Court of King's Bench of Alberta

Citation: Kaup v Landrex Hunter Ridge Inc, 2023 ABKB 542

Date: 20230927
Docket: 2003 03189
Registry: Edmonton

Between:

Martin Kaup and Martin J. Kaup Professional Corporation

Plaintiffs/Defendants by Counterclaim

- and -

Landrex Hunter Ridge Inc. and Landrex Inc.

Defendants/Plaintiffs by Counterclaim

Memorandum of Decision
of the
Honourable Justice L.K. Harris

I. Introduction

[1] The Plaintiffs, Martin Kaup (Kaup) and Martin J. Kaup Professional Corporation, (MKPC) are suing two related corporations - Landrex Hunter Ridge Inc. (LHR) and Landrex Inc. (Landrex) for breach of contract. Landrex counter-sued MKPC, also for breach of contract. At issue are two contracts, signed in 2017, a Master Sales Agreement (the MSA) and an Agreement for Sale. The Agreement for Sale is for land owned by MKPC (the MKPC Land) to be sold to Landrex. The Defendants' land (the LHR Land) is adjacent to a separate parcel of land owned by Kaup. The MSA included a clause requiring LHR to "clean out the ditch" on its lands because Kaup believed that the Defendants' failure to adequately manage their land was causing flooding

on his land. The parties disagree about what "clean out the ditch" means: Kaup understood that it meant the Defendants would mechanically remove silt and dirt from the ditch while the Defendants argue that the phrase "clean out the ditch" is void for uncertainty and should be severed from the MSA.

[2] The Defendants applied for summary judgment of the counterclaim and summary dismissal of the Plaintiffs' claim. The Plaintiffs brought a cross-application for an order resolving certain questions at issue in the actions, and in the alternative, summary judgment of their action and summary dismissal of the counterclaim. The Applications were heard in May, 2022 by Applications Judge Summers.

[3] Summers AJ concluded that both the statement of claim and the counterclaim could be determined summarily. The Plaintiffs' claim was dismissed, and the Defendants' counterclaim was granted.

[4] The Plaintiffs appeal the decision of Summers AJ.

II. Background

[5] The general area in which the LHR Land and the Kaup Land are located has historical water drainage issues leading to flooding from time to time.

[6] In July 2016, LHR obtained approval from Alberta Environment and Parks to construct and operate a storm water management system on their Land. Approximately three weeks after the approval was granted, Kaup filed a Notice of Appeal. Kaup's concern was that flooding on his land was caused, at least in part, by the lack of water management on the LHR Land.

[7] The Defendants disagreed with Kaup, but wanted to resolve Kaup's Appeal so that it could proceed to develop the LHR Land.

[8] The parties negotiated two agreements. On January 19, 2017, the parties signed a Master Sales Agreement (the MSA). Under the MSA:

- LHR would "clean out the ditch" located on the LHR Land:

  > Landrex Hunter Ridge Inc. will clean out the ditch located upon the Landrex Hunter Ridge Inc. Land (located south of Township Road 554, Sturgeon County, Alberta and north of the St. Albert Costco store).

- Kaup would withdraw his appeal and would not raise further opposition to development licenses for drainage issues for the LHR Land.
- Landrex and MKPC would sign a separate Agreement for Sale whereby Landrex would purchase the MKPC Lands for $1,250,000 plus GST.
- The purchase price was to be paid according a schedule whereby Landrex would make an initial payment of $450,000 by January 23, 2017, followed by installments of $200,000 on January 23rd of each year until the purchase price was paid in full.

- Upon payment of the purchase price in full, MKPC would transfer title to the MKPC Land to Landrex.

[9] The MSA does not provide any definition of "clean out the ditch".

[10] On the sane day, January 19, 2017, Landrex and MKPC entered into the Agreement for Sale for the MKPC Land to Landrex, which included the payment schedule set out in the MSA.

[11] Kaup withdrew his Appeal and Landrex made the payments as contemplated in the MSA and the Agreement for Sale.

[12] Subsequent to the signing of the agreements, Kaup engaged in communications with the Defendants about his belief that the flooding on his Lands was caused by the neglected ditch on the LHR Land. Kaup repeatedly requested that the Defendants clean out the ditch. However, the Defendants' consultants advised that the ditch was not the cause of the flooding on Kaup Land. Despite that, the Defendants offered to take certain steps to address Kaup's concerns, including cleaning culverts, mowing, and removing debris or other blockages. Kaup disagreed with the Defendants' proposals, but did not indicate what he thought needed to be done to the ditch until much later in 2019.

