KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 87

Date: **2024 05 15**
File No.: QBG-SC-00035-2022
Judicial Centre: Swift Current

BETWEEN:

FRANK JAMES WILLMAN

PLAINTIFF

- and -

RONALD GEORGE WILLMAN

DEFENDANT

Counsel:

Logan Salm	for the plaintiff
Ryan Nagel	for the defendant

JUDGMENT
May 15, 2024

RICHMOND J.

I. INTRODUCTION

[1] Frank James Willman [Frank] and Ronald George Willman [George], two brothers, are litigating over ownership and possession of land. The land in question has been the subject of three separate claims since the death of Frank's common-law partner, Susan McAuliffe [Susan], in 2012. The most recent action is between the two brothers, but their dispute is inextricably tied to prior litigation and what has occurred since Susan's death.

II. HISTORY

[2] Susan and Frank lived and worked on property legally described as NW 19-12-20 W3 [Homestead]. Susan had acquired that parcel along with SE 30-12-20 W3, SW 30-12-20 W3, NE 19-12-20 W3, and NE 30-12-20 W3 [Pastureland] in or about 1998. She later incorporated L+Livestock LTD and transferred the property into the corporation. Frank and Susan's relationship evolved, and Frank moved onto the property in 2004. Frank was given 10 shares of the corporation in 2010 and was added as a director of the corporation in 2011.

[3] Frank and Susan listed the property for sale for $550,000 in 2010 with the intention of relocating. However, the property did not sell before tragedy intervened; Susan was diagnosed with cancer and succumbed to the disease on May 10, 2012. At the time of Susan's death, she had both a common law spouse – Frank – and a lawful husband, Ambrose McAuliffe [Ambrose]. Ambrose had been named executor and sole beneficiary of Susan's estate pursuant to a will dated May 19, 1993.

[4] Ambrose, an American citizen, purported to sell L+Livestock LTD assets on behalf of the estate and entered into an agreement with Stuart Chutter [Chutter] to buy the land, equipment, and chattels for $500,000. An agreement was signed August 8, 2012. Frank commenced his own action against Susan's estate on August 10, 2012, and ultimately Ambrose proposed the following settlement: Frank was to receive the land, cattle, tack, vehicle, equipment, and remaining chattels in exchange for a payment of $350,000 to be paid as follows: a non-refundable deposit of $35,000 to be paid on or before April 1, 2014, and the balance of $315,000 on or before May 1, 2014.

[5] Frank believed he was being given the opportunity to acquire the land and assets at far below market value. The land had been listed only a few years earlier at $550,000 and the Chutters had offered $500,000. In his mind, the settlement equated to him getting the Homestead and chattels for nothing, and the Pastureland for $350,000.

Frank wanted to pursue the arrangement, but there was a problem as Frank had neither the downpayment, nor the balance required to complete the purchase.

[6] Frank approached a friend and fellow rancher, Jeff Taylor [Jeff] with whom he had a working arrangement. Frank suggested Jeff borrow $350,000 and buy the Pastureland. Frank would own the Homestead and chattels and Jeff would own the remaining land. They would work together in a joint venture. Jeff agreed to this arrangement, but a lack of financial backing made short thrift of their plan. Jeff was not able to raise the deposit of $35,000 which was due by April 1, 2014, let alone the balance of the funds. Nothing was put in writing between the two of them and, in any event, the money was not there. With the April 1, 2014, deadline approaching, Frank had to find the money to complete the settlement. Frank called on his brother, George, for help.

[7] Frank, George, and Jeff met on March 31, 2014, at Frank's lawyer's office. His lawyer, Joel Friesen of Anderson & Company, had been representing Frank in the litigation with Ambrose. Mr. Friesen was not called to testify at the trial, but the parties were all of the view that Mr. Friesen made it clear that the money was needed or the deal with Ambrose would fall through. Mr. Friesen was not involved in the drafting of any arrangements between Frank, Jeff, and George. George provided all the funds for the purchase, and all the land – the Homestead and the Pastureland – was transferred into his name.

[8] The parties disagree on what the arrangement was between the parties respecting the acquisition of the land by George, though it is equally clear by the actions of the parties after that date that some type of arrangement existed.

