Court of King's Bench of Alberta

Citation: Armstrong v Gula, 2024 ABKB 358

Date: 20240619
Docket: 2009 00065
Registry: Peace River

Between:

Jeffrey Armstrong

Plaintiff

- and -

George Michael Gula, by His Litigation Representative, Lynette Gayle Gula

Defendant

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] The defendant, Lynnette Gayle Gula, on behalf of the estate (**Estate**) of George Gula (**Gula**) seeks to summarily dismiss the action of the plaintiff, Jeffrey Armstrong (**Armstrong**), to enforce a November 2017 "Residential Real Estate Purchase Contract" (**Contract**) by which Armstrong argues Gula agreed to sell five quarter sections of land in or near Cherry Point, Alberta (**Lands**) for $330,000.

[2] I summarized the background in this matter in ***Armstrong v Gula***, 2023 ABKB 270 (**Decision**) at paras 4-7:

> [4] In November 2017, Armstrong was interested in acquiring land in or near Cherry Point. He had never met Gula. He approached Gula at his home on the Lands to see if Gula was interested in selling. Armstrong's evidence is that in their first meeting the parties reached an agreement at Gula's kitchen table for the sale of the Lands and a tenancy arrangement that would allow Gula to remain on

> the Lands following the sale. Armstrong had his lawyers prepare the Purchase Contract and Armstrong personally prepared an Alberta Residential Tenancy Agreement. Armstrong asserts that he then re-attended at Gula's residence where the parties reviewed the Purchase Contract and signed it. The entire process took a matter of a few days.
>
> [5] The Purchase Contract's closing date was January 31, 2018, however, on January 30, 2018, Armstrong's counsel was advised that (1) Gula did not have a copy of the Purchase Contract; (2) Gula did not intentionally sign any document to sell his Lands; (3) if he signed any document, he was tricked into signing it; (4) he never intended, nor does he intend to now, sell the Lands. The transaction did not close.
>
> [6] Nineteen months later, in October 2019, Armstrong filed and served this action seeking specific performance of the Purchase Contract and damages. At that time, Gula no longer had capacity to instruct counsel and, in March 2020, a Statement of Defence was filed on his behalf by his niece and litigation representative, Lynette Gula. Gula passed away in October 2020 and the action is being defended on behalf of [the Estate] by his personal representatives.
>
> [7] In December 2022, the Estate filed a summary dismissal application to dismiss Armstrong's action, including on the basis that the Purchase Contract is void *ab initio* or unenforceable. The Estate asserts, among other things, that the Purchase Contract was forged, that Gula lacked capacity to contract, that Armstrong made misrepresentations to Gula, and that the Purchase Contract is unconscionable. The Statement of Defence also pleads mistake and *non est factum*.

[3] The Estate's application (**Application**) first came before me on April 26, 2023. Prior to and at the Application, I raised with the parties whether there was evidence in the record as to whether Armstrong had provided written notice of waiver of the purchaser's conditions as contemplated in the Contract and, if not, what, if anything, was the impact of that on the Contract and the Application (**Condition Waiver Issue**). More specifically, the Condition Waiver Issue relates to whether Armstrong provided to Gula by the condition date (**Condition Date**) the written notice contemplated by clauses 8.4 and 8.5 of the Contract and, if not, the legal effect of that fact.

[4] On May 2, 2023, I delivered the Decision. I held at para 42 that the Condition Waiver Issue was adequately pleaded but that the Application should be adjourned on these terms:

> (a) [the Application] shall proceed, with the Condition Waiver Issue to be considered, however, [the Application was] adjourned for a further evidentiary process and legal argument prior to my decision being rendered, as set out below;
>
> (b) although not, in my view, strictly necessary, for efficiency and to avoid further disputes, if the Estate intends to formally advance an argument that the Condition Waiver Issue supports summary dismissal, the Estate shall propose an amendment to the Statement of Defence to specifically plead and particularize its allegations in respect of the Condition Waiver Issue;

(c) if Armstrong consents to the proposed amendment to the Statement of Defence, the parties shall arrange to have it filed and provided to my office. Armstrong shall have the right to file a Reply to the amended Statement of Defence, as contemplated by rule 3.33 [of the *Alberta Rules of Court*, Alta Reg 124/2010 (***Rules***)], to address the Condition Waiver Issue, within 10 days after service of the filed amended Statement of Defence;

(d) if Armstrong does not consent to the proposed amendment to the Statement of Defence, the Estate is granted leave to amend its [Application] to include an application to amend the Statement of Defence (with its proposed amendment), and this will be heard by me as part of the summary dismissal application;

(e) the parties shall be entitled to produce additional records, file supplemental affidavits, and to conduct further questioning on existing or new affidavits, to address the Condition Waiver Issue and (if necessary) the proposed amendment to the Statement of Defence;

(f) each party may file a supplemental brief of argument to address the amendment application (if necessary) and the Condition Waiver Issue, to maximum of 12 pages (excluding authorities); and

(g) the parties are encouraged to agree to a schedule to accommodate the steps contemplated by this order, and have leave to approach my [office] to schedule a further ½ day of oral argument once they are ready to schedule it.

[5] Following the Decision, the parties agreed to a schedule of the steps contemplated in the order. The Estate proposed an amended Statement of Defence in May 2023, but Armstrong opposed it. The additional procedural steps led to additional evidence, supplemental written briefs, and supplemental oral submissions on November 10, 2023.

[6] For the reasons set out below, I find that the Estate has discharged its onus to prove there is no merit to Armstrong's claim because Armstrong did not provide written notice to Gula as contemplated by clauses 8.4 and 8.5 of the Contract and the Contract came to an end on its own terms. Armstrong failed to establish that there is a genuine issue requiring trial and I find that the matter can be fairly determined summarily on the record before the Court. Accordingly, I summarily dismiss Armstrong's action.

II. The Record

[7] The record on this application includes:

(a) May 6, 2022 affidavit of Ben Stevenson (Gula's friend and neighbour) and October 12, 2022 questioning transcript;

(b) May 12, 2022 affidavit of Nathan Stevenson (Gula's neighbour) and November 25, 2022 questioning transcript;

(c) May 12, 2022 affidavit of John Stevenson (Gula's friend and neighbour) and October 12, 2022 questioning transcript;

(d) May 13, 2022 affidavit of Peter Philip Gula (**Phil**) (Gula's brother) and September 20, 2022 questioning transcript;

(e) May 13, 2022 affidavit of Ingrid Gula (**Ingrid**) (Gula's sister-in-law and Phil's wife) and September 20, 2022 questioning transcript;

(f) May 26, 2022 affidavit of Nathan Gula (**Nathan**) (Gula's nephew) and November 30, 2022 questioning transcript;

(g) June 3, 2022 affidavit of Sylvia Gula (Gula's sister-in-law and widow of Gula's late brother Lawrence Gula) and September 20, 2022 questioning transcript;

(h) June 9, 2022 affidavit of David Bannow (Gula's friend and neighbour) and November 25, 2022 questioning transcript;

(i) June 22, 2022 affidavit of Tyler Carstad (Gula's friend and neighbour) and November 25 2022 questioning transcript;

(j) July 7, 2022 affidavit of Ashley Johnson (Gula's neighbour and tenant) and November 8, 2022 questioning transcript;

(k) July 7, 2022 affidavit of Charles Johnson (Gula's friend, neighbour and tenant) and October 12, 2022 questioning transcript;

(l) July 22, 2022 affidavit of Corlia Purdue (Gula's friend and neighbour) and November 8, 2022 questioning transcript;

(m) August 10, 2022 affidavit of Lynette Gula (**Lynette**) (Gula's niece, former power of attorney, and one of the personal representatives of the Estate) and December 16, 2022 questioning transcript (including undertaking responses);

(n) January 27, 2023 Armstrong affidavit and February 16, 2023 questioning transcript (including undertaking responses);

(o) July 24, 2023 Lynette affidavit;

(p) July 24, 2023 affidavit of Laureen Gula (Gula's niece);

(q) July 24, 2023 Nathan affidavit;

(r) July 24, 2023 affidavit of P. Jason Forbes (**Forbes**) (lawyer at KMSC Law LLP (**KMSC**)) and September 25, 2023 questioning transcript; and

(s) August 1, 2023 Armstrong affidavit and September 28, 2023 questioning transcript (including undertaking responses).

III. Issues

[8] The issues in the Application are:

(a) Can and should the Condition Waiver Issue be considered in this Application?

(b) Should Armstrong's claim be summarily dismissed?

(c) Should the Estate be permitted to amend its Statement of Defence?

IV. Analysis

A. Can and Should the Condition Waiver Issue be Considered in this Application?

[9] Armstrong argues, as a threshold issue, that summary dismissal cannot and should not be granted based on the Condition Waiver Issue because it is not pleaded in the Statement of Defence. Armstrong argues that the Estate did not "seek relief for a contractual breach" in the Statement of Defence and that the Estate's previous pleadings all were based on the fundamental position that the Contract never existed and never came into being, so there was nothing to enforce. Armstrong argues that the relief that would flow from the Condition Waiver Issue is not before the Court, that the Court cannot grant relief the parties have not sought (relying on ***Sumner v PCL Constructors Inc***, 2011 ABCA 326 at para 43), and that the Court has no jurisdiction to decide the Application based on the Condition Waiver Issue.

[10] Armstrong misconstrues the Estate's pleading and position in respect of the Condition Waiver Issue as well as the effect of the Decision. His argument is based on the false premise that the proposed amendment to the Estate's Statement of Defence is *required*, or that an application to amend the Statement of Defence must be heard before the Application. I addressed this very question in the Decision at paras 18-29 and 42. At paragraphs 23-29, I stated (emphasis added):

> [23] In this case, the Amended Statement of Claim pleads the following:
>
> > 4. On or about November 23, 2017, the Defendant entered into a Residential Real Estate Purchase Agreement to sell the Lands to the Plaintiff for the total sum of $330,000 (the "Agreement").
> >
> > [...]
> >
> > 6. The Agreement was subject to [sic] financing condition which was removed by the Purchaser after his financing was approved by the Bank of Montreal.
> >
> > [...]
> >
> > 10. **On or about January 15, 2018, the Purchaser removed his financing condition in writing and the Agreement became unconditional**.
> >
> > [...]
> >
> > 12. The Purchaser's solicitor, Thorne & Thorne contacted the solicitor for the Vendor, KMSC Law in Fairview and sent them a copy of the Agreement and Waiver of Conditions.
>
> [24] **In substance, Armstrong's Statement of Claim asserts that the Purchase Agreement was conditional, but became unconditional on January 15, 2018 when the Purchaser removed his financing condition**. It also pleads that the "Waiver of Conditions" were sent to Gula's lawyers, KMSC Law, in Fairview.