[13] In August 2019, Kaup offered to accept a delivery of 1060 cubic meters of dirt in exchange for terminating LHR's obligation to clean out the ditch. The parties exchanged several counteroffers, but were unable to come to an agreement on the issue.

[14] On January 28, 2020, Kaup alleged in an email that the Defendants were in default of the Agreements. He issued a statement of claim on February 11, 2020, alleging that the Defendants were in default and purporting to cancel the Agreements. The statement of claim sought, *inter alia*, a declaration that the Agreements were terminated and a direction that all sums paid by the Defendants were forfeited.

[15] The Defendants filed a statement of defence and counterclaim, denying that they were in breach of the Agreements, and seeking an order for specific performance requiring MKPC to transfer title to the MKPC Land to Landrex.

[16] On September 18, 2020, Kaup filed a second Notice of Appeal in relation to the development approval obtained by LHR in July 2016.

III. The Decision Below

[17] The Plaintiffs argue that the phrase "clean out the ditch" means that the Defendants were to remove silt and dirt from the ditch on the LHR Land by mechanical means. Kaup swore an Affidavit explaining the basis for this position.

[18] The Defendants disagreed, arguing that the phrase "clean out the ditch" is void for uncertainty and should be severed from the MSA. As such, they are not in breach of the MSA and the Plaintiff should be directed to transfer title to the MKPC Land to Landrex.

[19] Summers AJ found that the action was simply "one of contractual interpretation" and that the phrase "clean out the ditch" was indeed a term of the MSA. However, Kaup's evidence that he thought "clean out the ditch" meant removing silt and dirt using construction equipment was of limited assistance, even if it was admissible. "Clean out the ditch" was vague as it did not specify what was to be removed, the volume to be removed, and what was to be achieved. After

concluding that the phrase was vague, Summers AJ cited ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 and considered the surrounding circumstances to see if they assisted in providing meaning.

[20] Kaup provided evidence consisting of emails with and between various Landrex representatives and his own handwritten notes from points in time before the parties signed the MSA, referring to Kaup's belief that the ditch on the LHR Land was causing flooding on the Kaup Land. Kaup also provided other emails and written communications after the MSA was signed which referred to Kaup asking the Defendants' representatives about their plans to clean the ditch. Summers AJ noted that these materials were neither contemporaneous with the MSA signing and therefore did not constitute surrounding circumstances or, in the case of the handwritten notes, did not reflect that the parties were *ad idem* on what was required, but rather, that they disagreed as to the utility of cleaning the ditch.

[21] Summers AJ concluded that as at the time the MSA was signed, the parties had not determined what exactly needed to be done to clean out the ditch. The Defendants' "plan" was to assess the situation in the spring of 2017, and while the use of equipment was contemplated, it was not definitive. The exact nature of what was to be done could encompass any number of things, but ultimately the Defendants took little action until the spring of 2019 when they were pressed by Kaup. Kaup's position was that he would wait to see if he was satisfied with what the Defendants proposed.

[22] It wasn't until May 2019 that Kaup took the position that "clean out the ditch" meant "digging and removal of dirt and silt from the ditch". In other words, it was an agreement to agree, in which case the phrase "clean the ditch" was void for uncertainty.

[23] Further, the phrase "clean out the ditch" could not be saved using the criteria in ***Ko v Hillview Homes Ltd***., 2012 ABCA 245, leave to appeal ref'd [2012] SCCA No. 445.

[24] Summers AJ addressed whether evidence that cleaning the ditch would prevent flooding on Kaup's land could be a factor in deciding the meaning of "clean out the ditch," he found that the Court should give a purposive approach to determining the parties' intentions and that cleaning the ditch was intended to assist Kaup. However, the evidence showed that removing silt and dirt would not have improved the flooding on the Kaup Land, and therefore, could not lead to the conclusion that removal of silt and dirt was required.

[25] Summers JA ordered that the clause "clean out the ditch" be severed from the MSA. As a result the Defendants were not in breach of the MSA.

