] Later, Ms. Munro described her understanding of the term of the Agreement as "we were there until the end."

[72] Ms. James was forthright in describing her intention when she drafted the Agreement: she wished to make a contract by which the plaintiffs would look after her ponies and in exchange they would inherit her estate. When asked on direct examination whether the written Agreement covered the terms she felt she had agreed to she replied "yes."

[73] There is simply no evidence to support the proposition that the parties intended to include in the Agreement an implied term that the Agreement could be terminated prior to Ms. James' death.

[74] As such, I find that there is no implied term in the Agreement empowering a party to terminate the Agreement on notice and, absent a breach of the Agreement by the plaintiffs, Ms. James had no right to terminate the Agreement.

B. Issue 2: Did Ms. Munro and Mr. Boughey fundamentally breach the Agreement?

[75] Ms. James argues that Ms. Munro and Mr. Boughey failed to fulfil their obligations under the Agreement. Much of the defendant's written argument is devoted to establishing cause for dismissal--i.e. that Ms. James could terminate the Agreement, even without notice, because

the plaintiffs gave her cause to dismiss them. However, cause for dismissal is a concept applicable to employment relationships. Having found that the relationship between Ms. James and the plaintiffs was not an employer-employee relationship, I do not find the concept of cause for dismissal to be helpful to the analysis in this case.

[76] Nevertheless, if the plaintiffs fundamentally breached the Agreement, as a matter of contract law, Ms. James may have been relieved of her obligations under the Agreement. As such, it is necessary to review the alleged breaches by the plaintiffs of the Agreement.

[77] The primary clauses of the Agreement in issue with respect to the plaintiffs' performance are contained in paragraphs 7 and 13:

7. The Managers will operate the farm and care for the Owner's animals as they would for their own .
13. Each party will have quiet enjoyment of their homes and of the farm and facilities in general.

[78] Ms. James argues that these provisions of the Agreement were breached by Ms. Munro and Mr. Boughey. The plaintiffs argue that they abided by all provisions in the Agreement and were never in default.

1. Credibility

[79] While many of the central facts are not in dispute, on the issues surrounding the plaintiffs' performance of their obligations under the Agreement, the evidence of Ms. James and Ms. Brown on the one hand, and the plaintiffs on the other, is not consistent. As such, I must consider the credibility of these witnesses in order to find the necessary facts to determine whether the plaintiffs did indeed breach the Agreement as alleged by the defendant.

[80] It is important for the court, in assessing credibility, not to rely solely on the personal demeanour of interested witnesses. Determination of credibility must involve a consideration of whether the witnesses' evidence is consistent with "the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357.

[81] The court must consider a number of factors in a credibility analysis. These factors include the witness' ability to observe events, his or her firmness of memory, the reasonableness of the witness' evidence, harmony with independent evidence, consistency of the witness' own sworn evidence over time, and any motivation the witness may have to lie: *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296 at para. 186.

a) Mr. Boughey and Ms. Munro

- [82] I found Mr. Boughey and Ms. Munro to be forthright witnesses. They were careful in their responses and did not overstate their evidence with respect to their contributions to the Property or their care of the ponies.
- [83] Both Mr. Boughey and Ms. Munro readily testified about matters that painted them in a negative light. For example, they did not seek to minimize their own wrongdoing when they inappropriately looked at privileged documents belonging to Ms. James that were dropped off at the Property.
- [84] The evidence of Mr. Boughey and Ms. Munro about the work they did in operating the farm and caring for the ponies was supported by photographic evidence and the evidence of third party witnesses such as the farrier, veterinarians, and other individuals who visited the farm. It was also, most importantly, supported by the fact that for ten years, up until late 2017, they appeared to have a happy working relationship and friendship with Ms. James. Ms. James' emails to Ms. Munro during this period demonstrate gratitude and professional respect for the work of the plaintiffs.
- [85] As a result, I find the plaintiffs' evidence about the work they did in performance of their obligations under the Agreement to be wholly credible.
- b) Ms. James
- [86] Ms. James presented as a fiercely intelligent, somewhat impatient woman whose small stature belies a highly domineering personality. She does not suffer fools, as was evident at trial from the exasperation she demonstrated when opposing counsel, and even at times her own counsel, made suggestions she believed to be incorrect.
- [87] However, notwithstanding her forceful personality, Ms. James was almost 96 years old at the time of trial. She testified that she suffers from age related memory problems and that her short term memory has declined in recent years. There were a number of occasions during her direct examination where she denied authorship of a document such as an email or Facebook post that was quite obviously authored by her. When asked about events leading up to the termination of the Agreement, and particularly when asked to cite examples of the plaintiffs' poor performance under the Agreement, she frequently referred to events that happened in 2019, a year after the termination of the Agreement, and needed to be redirected by her counsel to the relevant time period.
- [88] By her own admission, Ms. James' memory is not what it used to be. Based on her evidence, it is clear that she quite simply cannot remember with accuracy a number of the central events relevant to this lawsuit.
- [89] In addition to her sometimes poor memory, I find that Ms. James often overstated her evidence about the alleged shortcomings of the plaintiffs as farm managers, to a point that it stretched credulity that two people so apparently incompetent could have lasted in the role of farm managers for more than a few days, let alone ten years.

- [90] For example, Ms. James stated that Ms. Munro "never" groomed the ponies. I do not accept that Ms. James would have hired someone to care for her ponies, and kept that person employed for ten years, if that person never groomed them.
- [91] Further, with respect to tasks around the farm that Ms. James wished the plaintiffs to perform, such as strip grazing or manure removal, Ms. James testified that she repeatedly raised with the plaintiffs the need for these tasks to be completed, and that they simply ignored her or refused to do the work. However, she struggled to come up with more than one or two specific incidences during the term of the Agreement where any of these issues were even discussed with the plaintiffs.
- [92] While I accept that Ms. James likely had long-held subjective feelings of annoyance and disappointment about the plaintiffs and the work they did, her evidence about actual shortcomings in the plaintiffs' performance was extremely vague. The few specific incidents she was able to refer to, for the most part, fell outside the terms of the Agreement. As such, I approach with caution Ms. James' evidence about the plaintiffs' performance under the Agreement.
- c) Ms. Brown
- [93] Like Ms. James, Ms. Brown gave evidence which I find was exaggerated and inconsistent with the preponderance of probabilities, in an effort to portray the plaintiffs as poor farm managers who failed to perform their jobs in accordance with the standards contemplated under the Agreement.
- [94] Ms. Brown described the Property, when she first attended in 2015 as "overgrazed," and she said that the Property was "not well kept". She testified that "everything was weeds" and that the ponies had to be led to graze along the side of the road or the lawn because there was no pasture on which they could graze. While other defence witnesses testified that the farm was generally overgrazed, no one other than Ms. Brown suggested that the ponies had to graze on the lawn or by the side of the road due to lack of pasture. In and of itself, this appears to be an overstatement when assessed against the evidence of even Ms. James herself, as well as the pasture management expert retained by the defendant, Mr. Haddow, whose report was in evidence. Moreover, the credibility of Ms. Brown's statements must be assessed against the fact that she decided to board her horse on the Property under the care of Ms. Munro. Her horse continued to reside on the Property at the time of trial. It is not credible that Ms. Brown would choose to keep her horse on a property that has been in such poor condition for the last five years.
- [95] Ms. Brown was a challenging witness. In direct examination she was often glib with her answers and on cross-examination, she was evasive. She required a direction from the Court before she would answer a relatively straightforward question about whether she had any photographs showing the condition of the Property between 2015 - 2017, a question she repeatedly claimed not to understand.

