COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mitchell v. Manson,*
2024 BCCA 142

Date: 20240418
Docket: CA49097

Between:

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

Appellants
(Defendants)

And

Ian Craig Manson

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 2, 2023 (*Manson v. Mitchell*, 2023 BCSC 723, Vancouver Docket S219805).

Counsel for the Appellants:	R.S. Anderson, KC J. Brook
Counsel for the Respondent:	C.J. Watson J.G.M. Foster
Place and Date of Hearing:	Vancouver, British Columbia December 8, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 18, 2024

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The respondent was injured in a mountaineering accident. The summary trial judge found that a digital waiver signed by the respondent releasing the appellants of all liability could not serve as a complete defence because it specified the date of an earlier trip the parties participated in that summer, when the trip that gave rise to the injury had not yet been organized. No further waiver was proffered or signed. On appeal, the appellants allege, among other errors, that the judge failed to construe the waiver as a whole, and in light of the surrounding circumstances, to find that the parties had intended for the waiver to apply to all trips in which the parties participated that season.

HELD: Appeal dismissed. The judge reviewed the evidence, found no ambiguity in the waiver, which listed one date under "Trip Details", and concluded that the objective mutual intention of the parties interpreted in the greater context was for the waiver to apply only to the first trip the parties took together, in which no accidents occurred. This decision is entitled to deference and the appellants fail to establish any error of law or principle, or palpable and overriding error.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This case illustrates the sort of problem that can arise when a liability waiver is completed online.

[2] The appellant (defendant) Jeffrey Mitchell is an experienced mountain guide. The respondent (plaintiff), Ian Manson, is an avid outdoorsman who became Mr. Mitchell's client. They were both injured on July 15, 2021, during a climbing expedition on Mt. Rogers in Glacier National Park, British Columbia. Mr. Manson was 63 years old at the time. This was their third climb together that summer.

[3] Their first climb was a 'get to know each other' rock-climbing expedition on June 18, 2021. Before setting out on that expedition, Mr. Mitchell required Mr. Manson to sign a waiver of liability online (the "Waiver") by which, among other things, Mr. Manson agreed to waive any claims against Mr. Mitchell, his company, (described in the Waiver as "Revelstoke Alpine School" instead of its proper corporate name, "Revelstoke Alpine School Inc.") and the Association of Canadian Mountain Guides, due to any cause, including negligence, breach of contract or breach of statutory duty, and to release them from all liability for property damage or personal injury, in connection with wilderness activities in which he participated.

[4] Mr. Manson went online the morning of June 17, 2021, to complete the Waiver. The online template set out the terms of the release and waiver of liability, noting "today's date: June 17, 2021". Mr. Manson was then required to fill into the appropriate spaces his name, telephone number, date of birth, medical information (including allergies, medications, medical conditions, name and phone of family doctor, and medical insurance number), his address, email address, and an emergency contact (name and phone number).

[5] The last space to be filled in was headed "Trip Details". It offered only a drop-down menu limited to the "Trip Date", requiring Mr. Manson to choose a date. Unsurprisingly, he clicked on the date scheduled for the rock climb, being "Jun 18,

2021". It was not possible to enter any additional information or select more than one date.

[6] After this first climb, Mr. Manson went on a second climbing expedition with Mr. Mitchell from June 25–27, 2021, climbing Mt. Denman in Desolation Sound, and planned a further three-day climb on Mt. Rogers in July. It was on this third expedition that Mr. Manson and Mr. Mitchell were injured.

[7] Mr. Mitchell did not ask or require Mr. Manson to sign further liability waivers for either the Mt. Denman or Mt. Rogers climbs.

[8] Mr. Manson then sued the appellants (properly naming Mr. Mitchell's company, Revelstoke Alpine School Inc.) claiming damages for his injuries. The appellants raised the Waiver signed June 18, 2021, as a complete defence. It was (and remains) their position that the Waiver, when properly interpreted in light of the parties' intentions as disclosed by the surrounding circumstances, applied to all three climbs—and any future climbs the parties were planning to undertake together that summer of 2021—as part of their 'summer climbing program'. Alternatively they sought (and continue to seek) to imply a term that the waiver so applied, or to rectify it.

[9] Justice Hughes dismissed the application for judgment. Although she found that the application was suitable for summary trial, she concluded that the Waiver had no application to the Mt. Rogers expedition, and declined to imply a term into the Waiver or to rectify it. In her view, the Waiver applied only to the June 18 climb.