[9] Frank claims the deal that he, George, and Jeff reached in a discussion which occurred in the parking lot outside the law office was the following:

a) George would provide the purchase funds of $350,000 for the Pastureland;

b) Frank would receive all of the chattels and the Homestead, but the Homestead would be transferred to George as collateral, along with the Pastureland to ensure George's investment was not at risk if land values fell;

c) Jeff would pay George the $350,000 by the fall of 2014 and interest on the purchase price. Once the monies were paid, George would transfer the Homestead to Frank and the balance of the land to Jeff. In the event Frank and Jeff never bought the land in the fall of 2014, George could exercise the Homestead as security in the event the Pastureland decreased in value; and

d) Frank was to cover the transaction fees incurred.

[10] George's memory of their arrangement differs. George does not dispute that he was to pay the $350,000. He also does not dispute that Jeff was to make the purchase in the fall of 2014, but he claims there was no discussion about the Homestead being collateral. He claims to have understood that he was acquiring all the property, though he was to be bought out in the fall. He agreed the investment was to be temporary.

[11] To further complicate an already unclear arrangement, Chutter, unhappy with having lost his agreement to purchase the property from Ambrose for $500,000, commenced an action in which he sought specific performance on his offer to purchase, and registered a certificate of pending litigation. Frank and George were both named as defendants in the proceedings.

[12] George and Frank agree that in the summer of 2014, Frank asked George about providing the Homestead to Jeff to use as collateral to obtain financing. George was opposed to the suggestion. However, the request may have been moot as Jeff, in his testimony, suggested he was going to try to build a cattle herd for the time being and financing the purchase of land at the same time was not an option. Furthermore, with the registration of interest on title by Chutter, a purchase could not have been completed without first addressing Chutter's claim.

[13] Frank and George both testified that an agreement had been reached with respect to renting land but again, there is disagreement on the terms. Frank claims he was to rent the land for $12,000 per year. This did not include the Homestead as, in his mind, he owned it. George does not disagree with the amount but maintains there was no discussion separating the Homestead and the remaining land. There appears to be disagreement about what was paid. George claimed rent increased, Frank claimed there were adjustments made for work he did. The parties disagreed over who was responsible for taxes. The arrangement was loose to say the least, and no tax returns were filed to verify what income or expense may have been claimed by either one of them over the years.

[14] The parties suggested that Jeff again offered to buy the land in the spring of 2017. As the Chutter action remained outstanding, it is difficult to surmise how that purchase may have been accomplished, but George refused to sell. Jeff testified that he felt this was a breach of their previous agreement. Frank suggests that at the same time, he brought up the notion of returning the Homestead to him. He claims George responded that it was not a good time given the litigation with Chutter.

[15] In the fall of 2017, the Chutter matter came to an end with Chutter discontinuing the action without costs after the first day of trial.

[16] Frank and his friend, Crystal Parish, both testified that when the Chutter matter completed, soon after leaving the court room, George advised Frank that he should transfer the Homestead to him, and Frank responded by saying he owed George money for legal fees.

[17] In keeping with previous discussions between Frank and George, the agreement to pay legal fees was no agreement at all but rather an expectation that Frank should contribute something, but there was no apparent meeting of the minds for what that amount should be. Frank had it in his mind that he should only pay a fifth of the cost, as he would only be receiving one of the five quarters. George had it in his mind that they would be sharing the legal fees equally.

[18] Life carried on as usual for both men until an argument severed their relationship in the fall of 2018. They have not spoken or seen each other since, other than in connection with this litigation. George told Frank to get off his land. Frank understood that to mean the Pastureland but remained on the Homestead. George sent a notice of termination of lease and demand for possession in September 2021. When asked at the questioning why he waited so long, he responded, “It just wasn’t worth it. It was just going to – arguing and everything is just going to escalate it, so I just left it alone”.

[19] Faced with threat of eviction, Frank commenced an action against George wherein he asked for a transfer of the Homestead or, alternatively, damages.

III. THE ISSUES

[20] Frank claims breach of contract, alleging there was an oral agreement requiring George to transfer the Homestead to him.