- [96] Ms. Brown consistently professed her disinterest and neutrality in the breakdown of the relationship between the plaintiffs and Ms. James. She said that in late 2017 she was determined "not to get pulled into the middle" of the conflict between Ms. James and the plaintiffs. However, it was in late 2017 that she arranged for Ms. James to see a lawyer to make a new will that would make her the sole beneficiary in place of the plaintiffs. Far from being reluctant to be drawn into the fray, I find that Ms. Brown was a central figure in the breakdown of the relationship between the plaintiffs and Ms. James.
- [97] Ms. Brown's testimony about the events surrounding the making of the December 2017 Will raises particular concerns about her credibility. Ms. Brown testified that she had no involvement in the preparation or execution of the December 2017 Will. She testified that Ms. James made her own appointments and drove herself to them. On direct examination, she testified that there was only one exception to this, which was the December 20, 2017 appointment wherein a representation agreement was signed by Ms. James, appointing Ms. Brown as her representative. This is different from Ms. James' evidence on discovery, wherein she testified that Ms. Brown arranged for her to meet with a lawyer and drove her to the appointment on December 7, 2017, at which she executed the December 2017 Will. On cross-examination, Ms. Brown admitted that she drove Ms. James to the December 7, 2017 appointment.
- [98] Ms. Brown testified that she saw a draft of the December 2017 Will before it was signed. However, she also testified that, even though she took Ms. James to the December 7, 2017 lawyer's appointment, she did not know that Ms. James had actually executed the December 2017 Will until she testified at trial in February 2020. I find this to be highly improbable. Even if she had not known on December 7, 2017 that Ms. James signed a will making her the sole beneficiary, Ms. Brown most certainly would have found out about the December 2017 Will in the course of this litigation. Ms. Brown was a named defendant up until January 2020, a few weeks before trial, and had access to complete documentary disclosure, including a copy of the signed December 2017 Will. Given the centrality of the December 2017 Will to this litigation, it defies belief that Ms. Brown only learned about its contents while on the witness stand.
- [99] As a result of the frailties in Ms. Brown's evidence referred to above, I have not placed any weight on her evidence as it pertains to the performance by the plaintiffs of their obligations under the Agreement.

2. Operation of farm and care of ponies

- [100] Paragraph 7 of the Agreement states that "the Managers will operate the farm and care for the Owner's animals as they would for their own." Ms. James argues that Ms. Munro and Mr. Boughey were incompetent in the operation of the farm and that they therefore breached paragraph 7 of the Agreement.

[101] The Agreement is silent as to the standards that the plaintiffs are required to meet in the operation of the farm. While they are obliged under the Agreement to care for Ms. James' animals as they would their own, the Agreement simply charges them to "operate" the farm. There is no term of the Agreement that the plaintiffs shall improve the condition of the farm, rehabilitate the pastures or improve grazing practices.

[102] I must therefore consider the state of the Property and the animals over the course of the term of the Agreement in order to determine whether the plaintiffs met their obligation to operate the farm and care for Ms. James' animals as they would for their own.

a) State of Property before the plaintiffs arrived

[103] The plaintiffs both testified that the Property was not in particularly good condition when they moved there. The pastures were infested with weeds, particularly tansy ragwort, a weed that is poisonous if eaten by ponies. Field 14 contained refuse from an abandoned logging operation, including an old portable sawmill, discarded lumber, an old roof, and concrete blocks.

[104] The plaintiffs' evidence about the poor state of the Property when they moved there is corroborated by photographs taken in the summer of 2008. These photographs show a serious infestation of tansy ragwort, including in the pastures where ponies were grazing. Refuse in Field 14 is also visible in the photographs.

[105] Ms. James testified that the pasture was healthy when she first purchased the Property, and that it continued to be in good condition until the plaintiffs moved onto the Property in 2008. Ms. James asked Mr. Haddow, a pasture expert who prepared a report on the condition of the Property, to make the assumption in his report that the pasture was in good condition until the plaintiffs moved onto the Property in 2008. However, the photographs demonstrate that this was not the case. Mr. Haddow was asked on cross-examination to review the 2008 photographs and he conceded that they demonstrated that the Property was subject to overgrazing and weed infestation.

[106] I therefore cannot accept the evidence of Ms. James that the fields were in good condition at the time the plaintiffs moved to the Property.

b) Improvements made by the plaintiffs

[107] Mr. Boughey testified as to extensive improvements he made to the Property, including the building of structures, the improvement and installation of fencing, the clearing of weeds, and the removal of refuse.

[108] Ms. James does not dispute that the plaintiffs made these improvements, although there is some dispute about whether she approved of all the improvements made to the Property. It is not necessary for me to determine whether Ms. James approved of all the improvements to the Property made by the plaintiffs, since she does not allege that the plaintiffs breached the Agreement by making unauthorized changes to the Property.

c) Ongoing maintenance

[109] The far more contentious issue between the parties is the ongoing maintenance of the Property. Ms. James argues that the plaintiffs failed to properly maintain the Property and failed to look after her ponies, in violation of the terms of the Agreement. Ms. James' complaints primarily concern weed management, pasture maintenance, manure management, and care of the ponies.

i. Weed management

[110] Tansy ragwort is a serious problem for ponies, particularly in the Cedar area, where it is rampant. Two of Ms. James' ponies died from tansy ragwort poisoning prior to the plaintiffs' move to the Property and Ms. James was understandably anxious about the fact that her farm was infested with a weed that, if not controlled, would likely kill more of her beloved animals. I find that controlling tansy ragwort was a central priority for Ms. James, and a large part of what the plaintiffs were being asked to do under the Agreement.

[111] With respect to control of tansy and other weeds, Mr. Boughey testified that he tried a number of methods, including pulling the weeds, cutting them down, and the application of herbicides. The method that Mr. Boughey found most effective was to use his large weed-wacker and the tractor's billy-goat extension to cut down the tansy before it bloomed. While the tansy ragwort did not disappear, he testified that this was an effective method of controlling its spread and ensuring that most plants did not flower. He testified that by 2017 the amount of tansy on the farm was in decline.

[112] Carrie Daviduk, a farrier who attended the farm many times to care for the ponies, testified that the tansy situation improved after the plaintiffs moved to the Property. Tina Knott, a trainer who worked with Mr. Boughey, also testified that the amount of tansy ragwort on the Property decreased over the time that the plaintiffs were living on the Property.

[113] Ms. James testified she was unhappy with the plaintiffs' management of tansy. However, when asked on direct examination what her concerns were about the work done by the plaintiffs to remove tansy on the farm, she only referred to an incident in 2019, after the litigation had been commenced, when the plaintiffs stopped managing tansy on certain parts of the Property. She did not offer any specific evidence about the plaintiffs falling short in fulfilling their obligation to control the growth of tansy ragwort on the Property. Nor did she testify that she ever alerted the plaintiffs to the fact that she thought their work to control the tansy was unsatisfactory.

[114] Two of the defendant's witnesses gave evidence that may suggest that the amount of tansy on the Property increased over the relevant period. Alison Heikes worked for Ms. James for two years in the early 2000s. Her primary responsibility was feeding the ponies. She testified that there was very little tansy growing on the Property during the years that she worked there. She testified that in 2018, she went back to the farm and saw that there was more tansy on the Property than when she had worked there in the early 2000s. The

defendant relies on this evidence to support the argument that the tansy infestation worsened over the time the plaintiffs lived on the Property.

- [115] Ms. Heikes was shown photographs taken in the summer of 2008 and she testified that the condition of the Property in the photos, particularly with respect to tansy ragwort, was much worse than it had been when she worked on the Property. Ms. Heikes was unable to recall the precise years she worked on the Property, except that it was the early 2000s. Based on her testimony, and her admission that the photographs showed a tansy infestation worse than what she observed during her time on the Property, I must conclude that the decline in the condition of the Property with respect to noxious weeds happened sometime between Ms. Heikes' departure and the arrival of the plaintiffs in 2008.
- [116] Mary Jacqueline Moad is a friend of Ms. James who testified that the tansy problem on the Property got much worse between 2009 and 2018. She testified that in 2009, she saw Ms. James' ponies grazing in one of the fields, referred to by the parties as Field 2, which was overrun with tansy ragwort. She reported this to Ms. James, who began to cry and said "I've asked Bruce and Fonda to get rid of the tansy over and over again, and they ignore me".
- [117] Ms. Moad's evidence about what Ms. James told her is a hearsay statement and is not admissible for the truth of its contents. To the extent that the defendant relies on this evidence to support the proposition that Ms. James complained to her friends about the plaintiffs' poor weed control practices, I find Ms. Moad's rendition of events to be improbable. Due to its location at the front of the Property, Ms. James could see Field 2 from the driveway every time she entered or left the Property. The notion that she saw her ponies grazing in a field overrun by tansy, and rather than confronting the plaintiffs immediately, she had a teary conversation with a friend about the fact that her beloved ponies were grazing in a field full of poisonous plants, defies logic. This is particularly true given Ms. James forthright and direct personality and her strong will, all character traits that were apparent during the multiple days she spent on the witness stand.
- [118] Ms. Moad's evidence is also improbable because Ms. James herself never testified that Mr. Boughey and Ms. Munro ignored her requests to remove tansy. She simply testified that they disagreed about the best methods to control the tansy.
- [119] Considering the evidence of all the witnesses, I decline to find that the plaintiffs failed to fulfil their obligations under the Agreement as it pertained to controlling tansy ragwort on the Property. Tansy ragwort was an issue on the Property in 2008 when the plaintiffs moved to the Property and it continues to be an issue today. However, I accept Mr. Boughey's evidence that he managed to control the weed infestation and that the condition of the Property as it pertained to noxious weeds was better in 2018 than it was in 2008.

