In the Court of Appeal of Alberta

Citation: Pittman Brothers Production Ltd v Evans, 2024 ABCA 185

Date: 20240531
Docket: 2201-0203AC
Registry: Calgary

Between:

Pittman Brothers Production Ltd.

Appellant
(Plaintiff)

- and -

Bonnie Jean Evans and Nancy June Skrynyk

Respondents
(Defendants)

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Jolaine Antonio
The Honourable Justice April Grosse

Memorandum of Judgment of the Honourable Justice Antonio and the Honourable Justice Grosse

Dissenting Memorandum of Judgment of the Honourable Justice Slatter

Appeal from the Order of
The Honourable Justice G.A. Campbell
Dated the 22nd day of August, 2022
Filed on the 31st day of August, 2022
(2022 ABQB 541, Docket: 2006 00297)

Memorandum of Judgment

The Majority:

INTRODUCTION

[1] The appellant appeals a chambers decision summarily dismissing its claim for specific performance on the basis that damages would be an adequate remedy. The underlying claim for breach of contract has not yet been decided.

[2] For the reasons that follow, the appeal is allowed. If the appellant is successful in establishing a breach of contract, there is a genuine issue for trial as to whether specific performance or damages is the appropriate remedy.

FACTUAL AND PROCEDURAL CONTEXT

[3] The appellant was incorporated in 1995 by brothers Jerome Pittman and Charles Pittman to hold farmland and otherwise carry out farming operations. Jerome and Charles are shareholders and directors of the appellant. A third brother, Pat Pittman, also farms with Jerome and Charles, but Pat is not a shareholder or director in the appellant. The Pittmans farm in the Warner area of Alberta.

[4] The respondents are sisters who, in 2017, inherited approximately 540 acres of farmland near Warner from their father, Gordon Evans. That land is the subject of this litigation (the disputed lands).

[5] The Pittman family and the Evans family have been neighbours for decades. Jerome Pittman worked as a summer farm hand for Gordon Evans from 1975 to 1982, when he was approximately 12 to 19 years old. Thereafter, Jerome worked full-time for Mr. Evans during farming seasons until 1997. His work included work on the disputed lands.

[6] In 1997, the Pittmans began farming the disputed lands through a crop share agreement with Mr. Evans. They continued to do so through successive crop share or lease agreements until December 31, 2019 when the last lease, entered with the respondents, expired.

[7] Jerome Pittman, either on his own, or jointly with Charles Pittman, purchased the land to the west of the disputed lands (the home lands) from Gordon Evans in 2006. Since that time, Jerome has lived on the home lands with his family. The home lands were previously the home of Gordon Evans and his family, including the respondents. At one time, the home lands and the disputed lands were contiguous. They are now separated by a divided highway and a railway.

[8] Jerome Pittman's evidence is that he had a close relationship with Gordon Evans. Jerome, Charles and Pat were all pallbearers at Gordon's funeral in 2017. When Gordon's wife passed away in 2015, she left a gift for each of the children of Jerome, Charles and Pat in her will.

[9] The Pittmans have significant land holdings and farming operations beyond the home lands and the disputed lands. As of January, 2020, Charles, Jerome and Pat Pittman were collectively farming approximately 7300 acres of land (11.5 sections) in the Warner area, not including the disputed lands. Some of the lands are owned by Jerome and Charles, some by Pat, and some by the appellant. In other cases, the Pittmans farm lands owned by others pursuant to formal or informal lease or similar arrangements, including approximately 800 acres immediately south of the disputed lands and the home lands.

[10] In the fall of 2019, the respondents sent an email addressed to "Jerome, Charles, Pat," thanking them for doing an excellent job of taking care of "Dad's land". The email advised that the respondents had decided to sell "this final remaining piece of Dad's property" and that they were "hoping that Dad's wish can come true, to have the farm pass into your family now…." This email led to a series of communications between the Pittmans and the respondents about the purchase of the disputed lands. Whether those communications resulted in a binding agreement is the main underlying issue between the parties. The Pittmans intended to use the appellant as the vehicle to purchase the disputed lands.

[11] On April 2, 2020, the appellant filed a caveat on title to the disputed lands, claiming a purchaser's interest. In the meantime, the respondents had been negotiating with another neighbour. By April 2, 2020, the respondents had accepted an offer from R.J. McKenzie Farms Ltd. to purchase the disputed lands, but that agreement was not registered on title. The McKenzie offer was approximately $535,000 higher than the price that the appellant claims it had agreed to with the respondents. Closing of the McKenzie agreement was postponed when this litigation arose.

[12] The appellant filed an Amended Amended Statement of Claim on May 6, 2020. On May 21, 2020, the respondents filed an application for summary dismissal of the appellant's claim, and for discharge of the associated caveat and certificate of lis pendens (CLP). On August 31, 2021, an applications judge issued a written endorsement, dismissing the application. The respondents appealed to a justice in chambers, but only on the availability of specific performance and the discharge of the caveat and CLP. The chambers justice agreed with the respondents that even if the appellant was ultimately successful in making out a claim for breach of contract, damages would be an adequate remedy. Accordingly, she summarily dismissed the claim for specific performance and discharged the caveat and CLP: *Pittman Brothers Production Ltd v Evans*, 2022 ABQB 541 (the chambers decision).

GROUNDS OF APPEAL

[13] The appellant raises four grounds of appeal: 1) the chambers justice erred in placing the burden on the appellant to demonstrate that a substitute property was not available; 2) the chambers justice erred in not considering the behaviour of the respondents with respect to the availability of specific performance; 3) the chambers justice erred in granting partial summary judgment where such judgment does not dispose or substantially dispose of the litigation; and 4) the chambers justice erred in determining that this was an appropriate case for summary judgment.

STANDARD OF REVIEW

[14] The statement of the test for summary judgment, including the burden of proof, is a question of law reviewable for correctness. Whether the chambers justice was required to consider the behaviour of the respondents as a necessary element of the test for specific performance and failed to do so is an extricable question of law reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 27. The assessment of whether summary judgment, including partial summary judgment, was appropriate is entitled to deference: *Nixon v Gruschynski*, 2022 ABCA 205 at para 14; *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para 10.