[21] Frank relies on the doctrine of unjust enrichment alleging that George received the land – the Homestead and the Pastureland – at a reduced price due to the settlement agreement Frank had with Ambrose.

[22] Frank alleges fraudulent misrepresentation and suggests that George said he would transfer the Homestead to Frank and failed to do so, and but for those assurances, Frank would not have entered into the agreement with Ambrose in the first place.

[23] Frank suggests a constructive trust arrangement existed whereby George held the land in trust for Frank, with Frank having equitable title.

[24] Frank relies on promissory estoppel and suggests that George promised him the Homestead, and Frank relied on such promise.

[25] Lastly Frank relies on the doctrine of *quantum meruit* to suggest George should pay damages for the work and upkeep Frank provided on the Homestead.

a. Is There a Contract for Frank to Acquire the Homestead?

[26] It was argued on Frank's behalf that he has been consistent and credible with his understanding and recollection of his 2014 agreement with George. There is little doubt on the evidence that Frank intended to own the Homestead and chattels, and the remaining Pastureland would be owned by Jeff. Jeff would pay the settlement funds to Ambrose, and Jeff and Frank would thereafter operate a joint venture. However, Jeff was unable to come up with the money and with the deadline for payment to Ambrose looming, Frank had to pivot and contacted his brother George for assistance.

[27] There is also little doubt on the evidence that all parties intended George's involvement to be temporary. He was providing financial assistance as Frank and Jeff could not raise the funds themselves. Even that agreement, however, lacked specificity.

Jeff, George, and Frank were all of the opinion that Jeff was to raise the money by the fall at which time George would be reimbursed including some compensation for his investment. However, no time frame or agreement was set respecting the terms of repayment to George. Frank testified, "Jeff would have to pay a little extra in the fall". No attempt was made to establish what "the little extra" might be. In any event, that agreement fell by the wayside. Jeff decided to build his credit by building a cattle herd and was not able to buy anything from George. Also, with the Chutter registration on title, the land could not have been transferred in any event.

[28] Frank maintains there was, however, another agreement. He suggests that the Homestead was never intended to be part of the purchase, and George was only acquiring the Pastureland until Jeff could afford to buy it in the fall. Frank claims that when George expressed concern that the Pastureland was not worth $350,000, Frank then offered the Homestead as collateral. Frank denies that the return of the Homestead was contingent on Jeff purchasing the farmland. Rather, it was collateral for George's investment in the event the Pastureland was not worth $350,000. It is unclear, however, if their arrangement was not related to a purchase by Jeff, when the Homestead was to be transferred back to Frank, if at all. It was argued that if Jeff failed to make the purchase – which is what occurred – and the land value went down, George would retain the Homestead. If, on the other hand, the land value did not go down, the Homestead was to be transferred to Frank. No evidence was led as to value in the fall of 2014, but it is known that Chutter had commenced litigation and, as a result, the land was unsaleable to anyone other than Chutter, and Chutter wanted all the land, including the Homestead.

[29] George maintains there was no distinguishment made between the Homestead and the Pastureland and he was simply buying all the land temporarily with a view to selling it all back in the fall; a sale which did not occur. George denies Frank's suggestion that the Homestead was collateral. It was argued that Frank's version of

events is to be believed over George's. However, even if Frank is believed and the Homestead was to be provided as collateral, there is no indication in either of their versions of events as to when the Homestead was to be returned to Frank other than they both agreed it, along with the Pastureland, was to be transferred in the fall of 2014 when Jeff obtained financing. George disputes there was a contingency plan as to what would occur if Jeff did not buy the Pastureland.

[30] Frank suggested Jeff could have obtained financing through Farm Credit Canada Corporation if he could have put up the home quarter as collateral for Jeff's loan, but when he approached George about it, George refused. Of course, why George would have any say over what Frank could do with the Homestead that Frank claims George only held as collateral was not answered. Jeff testified but made no mention of needing the Homestead as collateral to get a loan. He conceded he could not get a loan as he was working on building his credit by borrowing to acquire a herd of cattle. The original oral agreement to have George sell the land to Jeff in the fall of 2014 fell by the wayside, and Chutter registered an interest rendering a sale to anyone but Chutter difficult, if not impossible. The parties all agree that George then agreed to lease the land to Frank, but again, there is very little certainty surrounding the terms of the lease. Nothing was put in writing.