ii. Pasture management

- [120] Ms. James argues that the plaintiffs have caused the fields on the Property to become overgrazed by failing to practice strip grazing. Strip grazing is a pasture management practice in which equines are fenced into a small area in a field to graze in order to allow the remainder of the field to grow.
- [121] Ms. James testified that she told Mr. Boughey that she wanted to set up strip grazing on the Property and he refused. Ms. Munro testified that Ms. James never asked her to practice strip grazing on the Property. Nora Wright, who worked on the Property for approximately a year in 2002-2003, testified that strip grazing was never practiced on the Property during her time working there.
- [122] On cross-examination, Ms. James was questioned on precisely what she asked the plaintiffs to do with respect to strip grazing and when she asked. She could point to only one incident, in the fall of 2016, when she asked Mr. Boughey to try strip grazing in one of the fields and he told her that he thought it was better done in the spring. It does not appear that they ever discussed the issue again.
- [123] It therefore does not appear, as the defendant now argues, that Ms. James repeatedly asked Mr. Boughey and Ms. Munro to practice strip grazing, or any particular form of pasture management, over the period of time the Agreement was in force. On the contrary, it appears that, at most, the matter was discussed once.
- [124] Mr. Haddow, who was qualified as an expert in farm management practices, opined that the pastures were overgrazed and in poor condition when he attended the Property in 2018. In his report, Mr. Haddow reviews the farm management practices in place over the course of the Agreement and opines on whether they met industry standards. He also considers the cost of feed that would be saved had the pastures been better managed such that the ponies could be partially pasture fed (rather than primarily fed hay), and he quantifies the cost of remediating the pastures.
- [125] Like any expert report, the strength of Mr. Haddow's report depends in part on the veracity of the factual assumptions upon which he relied. Mr. Haddow's assumptions include many facts provided to him by Ms. James which have not been established in evidence. These include the assumption that Ms. James directed the plaintiffs to manage the pastures using strip or rotational grazing with periods of rest using electric braid fencing, and the assumption that she directed the plaintiffs to remove the horses from the pastures when the grass reaches about four inches of height. With respect to the former assumption, I have found that at most, Ms. James discussed strip grazing once with Mr. Boughey in 2016, and never with Ms. Munro. With respect to the latter assumption, no evidence was given by Ms. James or anyone else that she ever gave these instructions to the plaintiffs at all.

- [126] Mr. Haddow's report also relies on the assumption that the pastures were in "fair to good" condition in 2007. At page 19 of his Report, Mr. Haddow reports that before the plaintiffs took over management of the Property, Ms. James rotated her ponies between Fields 14 and 31 during the winter months. During the growing season, she moved the ponies from pasture to pasture when stubble heights of grasses reached 2-3 inches, and re-entry did not occur until the grass was 4-5 inches in height.
- [127] There was no evidence offered at trial that would support these assumptions. First, Ms. James did not testify that she rotated the ponies in the manner described in Mr. Haddow's report. She did not testify about her pasture management practices prior to the Agreement at all. The only person to testify about the pasture management that occurred prior to the Agreement was Nora Wright, who said no strip grazing was done in 2002-2003 and did not testify that there was any rotation of the animals to preserve pasture.
- [128] On cross-examination Mr. Haddow was shown photographs of the Property in the summer of 2008. He admitted that the pasture in those photos was in poor condition.
- [129] Mr. Haddow's report is based on two central assumptions: first, that the Property was in fair to good condition in 2007 with rotational grazing being utilized, and second, that Ms. James asked the plaintiffs to manage the pasture in a particular way. Neither of these assumptions have been proven by the defendant. As such, Mr. Haddow's report is of extremely limited use.
- [130] There is no term in the Agreement that requires the plaintiff to keep the pastures at a certain level of productivity. I think it is most likely that neither Ms. James, nor Mr. Boughey, nor Ms. Munro turned their mind to pasture management during the bulk of the time that the Agreement was in effect. The plaintiffs had been hired to look after the ponies, not maximize the pasture yield. Pasture management appears to have been an issue that only arose, at the earliest, in late 2016 when Ms. James asked Mr. Boughey to try strip grazing, and it only became a preoccupation of Ms. James after the commencement of litigation.
- [131] To the extent that the plaintiffs failed to optimally manage the pastures, I do not find this to be a breach of the Agreement.

iii. Manure management

- [132] Mr. Boughey testified at length about how he managed manure on the Property. He described the ways in which he would use the farm equipment to break up and spread manure in some areas, and pile it for later removal in others.

- [133] Ms. James testified that manure was never removed, and it was just left in giant piles around the Property. When asked what the plaintiffs should have done about manure, she testified they should have moved it off the Property, or allowed it to dry and then broken it up and spread it out to compost. Interestingly, this is not much different from what Mr. Boughey testified he did to manage manure on the Property.
- [134] A number of witnesses testified that there were multiple large piles of manure around the Property.
- [135] Ms. James testified that she wanted the plaintiffs to do a better job of managing manure and they didn't comply with her requests. The plaintiffs testified that Ms. James never raised concerns about manure removal with them.
- [136] Once again, Ms. James was unable to point to a specific incident in which she asked the plaintiffs to change their manure management practices.
- [137] Much like pasture maintenance, it appears that optimal practices were not followed on the Property between 2008 - 2018 with respect to manure management, however this in and of itself does not amount to a breach of the Agreement. There is no evidence that Ms. James had a better system of manure management in mind than what the plaintiffs were doing. Her evidence that she communicated to them that they were not managing the manure properly is vague and not terribly clear. I therefore do not find that the plaintiffs breached the Agreement by the way they managed manure removal.

iv. Care of ponies

- [138] Ms. Munro, Mr. Boughey and Ms. James became acquainted through their mutual love of Welsh ponies. Prior to the Agreement, Ms. Munro had boarded and trained ponies owned by Ms. James. I find that the primary reason why Ms. James sought out Mr. Boughey and Ms. Munro to live on the Property was their demonstrated skill with equines.
- [139] Ms. James was asked in direct examination what she understood paragraph 7 of the Agreement to mean. She testified that she expected that the facilities would be maintained and cared for and that the animals would be fed, groomed, wormed and well looked after.
- [140] For the above reasons, I am not persuaded that, at the time the Agreement was entered into, any party had in mind the productivity level of the pastures or the efficiency of manure removal. However, I do find that it was of primary importance to Ms. James that her ponies be properly cared for. The Agreement states that the plaintiffs must look after Ms. James' animals as they would their own, and any failure to do so on the part of the plaintiffs would be a significant breach of the Agreement.