[26] Finally, Summers AJ considered what the Plaintiff's remedy would be had he found that the Defendants were in breach of the MSA. The Plaintiffs argued that they could terminate both agreements and keep the money paid by Landrex. Summers AJ found that performance of the covenants under the Agreement for Sale were in no way dependent on performance of the covenants under the MSA. As stand-alone agreements, a breach of the MSA by the Defendants did not entitle the Plaintiffs to the remedy they sought.

IV. Standard of Review

[27] This Appeal is governed by Rule 6.14 of the *Alberta Rules of Court*, AR 124/2010, the relevant portions of which state:

> Appeal from applications judge's judgment or order
>
> 6.14(1) If an applications judge makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.
>
> ...
>
> (3) An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.
>
> (4) The record of proceedings is
>
> (a) the application before the applications judge,
>
> (b) affidavits and other evidence filed by the parties respecting the application before the applications judge,
>
> (c) any transcript of proceedings before the applications judge, which must be ordered and paid for by the appellant, unless the Court determines, or the parties agree, that transcripts are not needed, and
>
> (d) the applications judge's judgment or order and any written reasons given for the decision.

[28] The Plaintiffs rely upon an affidavit sworn by Kaup on August 31, 2021 that was before Summers AJ (the First Kaup Affidavit). In support of their Appeal, the Plaintiffs also filed a second affidavit sworn by Kaup on September 1, 2022 (the Second Kaup Affidavit) pursuant to Rule 6.14(3) containing evidence which was not before Summers AJ.

[29] The Defendants rely upon the Affidavit of Larry Andrews which was before Summers JA.

[30] The standard of review on appeals from an Applications Judge is correctness; ***Bahcheli v Yorkton Securities***, 2012 ABCA 166 at para 30, ***Singh v Noce,*** 2019 ABCA 55 at para 8, and ***Stylecraft Developments (1984) Ltd v Carscallen LLP,*** 2023 ABKB 504 at para 8.

[31] An appeal of an Application Judge's decision is, in effect, *de novo*, and although Rule 6.14(3) provides that the appeal is on the record of proceedings before the Applications Judge, if there is new evidence admitted that was not before the Applications Judge, the judge hearing the appeal is considering a different case than the one below. I may exercise any discretion afresh and substitute my views for those of the Applications Judge.

[32] If, however, I decide that the Second Kaup Affidavit should not be admitted, and there is no new evidence, then I may frame my decision by reference to the correctness of the decision below: ***HOOPP Realty Inc. v Emery Jamieson LLP,*** 2020 ABCA 159 (at para 41), leave to appeal ref'd [2020] SCCA No 204.

V. Issues

[33] The issues raised in this Appeal are as follows:

(a) Should the Second Kaup Affidavit be admitted into evidence?

(b) Can the phrase "clean out the ditch" be interpreted as Kaup argues? If it can, have the Defendants breached the MSA and what remedy are the Plaintiffs entitled to?

(c) If the phrase "clean out the ditch" is void for uncertainty, what is the appropriate remedy?

(d) Should either party's application for summary judgment/summary dismissal be granted?

VI. Law and Analysis

A. Is the Second Kaup Affidavit admissible?

[34] The Defendants acknowledge that the test relating to the admissibility of new evidence under Rule 6.14(3) is low.

[35] However, they argue that the Second Kaup Affidavit is inadmissible as evidence in this Appeal because it consists solely of opinion, argument, conclusion, and hearsay. It is largely a repetition of what was contained in the First Kaup Affidavit, and it fails to explain why any new evidence was not tendered previously.

[36] The Second Kaup Affidavit accomplishes three things:

- it responds to the conclusion of Summers AJ that Kaup was expecting "an agreement to agree". Kaup denies that this was the case, and goes on to explain the importance of the ditch cleaning to him and argue that Summers' AJ conclusions were improperly based on hearsay;
- it provides some additional emails between various LHR representatives ostensibly demonstrating the Defendants' knowledge of what "clean out the ditch" meant. Kaup reiterates that the Defendants knew that "clean out the ditch" meant the removal of dirt and silt with construction equipment;
- Kaup points to dredging done on a different ditch on land owned by Sturgeon County in the same general area. He says that this is the same work that was agreed to by the Defendants in the MSA. Kaup also attaches as exhibits photographs which he says depict the state of the ditch which is the subject of the MSA in 2016, 2017 and 2022.

[37] The Plaintiffs argue that the Second Kaup Affidavit further clarifies his recollection, corrects Summers AJ' inaccurate conclusions, attaches relevant photographs about the definition of the term "clean out the ditch," and attaches documents that are on the court record but were not relevant "until Master Summers relied on hearsay in his decision."