ANALYSIS

[15] Specific performance is an equitable remedy. Whether it is appropriate in any particular case is fact-dependant. Perhaps for this reason, there are varied statements in the jurisprudence as to what is required to make out a case for specific performance in the context of a sale of real property. It is common for courts to consider whether the property is unique, whether the property has some special suitability to the plaintiff and whether a substitute property is readily available. However, these are all simply factors that may shed light on the key inquiry - whether damages are an adequate remedy to serve justice between the parties: *Raymond v Anderson*, 2011 SKCA 58 at para 14; *Harle v 101090442 Saskatchewan Ltd*, 2014 SKCA 6 at para 101; B Ziff, *Death to Semelhago!* (2016) 39 Dalhousie LJ 1 at pp 3, 5.

[16] Specific performance is no longer the presumptive remedy in cases involving the sale of land: *Semelhago v Paramadevan*, [1996] 2 SCR 415; 1996 CanLII 209 (SCC). At trial, the party claiming specific performance bears the burden of demonstrating that damages are not an adequate remedy: *Bethel United Church v North Pacific Properties*, 2022 ABCA 224 at para 130. However, where a defendant applies for summary judgment, it carries the burden of proving the factual elements of its case, and that there is no genuine issue requiring a trial, on a balance of probabilities: *Weir-Jones* at para 32. As the moving party in this case, the respondents bore the burden of proving the factual elements relevant to the availability of specific performance on a

balance of probabilities, and that considering the facts, the record and the law, there was no genuine issue for trial: *Weir-Jones* at para 35. The appellant did not have a symmetrical burden to prove the opposite in order to send the matter to trial: *Weir-Jones* at paras 32 and 35.

[17] While the chambers justice accurately stated the test and burden for summary judgment in some places, she ultimately erred in law by requiring the appellant to demonstrate that substitute property was not readily available, or that the disputed lands were sufficiently unique to justify specific performance, in order to raise a triable issue: for example, see chambers decision at paras 21, 68, 70, 71 and 73. Whether she would have found a triable issue had she not, in effect, imposed the same burden on the appellant that it would bear at trial, we do not know. We are not convinced that in the course of articulating what the appellant had failed to demonstrate, the chambers justice made underlying findings of fact to which we can defer; rather, she listed several points on which "there is evidence": chambers decision at paras 62-67. She implied that the appellant could not raise a triable issue without having looked for alternate land itself: chambers decision at paras 69-70. Yet, evidence of a failed search for alternate land by the claimant is not a pre-requisite to a successful claim for specific performance.[1] For these reasons, the conclusion of the chambers justice as to whether there was a genuine issue for trial was the product of an error of law and must be set aside.

[18] The chambers justice did not hear oral evidence. We are in a position to review the existing record and assess whether the respondents have demonstrated that the claim for specific performance has no merit, applying the correct burdens on the parties. We conclude that the record gives rise to a genuine issue in at least two respects.

Existence and availability of comparable properties

[19] It is uncontested that there is other farmland in the area with similar soil and growing potential as the disputed lands. However, the respondents have not established on a balance of probabilities that any such land of a comparable size to the disputed lands was, or is likely to be, available to the appellant within a reasonable time of the alleged failed sale. This is relevant because the respondents' primary argument on the adequacy of damages assumes that the appellant can purchase a replacement property and receive damages for any difference in purchase price or value as compared to the disputed lands.

[20] The respondents rely on a consultant's report, which identifies seven "comparable properties" that transacted between November 2019 and December 2021. However, only three of those were even close to the size of the disputed lands. The others were much larger (1274 acres) or much smaller (215 acres or less). We are not prepared to assume on this record that buying

[1] The issue of mitigation of damages is distinct and only arises if specific performance is refused or abandoned.

three or four disparately located quarter-sections, or a parcel more than twice the size, is the functional equivalent of the 540 contiguous acres in issue. It is noteworthy that the two parcels closest in size (530 and 636 acres, respectively) were sold prior to the dispute crystallizing between the parties. Accordingly, they were not actually available to the appellant as replacement properties. Nonetheless, the report establishes that in this particular period of 25 months, three properties sized between 311 and 636 acres sold in the area.[2]

[21] What the report does not establish is that the properties identified as comparable, or any properties like them, were realistically available for purchase by the appellant. In other words, the report (and the evidence as a whole) does not establish that the few documented sales reflect the existence of an accessible market. The evidence is uncontested at this stage that farm properties are often sold under rights of first refusal, or through more informal arrangements amongst neighbours. The list compiled by the expert included land titles transfers and anything listed on the MLS, but the expert confirmed in cross-examination that he did not believe any of the identified properties were listed through the MLS. He did not know whether they were otherwise publicly marketed or subject to rights of first refusal. What occurred with the disputed lands illustrates why it may not be fair to assume that all lands sold were available to all potential purchasers. The disputed lands were not publicly marketed. They were privately offered to the Pittmans and then to McKenzie.

[22] The foregoing is compounded by the evidence of the appellant that the disputed lands are particularly suited to its farming operation due to being adjacent to other lands farmed by the appellant, and the relationship between the appellant, the appellant's principals, the disputed lands, and Mr. Evans. In other words, the analysis of comparable properties is not necessarily as simple as looking for other lands of similar size available in the area.

[23] The respondents argue that factors such as proximity to existing farmed lands can be wholly accounted for by compensation for the extra cost of hauling equipment, including paying for labour. There is authority for the proposition that special suitability going to profitability is compensable in damages: *365733 Alberta Ltd v Tiberio*, 2008 ABCA 341 at para 10; *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at paras 40-41. However, assuming (without deciding) that the disputed lands could be treated as purely commercial lands, the latter can have special suitability not compensable in damages: *Lucas v 1858793 Ontario Inc (Howard Park)*, 2021 ONCA 52 at paras 73-77 and *Bethel*. Moreover, at this stage, the respondents have not addressed points such as whether the labour for hauling equipment is truly compensable

[2] Whether 311 acres could ultimately be seen as a fair replacement for 540 acres is a matter left for the trial judge in light of our other conclusions.

in dollars if it is undertaken by family members at the cost of recreation or family time, or the risk that weather intervenes during the extra time required to haul the equipment.