[25] In the Statement of Defence, the Defendant denied every allegation set forth in the Statement of Claim except where expressly admitted. The Statement of Defence does not admit paragraphs 4, 6, 10 or 12, and expressly denies paragraphs 4 and 6. The Statement of Defence further pleads, at paragraph 20, that if the Defendant did sign the Agreement, then Gula did not hear anything from Armstrong for some time and that Gula "**did not believe that any action was required by him** or that he had entered into any agreement or contract in relation to the Lands". At paragraph 47, the Statement of Claim pleads that "as a result of all of the foregoing defences pled by the Defendant, **the Defendant states that the Alleged Agreement is** void *ab initio* **or unenforceable in its entirety**". The Statement of Defence seeks a declaration that the "Alleged Agreement is void *ab initio* and/or unenforceable in its entirety".

[26] **In my view, the pleadings join issue on (1) whether Armstrong removed his conditions and the Purchase Contract became unconditional; and (2) whether the Purchase Contract, at the time of the Statement of Claim, was** valid, void *ab initio*, or **unenforceable. Armstrong's entire claim depends on the continued existence and validity of the Purchase Contract, and the Statement of Defence amply denies both its existence and enforceability**. Although it could have been made more express, **I find that the pleadings sufficiently include the Condition Waiver Issue**.

[27] Further, pleadings are only pleadings of fact, not evidence: rule 13.6(2)(a). Subject to certain matters which must be specifically pleaded to avoid surprise (rule 13.6(2) and (3)) or for which particulars are required (rule 13.7), pleading "a statement of a point of law" is discretionary: rule 13.8(1)(b). While it may sometimes be helpful to provide particulars, in a contract case a party does not need to plead every possible legal argument that leads to the contract not existing or being unenforceable, or that otherwise supports its interpretation, unless those matters may take the other party by surprise or are enumerated as requiring express pleading: rule 13.6(3); ***Campbell v Paradise Petroleums***, 2019 ABCA 410 at para 41. If an argument "necessarily went along" with arguments raised during the run up to an application, there can be no surprise: ***Campbell*** at para 41.

[28] **In all the circumstances, it should not be a surprise to Armstrong or his counsel that, to be successful in his claim, Armstrong will have to prove, on a balance of probabilities that, if there were conditions, any conditions in the Purchase Contract were waived in accordance with the Purchase Contract or were otherwise legally resolved through conduct of the parties**. This is obvious from his pleading that the Purchase Contract became unconditional upon waiver of the financing condition. He did not need the Estate to expressly state this in the pleading.

[29] **I am not persuaded by Armstrong's argument that the pleadings do not include the Condition Waiver Issue**.

[11] I have considered Armstrong's supplemental submissions. I remain unpersuaded by his arguments that the pleadings do not already sufficiently include the Condition Waiver Issue. One of the "real questions in dispute" between the parties, on the face of the existing pleadings, is

whether Armstrong removed his conditions and the Contract became unconditional as he has asserted in his Statement of Claim. Contrary to Armstrong's position, if a contract expired on its own terms because a certain event did not occur, neither a pleading of "breach of contract" nor a specific pleading of "performance" as contemplated by rule 13.6(3)(i) is required.

[12] When the effect of a written contract is clearly placed before the court, neither party should be surprised when the court interprets that contract: ***Campbell*** at para 41; ***Silver Eagle Management Inc v Onoway (Town)***, 2011 ABQB 139 at paras 72-75.

[13] Armstrong provided no persuasive case authorities supporting his characterization of the Statement of Defence or his position that a more specific pleading was required to avoid surprise.

[14] Further, in the Decision, I held that the Application would proceed "with the Condition Waiver Issue to be considered" and that the Estate must propose an amendment to the Statement of Defence to specifically plead and particularize its allegations in respect of the Condition Waiver Issue, though it was not strictly necessary.

[15] By May 2023, Armstrong had acquired *de facto* knowledge of the additional particulars during the additional process and, as a practical matter, any surprise was eliminated: ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12 at paras 8-17.

[16] Contrary to Armstrong's arguments, I did not "ask the parties to generate new evidence" or "require further investigation". Rather, I gave the parties an *opportunity* to provide supplemental evidence and submissions as a matter of procedural fairness, on matters I found were *already* engaged by the pleadings and the Application. That opportunity was given based, in part, on Armstrong's submission in April 2023 that, had he known the Condition Waiver Issue was being raised in the Application, "he would have considered producing further records, made further inquiries of Armstrong's former legal counsel about this issue to determine if other documents exist, questioned the Estate's witnesses on this issue, and adduced further evidence on the [Application] including of conversations Armstrong's former counsel had with KMSC Law LLP": Decision at para 14.

[17] Again, I have carefully considered Armstrong's supplemental submissions and I remain of the view that I have jurisdiction to consider the Condition Waiver Issue as part of the Application without the need for any amendments to the Statement of Defence and that the Application can and should be considered based on the existing pleadings.

B. Should the Claim be Summarily Dismissed?

1. Legal Framework and Evidentiary Principles

[18] Rule 7.3(1)(b) provides that a defendant may apply for summary judgment (in the form of summary dismissal) in respect of all or part of a claim where there is no merit to a claim or part of it.

[19] Summary judgment cannot be granted if the action presents a genuine issue for trial: ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 13; ***Clearbakk Energy Services Inc v Sunshine Oilsands Ltd***, 2023 ABCA 96 at para 5.

[20] The proper approach to summary dispositions in Alberta has been laid out by our Court of Appeal in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47 (emphasis in original):

> [47] The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> (b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[21] On a summary judgment application, the court has a duty to take a "hard look" at the merits of the claim or defence: ***Weir-Jones*** at para 44, citing ***Knee v Knee***, 2018 MBCA 20 at para 33.

[22] A defendant applicant for summary dismissal has the initial burden to prove the factual elements of its defence (that is, the facts on which it relies), on a balance of probabilities, that there is no merit to the claim, and that there is no genuine issue requiring a trial: ***Weir-Jones*** at paras 31-35 and 47(b); ***Eberle v Terroco Drilling Ltd***, 2022 ABCA 8 at para 10; ***Giustini v Workman***, 2021 ABCA 65 at paras 22-24; ***P & C Lawfirm Management Inc v Sabourin***, 2020 ABCA 449 at paras 38-39; ***Hannam*** at paras 145-151; ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2023 ABKB 659 at para 9. The resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial and, in the end, the

presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: ***Eberle*** at para 10.

[23] In ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587 at paras 91-100, I summarized some of the evidentiary principles that guide courts in assessing a summary determination application (case citations omitted):

> [91] First, with respect to applicant affidavits, they should generally be based on personal knowledge: rule 13.18(3): [...]
>
> [92] However, there is some flexibility in the application of rule 13.18(3) in the context of summary judgment applications – sometimes evidence not based on personal knowledge can be admitted. For example, courts may be more flexible where the applicant is a corporation or estate, where there are no people left with personal knowledge, or where the evidence would be admissible at trial as an exception to hearsay: [...]
>
> [93] Second, with respect to respondent affidavits, they may include hearsay evidence based on information and belief, provided the source of the information is disclosed: rules 13.18(1)(b) and 13.18(2); [...]
>
> [94] However, admission of the evidence is not necessarily enough - just because hearsay can be included in respondent affidavits does not mean it will or should be accepted by the court or given weight: [...] For example, respondent hearsay evidence may not be accepted or given weight in respect of the substantive issues to be decided on the summary judgment application, unless the hearsay evidence can be brought within an exception to the hearsay rule such that it would be admissible at trial: [...] Hearsay may also possibly be admissible if the respondent can "justify some expansion of the rules governing admissibility" in the context of the summary judgment application, for example, if the opposing party had a fair chance to challenge the hearsay evidence: [...]
>
> [95] Third, hearsay evidence in questioning on affidavits is presumptively inadmissible: [...]
>
> [96] Fourth, bald, conclusory, argumentative or self-serving statements, personal opinion, allegations, speculation, conjecture or assertions made in affidavits or questioning transcripts, in the absence of detailed facts and supporting evidence, should be given little or no weight and cannot establish a genuine issue requiring a trial: [...]
>
> [97] Fifth, the court will assume that each party has put their best foot forward and presented all the relevant evidence for the application: [...]
>
> [98] Thus, while a party is not required to question on affidavits, and while the court is not bound to accept evidence that has not been the subject of cross-examination, a party's failing to question on admissible evidence runs the risk that the evidence will effectively be unchallenged or uncontradicted for the purposes of the application, which may detract from the strength of the other party's case: [...]

> [99] Similarly, a respondent to a summary judgment application chooses what evidence it wishes to adduce and is not obligated to file a response affidavit or to address every point of evidence of the applicant: [...]. However, a respondent that fails to respond to or address admissible evidence in their responding evidence runs the risk that the court will infer that the responding party does not have contradictory evidence and the applicant evidence will be accepted as unchallenged or uncontradicted.
>
> [100] Sixth, even if there remain conflicts in the evidence after these principles are applied, this does not necessarily end the inquiry. Courts have tools to assist their assessment of whether conflicting evidence raises a genuine issue requiring trial. For example, courts may, in appropriate cases:
>
> > (a) find that the conflict is not really factual but rather a conflict of the litigants' opinions or positions: [...];
> >
> > (b) draw inferences based on admitted facts, undisputed evidence, the conduct of the parties, and corroborating evidence (such as documents with objective reliability): [...] Inferences must be reasonable, and they must be based on proven facts, and in considering whether to draw the invited inference the trier of fact must also consider other reasonable or plausible theories "based on logic and experience", not speculation: [...];
> >
> > (c) resolve issues based on the portions of the affidavits that are not in dispute, where appropriate, including because the conflicting evidence is not on an essential element of the claim or defence or not material to the outcome: [...];
> >
> > (d) balance the weight and perceived reliability of evidence because it is inconsistent with the balance of the record or the litigation history: [...]; and
> >
> > (e) assume as true the relevant facts asserted by the party opposing summary judgment and determine whether the law permits judgment on those facts, including because those assumed facts do not support that party's claim or defence: [...].

[24] I now turn to address the Estate's grounds for summary dismissal within this legal framework in accordance with the evidentiary principles noted above.

2. Should the Claim be Summarily Dismissed because the Contract Ended on its Own Terms?

a. Has the Estate Discharged Its Burden to Establish No Merit to the Claim Because the Contract Ended on its Own Terms?

[25] Assessing whether the Contract ended on its own terms requires an interpretation of it.

[26] The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79; ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 49. Provisions must be

interpreted in light of the contract as a whole: ***IFP*** at para 79; ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64.

