

# KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 111

Date: 2024 06 05  
File No.: KBG-RG-02336-2023  
Judicial Centre: Regina

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BETWEEN:

JASON MURRAY SHIRE

APPLICANT

- and -

RICHARD RANDALL BRADY, REPRESENTED BY HIS  
EXECUTOR JOSEPH BRADY AND LYNN BRADY

RESPONDENTS

**Counsel:**

E.F. Anthony Merchant, K.C.  
Kevin T. Miller

for the applicant  
for the respondents

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JUDGMENT  
JUNE 5, 2024

McMURTRY J.

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[1] The applicant Jason Shire [Jason] seeks a declaration that an option to purchase 37 Poplar Street, Kenosee Lake, Saskatchewan [37 Poplar Street], is valid and binding on the respondents, Richard Randall Brady [Randy] and Lynn Brady [Lynn]. Randy is deceased. He died in May 2023 and is represented in this litigation by his son and executor Joseph Brady [Joseph].

[2] In addition to the declaration, Jason seeks an order for specific performance under ss. 65 and 66(1) of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [QBA] (now ss. 10-15 and 10-16 of *The King's Bench Act, SS 2023*, c 28 [KBA]) compelling Randy and Lynn to perform their obligations under an agreement reached

on February 9, 2023. Jason also seeks an order, under the same provision, prohibiting Randy and Lynn from soliciting a sale from anyone other than him, or otherwise disposing of 37 Poplar Street, except to him. In the alternative, Jason seeks an award of damages for failure to comply with the Tenancy Agreement, in the amount of \$167,000. Finally, Jason applies for an order granting a certificate of pending litigation, under s. 46(1) of the *QBA* (now s. 9-2 of the *KBA*).

***Preliminary application to strike affidavit material***

[3] Jason objects to portions of paras. 3 and 6 of the affidavit of Lynn Brady, sworn October 31, 2023, as improper opinion evidence. The impugned portions of paras. 3 and 6 are struck. He also objects to para. 7 of the same affidavit as hyperbole. I disagree.

[4] Jason objects to portions of the affidavit of Joseph Brady, sworn November 1, 2023, as improper opinion, argument, or hearsay. Objections to parts of paras. 4, 5, 8, 10, 11, 12, 13 and 14, except for the second sentence where Joseph is explaining why he signed the Mortgage Gift Letter, are granted, and the impugned portions are struck.

***Preliminary issue on the style of cause***

[5] The respondents assert that Randy and Lynn jointly owned 37 Poplar Street, leaving Lynn as the surviving joint tenant. However, the evidence is unclear in this regard. Randy alone purchased the property by agreement for sale in 2018. The 2023 option to purchase states that Randy is the registered owner of the house and other chattels and that he is “in the process of transferring the lease [for 37 Poplar] into the names of the Optionor, [collectively, Randy and Lynn]” (Affidavit of Jason Shire, sworn October 16, 2023, Exhibit E, page 1). No further evidence was tendered on this

issue. In any event, the respondents agreed to consent to any necessary changes to the style of cause.

***Issues***

[6] The application raises several issues, two of which I will respond to here:

1. Did Randy and/or his estate acquiesce in Jason's breach of the agreement reached on February 9, 2023?
2. Can this matter be resolved summarily?

***Evidence***

[7] This matter proceeded by way of affidavit evidence.

[8] Jason deposed that he and his then-wife, Jenna Brady [Jenna] leased land now known civically as 37 Poplar Street, Kenosee Lake, Saskatchewan from the Province of Saskatchewan, on August 10, 2007, for a term of twenty years. At some point, Jason and Jenna entered into a mortgage.

[9] Jason and Jenna separated in 2015. In July 2015, Jason began living at the property alone and agreed to solely assume the obligations under the mortgage.

[10] To conclude their family property division, Jason and Jenna agreed to sell the chattels and lease relating to 37 Poplar Street, to Randy, Jenna's father, through an Agreement for Sale dated November 1, 2018 [AFS]. Pursuant to the terms of the AFS, Randy paid \$250,000 to Jason and Jenna, who in turn used the money to retire the

mortgage debt and to pay Jenna her share of the parties' family property.

[11] Paragraph 17 of the AFS permitted Jason to exercise an option to purchase the chattels and lease back from Randy for \$250,000, on or before December 22, 2021. In the interim, Jason paid rent to Randy. However, Jason was unable to exercise the option to purchase in time. He asserts that Randy agreed orally to permit Jason to continue to rent the property on the same terms as the AFS.

