IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Manson v. Mitchell,*
2023 BCSC 723

Date: 20230502
Docket: S219805
Registry: Vancouver

Between:

Ian Craig Manson

Plaintiff

And

Jeffrey Adam Mitchell, Revelstoke Alpine School Inc., and Association of Canadian Mountain Guides

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	C. Watson J.G.M. Foster
Counsel for the Defendants:	R.B.J. Kennedy, K.C. J.A. Brook
Place and Dates of Trial:	Vancouver, B.C. November 2-3, 2022
Place and Date of Judgment:	Vancouver, B.C. May 2, 2023

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Overview

[1] This action arises out of injuries suffered by the plaintiff, Ian Manson, as a result of a mountaineering incident ("Incident"), which occurred on the face of Mt. Rogers in Glacier National Park, B.C., on July 15, 2021 ("Mt. Rogers Expedition"). Mr. Manson is alleged to have suffered physical and psychological injuries and resulting economic loss as a result of the Incident.

[2] Mr. Manson claims against his mountaineering guide, Jeffrey Mitchell, and Mr. Mitchell's guiding company, Revelstoke Alpine School Inc. ("Revelstoke Alpine"), for negligence and breach of contract. He also claims against the Association of Canadian Mountain Guides ("ACMG"), a society that provides, among other things, accreditation and training for mountain guides.

[3] More specifically, Mr. Manson alleges that while belaying and when directly above Mr. Manson on the mountain, Mr. Mitchell tested the stability of a rock, thereby causing the rock to dislodge and fall towards Mr. Manson. Mr. Manson says that he moved to avoid the rock and then Mr. Mitchell either lost control or let go of the rope, which in turn caused Mr. Manson to lose his balance and fall backwards.

[4] Mr. Manson fell approximately seven meters before reaching the full length of the working rope, then arrested his fall on a ledge. As a result of the tightening of Mr. Manson's rope, Mr. Mitchell was dislodged from his stance. Both men were injured and evacuated by helicopter.

[5] The defendants seek, by way of summary trial, a declaration that a wavier signed by Mr. Manson on June 17, 2021 ("Waiver") applies to the mountaineering trip on which the Incident occurred, and therefore serves as a full answer and defence to Mr. Manson's claim. Mr. Manson applies by way of summary trial for a declaration that the Waiver does not apply to the Incident. In his submission, the Waiver was date-specific and applies to a different trip, on a different date, with different risks than the expedition that resulted in the Incident, and in any event, does not apply to the corporate defendant Revelstoke Alpine.

[6] The details of the Incident and a determination on liability are not before me on this summary trial, and I do not make any findings in that regard.

[7] For the reasons that follow, I find that the Waiver does not apply to the Mt. Rogers Expedition and accordingly is not a defence to Mr. Manson's claim.

Facts

[8] Mr. Manson is an avid outdoorsman, who has hired guides numerous times for heli-skiing, cat-skiing, ski-touring, rock climbing, and mountaineering. At the time of the Incident, he was 63 years old.

[9] Mr. Mitchell is a professional mountain guide, certified by the ACMG. He has been a member of the ACMG since 2011 and worked as a mountain guide since 2016. Mr. Mitchell is the owner and an employee of the corporate defendant Revelstoke Alpine. Prior to January 7, 2021, Revelstoke Alpine was known as Revelstoke Mountain School Inc.

[10] Mr. Manson was referred to Mr. Mitchell by their mutual plumber, Scott Hobson. Mr. Manson reached out to Mr. Mitchell by text message on June 6, 2021, writing that "I am 'old' (as in an old man) but keen. Pre[-p]andemic I was fit, now I am fat but still keen". Mr. Manson indicated that he wanted to do mountaineering and sport-climbing, and a scramble up Mt. Denman. The parties agree that mountaineering and sport-climbing are "quite different" activities.

[11] On June 7, 2021, Mr. Mitchell replied to Mr. Manson indicating that he was amenable to taking him climbing and getting him on a training program. Mr. Mitchell's evidence is that his use of the words "training program" were not in response to anything Mr. Manson said in his text message, but rather in response to what Mr. Hobson had told him about Mr. Manson's climbing goals for the summer.

Meeting at Revelstoke Pub

[12] Mr. Manson and Mr. Mitchell arranged to meet in person on June 15, 2021, at a pub in Revelstoke ("June 15th Meeting"). Mr. Manson's partner, Sally Simond, also

attended. There are conflicts in the evidence as to what was discussed at the June 15th Meeting.

[13] What is not disputed is that Mr. Manson and Mr. Mitchell discussed Mr. Manson's climbing experience and goal of climbing Mt. Denman. They also discussed going for a short local sport-climb so Mr. Mitchell could assess Mr. Manson's climbing skills and level of fitness, and Mr. Manson could in turn observe Mr. Mitchell guiding in a climbing environment.

[14] Mr. Manson says that during the June 15th Meeting, Mr. Mitchell checked his calendar on his phone and advised Mr. Manson of the days that he might be available to climb with him. Mr. Mitchell told Mr. Manson to book the dates he wanted online, through Mr. Mitchell's website. Mr. Manson's uncontradicted evidence on this point is that he did not make any online bookings.

[15] The principal differences in Mr. Mitchell and Mr. Manson's evidence about what transpired at the June 15th Meeting relate to two points: (a) whether a "summer climbing program" was discussed; and (b) whether Mr. Mitchell advised Mr. Manson that he would have to sign a release.

[16] With respect to the first point, Mr. Mitchell says in his affidavit that he and Mr. Manson agreed at the June 15th Meeting that:

a) Mr. Manson was going to retain Mr. Mitchell "as a mountain guide for all of [his] available time for a series of climbs during the summer of 2021"; and

b) their first trip together as part of this "summer climbing program" would be a day of sport-climbing at Begbie Bluffs on June 18, 2021 ("June 18th Begbie Climb").

[17] Mr. Mitchell recalled telling Mr. Manson that he would be sending him a message confirming his availability and a copy of the waiver Mr. Manson would need to sign. Mr. Mitchell's evidence is that it was his standard practice to advise new

clients about his waiver and that they would need to sign it before their first trip together.