[38] The party seeking to admit new or additional evidence must show that the evidence is "relevant and material". This test for relevance and materiality is "quite wide" and a "very lax test": ***Bahcheli***, at para 16; ***First Calgary Financial Credit Union Ltd v Inspired Luxury Homes Inc***, 2014 ABQB 787 at para 78. Having said that, the additional evidence sought to be considered must not only be relevant and material, but it must also be admissible evidence: ***Brian W Conway Professional Corporation v River Rock Lodge Corporation,*** 2015 ABQB 359 at para 30 (aff'd 2015 ABCA 404). In a case like this, where the Appellant seeks a final

disposition of a claim, the evidence must meet the standards required at trial: ***Attila Dogan Construction and Installation Co v AMEC Americas Ltd***, 2015 ABQB 120 at para 59, aff'd 2015 ABCA 406.

[39] Each of the three categories of evidence within the Second Kaup Affidavit face barriers to admission.

1. Kaup's subjective evidence as to his beliefs

[40] Summers AJ raises this issue in his Endorsement at para 22:

> Kaup stated in his Affidavit that he thought that "clean out the ditch" meant removing silt and dirt and that construction equipment would be required. However, Kaup's testimony as to his subjective belief that "clean out the ditch" meant removal of silt and dirt using mechanical equipment to dredge the Hunter Ridge Ditch is of limited assistance, even if it is admissible: ***Vandal v Cousineau,*** 2015 ABCA 408.

[41] In ***Vandal***, the Court considered an appeal of a trial decision in which the interpretation of a contract was in issue. The Court noted that ***Sattva*** does not permit a contracting party to testify "I believe the words of the contract mean such" (at para 9). Evidence of the parties about their subjective intentions is of limited assistance, if it is even admissible. At para 59 of ***Sattva,*** the Supreme Court noted:

> It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (***King***, at para. 35; and ***Hall***, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties…

[42] I echo Summers AJ's concern about this type of evidence. While Summers AJ did not expressly decide if such evidence ought to be admitted, it is clear from his decision that he gave it no weight. Despite that, the Plaintiffs have put forward more such evidence in the Second Kaup Affidavit when Kaup explains why he was prepared to withdraw his appeal and why he knows 'for certain' that the Defendants knew that cleaning out the ditch meant the removal of dirt and silt with construction equipment, amongst other examples.

[43] Kaup's denial that he was never expecting an agreement to agree as to what "clean out the ditch" meant and explaining why he had agreed that the Defendants would remove the silt and dirt in the ditch with construction equipment is the same type of evidence questioned by Summers AJ and precluded in ***Vandal*** and ***Satva***. In addition, it is argument, more suited to his written submissions as opposed to an affidavit. I therefore conclude that this is not admissible evidence in this appeal.

2. The Landrex Emails

[44] Kaup also attaches a series of emails between LHR representatives and some of its consultants in 2015 and 2016 as exhibits to the Second Kaup Affidavit. The emails contain discussions about Kaup and "what would be required for me to refrain from filing a Statement of Concern or to withdraw my Appeal of the Water License". While these emails do, at various times, refer to Kaup and conversations with Kaup, Kaup is not a party to these emails. They are

hearsay and of limited assistance for the purpose of establishing the Defendants' knowledge at the relevant time. Further, and as noted by Summers AJ, they are not contemporaneous with the signing of the Agreements. I conclude that this evidence is inadmissible because they would not be admissible at trial in this format, but even if admitted, they would provide limited assistance and would be given very little weight.

3. The Sturgeon County Ditch and Photographs

[45] The Plaintiffs argue that around the same time as his discussions with the Defendants about the flooding on the Kaup Land, the Defendants were experiencing similar flooding issues on the LHR Land, also caused by a neglected ditch on land owned by Sturgeon County. Sturgeon County took steps to dredge their ditch of dirt and silt using mechanical equipment. The Plaintiffs argue that because of Sturgeon County's actions to dredge their ditch, the Defendants knew that Kaup wanted the same thing done to the ditch on the LHR Land.

[46] The relevance of the work done by an unrelated party on an entirely different ditch is questionable. Photographs purporting to show that work being done, as well as the ditch on LHR Land in particular years are also of questionable assistance. However, I am mindful of the fact that the bar to admitting new evidence under Rule 6.14(3) is low. I will therefore consider this evidence admissible, but I decline to give it much weight.