- [141] Ms. Munro testified at length about the condition of the animals on the farm and the steps she took to care for them. She testified that when she moved to the Property in 2008, Ms. James' ponies had some behavioural and health issues. Many were either underweight or overweight and most needed to have their hooves trimmed. Some ponies required dental work and a number of them needed training in order to tolerate being handled by people.
- [142] Ms. Munro testified that upon moving to the Property, she made immediate changes to the ponies' feeding regime. She increased feeding from once per day to twice per day, introduced pellets to the stallions' diets, and modified the feed for each pony to suit its stage of life. She trained the ponies to be handled by the farrier, Carrie Daviduk, and set up a schedule for Ms. Daviduk to regularly attend to the ponies' hooves. She also arranged for the veterinarian to treat the ponies with dental issues. Additionally, Ms. Munro testified that she regularly brushed the ponies and trimmed their tails.
- [143] The only documentary evidence regarding the state of the ponies consists of a number of emails from Ms. James to Ms. Munro in which she makes positive comments about the condition of the ponies, saying that they "look very good" and "are in good shape".
- [144] Two veterinarians were called as witnesses. Dr. Fritz is a veterinarian who provided services at the Property from 2007 to 2013. Dr. Noseck is a veterinarian who originally worked for Dr. Fritz and who took over providing veterinary services at the Property in 2013. Dr. Fritz and Dr. Noseck both confirmed that during the time they provided services to the ponies at the Property, neither had concerns about the ponies' welfare.
- [145] Ms. Daviduk, the farrier, testified that some of Ms. James' ponies had behavioural problems in the early years. She testified that after Ms. Munro took over the care of Ms. James' ponies, the ponies became better behaved.
- [146] Ms. James testified that Gandhi, her white stallion, "always" looked dirty and that "there was absolutely no grooming" of the ponies during the time they were in the care of Ms. Munro. Like much of Ms. James' evidence about the services performed by the plaintiffs, her testimony on this point appeared overstated and implausible. Ms. James testified that the ponies were the most important thing in her life. If Ms. James truly had been upset about the condition of the ponies, and if she truly believed that there was "absolutely no grooming" being done during the ten years of the Agreement, she would have raised the matter with Ms. Munro. There is no evidence to suggest that she did so.
- [147] The only specific evidence provided by Ms. James pertaining to deficient care of the ponies was an incident she described wherein one of her ponies was being overfed by Mr. Boughey. In cross-examination, Ms. James conceded that this event occurred in April 2019, after the Agreement was terminated, and that it was Ms. Munro who advised her about the pony in question becoming overweight.

[148] Ms. Brown testified that the ponies were "pretty dirty" and some of them had rain rot because "they were in the rain all the time". As I have found Ms. Brown to be prone to overstatement and determined to paint the plaintiffs in the most negative possible light, I place no weight on this testimony.

[149] On the basis of the foregoing evidence, I decline to find that the plaintiffs breached the agreement by failing to look after Ms. James' ponies as they would their own.

v. Pony breeding

[150] Ms. James also argues that the plaintiffs breached the Agreement by failing to advance Ms. James' pony breeding requirements. While it is clear that the number of ponies bred on the Property has dropped precipitously since 2011, the evidence of Ms. Munro and Ms. James differs as to why this is the case.

[151] Ms. Munro understood that part of her job was to assist with the pony breeding operation. Ms. Munro testified that between 2011 and 2014, both she and Ms. James decided that they would temporarily halt breeding operations due to poor market conditions and an excess number of ponies on the farm. Some attempts to breed were made in 2015 and 2017 but only the 2015 attempt was successful. Ms. Munro testified that the decisions about when and which ponies to breed were made by her and Ms. James together and that she never refused a request by Ms. James to breed a mare.

[152] In contrast, Ms. James testified that she frequently asked Ms. Munro to have certain mares bred and "it would never happen". She testified that she expected foals to be born at a rate of about two per year but this was never achieved. Eventually, the breeding program stopped.

[153] As with many of her grievances against Ms. Munro and Mr. Boughey, Ms. James' unhappiness with Ms. Munro about the breeding operation lacks specificity. It is not clear from her evidence whether she tried to breed certain mares and was undermined by Ms. Munro, whether she and Ms. Munro had conversations where they disagreed about the breeding of certain mares, or whether the breeding program slowed down because Ms. Munro and Ms. James had a different understanding of Ms. James' expectations in that regard.

[154] Ms. James' position that Ms. Munro is solely responsible for the decline in breeding on the farm is not consistent with her evidence about how the breeding program operated. In describing the breeding process, Ms. James testified that "it's not really breeding, it's just moving animals." In describing the breeding work she did in 2007, 2008 and possibly 2011, Ms. James testified that she simply moved a mare in heat into a pasture with a stallion and waited for them to mate. In light of this testimony, I find it difficult to accept Ms. James' complaint that Ms. Munro put the farm's tax status in jeopardy by not advancing the farm's pony breeding requirements. On Ms. James' own testimony it appears that at all times Ms. James was capable of undertaking the pasture breeding herself, and that this was not a difficult or significant undertaking. If Ms. James was indeed seriously concerned that a

dearth of pony breeding was jeopardizing the tax status of the Property it is unclear why she would not take steps to address this concern herself, if in fact Ms. Munro was unwilling to move the animals at the right time. I find it is more likely that, consistent with Ms. Munro's evidence, the pony breeding operation slowed down due to the fact that there was excess inventory of ponies and the prospects of selling new foals was low.

[155] As such, I decline to find that the plaintiffs breached the Agreement by failing to continue Ms. James' breeding operation.

3. Quiet enjoyment

[156] Ms. James argues that the plaintiffs breached paragraph 13 of the Agreement by interfering with her quiet enjoyment of the Property. Paragraph 13 of the Agreement provides that "each party will have quiet enjoyment of their homes and of the farm and facilities in general."

[157] Ms. James testified that there were a number of times when she found Ms. Munro or Mr. Boughey to be "annoying," and she felt that their behaviour interfered with her quiet enjoyment of the Property. However, there are two main incidents in 2017 that were described by Ms. James as "the last straw" with respect to the plaintiffs violating her quiet enjoyment of the Property.

[158] I find that most of the alleged "annoying" behaviour that Ms. James attributes to Ms. Munro or Mr. Boughey (for example, the plaintiffs entering the indoor arena when Ms. James was there, or brushing their ponies too close to her), does not meet the threshold of being a violation of Ms. James' quiet enjoyment of the Property. The two "last straw" incidents merit further consideration.

a) Confrontation with Carmen Tshritter

[159] In the early summer of 2017, Ms. James required a mobility scooter. Nick Epp-Evans, whose job involves assessing and fitting individuals for mobility devices, came to the Property to assess Ms. James' needs for the purpose of providing her with the right scooter. This involved a number of visits to the Property, during which Mr. Epp-Evans got to know Ms. James and to learn about the equestrian facilities on the Property.

[160] Mr. Epp-Evans is also involved in the equestrian world; his son is a competitive rider. After delivering Ms. James' scooter to her, Mr. Epp-Evans approached Ms. James about the possibility of establishing a riding school on the Property. He knew five or six children, including his own son, who were looking for a facility at which they could train twice a week. He was interested in the possibility of using the indoor arena on the Property for this purpose. Mr. Epp-Evans' son was at the time being trained by a woman named Carmen Tshritter. Discussions ensued between Ms. James and Mr. Epp-Evans about Ms. Tshritter training children on the Property.

- [161] At some point in the fall of 2017, Ms. James informed Ms. Munro that Ms. Tshritter would be training Mr. Epp-Evan's son on the Property. Ms. Munro was surprised by this, and she took steps to obtain more information about Ms. Tshritter. Regardless of whether Ms. Munro did this because she felt threatened by the prospect of another trainer working on the Property (until that point in time, the only person who had given any equine lessons on the Property in the previous ten years was Ms. Munro), or whether she was simply concerned about the dynamics of another person working on the Property, I find it was reasonable for Ms. Munro to seek out further information about Ms. Tshritter.
- [162] Ms. Munro spoke to a number of friends and connections in the horse world, and she heard many negative things about Ms. Tshritter, her character, and her relationships with other trainers and students. Many of these allegations appeared to be more in the nature of rumour than fact, but they were enough to worry Ms. Munro. Based on the information she received, Ms. Munro did not want Ms. Tshritter to work on the Property. Ms. Munro raised her concerns with Ms. James, who dismissed them.
- [163] On November 18, 2017, Ms. Tshritter attended the Property, and Ms. Munro confronted her. According to Ms. James, Ms. Munro yelled at Ms. Tshritter for 15 minutes. According to Ms. Munro, Ms. Munro simply demanded to see Ms. Tshritter's proof of insurance. Either way, Ms. James was upset about this confrontation and she described this as one of the two incidents that led to her decision to "fire" Ms. Munro and Mr. Boughey.
- [164] The defendant characterizes this incident as an example of Ms. Munro wrongly asserting a right to direct what Ms. James did with visitors on her property. I find this to be an unfair characterization. I accept that Ms. Munro was genuinely worried about Ms. Tshritter working on the Property. In a text to Ms. Brown sent the day after the confrontation, Ms. Munro wrote: "How can someone as smart as Jessie be so taken in??? Apologies - I'm feeling like rug being yanked out from under me."
- [165] Rather than seeking to dictate the terms of Ms. James' actions on the farm, Ms. Munro's appears to have worked herself into a panic about someone she believed to be undesirable putting her safety, and the safety of Ms. James, at risk. While her actions in confronting Ms. Tshritter may have been overprotective and a bit alarmist, I find that they were ultimately motivated by concern about the well being of the three people who lived on the Property.
- [166] I cannot find that the November 18, 2017 confrontation amounted to a breach of Ms. James' quiet enjoyment of the Property. Ms. Munro may have acted emotionally, but she cannot be said to have interfered with Ms. James' quiet enjoyment of the Property for any period of time beyond the 15 minutes that the confrontation is alleged to have taken place.
- b) Confrontation in the arena
- [167] The second "last straw" described by Ms. James also involves Mr. Epp-Evans and Ms. Tshritter. One day in late November 2017, Ms. James informed Mr. Boughey that she wanted to use the indoor arena at 3 pm that afternoon. At 2 pm, Mr. Boughey and Ms. Brown were

in the arena. Shortly after 2 pm, Ms. James arrived and told Mr. Boughey to put his horse away. Mr. Boughey put his horse away but stayed in the arena doing chores. The Epp-Evans family, Ms. Tshritter, and a couple of guests arrived. Mr. Boughey told Ms. Tshritter not to use his equipment and he carried on doing chores, primarily sweeping, in the arena for the duration of the lesson.

