SUPREME COURT OF NOVA SCOTIA
Citation: *Fredericks v. Smysniuk*, 2025 NSSC 287

Date: 20250918
Docket: Hfx No. 517038
Registry: Halifax

Between:

Victor Fredericks

Plaintiff

v.

Fredrick Smysniuk and Jane Smysniuk

Defendants

Decision

Judge: The Honourable Justice Denise Boudreau

Heard: June 2, 3, 4, 18, 2025, in Halifax, Nova Scotia

Counsel: Victor Fredericks, Plaintiff, self-represented
Peter Rumscheidt, for the Defendants

By the Court:

[1] The plaintiff is a contractor who began building a house for the defendants in 2021. He left the project, unfinished, in 2022. He claims that defendants have not paid him for all the work he provided.

[2] The defendants have counterclaimed saying that the plaintiff, in fact, abandoned the project and breached the contract that the parties had signed. They further say that they were forced to complete the construction of their home themselves, at a significant loss.

Evidence

[3] I have considered all the evidence that I have heard at this trial. I note here the most relevant portions. Much of the relevant evidence was, in fact, the subject of substantial agreement between the parties.

[4] In June 2019 the defendants bought a piece of land on Partridge Lane in Mount Uniacke, Nova Scotia. They intended to build a home to live during their impending retirement. They had plans drawn up, which they discussed with a few builders; however, they discovered that their desired plan would cost upwards of $700,000 to $800,000 to build. Their budget was a maximum of $450,000.

[5] The defendants then revised their home plan and, according to them, made the home "smaller" (I should note that I do not have these first plans for comparison). However, once again when speaking with builders, they discovered that even this revised plan was estimated to cost $690,000. As this was still outside their budget, the defendants decided to wait until prices came down, and put their building plans on hold.

[6] In the summer of 2021, the defendants were at a social event and ran into the plaintiff, whom they knew since he had done some painting and odd jobs for them in the past. The plaintiff asked them how their home build was proceeding; they told him it was on hold due to cost. The plaintiff then informed them that he was a general contractor (the defendants were unaware of this) and suggested that he could build them their home. The plaintiff introduced them to Mike MacDonald, who he said was a contractor who he worked with. The plaintiff asked the defendants to send him their plans, and they could talk again at a later date. There was no mention of price at that time.

[7] The plaintiff noted in his evidence that, at the time of that conversation, he had only recently started taking on projects as a general contractor, although he had prior experience working for a construction company as a painter and doing renovations. He also noted that the defendants' home was the largest home he had

ever taken on, at that time, as a general contractor. I pause here to note that those facts alone likely explain much of what happened thereafter.

[8] The defendants then emailed their home plans to the plaintiff, and the parties (along with Mr. MacDonald) later met at the defendants' property to discuss. The defendants told the plaintiff that their bank had advised that the maximum loan they could receive for this home build was $550,000, and that this was their firm budget. The plaintiff gave no estimate of cost at that time, but the defendants understood from the discussion that the plaintiff was able to undertake to build their house within that limit. The plaintiff indicated that he would be providing a quote.

[9] Following this, and while the defendants were still waiting for the quote from the plaintiff, an excavation company appeared at the defendants' property and started digging a large hole. The defendants assumed that these workers had been hired by the plaintiff. The work progressed.

[10] The defendants had told the plaintiff (at some early point) that their bank required a written contract with their contractor in order for their loan to be processed. The defendants continued to remind the plaintiff that they needed this, but no contract appeared for some time.

[11] At some point during the excavation a problem emerged; the excavation had reached bedrock at eight feet, and the plans called for a nine-foot excavation. As a result, a meeting was held with the defendants, the plaintiff, and the excavation company representative. The defendants were advised that if they wished to conform to the original plan (i.e., a nine-foot excavation), the cost of the excavation work would effectively double. However, another option was suggested in the form of a design feature called a "pony wall". This was a wooden structure that would make up the one-foot difference between the home and the ground. The only real effect on the plan would be that the home would no longer be "flush" with the ground but would now require steps to enter.

[12] The defendants were displeased with this option since, as a retirement property, they had wanted a fully accessible home (in the event of any disability) without obstructions. However, it appeared that this was the only reasonable option. All parties agreed with it and the "pony wall" structure was built. Notably, there was no discussion between the plaintiff and the defendants as to whether there would be any additional cost to the defendants for this "pony wall", or whether there would be any adjustment to the building price.