B. The Interpretation of the phrase "clean out the ditch"

[47] The phrase "clean out the ditch" is clearly a term of the MSA.

[48] This leads to the question, does "clean out the ditch" means removing silt and dirt from the ditch through mechanical means, as argued by the Plaintiffs.

[49] Summers AJ correctly cited ***Sattva*** as the starting point for interpreting contracts. The first principle of interpretation requires the decision-maker to read the contract as a whole, giving the words used their ordinary and grammatical meaning: ***Sattva*** at para 47.

[50] The principles for dealing with uncertainty in contracts are set out in ***Ko***. The Court of Appeal noted that the test for interpreting contract terms is objective and that the subjective views of the parties as to the interpretation or operation of the contract are irrelevant (para 27).

[51] Further, the rule is far from a technicality (para 75, 80). Uncertain material terms cannot constitute a contract, and such provisions are usually impossible to perform or enforce (para 81). The essential terms must show, with a reasonable degree of certainty, what the parties meant (para 87, 101). Whether a term is essential depends on the type of the contract, for example, a contract to purchase a piece of machinery may require less specific details than a contract to build a house (para 91). As well, if the parties considered a term to be necessary and they included it in the agreement, but the term is too vague to interpret, the contract will be void. This may include terms beyond identifying the parties, property, or price (para 90).

[52] A party's unfair or unreasonable approach to negotiating an uncertain term is irrelevant (para 92). Although a court may be reluctant to find a contract void for uncertainty if it has been partly or fully performed at least by one side, there should be no general reluctance to find a contract void for uncertainty (para 118). Whether the parties thought they had a contract is irrelevant, particularly where the contract has not been performed (para 119).

[53] Uncertain terms may be saved in limited circumstances (para 120):

> 1. A specific manner of ascertaining the term has been given by reference to a published or to be published price or set of standards.
>
> 2. A third party arbitrator or valuator, or even one of the parties acting unilaterally, has been authorized to fix the term.
>
> 3. An established custom of the trade is implied as having been incorporated into the contract, e.g., when and where sales might close or that debts will be paid.
>
> 4(a) They may be so obvious (using as a test the "Oh, of course" reply to the officious bystander) that they must be implied in the contract.
>
> (b) Or some terms may be implied by law, e.g. use of Canadian currency, or simultaneous tenders of conveyance and price.

[54] The Court of Appeal further held a party can raise the validity of the contract later, and that it is not necessary to raise uncertain terms immediately (para 121). In addition, if no valid contract initially existed, **the later conduct of the parties** (short of a new contract) is irrelevant (para 121).

[55] In ***Hotchkiss v Budding Gardens Inc***., 2020 ABQB 794, Eamon J summarized the above principles, and went on to note that essential terms must be reasonably ascertainable or show a reasonable degree of certainty about what the parties meant (at para 65-66):

> ... A mere difficulty in interpretation, or ambiguity that can be properly resolved by applying contract interpretation techniques, does not result in uncertainty.
>
> In deciding the question, the Court is to interpret the written language of the lease to ascertain the parties' objective intent through the application of legal principles of interpretation... The exercise is to ascertain what a reasonable person would have understood from the words of the document read as a whole considering the properly admissible surrounding circumstances... While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement... The surrounding circumstances are ascertained from "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"... This evidence includes negotiations to the extent it shows the factual matrix (for example, by showing the genesis and aim of the contract)... If the meaning of the term is ambiguous (reasonably susceptible of more than one meaning), the scope of admissible evidence is wider and includes post-contract conduct... **However, subjective evidence of the parties' intentions is generally inadmissible**... Commercial contracts should be interpreted in accordance with sound commercial principles and good business sense... (Emphasis added, citations omitted).

[56] The phrase "clean out the ditch" is ambiguous because it could mean several things, from the perspective of the reasonable person reading the MSA, as a whole. While "cleaning out the ditch" could mean dredging with construction equipment, it could also equally mean cutting vegetation, picking garbage. or removing obstructions from culverts. There is nothing within the MSA that specifies the extent to which the ditch was to be cleaned, or how it was to be cleaned.

[57] This phrase does not show the parties' intentions with a reasonable degree of certainty, as required in ***Ko***.