[18] Mr. Mitchell was asked about the June 15th Meeting at his examination for discovery. At that time, he described the June 15th Meeting as a business meeting at which alcohol was consumed and testified that he had never before been retained by a single client for all of his available time for an entire season. Mr. Mitchell's evidence about whether a "summer climbing program" was discussed was equivocal: he could not say for certain whether or not the words "summer climbing program" were mentioned at the June 15th Meeting. Mr. Mitchell also admitted on discovery that he did not take any notes at the meeting, and did not confirm the agreement for the "summer climbing program" in writing after that meeting.

[19] Mr. Manson and Ms. Simond deny that there was any discussion of a "summer climbing program" at the June 15th Meeting or agreement that Mr. Manson was retaining Mr. Mitchell for all of his available time that summer. They also each deny any discussion of a waiver.

Circumstances Leading up to the Execution of the Waiver

[20] On June 16, 2021, Mr. Manson sent Mr. Mitchell an email seeking to confirm the dates that Mr. Mitchell would be available to guide him. Mr. Mitchell responded the same day, confirming his availability and advising Mr. Manson that he could book through the website, telling him "Just go to the dates in private guiding and book them. [It's] that easy". Mr. Mitchell's email did not mention or include a copy of a waiver.

[21] As of June 16, 2021, Mr. Mitchell and Mr. Manson had narrowed down certain potential dates for rock climbing and mountaineering excursions together, namely June 18, June 25–30, July 1–2, July 10–16, and August 2–9.

[22] The following day, June 17, 2021, Mr. Manson emailed Mr. Mitchell at 7:43 a.m. indicating that he would like to book the sport-climb "around town" on June 18 and an expedition to Mt. Denman on June 25–30. Notably, Mr. Manson does not

mention Begbie Bluffs as the location for their first outing of sport climbing around town.

[23] Mr. Mitchell responded by way of two emails. First, by separate email sent at 7:45 a.m., Mr. Mitchell wrote to Mr. Manson saying that he was looking forward to climbing with him the following day, asked what gear Mr. Manson had, and told him that he would need to sign a waiver before they headed out ("June 17th Email"):

> From: Jeff Mitchell
> Sent: Thursday, June 17, 2021 7:45 AM
> To: Manson, Ian
> Subject: Prep for Tmrw
> Attachments: Begbie Bluffs .kmz
>
> Hey Ian,
>
> Looking forward to getting out and doing some Rock Climbing with you tmrw. I just wanted to check in with you about gear. Do you have rock climbing shoes, harness, and a helmet?
>
> Also, I have a digital waiver that you will need to sign before we head out. The link is below.
>
> https://waiver.smartwaiver.com/w/5f847982ded79/web
>
> Let me know if you have any questions.
>
> Let's meet at 9 AM at the Begbie Bluffs Parking lot. I'll attach a KMZ of the parking lot location.
>
> See you tmrw, Jeff.
>
> [*photo*]
>
> Jeff Mitchell
>
> Revelstoke Alpine School
>
> ACMG Mountain Guide
>
> RevelstokeAlpineSchool.ca
>
> 250 200 0101

[24] It is undisputed that the June 17th Email is the only written correspondence between Mr. Manson and Mr. Mitchell about the Waiver. It also appears to be the first time Begbie Bluffs is identified in any written correspondence as the location for the sport climbing outing.

[25] Mr. Mitchell takes the position that the June 17th Email refers to all of the adventures that he and Mr. Manson had planned at the time or may in the future plan over the course of the summer, pursuant to the "summer climbing program" he says was agreed to at the June 15th Meeting. The defendants concede, however, that there is no evidence that Mr. Mitchell ever communicated to Mr. Manson that he intended the Waiver to apply to outings subsequent to the June 18th Begbie Climb. Nor is there any mention of a "summer climbing program" in the text or email correspondence between Mr. Mitchell and Mr. Manson, whether in relation to the Waiver or otherwise.

[26] The second email Mr. Mitchell sent on the morning of June 17, 2021, replied to Mr. Manson's 7:43 a.m. email. This email was sent by Mr. Mitchell at 08:08 a.m. and in it, Mr. Mitchell confirmed that he would pencil Mr. Manson in for the June 18 and June 25–30 dates. He also indicated that he would research current alpine conditions on the coast for the Mt. Denman expedition, and that he and Mr. Manson "will talk more about it tmrw".

[27] Mr. Manson completed and signed the Waiver through the weblink in Mr. Mitchell's June 17th Email at 7:54 a.m. that same day by initialling it with the letter "M" in two locations, one of which was above the words "Participant's Signature". He also provided the requested personal information.

Excursions and Correspondence Post-Waiver and Prior to the Incident

[28] Mr. Manson and Mr. Mitchell climbed together at Begbie Bluffs on June 18, 2021, without incident. That same day, Mr. Manson paid $450 for the June 18th Begbie Climb by e-transfer to revelstokemountainschool@gmail.com. The e-transfer confirmation he received showed that the payment was made to Revelstoke Mountain School Inc. Mr. Manson says that this is the first time he became aware that he was dealing with a limited liability company.

[29] On June 25–27, 2021, Mr. Manson, Mr. Mitchell, and Mr. Mitchell's partner Rachel Reimer (also an experienced mountaineer) successfully completed a three-day mountaineering expedition to Mt. Denman ("Mt. Denman Expedition"). Mr.

Mitchell did not request that Mr. Manson sign a waiver before this expedition. Nor did he discuss the Waiver with Mr. Manson or communicate his intention that the Waiver applied to the Mt. Denman Expedition. On July 8, 2021, Mr. Manson paid $2,395.77 for the Mt. Denman Expedition by e-transfer to revelstokemountainschool@gmail.com, which comprised three days of guiding fees of $600 per day plus expenses.

[30] In early July 2021, Mr. Mitchell and Mr. Manson communicated about other potential expeditions that could be undertaken over the course of the summer. The idea of climbing Mt. Rogers was first raised by Mr. Mitchell in a July 3, 2021, email. A three-day excursion and ascent of Mt. Rogers was subsequently planned for July 14–16, 2021.

[31] The parties did not discuss the Waiver between the Begbie Climb and the Mt. Rogers Expedition. Mr. Mitchell did not ask Mr. Manson to sign a further waiver in advance of the Mt. Rogers Expedition nor did he communicate to Mr Manson his intention that the Waiver applied to this expedition.

[32] The Mt. Rogers Expedition began as planned on July 14, 2021. The Incident occurred the following day on July 15, 2021.