[13] Having said that, the defendants do say that the plaintiff mentioned (at the time) that this option was in fact cheaper than the original plan; the plaintiff (before me) agreed that this was the case (as wood is cheaper than concrete).

[14] The defendants note that, throughout, they were repeatedly clear with the plaintiff that this project stay within their budget.

[15] After these events had already occurred, and after multiple requests, the plaintiff finally provided the defendants with a draft contract to review. The plaintiff notes that this draft was a document that he found on the internet, and that he personally amended to suit the circumstances. He did not have it reviewed by any lawyer at any time (nor, in fact, did the defendants).

[16] The defendants noted that the price in the draft contract was now quoted as $581,325. They were somewhat surprised by this number, as it was more than the budget they had stipulated to the plaintiff. However, the defendants felt they could meet that new price, so they did not dispute it.

[17] The parties then met, and the defendants noted a few changes that they had made, which the plaintiff agreed to. The document (the “Contract”) was then signed by the parties on October 17, 2021.

[18] The Contract was an entirely "homemade" document, which in my view was woefully inadequate to serve as a contract for the building of an expensive home. Following some introductory paragraphs (identifying the defendants as the "Owner" and the plaintiff as the "Contractor"), some of the more salient portions of the Contract are quoted below:

> 3. CONTRACT DOCUMENTS: The following documents are incorporated by reference into this Agreement and hereby made contract documents.
>
> A. This Agreement
>
> B. Plans: Drawn by: **CADtech**; dated **August 19, 2020**; 7 pages.
>
> C. Written description of work attached to this Agreement, if applicable.
>
> D. Other: _____.
>
> E. OWNER-SUPPLIED MATERIALS: Owner will furnish the following materials at Owner's sole expense for the project and these owner furnished items will not be marked up or warrantied by Contractor: _____.
>
> F. ALLOWANCES: Allowances for the project that are included in the Lump Sum contract price include the following:
>
> $15,000.00 for electrical
>
> $15,000.00 for plumbing.
>
> Payment for work designated in the Agreement as ALLOWANCE work has been initially factored into the Lump Sum Price and Payment Schedule set forth in this Agreement. If the final amount of the ALLOWANCE work exceeds the line item ALLOWANCE amount in the Agreement, the difference between the final amount and the line item ALLOWANCE amount stated in the Agreement will be treated as Additional Work and is subject to Contractor's profit and overhead at the rate of 2%.
>
> If the final amount of the ALLOWANCE work is less than the ALLOWANCE line item amount listed in the Agreement, a credit will be issued to the Owner after all billings related to this particular line item ALLOWANCE work have been received by Contractor. The credit will also include the contractor's markup on the amount of the Allowance coverage. This credit will be applied toward the contractor's next invoice on the project. The contractor and the owner shall both document the cost of all Allowance items with receipts and invoices.

SCOPE OF WORK: Contractor will furnish all labor, equipment, tools, dust barriers, materials, scaffolding, transportation, items required for safe operations in accordance with the safety provisions in this Agreement, and supervision to complete, in a substantial and workmanlike manner, to the satisfaction of the Owner and/or its Representative, the following work in accordance with all applicable Building Codes and also in accordance with all the Contract Documents specified in this Agreement. All products and materials shall be installed according to manufacturer's written instructions and construction industry standards.

A. See Scope of Work described above.

B. Scope of work is attached to this agreement. Yes _____; No _____.

If attached, both parties initial the Scope of work attachment.

C. Additional clarifications to Scope of Work or Project: _____.

D. EXCLUSIONS

i. The following work (LABOR AND MATERIALS) is excluded from this Agreement:

~~Well and Sewer System~~ Included in price.

(NOTE: This is struck out, initialled by all three parties and the words, "Included in price." is handwritten. This was a change requested by the defendants and agreed to by the plaintiff.)

ii. The following MATERIALS ONLY are excluded this Agreement*:

None

*Contractor's labor costs to install the excluded MATERIALS noted in the section immediately above, however, are NOT INCLUDED in this Agreement.