[58] I must therefore turn to the objective evidence of the surrounding circumstances at the time of the execution of the MSA to determine if those circumstances assist in establishing the meaning of the phrase "clean out the ditch". As noted in ***Satva***, the nature of surrounding circumstances vary from case to case but does have restrictions:

> It does, however, have its limits. It **should consist only of objective evidence** of the background facts **at the time of the execution of the contract**... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties **at or before the date of contracting**. (Citations omitted, emphasis added)

[59] Summers AJ succinctly summarized the surrounding circumstances evidence before him at paras 27 – 34 of his Endorsement. The Kaup's subjective beliefs set out in the First Kaup Affidavit cannot assist. The First Kaup Affidavit also included two relevant exhibits: a handwritten note by Kaup recording discussions he had with Landrex representatives during a meeting on November 18, 2016, two months before the MSA was executed. It stated in part:

> "I want them to dredge their ditch I said" and "won't solve they say" and "may help I say"

[60] The second exhibit consisted of an exchange of emails between Kaup and LHR representatives from March 2017, (two months **after** the MSA was executed) in which Kaup asks what the plans were for Landrex to clean out the ditch. Landrex responded that "we will be assessing the work required in April/May and do what is necessary once we have some equipment onsite…"

[61] As noted above, there is an email from Kaup to Landrex dated May 21, 2019, in which Kaup states that to "clean out the ditch" means to "clean out the silt and dirt" which "involves digging and removal of dirt and silt from the ditch". However, as noted earlier, this email is not contemporaneous with the signing of the MSA and constitutes irrelevant later conduct on the part of Kaup.

[62] Landrex provided no response to the meeting notes from November 18, 2016, and asserts that the parties could not have intended to dredge the ditch because doing so would have required approval under the *Water Act*. Further, Sturgeon County's actions in cleaning their ditch could not act as a precedent because Landrex disputed that the situations with both ditches were the same.

[63] Kaup argues that Summers AJ erred in his finding that the contractual term "clean out the ditch" did not mean removing silt and dirt from the ditch, and that this error was articulated in three ways:

- by concluding that the parties had not determined what exactly needed to be done,
- by concluding that Kaup was expecting an agreement to agree, and
- By concluding that "cleaning out the ditch" does not necessarily mean that silt and dirt had to be removed.

[64] The Plaintiffs' evidence does not establish the surrounding circumstances to the required degree. Most of the Plaintiffs' evidence in the First Kaup Affidavit is either inadmissible subjective opinion, or not contemporaneous with the negotiation and signing of the MSA. The only admissible, contemporaneous evidence is the handwritten note, but I find that it does not establish that the parties agreed that the ditch be cleaned by removing silt and dirt by mechanical means. At best, they only establish that the parties disagreed on the cause of the flooding on the Kaup Land, and that the Defendants' view was that they would assess and then decide what was needed to clean the ditch.

[65] The Second Kaup 2022 Affidavit does not improve the Plaintiffs' position. As noted above, Kaup's statements as to his subjective beliefs and explanations as to why the subject phrase means dredging the LHR ditch by mechanical means is inadmissible. The various emails between Landrex representatives and their consultants are hearsay and bear little weight. The information regarding what was done by Sturgeon County to another ditch is irrelevant to the issue at hand. Photographs of the ditch in question do nothing to assist in the interpretation of the MSA.

[66] The Plaintiffs argue that the phrase "clean out the ditch" must mean that the Defendants had an obligation to take positive steps, and to conclude otherwise means the parties contemplated the Defendants doing nothing. This would allow the Defendants to escape their obligations under the MSA and would be patently unfair.

[67] While I agree that the phrase "clean out the ditch" seems to contemplate the Defendants taking steps to do something, the issue is defining precisely what those steps are. The inability to reach any conclusion on this point based on the evidence presented by the parties leads to the finding that this provision is too vague to be enforced, and cannot be saved.

[68] If the parties intended that the ditch was to be dredged using mechanical equipment, then the parties could have simply included that requirement in the MSA. They did not. The Plaintiffs may honestly, but subjectively, believe that dredging is required, but such a requirement is not clear from the surrounding circumstances.

[69] Therefore, the evidence of the surrounding circumstances does not assist in determining the proper interpretation of the phrase "clean out the ditch". I conclude that this provision is void for uncertainty, and unable to be saved in accordance with the criteria set out in ***Ko***.