[168] Ms. James alleges that Mr. Boughey, by staying in the arena, interfered with herself and her guests. Mr. Epp-Evans testified that he thought Mr. Boughey was "doing everything he could to eavesdrop" by repeatedly sweeping the same spot right behind the bleachers where Mr. Epp-Evans and the other guests were sitting. Mr. Epp-Evans told Ms. James that Mr. Boughey's behaviour was making him and his guests uncomfortable. After the guests left, Ms. James confronted Mr. Boughey and told him to stay out of the arena when she had guests. He agreed.

[169] Ms. James testified that a few days later Mr. Epp-Evans and his entourage arrived for a lesson and the same events took place, with Mr. Boughey staying in the indoor arena and eavesdropping on Ms. James' guests. I find that Ms. James must be mistaken in her recollection on this, as Mr. Boughey, Ms. Brown, and Mr. Epp-Evans all testified that there was only one incident involving these individuals in the indoor arena.

[170] While I accept that Mr. Boughey's presence in the indoor arena during her guest's lesson may have been (to use a word favoured by Ms. James) annoying, I do not find it was a breach of the Agreement. In the context of the other events of November 2017, and the concern that Ms. Munro likely shared with her husband about Ms. Tshritter, Mr. Boughey no doubt thought it was prudent to stay in the arena during the lesson and keep an eye on things. While it is questionable whether this was indeed prudent, and it is likely that Mr. Boughey's behaviour appeared odd to the others in the arena, I cannot find that it interfered in any way with the activities of Ms. James' guests.

[171] The two incidents described as "last straws" collectively lasted a duration of less than two hours. I cannot find a breach of Ms. James' right to quiet enjoyment of the Property on the basis of what amounted to two short incidences of behaviour that was irritating to Ms. James, particularly when considered in the context of a ten year working and living arrangement among the parties. As such, I decline to find that the plaintiffs have breached paragraph 13 of the Agreement.

4. Other pleaded bases for ending the Agreement

[172] There are a number of other bases enumerated in the Response to Civil Claim to support Ms. James' termination of the Agreement. Specifically, Ms. James has pled that the plaintiffs failed to allow Ms. James exclusive use of her garage, failed to pay their share of various expenses, and failed to keep proper business records of farm expenses.

- [173] With respect to the garage, it was clear on the evidence of all parties that the share of the garage used by Ms. James and Mr. Boughey changed over time, on the agreement of both parties. There is no basis on which Ms. James can argue that Mr. Boughey denied her exclusive use of her garage, when at all times his use of her garage was with her express agreement.
- [174] The defendant's allegation that the plaintiffs failed to pay their share of expenses has not been made out on the evidence, nor was it pursued in argument by the defendant except insofar as the defendant argued that the plaintiffs' share of 2019 joint expenses should be set off against any award the plaintiffs receive. I do not understand the plaintiffs to take issue with the position that their share of 2019 expenses must be paid.
- [175] Ms. James was asked on direct and cross-examination about her allegation that Ms. Munro failed to keep proper business records of farm expenses. Ms. James admitted in testimony that Ms. Munro recorded all the information concerning farm expenses in a ledger book. Her primary complaint appeared to be that she would have preferred if Ms. Munro used only a single colour of ink, and left more room on the spreadsheets for reconciliations. These are extremely minor concerns. Having reviewed the extensive farm records in evidence, I cannot find that the plaintiffs failed to keep proper business records of farm expenses.
5. Conclusion re: Whether the plaintiffs breached the Agreement
- [176] Ms. James has not succeeded in establishing that the plaintiffs breached the Agreement. The plaintiffs fulfilled their end of the bargain with Ms. James and they reasonably expected the Agreement to continue in force for the remainder of Ms. James' life.

C. Issue 3: Defendant's counterclaim

- [177] The defendant has brought a counterclaim, seeking damages for losses she claims to have incurred as a result of the plaintiffs' breach of the Agreement. She seeks a legal and equitable set off and argues that the amount payable to the plaintiffs under the Mortgage is largely offset by the costs of remediation of the Property and occupation rent that the plaintiffs ought to pay for their house and their animals.
- [178] Because I have found that the plaintiffs did not breach the Agreement as it pertained to managing the pastures, I decline to find that the plaintiffs are liable for the cost of rehabilitation of the pastures.
- [179] With respect to the defendant's claim that she is entitled to an equitable set off for occupation rent, I cannot agree. The terms of the Agreement govern the residency of the plaintiffs and their animals on the Property. No rent is payable by the plaintiffs. I cannot accede to the defendant's argument that an equitable set off should be applied against monies owed to the plaintiffs by the defendant on the basis that the plaintiffs were unjustly enriched by not paying rent for their home or their animals on the Property. Unjust

enrichment is not an applicable doctrine in this case, as there is an obvious juristic reason for any enrichment enjoyed by the plaintiffs and corresponding deprivation suffered by the defendant, namely the Agreement under which the plaintiffs have brought this lawsuit.

[180] There is only one set off claimed by the defendant that is appropriately considered in the remedy in this case, and that is the HSBC Mortgage. All parties are in agreement that the HSBC Mortgage is payable by the plaintiffs, and that any order made in this litigation should account for this liability.

D. Issue 4: What is the appropriate remedy?

1. Anticipatory breach

[181] On December 7, 2017, Ms. James changed her will to exclude the plaintiffs as beneficiaries, thereby ensuring that they would not inherit her estate pursuant to paragraph 14 of the Agreement. On January 7, 2018, Ms. James gave the plaintiffs notice of her intention to terminate the Agreement by delivering the Notice.

[182] Anticipatory breach is defined in Fridman, *The Law of Contracts* (5th ed., 2006 at p. 605-606) as occurring when "a party, by express language or conduct, or as a matter of implication from what he has said and done, repudiates his contractual obligation before they fall due." The author notes that:

[] for this type of breach to occur the following must be established: (1) conduct which amounts to a total rejection of the obligations of the contract; (2) lack of justification for such conduct.

[183] I find that Ms. James committed an anticipatory breach of the Agreement when she changed her will to make Ms. Brown the sole beneficiary of her estate and delivered the Notice to the plaintiffs. In so doing, Ms. James totally rejected the obligations of the Agreement, and had no justification for such conduct.

[184] In the face of an anticipatory breach, the non-defaulting party has an election as to whether to treat the contract as continuing or as ended. If the non-defaulting party treats the contract as ended and accepts the repudiation, they may pursue a claim against the defaulting party. Alternatively, a non-defaulting party may decline to accept the repudiation and keep the contract alive in all respects: *Malek v. Tanbakookar*, 2012 BCSC 1742 at para. 41.

[185] In other words, repudiation itself does not terminate a contract. Only upon acceptance of the repudiation by the non-defaulting party will the contract come to an end.