5. LUMP SUM CONTRACT AMOUNT AND PAYMENT SCHEDULE: Owner will pay Contractor the total lump sum of: $581,325.00

INSTALLMENTS AS WORK PROGRESSES according to the following schedule:

A. Contract Deposit: **$58,000.00**

B. Second Payment: **~~$174, 442.00~~** As determined by the bank at each phase of construction for item B. and C.

After completion of the excavating, concrete work

(**NOTE**: The amount is struck, initialed by all three parties, and a note is handwritten: "As determined by the bank at each phase of construction for item B. and C.". This again was another change initiated by the defendants and agreed to by the plaintiff.)

C. Third Payment: **~~$174, 442.00~~**

After completion of the framing, gyproc/crack fill/painting, cabinet installation

(**NOTE**: The number is struck and initialed by all three parties.)

(There is no "D".)

amount

E. Final payment ~~**(179, 496.00)**~~ (**NOTE:** The number is struck and the word "amount" is written over it, initialed by all three parties.) is due upon completion of all work under this Agreement (including all punch-list work), inspection and approval of work by building department (if applicable), and Contractor furnishing the following to Owner's Representative:

i) all product warranties, manufacturer's maintenance instructions and information to Owner

ii) a lien release upon final payment to Contractor, who also agrees to furnish Owner's Representative with a Lien Release for all Subcontractor, lower-tier Subcontractors and material suppliers that have lien rights against the project.

…

6. Any changes to the plans and specifications, will be the financial responsibility of the homeowner.

…

14. ENTIRE AGREEMENT, MODIFICATION, SEVERABILITY: This Agreement represents the entire agreement and legal understanding of the parties. It shall be deemed to have been drafted by both parties to this Agreement.

[19] As one can see, the Contract is unclear as to what it actually encompasses. The section entitled "Scope of Work", where one would expect to find a description of the work to be performed, is vague to the point of being essentially meaningless. The section reads "Contractor shall furnish all labor, materials ...", without indicating any detail whatsoever as to which labour and materials, and/or what they are for.

[20] Having said that, the Contract does reference and incorporate the house plans dated August 19, 2020, as per paragraph 3(B) hereinabove.

[21] Those plans (7 pages) first show the exterior of the one-story home, including measurements and placement of windows. They also show the interior of the home, consisting of a(n) (unfinished) basement plus one floor. The floors on the plan are divided into (measured) rooms, and various items within those rooms are shown by way of squares or circles, either identified or not (e.g., square marked "fireplace"; square marked "heat pump"; squares in the kitchen presumably representing counters, stoves, etcetera; circles in the bathrooms ostensibly representing toilets and sinks, and so on).

[22] There are very few specifications noted. In the last three pages of the plans we see specific materials noted to be used for "finished floor" (i.e., to be "as specified", with "plywood" and "vinyl/ceramic finishes"); for "wall construction" (including extensive descriptions of the materials and detail for the foundation and footings); and "roof construction" (25 year asphalt shingles min, etcetera). There are also noted specifications for "adaptable housing" (presumably to ensure an entirely handicapped-accessible home).

[23] However, the plans are entirely silent as to all other details or "specs" (e.g., fixtures/lighting materials or allowance, materials/allowance for siding, materials/allowance for heating system(s), material/allowance for decking, material/allowance for counters, and so on). The only specifications of that nature

were the allowances in the contract for “electrical” and “plumbing”, as noted hereinabove.

[24] After the contract was signed, the plaintiff continued to work on the house. However, serious difficulties arose almost immediately.

[25] Before the end of October 2021, the plaintiff advised the defendants that he needed an advance to pay for the excavation/foundation work that had been done. The defendants wrote him a cheque for $100,000. Following that time, some disputes arose between the plaintiff and Mr. MacDonald, the details of which are not essential to the narrative here, except to say that they caused Mr. MacDonald to exit the project.

[26] The plaintiff then advised the defendants that he was “maxed” on his own credit, which meant he was having difficulty buying the materials needed to continue work on their home. As a result, the defendants agreed (having, in practical terms, no choice) to use their own credit accounts at various hardware and building supply stores in order to keep materials being delivered. The defendants understood that the plaintiff had agreed to reimburse them for these payments at a later date, but he never did. Later the plaintiff advised the defendants that he was

still having financial difficulties and was needing to cash out RRSPs in order to pay his employees. The defendants provided him another advance.