[31] George has title to all the land in question, including the Homestead; "... a certificate of title is, subject to certain specified exceptions, conclusive evidence of ownership, so that it can be relied upon in all transactions concerning the land. This principle is often called the principle of indefeasibility" (see: *Firm Capital Mortgage Fund Inc. v West Canadian Development Kensington Project Ltd.*, 2018 SKQB 198 at para 19, 62 CBR (6th) 184, citing Ball J. in *Farm Credit Canada v Gherasim*, 2016 SKQB 182 at para 14). The question is whether the indefeasibility of title is paramount in this case, having regard to Frank's suggestion of an agreement that the Homestead would be transferred to him.

b. The *Statute of Frauds*

[32] Frank argues their oral agreement takes precedence and he owns the Homestead, although title is in his brother's name. Although the brothers initially met with Frank's lawyer to discuss the needs for the funds to settle with Ambrose, apparently nobody in the room saw the desirability of reducing the terms of their arrangement to writing. George relies on the *Statute of Frauds*, 1677, 29 Cha II, c 3. Frank does not take issue with the fact that their agreement was not in writing but suggests there was part performance taking it outside the restrictions of the *Statute of Frauds*.

[33] In *Matovich Estate v Matovich*, 2015 SKCA 130 at paras 18-21, 472 Sask R 71, the Court of Appeal considered the question of part performance:

> [18] The *Statute of Frauds* along with other English statutes were received into law in this province as they existed on July 15, 1870. Section 4 of the *Statute of Frauds* renders agreements relating to land unenforceable, unless they are in writing and signed by the parties involved. As pointed out by the Earl of Selborne in *Maddison* [*Maddison v Alderson*, [1883] 8 App Cas 467] at p. 474, s. 4 of the *Statute of Frauds* "does not avoid parol contracts [respecting land], but only bars the legal remedies by which they might otherwise have been enforced…."
>
> [19] In equity, part performance of a parol contract concerning land was held to take it outside the operation of s. 4 of the *Statute of Frauds*. The Earl of Selborne described the doctrine of part performance at p. 479 of *Maddison* as follows:
>
> > All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged…
>
> [20] The Supreme Court of Canada has considered the doctrine of part performance on numerous occasions. One of the first such cases was *McNeil v Corbett* (1907), 39 SCR 608, where Duff J., after quoting the above statement of the Earl of Selborne from *Maddison*, went on to add this further explanation:
>
> > i.e. to an agreement respecting the lands themselves; [and, as further explained in that case] a plaintiff who relies upon acts

> of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds [*sic*], should first prove the acts relied upon; it is only after such *acts unequivocally referable.* [*sic*] *in their own nature to some dealing with the land which is alleged to have been the subject of the agreement* sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts.…
>
> (Emphasis added)
>
> [21] In other words, for the doctrine of part performance to apply, the acts allegedly constituting part performance must unequivocally, in their own nature, point to some dealing with the land in issue (see also *Meisner v Meisner* (1905), 36 SCR 34; *Degelman v Brunet Estate*, [1954] SCR 725 at 726; *Brownscombe v Vercamert Estate*, [1969] SCR 658 [*Brownscombe*]; *Thompson v Copithorne Estate*, [1974] SCR 1023; and *Buchko v Buchko* (1997), 156 Sask R 100 (QB) aff'd, (1998), 172 Sask R 152 (CA)).
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> [Emphasis in original]

[34] Circumventing the *Statute of Frauds* requires as a first step an oral agreement. The contract, as suggested by Frank, was that George would acquire all the land, with Jeff purchasing and reimbursing George in the fall. In the event Jeff did not purchase the land, George was to transfer the Homestead back to Frank. There was part performance, Frank argues, as he allowed the transfer of the Homestead to George. He argues that it was the agreement that the Homestead was to be used as collateral and was not contingent on Jeff buying the property in the fall. In the event Jeff did not buy the Pastureland, the Homestead would be transferred back to Frank.