The Waiver

[33] Mr. Mitchell is insured through the ACMG's insurance program. As a condition of coverage, he is required to have all clients sign the ACMG's release of liability prior to guiding them. Mr. Mitchell testified that the purpose of the ACMG waiver is twofold: first, it informs the client of the risks, dangers, and hazards that the client may face during a guided activity; second, it contains a release of liability in favour of the named releasees.

[34] Mr. Mitchel testified that it is his practice never to embark on a guiding trip without having the client sign a waiver, and that he has never guided a client without them doing so. He also testified that when clients retain him to guide them on multiple dates, his standard practice is to "have them sign a single waiver at the

beginning of the program or season prior to embarking on the first guiding trip". Prior to the COVID-19 pandemic, Mr. Mitchell normally used a paper waiver that the client would sign in his presence prior to a climb or expedition. However, as a result of the pandemic, he transitioned to using an electronic waiver to minimize face-to-face contact between himself and clients.

[35] Mr. Manson was experienced in signing waivers when he went rock climbing or mountaineering with a guide, having done so on multiple prior occasions. Mr. Manson had never climbed with a guide in Canada or the United States without signing a waiver, though his evidence was that he did so on a trip-by-trip basis—i.e. he signed a separate waiver for each trip. As such, Mr. Manson was not surprised when Mr. Mitchell asked him to sign a waiver.

[36] The Waiver provided as follows:

> **To: Revelstoke Alpine School; ASSOCIATION OF CANADIAN MOUNTAIN GUIDES; HER MAJESTY THE QUEEN IN RIGHT OF CANADA;** and their directors, officers, employees, guides, agents, independent contractors, subcontractors, representatives, successors and assigns (all of whom are hereinafter collectively referred to as **"the Releasees"**)
>
> **WILDERNESS ACTIVITIES**
>
> In this Release Agreement, the term **"wilderness activities"** shall include but is not limited to: alpine skiing, nordic skiing, telemark skiing, snowboarding, hiking, touring, mountaineering, rock climbing, ice climbing, expeditions, trekking, glacier travel, and all activities, services and use of facilities either provided by or by the Releasees including orientation and instructional sessions or classes, transportation, accommodation, food and beverage, and water supply, and all travel by or movement around helicopters, other aircraft, snowcats, snowmobiles or other vehicles and camping or overnight stays in the outdoors.
>
> …
>
> In consideration of the Releasees allowing me to participate in wilderness activities as defined in this Release Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, I hereby agree as follows:
>
> 1. **TO WAIVE ANY AND ALL CLAIMS** that I have or may in the future have against the Releasees and **TO RELEASE THE RELEASEES** from any and all liability for any loss, damage, expense or injury including death that I may suffer … as a result of my participation in wilderness activities, DUE TO ANY CAUSE

> WHATSOEVER, INCLUDING NEGLIGENCE, BREACH OF CONTRACT…
>
> …
>
> In entering into this Release Agreement I am not relying on any oral or written representations or statements made by the Releasees with respect to the safety of wilderness activities, other than what is set forth in this Release Agreement.
>
> **I CONFIRM THAT I HAVE READ AND UNDERSTOOD THIS RELEASE AGREEMENT PRIOR TO SIGNING IT, AND I AM AWARE THAT BY SIGNING THIS RELEASE AGREEMENT I AM WAIVING CERTAIN LEGAL RIGHTS WHICH I OR MY HEIRS, NEXT OF KIN, EXECUTORS, ADMINISTRATORS, ASSIGNS AND REPRESENTATTIVES MAY HAVE AGAINST THE RELEASEES.**
>
> Today's Date: June 17, 2021
>
> [emphasis in original]

[37] The Waiver contained a section titled "Trip Details". It is undisputed that Mr. Manson inserted the date of June 18, 2021—the date of the following day's Begbie Climb—above the words "Trip Date" in this section of the Waiver. Mr. Manson selected this date from the drop-down menu in the electronic waiver program. Mr. Manson's evidence is that this field was pre-populated such that the only options available to him were to choose a specific single date from a drop-down calendar, which he did.

[38] Mr. Mitchell testified that on the morning of June 18, 2021, he checked the Waiver and confirmed that Mr. Manson had properly signed and completed it. Mr. Mitchell did not recall whether he specifically noted the June 18, 2021, date when he reviewed the Waiver, but regardless, he intended that the Waiver would cover all of his and Mr. Manson's guided activities pursuant to the "summer climbing program" that would take place over the summer of 2021.

[39] Mr. Mitchell testified that he understood Mr. Manson had the same intention. However, there is no evidence that Mr. Mitchell communicated his intention that the Waiver would apply to all future rock climbing and mountaineering outings that Mr. Manson may hire him for over the course of the summer, or pursuant to a "summer climbing program", to Mr. Manson.

[40] Mr. Manson did not tell Mr. Mitchell that he shared Mr. Mitchell's understanding that the Waiver would apply to all of their climbing activities over the course of the summer. Nor did he tell Mr. Mitchell that he had a different understanding, i.e. that the Waiver was limited to the June 18th Begbie Climb. Mr. Manson's evidence is that there was no discussion whatsoever between him and Mr. Mitchell about the Waiver.

[41] It is undisputed that the only communication between Messrs. Mitchell and Manson about the Waiver specifically is reflected in Mr. Mitchell's June 17th Email. Neither party says that they verbally discussed the Waiver, either on June 17, 2021, when Mr. Mitchell sent to Mr. Manson and he signed it, or at any time thereafter.

[42] It is also undisputed that Mr. Manson read and understood the Waiver when he signed it and that he is bound by it. As such, if the Waiver applies to the Mt. Rogers Expedition and all of the defendants are found to be releasees under the Waiver, then the plaintiff agrees that the scope and wording of the Waiver covers the Incident and the allegations of negligence in this action.

Issues

[43] The issues to be decided on this summary trial are:

a) Does Waiver apply to the Mt. Rogers Expedition;

b) Should the Wavier be rectified to substitute "Summer of 2021" in place of "June 18, 2021"; and

c) If the Waiver applies to the Mt. Rogers Expedition, as drafted or if rectified, does it apply to Revelstoke Alpine?

[44] Mr. Manson says that the Waiver does not bar his claim because it is expressly date-specific, and therefore only applies to the June 18th Begbie Climb. Mr. Manson also says that the Waiver does not apply to Revelstoke Alpine, either expressly or by reference.