[27] The payments made by the defendants to the plaintiff for the building of their house were: $100,000 in October; $20,000 in November; $50,000 in March 2022; and $141,232.33 in April 2022. In total the defendants paid the plaintiff $311,232.33.

[28] Through this time, a few changes were discussed between the parties and agreed to. For example, the plaintiff identified a problem with the size of an opening in the kitchen (as per the plans), and the parties agreed to move a pantry wall. Also, on the suggestion of the plaintiff, the roofing material was changed (from asphalt to metal). The plaintiff did not advise the defendants that there would be any extra cost for any of these changes that were being made. The defendants also assert that, to this point, the plaintiff had not advised them that the project was in any way over budget.

[29] In May 2022, the plaintiff asked to meet with the defendants. At this point, based on the evidence and the photographs, it appears that the outside of the home was essentially finished, although the inside still required significant work. The plaintiff advised the defendants that he was concerned that the project was way

over budget; that “things had got away from him”; and, in fact, he estimated that his original estimate was about $150,000 short. The plaintiff advised the defendants that he would be stepping back from the project to look at his finances. The defendants note that they were shocked and surprised at this.

[30] Later that same month the plaintiff again came to the defendants. He now had a document with him, which he said was a spreadsheet prepared by his accountant. The document itemized a list of expenses and, on its face, purported to show that the defendants’ home project was already over budget by an amount of over $350,000.

[31] In response, the defendants told the plaintiff that this was his problem, and that he had to finish their house for the contractually agreed-upon amount. The plaintiff apologized and left.

[32] Work on the project then halted. The plaintiff returned the day after the meeting and said he had to retrieve his tools, which the defendants allowed him to do; later others came and retrieved some other materials. After that point neither the plaintiff nor his workmen ever returned, nor did they do any further work on the property.

[33] As I previously noted, at that time the exterior of the house was essentially finished but the interior still required significant work. The defendants were forced to finish the job and complete their "half-finished" house. The electrical and plumbing contractors agreed to stay and complete their work as long as their invoices were paid. The defendants found other tradespeople to do the other work and did some of the finishing work themselves. In doing so, they were forced to use some of their savings and to obtain a loan from a family member, as the final cost went over their original budget.

[34] The defendants have kept very careful and detailed records of everything they have spent to finish their home. All these expenses are contained in Exhibits 1-C and 1-D, starting with a summary of all costs and followed by the actual receipts for each cost.

[35] In the context of this lawsuit, the plaintiff claims that the defendants still owe him some amount of money for this project. However, even at trial he was entirely unsure what that amount might be.

[36] In the plaintiff's original Statement of Claim, he sought the amount originally noted on the May 2022 spreadsheet ($354,262.39). This document was placed before me in evidence as the document shown to the defendants by the

plaintiff in May 2022. The plaintiff has advised that this document was prepared "by an accountant". This is entirely unconfirmed, as the plaintiff did not call any accountant to testify before me, either to authenticate the document or to explain it.

[37] At trial, the plaintiff was asked about the document. He had great difficulty explaining the amounts noted thereon, and how they could be reconciled with the amounts already paid by the defendants. The spreadsheet, it was also noted, included no source documents, meaning that there was no evidence in support of the suggestion that the amounts listed were accurate.

[38] The plaintiff was then asked to re-calculate, from his own understanding, what he believed he was owed. Having taken a break, the plaintiff then produced an entirely new handwritten document showing an amount owing to him by the defendants, in his view, of $174,664.29.

[39] This new document was no more helpful than the last. The plaintiff could not explain the difference in the two amounts, nor could he explain many of the items listed thereon. For example, he could shed no light on why he felt that the defendants still owed for foundation and excavation work when they had specifically paid $100,000 for that purpose.

[40] More fundamentally, the plaintiff in his evidence could not explain why the project went over budget at all. He repeatedly pointed to the fact that there were changes made to the original plans which, according to clause 6 of the contract, were the defendant's responsibility. The plaintiff noted as an example the change to the roof material that was agreed to by the defendants (from asphalt to metal).

[41] While this is possibly one aspect of the problem, it is simply impossible that this is the full explanation. It is patently obvious to me that the few changes noted by the plaintiff did not cause a budget over-run of hundreds of thousands of dollars.