[35] George was investing $350,000 with the intention that come fall 2014, he would get all his money back plus interest. It is unclear from Frank's version of events why George would give Frank the Homestead if Jeff did not complete the purchase. Without a sale to Jeff, George would not recover his investment, he would be saddled with Pastureland, and he would then have to consider whether he wished to keep it or sell it, hoping he could sell it for enough to recoup his investment and costs. Frank says George was only to keep the Homestead if the land value fell, yet he led no

evidence of value in 2014, and, given the registration by Chutter, the land could not be sold in any event.

[36] It was then suggested that George's refusal to sell the Pastureland to Frank and Jeff in 2017 crystalized the agreement, and George received ownership of the Pastureland which had increased in value since 2014. The difficulty with this argument is the question of whether George had an obligation to sell the land to Jeff in 2017, as the original agreement was for Jeff to purchase the land in the fall of 2014.

[37] Even if it can be argued the offer to purchase extended past the fall of 2014, how then was George to be compensated? He had invested $350,000 in the spring of 2014. He had received some land rent since. He had paid taxes. He had paid legal fees. What was George to be paid over and above his $350,000 investment? It was suggested that land values went up by 2017 but there is no evidence to that effect. No appraisals were filed to establish the value in 2014, in 2017, or currently for that matter. Furthermore, the land only had value if it could be sold and, at the time, Chutter still had a registration on title which prohibited a sale to anyone other than Chutter who wanted the entire package, including the Homestead and chattels.

[38] In *Woods v Woods*, 2022 BCSC 2269, the court recently summarized the law respecting certainty of terms:

> ***A. Contractual Certainty***
>
> 49 The law on the level of certainty required to establish the existence of a contract was recently summarized in *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416:
>
> > [205] The test that governs whether the parties have formed an enforceable contract essentially involves answering two questions: (1) whether the parties objectively intended to enter contractual relations; and (2) whether they had reached agreement on essential terms that are sufficiently certain to enforce...

[206] The court's determination of contractual intention is rooted in the facts and requires it to consider whether a reasonable third-party observer would conclude from all the circumstances, including the document itself, the circumstances underlying execution, and the parties' subsequent conduct, that the parties intended to enter into binding legal relations...

[207] The case law recognizes that the above determinations are fact-driven...

[208] Critical to a determination of the nature of the December 5 Document in this case is the distinction between non-binding preliminary agreements to agree, agreements to enter into further agreements without binding intent, and agreements with binding intent that anticipate further documentation. This continuum was described by the Ontario Court of Appeal in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (O.N.C.A.) at 103-104:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty

> as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract ...
>
> [Emphasis added; Citations omitted.]

…

[260] Where there is an intention to contract, the court will make a significant effort to give meaning to that agreement. However, there are limits to how far a court can go; a court cannot create an agreement on essential terms where none exists...

[261] In *Concord Pacific BCSC*, Voith J. (as he then was), whose analysis was generally affirmed in *Concord Pacific BCCA*, helpfully summarized the principles that have developed in Canada, and BC more specifically:

> [331] ... The fact that parties may wish to contract, or that they believe they have entered into a binding contract, does not make it so. That belief or wish will engage other principles. It will likely cause the court to strive to assist the parties and to find meaning in the substance of their agreement: Hoban at para. 4. In *Marquest Industries Ltd. v Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C. C.A.), the Court, at 517 - 518, said:
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> > [E]very effort should be made by a Court to find a meaning, looking at substance and not mere form, and the difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted ... [I]f the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting what is repugnant to such real intentions so ascertained.
>
> …
>
> [262] What constitutes an "essential" term in an agreement will depend on both the nature of the agreement and the circumstances of the case: *Concord Pacific BCSC* at para. 341; *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA

> 71 at para. 14. The key question to answer in analysing certainty of terms is whether the parties have agreed on all matters that are "vital or fundamental" to the arrangement, or whether they intended to defer legal obligations until a final agreement has been reached. What constitutes an essential term is fact specific. Different types of contracts may have different essential terms, though price is generally considered essential in most contractual contexts.
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> [Emphasis in original]

[39] George and Frank disagree respecting their discussions in the spring of 2014, but as pointed out in *Ziola v Petrie*, 2021 SKCA 97 at para 47, [2021] 10 WWR 123: "…no matter which version of the conversation is true, a reasonable onlooker could not find consensus between the parties".