Damages for lost production

[24] We have considered whether it has been established that damages would be an adequate remedy even if comparable land were not readily or ever available. If one again assumes that the appellant's intended acquisition of the disputed lands can be viewed in purely commercial terms, then arguably, lost expected profits from the disputed lands for the period the appellant was unable to reasonably acquire a comparable property, or even for the entire period that the appellant was expected to hold the disputed lands, would be an adequate remedy. However, even in purely commercial matters, specific performance may be appropriate where the calculation of damages would be highly speculative or particularly time-consuming, difficult or complex: *Southcott* at para 40; *Covlin v Minhas*, 2009 ABCA 404 at para 15; *Lucas* at para 79.

[25] The uncontested evidence of Jerome Pittman is that the appellant planned to continue farming the disputed lands indefinitely and there was no intention to re-sell them. As set out above, the existing record does not allow us to find that even facially comparable properties have been available or are likely to be available to the appellant over any particular period. While estimates of lost crop profits from the disputed lands are likely available for the near future based on historical production, the same cannot necessarily be said for a longer term assessment, because of all the variables that affect farm income. The existing record does not address damages relating to lost production or their calculation. It does not allow us to conclude that the calculation of damages over a long term would be anything but speculative, time-consuming, difficult and complex.

The caveat

[26] This case was decided by the chambers justice, and argued before this Court, on the basis that the decision on the application for summary judgment in respect of the specific performance remedy was determinative, either way, of the application to discharge the caveat. We make no comment as to whether or how the two could diverge in another case.

CONCLUSION

[27] Having set aside the conclusions of the chambers justice that resulted from an error of law, we are not satisfied that the respondents have demonstrated that there is no triable issue on the remedy of specific performance. We need not address the other points raised by the parties. It is preferable to leave the slate as clean as possible for the trial judge. Of course, even matters addressed in this decision will be considered afresh by the trial judge based on the evidence and argument at that time.

[28] The appeal is allowed. The order summarily dismissing the claim for specific performance and discharging the caveat and CLP is set aside.

Appeal heard on December 8, 2023

Memorandum filed at Calgary, Alberta
this 31st day of May, 2024

Antonio J.A.

Grosse J.A.

Dissenting Memorandum of Judgment

Slatter, J.A. (dissenting):

[29] The appellant appeals a decision which discharged its caveat from farmland near Warner Alberta: ***Pittman Brothers Production Ltd v Evans***, 2022 ABQB 541. The appellant's entitlement to a caveat depends on it being able to establish an "interest in land", which in turn would require it to establish that a) it had an enforceable contract to purchase the land, and b) on a breach of that contract it would be entitled to the equitable remedy of specific performance. Only the appellant's entitlement to specific performance is at issue in this appeal.

Facts

[30] The respondent sisters inherited the subject land from their father. The lands had been farmed for a number of years under a series of crop lease agreements by members of the Pittman family (particularly some or all of the brothers, Jerome, Pat and Charles Pittman).

[31] In late 2019 the respondents indicated that they were ready to sell the lands. This resulted in a series of emails between the parties that is said to form the binding contract for the sale of the land:

A. November 19, 2019, from Jerome Pittman:

> Had an opportunity to talk with Charles and Pat this AM regarding your last Email, and I just wanted to touch base with you!
>
> Seems we have farming in our blood. . . .
>
> Despite farmings many ups and downs, we still love what we do!
>
> Thank you for considering us and for giving us the opportunity to do what we love!
>
> Are we interested in your offer???
>
> Absolutely!!! We are hopeful we can strike a deal that would not only meet our needs but yours as well!

> We have tried to be some what pro active in getting all of our ducks in a row with regards to the sale of your property.
>
> We have hired a account who specializes in agriculture/land financing to do a financial stability and feasibility study on the proposed purchase of your property.
>
> We have also met with our loans officers and discussed some of the possible finance scenarios.
>
> We realize that you also have much at stake and that time is of the essence!
>
> ASAP: when we hear back from our account and loans officer we will let you know and hopefully we can move ahead!

B. December 31, 2019, from Bonnie Evans:

> Hello Jerome, Pat, Charles,
>
> Wishing you and yours a Happy New Year, with much to look forward to as we all take our next trip around the sun.
>
> This is an update to let you know that Nancy and I are now ready to move forward with a sale for Dad's land.
>
> I did receive your expression of interest through Jerome, and I know you were undertaking some analysis on how best to move forward regarding this.
>
> I'm hoping that review is now complete, and you're able to let me know something definitive, within the first week of January, on whatever your final decision must be regarding a purchase.
>
> I look forward to hearing from you.

C. January 1, 2020, from Jerome Pittman:

> Happy New Year, isn't it great to have a new start.

Yes, our accountants have completed our farm's finance reviews and forwarded the information to our loans officer's.

I would like this opportunity to clarify the necessary business dealings to go forward with the sale of your Dad's land.

You have stated that you are looking for an approximate 1.8 million for the property. Is it our understanding that we are to make an offer on the said approximate value or are we to meet an existing offer?

At the risk of being socially inappropriate, can we make an informal offer via email? If acceptable this would be followed up with a formal legal offer.

We look forward to offering something that is good for both of us. Above all, it is our hope that business dealings will never get in the way of our friendship.

D. January 2, 2020 from: Bonnie Evans:

Hi Jerome, Pat, Charles,

We are giving you first opportunity to meet our expected price. We're certainly willing to review an informal offer from you by email, that's no problem at all. All the necessary paperwork can follow shortly, should we be able to find an agreement.

E. January 2, 2020, from Jerome Pittman:

Hello again Bonnie and Nancy!

Had and opportunity to discuss our business dealings with Charles and Pat this Am and we decided that it would be best if we accepted your offer of sale of your land for 1.8 million as you have requested.

If this is still a go for you and your families we will follow up this message with a formal offer to purchase and funds ASAP.

All the best as always.