[45] The defendants say the Waiver applies to all rock climbing and mountaineering trips where Mr. Mitchell guided Mr. Manson in the summer of 2021, including the Mt. Rogers Expedition. If the Waiver does not apply to the Mt. Rogers Expedition as drafted, then the defendants say it ought to be rectified to replace "June 18, 2021" with "Summer of 2021".

[46] The defence of voluntary assumption of risk is also pleaded, but was not advanced on this summary trial application, nor did the defendants pursue their allegations of bad faith against the plaintiff. Further, while the defendants' application materials seek rectification based on both common and unilateral mistake, only rectification based on common mistake was advanced at the hearing.

Analysis

Suitability for Summary Trial

[47] On a summary trial application, the court must be satisfied that it can find the facts necessary to decide the disputed issues: Rule 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. The factors to be considered in determining if it would be just to decide the matter by way of summary trial include: the complexity and urgency of the matter, the costs of proceeding to a conventional trial compared to the amount involved, whether a summary trial will add unnecessary complexity to the matter, and whether a summary trial would amount to litigating in slices: *Saran v. Cartonio, Inc.*, 2020 BCSC 556 at para. 37, aff'd 2020 BCCA 252, citing *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31. No factor is determinative on its own: *Saran* at para. 38.

[48] Proceeding by way of summary trial is not precluded by the fact that there is a conflict in the evidence: *Jamieson v. Whistler Mountain Resort Limited Partnership*, 2017 BCSC 1001, at para. 68, citing *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 22. The determinative issue is whether the court is able to find the facts necessary to decide the issues of fact or law raised on the summary trial application and deliver a just and fair result: Rule 9-7(15) of the *Rules*; *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89*;* see also

Inspiration Mgmt. Ltd. v McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 at 214–215, 1989 CanLII 229 (C.A.).

[49] Where there is little dispute as to the factual matrix, cases involving the interpretation and application of waivers can be ideal candidates for determination by way of summary trial: *Dixon v. B.C. Snowmobile Federation et al.*, 2003 BCCA 174, at para. 5; *Jamieson* at paras. 65–73.

[50] In this case, all parties submit that the issues are suitable for determination by summary trial. Consent of the parties is an important consideration, but is not determinative. The court acts as a gatekeeper and should not grant judgment if it cannot find the necessary facts or it would be unjust to do so: *Main Acquisitions Consultants Inc.* at para. 89.

[51] The parties both submit that the conflicts in the evidence about what was said at the June 15th Meeting do not render the matter unsuitable for determination by way of summary trial, because the Court can look to other evidence to find the facts necessary to determine the issues that arise. Having considered the whole of the evidence before me, I agree that this case is suitable for determination by summary trial.

[52] I am cognizant that there are conflicts in the evidence as to what was discussed between Mr. Manson and Mr. Mitchell at the June 15th Meeting. Yet as the Court noted in *Jamieson*, rare is the case where there is complete agreement on all of the evidence: at para. 68, citing *MacMillan* at para. 22. In my view, the conflicts in the evidence regarding the June 15th Meeting can be resolved by reference to the whole of the evidence before me, including evidence given on examination for discovery and the contemporaneous text messages and email communications between Mr. Mitchell and Mr. Manson.

Does the Waiver Apply to the Incident?

[53] Mr. Manson’s position is that in accordance with its express terms, the Waiver applies only to the June 18th Begbie Climb. The defendants conceded in their oral

submissions that if the Court considers only the language of the Waiver, then Mr. Manson's position prevails. However, the defendants say that *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] requires the Court to look beyond the words of the contract and interpret those words in light of the surrounding circumstances and the purpose of the contract, and that doing so results in the only reasonable interpretation of the Waiver, being that it applies to the Mt. Rogers Expedition.

[54] The enforceability of the Waiver is determined by applying the framework set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 [*Tercon*]: *Alton v. Lower Mainland Motocross Club*, 2017 BCSC 2460 at paras. 35–36, citing *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 27. The *Tercon* framework comprises three questions:

> 1. As a matter of ordinary contractual interpretation, does the exclusion clause apply to the circumstances established in the evidence?
> 2. If so, was the exclusion clause unconscionable at the time the contract was made (*e.g.*, because of unequal bargaining power, *et cetera*)?
> 3. If the clause is valid and applicable, should the court decline to enforce it because of an overriding public policy concern that outweighs the very strong public interest in the enforcement of contracts?
>
> *Cooper v. Blackwell*, 2017 BCSC 1991 at para. 25, citing *Tercon* at paras. 121–123.

[55] Mr. Manson concedes that the Waiver is not unconscionable and that there are no overriding public policy concerns that militate against its enforcement. As such, only the first branch of the *Tercon* test is in issue, namely whether as a matter of ordinary contractual interpretation, the Waiver applies to the Mt. Rogers Expedition and, therefore, the Incident.

[56] Determining whether the Waiver applies to the Mt. Rogers Expedition is an exercise in contractual interpretation. The ordinary rules of contractual interpretation apply to releases: *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 34, 43 [*Corner Brook*]; see also *Rai v. Sechelt (District)*, 2021 BCCA 349 at para. 46.

[57] The overriding goal when interpreting a contract is to determine the intent of the parties and the scope of their understanding at the time the contract was made. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *Sattva* at para. 47. The central question is what was the parties' mutual and objective intention as expressed by the words of the contract: *Sattva* at para. 57; *Corner Brook* at para. 32.

[58] The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting: *Sattva* at para. 60; *Wade v. Duck*, 2018 BCCA 176 at para. 26. As *Sattva* makes clear, the surrounding circumstances or factual matrix within which the contract was formed are considered when interpreting a contract, but must not be allowed to overwhelm the words of the contract within the interpretation exercise: *Sattva* at para. 57.

[59] Thus, in the context of interpreting whether the Waiver applied to the Mt. Rogers Expedition, *Sattva* limits the admissible evidence to what the parties knew or ought to reasonably have known at the time the Waiver was signed on June 17, 2021: *Sattva* at para. 60. In the present circumstances, the evidence of the surrounding circumstances encompasses Mr. Manson and Mr. Mitchell's discussions at the June 15th Meeting, together with their text and email correspondence prior to Mr. Manson executing the Waiver on June 17, 2021.