[12] On February 9, 2023, Randy, Lynn, and Jason executed a Tenancy Agreement, permitting Jason to continue to lease the property between February 2023 and July 1, 2031, for \$1,200 a month. Clauses 2(a) and (l) and 4 (c) of the Tenancy Agreement read:

- 2. TENANTS' COVENANTS:  
The Tenant covenants with the Landlord as follows:
  - (a) Rent – to pay rent on the days and in the amounts aforesaid.
  - ...
  - (l) Insurance – to obtain, and maintain in good standing throughout the term of this Lease ... a policy of insurance insuring the Tenant's goods and belongings ... such policy to also include a minimum of One Million (\$1,000,000.00) Dollars of liability insurance ... proof of such insurance to be provided to the Landlord by the Tenant prior to the commencement of the term of this Lease.
  - ...
  - 4. ...
    - (c) No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision (whether or not similar) nor shall such waiver constitute a continuing waiver unless otherwise expressly provided in writing.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit D)

[13] The parties also executed an Option to Purchase [OTP] on February 9,

2023. Paragraph 3 of the OTP says:

3. The within Agreement shall be immediately terminated in the event any of the following occurs:  
...  
b. The Optionee is in default of the Tenancy Agreement; ...

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit E)

[14] Jason deposed that Randy encouraged him to obtain a mortgage, and suggested he refrain from paying rent to allow him to do so. As Randy is deceased, both parties are at a disadvantage in establishing or denying his position. However, Randy and Jason texted each other about this issue and neither party disputes the authenticity of the text messages.

[15] On March 17, 2020, three years before the events in issue, Randy texted Jason:

Hi Jason  
Due to current virus situation if money is short do not worry about rent until things get back to normal  
Randy

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 9)

[16] On June 10, 2020, Jason texted Randy to say he would catch up “the other two months we missed”. Randy responded:

No need to catch up  
That amount is forgiven due to covid 19.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 10)

[17] On December 31, 2020, Randy texted Jason:

Hey Jason

I would like to forget about the rent for December and would 600 a month until April work starting Jan 1.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 12)

[18] More recently, on Monday, March 27, 2023, at 3:55 p.m., Randy wrote to Jason to say he wanted to sell 37 Poplar Street. Randy wrote:

I have made a decision to sell 37 polar (*sic*)  
I wanted to go over the timeline for you  
To purchase or find a new place to look to live

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 24.  
Note: the exhibit does not show the year this message was sent, but I am confident it was 2023 because the 27<sup>th</sup> was a Monday in 2023)

[19] It appears Jason immediately called Randy because Jason also sent a text a few minutes after Randy's text above, apologizing for "hanging up". Randy responded to Jason's apology a few minutes after that:

I don't mean you have to be out by end of month  
Just set timelines so you can be prepared  
I understand this is not easy for either of us

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 25)

[20] Jason deposed that he understood Randy had set a deadline of May 2023 to secure a mortgage, although a text message from Randy to Jason, on March 30, 2023, gives a deadline of April 30, 2023. This text states:

... I still want to move ahead with the sale of 37 Poplar. You still have the right to buy the property by submitting an Offer to Purchase not pending financing by April 30th.  
If you're unable to purchase the property we ask that you be moved out by May 31st.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 29)

[21] From February to May 2023, Randy was very ill. He died sometime in May 2023. It seems that Joseph took over negotiating with Jason on behalf of his parents, Randy and Lynn. Joseph deposed that Jason's failure to pay rent on time and to provide proof of rental insurance were the reasons why Randy believed that Jason had violated the terms of the Tenancy Agreement, and thus the OTP.

[22] Joseph relied on texts between himself and Jason dated Sunday, February 26, and Friday, March 3, 2023 to show the discussion on tenant insurance (Affidavit of Joseph Brady, sworn November 1, 2023, Exhibit B). However, thereafter, Joseph and Jason continued to text about the anticipated purchase of 37 Poplar Street by Jason.

[23] In a text conversation on Friday, April 21, 2023, Joseph texted Jason:

Did you get your appraisal booked and the gifted equity number figured out?

(Affidavit of Jason Shire, sworn October 16, 2023 Exhibit F, page 3)

[24] Jason responded:

No, but we don't need that at the moment mortgage is gonna go through.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 3)

[25] On Monday, May 1, 2023, by text, Jason and Joseph had the following short conversation:

Do we do offer to purchase and get appraisal done?