[42] In any event, the plaintiff did not provide this court with *any* evidence whatsoever as to the difference in cost between the original plan and any changes made. For example, the plaintiff noted that a metal roof is "more expensive" than an asphalt roof, but that was the extent of his evidence. He provided no figures or supporting evidence on that difference. He did not provide any evidence on *any* difference in cost between the original plan and *any* changes.

[43] The defendants have counterclaimed against the plaintiff. They note that, in total, they spent nearly $800,000 to finish this home, and that the plaintiff had

promised by contract to complete it for $581,000. In the view of the defendants, the plaintiff must reimburse them the difference.

Analysis

[44] It is trite to say that a contract is formed, and can only be formed, when two or more parties form a "meeting of the minds", more formally described as a *consensus ad idem*. While individual parties may have beliefs or opinions about whether a contract was formed, and its terms, that does not resolve the issue. The salient question is whether, in the view of an objective observer, an enforceable agreement was entered into:

> … An alleged agreement, however reached, orally, in a document purporting to be a contract or in a letter of intent, must be clearly manifested, expressly or by implication. An inward intent will not suffice. "The law judges of the intention of the person", said Sirois J. of Saskatchewan in *Gutheil v. Caledonia No. 99 R.M.*, "by his outward expression only and it judges of an agreement between two persons exclusively from those expressions of their intentions, which are communicated between them". …
>
> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co*:
>
> > the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the

> essential terms of that contract can be determined with a reasonable degree of certainty.
>
> Fridman, *The Law of Contract in Canada*, Carswell 6th ed (2011); pp. 14-15

[45] In *United Golf Developments Ltd. v. Iskandar*, 2008 NSCA 71, the court stated the following:

> [14] To have an enforceable contract, there must be agreement between the parties as to all essential terms. To use the language of a leading case, a contract "… settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties": **May and Butcher, Ltd. v. The King**, [1934] 2 K.B. 17 (H.L.) at p. 21. Determining what terms are "essential" in a particular case is, however, more difficult than stating the principle. The sort of terms that are considered essential varies with the nature of the transaction and the context in which the agreement is made: **Mitsui & Co. v. Jones Power Co.**, 2000 NSCA 95 … .

[46] In the case at bar, it seems that all parties believed a "contract" had been formed for the building of "a house", whatever that might have meant to each party. It is also clear that both the plaintiff and the defendants performed actions which, to an objective observer, evidenced that "an agreement" existed. For example, all of them signed a written document; the plaintiff then commenced the process of building a house for the defendants; and the defendants paid him over $300,000 in partial payment of same.

[47] The much more difficult question, however, is whether the parties were *ad idem* as to what this "agreement" was, and more particularly, as to the *terms* of that agreement. The written documents are, to say the least, less than clear.

[48] Since *Sattva Capital Corp. v. Creston Moly Corp.* , [2014] 2 SCR 633, it is settled law that in contract disputes, courts are not limited to evidence contained within the four corners of a written contractual document. Evidence of surrounding circumstances (i.e. facts that were known or that reasonably ought to have been known to both parties at or before the date of the contract) may be considered in all cases, even those where there is no apparent ambiguity in the contract. The court noted:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J. …). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (... As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] The court later went into further detail on the place of surrounding circumstances in contractual interpretation:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (...). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (...). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (...).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (...), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [59] 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 (...). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (...). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (...).
>
> [60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[50] Our Court of Appeal discussed the issue of contractual "surrounding circumstances", and the *Sattva* interpretative principles generally, in *Grafton Developments Inc. v. Allterrain Contracting Inc.*, 2022 NSCA 47:

> [18] Surrounding circumstances comprise "facts and circumstances that were or "reasonably ought to have been within the knowledge of both parties at or before the date of contracting"" (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at ¶ 30).
>
> ...
>
> [20] Surrounding circumstances are relevant to contractual interpretation, irrespective of whether the contract is ambiguous:
>
> > [13] Prior to the Supreme Court's decision in *Sattva*, it was not clear that the surrounding circumstances or the "factual matrix" of the contract had to be taken into account when interpreting a contract. The Supreme Court had earlier suggested in *Eli Lilly & Co. v Novopharm Ltd*., [1998] 2 SCR 129 at para 55-56 that the surrounding circumstances only had to be considered when the contract was ambiguous. Sattva has made it clear that the ***surrounding circumstances are relevant, whether or not there is an ambiguity in the contract***.
> >
> > (*Directcash Management Inc. v. Seven Oaks Inn Partnership*, 2014 SKCA 106)
>
> [21] Surrounding circumstances may include pre-contractual conduct where there is ambiguity or inconsistency in a contract. However, evidence of the parties' subjective intentions is inadmissible (...).