[27] In interpreting contracts, courts must consider the relevant surrounding circumstances, including the "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": ***IFP*** at paras 82–83; ***Sattva*** at para 58. Relevant background facts can include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract, the nature or custom in the industry in which the contract was executed, antecedent agreements leading up to the contract, and even negotiations if they shed light on the factual matrix: ***IFP*** at paras 83–85 and the cases cited therein; ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 32.

[28] "Surrounding circumstances" does not include the parties' subjective intentions and cannot be used to add to, detract from, vary, or otherwise overwhelm the written words: ***Sattva*** at paras 59-60; ***IFP*** at paras 81-82; ***Talwandi Video Lab Inc v 1441419 Alberta Ltd***, 2024 ABCA 140 at para 11; ***Alberta Union*** at para 26.

[29] If the terms of an agreement are ambiguous, the court may refer to the parties' post-contractual conduct to resolve the ambiguity: ***IFP*** at paras 86-87; ***Shewchuk v Blackmont Capital Inc***, 2016 ONCA 912 at paras 46, 56. Mere difficulty in interpreting a contract is not the same thing as ambiguity; a contract is ambiguous when the words are reasonably susceptible to more than one meaning: ***IFP*** at para 86.

[30] The Contract included the following terms:

> 2.1 The Purchaser and the Vendor agree to act cooperatively, reasonably, diligently and in good faith.
>
> [...]
>
> 3.5 The Deposit shall be held in trust for both the Vendor and the Purchaser and shall be:
>
> a) Refunded to the purchaser if this offer is not accepted, a condition is not satisfied or waived (as per Paragraph 8.4) or the Vendor fails to perform or complete this Agreement; and
>
> [...]
>
> 7.1 All time periods, deadlines and dates in this Agreement shall be strictly followed and enforced. All times will be Alberta time unless otherwise stated.
>
> [...]
>
> 8.1 The Purchaser's conditions are:
>
> a) This Agreement is subject to the Purchaser obtaining satisfactory financing on or before January 16, 2018
>
> c) This Agreement is subject to an appraisal being completed that indicates that the value is equal or greater than the Purchase Price on or before January 16, 2018.

[...]

8.3 Unless otherwise agreed in writing, the Purchaser's Conditions are for the sole benefit of the Purchaser and the Vendor's Conditions are for the sole benefit of the Vendor.

8.4 The Purchaser and the Vendor may unilaterally waive or satisfy their Conditions by giving a written Notice to the other party (the "Notice") on the stated Condition Day.

8.5 Provided that the Purchaser and the Vendor, as the case may be, uses reasonable efforts to satisfy the Conditions, if the written Notice has not been given on the stated Condition Day, then this Agreement is ended.

[...]

10.1 This Agreement is intended to create binding legal obligations. The Vendor and the Purchaser acknowledges that they have read this Agreement carefully and are free to obtain legal advice before signing.

11.1 For the purpose of giving and receiving any notice referred to in this Agreement, all notices must be in writing and must be delivered to the address or faxed to the number described below.

Vendor's Information

George Gula

Box 641, Cherry Point, AB T0H 0T0

Phone: 250-219-4236

[...]

12.1 The Purchaser offers to buy the Property for the Purchase Price according to the terms of this Agreement.

[...]

13.1 The Vendor accepts the Purchaser's offer and agrees to sell the Property for the Purchase Price according to the terms of this Agreement.

[...]

LEGAL REPRESENTATIVES

Vendor's Lawyer

Jason Forbes Fairview

KMSC Law

10316 110 Street

Fairview, AB, T0H 1L0

Purchaser's Lawyer:

Roger Lennartsson

Thorne & Thorne

9906 Sutherland Street

Fort McMurray, AB, T9H 1V4

Phone 780-790-1668

Fax: 780-790-1668

Email: thorne.thorne@shaw.ca

[31] The Estate interprets the Contract, in particular clauses 8.4, 8.5 and 11.1, as plainly and unambiguously providing that the Contract ended on its own terms if Armstrong failed to provide a written notice waiving his conditions to Gula's mailing address on or before January 16, 2018.

[32] This is not the first time a dispute over waiver of purchaser's conditions has been litigated. The Estate relies on several cases to support its position. I review those cases, together with cases considering (or considered in) those cases.

[33] In ***Gaywood-Hall Developments Ltd v Wilkes et al***, 1972 CanLII 586 (ON SC), the agreement provided for a purchaser's condition related to subdivision approval which, if not met, would result in deposit monies returned to the purchaser without interest or deduction. The Court held that a purchaser's communication to his solicitor to waive the conditions was insufficient to waive conditions by the required date and the purchaser's action was dismissed.

[34] In ***Crerar v Credit Foncier Trust Co***, 1987 CarswellOnt 133 (ONSC), the Court held that the agreement included a true condition precedent relating to a letter of credit that could not be waived by one party. In *obiter*, the Court also addressed whether the condition, if it was not a true condition precedent, had been waived. The Court held that a late waiver of condition sent by counsel was insufficient because waiver must be made known "at least before the time for its fulfilment arrives".

[35] In ***Nesis v Benter Investments Co***, 1990 CanLII 687 (BC SC), an agreement contained conditions in favour of the purchaser, including an inspection condition. The agreement provided that "[u]nless each condition is waived or declared fulfilled, by written notice given by the benefitting party to the other party on or before the date specified for each condition, this contract will be thereupon terminated and the deposit returned to the Purchaser". The Court held that, after a satisfactory property inspection, a handshake between the purchaser and vendor's real estate agent and an oral confirmation that "we have a deal" was insufficient to constitute the required written notice removing the condition. The purchaser's claim was dismissed. ***Nesis*** has been confirmed as well-reasoned by the British Columbia Court of Appeal: ***KPMG Inc v 0747825 BC Ltd***, 2017 BCCA 277 at para 39.

[36] In ***Firoozi v 809963 Ontario Limited***, 2005 CanLII 56173 (ON SC), an agreement included two conditions in favour of the purchaser which could be waived, failing which the agreement became "null and void". The Court held that late delivery of a notice of waiver was fatal, and that the agreement was null and void. In that case, like this one, there was a dispute about whether there was a binding agreement in the first place. The Court stated that "[e]ven if

there had been a final agreement, the failure to deliver... one or both of the waivers on time would render the agreement at an end".

[37] In ***McKee v Montemarano***, 2009 ONCA 359, the agreement included a provision that "[u]nless the Buyer gives notice in writing delivered to the Seller not later than 5:59 p.m. on the 1st day of February 2006, that this condition is fulfilled, this Offer shall be null and void and the deposit shall be returned to the Buyer in full, with interest and without deduction" and the parties "shall both be released from any further obligations under the Agreement". The Court of Appeal upheld the lower court's finding that hand delivery of the notice to the vendor's home (instead of personal delivery) was insufficient, and that the agreement became null and void.

[38] In ***Leasing Group Inc v Prospect Developments (2003) Inc***, 2011 ABCA 83, a condominium purchase agreement included a clause that if the vendor/developer was unable to register a proposed condominium redivision plan by a condition date, the vendor/developer could provide written notice to the purchaser to extend the date, failing which "this agreement shall be null and void and the deposits shall be returned" to the purchaser. Justice Strekaf (as she then was) summarily dismissed the vendor/developer's action against the purchaser because she found that the plan had not been registered and the written notice extending the condition date had not been provided. The Court of Appeal upheld summary dismissal as follows (emphasis added):

> [9] We find it unnecessary to further embroider the law as to conditions precedent in contracts in this case. **In our view, this is a simple matter of interpreting the agreement as it was settled by the parties**. In her declaration, the chambers judge used the wording "null and void" because that happened to be the language that the parties chose. **But her declaration and judgment amount in reality to saying that the agreement should be concluded according to its own terms.** The way that she found the contract was concluded was the one that arose under the undisputable circumstances.
>
> [10] In a practical sense, one might say that the agreement was not nullified or voided in its entirety, because the duty of the appellant to refund the deposit to the respondent remained. What was cancelled under the terms of the agreement was the obligation of the respondent to buy and of the appellant to sell the subject real property, which was what the clause characterized as 'conditional'. That cancellation was part of the agreement just like the refund obligation was. **Those terms came into effect because the factual triggers for doing so occurred**.

[39] In ***High Tower Homes v Stevens et al***, 2014 ONSC 2309 [***High Tower* SC**], the agreement provided that any notice to be given or received pursuant to the agreement "shall be deemed given and received when delivered personally". Before the expiry of the condition date, the purchaser's lawyer faxed the vendor's lawyer a letter indicating that the purchaser waived all conditions, making the deal firm. The Court held that the faxed letter was insufficient because it was not personally delivered and that the agreement was "never completed according to its terms, and is therefore not enforceable". ***High Tower* SC** was upheld on appeal: 2014 ONCA 911 [***High Tower* CA**].

[40] In ***Carmel Cove Resort & Spa Inc v 0747825 BC Ltd***, 2016 BCSC 1251, the agreement between a receiver and a purchaser included a seller's condition that the receiver had to obtain court approval within 21 days of acceptance of the agreement. The agreement's terms and

conditions included that "[u]nless each condition is waived or declared fulfilled by written notice given by the benefitting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon ...". The receiver had obtained court approval within the time required but notice of fulfillment of the condition was not sent until four days after the condition date. The Court applied ***Nesis*** and held that the consequences of failing to comply with the clear terms of the contract led to termination and the claim was dismissed.

[41] The British Columbia Court of Appeal upheld ***Carmel*** in ***KPMG Inc***. The Court noted the importance of certainty in commercial contracts, which justifies a strict approach to the manner of waiving conditions, relying on ***Ariston Realty Corp v Elcarim Inc***, 2014 ONCA 737, leave to appeal ref'd [2015] SCCA No 79; ***Castledowns Law Office Management Ltd v FastTrack Technologies Inc***, 2009 ABCA 148, leave to appeal ref'd [2009] SCCA No 260; ***Leasing Group***; and ***High Tower*** **CA**. The Court noted, at para 28, that the strict approach was consistent with the commentary in J Victor Di Castri, *The Law of Vendor and Purchaser*, 3rd ed (Toronto: Carswell, 1988)(loose-leaf updated 2016, release 8) vol. 2 at para 790: "Where a power to waive is given by contract it must be exercised strictly in accordance with its terms, with particular reference to any time period, and also, communicated to the other party".