[60] A party's subjective intention is irrelevant; the court must instead determine the parties' mutual intention based on objective evidence of their conduct and the surrounding circumstances: *Ratanshi v. Brar Natural Flour Milling (B.C.) Ltd*., 2021 BCSC 2216 at para. 71; see also *Sattva* at para. 59. The parole evidence rule precludes having regard to evidence outside the words of the written contract to add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing: *1001790 BC Ltd. v. 0996530 BC Ltd*., 2021 BCCA 321, at para. 44, citing *Sattva* at para. 59.

[61] Finally, a release "will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution": *Corner Brook* at para. 29, citing *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291 at para. 17 [*Bank of British Columbia*]. In this way, the proper approach to interpreting releases under the ordinary principles of contractual interpretation prescribed by *Sattva* is consistent with the approach to releases formerly applied using the Blackmore Rule: *Corner Brook* at paras. 29, 32.

[62] In the defendants' submission, interpreting the Waiver in light of surrounding circumstances mandates the conclusion that the "June 18, 2021" date in the Waiver is not limited to that date, but rather represents the first day of a series of guided outings that Mr. Manson and Mr. Mitchell were going to undertake together that summer. The defendants say that Mr. Mitchell and Mr. Manson "clearly" considered, at the time the Waiver was executed, that the "Trip Date" of June 18, 2021, was "simply the first day of a series of trips that [Mr. Manson] and [Mr. Mitchell] had discussed engaging in together" over the course of the summer.

[63] I disagree. As a starting point, what Messrs. Manson and Mitchell indicated to the outside world is to be determined within the four corners of the contract: *1001790 BC Ltd.* at para. 42. On its face, the Waiver expressly applies to the Begbie Climb on June 18, 2021. The date "June 18, 2021" that was inserted by Mr. Manson into the "trip date" field of the Waiver is clearly and unequivocally to that effect.

[64] Interpreting the Wavier in light of the surrounding circumstances does not yield a different result. Rather, the surrounding circumstances support a finding that Mr. Mitchell and Mr. Manson's mutual intent, objectively determined, was that the Waiver applied to the June 18th Begbie Climb. More specifically:

a) There were no other rock climbing or mountaineering trips confirmed at the time the Waiver was signed. Dates for the Mt. Denman Expedition were "pencilled in", but that expedition was not confirmed until June 21, 2021;

b) Mr. Mitchell and Mr. Manson were contemplating additional potential dates in July and August—including the July 10–16 dates that eventually became the Mt. Rogers Expedition—but neither those dates or the expeditions to be undertaken were confirmed;

c) There had been no discussion whatsoever between the parties about an expedition to Mt. Rogers prior to Mr. Manson executing the Waiver;

d) There is no evidence of any communications between Mr. Mitchell and Mr. Manson in which Mr. Mitchell communicated his subjective intention that the Waiver would apply to any and all guided trips the two of them did together over the course of summer 2021; and

e) Mr. Mitchell reviewed the Waiver after Mr. Manson inserted the "June 18, 2021" date in the "Trip Date" field and "confirmed that Mr. Manson had properly signed and completed it".

[65] Moreover, the only documented communication between Mr. Manson and Mr. Mitchell about the Waiver is Mr. Mitchell's June 17th Email sending the Waiver to Mr. Manson. The only trip contemplated in that email is the June 18th Begbie Climb. Mr. Mitchell twice refers to the following day's Begbie Climb, using the abbreviation "tmrw" (tomorrow—i.e. June 18, 2021) in both the subject line of the email ("Prep for Tmrw") and with reference to them "getting out and doing some Rock Climbing with you tmrw".

[66] Mr. Mitchell's June 17th Email does not mention a "summer climbing program" or any other rock climbing or mountaineering trips over the course of the summer. Nor did Mr. Mitchell refer to any other dates or trips in June, July, or August 2021, when he sent Mr. Manson the link to the Waiver. I accept that the Mt. Denman Expedition was being discussed and the June 25–30 prospective dates for that trip were "pencilled in" as of June 17, 2021, but Mr. Mitchell did not send the Waiver to Mr. Manson in his 8:08 a.m. email "penciling in" June 18th for the Begbie Climb and the June 25–30 dates that would later become the June 25–27 Mt. Denman

Expedition. Rather, he sent the Waiver to Mr. Mitchell in his 7:45 a.m. email confirming the June 18th Begbie Climb and providing Mr. Manson with additional information for that climb alone.

[67] The substantive content of Mr. Mitchell's June 17th Email is also limited to rock climbing at Begbie Bluffs. Mr. Mitchell references Begbie Bluffs and provides a map to that location. He also lists the gear required for the planned half-day rock climbing trip. Mr. Mitchell does not mention any other climbs or types of mountaineering activities or the additional gear that would be required for a multi-day mountaineering trip.

[68] Accordingly, I do not accept the defendants' submission that Mr. Mitchell's use of the words "before we head out" when telling Mr. Manson that a waiver needed to be signed in the June 17th Email refers to anything other than the following day's rock climbing outing to Begbie Bluffs. The June 18th Begbie Climb was the only trip confirmed as of June 17, 2021, when Mr. Manson inserted "June 18, 2021" into the "Trip Date" field of the Waiver and signed it. As such, I find that the words used by Mr. Mitchell in his June 17th Email, read in context with Mr. Mitchell's multiple references to "tmrw", leads to the conclusion that the reasonable and objective intentions of the parties were that the application of the Waiver was limited to the June 18th Begbie Climb.

[69] Nor do I accept the defendants' submission that Mr. Manson and Mr. Mitchell's email correspondence of June 16, 2021, suggests that the June 18, 2021, date in the Waiver was simply the first in a series of dates that were part of the "express written communication" for guided climbing and mountaineering activities. In that correspondence, Mr. Mitchell and Mr. Manson discussed potential dates for additional guided trips in June, July and August, some of which dates ended up being the dates of the Mt. Rogers Expedition. The fact that additional dates were being contemplated when the Waiver was signed is not disputed, but also does not change the fact that only the June 18th Begbie Climb was confirmed when Mr. Manson signed the Waiver.

[70] More importantly, the Mt. Rogers Expedition was not within the parties' contemplation as of June 17, 2021. Mr. Manson and Mr. Mitchell had not had any discussions whatsoever about the Mt. Rogers Expedition. The prospect of undertaking that expedition was first raised by Mr. Mitchell in a July 3, 2021, email to Mr. Manson.