F. January 2, 2020 from: Bonnie Evans:

> Jerome, Charles, Pat.
>
> Thank you so much. Nancy and I are grateful that this works for you, and we're happy to accept your proposal.
>
> I look forward to receiving your formal offer.
>
> Blessings to you all,

G. On January 10, 2020, the Pittmans delivered an unsigned draft Agricultural Real Estate Purchase Agreement. The draft showed the appellant corporation as the purchaser, the price at $1.8 million, but did not provide for any deposit. The legal description of the lands was to be included in Schedule "A", but that schedule was not attached.

H. January 14, 2020 from: Bonnie Evans:

> Hi Jerome, Pat, Charles,
>
> A couple of Items:
>
> - your Offer mentions "attached Schedule A", but I seem not to have received that attachment. Could you please send to me.
>
> - We'll need a bit more time beyond the mentioned timeline of Jan. 15. I expect it may be approx. more towards the end of the month, though we will move through this for you as soon as possible.
>
> My thanks in advance for the above adjustments .... we'll get back to you soon as possible with any further requests.

I. January 17, 2020, from Jerome Pittman:

> Good morning Bonnie!
>
> I have talked to my lawyer about our concerns of the agreement, and yes they did screw up! They will be making the needed amendments and sending off a new agreement! Sorry again for this inconvenience!

J. January 19, 2020, from Jerome Pittman:

> Hi Bonnie! Here is the "newest" revised version of the purchase agreement. Let me know if this works for you and Nancy! (*A revised draft Agricultural Real Estate Purchase Agreement was attached*.)

K. February 5, 2020 from: Bonnie Evans:

> Hi Jerome, Pat, Charles,
>
> A couple updates for you:
>
> 1.) our lawyer has reviewed your second Offer to Purchase, and feels it's missing some essential info common to real estate transactions, so we are having her draft up a new one for us.
>
> 2.) Nancy and I will continue to cover land taxes with the county, until a final sale date can be determined.
>
> 3.) Has your lawyer yet been able to remove your previous lease from Land titles?
>
> Many thanks,

L. February 18, 2020 from: Bonnie Evans:

> This is a follow up to my call with Jerome last Wednesday.
>
> Nancy and I are still hoping you'll be willing to take ownership of Dad's last piece of land. Bearing in mind that current land assessment value is 2.34 million, and rising, we're hoping you'll be able to respond with an offer that takes current market value into consideration.
>
> We would like to move towards closing this sale soon, as farming season is approaching. I'm therefore asking that you please let me know by end of day this Friday, Feb. 21, either what your offer can be, or if you'd prefer to decline - at which point I would need to begin a search for other options.
>
> Should you wish to proceed, we do have an agricultural purchase contract drawn up, which we can have sent to you within a few days

of receiving an agreeable offer. I would expect things would flow fairly quickly from there.

My thanks in advance,

M. February 20, 2020, from Jerome Pittman:

Hello Bonnie/Nancy

We are surprised and disappointed that you have chosen to not honour the mutually agreed upon price for your fathers land in the amount of 1.8 million $

To honour your word and Gord's legacy,and to not potentially put at risk the future of "3" farm families, we kindly ask that you reconsider your original asking price.

Acting in good faith Pittman Brothers have incurred significant legal and accounting expenses in preparation for closing the deal.

We are not prepared to absorb these costs should you not honour our agreement.

N. February 20, 2020 from: Bonnie Evans:

Hi Jerome, Charles, Pat,

Thank you for getting back to us within the requested timeline.

Nancy and I are certainly willing to accept reasonable offers which take current market value into consideration. Land prices are increasing, that's simply the realities of the market.

I will ask you to take into account that you have already purchased the first part of Dad's farm for what would have been far below market value even at that time. Combining the two purchases, one for below market value, and one for approx. current value, would still mean that your family has achieved a solid future at a very good overall price.

> I do hope you can understand our point of view, and we hope for a positive response from you this week.

There was no further correspondence after this point before the litigation commenced.

[32] On April 2, 2020 the appellant filed a caveat against the lands, claiming an interest "as Purchaser under an Agreement for Sale . . . under and by virtue of the Agreement for Sale dated January 2, 2020".

[33] On that same day, April 2, 2020, being of the impression that they had not sold the land to the appellant, the respondents sold the land to third parties for $2.254 million. On April 20, 2020 they gave notice to the appellant to take proceedings on its caveat.

[34] In May 2020 the appellant issued the underlying statement of claim. The statement of claim alleges that the emails of January 1st to 2nd (emails "C" to "F", *supra*, para. 31) constitute a binding contract for the sale of the lands (Amended Amended Statement of Claim, paras. 21-25). The statement of claim alleges that the subsequent exchange of formal draft agreements of purchase and sale was in furtherance of implementing the contract formed by the emails (paras. 26-28). The remedy claimed was specific performance, or in the alternative damages.

[35] On May 21, 2020 the respondents brought an application to have the caveat discharged from the lands and have the action summarily dismissed.

[36] In unreported reasons, a Master in Chambers dismissed both applications. The respondents did not appeal the portion of the order refusing summary dismissal of the whole action. They did appeal the refusal of the Master to summarily dismiss the claim for specific performance. That appeal was allowed, and the chambers judge summarily dismissed the claim to the extent that it asserted a right to specific performance, assuming a contract existed.

[37] The chambers judge concluded that partial summary judgment on the claim for specific performance was appropriate because it could be separated from the other issues in the action and its resolution would focus the issues and crystallize the claim for damages: reasons at paras. 40-41. Specific performance was no longer granted as a matter of course in claims concerning real property, and the claimant had to show that the property was in some respects unique: reasons at paras. 46-49, 60-61, 71. Even though the lands were in some proximity to other lands farmed by the Pittman family, the lands were bare lands and were "representative of other lands in the area with no special features": reasons at paras. 62-64. There was evidence of "numerous properties in the same area as the lands with similar or the same features", and while there had not been completed sales at the actual time of breach there was market activity for comparative substitute property: reasons at paras. 66-68. The plaintiff had made no effort to find other suitable land in the area, and so "cannot demonstrate the other land in the area is unavailable": reasons at paras. 69-

70. The plaintiff did not have a right to specific performance, and its caveat should be discharged: reasons at para. 74.