[10] The appellants raise a number of issues which are essentially six different ways of saying the same thing: that the judge erred in interpreting the Waiver as applying only to the June 18 climb. They say that she committed extricable errors of law in the following ways:

1. She failed to give proper consideration to the surrounding circumstances in determining the intention of the parties and the scope of their understanding.

2. She failed to read and construe the Waiver as a whole.

3. Alternatively, she erred in failing to find that the Waiver was ambiguous so as to entitle her to take into account subsequent conduct.

4. She failed to consider commercial reasonableness in interpreting the Waiver.

5. She forgot, ignored or misconceived material evidence, or made palpable errors of fact.

6. She erred in failing either to rectify the Waiver to reflect the parties' agreement as to its scope, or to imply a term to the effect that the Waiver applied to all activities that summer.

[11] Finally, the appellants ask this Court to declare that Mr. Mitchell's company, Revelstoke Alpine School Inc., is entitled to the benefit of the Waiver, which refers to "Revelstoke Alpine School". The judge found it unnecessary to determine this question given her conclusion that the waiver did not operate to bar Mr. Manson's claim. There was therefore no benefit to be had.

[12] Notably, this is not a case about whether the Waiver, by its terms, would protect the appellants from a claim in negligence, breach of contract or breach of statutory duty arising from an activity coming within its scope. It clearly would, and Mr. Manson does not suggest otherwise. The question is solely whether the judge erred in failing to find it broad enough to apply to any expedition other than the first climb on June 18, 2021. If she did not err, then it would remain open to Mr. Manson to pursue his claim and attempt to establish liability.

[13] For the reasons that follow, I would dismiss the appeal.

2. STANDARD OF REVIEW

[14] For the reasons discussed at length in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, "[c]ontractual interpretation involves issues of mixed fact and

law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (at para 50). The standard of review for questions of mixed fact and law is palpable and overriding error.

[15] As noted above, the appellants argue that, in this case, the issues raise extricable questions of law that attract the less deferential correctness standard. Indeed, the Supreme Court acknowledged in *Sattva* that:

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law [internal citation omitted]. Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" ([*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80] at para 21).

[16] At the same time, the Court warned of the need to be cautious in identifying extricable questions of law:

> [54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in [*Housen v Nikolaisen*, 2002 SCC 33] to exercise caution in attempting to extricate a question of law is relevant here:
>
> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]
>
> [55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. <u>The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare</u>. . . .
>
> [Emphasis added.]

[17] For the reasons I develop below, I am not persuaded that this case turns on extricable errors of law. In my view, the issues raised by the appellants all comprise questions of fact or of mixed law and fact that attract the deferential standard of palpable and overriding error.

3. INTERPRETING THE WAIVER

3.1 Overview

[18] The task of the summary trial judge was to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para 47. The Court went on in *Sattva* to say this:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement …. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract…. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [internal citations omitted].
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. … Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added.]

[19] The essential question the judge had to decide was whether it was the objective mutual intention of Mr. Manson and Mr. Mitchell as expressed in the words of their contract, viewed in the context of the surrounding circumstances, that Mr. Manson would waive any claims against the appellants arising out of the mountaineering services provided by Mr. Mitchell not only on the "trip date" of June 18, 2021, but also in relation to any additional expeditions that the parties scheduled over the course of the ensuing summer.

[20] After reviewing the evidence, the judge concluded that the objective mutual intention of the parties as stated in the Waiver, interpreted in the context of the surrounding circumstances, was that the Waiver was limited in its application to the one trip of June 18, 2021. As *Sattva* indicates, this conclusion is entitled to deference in this Court, even if we might have come to a different conclusion, unless the appellants are able to establish an error of law or principle, or palpable and overriding error.

[21] The appellants contend that the judge erred in limiting the circumstances that she considered to discussions and communications between Mr. Mitchell and Mr. Manson up to the time that the Waiver was signed, and failed to take into account what each party generally understood about such agreements, commercial reality, and what the agreement as a whole provided. They point to Mr. Mitchell's evidence that it was his intention that the Waiver would apply to any expeditions they undertook together that summer, and argue that the judge erred in suggesting that in the absence of expressly including a specific trip, the waiver would not apply to that trip. This, they say, turns *Sattva* on its head.

[22] I will turn now to look at the background of the parties' dealings to the time that the waiver was signed, and then I will consider the judge's findings and the errors alleged by the appellants. The facts are fully set out in the summary trial judge's reasons. I propose to review only those most relevant to the positions taken in this appeal.