- [186] An innocent party to a breach of contract may either 1) accept the breach, treat the contract as being at an end and sue for damages, or 2) decline to accept the breach, keep the contract open and sue for specific performance, or damages in lieu thereof. The innocent party may claim all of these remedies in the alternative and is not required to elect among them until judgment: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 at para. 203.
- [187] In this case, the plaintiffs never accepted the defendant's repudiation of the Agreement. Mr. Boughey and Ms. Munro testified that when Ms. James gave them the Notice, they did not consent to the Agreement coming to an end. The plaintiffs continued, as best they could, to do their jobs on the Property after Ms. James gave them the Notice. This became increasingly difficult when Ms. James put locks on gates so that the plaintiffs could not access certain pastures and ponies, and otherwise forbade the plaintiffs from continuing to do much of the work they previously had done on the Property.
- [188] On February 8, 2018, the plaintiffs commenced the action herein. In the original Notice of Civil Claim, the plaintiffs did not seek damages for breach of contract, nor did they expressly seek specific performance. Instead, the plaintiffs sought a declaration of a proprietary interest in the Property. The Notice of Civil Claim was amended in October 2019 to include an alternative claim for damages for breach of contract. The position of the plaintiffs throughout the litigation has been that they wish for the contract to continue and the relief they seek in this action primarily consists of declaratory and equitable relief that would restore them to the position they would have been in had Ms. James never purported to terminate the Agreement.
- [189] While the plaintiffs have not specifically pled specific performance, the relief they seek in the further amended Notice of Civil Claim, namely declaratory relief with respect to their rights under the Agreement and a proprietary interest in the Property, is relief to which they would only be entitled if the Agreement were still in force. As such, the further amended Notice of Civil Claim seeks specific performance without precisely using those words.
- [190] Even if specific performance is not properly pled, this Court has discretion to grant remedies that are not explicitly sought in pleadings, so long as the pleadings disclose facts that give rise to those remedies: *Fédération franco-ténoise c. Canada (Procureur général)*, 2008 NWTCA 5 at para. 80.
- [191] Therefore I find, notwithstanding the plaintiffs' failure to specifically plead specific performance, the plaintiffs have not accepted the repudiation of the Agreement by the defendant and they are entitled to bring a claim for specific performance.

2. Specific performance generally

- [192] The plaintiffs seek specific performance or, alternatively, damages in lieu of specific performance.

- [193] The primary award for breach of contract is generally monetary damages. Specific performance is a discretionary remedy, supplementary to the common law remedy of damages: *Fridman on Contracts*, p. 797. Specific performance is only available as a remedy where monetary compensation is inadequate: *Chan v. Chadha Construction*, 2000 BCCA 198 at para. 10.
- [194] The Agreement is an unusual contract. It is not a contract for the sale of land, it is not an employment agreement, and it is not a typical contract to make a will. At the same time, it contains some elements that are analogous to each of these types of contract. Courts of equity have approached each type of contract differently when a claim for specific performance is made.

3. Specific performance in land contracts

- [195] Historically, it was commonplace for specific performance to be granted as a remedy in the context of contract disputes involving real property. However, the modern approach favours damages, rather than specific performance, as a remedy for breach of contracts involving real property. In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at 429, Sopinka J. reiterated the exceptional nature of specific performance as a remedy when land is in issue:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

- [196] The Agreement may be partially characterized as a contract for the transfer of real property, insofar as the parties expressly contemplated that the primary asset that would pass to the plaintiffs at the conclusion of the Agreement was the Property. The parties disagree about the meaning of paragraph 14 of the Agreement, and whether, on Ms. James' death, the plaintiffs were to receive the residue of Ms. James' estate or the Property itself. My findings about the proper construction of paragraph 14 are discussed below. However, for the purposes of characterizing the Agreement, and considering the availability of specific performance as a remedy, there is no doubt based on the whole of the evidence that the parties believed that the plaintiffs would likely take over ownership of the Property at some point, and this was a central part of the consideration that the plaintiffs believed that they would receive under the Agreement. In this respect, the Agreement is a contract concerning real property and the criteria for specific performance set out in *Semelhago* require consideration.
- [197] In this case, the plaintiffs have built their lives on the Property for the last ten years. Both Ms. Munro and Mr. Boughey testified that they did not ever turn their minds to leaving the farm; they expected and understood that, because of the Agreement, they would live out their lives there.

[198] Other properties may exist in the Nanaimo area that could suitably house the plaintiffs and their animals. However, I find that the Property in this case is unique precisely because the plaintiffs have spent the last ten years investing their time, money and energy in reliance on the Agreement and the promise that they would inherit the Property on Ms. James' death. The Property has become their home. Monetary damages, even if quantifiable, would not fully place the plaintiffs in the position they would be in had the Agreement been performed because such a remedy would deprive them of a future in the home they have built.

[199] Were the Agreement simply a contract for conveyance of the Property to the plaintiffs, I would not hesitate to find that specific performance was the appropriate remedy for the defendant's breach. However, the analysis is complicated by the fact that the Agreement contains many elements not normally found in real property contracts.

4. Specific performance as a remedy in service contract cases

[200] Specific performance is not generally available as a remedy for breach of a contract for personal services: *Emerald Resources Ltd. v. Sterling Oil Properties Management Ltd.*, (1969) 3 D.L.R. (3d) 630 at 647 (Alta. C.A.) [Emerald], *aff'd* (1970), 15 D.L.R. (3d) 256 (SCC). As noted by S.M. Waddams in *The Law of Contracts*, 6th Ed. (Toronto: 2010), at 682:

There are obvious objections to an order of the court that compels parties to work together against their will in a close and personal relationship. Difficulties of supervision might be formidable. Moreover, an order actually directing an employee to serve another comes close to a kind of slavery.

[201] As I have held, the Agreement in this case is not a personal services contract, as that term is used in the jurisprudence. However, the Agreement possesses some of the same elements that, according to cases such as *Emerald*, make specific performance a problematic remedy in this case. An order for specific performance of the Agreement would necessitate Mr. Boughey, Ms. Munro, and Ms. James to work and live together in a close and personal relationship for the remainder of Ms. James' life. Mr. Boughey and Ms. Munro would retain responsibility for caring for Ms. James' animals and the parties would continue to share expenses and facilities at the Property. They would be required to interact with one another on a daily basis.

[202] There has been a complete breakdown in the relationship between Ms. James on the one hand and Mr. Boughey and Ms. Munro on the other. Little if any good will remains. While the parties disagree about the practicality of continuing the Agreement with the three parties living on the farm, it is my view that a remedy that requires the three parties to continue living and working together on the Property is untenable and would likely lead to further conflict and litigation.

5. Specific performance in contract to make will cases

- [203] In cases involving contracts under which a party has agreed to make a testamentary disposition to another, the courts will often award specific performance as a remedy for breach: *Johnson v. Nova Scotia Trust Co. et al.* (1973), 43 D.L.R. (3d) 222 (N.S.S.C.A.D.); *Barnes v. Cunningham* (1933), 3 D.L.R. 653 (N.S.S.C.A.D.); *Briese v. Dugard*, [1936] 1 D.L.R. 723 (Man. C.A.).
- [204] In the above cases, the courts do not expressly discuss the rationale for awarding specific performance, rather than damages, for breach of a contract to make a testamentary disposition. However, there a number of reasons why specific performance is preferable to damages in cases involving breaches of contracts to make wills.
- [205] First, a contract to make a will is a contract not only to transfer property but to create a relationship between a personal representative and a beneficiary with rights and obligations that go beyond the four corners of the contract, and indeed go beyond the bounds of contract law. A will gives rise to a fiduciary relationship between the personal representative and beneficiary, and a failure by the personal representative to fulfil her duties could give rise to a claim for breach of trust. Damages for breach of a contract to make a will risk undercompensating the plaintiff because they do not place the plaintiff in the position of beneficiary of an estate with the rights and remedies associated with this position.
- [206] Second, by its nature, a testamentary gift has an uncertain value insofar as any gift that passes through an estate is subject to probate fees and taxes triggered on death. In these cases, the consideration that is to pass to the party entitled to receive the testamentary gift is uncertain and damages for breach of a contract to make a will would be extremely difficult to calculate.
- [207] I accept the plaintiffs' argument that specific performance is generally the most appropriate remedy in the face of a breach of a contract to make a testamentary gift. However, in all of the cases noted above, the will-maker had died by the time the action was brought. Therefore the consideration due to the plaintiff under the contract was due. In those cases, an order for specific performance was an order requiring the personal representative of the estate to distribute the estate assets to the plaintiff. What makes this case exceedingly difficult from a remedial perspective is the fact that Ms. James is still alive and the plaintiffs, under the terms of the Agreement, are not yet entitled to anything.
6. What does specific performance entail in this case?
- [208] The plaintiffs argue that they are entitled to a remedy that would have the Property transferred to them now, or, alternatively, that they are entitled to receive a damages award equivalent to the expected value of the Property on Ms. James' death. I do not agree. Both remedies would give the plaintiffs more than what they bargained for under the Agreement, which was to receive consideration under the Agreement only once Ms. James dies and after both parties have discharged their obligations under the Agreement for the duration of Ms. James' life. Put simply, specific performance of the Agreement entitles the

plaintiffs to nothing until Ms. James dies.