Issues and Standard of Review

[38] The appellant raises four issues:

(a) whether there was an error in placing the burden of proof on the appellant to demonstrate the unavailability of substitute property,

(b) whether there was a mixed error of fact and law in applying the facts to the law,

(c) whether the respondents' conduct entitled the appellant to equitable relief, and

(d) whether this case was suitable for summary judgment, partial or otherwise.

The background to all of these issues is the entitlement of a claimant to maintain a caveat on real property.

[39] The legal tests, such as for the entitlement to specific performance, the placement of the burden, and the availability of summary judgment, raise questions of law reviewed for correctness. Questions of fact, or of mixed fact and law are reviewed for palpable and overriding error. That would include factual questions such as the uniqueness of the land and the availability of substitute land. Whether to grant summary judgment, and whether specific performance is available, contain elements of discretion that are reviewed for an error of principle or unreasonableness.

Caveats and Specific Performance

[40] Caveats can be filed under s. 130 of the *Land Titles Act*, RSA 2000, c. L-4. The effect of a caveat is to give notice of the claim of the caveator to other persons dealing with the land. A caveat cannot be filed unless the caveator claims "to be interested in land".

[41] The purchaser under an agreement for sale of the land is recognized as potentially having an "interest in land" that would support a caveat. However, the purchaser's ability to maintain a caveat depends on the purchaser being entitled to specific performance of the contract. If the purchaser is only entitled to a claim for damages, that is not an "interest in land" that can support a caveat: ***1244034 Alberta Ltd v Walton International Group Inc***, 2007 ABCA 372 at para. 17, 82 Alta LR (4th) 259, 422 AR 189.

[42] The ability of the appellant to maintain its caveat on the land therefore depended on it showing that at trial it could potentially prove a) it had a binding contract for the purchase of the land, and b) upon breach of that contract it would be entitled to specific performance.

[43] The *Land Titles Act* contains mechanisms for dealing with disputes about the validity of caveats. Under s. 141 the owner can apply to the court, calling on the caveator to show cause why the caveat should not be discharged,

> . . . and on hearing of the application the court may make any order in the premises and as to costs that the court considers just.

The statute therefore gives the court a very wide discretion over the discharge of questionable or inappropriate caveats. As noted, the trial court's exercise of that discretion is reviewed for errors of principle or unreasonableness.

[44] Until 1996 it was assumed that the purchaser of real estate was entitled as a matter of course to specific performance on a breach of the contract. However, in ***Semelhago v Paramadevan***, [1996] 2 SCR 415 the Supreme Court of Canada displaced that presumption. The discretionary nature of specific performance as an equitable remedy was confirmed. Citing ***Adderley v Dixon*** (1824), 1 Sim. & St. 607, 57 E.R. 239 at p. 240, the Court stated that the real question was whether damages in the particular case would afford a complete remedy.

[45] There was no longer a presumption that damages would always be an inadequate remedy in the case of a breach of contract for the purchase and sale of land:

> 22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief. . . . Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, the Newfoundland Court of Appeal (per Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:
>
> > The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite

> different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. . . .

Since 1996, the availability of the discretionary equitable remedy of specific performance has focused on the adequacy of damages as a remedy, considering the uniqueness of the real estate and the availability of substitute land.

[46] Land is not a fungible commodity that is available "off-the-shelf", and in this context availability of substitute lands only requires that there be an active market in which suitable land could be found, not that a specific parcel is immediately available. Further, the law no longer regards every piece of land as being inherently unique, and variances in the size and location of potential substitute lands are to be expected.

[47] As in ***Southcott Estates Inc v Toronto Catholic District School Board***, 2012 SCC 51, [2012] 2 SCR 675, whether the land is "unique" often depends on whether substitute lands are available. However, lands can be "unique" if they have some special value for the plaintiff, notwithstanding that other similar land might be available. In this case the appellant invoked both branches of this test. It argued that comparable farmland was not available in the area. It also argued that because this land was in close proximity to other lands that it farmed, the land had a unique value to it.

[48] This case therefore involves overlapping discretionary considerations. The first is whether, at trial, the appellant would be entitled to the discretionary equitable remedy of specific performance. The second discretionary consideration is whether, given the state of the record at this time, it is "just" to allow it to maintain its caveat. This is not a case where it is agreed, or has been found, that there is a contract for the sale of lands and the only issue is the nature of the remedy. In this case the existence of the contract is very much in dispute.

Burden of Proof

[49] The appellant argues that the chambers judge reversed the burden of proof, for example by saying:

> 46 Since the Supreme Court's seminal decision in *Semelhago*, case law has made clear that specific performance should not be granted as a matter of course and the plaintiff must produce evidence "that the property is unique to the extent that its

> substitute would not be readily available": at para 22. Thus, the plaintiff must prove that the disputed lands are unique and unique means that a substitute for it is not readily available. . . .
>
> 61 A plaintiff's claim for specific performance will largely be determined by whether it can establish that the subject land is unique. Thus, this application depends on the court being convinced that the Lands are not unique, that there is substitute land available and that damages would provide an adequate remedy. . . .
>
> 71 Similar to the case in *Klimp*, while the location of the Lands may effect some economy and convenience for the Plaintiff and its principals' family farming operation, the evidence does not establish that the Lands are unusual enough to be "unique". In the result, the Plaintiff has not established that the Lands are unique to it because no substitute lands are readily available to it to warrant an award of specific performance.

These various passages do not send a consistent message about the chambers judge's view of the burden of proof.

[50] Paragraph 46 places the burden of proving uniqueness on the plaintiff, although ***Semelhago*** is equivocal on the point. The first sentence of para. 61 implies that the burden of proving uniqueness is on the plaintiff, although the second sentence implies that the defendant must prove that the lands are "not unique". Paragraph 71 places the burden of proving uniqueness on the plaintiff, but it refers to uniqueness in the second sense of the word. In other words, it is referring to land as being "unique to it" because it has a special value to the plaintiff.

[51] An action on a contract for the purchase and sale of lands engages several shifting burdens of proof.

[52] First of all, the party claiming a right to purchase the lands has the burden of proving that there was an enforceable contract, and that it was breached by the vendor. In many cases the existence of a contract, and the existence of a breach, will not be a matter of serious contention. Alternatively, even if a contract and breach are not admitted, the defences raised may sometimes be challenging to prove. In this appeal, however, there is a serious triable issue as to whether a contract ever came into existence.