3.2 Surrounding circumstances: dealings between the parties to the signing of the Waiver

[23] Mr. Manson was referred to Mr. Mitchell by a mutual friend, and texted him on June 6, 2021, indicating that he wanted to do "mountaineering and sport", but was out of shape since Covid. He expressed an interest in "doing a scramble up Mt. Denman", ending his text with: "Hope we can connect and get outside". Mr. Mitchell responded that he would be happy to take Mr. Manson climbing, get him on a

training program and get him into the Alpine. He ended with: “Let [*sic*] connect and come up with a plan”.

[24] The two men met at a pub in Revelstoke on June 15, 2021. Mr. Manson’s partner, Ms. Simond, also attended. The judge noted that there were conflicts in the evidence (all given by affidavit) as to what was discussed at that meeting, but, the judge noted:

> [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.

[25] The dispute related to whether they discussed Mr. Manson hiring Mr. Mitchell as a guide for a “summer climbing program”, and that Mr. Manson would have to sign a waiver before their first expedition. Mr. Mitchell deposed that they did discuss these things at the pub, while Mr. Manson and Ms. Simond deposed that they did not.

[26] It is clear, however, that they did discuss dates when Mr. Mitchell would be available to guide Mr. Manson. The next day, June 16 at 8:01 AM, Mr. Manson emailed Mr. Mitchell asking for a listing of his available dates in June, July and August, indicating that he understood Mr. Mitchell would be available as follows:

1. June 18
2. June 25-30
3. July 1 and 2
4. July 16….[to???]
5. Aug 1 … [to???]

June 18 was the date of their first, “short local sport-climb”, expedition.

[27] Mr. Mitchell responded that same day at 9:37 PM, over 12 hours later, advising that the first three dates were correct and that the remaining two periods of availability were July 10–16 and August 2–9. There was no mention of a waiver. Mr. Mitchell noted:

> As far as payment goes, we can do cash, or if it is easier for you, you can book it through my website. Just go to the dates in private guiding and book them. It's that easy.

[28] Mr. Manson did not book any dates in "private guiding" on Mr. Mitchell's website. Instead, he emailed Mr. Mitchell at 7:43 AM on the morning of June 17:

> Jeff
>
> If possible, I would like to book you in for the following:
>
> 1. June 18 sport climbing "around town"
> 2. June 25-30 Denman
>
> Hope that works for you.

[29] Mr. Mitchell sent an email to Mr. Manson at 7:45 AM that same morning that seemed to cross over with Mr. Manson's. It included the first reference in writing to a waiver:

> 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.
>
> [Link]
>
> 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.

[30] Mr. Manson immediately went online to fill in the Waiver form and sign it electronically. He completed this by 7:54 AM.

[31] At 11:08 AM on June 17, Mr. Mitchell replied directly to Mr. Manson's email of 7:43 AM:

> Ok, that sounds good, I'll pencil you in for those dates. I'm just doing a bit of research on Denman and looking into current Alpine conditions on the coast.
>
> I am also getting pretty excited about the expedition and heading back to Desolation Sound.
>
> We will talk more about it tmrw.

[32] The Begbie Bluffs rock-climbing expedition proceeded as scheduled on the morning of June 18, 2021. Mr. Mitchell deposed that he picked up Mr. Manson at his house, examined his gear, and then drove them both to Begbie Bluffs. He further deposed:

> 58. While we were on the way to Begbie Bluffs, I discussed the climbing that we would be doing that day. I then asked Mr. Manson about the Waiver to confirm that he had understood it and asked him if he had any questions about it. He confirmed to me that he had understood the Waiver and had no questions.
> …
> 62. At the end of our climbing session that day, I felt confident about Mr. Manson's ability, level of fitness and technical skills and was comfortable with spending several days in the mountains with him.

3.3 The judge's findings

[33] The judge found that there was no further discussion between the parties about the Waiver between the June 18 climb and the Mt. Rogers expedition:

> [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.

[34] The appellants contend that the judge palpably erred in finding that there was no further discussion about the Waiver, asserting that the parties discussed it in the car on the way to the Begbie Bluffs climb (as noted above), and discussed it again during the Mt. Denman climb. I will deal with that issue below.

[35] The judge further found that Mr. Mitchell did not ask Mr. Manson to sign any further waivers in advance of the Mt. Rogers expedition, and did not communicate to Mr. Manson any intention that the waiver signed on June 18 would apply to the Mt. Rogers expedition (at para 31).