[51] That last sentence makes the point that a contracting party's subjective belief or understanding as to the terms of a contract is, generally speaking, irrelevant in contract litigation. This intuitively makes sense: what one party is privately thinking cannot possibly form the basis for a *consensus ad idem* with another.

[52] On the other hand, one party's beliefs or understandings can be relevant and admissible, if they are/were communicated to the other party at a relevant time. In

Cove Contracting Ltd v Condominium Corp No 012 5598 (Ravine Park), 2020 ABQB 106, the appellant contractor entered into a contract to rebuild a condominium complex. The contractor's understanding was that a third party, ATCO, would be doing the underground electrical utility services electrical work, and that this work was not included in the contract. The condominium corporation believed it was included. An arbitrator sided with the condo corporation and found that the work was included, based on e-mails between the appellant and ATCO.

[53] On appeal, the court noted that "even if the November 29, 2016 emails did clearly state that ATCO would install and pay for the underground electrical services, it would not change the terms of the contract between Cove Contracting and Ravine Park" because there was (in the arbitrator's words) "no evidence that Ravine Park was ever made privy to the ... email. At most, the email is an explanation for Cove's subjective understanding that the Project would be turnkey". The court further noted:

> [27] Cove Contracting does not take issue with that finding. It is important, because communications of which Ravine Park was unaware at the time of the formation of the construction contract, are not relevant to interpreting that contract.

Plaintiff's Claim

[54] In my view, the plaintiff's claim is very simply dealt with.

[55] As noted above, it is the plaintiff's contention that the project went over budget because of changes that were made by the defendants (or changes that had to be made, which were agreed to by the defendants). The plaintiff points to various examples: the roofing, the "pony wall", and so on. On the other hand, the plaintiff produced no evidence in support of the alleged differences in cost for any of these "changes". I have no way of knowing what those differences are.

[56] As I have already said in this decision, I do not accept the plaintiff's submission that these changes caused the project to go over budget. The plaintiff has produced no evidence to prove, or substantiate, or quantify, his claim.

[57] The plaintiff provided more than one bare "calculation" for what he believed he was still owed, but he could not explain what those numbers represented. Nor could he explain why his costs (as the time he left the project) had not been covered by the money already paid by the defendants.

[58] In short, the plaintiff has not made out his case.

[59] In my view, there is a very simple explanation for the events that occurred. It must be remembered that, prior to the plaintiff's involvement, other contractors had quoted a significantly higher price to the defendants for building this same/a similar home. Having looked at all of the circumstances, it seems obvious to me

that in agreeing to build this house for the defendants, the plaintiff substantially misestimated and miscalculated the cost of the build of a home of this size (due to inexperience and, very likely, his eagerness to get hired to do this work). Furthermore, the lack of specificity in the Contract is a strong indication that there was little to no "consensus" between the parties on what was included and what was not; the plaintiff simply failed to specify what the contract was to include. Perhaps that was the reason for the miscalculation; or, perhaps the plaintiff assumed there would be ongoing discussions and agreements as the home progressed as to what would be included and at what price; or, perhaps he did not turn his mind to these questions at all.

[60] I feel it necessary to note that, at the very outset, all of these circumstances should also have raised "red flags" for the defendants. If they did, they chose to ignore them.

[61] The end result was, to be frank, entirely predictable. I find that the plaintiff eventually realized he could not build the house for the agreed upon amount, and he then unilaterally abandoned the project. This left the defendants to deal with the fallout.

[62] In the final analysis, I cannot say whether the plaintiff has lost any money in this "deal". Any possible losses incurred by the plaintiff were unsubstantiated and unquantified in the evidence before me. He has provided no convincing evidence to substantiate any losses whatsoever.