[53] In addition to the burden of proving the contract and breach, an action on a contract for the purchase and sale of lands will engage remedial burdens. If the innocent purchaser is content with a remedy in damages, the onus is on that party to prove its damages, and the onus is on the vendor to prove a failure to mitigate. However, if the innocent purchaser wants specific performance because damages are not an adequate remedy, then:

(a) Where the innocent party can demonstrate "a fair, real and substantial justification", or "a substantial and legitimate interest" for claiming specific performance a failure to mitigate will be justified: ***Southcott*** at paras. 36-37. This will depend on the innocent party demonstrating that damages did not appear to be an adequate remedy because the land had some unique value to it, and substitute lands were not available. Thus, even if the innocent purchaser is denied specific performance at trial, its conduct in failing to mitigate may still be "reasonable", meaning that its claim for damages will not be compromised by the failure to purchase substitute lands: ***Southcott*** at paras. 36-37.

(b) Where the innocent party had no legitimate claim to specific performance, and it failed to mitigate its damages, its damages award will be reduced. In this scenario the onus is on the vendor to prove that mitigation was possible and the claimant failed to make reasonable efforts to mitigate. This is consistent with the general onus on defendants. The onus on the defendant vendor will engage showing that the land was not unique or comparable substitute land was available to the purchaser.

Layered on top of these other burdens is the burden on a purchaser who files a caveat in anticipation of being able to prove (a) a contract, (b) a breach, and (c) an entitlement to specific performance. That purchaser must be able to prove that it is "just" to maintain the caveat until trial.

[54] ***Southcott*** presented a complex scenario. As a purchaser Southcott initially claimed a right to specific performance. At trial it was able to prove (a) a contract, and (b) a breach, but it was not able to establish a right to specific performance. The trial judge found that the lands were not sufficiently "unique" to support specific performance, and damages were an adequate remedy. By the time the claim reached the Supreme Court of Canada, Southcott had abandoned its claim for specific performance, and it merely sought damages. However, it sought damages based on the value of the property at trial, arguing that it had no duty to mitigate. But because the lands were merely an investment property, and there was nothing unique about them, Southcott never had a viable claim to specific performance: ***Southcott*** at paras. 40-41.

[55] The trial judge in ***Southcott*** had held that there was "no evidence" that profitable substitute properties were available, implying that the burden was on the vendor to prove a failure to mitigate. The Court of Appeal agreed that once specific performance was off the table the burden was on the vendor to prove a failure to mitigate, but reversed the trial judge's decision on the basis that the level of proof expected was unreasonable: ***Southcott*** at paras. 43-44. The Supreme Court of Canada agreed that the burden of proving a failure to mitigate was on the defendant, and that the trial judge had made a palpable and overriding error in the level of proof required. However, "the error is best approached as an evidentiary issue rather than as one engaging the burden of proof":

Southcott at paras. 45-46. The statements about the burden in ***Southcott***, therefore, only covered the burden at the point that it had already been decided that there had been no viable claim for specific performance. It did not expressly state where the threshold burden lay to demonstrate "a fair, real and substantial justification" for specific performance.

[56] Further, ***Southcott Estates*** concerned a generic parcel of land being purchased for investment. It did not examine the second component of "uniqueness", namely where the plaintiff claims that the land has a special value to it. While it is reasonable in the context of mitigation to allocate the burden of proving the availability of substitute generic land to the defendant, proof of "personal uniqueness" more properly belongs on the plaintiff. The plaintiff has the better opportunity to demonstrate why land has special value to it.

[57] In this action the initial burden is on the appellant to show there is a binding contract. It has established that there is a triable issue on that point. At trial, in order to justify a failure to mitigate, the appellant would have to show that it had "a fair, real and substantial justification", or "a substantial and legitimate interest" for claiming specific performance. That would place a burden on it to show some unique quality in the lands that justify specific performance. Even if it is unsuccessful at trial, a failure to mitigate might still be reasonable if it had a fair, reasonable and substantial claim to specific performance, even if it took no steps to mitigate. However, if the matter proceeds to trial and the appellant is not able to show it had an entitlement to specific performance, then the burden would fall on the respondents to prove a failure to mitigate. That would engage an overlapping obligation to prove that damages were a sufficient remedy because the lands were not unique and substitute lands were available. At this interlocutory level of the proceedings, the overlapping burdens are best addressed by examining whether it is "just" that the appellant be allowed to maintain its caveat, an issue which must be analysed in the context of all of the other overlapping burdens.

[58] Where the legal burden of proof lies is rarely decisive in civil proceedings: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 at para. 41, 26 Alta LR (7th) 241. In most cases there is a body of evidence that the judge must assess for reliability and credibility, and then weigh. The judge must strive to resolve the case on the evidence, and the circumstances under which resort can be had to the burden of proof must be exceptional: ***Stephens v Cannon***, [2005] EWCA Civ 222 at para. 46. The burden of proof is usually only decisive where:

> (a) There is "no evidence" on a necessary fact, in which case the party with the burden will lose;
>
> (b) The evidence on a necessary fact is exactly evenly balanced, a rare situation, in which case the party with the burden will lose: ***Robins v National Trust***, [1927] AC 515 at p. 520; ***Morris v London Iron and Steel Co. Ltd***, [1988] QB 493; or

> (c) Each party presents a plausible case, but neither party's case establishes the underlying facts on a balance of probabilities. The party with the burden will lose, even if that party's version is more probable than that of the other party. "Greater probability" or "least unlikely" is not the equivalent of "proof on a balance of probabilities": ***McPhee v British Columbia (Ministry of Transportation and Highways)***, 2005 BCCA 139 at paras. 18-20, 38 BCLR (4th) 328; ***Rhesa Shipping Co SA v Edmunds (The Popi M)***, [1985] UKHL 15, [1985] 1 WLR 948.

In most cases the body of evidence will prove the disputed fact on a balance of probabilities, one way or the other. As pointed out in ***Southcott Estates*** at para. 46, in most situations any allegation of error "is best approached as an evidentiary issue rather than as one engaging the burden of proof".