[36] The judge then turned to the appellants' contention that interpreting the Waiver in light of the surrounding circumstances led to the conclusion that the date in the Waiver under "Trip Details" of June 18, 2021, did not limit the applicability of the Waiver to that date, but rather represented the first day in a series of guided

outings that the parties planned to undertake together that summer: the 'evolving contract' concept.

[37] The judge disagreed. Key to her conclusion were these facts: on its face, the Waiver expressly applied to the Begbie climb on June 18, 2021; the parties had confirmed no other expeditions at the time that the Waiver was signed; an expedition to Mt. Rogers had not yet even been discussed; there was no mention in any written communication of a "summer climbing program" or the like, and Mr. Mitchell's email of 7:45 AM on June 17 that forwarded the link to the waiver discussed only the Begbie climb they were to undertake the next day.

[38] In the judge's view, the only evidence supporting the interpretation for which the appellants contended was Mr. Mitchell's own subjective intention. What was missing was evidence that aligned Mr. Mitchell's subjective intention with the parties' mutual and objective intention as expressed by the words of the contract:

> [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.
> …
> [63] … 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. [Emphasis added.]

[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 in quote from *Sattva* added by Hughes J.]

[39] The judge considered the circumstances to be akin to those arising in *Cooper v Blackwell*, 2017 BCSC 1991, where a client was accidentally shot and killed by his guide in the course of the bear hunt:

> [75] ...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. <u>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</u> signed on July 28, 2013.
>
> [Emphasis added by Hughes J.]

[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.

3.4 Alleged errors in applying interpretive principles

3.4.1 Experience and commercial practice

[40] The appellants complain that, while the judge seemed prepared to accept that it was Mr. Mitchell's intention that the waiver apply to any activities they undertook together that summer, she erred in concluding that that the evidence did not establish any reciprocal understanding on the part of Mr. Manson. What she failed to take into account as a surrounding circumstance, the appellants submit, was that Mr. Manson had a long experience with similar expeditions, had always signed waivers in relation to those expeditions, and knew perfectly well that clients were "not allowed" (the appellants' phrase) to participate without first signing a waiver.

[41] They link this to commercial reasonableness and commercial practice. They submit that it would make no sense, commercially, for Mr. Mitchell to have Mr. Manson sign only a waiver relating to their first climb together, and nothing for the subsequent, more demanding, climbs—particularly given that Mr. Mitchell's insurance required him to have a waiver in place for any expedition. They rely on evidence from another professional mountain guide of considerable experience who deposed:

> 8 It is standard practice within the mountain guiding community in Canada that a guide will require that the waiver is signed by the client either before the activity takes place or at the beginning of a multi-activity or multi-day program.
>
> 9 It is common for private clients to book the same guide for multiple destinations or multiple trips per summer season. This was the situation in my climbing guiding practice. Several clients booked multiple trips with me each year and would sign the waiver at the beginning of the first trip but not for each trip thereafter. …

[42] The deponent did not append as exhibits any copies of these waivers, but the record included a number of waivers previously signed by Mr. Manson. These were consistent with Mr. Manson's evidence that although he had signed waivers on many prior occasions, he had always done so on a trip-by-trip basis.

[43] They included two signed with Squamish Rock Guides that provided for multiple trip dates. The first included as the "trip date" "April 25/27, 2019", while the second specified a "trip date" of "May 7, 8, 10, 11, 2019". Also included were a number signed with Yamnuska Mountain Adventures that related to specific expeditions, such as 'Intro to Mountaineering, Sept. 4-9 2017', '50+ Rock Climbing Sept. 11, 2018', and 'Yoho Peaks, Sept. 14, 2018'.

[44] As to Mr. Mitchell's insurance requirements, the judge observed:

> [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".

3.4.2 The entire agreement

[45] The appellants argue that, in addition to failing to give proper consideration to these surrounding circumstances, the judge erred in failing to consider those circumstances in the context of the entire agreement. They point to the body of the waiver, which focuses on the releasor's awareness of the "risks, dangers and hazards associated with", and participation in, "wilderness activities". The waiver defines "wilderness activities" as follows:

> 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 [sic] 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.

[46] They contend that the breadth of this definition indicates an intention that the Waiver not be limited to one specific activity on one specific day, but to a whole range of activities and/or services provided by the appellants.

[47] The appellants further rely on the ‘evolving contract’ concept mentioned above. They assert that the agreement between the parties was not limited to the Waiver as it read as of June 18, 2021, but comprises its terms together with other terms clearly not specifically mentioned in the Waiver but equally clearly negotiated between the parties, including the details of the other trips they undertook and the consideration to be paid by Mr. Manson. It was, therefore an ‘evolving contract’ with its coverage expanding and crystallizing as the details of each additional expedition within the “summer climbing program” were finalized.