[42] In ***WED Investments Limited v Showcase Woodycrest Inc***, 2021 ONSC 237, the Court addressed waiver of a purchaser's conditions in respect of two different agreements. With respect to the first agreement, the court distinguished ***High Tower*** **CA** and interpreted the agreement such that the parties intended that they could communicate by email. Therefore, a waiver sent by email before the condition date was sufficient to waive the condition and the contract was not null and void. This was upheld on appeal: ***WED Investments Limited v Showcase***, 2022 ONCA 384. With respect to the second agreement, the Court held that the conduct of the vendor extended the condition date twice, it was not extended a third time and the purchaser's failure to meet the extended deadline caused the agreement to become null and void.

[43] In ***Kwan v LSN Investments Inc***, 2022 ONSC 3174, the Court granted summary judgment returning a purchaser's deposit when the purchaser did not provide written notice of waiver of condition, the contract became "null and void", and the purchaser did not otherwise waive its rights or revive the agreement. There was no genuine issue requiring a trial.

[44] The Contract was prepared by Armstrong's counsel, Roger Lennartsson (**Lennartson**) of Thorne & Thorne (**Thorne**) Barristers and Solicitors.

[45] Armstrong pointed to some industry practice in relation to waiver of conditions which arguably could be considered context to the Contract. That included Lennartson's hearsay evidence offered through Armstrong (emphasis added):

> I understood that the parties were not represented by real estate agents and that this was a private transaction. The vast majority of private transactions are "friendly", with both parties wanting to close the transaction. As a result, parties to private transactions can be less strict about procedural deadlines, including the waiver notice date, **and deadlines are usually not an issue unless a party makes them one**.

[46] Industry practice was also explored in questioning of Forbes, who was listed as Gula's legal representative in the Contract and was briefly involved with the transaction. Forbes agreed that condition waiver dates could become less important, or of less concern to counsel, if the

buyer and seller have a relationship and time is not of the essence in that relationship or in that contract, because if the deadline is missed the transaction likely will still proceed through an extension of the condition. Forbes had experience with one or two files where condition dates were missed, counsel relied on the contract, and the deal was ended.

[47] The industry practice evidence, in summary, is that it is rare for a party to rely on the strict requirements of condition waiver dates when the transaction is friendly and both parties wish to proceed, that the condition dates usually will be extended or otherwise dealt with in those situations, but that in some cases parties do rely on strict compliance with the contract. That evidence is consistent with the cases noted earlier. Of course, as noted, any industry practice can only inform the interpretation of the words used by the parties, not change or overwhelm them: ***Sattva*** at paras 59-60; ***IFP*** at paras 81-82; ***Talwandi Video*** at para 11; ***Alberta Union*** at para 26.

[48] Consistent with the industry practice evidence, the context to the Contract, as of November 23, 2017, included that it was a friendly private transaction. But it also included that the parties discussed and were aware of, anticipated, and set the Condition Date based on an awareness of the strict requirements of the waiver of conditions by the Condition Date and the potential need for a written extension of the Condition Date. Armstrong testified (emphasis added):

> When reviewing the Sales Agreement, I commented specifically on the extended condition period, which was 1.5 months rather than the usual one or two weeks**. I explained to Mr. Gula that although condition dates are usually one or two weeks out, I still had to get home and contact banks for a mortgage approval, and if I could not get the approval in one or two weeks, re-signing the Sales Agreement to extend the condition date could be difficult**. I told him that the condition date would not change the possession date in any way.

[49] The Contract, as a whole and in its context, illustrates an objective and unambiguous intention that:

(a) the parties were required to strictly follow time periods, deadlines and dates (clause 7.1);

(b) there was a contemplated difference between satisfying a condition and waiving a condition, and if either did not happen the deposit was to be returned (clause 3.5(a));

(c) notices had to be in writing (clauses 8.3, 8.4, 8.5, 11.1) and written notices to Gula must be delivered to his mailing address or faxed to his number (clause 11.1);

(d) Armstrong could unilaterally waive or satisfy his conditions by giving a written notice to Gula on the stated condition day (clause 8.4);

(e) if the written notice waiving Armstrong's conditions has not been given on the stated condition date, the Contract is "ended" (clause 8.5); and

(f) the Contract formed the entire agreement of the parties (clause 6.3).

[50] The Contract is similar to many of those described in the cases above. In my view, it objectively contemplates the commercial certainty described in ***KPMG Inc***. Armstrong has not

pointed to any provision of the Contract, or any context in existence at the time of the Contract, that supports a different interpretation.

[51] Accordingly, if the strict terms of the Contract were not followed and written notice of waiver of Armstrong's conditions was not delivered to Gula's address by the Condition Date, then the Estate will have discharged its onus to show there is no merit to the claim and no genuine issue requiring trial because the Contract ended on its own terms before closing.

[52] There is no evidence that a written notice was delivered to Gula's address on or before the Condition Date. While Armstrong signed an unwitnessed document called "Waiver of Conditions to Real Estate Purchase Contract" (**Waiver Notice**), which on its face is dated January 15, 2018, and which may be evidence that Armstrong's conditions were satisfied as far as he was concerned, the only evidence is that Armstrong provided this to Lennartson's office. There is no evidence that Armstrong, Lennartson, or anyone else, delivered the Waiver Notice to Gula's address on or before January 16, 2018 as required by the Contract.

[53] Further, even if it had been sufficient for Armstrong to provide the Waiver Notice to Forbes, as Gula's "legal representative" named in the Contract, there is no evidence that the Waiver Notice was provided to Forbes at his address on or before the Condition Date. The evidence from the lawyers' records is that a legal assistant at Thorne (**Sutherland**) unsuccessfully attempted to email the Contract and the Waiver Notice on January 25, 2018 using an incorrect email address, and then successfully emailed them to Forbes' legal assistant (**Bombier**) on January 29, 2018. Both dates were well after the January 16, 2018 Condition Date.

[54] Based on the foregoing, I find the Estate has met its initial burden to prove factual elements of its defence and the facts upon which it relies, namely its denial of paragraphs 6 and 10 of the Amended Statement of Claim (which pleaded that Armstrong removed his financing condition in writing and the Contract become unconditional), and that the Contract was unenforceable in its entirety.

[55] That does not end the matter, I must consider whether Armstrong has put his best foot forward and demonstrated from the record that there is a genuine issue requiring trial: ***Weir-Jones*** at para 47(c).

b. Has Armstrong Discharged His Burden to Establish a Genuine Issue for Trial?

[56] Armstrong made several arguments which, interpreted generously, raise the following issues as potentially requiring a trial: (1) the parties' (or the lawyers') conduct gave rise to an interpretation of the Contract, or an agreement, estoppel or waiver to extend or not rely on the Condition Date *before* the Condition Date expired; (2) the parties' (or the lawyers') conduct, gave rise to an agreement, estoppel or waiver to extend or not rely on the Condition Date *after* the Condition Date expired; or (3) the Contract should be rectified. I address these matters in turn.

i. No Genuine Issue re Post-Contract Conduct Prior to Condition Date

[57] Armstrong points to post-Contract conduct he alleges occurred between him and Gula, and between the law firms, prior to the Condition Date that raises genuine issues as to the interpretation of the Contract (pointing to "the ambiguities these facts and evidence create about the proper interpretation" of the Contract), whether the parties agreed to extend the Condition

Date, whether Gula promised or represented he would not rely on the strict compliance with the Contract, or whether Gula waived his right to require strict compliance with the Contract.

[58] I first address the legal principles associated with these arguments.

[59] When interpreting a contract, post-contractual conduct must be distinguished from the factual matrix or surrounding circumstances. As noted above, the surrounding circumstances or factual matrix consists only of objective evidence of the background facts at or before the time of the execution of the contract: ***Shewchuk*** at para 41; ***Riddell Kurczaba Architecture Engineering Interior Design Ltd v Governors of the University of Calgary***, 2018 ABQB 11 at para 51, aff'd 2019 ABCA 195 at para 6; ***Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd***, 2023 ABKB 724 at para 34; ***Eco-Zone Engineering Ltd v Grand Falls – Windsor (Town)***, 2000 NFCA 21 at para 11; and ***King v Operating Engineers Training Institute of Manitoba***, 2011 MBCA 80 at para 72.

[60] A vendor and purchaser may agree to amend or vary the provisions of their agreement by their actions during the course of an agreement, and an entire agreement clause does not necessarily preclude that: ***High Tower* CA** at para 20(4); ***Colautti Construction Ltd v Ottawa (City)***, 1984 CanLII 1969 (ON CA); ***Silver Eagle*** at paras 46-51.

[61] The jurisprudence discloses six types of estoppel: estoppel by representation of fact (sometimes referred to as estoppel by conduct), proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence: ***Ryan v Moore***, 2005 SCC 38 at para 52; ***Northern Sunrise County v Virginia Hills Oil Corp***, 2019 ABCA 61 at para 30; ***Scotsburn Co-Op Services v WT Goodwin Ltd***, 1985 CanLII 57 (SCC) at para 26; ***Jelonek v Monterrosa-Renaud***, 2022 ABKB 738 at para 25.

[62] Armstrong's arguments conceivably engage estoppel by representation or promissory estoppel. The distinction between the two is that the former involves estoppel based on representations of facts or law by words or conduct, and the latter involves representations as to future actions: ***Jelonek*** at para 25.

[63] Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom the representor is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or to do anything inconsistent with it: ***Ryan*** at para 5. Estoppel by conduct has been described as requiring evidence of a representation, reliance and detriment: ***Northern Sunrise*** at para 30; ***Scotsburn*** at para 26.

[64] The party invoking promissory estoppel must prove (1) that the other party made, by virtue of word or deed, a promise or assurance intended to alter their existing legal relationship and to be acted upon by the party receiving the assurance; and (2) the recipient of the assurance acted upon it in a manner which changed his or her position: ***Maracle v Travellers Indemnity Co of Canada***, 1991 CanLII 58 (SCC); ***B & R Development Corporation Ltd v Trail South Developments Inc***, 2012 ABCA 351 at paras 22-23, leave to appeal ref'd [2013] SCCA No 34; ***Blue Hill Capital Corporation v Daon Property Corporation***, 2014 ABCA 282 at para 18; ***High Tower* CA** at paras 57-58. The promise can be inferred from the circumstances, but must be unambiguous: ***High Tower* CA** at para 58, citing ***Engineered Homes Ltd v Mason***, 1983 CanLII 142 (SCC). The party making the promise must have knowledge of the facts giving rise to the

legal rights that the promise affects: ***Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada***, 2021 SCC 47 at para 24; ***Jelonek*** at para 26.