[59] In summary, the burden of proving the uniqueness of the property, and the availability of substitute property, shifts from one party to the other during the analysis. It is for this reason that ***Southcott***, notes that the issue "is best approached as an evidentiary issue rather than as one engaging the burden of proof".

[60] One solution would be to defer all these issues to trial. That, however, is inconsistent with the modern culture that issues should be decided prior to trial where the record permits a fair resolution: ***Hryniak v Mauldin***, 2014 SCC 7 at para. 28, [2014] 1 SCR 87. Maintaining the caveat would tie up the land for many years. Both parties, and the third party purchaser, would face significant litigation risk and uncertainty. That is undesirable if damages could adequately compensate the appellant for any losses it might incur if it can establish a contract.

[61] In this case the chambers judge had competing evidence on the availability of substitute lands. The respondents tendered an affidavit from a rural property appraiser and agricultural consultant. Both parties relied on this expert evidence to support their position on the availability of substitute land: reasons at paras. 17, 22. The court did not accept that the consultant was an expert on "uniqueness": reasons at para. 19. However, there was information in the consultant's report that was "useful factual information in the court's determination of whether the Lands were unique": reasons at para 21. The appellant provided information on other lands in the vicinity farmed by various representatives of the Pittman family: reasons at paras. 50-52, 57. This latter evidence was uncontradicted by the respondents.

[62] The chambers judge considered all this evidence and concluded:

> 62 I accept that the Plaintiff does cooperatively farm lands they own or lease with its principals Jerome and Charles Pittman, another brother and apparently other

> family members and family-owned corporations. However, even viewing this as a family based agricultural operation with joint farming operations, there is evidence that the Lands are representative of other lands in the area with no special features. There is no infrastructure on the Land; it is bare farmland.
>
> 63 While it is true that contiguous land is an attractive feature for farmers, there is evidence that the Plaintiff itself and with its affiliation of related parties, owns property, over 7300 acres of land, that is spread wide across the area of the County in question.
>
> 64 There is evidence that the Lands are not adjacent to land owned by the Plaintiff but to land owned by family or related family members and are physically separated from those lands by a divided provincial highway and a railroad track.
>
> 65 There is evidence that the acreage of the basket of properties owned or rented by the Plaintiff and its affiliation of related parties has fluctuated from time to time.
>
> 66 There is evidence that there are numerous properties in the same area as the Lands with similar or the same features, such as soil grade and locational benefits, as the Lands to the Plaintiff's and its principals' family farming operations.
>
> 67 While there may not have been evidence of completed property sales at the exact time of the alleged breach, I do not think that is necessary. The sampling of comparable property sales, said not to be exhaustive, is evidence that there was market activity for comparable substitute property in the vicinity of the Lands over a period of time both before and after the alleged breach -- from a few months before the alleged breach to one year after the alleged breach.

This analysis follows directly after the somewhat ambiguous statement about the burden of proof found in para. 61: see *supra*, para. 49.

[63] This analysis is, in essence, a weighing of the evidence. Both parties relied, in part, on the same evidence, namely the evidence of the appraiser. The respondents did not challenge the evidence presented by the appellant about other land in the area farmed by the Pittman family. This is not a case where the judge had to select the evidence of one party over the other, nor was the analysis tied directly to the burden of proof. The proper interpretation of these findings is that the chambers judge found that the evidence, on a balance of probabilities, demonstrated that there was substitute land available, and that the subject lands had no special value to the appellant. As noted, this "is best approached as an evidentiary issue rather than as one engaging the burden of proof". The burden of proof was not the decisive factor and the statements on that topic do not undermine the decision under appeal.

[64] The statements of the chambers judge on the burden of proof do not follow the detailed analytical model outline above. However, the burden was not necessarily misplaced because there was a burden on the appellant to show "a fair, real and substantial justification" for claiming specific performance. That placed at least some evidentiary burden on the appellant to show the uniqueness of the property. The appellant chose to call no expert evidence and relied instead on the expert evidence called by the respondents. To the extent that there was a burden on the respondents to show that the appellant had no "fair, real and substantial justification" for claiming specific performance, the chambers judge found that it had been met.

[65] At the end of the day, given the uncertainty about the existence of a contract, the chambers judge's statements about the burden of proof do not disclose a reviewable error, and she was entitled to find that the appellant had not shown that it was just that it be allowed to maintain its caveat until trial. The "uniqueness" of the lands and the availability of substitute lands are findings of fact on which deference is owed, absent palpable and overriding error. The chambers judge's findings were available on the record.

Is it "Just" to Maintain the Caveat until Trial?

[66] The chambers judge's finding of fact that these lands are not unique is sufficient to defeat the claim for specific performance, which undermines the legal basis for the appellant's caveat. Further, there is uncertainty over the appellant's claim that it has a binding contract for the purchase of the land. Since the respondents did not appeal the dismissal of their summary dismissal application, it must be assumed that there is a "triable issue" with respect to the existence of a contract.

[67] However, a preliminary review of the relative merits of the claim is relevant to determining whether it is "just" to maintain the caveat until trial. In ***Main v Jeerh***, 2006 ABCA 138 at para. 41, 59 Alta LR (4th) 53, 384 AR 276 the claimant's caveat was discharged because he could not show a *prima facie* case that a contract existed. Obviously if the claimant cannot even show a *prima facie* case, the caveat cannot survive, but the opposite is not necessarily true. It does not follow that showing a *prima facie* case is conclusive of whether it is "just" to maintain the caveat until trial. This will tie up the lands and create litigation uncertainty for all parties.

[68] As noted, the appellant alleges that the emails of January 1st to 2nd (emails "C" to "F", *supra*, para. 31) constitute the binding contract for the sale of the lands. The existence of a binding contract is challenged, and is not obvious from this record.