[48] As far as I have been able to determine, the ‘evolving contract’ metaphor was not specifically raised before the summary trial judge, but it was nevertheless implicit in the submissions made by the appellants in relation to the question of what the parties must be taken to have contemplated. As such, the judge dealt with it in the passages quoted above.

3.4.3 Ambiguity and subsequent communications

[49] In the alternative, the appellants contend that the judge erred in failing to find that the “trip date” field in the waiver, viewed as part of the contract as a whole and the surrounding circumstances, is ambiguous. The ambiguity, they say, is to whether the field was intended to apply only to one trip on the specified date, or to a program of expeditions beginning on the specified date.

[50] In the circumstances, the appellants argue, the judge was entitled in law to have regard to subsequent communications as an aid to resolving the ambiguity. They point to the evidence of Mr. Mitchell and his partner Ms. Reimer (denied by

Mr. Manson) that Mr. Manson raised the subject of the Waiver during the Mt. Denman expedition.

[51] Their evidence was to the effect that Mr. Manson brought up the Waiver in the context of the medical condition that he had listed on it, and discussed his heart condition with Mr. Mitchell at some length. According to Mr. Mitchell:

> [Mr. Manson] talked about where he stored his medication, his heart condition, how to administer the medication, and the medical tests that he had done. I understood that he was telling us about this so that Ms. Reimer and I would be able to respond to any medical emergencies that he might have while on the trip. I recall that he instigated this conversation by specifically mentioning "the Waiver".

[52] Mr. Manson agreed that he discussed his medication, but denied any mention of the Waiver. What he said about the conversation was this:

> When I go on an activity which will require significant sustained exertion, I will carry with me nitroglycerin tablets. And those nitroglycerin tablets are carried on the waistband of my backpack. And so in a discussion with Reimer and Mitchell during one of our breaks on day 1 of Denman -- I'm going to say this, and I hope that it resonates with you.
>
> In a discussion that did not involve the use of the word "waiver", I alerted Reimer and Mitchell that because we were on a multi-day activity and that multi-day activity was taking us into a remote wilderness environment, it was important that I carry with me my heart tablets, should I have an acute heart event, and it was important that they should know where those heart tablets were. Which is on the belt strap of my backpack.
>
> Now, Mr. Kennedy, I distinguish a remote wilderness mountaineering trip such as Denman with driving 8 kilometres down the paved highway to Begbie Bluffs. I did not carry my heart medication tablets with me. I did not alert Mitchell to the need for him to know where my heart medication tablets were. And I did not list my heart medication tablets, which I carry with me on extended strenuous mountaineering trips because the two risks are entirely different.
>
> And so because when I signed the waiver on June 17th at 7:54 a.m., I did not list my acute heart medication tablets on the waiver is because we were going to Begbie Bluffs. We were sport climbing. I'm the whole thing was one and done in under three hours. I think we climbed 60 metres. Mr. Kennedy, that's a very different day than three days and an ascension into a remote wilderness environment.

[53] The judge did not specifically refer to the evidence about this conversation, although, consistent with Mr. Manson's evidence, she observed at para 81, "The Mt.

Rogers Expedition was also an entirely different trip in nature, activity level, duration, and risk profile than the June 18th Begbie Climb".

[54] In declining to consider any subsequent conduct, the judge said this:

> [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.

3.4.4 Forgotten, ignored or misconceived material evidence, and factual errors

[55] The appellants contend that a review of the summary trial judge's findings demonstrates that "she made extricable errors of law in forgetting, ignoring and misconceiving material evidence". I am not persuaded that any of these alleged errors establishes an error of law, or otherwise an error that is palpable and overriding. I will deal with them as particularized by the appellants:

[56] At paras 29 and 31 of her reasons, the judge found that Mr. Mitchell did not discuss the waiver with Mr. Manson after June 18, or communicate his intention that it applied to the Mt. Denman expedition, or otherwise discuss it between June 18 and the Mt. Rogers expedition. The appellants contend that this ignores evidence of Mr. Mitchell and Ms. Reimer about the discussion during the Mt. Denman climb concerning Mr. Manson's heart condition and his medications (see above at paras 51–52).