[63] Furthermore, and in any event, if the plaintiff has suffered any loss, such was caused by his own fault and carelessness in agreeing to a project that he could not fulfill. I trust this is a valuable lesson for him if he chooses to go forward in this industry.

[64] I dismiss the plaintiff's claim entirely. I am also ordering that the lien registered against this property by the plaintiff be vacated.

Counterclaim

[65] As noted, after the plaintiff left the property, the defendants were forced to finish the work themselves. They have provided me with extensive evidence of their costs for doing so, including a full breakdown of all costs (as well as a receipt for every expense). They seek for the plaintiff to reimburse them for all costs over and above the amount they had agreed upon (which was $581,000). As of their last (written) submissions, they propose that their claim is in the amount of $199,958.03.

[66] I accept that the expenses itemized in Exhibits 1-C and 1-D were actually borne by the defendants. However, that does not end the matter.

[67] There are multiple other difficulties that arise within the counterclaim because of the vagueness of the Contract and its terms.

[68] First, in my view, there is a fundamental question that must be asked: whether an enforceable contract (a true and full consensus between the parties) was truly formed in this case, from an objective standard.

[69] The Contract itself, when one reads it, leaves an objective reader with questions: what was this a contract "for" exactly? What was included? The Contract itself does not say; the attached plan, while providing some information, is less than clear.

[70] The defendants submit that, from their perspective, this was a contract for a fully completed, "turnkey" house, including every possible fixture (whether specifically noted or not). I can accept that this is what they thought. I am less convinced that this is what was agreed upon by all.

[71] As noted, the Contract did incorporate the plan of a house; the plaintiff began building a house. There can be no doubt that the Contract was for the building of a house. However, the evidence does not automatically lead to the

further conclusions being offered by the defendants, which is that the plaintiff a) agreed to furnish absolutely everything to complete the house, and b) in cost amounts as determined by the defendants. The Contract/plan does not contain these provisions, and I fail to see that either is established by the other evidence before the court.

[72] This Contract is vague and equivocal to the point that there could be any number of interpretations as to the meaning of many/all of the sections. Most fundamentally, the section "Scope of Work" (arguably the most important part of the document) gives us no hint as to what the "scope of work" actually was.

[73] The home plans attached to the Contract, while providing some information, provide precious little assistance in determining what was being included and what was not. It seems that no party to this Contract gave any thought to specifying what the plaintiff was actually agreeing to build and/or supply.

[74] In addition to the documents being unclear, I have no evidence that there was any discussion between the parties as to what was included or not, nor any discussion of any specific cost (or limit) in respect of most of the items. The only discussions I heard of were related to the changes being made as the project progressed (as noted hereinabove).

[75] In my view, what is before the court does not represent an enforceable *consensus ad idem* as to the building of a fully finished house with all fixtures included.

[76] As one example that was extensively discussed during submissions, there is a line item paid for by the defendants "heat pump = $28,750". The defendants seek reimbursement for that expense.

[77] The Contract does not say that the plaintiff will supply any heat pump(s), nor that he will do so at a price of nearly $30,000. The plans attached to the Contract show a drawn square in the basement that is marked "heat pump". The plans are silent as to whether this meant an *installed* heat pump, or merely a rough-in for a later install by the defendants.

[78] Even if we could conclude that this square on the plan represents an installed heat pump (which, in my view, we cannot), the contract is also silent as to any amounts or allowances for this equipment. To be more particular, there is nowhere in the Contract showing that the parties had agreed upon a heat pump system in an amount costing over $28,000, payable by the plaintiff.

[79] As another example, there are multiple expenses paid for by the defendants for a "fireplace", either labour or materials, sometimes combined with a "pantry".

By my quick math I see that the receipts for either/both of these items total close to $10,000.

[80] Once again, the contract is silent as to either a fireplace or a pantry. The plan shows a square in the living room and the notation “propane fireplace”, as well as a room marked “PTRY” which I believe is the pantry. Within that room on the plan, we can also see squares noting “fridge”, “freezer”, “floating doors”, and an unmarked square (perhaps a countertop?).

[81] Once again, the evidence before me does not show a “*consensus ad idem”* that the plaintiff agreed to supply and install a fireplace. More particularly, even if it did, there was clearly no consensus of the amount/allowance that the plaintiff was contracting to spend on that item. I would say the same in respect of any amounts spent on “pantry” items, whatever those might be.