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 5)

[26] Joseph responded:

I've got the offer to purchase. The appraisal has to come in atleast (*sic*) \$385,000 so ya get it done."

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 5)

[27] On Thursday, May 18, 2023, Jason wrote to Joseph:

Hey buddy, Brian is sending the appraisal info to bank tomorrow morning. Do you want me to get an offer to purchase done up? Or are you going to do that?

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 8)

[28] Joseph responded:

I'll do it tomorrow morning.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 8)

[29] On May 3, 2023, Lynn, Joseph, and Carson Brady (brother to Joseph and co-executor in Randy's estate) signed a Mortgage Gift Letter, as donors, which says, in part:

TO WHOM IT MAY CONCERN:

This letter confirms that the undersigned is making a financial gift in the amount of: \$135,000 in equity of the property ...

For use toward the purchase of the property located at:  
37 Poplar St Kenosee Lake.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit G)

[30] Jason is named as the recipient, but he did not sign the Mortgage Gift Letter.

[31] By letter dated May 31, 2023, Affinity Credit Union advised Jason they had approved financing to purchase 37 Poplar Street: Affidavit of Jason Shire, sworn October 16, 2023, Exhibit H. An appraisal, apparently obtained by the Credit Union showed that its value as of May 12, 2023 was \$417,000: Affidavit of Jason Shire, sworn

October 16, 2023, Exhibit N.

[32] In June 2023, Jason and Joseph continued to text about the sale of 37 Poplar Street. On June 1, 2023, the following exchange occurred:

[Jason:] Hey man, was just calling to see if we're good to use the same lawyer or do I need to get my own?

[Joseph:] We use the same one.  
Chad Jesse ant (*sic*) Bridges in Estevan.

[Jason:] That's what I thought but she needed me to confirm

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 9)

[33] On June 13, 2023, the conversation picked up again:

[Jason:] You hear anything from the lawyer on signing these papers and finishing this deal up?

[Joseph:] Yup talked to him today. He will be contacting you

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, page 9)

[34] Similar text conversations occurred on June 16 and 28, and July 15, 2023. However, on July 26, 2023, Joseph sent an email to Jason, taking a different tack:

Jason  
We will require you to pay your past due rent immediately.  
You will have 3 options.  
You can pay the 8 months rent that you owe, you can withdraw from the purchase of the home or you can refuse to pay and we will initiate legal proceedings against you.

(Reply Affidavit of Jason Shire, sworn November 8, 2023, Exhibit D)

[35] Jason responded:

Hey Joe,  
I've planned on paying this amount the whole time.  
The lawyer bill is paid, the appraisal has been paid, the insurance has been taken care of.

Lawyer told us the final proceedings on the house by the Ministry will take 3 weeks than (sic) it will be complete.  
have never once stated I would not be paying this amount. I will make arrangements to have it paid.

(Reply Affidavit of Jason Shire, sworn November 8, 2023, Exhibit D)

[36] Jason deposed that he paid \$9,600 the next day, which payment appears in a ledger of rent payments, attached as an exhibit to the affidavit of Joseph Brady sworn November 1, 2023, at para. 4, Exhibit A.

[37] On August 8, 2023, Jason received a letter from Joseph, representing himself and Lynn, advising Jason that he was in breach of clauses 1(a) and 2(l) of the Tenancy Agreement. It further stated that Jason had “been late paying rent every month since [the Tenancy Agreement] was signed and have never produced renters insurance.” (Affidavit of Jason Shire, sworn October 16, 2023, Exhibit M). Joseph advised, “We will be enacting our right to terminate this agreement and will require you to vacate the property by Sept 30, 2023.” (Affidavit of Jason Shire, sworn October 16, 2023, Exhibit M).

[38] On August 21, 2023, Jason again texted Joseph:

I want you to know, Joey, Randy told me not to pay that rent and when I told him I would. He told me to shut up and listen to him.  
I honestly wouldn't have done anything to you guys if he hadn't.  
Whether he was under sedation or not, he said it and was firm about it.  
How was I to know that's not how he felt.  
I paid off the debt I needed to to (sic) get that mortgage and settle everything between me and the Bradys.