[40] I am satisfied there was an oral agreement for George to purchase the land for $350,000 with Jeff and Frank being given the option to acquire the land back by the fall of 2014 and George being reimbursed both his investment, costs incurred, and "something" for his trouble. This latter point perhaps making it an agreement to agree rather than a binding contract but that aside, I am not satisfied on the evidence of any other agreement. Jeff was not able to acquire the land in the fall of 2014 and the terms of that agreement were not met. Frank's suggestion that there was an agreement that George hold the Homestead as collateral is not only denied by George but is vague and lacks essential terms even as Frank describes it. Frank's suggestion that the Homestead was to be held as collateral neglects to address at what point was the collateral to be returned? How much did the land have to drop in value before the collateral could be utilized? There appears to have been no agreement as to terms in Frank's version of events other than if the Pastureland dropped in value, George would be covered. Given that no time was discussed, and no land valuations filed, it is difficult to assess when the collateral agreement, if it existed, was to come into play.

[41] George and Frank appear to have stumbled along with a less than clearly defined lease agreement and vague promises to transfer the Homestead to Frank

someday. In summary, the only oral agreement is that George would purchase all the land and Frank/Jeff would have the option to purchase it back in the fall with something extra for George's "trouble". There was part performance as George acquired the land, but Jeff did not complete the purchase in the fall of 2014 as had been arranged. The parties do not appear to have discussed what would happen if Jeff did not exercise the option in the fall.

c. Unfair Deprivation

[42] In addition to finding an agreement and part performance, it must also be shown it would be unfair to deprive Frank the benefit of the agreement. I am not convinced there was an agreement the land was to be held as collateral, but even if there was such an agreement, I am not satisfied there is unfair deprivation.

[43] Frank valued the Homestead at $200,000. This was not based on any appraised value, but rather because the entire package had been listed for $550,000 a few years earlier, prior to Susan's death. Frank concluded that based on the listing agreement, the Homestead must be worth $200,000. The value he assigned to the land was partially corroborated by the sale agreement signed with Chutter at $500,000. Given that Ambrose was prepared to settle with Frank for $350,000, Frank assumes the Homestead was worth $200,000 given the entire package was listed for $550,000. Unfortunately, without evidence of values, this is little more than assumption. The listing price and the Chutter offer support an argument that the land was worth more than the $350,000 paid. However, such an argument ignores the value of the chattels and assumes that the Homestead, rather than any of the other quarters, is the most valuable.

[44] To suggest that Frank got nothing from the arrangement if George retains the Homestead is inaccurate. Frank was buying time. He was under the impression the settlement with Ambrose was a good deal and wanted to complete it but lacked the

financial means to complete the arrangement himself. He first tried to engage Jeff, but Jeff was not able to raise the necessary funds. Having George make the purchase allowed Frank and Jeff additional time to obtain financing. Unfortunately, their plan went awry.

d. Estoppel

[45] Frank argues that if the formal necessities of contract were not completed by the parties, he suggests justice can be achieved for Frank through the equitable principle of estoppel. It was argued that "George represented that he would transfer the Homestead to Frank if the Pastureland did not lose value" (Frank's brief of law at page 25).

[46] Leaving aside for the moment that George disputes this claim, there is the added problem that there is no date as to when the transfer was to occur, and secondly, no evidence was led as to value. It is unknown whether the Pastureland is worth the same, more, or less than it was at the time of purchase. In the answers to questions read in at trial, it was suggested to George at the questioning that he did not sell to Jeff in 2017 as the price of the land had gone up since 2014. George replied yes, that was one of the reasons. There is no indication as to what that value might have been and whether the value is still up today. Frank argues it would not be in the interests of justice should he be barred from using promissory estoppel as a response to George initiating his eviction notice, and promissory estoppel should be used to rectify an injustice.