C. Remedy

[70] As a result of finding the phrase "clean out the ditch" void for uncertainty, Summers AJ concluded that obligation could be severed from the remainder of the MSA, relying upon ***Hotchkiss v Budding Gardens Inc,*** 2021 ABQB 333 (***Hotchkiss #2***). In that case, at paragraphs 12-13, Eamon J found that British Columbia authority on the issue of contractual severance was consistent with authority in Alberta, and those cases provided that 'severance of uncertain terms is limited to those that are:

> (a) meaningless, minor, or subsidiary to an otherwise enforceable agreement; or
>
> (b) in a divisible part of an agreement.

[71] Vague or uncertain terms that the parties intended to govern a vital aspect of the parties' relationship are not severable; they vitiate the entire agreement: ***Hotchkiss #2*** at para 12, citing ***Khela v Clarke***, 2021 BCSC 503. Further, in ***Ko***, the Alberta Court of Appeal held that the

Court may sever if the subject matter is separable (at para 155). In ***Hole v Hole***, 2016 ABCA 34 at para 49, the Court held that uncertain terms that are not an essential part of the contract will not be fatal to its enforcement; uncertain or meaningless terms that are subsidiary may be severed from the contract.

[72] I conclude that the portion of the MSA provision requiring the Defendants to "clean out the ditch" is not severable. It is not clearly a divisible part of the agreement.

[73] The Court should not be creating a new agreement, and cannot make a bargain for the parties (***Ko*** at para 96). Keeping in mind that the entire point of the MSA was to deal with the flooding that Kaup wanted addressed, it is unlikely he would have entered into an agreement that did not include a provision for cleaning out the ditch, nor would he have withdrawn his appeal nor his objections to the development licenses.

[74] In ***Hudye Inc v Rosowsky***, 2022 ABCA 279, the Court of Appeal was dealing with the appropriate remedy for breach of fiduciary duty and ordered that the entire agreement be set aside. While dealing with the equitable remedy of recission, in my view the same principles are applicable to severance. The Court of Appeal held, at paras 72-74:

> Partial rescission of a contract is not generally available: see ***Kingu v Walmar Ventures Ltd*** (1986), 1986 CanLII 142 at p 6 (BCCA), 10 BCLR (2d) 15; ***Mirage Consulting Ltd v Astra Credit Union Ltd***, 2017 MBQB 63 at para 15.
>
> The rule against partial recission is based on the notion that "the court should not involve itself in the rewriting of bargains along lines it may consider to be fair where the contract is not severable": ***Mirage*** at para 15; Dominic O'Sullivan, Steven Elliott & Rafal Zakrzewski, The Law of Rescission, 2nd ed (New York: Oxford, 2014) at 398, para 19.03. O'Sullivan goes on to note, at para 19.05, that rescission will be refused where the contract is part of a wider transaction where each of the components were contracted in contemplation of the others. The effect would be to enforce an agreement to which the parties did not agree...
>
> We are satisfied that it would be inappropriate to set aside only a portion of the GCA. **It is not at all clear that the parties would have entered into** the salary component of the GCA **in the absence of** the equity component, or in the absence of Rosowsky's participation in the Trust Agreement. It would be unjust in these circumstances to uphold only a portion of that agreement. (emphasis added)

[75] I conclude that the MSA is void for vagueness. Severance is only available if the vague provision is not an essential term (McCamus, John, *The Law of Contracts*. Third Edition (Toronto: Irwin Law, 2020) at 116). In my opinion, the clause relating to cleaning out the ditch is not meaningless, minor, or subsidiary to an otherwise enforceable agreement, nor is it in a divisible part of the MSA (***Hotchkiss #2***). The relevant surrounding circumstances are that the agreements arose to deal with the flooding Kaup wanted addressed. It is unlikely he would have entered into an MSA that did not include a provision for cleaning out the ditch, nor would he have withdrawn his appeal nor his objections to the development licenses.

[76] With the voiding of the MSA, the Defendants cannot be not in breach as alleged by the Plaintiffs.

[77] There is no dispute, however, as to the Agreement for Sale. The MSA called for the parties to enter into an Agreement for Sale; they did so and it has been performed as the

Defendants have made the payments to the Plaintiffs as set forth in the schedule. The Agreement for Sale is not dependent upon the MSA for its validity since it contains all the essential terms. In and of itself, it is a stand-alone agreement and I decline to interfere with any steps taken by the parties to perform its terms.