(Affidavit of Jason Shire, sworn October 16, 2023, Exhibit F, pp. 14, 15 and 16)

[39] Joseph attached a ledger to his affidavit, and deposed that it illustrated Jason's failure to pay rent at all or on time, between December 1, 2022 and October 1,

2023. The ledger reads:

Item	Amount Paid	Date of Payment	Description	Amount
Dec 1				
Jan 1				
Feb 1				
Mar 1	0			
Apr 1	0			
May 1	0			
Jun 1	0			
Jul 1	0	July 27th, 2023	Paid Arrears From Dec 1, 2022 - July 1, 2023	\$9600.00
Aug 1	0	Aug 31st, 2023	Paid Arrears From Aug 1	\$1200.00
Sept 1	0	Sept 29th, 2023	No payment as of Sept 19	\$1200.00
Oct 1	0		No payment as of Oct 3	

(Affidavit of Joseph Brady, sworn November 1, 2023, Exhibit A)

[40] In her affidavit evidence, Lynn joined Joseph in asserting that Jason was given “an opportunity in April to either purchase the house, or be moved out by May 31<sup>st</sup>” (Affidavit of Lynn Brady, sworn October 31, 2023, para. 7). However, neither Joseph, nor Lynn explained why Joseph continued to negotiate with Jason after April 30 and again after May 31.

### ***Relevant Legislation***

[41] Section 46 of the *QBA* is now s. 9-2 of the *KBA*. Section 9-2 of the *KBA* reads as follows:

#### **Certificate of pending litigation**

**9-2(1)** Commencing an action or matter in which any title to or interest in land is brought in question is not deemed to be notice of the action or matter to any person who is not a party to it until an interest based on a certificate of pending litigation, accompanied by a certificate of pending litigation signed by the local registrar, is registered in the Land Titles Registry.

- (2) A certificate of pending litigation must:
- (a) certify that some title or interest in land is called in question by an action or matter pending in the court; and
  - (b) describe the land and the parties to the action or matter.
- (3) Subsection (1) does not apply to:
- (a) an action or matter for foreclosure or sale on a registered mortgage; or
  - (b) an action or matter for cancellation or sale on an agreement for the sale of land of which the plaintiff is the registered owner.

[42] Sections 65 and 66 of the *QBA* are now ss. 10-15 and 10-16 of the *KBA*.  
Sections 10-15 and 10-16 read:

**Interlocutory mandamus, injunction or appointment of receiver**

**10-15(1)** A judge may, on an interlocutory application, grant a mandamus or an injunction or appoint a receiver if it appears to the judge to be appropriate or convenient that the order should be made.

(2) An order pursuant to subsection (1) may be made unconditionally or on any terms and conditions that the judge considers appropriate.

(3) If an injunction is sought, whether before, at or after the hearing of an action or matter, to prevent any threatened or apprehended waste or trespass, a judge may grant the injunction:

- (a) whether the person against whom the injunction is sought:
  - (i) is or is not in possession under any claim of title or otherwise; or
  - (ii) if not in possession, does or does not claim a right to do the act sought to be restrained under any colour of title; and
- (b) whether the estates claimed by any of the parties are legal or equitable.

**Damages in addition to or instead of injunction or specific performance**

**10-16(1)** On an application for an injunction against a breach of a covenant or an agreement or against the commission or continuance

of a wrongful act or an application for the specific performance of a covenant or an agreement, a judge may:

(a) award damages to the injured party, either in addition to or in substitution for the injunction or specific performance; or

(b) grant any other relief that the judge considers appropriate.

(2) Damages awarded pursuant to clause (1)(a) may be ascertained in any manner that the judge may direct.

**1. Did Randy and/or his estate acquiesce in Jason’s breach of the agreement reached on February 9, 2023?**

[43] Randy died in May 2023, at the time the parties were negotiating the sale of 37 Poplar Street to Jason. In his text, Randy set a hard deadline of April 30, 2023 (Affidavit of Jason Shire, sworn October 16, 2023, Exhibit C, page 28). However, the parties continued to negotiate a sale after April 30, 2023.

[44] The respondents argue that Jason breached the terms of the Tenancy Agreement by failing to pay rent on the first day of each month and by failing to provide proof of insurance. They submit that the effect of these defaults is the invalidity of the OTP.

[45] There is no controversy whether Jason paid rent on time or provided insurance as required. The question for resolution is whether Randy and/or his estate acquiesced in the breaches of the Tenancy Agreement or waived its terms. The respondents assert that “it is unlikely Randy ever agreed to waive rent payments” (Respondents’ brief, para. 41). However, the evidence seems to suggest that the parties expected to finalize the sale of 37 Poplar Street up until the end of July 2023, more than two months after Randy’s death. This is evidence of waiver.