[65] Waiver of a legal right requires (1) full knowledge of the right and (2) an unequivocal and conscious intention to abandon it: ***1242311 Alberta Ltd v Tricon Developments Inc***, 2021 ABCA 418 at paras 22, 30; ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co***, [1994] 2 SCR 490 at 500, 1994 CanLII 100; ***High Tower* CA** at para 43. The intention to relinquish the right must be communicated, which can be formal, informal or inferred from conduct, with the overriding consideration being whether one party communicated to the other party a clear intention to waive a right: ***High Tower* CA** at para 43; ***Technicore Underground Inc v Toronto (City)***, 2012 ONCA 597 at para 63; ***Fortress Carlyle Peter St Inc v Ricki's Construction and Painting Inc***, 2019 ONCA 866 at para 34. A delay in raising the issue after a late delivery of a notice does not necessarily constitute a waiver of the time requirement or an extension of that time unless that is expressly communicated: ***Firoozi*** at paras 87-90; ***Kwan*** at para 87.

[66] There is no material conflict in the evidence of what occurred between execution of the Contract and the Condition Date. Armstrong points to evidentiary gaps and reasonable inferences from the record. Even accepting or assuming Armstrong's evidence for the sake of discussion, the record includes the following evidence of what occurred on or before the Condition Date:

(a) the transaction was a "friendly" private transaction, which often means condition waiver deadlines will not be strictly relied on unless one party decides to enforce them;

(b) Lennartson drafted the Contract;

(c) the Contract was signed by both parties on November 23, 2017;

(d) Armstrong kept Gula updated by phone on the progress of the transaction at each step, including Armstrong obtaining financing approval and his waiver of conditions. He testified to "a few" conversations with Gula between signing and the Condition Date, but did not provide details or dates of the conversations. Armstrong's phone records indicate four calls with Gula with the last one on January 3, 2018, although he described calls made from other phones;

(e) Armstrong deposed in his August 1, 2023 affidavit that he confirmed the transaction with Gula before putting down his deposit money. It is unclear whether he was referencing the deposit under the Contract (which was paid to his lawyers on November 27, 2017) or a deposit on another transaction with another adjacent landowner (Lacroix) which, according to the terms of the Lacroix agreement, had to be paid within 10 business days of December 18, 2017;

(f) Armstrong obtained confirmation of his financing from BMO on January 10, 2018;

(g) Armstrong was aware of the Condition Date and executed the Waiver Notice on January 15, 2018, the day before the Condition Date;

(h) Armstrong provided the Waiver Notice to Lennartson's office and relied on Lennartson to deliver it. Armstrong's evidence is that he believes Lennartson obtained consent from Forbes to provide the Waiver Notice after the January 16,

2018 Condition Date. Armstrong's belief is founded primarily upon Lennartson's experience as counsel;

(i) Lennartson was aware of the need to properly provide the Waiver Notice. Because of Gula's remote location and the potential difficulties reaching him, Lennartson instructed Sutherland to phone Forbes' office to inquire about delivering the Contract and Waiver Notice to Forbes' office;

(j) there is no evidence that Forbes and Lennartson had any direct communications on or before the Condition Date. Forbes had no dealings with Gula on or before the Condition Date and had never been formally retained; and

(k) there is evidence that Sutherland had a phone call with Bombier or someone else at Forbes' office (**Discussion**), although the date of the Discussion and its contents are unknown. As noted earlier, the evidence is that Sutherland did not attempt to email the Waiver Notice until January 25 and did not succeed in doing so until January 29, 2018.

[67] In my view, the evidence Armstrong relies on does not establish a genuine issue requiring a trial.

[68] I disagree with Armstrong's argument that the post-contractual conduct is relevant to the interpretation of the Contract. The Contract is unambiguous, so post-contractual conduct is not needed to resolve an ambiguity. Even if the post-contractual conduct could be used to interpret the Contract, it does not raise a genuine issue requiring trial because the proposed interpretation is contrary to the words used in the Contract.

[69] Further, the post-contractual conduct prior to the Condition Date does not establish a genuine issue requiring a trial with respect to whether Gula (or Forbes, Bombier or someone else) reached an agreement or made a promise, assurance or representation that induced Armstrong to act to his detriment, or that Gula waived his right to rely on the strict terms of the Contract. On Armstrong's own evidence, there is no genuine issue that any such conduct took place before January 15, 2018. The fact that Armstrong completed the Waiver Notice on January 15, 2018 and provided it to his counsel to handle, suggests that Armstrong continued to be aware of and believed he was bound by the Condition Date. This is also consistent with his evidence that he believed that Lennartson had obtained an extension of the Condition Date and Lennartson's hearsay evidence that he was aware of the need to provide the Waiver Notice and instructed Sutherland to speak to Forbes' office.

[70] Therefore, on the record, the Discussion is the only event on or before the Condition Date that Armstrong realistically can point to. However, in my view, the fact the Discussion occurred does not establish a genuine issue requiring a trial. There is no evidence of when the Discussion took place or of what was said. There is an absence of evidence of an agreement, extension or variation of the Contract, a promise, representation or waiver.

[71] A respondent to a summary judgment application has a duty to put their best foot forward, and cannot suggest that more favourable evidence may be unearthed in the future: ***Weir-Jones*** at para 37; ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at paras 11, 19; ***H2S Solutions Ltd v Tourmaline Oil Corp***, 2019 ABCA 373 at para 19; ***Kudzin v APM Construction Services Inc***, 2023 ABKB 425 at para 173.

[72] Armstrong argues that there is no obligation for a third party such as Lennartson to participate in the case. However, Lennartson did participate and provided some selected information which Armstrong relied on in his affidavit. Armstrong did not elaborate on how that partial participation came about, or what steps he or his counsel took, if any, to have Lennartson file an affidavit so he could be questioned. If Lennartson's declining to provide an affidavit was an outright refusal to assist his former client, he could have been required to provide evidence. Armstrong took no steps to compel Lennartson's evidence under rule 6.8. He was not obligated to do so, but it leaves the Court without further evidence from Lennartson to support Armstrong's position that there is a genuine issue requiring trial: ***McDonald*** at para 99.

[73] Further, Armstrong did not adduce, or appear to take any material steps to obtain, direct evidence from the Discussion participants. In questioning, Forbes provided his understanding that Bombier had no independent memory of the Discussion. Bombier appears to have been available and still working for KMSC, but Armstrong did not seek to question her under rule 6.8. With respect to Sutherland, there is no evidence of what, if any, attempts were made by Armstrong, or his counsel, to locate her or have her provide evidence, whether voluntarily or under rule 6.8.

[74] In questioning, Forbes acknowledged he had not specifically searched his or Bombier's email accounts for emails relating to the matter. However, whether any such emails exist and whether they may relate to the Discussion is speculative and Armstrong did not provide a factual foundation to infer that such emails exist. In any event, Forbes made himself available for questioning by providing an affidavit and Armstrong could have requested an undertaking from Forbes to search for further emails or records. Armstrong did not question on the defendants' affidavit of records.

[75] In any event, the documentary record that is before the Court does not support a genuine issue requiring trial about the Discussion. Neither the Forbes file nor the Lennartson file has any notes or records of the Discussion, or any records of any communication between the law firms before January 25, 2018 (let alone before the Condition Date). There is no evidence that Forbes and Gula, or Forbes and Lennartson, dealt with each other on the matter on or before the Condition Date. The Estate provided affidavits from family members involved in managing Gula's or the Estate's affairs, all of whom testified they have not seen any records relating to the transaction among Gula's possessions. Armstrong seemed to acknowledge in argument that it is unlikely that the details of the Discussion will ever be known.

[76] In the result, there is insufficient evidence about the details or timing of the Discussion and Armstrong has not satisfied the Court that any such evidence is likely available.

[77] Armstrong's "belief", or his counsel's assertion that it can be inferred, that Lennartson must have or likely obtained an extension because he is an experienced lawyer, or because it may sometimes be the practice for parties to take a relaxed approach to condition waivers, is speculation that also does not establish a genuine issue for trial in this case. Inferences must be drawn from the positive proven (i.e. accepted) facts which are reasonably supported by the record, because otherwise they are speculation or conjecture: ***Chavez-Salinas v Tower***, 2022 BCCA 43 at para 24, citing ***Housen v Nikolaisen***, 2002 SCC 33 at paras 19-23; ***Gray v McNeill***, 2017 ABCA 376 at para 18; ***Grafikom Speedfast Limited v Heidelberg Canada Graphic Equipment Ltd***, 2013 ABCA 104 at para 16; ***Walton v Alberta (Securities Commission)***, 2014 ABCA 273 at para 26, leave to appeal ref'd [2014] SCCA No 476. Drawing inferences when

there is an evidentiary gap, based on an "educated guess" is speculation: ***Walton*** at para 26, citing ***United States of America v Huynh***, 2005 CanLII 34563 (ON CA).

[78] In this case, there is insufficient evidence, or likely future trial evidence, to establish a genuine issue requiring trial that the parties' conduct on or before the Condition Date somehow affected the operation of the clear terms of the Contract (whether characterized as an agreement, amendment, variation, extension, representation, promise, waiver, or something else).

ii. No Genuine Issue re Conduct After Condition Date

[79] Armstrong also relies on the parties' conduct after the Condition Date to establish a genuine issue for trial.

[80] The conduct of parties following the expiry of a condition waiver date (or other contractual requirement), can potentially establish genuine issues requiring a trial where there is evidence that a terminated agreement may have been "consensually revived", a new agreement created, or a waiver or estoppel engaged: ***Kwan*** at para 57; ***Charanek v Khosla***, 2010 ABQB 202; ***Leishman v Virostek***, 2011 ABQB 488; ***Rabinowitz v 2528061 Ontario Inc***, 2024 ONSC 2357.

[81] In ***Charanek***, the purchasers took the position that a real estate purchase contract ended in accordance with its own terms because a notice of waiver or satisfaction of the purchaser's conditions was not given prior to the date specified. They sought summary judgment for a declaration that the agreement was void and for return of their deposit. Master Mason, as she then was, declined to grant summary judgment because there was "some evidence that the parties treated the Agreement as continuing or revived following the Condition Day".

[82] In ***Leishman***, Master Hanebury granted summary judgment to a vendor against purchasers on a residential home sale. The contract included a condition that the purchasers sell their house, which the purchasers waived. After the vendor commenced an action, the purchasers asserted that the vendor had failed to prove the vendor had received the purchasers' waiver notice. The Court distinguished ***Leasing Group*** because both parties "continued to treat the contract as a binding contract" for six months after the condition date, including forwarding of closing documents, and that the purchasers made no mention of the contract ending until the vendor commenced the lawsuit. The Court held that the parties' conduct constituted mutual waiver of the condition and granted summary judgment against the purchasers.

[83] In ***Rabinowitz***, the Court held that the condition waiver date was extended, but also concluded, in *obiter*, that if the agreement ended then it was revived by the parties because they continued to treat it as "alive". The Court referenced significant continuing activity between the parties and their representatives following the condition date.