[71] Mr. Mitchell also relies on his assertion that he told Mr. Manson at the June 15th Meeting that a waiver would be required. I have no reason to reject Mr. Mitchell's evidence that he mentioned the need for a waiver at the June 15th Meeting. However, accepting this evidence does not change the analysis. Mr. Mitchell's evidence is that as he and Mr. Manson were leaving the restaurant at the end of the June 15th Meeting, Mr. Manson asked about next steps and that "I told Mr. Manson that I would send him a message confirming my available dates and a copy of my wavier that he would need to sign". Mr. Mitchell does not go so far as to say that the prospective waiver was discussed in any detail at that meeting, or that he told Mr. Manson that the form of waiver he would be sending would apply to all guided trips they might do together over the course of that summer. Mr. Mitchell's evidence simply does not assist in establishing a mutual and objective intent that the Waiver applied not just to the June 18, 2021 trip as specified therein, but to all guided outings that may later occur over the course of the summer.

[72] Mr. Mitchell's June 17th Email sending the online Waiver to Mr. Manson does not make any mention, either expressly or by implication, of a previous discussion about a waiver, be it one that would apply to all outings over the course of the summer, or at all. Rather, the language used by Mr. Mitchell—"Also, I have a digital waiver that you will need to sign before we head out"—is consistent with that being the first instance in which the waiver was raised in any substantive way and with it sent in respect of the following day's climb.

[73] As such, I find that the surrounding circumstances simply do not provide any basis to depart from the express wording of the "Trip Date" field of the Waiver. The factual matrix within which the Waiver was executed does not support an objective

mutual intention on the part of Mr. Mitchell and Mr. Manson that “June 18, 2021” in the “Trip Date” field of the Waiver was understood to mean anything other than the June 18th Begbie Climb.

[74] At base, the defendants’ proposed interpretation of the Waiver invites me to do exactly that which is not permitted by *Sattva* and which the Court of Appeal found constituted reversible error in *1001790 BC Ltd.*: allow the surrounding circumstances as they were subjectively understood by Mr. Mitchell to overwhelm the words of the Waiver by adding to, varying or contradicting a written contract. Accepting the defendants’ position would allow Mr. Mitchell’s subjective intention to effectively create a new agreement on terms that were never discussed by Mr. Mitchell and Mr. Manson. *Sattva* is clear that such an approach to contractual interpretation is impermissible:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> [emphasis added]

[75] I agree with Mr. Manson that the present circumstances are akin to those in *Cooper*, where a client was accidentally shot and killed by his guide while participating in a grizzly bear hunt. The deceased had signed releases for prior grizzly hunting trips in 2009, 2012, and 2013. When the 2013 release was signed, Mr. Cooper only contemplated participating in one hunt: the 2013 hunt. However, the 2013 hunt was unsuccessful and as such, Mr. Cooper was offered to return the following year free of charge. He was not asked by the guide to sign a new release when he returned in 2014.

[76] In those circumstances, the Court found that the release did not apply to the 2014 hunt because, at the time of its execution, it was contemplated and intended by both parties that it applied to the 2013 hunt, reasoning as follows:

> [31] The Liability Release Agreement was signed by Mr. Cooper on July 28, 2013. At that time, there was only one "guided excursion" in which Mr. Cooper was scheduled to participate; that, of course, was the grizzly hunt set for September 1–10, 2013. To use the plaintiff's terminology, it was a date-specific excursion, expected and intended by all parties to start on September 1 and finish on September 10, 2013. The contract did not come with a successful hunt guarantee. There was no obligation on Wistaria's part, nor indeed was there any expectation or contemplation by any of the participants, that the hunt would be extended or continued if a grizzly was not "bagged" on or before September 10, 2013.
>
> [32] These surrounding circumstances strongly militate in favour of a conclusion that, at the time of its execution, the Liability Release Agreement was contemplated and intended by both parties to apply only to the hunting excursion starting on September 1 and ending on September 10, 2013.
>
> [33] I have no hesitation in concluding that the grizzly hunt in May 2014 was a separate and distinct excursion not in any way contemplated by the parties at the time the July 28, 2013 Liability Release Agreement was executed by Mr. Cooper. Since the wording of that Agreement refers only to the excursion which had been contracted for by the parties at the time of the document's execution, I find that, properly interpreted, it has no application to the fatal accident that occurred some 8 1/2 months following completion of the September 2013 hunt.

[77] As in *Cooper*, here, the June 18th Begbie Climb was the only guided excursion in which Mr. Manson was scheduled to participate in when he signed the Waiver. Similarly, there was no obligation on Mr. Manson to hire Mr. Mitchell, or on Mr. Mitchell to guide Mr. Manson, on future climbs. As the parties discussed at the June 15th Meeting, the purpose of the June 18th Begbie Climb was for Mr. Mitchell to assess Mr. Manson's fitness and skill level, and Mr. Manson to assess Mr. Mitchell's performance as a guide. Likewise, the wording of the Waiver here only refers to the June 18th Begbie Climb that had been confirmed when the release was signed.

[78] The Court in *Cooper* also noted that a party's subjective rationale or intent is inadmissible evidence when informing the proper interpretation of a release. The Court then rejected the same argument being advanced here by Mr. Mitchell that he

subjectively intended the Waiver would apply to all of his trips with Mr. Manson over the summer of 2021:

> [34] I do not doubt that each of Mr. and Mrs. Blackwell may well have considered the 2014 hunt to have been a "continuation" or "extension" of the unsuccessful hunt undertaken almost nine months earlier. One can readily understand from a commercial perspective how the "no additional fee" aspect of the venture might reinforce such a view. However, the law is clear that their subjective rationale and intent in providing Mr. Cooper a no-fee hunt is not admissible evidence, whether under the guise of "surrounding circumstances" or otherwise, informing the proper interpretation of the Liability Release Agreement signed on July 28, 2013.
>
> [emphasis added]

[79] The defendants say *Cooper* is distinguishable because at the time the release was signed, the 2014 hunting trip was “not remotely within the parties’ contemplation” such that it was understandable that in those circumstances, the Court did not extend the 2013 release to the 2014 hunting trip. This is not, in my view, a distinguishing factor. Rather, the same circumstances arise here, in that the Mt. Rogers Expedition was not within Messrs. Manson and Mitchell’s contemplation at the time the Waiver was signed.