[209] The defendant raises two additional problems with the plaintiffs' position on remedy: 1) the Agreement entitles the plaintiffs to the residue of Ms. James' estate on her death, not the Property; and 2) the residue of Ms. James' estate cannot be quantified at this time.

a) Are the plaintiffs entitled to receive the Property or the residue of Ms. James' estate?

[210] An issue arose between the plaintiffs and defendant about whether the Agreement mandates that the residue of Ms. James' estate, or the Property itself, is payable to the plaintiffs on Ms. James' death. This is important because the plaintiffs' position is that the Property ought to be transferred to them outright, without being subject to the payment of Ms. James' testamentary expenses, taxes and personal debts. The defendant's position is that, at best, the plaintiffs are entitled to the residue of Ms. James' estate, which would be subject to any debts that arose during her lifetime or on her death.

[211] While the words of paragraph 14 ("Upon the death of the Owner, the Managers will inherit her entire estate") clearly refer to the residue of the estate, the plaintiffs argue that when construed in the context of the surrounding circumstances and the reasonable expectations of the parties, the parties must have intended "estate" in this context to specifically refer to the Property, as well as any other assets that the defendant owned. In support of this construction, the plaintiffs point to the following evidence:

- a) In her response to civil claim, Ms. James admitted that "in exchange for the Plaintiffs managing the farm on the Lands and taking care of James' ponies, James would transfer the Lands to the Plaintiffs when James died."
- b) At trial, on multiple occasions, Ms. James admitted that it was her intention at the time the Agreement was signed that the Property pass to the plaintiffs on her death.
- c) Ms. James sent a letter to her lawyer on July 12, 2007, wherein she discussed "two options" for transferring the Property to the plaintiffs, including leaving her assets to the plaintiffs under her will and, alternatively, completing a contract of purchase and sale for the Property that would be effective on the date of her death.
- d) The Property was Ms. James' primary asset and the only asset that the plaintiffs knew about.
- e) When asked what she understood "estate" to mean in the context of paragraph 14, Ms. James testified that "we took it as what we saw."

[212] I accept that the Property was at the forefront of the minds of the parties during 2007 and 2008 when the Agreement was negotiated and signed. It was Ms. James' primary asset and the only asset that Mr. Boughey and Ms. Munro knew about (later, Ms. James told Ms. Munro that she had purchased 20 ounces of gold that she intended to be used to pay expenses arising on her death). I am satisfied that no party turned their mind to any scenario other than the one they most expected, which was that the Property would remain unencumbered and unsold for the duration of Ms. James' life, and that on Ms. James' death,

ownership of the Property would pass to Mr. Boughey and Ms. Munro as beneficiaries of Ms. James' estate.

- [213] That being said, the parties' exclusive focus on the Property when considering Ms. James' estate is not determinative of the meaning of paragraph 14. The proper construction of the Agreement must be determined objectively with reference to the surrounding circumstances at the time the Agreement was made: MacMillan Bloedel at para. 30.
- [214] The Agreement refers to "West Abbey Farm" and "the farm" in 6 of its 14 paragraphs. It is significant in this context that the final paragraph of the Agreement stipulates that the plaintiffs will inherit the defendant's "estate" and does not say that they will inherit "the farm" or "West Abbey Farm".
- [215] On cross-examination, Ms. Munro and Mr. Boughey both testified that they did not understand the Agreement to preclude Ms. James from mortgaging or even selling the Property if she needed to. I find it would be unreasonable for them to think otherwise given the fact that, as far as they knew, the Property was her only asset. At all times during the performance of the Agreement, the behaviour of the plaintiffs was consistent with the behaviour of two people who would likely inherit the Property, but who did not own it yet. The plaintiffs consistently testified that they deferred to Ms. James on almost all things relating to the farm and the Property. They understood the Property to be hers to do with as she wished until she died.
- [216] Further, while the parties did not expressly turn their minds to the various scenarios that could impinge on the ultimate value of Ms. James' estate, it would reasonably be in the contemplation of the parties that probate fees and taxes would be payable from Ms. James' estate on her death. If the Property were her only asset, these expenses would have to be paid from the equity in the Property.
- [217] The interpretation of the Agreement advanced by the plaintiffs, that the parties agreed Ms. James would transfer the Property and all her assets to the plaintiffs on her death, without any deduction for debts, taxes and expenses that will arise during her lifetime and on her death--is not reasonable. If I acceded to the plaintiffs' interpretation, I would be finding that the parties intended by the Agreement to bankrupt Ms. James' estate. Any reasonable person, had they turned their mind to the matter, would have contemplated estate expenses, taxes and probate fees being triggered by, and payable on, Ms. James' death, from whatever assets she owned when she died.
- [218] In all the circumstances, I find the most reasonable interpretation of paragraph 14 is consistent with the plain meaning of the words, which is that Ms. James agreed that on her death, she would leave the residue of her estate, namely what was left after she died and the debts of her estate were paid, to the plaintiffs. While the parties anticipated that this would likely involve the plaintiffs assuming ownership of the Property without any further erosion of its equity, paragraph 14 was worded in a way that ensured that the expenses of Ms. James, and her estate, would be met.

b) Value of Ms. James' estate on her death

[219] The Property, which is encumbered by the HSBC mortgage, has an appraised value as at the time of trial of \$1.525 million. Ms. James also owns 20 ounces of gold, some farm equipment and her ponies. The value of the Property, and the value of Ms. James' gold, will fluctuate with market forces. Because of this, and because it is impossible to predict how long Ms. James will live, and what expenses she will incur during her remaining years, it is impossible to estimate with any accuracy what the value of her estate will be on her death. This further complicates any attempt to quantify the consideration that is to pass to the plaintiffs on her death.

7. Mutuality and partial specific performance

[220] The plaintiffs have undischarged obligations under the Agreement that, in accordance with the terms of the Agreement, would need to be fulfilled for the duration of Ms. James' life. I have concluded that the plaintiffs' personal service obligations under the Agreement, such as operating the farm and caring for the animals, are not suitable for an order of specific performance. Further, it is not tenable for the parties to continue to live together in close proximity on the Property in light of their relationship breakdown. I therefore must consider whether specific performance of some, but not all, of the Agreement is an available remedy in this case.

[221] In the past, courts have recognized, as a general principle, that a plaintiff with outstanding obligations under a contract ought not be awarded specific performance, thus compelling the defendant to fulfill its obligations, if the same remedy of specific performance would not be available to the defendant: R. Sharpe, *Injunctions and Specific Performance*, Looseleaf ed. (Toronto: Canada Law Book, 2016) at 10.430. This is known as the doctrine of mutuality and its object is to avoid undue hardship to the defendant. The doctrine recognizes that it would be unfair to force a defendant to fulfill their side of a bargain with no promises or assurances that the defendant will also receive the benefit that they bargained for from the plaintiff.

[222] However, recent and persuasive legal commentary encourages the courts to examine the applicability and usefulness of this doctrine when it is removed from its historical context: Sharpe at 10.530. In *Injunctions and Specific Performance*, Mr. Justice Sharpe explains how the doctrine of mutuality originated in a time where the courts of equity and law operated separately from one another, and the doctrine was at least partly produced in response to the "hazards of the dual court system". Under this dual system, if a plaintiff sought an equitable remedy, such as specific performance, they would initiate that suit before a court of equity. If the plaintiff was awarded specific performance in equity, but the only remedy left to the defendant was the non-equitable award of monetary damages, "the defendant would have been faced with the expense and inconvenience of an entirely new set of proceedings" in courts of law: 10.540. Thus, a court of equity would not award specific performance to the plaintiff where it could not assure the defendant that the plaintiff would

also perform its obligations, and where it did not have the jurisdiction to award monetary damages in law.