[84] Here, there is no material conflict in the evidence about what occurred following the Condition Date:

(a) Armstrong testified that he spoke to Gula about conditions having been removed, but did not provide the date or details of that conversation. He testified that Gula did not object at the time of the conversation;

(b) on January 26, 2018, Armstrong attended at Lennartson's office and signed closing documents;

(c) on January 29, 2018, Sutherland forwarded her January 25 email to Bombier with the Contract and Waiver Notice and a request to extend the closing date. Bombier passed the email on to Forbes;

(d) on January 30, 2018, Forbes contacted Gula. Forbes' notes are admissible estate and business records: ***Saito v Lester Estate***, 2021 ABCA 179 at paras 12-13; ***ATCO Energy Solutions Ltd v Energy Dynamics Ltd***, 2024 ABKB 162 at para 177; ***Rooney v GSL Chevrolet Cadillac Ltd***, 2022 ABKB 813 at paras 28-30; ***Ares v Venner***, 1970 CanLII 5 (SCC); ***R v Monkhouse***, 1987 ABCA 227 at para 23. They are also sufficiently corroborated by Forbes' direct testimony (and *vice versa*) under the *Alberta Evidence Act*, RSA 2000, c A-18 (***AEA***), section 11: ***Spady v Spady Estate***, 2022 ABQB 591 at paras 46-50. Forbes' notes indicate that Gula told Forbes he had no intention of selling the Lands, that he thought he was signing documents to keep Hutterites from buying land, and that Armstrong never mentioned anything about the Lands;

(e) that day, Forbes dictated and sent a letter to Lennartsson stating:

> Further to my conversation with Brittany of your office, this is to confirm my discussion with George Gula, the Vendor in the Residential Real Estate Purchase Agreement dated November 23, 2017, wherein he has advised as follows:
>
> 1. That he does not have a copy of the Residential Real Estate Purchase Agreement;
> 2. That he did not intentionally sign any document to sell his land;
> 3. That, if his signature is on any document, he was tricked into signing the same;
> 4. That he never intended, nor does he intend now, to sell his land.

(f) Lennartson phoned Armstrong and advised him the transaction was not going through and Armstrong testified he was confused and didn't understand what was going on;

(g) that same day, Sutherland advised Armstrong's bank that "the transaction has collapsed and as previously discussed we will require new mortgage instructions for Jeff to sign in order to secure the land and cabin being sold by the other Seller". Armstrong also attempted to back out of his purchase of the Lacroix lands;

(h) after sending the letter, Forbes closed his file and, given Gula's position, likely did not review the Contract in detail or the clauses dealing with the waiver of conditions. Forbes' time spent on the matter was a total of 30 minutes on one day. He was never formally retained by Gula and did not bill for his time;

(i) Armstrong called Gula to ask why the deal was not going through and, according to Armstong, he did not receive a straight answer;

(j) sometime later, Armstrong's deposit for the transaction was returned to him; and

(k) there is no evidence of any further material communication between the parties, lawyers on their behalf, or between Armstrong and Gula's family, after January 30, 2018, until July 2019. The Statement of Claim was not filed until October 2019.

[85] This record does not give rise to a genuine issue requiring a trial that the Contract was somehow revived, a new contract created, or that a waiver or estoppel arose, by the parties' conduct subsequent to the Condition Date. ***Charanek***, ***Leishman*** and ***Rabinowitz*** are clearly distinguishable. In each of those cases, there was evidence of material conduct by the parties after the condition date consistent with continuing toward closing. In this case, the uncontradicted post-Condition Date evidence reflects Gula's immediate rejection of the Contract, not its revival. Then, after being confused and not getting answers he found satisfactory about why the transaction was not closing, Armstrong remained silent for months. The fact Forbes did not articulate the lapsed Condition Date in his list of reasons for Gula not closing the transaction in the January 31 letter, or prior to the litigation, was reasonable and does not establish a genuine issue requiring trial.

[86] Armstrong has not established a genuine issue requiring a trial based on post-Condition Date conduct.

iii. No Genuine Issue re Rectification

[87] In argument, Armstrong sought an adjournment of the Application so that he could seek to file a reply to plead rectification in the event the proposed amendments to the Statement of Defence were allowed. Accordingly, to be fair to him, I have also considered whether rectification raises a genuine issue requiring a trial or whether it is appropriate to exercise my discretion to adjourn the Application to allow Armstrong to plead rectification.

[88] The principles governing rectification were summarized by the Alberta Court of Appeal in ***Stikeman Elliott LLP v 2083878 Alberta Ltd***, 2019 ABCA 274 at paras 32-38:

> [32] ***Canada (Attorney General) v Fairmont Hotels Inc***, 2016 SCC 56, [2016] 2 SCR 720 summarized the purpose of rectification: "rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions..." (paras 12 and 38; see also ***Public Service Alliance of Canada v NAV Canada (2002)***, 2002 CanLII 44896 (ON CA), 212 DLR (4th) 68, 80 , 59 OR (3d) 284 (CA); ***Royal Bank of Canada v El-Bris Limited***, 2008 ONCA 601, para 13, 298 DLR (4th) 281; ***Shafron v KRG Insurance Brokers (Western) Inc***, 2009 SCC 6, paras 2, 54-55, 57, [2009] 1 SCR 157.
>
> [33] In ***Fairmont***, the Supreme Court of Canada said that two types of error might support a grant of rectification: common mistake and unilateral mistake. Common mistake arises where the parties to a written instrument are under a common mistake that it accurately records the terms of their antecedent agreement:
>
> > …an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose

> terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement (para 14).

(See also ***Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd***, 2002 SCC 19, paras 31, 37 and 40, [2002] 1 SCR 678; and ***Graymar Equipment (2008) Inc v Canada (Attorney General)***, 2014 ABQB 154, para 40, [2014] 8 WWR 524).

[34] Unilateral mistake occurs where an instrument formalizes a unilateral act, such as the creation of a trust, or where one party says an instrument does not accurately reflect their agreement while the other party says that it does. Added to the four prerequisites above, the Court requires that the party resisting rectification of a unilateral mistake knew or ought to have known about the mistake and permitting that party to take advantage of the mistake would amount to fraud or the equivalent to fraud (***Fairmont***, para 15, referencing ***Performance Industries***, para 38).

[35] The Court also said that the standard of proof upon the party seeking rectification is the usual civil standard, the balance of probabilities, although the "evidence must always be sufficiently clear, convincing and cogent":

> A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action.

(***Fairmont***, para 36; see also ***FH v McDougall***, 2008 SCC 53, paras 31, 40, 46 and 49, [2008] 3 SCR 41; ***McLean v McLean***, 2013 ONCA 788, paras 40-43, 118 OR (3d) 216).

[36] The Court said that rectification should be used "with great caution" since a "relaxed approach to rectification as a substitute for due diligence at a time a document is signed would undermine the confidence of the commercial world in written contracts" (para 13, referencing ***Performance Industries***, para 31).

[37] This Court said in ***Harvest Operations Corp v Canada (Attorney General)***, 2017 ABCA 393, para 8, [2018] 3 WWR 51, that rectification is an equitable remedy and equitable remedies are discretionary in nature. While the parties to a share acquisition and reorganization both intended their transaction to have a tax-neutral affect, it did not (paras 2-6). This Court refused rectification, observing that it is "an extraordinary remedy to be sparingly granted" (para 50) which has "the capacity to do much mischief if misapplied" (para 51, referencing ***Jumbo King Ltd v Faithful Properties Ltd***, [1999] HKCFA 38; ***Bank of Credit & Commerce International SA (in liquidation) v Ali (no 1)***, [2001] UKHL 8, para 39, [2002] 1 AC 251). Rectification is not available just because the means that the parties adopted to execute their business objective had unanticipated adverse tax consequences (paras 43, 45 and 66). Likewise, the Court has no general

> equitable jurisdiction to remedy mistakes made by the parties outside the rectification doctrine (paras 73-75).
>
> [38] This Court also said in ***Composite Technologies Inc v Shawcor Ltd***, 2017 ABCA 160, para 134, [2017] 8 WWR 427, in rejecting rectification of a technology transfer agreement, that the presumption that the written text accurately reflects the parties' agreement "is at its strongest when the party challenging the accuracy of the written agreement seeks recognition of the term that is totally contrary to that incorporated into the text..." (see also ***Hawrish v Bank of Montreal***, 1969 CanLII 2 (SCC), [1969] SCR 515, 520-521, 2 DLR (3d) 600).

[89] In considering these principles, I find that Armstrong has failed to raise a genuine issue requiring a trial that the Contract could or should be rectified. Armstrong has not identified what the mistake is in the Contract, what exactly the parties' actual agreement was at the time of the Contract that is not reflected in the Contract, or what he asserts is required to rectify the mistake. There is no evidentiary record existing at the time of the Contract to discern these matters or to provide an air of reality to rectification, let alone establish a genuine issue requiring trial.

[90] Armstrong has not established a genuine issue requiring a trial based on the possibility of rectification of the Contract.

c. Is it Possible to Fairly Resolve the Claim and, if so, Should the Court Exercise its Discretion to do so?

[91] I am satisfied that it is possible and appropriate to fairly determine Armstrong's claim summarily. Real estate contracts, like the Contract, are often drafted to require formal compliance with written notice provisions. This provides parties commercial certainty and will often avoid litigation. The wisdom of that approach is highlighted by cases like this when one of the transaction participants becomes unable or unavailable to provide evidence. Parties seeking to strictly enforce such contracts against their counterparties are well advised to themselves strictly comply with the contract terms to avoid disputes.

[92] Armstrong argues that the application should be adjourned so that, among other things, the Estate can produce further records. However, he does not point to any specific types of records that are missing or expected to be produced. As noted earlier, Armstong speculates that there may be more KMSC emails. As noted, he did not seek an undertaking from Forbes or question on the affidavit of records. In any event, Forbes' involvement at the relevant times was extremely limited, and the entire KMSC relevant file has been produced. I am not satisfied, on a balance of probabilities, that there is likely anything further to be produced and I decline to exercise my discretion to adjourn so that a potential further affidavit of records can be produced: ***Anglin v Resler***, 2024 ABCA 113 at para 39; ***Masterfeeds Inc v Vonesch***, 2021 ABCA 331 at para 2; ***McDonald v Sproule Management GP Ltd***, 2018 ABCA 295 at para 1.

[93] Armstrong asserts prejudice based on his potential claim against Lennartson for negligently failing to provide the Waiver Notice to Gula, or to otherwise obtain an agreement, extension or waiver of the Contract requirements. Armstrong deposes that he has been advised by his current counsel that he is "likely prevented from bringing a claim" against Lennartson due to the *Limitations Act*, RSA 2000, c L-12, yet at the same time seeks an adjournment to allow him to further amend the Statement of Claim to add a claim against Lennartson. Armstrong's

current counsel argued that the Court should decide in this application whether a claim against Lennartson is statute-barred.