[80] As such, I find that the result in *Cooper* likewise follows here, namely that properly interpreted, the Waiver has no application to the Incident that occurred almost a month later on a different trip with different risks that was not within Mr. Manson’s contemplation when he signed it.

[81] Limiting the applicability of the Waiver to the June 18th Begbie Climb is also consistent with the requirement that as a matter of law, a waiver requires an unequivocal and conscious intention to abandon rights: *Cooper* at para. 41; *Sandhu v. Mangat*, 2018 BCCA 454 at para. 58. The Mt. Rogers Expedition had not even been raised by Mr. Mitchell as of June 17, 2021, and was thus was not within Mr. Manson’s contemplation at the time he signed the Wavier. The Mt. Rogers Expedition was also an entirely different trip in nature, activity level, duration, and risk profile than the June 18th Begbie Climb. Considered within this factual context, the defendants’ assertion that the Waiver applies to the Mt. Rogers Expedition runs

afoul of the well-settled principle that a release "will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution": *Bank of British Columbia* at para. 17.

[82] Express notice and clarity of language are also essential: *Apps v. Grouse Mountain Resorts Ltd*., 2020 BCCA 78 at para. 25; *Tercon* at paras. 71–73; *Ferrer v. Janik*, 2019 BCSC 1004 at para. 26, aff'd *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. Likewise, there is no evidence of express notice to Mr. Manson that the Waiver would apply to anything other than the June 18th Begbie Climb. The evidence in this regard is limited to Mr. Mitchell's subjective intention that the Waiver would apply to any guided outings they may do together over the course of the summer, which he never communicated to Mr. Manson.

[83] Moreover, Mr. Mitchell testified that he was aware that having a proper waiver in place prior to guiding a client was important for insurance purposes. Accepting this to be the case, then it was all the more so incumbent on him to have confirmed his understanding that the Waiver applied not just to the June 18th Begbie Climb on the date stated therein, but to all future climbing or mountaineering trips they might undertake over the course of the summer. In such circumstances, Mr. Mitchell's asserted subjective intention is difficult to reconcile with his evidence that he reviewed the Waiver on June 18, 2021, after Mr. Manson inserted the June 18, 2021, date and "confirmed that Mr. Manson had properly signed and completed it".

Should a Term be Implied into the Waiver?

[84] The defendants plead in the alternative that the factual matrix leading to execution of the Waiver requires that a term be implied to the Waiver. The term they assert ought to be implied is that the Waiver was intended to apply to the climbing and mountaineering activities within the contemplation of the parties in the summer of 2021.

[85] I do not accept this submission for two reasons. First, it is simply an attempt to recast a submission that I have already rejected as an impermissible approach to contractual interpretation, namely that Mr. Mitchell's subjective intention ought to be

preferred over the express language of the Waiver interpreted in light of the surrounding circumstances, objectively interpreted.

[86] Second, the Mt. Rogers Expedition was not within Mr. Manson and Mr. Mitchell's contemplation at the time the Waiver was executed. Accordingly, implying a term that the Waiver applies to "the range of climbing and mountaineering activities in the summer of 2021 that were within the contemplation of the parties" (emphasis added) would not, in any event, have the effect the defendants seek, namely that the Waiver applies to that expedition, and by consequence, the Incident.

Can Subsequent Conduct be Considered?

[87] The defendants submit in the further alternative that the "Trip Date" field of the Waiver is ambiguous and accordingly, I can look to the subsequent conduct of the parties to resolve that ambiguity. They then say that the conduct of the parties following the execution supports an interpretation that the parties intended that the Waiver should apply to the Incident. I disagree.

[88] There is no ambiguity in the June 18, 2021, date in the "Trip Date" field of the Waiver. Where the wording of a contract is clear, subsequent conduct of the parties cannot be used to create an ambiguity: *Chung v. Quay Pacific Property Management Ltd.*, 2020 BCSC 714 at para. 130; *Wade* at para. 28. As such, recourse to subsequent conduct is unnecessary and impermissible.

[89] In the result, I conclude that the Waiver as drafted and interpreted in accordance with the principles set out in *Sattva*, applies only to the June 18th Begbie Climb.

Is Rectification Available?

Rectification Based on Common Mistake

[90] If, by mistake, a contract does not reflect the agreement it was intended to record—because a term has been omitted, an unwanted term included, or a term incorrectly expressed—the court may exercise its equitable jurisdiction to rectify the contract to make it accord with the parties' true agreement: *Canada (Attorney*

General) v. Fairmont Hotels Inc., 2016 SCC 56 at para. 12 [*Fairmont*]. Rectification is a potent remedy that must be used with great caution to avoid undermining commercial confidence in written contracts: *Fairmont* at para. 13; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 31.

[91] Rectification is limited to cases where a written instrument has incorrectly recorded the parties' antecedent agreement; it is not concerned with mistakes in the making of the antecedent agreement. As the Court noted in *Fairmont* at para. 13, "rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself" (emphasis in original).

[92] Two types of error may support a grant of rectification: common mistake and unilateral mistake. Only common mistake is in issue here. An order for rectification based on common mistake is predicated on the applicant showing that:

a) The parties had reached a prior agreement whose terms are definite and ascertainable;

b) The agreement was still effective when the instrument was executed;

c) The instrument fails to record accurately the prior agreement; and

d) If rectified as proposed, the instrument would carry out the agreement.

See *Fairmont* at para. 14.

[93] To meet the first branch of the test for common mistake set out in *Fairmont*, the defendants allege that Mr. Mitchell and Mr. Manson entered into an oral agreement at the June 15th Meeting that Mr. Manson would retain Mr. Mitchell to guide him over the course of a "summer climbing program". As such, they say that the Waiver fails to accurately record this antecedent agreement and should be rectified to substitute "Summer of 2021" for "June 18, 2021" in the "Trip Date" field.

[94] The defendants must establish on a balance of probabilities that the terms of the prior agreement are "definite and ascertainable": *Fairmont* at para. 14. The defendants say that the definite and ascertainable terms of the prior agreement were that Mr. Mitchell would guide Mr. Manson during the climbing and mountaineering activities they had agreed to engage in in the summer of 2021, pursuant to the Waiver that Mr. Manson read and agreed to on June 17, 2021.