[82] I could point to many other similar examples in the list of expenses provided by the defendants: “garage doors and related equipment”; “water systems and equipment”; “closet built-ins”; “mouldings”; “ceiling fans”; the list goes on. None of these are provided for in the Contract, and no allowance or price had been discussed or agreed upon. Even if the defendants thought all of these things were included, I have no evidence that the plaintiff agreed to any of them.

[83] There are other difficulties with the claims made by the defendants. For example, I note that there are a number of line items marked “Electrical” at page 2; these receipts alone total $40,889.01 (although there are other receipts that one could consider to be electrical-type expenses, on other pages). There are also line items for “plumbing” for a total of over $19,000 on page 5 (again, arguably not the only “plumbing” expenses; other line items note related items such as “faucets”).

[84] However, the Contract provided “electrical” and “plumbing” allowances of $15,000 each. Those were actual limits that were agreed upon by the parties, two of the few items that *were* clearly the subject of consensus. It is unclear to me how to factor in those expenses. Additionally, I have no evidence as to whether either or both allowances were reached even *before* the plaintiff left the project.

[85] As I said during submissions, I accept that the defendants actually spent the amounts showing in Exhibits 1-C and 1-D to finish their home. Furthermore, and to be very clear, I am not attributing any ill motive to the defendants, nor am I suggesting that they are using this process for unfair gain (e.g., by buying more expensive items than would otherwise have been used, as suggested by the plaintiff). I fully accept that the defendants had to finish their home, and I further accept that they spent what they believed was fair in order to finish that home.

[86] What I am saying, however, is that the court cannot enforce agreements that were not shown to be reached. The evidence before me gives me no comfort that what was spent by the defendants to finish this home was *actually agreed upon* by the parties when the Contract was formed. This is true, both in relation to the line items listed, as well as in their actual cost.

[87] Perhaps the best that could be said is, by signing this Contract, the parties were "agreeing to agree" as to the ongoing costs, as the house was being built and as issues came along. Certainly, that seems to be how they conducted themselves as the process moved along.

[88] However, an "agreement to agree" is not an enforceable contract. I am not able to say with any degree of certainty that the amounts sought by the defendants were the subject of an enforceable agreement.

[89] To the credit of the defendants, when my concerns were pointed out to them, they agreed to reduce their claim by two line items: a $1,712 claim (for "test pits and septic design") and a $6,555 claim (for a "water treatment system"). This was in acknowledgement that those items were nowhere contained in the Contract or plans. However, in my view, that is only the tip of the iceberg.

[90] I find that this Contract is so vague in its terms as to be unenforceable. I heard no extrinsic evidence as to the "intentions of the parties" which alters that conclusion.

[91] In response to my concerns, the defendants argued that at no time during this litigation (either pre-trial or at trial) did the plaintiff specifically raise the "vagueness" of the terms of the contract as a possible defence. Defense counsel pointed out that during this litigation they provided the plaintiff with all of their expenses incurred to finish the house, and at no time did the plaintiff object or respond that he had not contracted to build a finished house (I should note that these suggestions were not submitted as evidence, but rather, were merely asserted as having occurred by defence counsel). Therefore, said the defendants, his non-objection should be understood as an acknowledgement that the defendants' interpretation of the contract is correct, that the contract was for a "turnkey" house, and that the plaintiff is responsible for all their expenses.

[92] In my view, that suggestion cannot be sustained in law. The plaintiff's formal defence to the counterclaim notes, "The Plaintiff denies the facts and allegations in the Statement of Counterclaim and puts the Defendants to the strict proof of those facts. The Plaintiff seeks the dismissal of this Counterclaim with costs against the Defendant." The plaintiff was thereby keeping all of his legal

options open. At no time, to my knowledge, did he make any formal Admission to the effect suggested by the defendants.

[93] I note that the defendants Counterclaim had sought general damages from the plaintiff; however, there were no submissions made in respect of that claim. I therefore understand that it was not being pursued. I dismiss the counterclaim of the defendants.

[94] I would ask counsel and the plaintiff to discuss the issue of costs in an effort to reach agreement. Failing such, I will accept submissions as to costs within 30 days of the parties' receipt of this decision.

Boudreau, J.