[94] In my view, it is not fair or appropriate to adjourn the Estate's summary dismissal application to allow Armstrong to attempt to add claims he may have against others, including his lawyers, for several reasons. No application to amend the claim has ever been filed despite the Condition Waiver Issue being amply pleaded in the first instance and addressed specifically in April 2023. In any event, the Estate is entitled to summary dismissal and should not have to continue to be involved in potential litigation between Armstrong and his lawyers.

[95] Even if it is assumed that Armstrong's argument about potential limitations-based prejudice is properly to be considered under my summary judgment discretion, Armstrong has not provided sufficient evidence to persuade me that summary dismissal should not be granted because he is statute-barred from seeking relief against others in another process. There is an evidentiary vacuum as it relates to Armstrong's dealings with Lennartson, Thorne's subsequent litigation counsel (Sandeep Khokar), and his current counsel (since January 2022), or dealings amongst his legal counsel.

[96] Given the incomplete information I have, and the unique circumstances of this situation, it is inappropriate for me to comment on the potential substantive merit of any claims Armstrong may have or make against his counsel, or on the substantive merit of any limitation defences. Those issues should be decided if such a claim is advanced, on a full record, and when all parties to that dispute are present.

[97] In all the circumstances, I find it is appropriate to grant summary dismissal rather than compelling the Estate to continue to be involved in potentially protracted litigation between Armstrong and his counsel. "Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": ***Hryniak v Mauldin,*** 2014 SCC 7 at para 5.

d. Conclusion re Summary Dismissal because the Contract Ended on its Own Terms

[98] I summarily dismiss Armstrong's claim against the Estate because the Contract, if it was valid, ended on its own terms, there is no merit to Armstrong's claim, there is no genuine issue requiring a trial, and I am left with sufficient confidence that the state of the record permits fair summary disposition.

3. Should the Claim be Summarily Dismissed Based on Other Grounds?

[99] Given my findings above, it is not necessary to assess the Estate's other grounds for summary dismissal. However, in case I am wrong on the first ground, and because it may be relevant to costs, I will briefly comment on the other grounds. I have limited my review to those matters expressly raised in the Estate's written or oral argument.

[100] Briefly stated, had I not granted summary dismissal based on the Contract ending on its own terms, I would not have granted summary dismissal based on the Estate's other grounds. The other grounds raise numerous genuine issues requiring a trial, some of which I address below.

a. What was Communicated between Armstrong and Gula prior to the Contract's Execution?

[101] The interactions between Armstrong and Gula are critical to several of the Estate's defences relied on in support of summary dismissal, including what Armstrong told Gula about the nature of the Contract before it was executed and whether Armstrong failed to disclose that he was a hunter. The determination of these matters would ripple through many of the Estate's other grounds.

[102] Determining these matters requires a credibility and reliability assessment of Armstrong and the various other witnesses as to what Gula told them about the transaction. Courts assess credibility and reliability on a number of factors, some of which, in this case, would require *viva voce* evidence and a review of the "whole tapestry of evidence": see, for example, ***Brar v Brar***, 2017 ABQB 792 at paras 12-16; ***Vestby v Galloway***, 2020 ABQB 361 at para 57. Credibility can leave genuine issues for trial which are "not amenable to" or "impossible to resolve" in a summary adjudication: ***Weir-Jones*** at paras 35, 38; ***Condominium Corp No 0321365 v Cuthbert***, 2016 ABCA 46 at para 28; ***Nafie v Badaway***, 2015 ABCA 36 at para 106, leave to appeal ref'd [2015] SCCA No 128; ***Barter v Barter***, 1996 ABCA 248 at para 8; ***Walker v Walker***, 2001 ABCA 106 at paras 3-5; ***Phillips v Phillips***, 2005 ABCA 44.

[103] Gula's death also engages section 11 of the *AEA*, which requires an assessment of whether various witnesses' evidence about what Gula told them is "corroborated by other material evidence": ***Spady*** at paras 46-50. In this case, as it relates to the Estate's remaining grounds for summary dismissal, that analysis would be more fairly and appropriately conducted alongside the credibility assessment based on the full tapestry of evidence available at trial.

b. Do Armstrong's Misrepresentations Render the Contract Void, Voidable or Otherwise Unenforceable?

[104] Civil fraud or fraudulent misrepresentation requires: (a) a false representation by the defendant; (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (c) the false representation caused the plaintiff to act; and (d) the plaintiff's actions resulted in a loss: ***Bruno Appliance and Furniture Inc v Hryniak***, 2014 SCC 8 at para 21; ***Toronto Dominion Bank v Wilde***, 2022 ABCA 128 at paras 38-39; ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***, 2017 ABCA 378 at para 21; ***Wang v Shao***, 2019 BCCA 130 at para 24, leave to appeal ref'd 2019 CanLII 106992 (SCC). While summary determination may be available when fraud allegations are involved, courts must be careful in summary determinations based on fraud where credibility is at issue: ***Precision Drilling*** at paras 26-27. This case would require a trial to fairly determine whether Armstrong was fraudulent.

[105] The elements of negligent misrepresentation are (1) there must be a duty of care based on a special relationship; (2) the representation must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the representation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted: ***Giustini*** at para 36, citing ***Queen v Cognos Inc***, 1993 CanLII 146 (SCC); ***Alberta v Cox***, 2017 ABCA 5 at para 67. The duty of care analysis involves considering both proximity and foreseeability, with the former requiring a consideration the defendant's "undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff": ***1688782 Ontario Inc v Maple Leaf Foods***

Inc, 2020 SCC 35 at para 33; ***Deloitte & Touche v Livent Inc (Receiver of),*** 2017 SCC 63 at para 30; ***Axiom Foreign Exchange International v Rudiger Marketing Ltd***, 2024 ABKB 224 at paras 62-64.

[106] In my view, the existence of a genuine issue requiring a trial about what Armstrong and Gula said to each other in their pre-Contract discussions also means there is a genuine issue about the application of the elements of this test. The Court cannot apply the test without making findings about what was said.

[107] There is also a genuine issue about whether Gula reasonably could rely on any negligent misrepresentation given the Contract's form of "entire agreement" or "whole agreement" clause (clause 6.3): ***Horizon Resource Management Ltd v Blaze Energy Ltd***, 2013 ABCA 139 at para 47; ***Gainers Inc v Pocklington Financial Corporation***, 2000 ABCA 151 at para 16; ***1234389 Alberta Ltd v 606935 Alberta Ltd***, 2020 ABQB 28 at para 183; ***Houle v Knelsen Sand and Gravel Ltd***, 2016 ABCA 247, leave to appeal ref'd 2017 CanLII 12239 (SCC).

[108] The allegation that Armstrong committed misrepresentation by failing to disclose he was a hunter engages additional issues. Absent a duty to disclose, non-disclosure generally has no legal consequences, except in those cases where silence amounts to fraud: ***Martel Building Ltd v Canada***, 2000 SCC 60 at paras 67-68; ***Motkoski Holdings Ltd v Yellowhead (County)***, 2010 ABCA 72 at para 60; ***Ryan*** at paras 76-78; ***Xerex Exploration v Petro-Canada***, 2005 ABCA 224 at para 56. A duty to disclose can arise when silence effectively renders a previous representation inaccurate, where a party brings up a particular subject in negotiations and thereby assumes a duty to ensure that the other party is aware of all the material facts relevant to that assertion, where a statement honestly made is later discovered to be false, or where one party asks the other a direct question: ***Xerex*** at paras 56-58; ***PR Construction Ltd v Colony Management Inc***, 2023 ABKB 25 at para 102; ***NEP Canada ULC v MEC OP LLC***, 2021 ABQB 180 at para 760, rev'd 2022 CarswellAlta 3849; ***Opron Construction Co v Alberta,*** 1994 CanLII 18362 (AB KB) at paras 516-521; ***Wang*** at paras 45-46. Given the genuine issues requiring a trial to resolve the parties' pre-contractual dealings and the fraud allegations, there is a genuine issue requiring a trial about whether the Estate can rely on Armstrong's non-disclosure.

c. Did Gula Lack Capacity to Contract?

[109] The parties generally agree that the test for whether a contract is voidable on the basis of a lack of mental capacity requires the following: (a) the party seeking relief was mentally incompetent at the time of the contract; (b) by reason of the mental incompetence, that party was not capable of understanding the terms of the document and of forming a rational judgment of its effects upon their interests; and (c) the other party had actual or constructive knowledge of the incompetence: ***Bank of Nova Scotia v Kelly***, 1973 CanLII 1289 (PE SCTD); ***RMK v NK***, 2020 ABQB 328 at para 132; ***Guardian Law Group v LS***, 2021 ABQB 591 at paras 41-44. The inquiry is highly fact-specific: ***RMK*** at para 130; ***Laszlo v Lawton***, 2013 BCSC 305 at para 197.

[110] There is no categorical prohibition against summarily determining contractual capacity issues: ***Hess v Thomas Estate***, 2019 SKCA 26 at para 19. However, affidavit evidence, even from medical experts, may not be sufficient for the court to make the factual findings necessary to conclude a lack of contractual capacity: ***Hess*** at para 19. In ***Gauthier v Gauthier***, 2017 MBQB 116, aff'd 2019 MBCA 71, which is relied on by the Estate, the matter originally proceeded summarily but it became clear it required a trial.

[111] There are two key problems with the Estate's attempt to have Gula's contractual capacity resolved summarily. First, the Estate relies on the observations of family members and friends, and records or hearsay from medical professionals. In my view, given the nuanced nature of the evidence about Gula's medical history, starting with a serious head injury in 1974, his history of having capacity to enter into agreements and engage lawyers prior to November 2017 (while at the same time experiencing observable cognitive decline according to his family and friends), and the lack of expert opinion evidence about the likely state of Gula's ability to understand and judge the effects of the Contract, causes me to lose confidence in the record. If this matter was not otherwise summarily dismissed, I would not be comfortable making the inferences or findings about capacity that the Estate asks me to make in these circumstances.

[112] Second, and in any event, the Estate acknowledges that there is a conflict in the evidence between the observations of its witnesses about Gula's capacity generally and Armstrong's observations in his dealings with Gula in respect of the Contract. This again raises important credibility questions that affect all three elements of the legal test noted above and cannot be resolved without *viva voce* evidence.

d. Was the Contract Unconscionable?