[95] A definite and ascertainable agreement must be proven by "clear, convincing and cogent" evidence: *Fairmont* at para. 36. It is insufficient to show mere intent that differs from the recorded agreement. Rectification is only available with the existence of "not merely an inchoate or otherwise undeveloped 'intent', but rather … an antecedent agreement which was not correctly recorded therein": *Fairmont* at para. 31 (emphasis in original), citing *Performance Industries Ltd.* at para. 37.

[96] The key question is whether there was a "manifest meeting of the minds": *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 322. The parties must "have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *Voitchovsky v. Gibson*, 2022 BCCA 428 at para. 32. In this way, the inquiry is objective and does not consider the parties' subjective understandings: *Berthin v. Berthin*, 2016 BCCA 104 at para. 46.

[97] While I accept that the prospect of Mr. Mitchell guiding Mr. Manson on multiple different trips over the course of the summer was discussed at the June 15th Meeting, the evidence falls short of establishing that a definite and ascertainable oral agreement was reached on the terms alleged by the defendants.

[98] First, the defendants' assertion that Mr. Manson agreed to retain Mr. Mitchell for all of his available time pursuant to a "summer climbing program" at the June 15th Meeting is not consistent with his conduct and correspondence with Mr. Manson thereafter. Contrary to his affidavit evidence, Mr. Mitchell did not in fact block off or reserve dates for Mr. Manson based on their discussions at the June 15th Meeting. This is implicitly admitted in Mr. Mitchell's written submissions, where he

acknowledges that "[t]here is no suggestion that [Mr. Mitchell] is committing or reserving those days for the plaintiff".

[99] Instead, Mr. Mitchell told Mr. Manson to reserve the dates he wanted by booking online, writing in his June 16, 2021, email to Mr. Manson that he could book through his website, telling him "Just go to the dates in private guiding and book them. [It's] that easy". Mr. Mitchell did not refer to a "summer climbing program" in any of his email or text communications with Mr. Manson in the days immediately following the June 15th Meeting, or at any time thereafter. Nor did Mr. Manson ever book any dates online. Moreover, while Mr. Mitchell asserts that the parties agreed at the June 15th Meeting that their first climb together would be the Begbie Climb, this is not consistent with the contemporaneous email correspondence, which suggests that the first time Begbie Bluffs was identified as a climbing location was in Mr. Mitchell's June 17th Email.

[100] The agreement asserted by the defendants is also inconsistent with Mr. Manson's evidence that he and Mr. Mitchell contemplated starting with a local sport-climb not only so that Mr. Mitchell could observe Mr. Manson's climbing ability and fitness, but also so that Mr. Manson could observe Mr. Mitchell as a guide in a climbing environment. This underscores the lack of a manifest meeting of the minds to create a legally binding obligation on either party, but most notably on Mr. Manson to retain Mr. Mitchell for an entire "summer climbing program" before he had even seen Mr. Mitchell functioning in a guide capacity. The defendants' position that Mr. Manson would have agreed at the June 15th Meeting to retain a climbing guide for all of his available time to guide him on potentially high-risk climbs over the course of the summer without having ever climbed with him or seen how he performed in a climbing environment is difficult to accept.

[101] Finally, there is no evidence that Mr. Mitchell and Mr. Manson discussed what Mr. Mitchell's fees were for rock climbing or mountaineering guiding services, or that Mr. Mitchell requested a retainer from Mr. Manson at the June 15th Meeting. Indeed, Mr. Manson paid Mr. Mitchell on an *ad hoc*, trip-by-trip basis, and the fee charged by

Mr. Mitchell varied depending on the activity in issue: $450 for the half-day June 18th Begbie Climb, and $600 per day plus expenses for the Mt. Denman Expedition.

[102] In summary, the defendants have not established by clear and cogent evidence that Mr. Manson and Mr. Mitchell entered into a definite and ascertainable agreement at the June 15th Meeting that Mr. Mitchell would guide Mr. Manson during the climbing and mountaineering activities they had agreed to engage in the summer of 2021, pursuant to the Waiver that Mr. Manson read and agreed to on June 17, 2021. At best, the parties contemplated that Mr. Mitchell would be available to guide Mr. Manson on climbing or mountaineering trips over the course of the summer on an *ad hoc*, trip-by-trip basis.

[103] In the absence of an agreement having been reached, the issue of ambiguity does not arise and reference to the parties' subsequent conduct is impermissible. Regardless, I would not accept the defendants' submission that Mr. Manson's July 2nd email in which he asks Mr. Mitchell to let him "know what particular dates we can continue adventures" suggests that future trips were part of a "summer climbing program" that was agreed to at the June 15th Meeting, and thus covered by the Waiver. To the contrary, that email is consistent with the *ad hoc* nature of the guiding trips contemplated at the time.

[104] In the result, I find that the defendants thus have not discharged their burden of proving that the Waiver fails to accurately reflect a definite and ascertainable prior agreement between Mr. Mitchell and Mr. Manson. The claim for rectification based on common mistake fails at the first branch of the *Fairmont* test. As such, I need not consider the remaining factors.

Does the Waiver Apply to Revelstoke Alpine?

[105] I have concluded that the Waiver as drafted does not apply to the Mt. Rogers Expedition and that the requirements for rectification have not been established. Accordingly, the Waiver does not operate to bar Mr. Manson's claim. It is therefore unnecessary for me to determine whether Revelstoke Alpine is entitled to the benefit of the Waiver as a named releasee or a third-party beneficiary, or alternatively,

whether the Waiver should be rectified to replace “Revelstoke Alpine” with “Revelstoke Alpine Inc.”, and I decline to do so. This is particularly the case given the prospect of this matter proceeding to a determination on the merits on a more fulsome evidentiary record.

Conclusion

[106] The Waiver applies only to the June 18th Begbie Climb; it does not apply to the July 14–15, 2021, Mt. Rogers Expedition during which the Incident occurred. The defendants failed to make out their claim for rectification. In the result, the Waiver provides no defence to the action brought by Mr. Manson against the defendants.

[107] The plaintiff’s application for a declaration that the Waiver does not bar his claim is granted. The defendants’ application seeking dismissal of the action is dismissed.

[108] Costs of both applications are awarded to the plaintiff in the cause.

“Hughes J.”