[46] Although both parties recognized the relevance of the issue of acquiescence, or waiver, neither provided authority. I will rely on the decision of the Supreme Court in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, [1994] 2 SCR 490 (WL), wherein the court considered whether an insurer, through its conduct, had waived its right to compel timely payment under a policy. Major J. wrote for the court as follows:

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[47] Later, Major J. discussed when waiver can be retracted:

27 Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hymans*, [1920] 3 K.B. 475; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616; *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused, [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance

by the person in whose favour waiver operates: *The Law of Contracts, supra*, [S.M. Waddams, *The Law of Contracts*, 3d ed (Toronto: Canada Law Book, 1993)] at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: *ibid.* at para. 606. ...

[48] Consequently, I must determine whether Randy, Joseph, or Lynn waived the terms of the Tenancy Agreement and OTP, in relation to payment of rent, to allow Jason to purchase 37 Poplar Street, with full knowledge of their rights under the contracts. Moreover, did Randy, Joseph, or Lynn unequivocally and consciously intend to abandon them?

[49] The Tenancy Agreement says at clause 4 that the provisions of the agreement cannot be waived unless the waiver is in writing. The text messages between Randy and Jason, and later between Joseph and Jason, are evidence of waiver in writing. Moreover, the respondents allowed Jason to remediate the rent default.

[50] The Tenancy Agreement was signed on February 9, 2023, when according to Joseph's ledger (Affidavit of Joseph Brady, sworn November 1, 2023, Exhibit A), Jason had not paid rent since November 2022. Indeed, he did not pay rent until July 27, 2023, after Joseph sent an email saying, "We will require you to pay your past due rent immediately" (Reply affidavit of Jason Shire, sworn November 8, 2023, Exhibit D). Even at that point, Joseph did not take the OTP off the table. He gave three options to Jason:

- 1) pay the eight months rent that he owes;
- 2) withdraw from the purchase of the home; or
- 3) refuse to pay and they would initiate legal proceedings against him.

[51] Again, he kept the OTP alive if Jason paid eight months rent, which he did the next day. Nothing was said about tenancy insurance.

[52] In his August 8, 2023 letter to Jason, Joseph stated that Jason had violated clause 1(a), although I believe he intended to refer to clauses 2(a), and 2(l), showing he was aware of Jason's obligations. Neither Joseph, nor Lynn, have explained why they were content to allow these breaches until sometime before August 8, 2023 but not thereafter.

## 2. Can this matter be resolved summarily?

[53] I must determine whether I am satisfied that this issue is capable of resolution on affidavit evidence. While not strictly an application for summary judgment, this matter raises a similar issue: is there a genuine issue requiring a trial?

[54] The matter of the application for a certificate of pending litigation, under s. 9-2 of the *KBA*, may be dealt with summarily. In *Houk v Daniels Investments Saskatoon Ltd.*, 2016 SKCA 147, 5 CPC (8<sup>th</sup>) 272, the Court of Appeal held the precondition for registering such a certificate can be satisfied depends solely on the pleadings. Ryan-Froslie J.A. wrote:

[14] ... s. 46 of the *Act* [*QBA*] provides for the registration of a certificate of pending litigation against land. Such certificates can only be registered where an "action or matter" calls into question title to or an interest in the land. Whether that precondition has been satisfied depends solely on the pleadings. ...

[55] I am satisfied the matter calls into question an interest in land. Indeed, the respondents did not argue otherwise. Thus, the applicant is entitled to the certificate of pending litigation.

[56] In relation to the remaining relief sought by Jason, summary resolution is less clear. While the respondents are not seeking a trial, I must determine whether I can resolve the application on affidavit evidence alone. There is no real dispute on the facts. The dispute is in the interpretation to be given to the facts.

[57] I am satisfied that the OTP of February 9, 2023 is valid and binding. Any breach of the Tenancy Agreement, which under clause 3(b) could invalidate the OTP, were waived to allow Jason to purchase 37 Poplar Street. I am satisfied further that Randy, Lynn and Joseph had full knowledge of their rights under the Tenancy Agreement and OTP and they unequivocally and consciously intended to abandon those rights.

[58] The applicant is entitled to the relief sought, with costs.

\_\_\_\_\_  
J.  
J.E. McMURTRY