[113] Unconscionability is an equitable doctrine used to set aside unfair agreements that resulted from inequality of bargaining power: ***Uber Technologies Inc v Heller***, 2020 SCC 16 at para 54. Two elements are required for the doctrine to apply: inequality of bargaining power and a resulting improvident bargain: ***Uber*** at paras 63-65; ***Douez v Facebook***, 2017 SCC 33 at para 115; ***Moore v Wetaskiwin Friends and Horizons Training***, 2022 ABKB 617 at para 102.

[114] An inequality of barging power exists when one party cannot adequately protect their interests in the contracting process: ***Uber*** at para 66. There are no rigid limitations on the types of inequality that fit this description; they may be personal (characteristics of the claimant generally) or circumstantial (vulnerabilities peculiar to certain situations): ***Uber*** at para 67. The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", but those disadvantages need not be so serious as to negate the capacity to enter a technically valid contract: ***Uber*** at para 67. In many cases, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both: ***Uber*** at para 68.

[115] A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable, as measured at the time the contract is formed: ***Uber*** at para 74. Improvidence must be assessed contextually, which may require reading the terms of the contract in the circumstances at the time of its formation, such as market price, the commercial setting, or the positions of the parties: ***Uber*** at para 75; ***Moore*** at para 105.

[116] The Estate's position that the Contract is unconscionable is based on the same core evidence it relies on to support its argument that Gula lacked capacity to contract. It essentially argues that, even if Gula had capacity, his cognitive limitations created or contributed to an inequality of bargaining power. I have already found that there is a genuine issue requiring a trial about whether Gula had capacity. For the same reasons, there is a genuine issue requiring trial about whether there was an inequality of bargaining power. In these circumstances, it would not be appropriate to summarily determine unconscionability: ***Hess*** at para 69. I need not consider the question of improvident bargain.

e. Should Specific Performance be Denied?

[117] Specific performance is an equitable remedy engaging the discretion of the court: ***Kroetsch v Chick***, 2023 ABKB 326, at paras 47-49; ***Herr v Bourne***, 2021 ABQB 478 at paras 89-91; ***Roman Catholic Episcopal Corp of the Diocese of London in Ontario v AXA Insurance Canada***, 2016 ONSC 4061 at para 47.

[118] The Estate relies on Armstrong's lack of clean hands and misrepresentations as a factor supporting dismissal of specific performance, relying on ***Guest v Beecroft***, 1957 CarswellBC 86 (BCSC) at para 6, and ***David Cooper Investments Ltd v Bermuda Tavern Ltd***, 1999 CarswellOnt 1795 (ONSC) at paras 110,114, aff'd 2001 CanLII 3639 (ON CA).

[119] In my view, the Estate's position that specific performance should be summarily determined is not persuasive. First, to make findings and exercise the court's discretion would require resolution of some of the other genuine issues that require a trial, including findings about what was said between Gula and Armstrong and whether, among other things, Armstrong misrepresented or misled Gula (which in turn requires findings about Gula's capacity or cognitive capabilities).

[120] Second, specific performance is only a relevant remedy if Armstrong succeeds in the trial of the action. In effect, the Estate seeks the preliminary summary determination of an issue or partial summary judgment. The latter raises consideration of additional factors, including whether there is a danger of duplicative or inconsistent findings: ***Issa v BMB Inc***, 2024 ABKB 159 at para 76; ***DIRTT Environmental Solutions Ltd v Falkbuilt Ltd***, 2021 ABQB 252 at para 23.

[121] It would not be appropriate or fair to make a decision on specific performance without being able to make findings about all the potentially relevant equitable considerations, or to otherwise isolate or pre-determine one of the potential remedies before determining the merits of the substantive claim.

f. Conclusion re Summary Dismissal on Other Grounds

[122] If I had not granted summary dismissal on the basis that I did, I would have dismissed the Application and directed the matter to trial.

C. Should the Estate be Entitled to Amend its Statement of Defence?

[123] It is not necessary for me to address this question because I have summarily dismissed Armstrong's claim based on the pleadings as they currently stand. In case I am wrong in my decision to grant summary dismissal, I will briefly address the amendment application.

[124] Rule 3.65(1) provides that, subject to rule 3.65(5), the Court may give permission to amend a pleading before or after the close of pleadings. It is discretionary. Judicial interpretation of rule 3.65 over time provides some guidance on the exercise of the discretion.

[125] I recently summarized the applicable framework in ***Astolfi v Stone Creek Resorts Inc***, 2023 ABKB 416 at paras 40-42:

> [40] The most recent Alberta Court of Appeal framework provides that there is a strong presumption in favour of allowing amendments to pleadings after the close of pleadings: ***Kosteckyj v Paramount Resources Ltd***, 2022 ABCA 230 at paras 12, 41; ***Pace v Economical Mutual Insurance***, 2021 ABCA 1 at para 3;

AARC Society v Canadian Broadcasting Corporation, 2019 ABCA 125 at para 85. The applicant need not show any particular reason for needing the amendment: ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2014 ABCA 74 at para 24. Courts should exercise their discretion to allow the amendment unless the non-moving party demonstrates an exception or compelling reason not to: ***Kosteckyj*** at paras 12, 41; ***Pace*** at para 3, 53; ***AARC Society*** at paras 6, 53.

[41] Courts must consider two distinct interests when assessing the merits of an amendment application: (1) the impact the proposed amendment will have on the non-moving party's litigation interests; and (2) the public interest in the resolution of litigation as quickly as reasonably possible without the expenditure of more public and private resources than is reasonably necessary: ***AARC Society*** at paras 57–62.

[42] What contemplates a compelling reason not to permit an amendment after the close of pleadings is not, and never has been, a closed list of exceptions. However, while described in different ways by different courts, certain compelling reasons or grounds not to permit amendments have been recognized over time, including:

> (a) the proposed amendment will significantly harm a legitimate litigation interest of the non-moving party; for example the proposed amendment will cause significant prejudice to a legitimate litigation interest of the non-moving party that cannot adequately be abridged by an ameliorative costs order or any other order: ***Pace*** at paras 4–5; ***Kosteckyj*** at para 41; ***AARC Society*** at para 64; ***Attila Dogan*** at para 25; ***Remington Development Corporation v Enmax Power Corporation***, 2022 ABCA 71 at para 33;
>
> (b) the proposed amendment advances a claim that cannot possibly succeed or is hopeless because it would have been struck if it were in the original pleading; the test is whether it is plain and obvious that there is no triable issue: ***Swaleh v Lloyd***, 2020 ABCA 18 at para 13; ***Remington*** at paras 35–37; ***Eon Energy Ltd v Ferrybank Resources Ltd***, 2018 ABCA 243 at para 18. This incorporates considerations like those under rule 3.68. For example, proposed amendments will be hopeless if they:
>
> > (i) disclose no cause of action or reasonable claim, or no reasonable defence to a claim: ***Pace*** at para 6; ***AARC*** Society at para 10; ***Attila Dogan*** at para 27; rule 3.68(2)(b);
> >
> > (ii) raise matters over which the court has no jurisdiction: rule 3.68(2)(a);
> >
> > (iii) are frivolous, irrelevant or improper: rule 3.68(2)(c);

(iv) constitute an abuse of process: rule 3.68(2)(d); and

(v) have an irregularity that is so prejudicial to the claim that it is sufficient to defeat the claim; rule 3.68(2)(e);

(c) the proposed amendment is not supported by a required threshold level of evidence, based on the nature of the proposed amendment: ***Balm v 3512061 Canada Ltd***, 2003 ABCA 98 at paras 25–29; ***Attila Dogan*** at para 24; ***Barker v Budget Rent-A-Car of Edmonton Ltd***, 2012 ABCA 76 at para 12; ***Brewin v Magyar***, 2022 ABKB 729 at paras 32–33; ***Club Industrial Trailers v Paramount Structures***, 2022 ABQB 34 at para 25;

(d) unless permitted by statute, the proposed amendment seeks to add a new party or a new cause of action after the expiry of a limitation period and is statute-barred or subject to a "rock-solid" limitations defence: ***Attila Dogan*** at para 25; ***Pace*** at para 6; ***AARC Society*** at para 65;

(e) if the failure to plead earlier, or the proposed amendment itself, involves bad faith: ***Pace*** at paras 7, 54; ***AARC Society*** at paras 11, 66; ***Attila Dogan*** at para 25; and

(f) the proposed amendment will contravene the public interest in promoting expeditious and economical dispute resolution: ***Pace*** at paras 4, 7, 51–52; ***Kosteckyj*** at para 41; ***AARC Society*** at paras 59–62.

[126] Had I not granted summary dismissal, I would have granted the Estate permission to amend its Statement of Defence. The proposed amendments are amply supported by evidence, do not add new claims or defences (but rather particularize existing pleadings), are not made in bad faith, and do not contravene the public interest. The amendments would not unduly delay the matter proceeding to trial.

[127] Further, I am not satisfied that the amendments would cause any or sufficient prejudice to Armstrong. They do not raise new issues, claims or defences. Any "potential for lost records" (as deposed by Armstrong) is speculative and if Armstrong failed to preserve records he did so at his own peril because records relevant and material to the amendments would also be relevant and material to the issues raised in the original defence. Further, Armstrong is partly responsible for any prejudice related to the passage of time's impact on memories or availability of witnesses, at least from January 2018 until October 2019, given his delay in commencing proceedings. Finally, including for the reasons set out above, I am not satisfied that allowing the proposed amendments would sufficiently prejudice Armstrong's potential claims against others.

[128] In the circumstances, if the action proceeded, then there would be no compelling reason or ground not to permit the proposed amendments.

V. Conclusion

[129] Armstrong's claim is summarily dismissed.

[130] In the event the parties are unable to reach agreement on costs, the following process shall apply:

(a) within four weeks of this decision, each party shall file and serve on the opposing party and submit to my office a written cost submission setting out their costs position. Each party's costs submission shall provide: (a) their position with respect to the factors set out in rule 10.33; (b) any pre-decision formal offer or other settlement offer they wish considered; (c) a draft proposed bill of costs pursuant to Schedule C of the *Rules*; (d) a summary of their proposed reasonable and proper costs that the party incurred in respect of the action. These submissions will be a maximum of 3 pages in letter format, single spaced (excluding authorities, offers, or proposed bills of costs), and

(b) within six weeks of this decision, each party shall file and serve on the opposing party and submit to my office their response submission to the other party's cost submission, to a maximum of 3 pages in letter format, single spaced (excluding authorities).

Heard on the 26th day of April, 2023 and 10th day of November, 2023.
Dated at the Town of Peace River, Alberta this 19th day of June, 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Robert A. Martz and Jennie S. Han
for the Plaintiff/Respondent

Leah Paslawski
for the Defendant/Applicant