[223] In the modern context, Sharpe J. suggests a much more limited application of the doctrine of mutuality at 10.550-10.560:

It may well have been that when the court was restricted to giving equitable relief, the defendant could be assured of performance by the plaintiff only where an equitable remedy was equally available to both sides. Surely such a concern is now irrelevant where monetary compensation would provide the defendant with appropriate protection. This suggests that [the doctrine of] mutuality should operate only where the court concludes that specific relief would impose an unjustifiable risk that the plaintiff will not perform, and that no remedial technique, whether equitable or legal in origin, can be employed to protect the defendant." [Emphasis added.]

[224] The plaintiffs' remaining obligations to the defendant under the Agreement, specifically those requiring the plaintiffs to continue to work on the Property in close proximity to the defendant and her animals for the rest of Ms. James' life, are not suitable for specific performance in light of the relationship breakdown between the parties. However, I find that these obligations may be adequately provided for, under the unique circumstances of this case, through damages and other "remedial techniques" in law. Thus, I find that it is reasonably open to me, and in fact necessary in order to put the plaintiffs in the position they would be in had the contract been performed, to grant the remedy of specific performance to the plaintiffs and order them entitled to Ms. James' estate on her death, despite the fact that specific performance is not available as a remedy to the defendant.

[225] Further, recognizing that the object of the doctrine of mutuality is to avoid undue hardship to the defendant and the risk that the defendant will not see the terms promised by the plaintiff carried out, I take particular note of the unique circumstances of this case. The plaintiffs performed their obligations under the Agreement for ten years. After the Agreement was purportedly terminated, they attempted to continue to operate the farm and care for the animals. They were prohibited from doing so by Ms. James, although they were able to continue with some of their duties under the Agreement. Notably, even at the time of trial, they were continuing to feed some of Ms. James' ponies. In these circumstances, it is difficult to accept that any undue hardship would be suffered by Ms. James in being deprived of services that she has actively sought to prevent the plaintiffs from performing.

[226] I find that the plaintiffs have substantially performed their obligations under the Agreement. In exchange they are entitled to have the defendant perform her end of the bargain and make them beneficiaries of her estate. In these circumstances, I cannot find that the defendant will experience undue hardship by such an order.

[227] While I have found that it is reasonable to grant an order of specific performance to the plaintiffs, I nonetheless find that there are also certain obligations owed by the defendant to the plaintiffs that are not suitable for an order of specific performance, namely the continued residency of the plaintiffs on the Property. I find it would impose an undue hardship on Ms. James to require her to spend her remaining years with the plaintiffs, with whom she now has a hostile relationship, living in close proximity to her on her farm.

[228] It is open to this Court to order specific performance of only part of the obligations a defendant owes under a contract, and not others: *Gaspari v. Creighton Holdings Ltd.* (1984), 52 B.C.L.R. 30 (S.C.) at para. 113. This is known as partial specific performance.

[229] In *Injunctions and Specific Performance*, Justice Sharpe explains:

11.200 where the plaintiff seeks specific [performance] in circumstances where only part of the defendant's promise is the appropriate subject of a decree for specific [performance] sweeping dicta to the effect that "when the Court cannot compel specific performance of the contract as a whole, it will not interfere to compel specific performance of part of the contract" [*Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116 (C.A.) at 123] are entirely misleading. There are, in fact, many situations in which specific relief will be granted in respect of only part of a contract and where the court will in effect order piecemeal performance. The essential criterion here is . . . that the remedy selected should foster rather than frustrate the reasonable expectations of the parties. In certain cases, specific relief in respect of part of the contract may distort what was intended and will on that account be refused. In other cases, specific relief of one aspect of the agreement may safely be ordered notwithstanding the inappropriateness of specific relief for other aspects.

[230] Recognizing that the plaintiffs have substantially performed their obligations under the Agreement and are entitled to have the defendant perform her end of the bargain, I find that the defendant's obligations to permit the plaintiffs to reside on the Property as their home and make full use of the farm is inappropriate for specific performance. I find that these obligations are independent of and severable from the terms of the Agreement respecting the disposition of Ms. James' estate. I find that this is the type of case contemplated in Justice Sharpe's text, whereby ordering partial specific relief will foster the reasonable expectations of the parties.

[231] As such, I find that the only portion of the contract to which the plaintiffs are entitled to specific performance is paragraph 14, and as a result the plaintiffs ought to be entitled to receive the residue of Ms. James' estate on her death.

8. Damages

[232] This raises the issue as to whether either party has a claim for damages for the remaining terms of the contract that are not suitable for specific performance.

[233] The damages assessment must account for two factors: the withdrawal of services by the plaintiffs for the remainder of Ms. James' life (an economic deprivation to Ms. James and an economic benefit to the plaintiffs) and the fact that the plaintiffs will be required to vacate the Property for the remainder of Ms. James' life (an economic deprivation to the plaintiffs, who will have to pay for alternative accommodation, and an economic benefit to Ms. James, who will be at liberty to rent the plaintiffs' house on the Property to someone else).

[234] Insufficient evidence was advanced at trial to allow the court to quantify the monetary value of all the services provided by the plaintiffs under the Agreement, or the limited services provided by the plaintiffs from January 2018 to the date of trial. The defendant tendered expert evidence to support that the fair market value rent for a home like the plaintiffs would be in the range of \$1,900 to \$2,000 a month.

[235] Broadly speaking, and acknowledging that a damages assessment of this nature cannot be precise, I find that these two factors offset one another, and I decline to make an award to account for the occupation rent value of the plaintiff's home on the Property for the remainder of Ms. James' life, as this amount is approximately offset by the value of the services the plaintiffs would have performed under the Agreement for the remainder of Ms. James' life had the Agreement not been breached.

9. Alternative relief sought

[236] As the plaintiffs have been successful in their claim for breach of contract it is unnecessary for me to consider their other equitable claims.

10. Conclusion on remedy

[237] I find that in order to put the plaintiffs in the position they would be in had the contract been performed, they must be entitled to partial specific performance of the Agreement.

[238] However, simply ordering that the plaintiffs must receive the residue of the estate on Ms. James' death is not sufficient to place the plaintiffs in the position they would be in had the Agreement been fulfilled. There are a number of additional orders that must be made.

[239] For example, since it was reasonably in the contemplation of the parties that, absent a health crisis or financial emergency for Ms. James, the Property would not be further encumbered during her lifetime, and given the erosion of the relationship between the parties, it is appropriate for the court to order that Ms. James may not transfer, sell or further encumber the Property without the agreement of the plaintiffs or further court order.

- [240] Additionally, the plaintiffs remain entitled to the registered Mortgage contemplated at paragraph 3 of the Agreement. I do not accept Ms. James' evidence that she and Ms. Munro agreed that the Mortgage would not be registered. I prefer Ms. Munro's evidence that the matter was never discussed after the Mortgage was signed, and that she and Mr. Boughey simply assumed that the Mortgage had been registered.
- [241] The registration of the Mortgage is a term of the Agreement, and in failing to register the Mortgage in 2008, Ms. James violated the Agreement. It appears that the plaintiffs were unaware of this violation at the time. Had Ms. James registered the Mortgage, the plaintiffs would have a secured charge against the Property in the amount of \$325,000. With a registered mortgage, the plaintiffs could petition for sale of the Property in order to collect on this indebtedness, and this would have been an available remedy to them upon Ms. James' purported termination of the Agreement. Ms. James' failure to register the Mortgage put the plaintiffs at a significant disadvantage in terms of collecting on the modest security the Agreement bestowed upon them. The plaintiffs must be made whole in this regard, particularly since they will not receive any other immediate interest in Ms. James' assets until after her death.
- [242] As such, I make the following orders:
- a) The entire residue of Ms. James' estate on her death, after payment of taxes and reasonable funeral and testamentary expenses, is payable to the plaintiffs.
 - b) During Ms. James' lifetime, Ms. James shall not dispose of or encumber the Property without the consent of the plaintiffs or a court order.
 - c) A copy of the order in this proceeding shall be registered on title to the Property.
 - d) Ms. James shall immediately register the Mortgage on the Property.
 - e) The plaintiffs shall vacate the Property within three months of the date of this judgment.
 - f) The plaintiffs are no longer obligated to perform services on the Property pursuant to the Agreement.
 - g) The plaintiffs are and will remain liable for making payments as they are due under the HSBC Mortgage.
- [243] Should either party require further direction with respect to the implementation of this judgment, they are at liberty to make arrangements with Supreme Court scheduling to appear before me. Similarly, with respect to costs, if the parties are unable to agree, they may make arrangements for a further appearance to address costs.

"Francis J."

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