D. Summary Disposition

[78] The Plaintiffs argue that Summers AJ erred in concluding that there was no issue with credibility and that Landrex did not in fact meet the test for summary disposition.

[79] The test articulated by the Court of Appeal in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47 remains the proper approach to summary dispositions:

> 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.

[80] This is a case of contractual interpretation, and although there are some contradictions in the evidence, that is not a bar to summary disposition. The Court of Appeal in ***Weir-Jones*** at para 36 held:

> The law is now clear that the mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out in ***Hryniak v***

> ***Mauldin*** at para. 48, summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted. It observed at para. 57: "On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute" (emphasis added).

[81] In ***Hryniak v Mauldin***, 2014 SCC 7, the Supreme Court acknowledged at para 28:

> The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations.

[82] Even if there are some contradictions in the record before me, that does not preclude finding that summary disposition is appropriate. In this case, the contradictions raised do not speak to the core issue, which is whether there is objective evidence of the surrounding circumstances that would allow me to determine the meaning of the phrase "clean out the ditch". As such, I am still able to reach the conclusion that the surrounding circumstances do not assist in establishing the meaning of that phrase.

[83] The Plaintiffs also raise a fairness argument. They say that after Landrex filed its application for summary disposition supported by the Affidavit of Larry Andrews, they sought to question Mr. Andrews, as well as several former employees of Landrex. When Landrex refused to produce the former employees for questioning, the Plaintiffs brought an application for an order compelling Landrex to do so. That application was heard by Schlosser AJ on February 12, 2021, and was dismissed. Schlosser AJ also stayed all procedural steps except questioning of Mr. Andrews on his Affidavit pending a determination of the summary disposition applications.

[84] The Plaintiffs argue that the Schlosser decision effectively allowed Landrex to hide evidence which could prove valuable to him in establishing the meaning of the phrase "clean out the ditch". In the face of that the Plaintiffs should not be permitted to succeed with summary disposition.

[85] There are two points to be made here. First, the Plaintiffs' complaint that the Schlosser Order prevented them from putting forward their best case is a collateral attack on that Order. If they disagreed with the Schlosser Order, then the remedy was to appeal. There is nothing on the record that shows that they did so. Second, the Plaintiffs do not demonstrate what additional evidence such questioning would produce, or even if the Defendants did in fact "hide" evidence. Without some concrete explanation as to how the former employees' evidence would have been helpful to the Plaintiffs' case, I conclude that the complaint of unfairness is purely speculative.

[86] Further, the Plaintiffs say that Summers AJ used the evidence of those former employees in the form of emails to find against the Plaintiffs, which they say is hearsay and should not have been considered. I note that those emails were attached to Kaup's own Affidavit. And, despite his complaint, Kaup attaches as exhibits more of such emails to the Second Kaup Affidavit and

purports to rely upon them as evidence of the knowledge of the Defendants. Having done so, Kaup cannot now suggest that the emails were not properly before the Court.

[87] Regardless, and considering the matter afresh, I conclude that these emails are of little assistance.

[88] It remains the case that I may consider the applications for summary disposition afresh. Having considered the test from ***Weir-Jones***, I have concluded that these claims are indeed appropriate for summary disposition. They involve an issue of contractual interpretation. The law in relation to contractual interpretation and dealing with uncertain terms is clear. The record in this case has allowed me to reach the conclusion that the requirement that the Defendants "clean out the ditch" as stated in the MSA is vague and void for uncertainty, and that the MSA is set aside for uncertainty. There is no genuine issue for trial in this case. The Plaintiffs' Claim is therefore dismissed and Landrex's Counterclaim insofar as it seeks specific performance of the Agreement for Sale is granted.

[89] Given my conclusions it is not necessary for me to consider what the Plaintiffs' remedy would have been had they been successful.

VII. Conclusions

[90] The Plaintiffs' Appeal of the decision of Summers AJ is hereby dismissed.

[91] The Defendants shall have their costs on the appropriate column of Schedule "C" of the *Rules of Court*. If parties cannot agree on costs, they may make written submissions to me, no longer than 3 pages in length, within 30 days.

Heard on the 5th day of May, 2023.
Dated at the City of Edmonton, Alberta this 27th day of September, 2023.

L.K. Harris
J.C.K.B.A.

Appearances:

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