[57] The appellants further contend that the judge's finding at para 30 that the idea of climbing Mt. Rogers was first raised by Mr. Mitchell in the July 3, 2021, email ignored evidence from Mr. Mitchell that, during the Revelstoke meeting, they discussed "potentially going to Hermit Meadows, Mt. Begbie, Mt. Sir Donald, the Bugaboos, and the Adamants". What the judge said was this:

> [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. …
>
> [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.

[58] In my view, these findings were open to the judge on the evidence, particularly given Mr. Manson's denials. Even on Mr. Mitchell's evidence, at best the discussion on Mt. Denman invoked the Waiver only as an indication that the Mt. Denman climb was something very different from the Mt. Begbie climb. To the extent this evidence was even admissible on the issue of interpretation, it would support the contention that whatever Mr. Mitchell's subjective intention might have been, it was not mutual. From Mr. Manson's perspective, it is evident that the information he entered into the Waiver form about his health and medication was relevant to the Begbie climb and did not apply (and was not intended to apply) to more demanding subsequent climbs.

[59] What is undoubtedly clear on even Mr. Mitchell's evidence is that he did not raise the Waiver himself or communicate any intention at any time that the Waiver applied to any expeditions beyond the Begbie Bluffs. Nothing about this evidence compelled the conclusion that the parties mutually understood that the Waiver applied to the Mt. Denman climb.

[60] The appellants then argue that the judge erred in finding at para 64(a) that, at the time the Waiver was signed, there were no other rock climbing or mountaineering trips confirmed, and that the dates for the Mt. Denman expedition

(June 25–30) had only been “pencilled in”. They contend that Mr. Manson asked to book both “sport climbing around town” on June 18 and mountaineering on Mt. Denman on June 25–30, to which Mr. Mitchell agreed, saying “I’ll pencil you in for those dates”.

[61] I see no error. The finding the judge made was open to her on the evidence, including the timing of Mr. Mitchell’s response about penciling in the dates. That came well after he had forwarded the Waiver in the context of “Rock Climbing with you tmrw”.

[62] The appellants then assert a number of errors relating to the judge’s findings concerning the parties’ alleged intention to organize a ‘summer climbing program’ including how the parties came to agree on the Begbie Bluffs climb. They maintain that the judge’s finding at para 99 that “Mr. Mitchell did not refer to a ‘summer climbing program’ in any of his email or text communications” must mean that she ignored or disregarded the exchange of emails on June 16 when Mr. Manson inquired about dates for Mr. Mitchell’s availability, and Mr. Mitchell responded by suggesting that he book dates on the website.

[63] With respect, that is not a correct characterization of the judge’s findings. She clearly did refer to the June 16 exchange in para 64, but concluded that although the parties contemplated additional potential dates in July and August, the dates were not confirmed before the Waiver was executed, nor was there any discussion about an expedition to Mt. Rogers before Mr. Manson executed the Waiver. The most important finding by the judge in that context, at para 64(d), was that there was no evidence of any communication in which Mr. Mitchell indicated to Mr. Manson an intention that the waiver would apply to any and all guided trips the two of them decided to do together over the course of that summer.

[64] Once again, these raise no error of law or palpable and overriding error of fact. The appellants are simply asking us to view the evidence differently from the view taken by the judge, which is not our task. As I discuss further below, while different people may indeed arrive at different interpretations of the evidence, we are

obliged to defer to the findings of the judge in the absence of palpable and overriding error or error of law. Neither has been demonstrated.

3.5 Discussion

[65] In my view, this case comes squarely within *Sattva*'s admonition at para 55, which I repeat here for ease of reference:

> …As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare...

[66] I can see no reversible error in the judge's interpretation. She proceeded to determine, as the appellants requested in their notice of application, whether

> … the plaintiff is bound by the terms and conditions of the exclusion of liability set forth on the release of liability, waiver of claims and assumption of risks agreement signed and agreed to by the plaintiff in favour of the defendants on June 17, 2021…".

[67] The appellants do not take issue with the principles of law cited by the judge, but rather with her findings concerning the parties' objective intention. Her conclusion that the objective mutual intention of the parties as stated in the waiver, interpreted in the context of the surrounding circumstances, was that the waiver was limited in its application to the Begbie Bluffs climb of June 18, 2021, was one that was open to her on the evidence. The appellants have demonstrated no error of principle, or palpable and overriding error. They have simply pointed to possible alternative interpretations aligned with Mr. Mitchell's subjective intention.

[68] The correspondence between the parties up to the time of the Begbie Bluffs climb is consistent with the judge's interpretation. When Mr. Mitchell advised Mr. Manson that he had a digital waiver that Mr. Manson would need to sign "before we head out", it was in the context of "getting out and doing some Rock Climbing with you tmrw".