[47] Although Frank perceives an injustice, it is unclear on the evidence who suffered the injustice. George purchased land for $350,000 on the understanding that he would receive his full investment back by the fall of 2014 and "something for his trouble". Instead, George's money was tied up in the land for years. He was paid some rent, but also incurred over $70,000 in legal fees in defending the Chutter claim. Frank has now lived on the Homestead at no cost for 10 years. He has paid to maintain the

property but has not expended for any major improvements. George argues he needs access to the Homestead for water. Frank does not dispute that water for the Pastureland was supplied by the Homestead but argues there are other options available to George.

[48] Frank argues that had he known he would get nothing from the arrangement with Ambrose, he would not have signed the settlement agreement as other options were available to him. There is no evidence of other options, and it is sheer speculation as to what might have been done. Frank wanted the litigation with Ambrose to be over. It was clear to him that $350,000 for the package was a good deal. Having George buy the land and complete the settlement with Ambrose allowed Frank the time to raise the funds with Jeff. George should have had his investment and "something for his trouble" by the fall of 2014. He did not.

e. Was George Unjustly Enriched?

[49] Frank relies on *Garland v Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629, and suggests the elements of unjust enrichment as stated by the Supreme Court are applicable:

> 30 … The cause of action has three elements: 1) an enrichment of the defendant, 2) a corresponding deprivation of the plaintiff, and 3) an absence of juristic reason for the enrichment …

[50] Frank suggests that the settlement agreement was to give Frank the opportunity to purchase the Homestead and farm equipment at a significantly reduced rate. No valuation of the property was provided but given that Chutter was prepared to litigate and seek specific performance respecting a purchase of the same assets at $500,000, one can safely assume that acquiring the same assets for $350,000 was then a bargain. However, there is no evidence as to what the Pastureland, the Homestead, or the chattels were worth. Frank also suggests that he was denied ownership of the Homestead as he would otherwise have been the owner if not for the agreement the Homestead be used as collateral.

[51] George argues he was buying all the land with the view that it would be repurchased in the fall of 2014. But for George's money, Frank could not have completed the settlement with Ambrose in the spring of 2014 and what alternate arrangement may have been negotiated with Ambrose is purely speculative. Frank argues there is no juristic reason for George to have retained the value of the Homestead. Yet George was to have received all his money back in the fall of 2014 and "something for his trouble". Instead, George incurred over $70,000 in legal fees and was embroiled in litigation for several years. Between 2014 and 2017, the only way George could have recovered his investment would have been to sell the land and assets to Chutter given Chutter's registration on title. I am not satisfied on the evidence that George was unjustly enriched by the transaction.

[52] A finding of unjust enrichment, which I am not convinced on a balance of probabilities exists in these circumstances, would not result in a return of the Homestead in any event. As mentioned in *Porterfield v Pirot*, 2017 SKQB 144 at para 43, [2017] 10 WWR 369, "… Just because a claim is made out for unjust enrichment a proprietary remedy does not always follow. The first remedy to consider is always a monetary award…"

[53] The land in question appears to have been consistently offered for sale as a package, first by Frank and Susan and then by Ambrose. At the questioning which was read in at trial, Frank was asked, "And what do you mean when you say he wouldn't have received as much for those four other quarters as if they were all sold with the home quarter?". He responded, "Well, what good are they to somebody without, you know, water and whatever and buildings and…". Of course, this begs the question of what value the Pastureland has without the water source. Frank now argues other options are available, but the reality is the Pastureland has relied on the Homestead water source. The unjust enrichment and constructive trust arguments fail in the circumstances.

f. Did George Fraudulently Misrepresent the Oral Agreement?

[54] Frank relies on *Bruno Appliance and Furniture, Inc. v Hryniak*, 2014 SCC 8 at para 21, [2014] 1 SCR 126, stating:

> [21] From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[55] Frank suggests George made false representations to Frank to entice Frank to consent to the transfer of the title of the Homestead to George, stopped Frank from enforcing his legal rights to the Homestead sooner, and enticed Frank to provide maintenance and upgrades on the Homestead for years.