[69] First of all, it would be unusual for a transaction of this magnitude to be consummated in a series of emails. The parties recognized that. Each of the emails "C" to "F" contemplate a formal agreement to be settled in the future; C: "formal legal offer", D: "the necessary paperwork can

follow shortly", E: "a formal offer to purchase", F: "your formal offer". The expectation that any contract would result from formal legal documentation is confirmed by the conduct of the parties. In the weeks that followed, draft formal contracts were exchanged, signalling that negotiations were still underway: ***Harvey v Perry***, [1953] 1 SCR 233 at p. 237. Those draft agreements introduced important financing conditions. It is also significant that the parties did not agree on the contents of the draft formal documents, evidence that a full binding contract had not been achieved in the emails. While an informal arrangement, made in contemplation of formal legal documents, may constitute a binding contract, that is not obvious on this record.

[70] In addition, in email "E" Jerome Pittman states that they had decided "it would be best if we accepted your offer of sale". The respondents, however, never made an offer. Rather they repeatedly invited the Pittman family to make an offer, and in email "F" confirmed that they were looking forward "to receiving your formal offer".

[71] Further, a contract of this type anticipates reciprocity of enforcement, and the corporate appellant is not mentioned in any of the emails said to form the contract. To illustrate, if there was a contract and on January 3 the Pittman family had repudiated it, the respondents should have been able to sue to enforce it. However, how could they maintain an action against the corporate appellant which is not mentioned in any of emails "C" to "F"? It is for this reason that a contract with an undefined nominee is too uncertain to be enforceable: ***Causeway Shopping Centre Ltd v Muise*** (1967), 63 DLR (2d) 26 (NSSC, App Div), affm'd ***Causeway Shopping Centre Ltd v Muise***, [1969] SCR 274; ***Westward Farms Ltd v Cadieux*** (1982), 138 DLR (3d) 137 at pp. 155-56, 16 Man R (2d) 219 (CA). It is questionable whether there is sufficient certainty over the contracting party in the emails to create an enforceable agreement.

[72] The late appearance of the corporate appellant also undermines the appellant's argument that the lands have a unique value to it because the Pittman family farms adjacent lands. The corporate appellant only owns lands which are some distance from the subject lands. The recognition of the separate corporate personality is an essential tool of social and economic policy: ***Hogarth v Rocky Mountain Slate Inc***, 2013 ABCA 57 at paras. 65-68, 75 Alta LR (5th) 295, 542 AR 289. The corporate appellant cannot claim a unique attachment to the land because some other members of the Pittman family own land in the area. As stated in ***Southcott Estates*** at para. 30: "Those who choose the benefits of incorporation must bear the corresponding burdens". The corporate appellant cannot treat itself as separate from its shareholders and officers for some purposes, but not for others.

[73] The other side of the equation is whether there would be an adequate remedy in damages. If the appellant is able to prove a binding contract, it would likely be entitled to the difference between the sale price of $2.254 million and the proposed price of $1.8 million. Any lost accounting and legal costs are easily calculated. The extra expenses involved in farming land

further from the home quarter could also be calculated, even if not with the same precision. Where damages are an adequate remedy, equitable relief is less inevitable.

[74] In summary, there is no reviewable error in the chambers judge's decision to discharge the caveat. If the matter proceeds to trial, and the appellant is able to prove a binding contract, there will be an adequate remedy in damages. In short, the appellant is not being left without a remedy. When all factors are considered, there is no reviewable error in the chambers judge's conclusion that it is not "just" to maintain the caveat.

Equitable Considerations

[75] The appellant argues that specific performance is an equitable remedy, and the conduct of the parties is relevant in determining the availability of the remedy.

[76] The appellant argues that the respondents have acted improperly by refusing to close the transaction in order to achieve a higher price, citing ***Lucas v 1858793 Ontario Inc (Howard Park)***, 2021 ONCA 52 at para. 100 and ***Paterson Veterinary Professional Corp v Stilton Corp***, 2019 ONCA 746 at para. 32, 438 DLR (4th) 374. This argument, however, assumes that there is no legitimate issue over the existence of a binding contract between the parties. Here the existence of the contract is being disputed on legitimate grounds. The respondents were surprised when the appellant filed its caveat on the same day that they agreed to sell the lands to the third party. Merely disputing the claim made is not regarded as improper conduct in equity. Further, while arguably relevant, the conduct of parties would not be an overriding consideration if damages were an adequate remedy.

[77] Secondly, the appellant claims that only one of the two respondents filed an affidavit. There is no procedural or evidentiary rule that every party that has a common interest in litigation must file a separate affidavit in order to meet the burden of proof. If the appellant thought that the other respondent had some relevant information, it could have examined her under R. 6.8: ***Guillevin International Co v Barry (cob Corvettes)***, 2022 ABCA 144 at para. 35, 43 Alta LR (7th) 222.

Suitability for Partial Summary Judgment

[78] The appellant argues that partial summary judgment should not have been granted, and that the issue of remedy should have been sent to trial with the issue of the existence of the contract.

[79] Summary judgment can be granted if a disposition that is fair and just to both parties can be made on the existing record. As noted in ***Hryniak*** at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This

> will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

The chambers judge correctly stated this test at para. 73 of the reasons and concluded that there was no genuine issue over specific performance that required a trial.

[80] The statement of the test for summary judgment and the interpretation of the *Rules of* Court are questions of law which are reviewed for correctness. The findings of fact underlying the summary judgment are entitled to deference. The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference: ***Hryniak*** at paras. 81-4: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 10, 86 Alta LR (6th) 240. The summary procedure adopted by the chambers judge does not disclose any reviewable error.

[81] The appellant argues that no litigation efficiency is achieved by severing the issues and granting partial summary dismissal. Litigation efficiency is not the only consideration. As has been noted on several occasions, maintaining the caveat on the title for many years will encumber the land and limit the ability of any party to deal in it. That is contrary to the public interest and the interest of all parties.

[82] There is no reviewable error shown on this point.

Conclusion

[83] The chambers judge found as a fact that the lands in question were not sufficiently unique to support the remedy of specific performance. Whether it is "just" to maintain a caveat involves a number of overlapping considerations, including the strength of the claim and the adequacy of a remedy in damages. The appellant has failed to show any reviewable error in the analysis, and the appeal should be dismissed.

Appeal heard on December 8, 2023

Memorandum filed at Calgary, Alberta
this 31st day of May, 2024

Slatter J.A.

Appearances:

R. Dodic, KC
D.M.I. McKenna, KC
for the Appellant

P. Barrette
for the Respondents