[69] The judge considered that, on its face, the Waiver applied only to that first climb. This is because under the heading “Trip Details”, the date of the Begbie Bluffs climb was filled in. That finding was open to her, and is consistent with the other forms of Waiver in evidence, which were executed in relation to specific trips, or otherwise specified each trip to which they applied, notwithstanding the broad language of the release portion. Indeed, the fact that the field headed “Trip Details” allowed for only a single date to be entered, chosen from a drop-down menu, suggests an intention to limit the Waiver to whatever trip was identified by the date that was inserted. On its face, that was the Begbie Bluffs climb.

[70] The judge then considered whether some different interpretation was justified because of the surrounding circumstances. Again, this was consistent with the approach mandated in *Sattva* at para 47:

> …Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning…

[71] The appellants were not able to point to a specific palpable error or error of principle committed by the judge in undertaking this process. Rather, their submissions amount to an argument that her conclusion ought to have been different. They refer to Mr. Mitchell’s subjective intention, and to the normal commercial practice of requiring a waiver for any expedition, and then attempt to reverse engineer this into an argument that it therefore must have been intended that this Waiver apply to expeditions to which it makes no reference. Again, that is not an approach that is open to this Court.

[72] The general understanding of the parties, as asserted by the appellants, does not assist. As to Mr. Mitchell, it supports only his own subjective intention. As to Mr. Manson, it cannot be said on the evidence that he expected or understood that the Waiver would apply to all climbing the parties undertook that summer. The suggestion that he must have understood that clients are “not allowed” to partake in such activities without first signing a waiver is unsupportable and puts the reasoning

backwards. There is no law against mountaineering without agreeing to waive liability; it is simply what guides generally require through contracts of adhesion. But if no waiver is proffered for the expedition in question, the expedition may lawfully be undertaken without it. That is solely a matter between the parties.

[73] In essence, the appellants seem to be arguing that because Mr. Manson almost certainly would have signed a waiver for the Mt. Rogers expedition, or indeed for the entire summer, if asked to do so, it must be inferred that he intended this particular Waiver to have that application. But respectfully, that is false logic. It is not what Mr. Manson might have been prepared to agree to that matters. What counts is what he did in fact agree to when he signed the Waiver. Indeed, it is difficult to imagine who would agree to waive any claims for negligence or fault on the part of their guide if not expressly obliged to do so before setting out on the specific activity in question.

[74] Similarly, while a release does not necessarily need to particularize with precision the exact claims that fall within its scope, sufficient language is required to effect a release of unknown claims: *Corner Brook (City) v Bailey*, 2021 SCC 29 at para 27. Such language, the judge found, was missing from the Waiver. While the circumstances cited by the appellants might support an argument that the Waiver should be interpreted as applying to the entire duration of a specific expedition beginning on the specified “trip date” (and therefore identified by it), I can see no error in the judge’s conclusion that neither the language nor the evidence supports a mutual intention that it apply to an unspecified subsequent, and as yet unconfirmed, separate expedition.

[75] As quoted above, the judge referred in para 83 to Mr. Mitchell’s evidence that he is required to have a waiver in place for insurance purposes. She noted that it was therefore all the more incumbent on him to have confirmed his understanding about the Waiver’s application. I observe that this must particularly be so when Mr. Mitchell decided to switch from a paper waiver to a digital version, which he did

in light of Covid issues, but which included a field that did not permit input of the kind of information that he says he required. This was a matter entirely within his control.

[76] The judge reviewed the surrounding circumstances in considerable detail. The appellants have not demonstrated any palpable and overriding error of fact. The judge considered the text of the Waiver in light of this factual matrix. Her conclusion that it could not be interpreted as intended to apply to the Mt. Rogers expedition— which occurred almost a month later, on a different trip, with different risks, and was not within the parties' contemplation when the Waiver was signed— was open to her on the evidence, and is entitled to deference. As far as commercial practice is concerned, the evidence did not support the appellants' argument. The other waivers in evidence were signed in relation to specific trips, or series of dates, and did not specify one date or expedition while purporting to extend to an entire season.

[77] Nor can it fairly be said, in my opinion, that the judge failed to consider the surrounding circumstances in the context of the entire agreement. What she did was construe the Waiver, which is precisely what the appellants asked her to do. She included in her consideration the portion of the Waiver that defined "wilderness activities", and specifically found that it did not include activities beyond June 18, 2021. In other words, the judge found that the Waiver did not apply to a subsequent guiding agreement that did not exist at the time the Waiver was completed. Accordingly, it was not a case of an 'evolving contract'. No error has been demonstrated with that conclusion. With respect, the appellants' argument is simply another way of attempting to attack the judge's fact-finding in interpreting the agreement in light of the surrounding circumstances.