[56] George did not entice Frank into any arrangement. On the contrary, Frank approached George as he was running out of time if he wanted to preserve the deal with Ambrose. He needed money. Jeff and Frank could not raise the funds in sufficient time to complete the settlement. It cannot be said George enticed Frank, as Frank approached him. It is unclear how George stopped Frank from enforcing his legal rights to the Homestead sooner. All the land was to have been purchased in the fall of 2014. That did not occur and neither Jeff, nor Frank, had the means to purchase the land.

[57] Secondly, until 2017 when the litigation with Chutter was complete, no transfer would have been permitted in any event.

[58] Lastly, to suggest that George enticed Frank to provide maintenance and upgrades on the Homestead for years is not substantiated. Frank's evidence is he was living on the Homestead at no cost and was responsible for maintenance. He filed a breakdown of his expenses. Many of the expenses appear to relate to the cattle operation

including fencing and water costs and equipment rental. Frank received the benefit of these expenses. There is no evidence George enticed Frank to make those expenditures.

g. Is Frank's Claim Barred by *The Limitations Act,* SS 2004, c L-16.1?

[59] Frank argues, he was not aware he would not receive the Homestead back until September 2021 when Notice of Termination of Lease and Demand for Possession was served. It is difficult to reconcile this argument with the facts of the case. Frank did nothing to obtain title to the Homestead for years. In the summer of 2014, Frank suggests he asked George to allow Jeff to use the Homestead as collateral for the purchase, but George rejected the idea. If in fact Frank, not George, owned the Homestead, then George should have had no say in what Frank did with the land provided he recovered his initial investment and "something for his trouble". Frank does not appear to have protested George's position in 2014 and this should have been the first indicator that George was not treating the Homestead as mere collateral as Frank believed, but rather treating it as property owned by him.

[60] Clearly, no transfer could occur while the Chutter matter was ongoing, and both appear to have been involved in the litigation, although George paid all the fees but for an initial retainer which the brothers shared. Once that litigation was complete, however, in 2017, the Homestead could have been transferred to Frank. A conversation occurred but there were no particulars about what had to occur or what would happen to the remaining land. There was discussion respecting the legal fees and again, no meeting of the minds. Frank should, again, have had an inkling at that time that the land was not being transferred; yet he was complacent, and matters continued as they were until the parties had an argument in the fall of 2018. George ordered Frank off the land and Frank retreated to the Homestead claiming he thought George was only referring to the Pastureland. Of course, George still had title to the Homestead and yet, Frank did nothing to ensure title was transferred to him. Frank had to have known at

any time between the fall of 2014 and the fall of 2018 that his interest in the Homestead was at risk and subject to George's whim.

[61] It follows that even if an agreement can be discerned from the unspoken expectations of the parties, or that a promise was made and relied on to Frank's detriment, neither of which has been established on a balance of probabilities, Frank is well past the time in which he could bring a claim.

IV. CONCLUSION

[62] In summary, Frank and George are family and – as is often the case between family members – their arrangement was nothing more than a loose understanding which they entered willingly and with the confidence that they were dealing with someone they have known and trusted for a lifetime. Frank sought out George's assistance when he was scrambling for the funds necessary to settle with Ambrose. There was no agreement in writing between the two of them. They trusted each other to do right by the other. Frank expected he would one day own the Homestead and George expected he would one day get his money back and "something for his trouble".

[63] Unfortunately, the Chutter claim and Jeff's inability to get financing prohibited completion of the original arrangement. Nonetheless, the brothers carried on with the Chutter litigation and use of the farmland with the expectation the other would treat him well and recognize his interests. Frank still expected he would one day get the Homestead and George expected reimbursement for legal fees and again, "something for his trouble".

[64] With the passage of time, resentments grew, and an argument ensued. George and Frank quit talking, and Frank retreated to the Homestead and cut water off to the Pastureland. The result was this litigation. Although Frank and George may have

a moral obligation to make things right between each other, the passage of time and the vagueness of their understanding or promises does nothing to usurp the indefeasibility of title.

[65] Frank's claim against George is dismissed with costs. George will have vacant possession of the Homestead within 60 days.

J.
C.M. RICHMOND