[78] As to ambiguity, no error has been demonstrated with the judge's conclusion that there was none. Ambiguity requires that, once an agreement has been interpreted in light of the surrounding circumstances, the result is two equally plausible but inconsistent interpretations: see, for instance, *Wade v Duck*, 2018 BCCA 176 at paras 26–28. That was not the case here. The judge concluded that, taking into account the text of the agreement and the factual matrix surrounding its

creation, only one interpretation was plausible. Moreover, for reasons stated above at para 58, the evidence of subsequent conduct that the appellants say should have been considered because of the alleged ambiguity would not have helped them.

[79] In conclusion, on this aspect of the appeal, I am of the view that the judge's interpretation of the Waiver was open to her on the evidence, and free of any error in principle or palpable and overriding error. I would accordingly defer to it.

4. RECTIFICATION OR IMPLYING A TERM

[80] In the absence of the appellants establishing error in the judge's interpretation of the Waiver, it seems to me that a case for rectification of the Waiver, or for implying a term into it, cannot be made.

[81] The appellants take no issue with the judge's summary of the law on rectification:

> [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.

[82] In the appellants' submission, there was a prior agreement about a "summer climbing program", for which the Waiver was then produced. The inaccuracy was inserting a specific date in the Waiver instead of a range of dates, due to electronic limitations.

[83] The judge concluded that the evidence fell short of establishing a definite and ascertainable prior oral agreement about a "summer climbing program", and indeed the appellants' argument runs counter to the judge's findings concerning the surrounding circumstances. I have already indicated my view that those findings were open to the judge and that no error has been demonstrated in relation to them. In these circumstances, the remedy of rectification is not available. The appellants were unable to establish the existence of an antecedent agreement that was incorrectly recorded in the Waiver.

[84] The appellants argue further that, given the factual matrix leading to the execution of the Waiver, it is open to the court to imply a term into the Waiver to the effect that it applies to the range of climbing and mountaineering activities in the summer of 2021 that were within the contemplation of the parties before the Waiver was signed and for which specific dates had been discussed, so that the "trip date" of June 18, 2021, was simply the first of what the parties intended to be multiple trips. Once again, this submission runs counter to the judge's findings concerning the surrounding circumstances—including that the Mt. Rogers expedition was <u>not</u> within the parties' contemplation at the time the Waiver was executed—and also to her findings concerning the lack of ambiguity in relation to the trip date. As the judge said at para 85, the argument:

> … 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.

[85] I find no error in the judge's refusal to imply a term into the Waiver or to rectify it.

5. OTHER MATTERS

[86] The respondent complains that in pointing to errors of fact, the appellants rely in part on discovery evidence that was in transcripts attached to affidavits in evidence below, but which was never brought to the judge's attention. In this case, as I have indicated, the appellants have failed to satisfy me of any misapprehension or palpable and overriding error of fact on the part of the judge. I am satisfied that there was evidence to support all the judge's conclusions, and therefore find it unnecessary to undertake an analysis of the law governing the use of discovery evidence on summary trials. As a general principle, however, I agree that a party should refer a judge specifically to any evidence or authority upon which that party relies in establishing its position. A judge cannot be expected to discern in a vacuum the scope or significance to the party of evidence and authorities to which no reference has been made. Consequently, a complaint in this Court that the judge below failed to mention some authority or piece of evidence to which they were not referred will be met with considerable skepticism.

[87] The appellants submit that if this Court should conclude that a determination of whether or not the Waiver was discussed on the Mt. Denman climb (given the conflicting evidence) is necessary in order to decide the scope of the Waiver, then the matter should be referred back to the trial court for resolution of that issue. For the reasons stated above, this problem does not arise.

[88] The appellants further ask for an order with respect to whether or not the appellant Revelstoke Alpine School Inc. is entitled to the benefit of the Waiver. The judge below did not decide this issue because of her conclusion that the Waiver did not apply to the Mt. Rogers expedition in any event. Accordingly, it did not operate to

bar Mr. Manson's claim against Revelstoke Alpine School Inc. whether or not it was a party to the Waiver.

[89] For the same reason, it is not necessary for this issue to be decided by this Court, and I would not do so.

6. DISPOSITION

[90] For the reasons set out above, I would dismiss this appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"