Court of Appeal for Saskatchewan
Docket: CACV4163

Citation: *Armstrong v M.J.A. Developments Inc.*, 2025 SKCA 12
Date: 2025-01-30

Between:

Rodger William Armstrong

Appellant
(Defendant)

And

M.J.A. Developments Inc.

Respondent
(Plaintiff)

Before:	Jackson, McCreary and Bardai JJ.A.
Disposition:	Appeal allowed in part
Written reasons by:	The Honourable Justice Georgina R. Jackson
In concurrence:	The Honourable Justice Meghan R. McCreary The Honourable Justice Naheed Bardai
On appeal from:	QBG-BF-00030-2019 (Sask KB), Battleford
Appeal heard:	October 1, 2024
Counsel:	Dwayne Braun for the Appellant David Samuel for the Respondent

Jackson J.A.

I. Introduction

[1] This appeal raises the question of the remedies available to a buyer under an agreement for the sale of land when the buyer is unable to fulfill their obligations. A particular aspect of the case is that the buyer has paid significantly towards the purchase price but, to date, has been unable to finance the payment of the balance.

[2] Briefly speaking, M.J.A. Developments Inc. [MJA] sold a residential property [Property] to Rodger Armstrong in 2009 for $230,000, payable in instalments over time under the terms of an agreement for sale pursuant to which MJA would remain the registered owner until all amounts were paid. Mr. Armstrong never registered his interest in the Property, and he ultimately defaulted on his obligations under the agreement.

[3] On an application by MJA, a judge of the Court of King's Bench granted summary judgment to enforce the terms of the agreement: *M.J.A. Developments Inc. v Armstrong* (13 February 2023) Battleford, QBG-BF-00030-2019 (Sask KB) [*Summary Judgment*]. The judge determined that, as of February 1, 2023, Mr. Armstrong owed $102,323.04, being some combination of interest and principal. Of note, it remains unclear what amount of that sum is principal and what portion is interest.

[4] The judge held that she was limited to cancelling the sale agreement and imposing a redemption period. In the result, she cancelled it and directed Mr. Armstrong to pay $102,323.04, giving him approximately three months to do so; otherwise, he would forfeit all sums paid and would have no claim to the Property. Mr. Armstrong appeals from that decision.

[5] I conclude that the appeal should be allowed in part, the order *nisi* set aside, and the matter remitted to the judge to consider whether judicial sale is an appropriate remedy.

II. Background

[6] MJA has developed multiple properties in one particular town in Saskatchewan. In 2008, MJA purchased the Property and commenced construction of a home on it.

[7] In 2009, Mr. Armstrong approached Walter Kyliuk, one of the principals of MJA, and expressed interest in buying the Property. According to the *Summary Judgment*, "Mr. Armstrong advised Mr. Kyliuk that he could not qualify for a mortgage but assured Mr. Kyliuk that he could provide a $90,000 down payment and pay the remainder of the purchase price over time" (at para 29).

[8] The result of the meeting between Mr. Kyliuk and Mr. Armstrong was an agreement to sell the Property for the purchase price of $230,000. Indeed, the parties entered into two agreements for sale of the Property: (a) an unsigned 2009 Agreement and (b) a signed 2015 Agreement, which was dated February 7, 2015.

[9] The essential terms of the 2009 Agreement were the following:

> THE Vendor agrees … as follows, that is to say:
>
> > (a) The sum of Ninety Thousand ($90,000.00) Dollars shall be paid by the Purchaser to the Vendor as a deposit on or before October 16, 2009;
> >
> > (b) The sum of One Hundred and Forty Thousand ($140,000.00) Dollars shall be paid by the Purchaser to the Vendor by way of bi-weekly payments of principal and interest in the amount of $594.00 commencing November 27, 2009, and thereafter every two weeks up to and including December 11, 2011, at which time a balance of $124,187.00 shall be owing by the Purchaser to the Vendor;
>
> INTEREST at the rate of Six (6%) percent per annum amortized over 13 years shall be calculated semi-annually on any amounts thereof outstanding.
>
> The Purchaser COVENANTS, promises and agrees with the Vendor as follows:
>
> > (a) That he will pay the said purchase price and interest at the times herein provided for payment thereof;
> >
> > (b) That he will pay and discharge all taxes, rates and assessments charged or assessed against the said lands from and after the 13th day of November, 2009.
> >
> > (c) That he has the right of payment of any amount at any time without penalty. Payment will be applied towards any outstanding interest firstly and then towards principal.
> >
> > (d) to assign the GST New Housing Rebate to the Vendor.
>
> THE Purchaser shall be entitled to vacant possession on the 13th day of November, 2009.
>
> THE VENDOR COVENANTS, promises and agrees with the Purchaser as follows:
>
> > (a) The Vendor acknowledges that it will not encumber the property being sold hereunder without the written consent of the Purchaser;
> >
> > …

> IF AND WHEN the Purchaser makes default in payment of any sum payable herein or in the performance of any covenant, promise, agreement or undertaking herein contained on their part, so much of the purchase price of the said land as is then unpaid to the Vendor hereunder shall, though not then due and payable, at the option of the Vendor become forthwith due and payable. Furthermore, in any event, the Vendor is hereby granted an interest to the said lands and premises and may register and maintain a caveat on the said lands and premises at the cost of the Purchaser until payment is made in full.
>
> IF AND WHEN the Purchaser makes default in payment of interest payable hereunder, the amount shall be forthwith added to the principal and bear interest at the aforesaid rate;
>
> …
>
> IF AND WHEN the Purchaser makes default in payment of any sum payable hereunder and the Vendor seeks by action in Court to cancel this agreement, the Purchaser shall have no right to repayment of any sum paid by him hereunder but the Vendor shall have the right to retain the same as liquidated damages … .
>
> (Emphasis added)

[10] While the 2009 Agreement was not signed, the parties conducted themselves as if it were binding upon them. Mr. Armstrong paid the $90,000 deposit and made monthly payments. MJA continued to complete the home. In November of 2009, Mr. Armstrong began living there. Title remained in the name of MJA. Mr. Armstrong did not, however, register an interest with the Land Titles Registry, showing his claim under the 2009 Agreement.

[11] On May 12, 2010, MJA entered into a mortgage with Toronto-Dominion Bank [TD Bank] in the amount of $162,500, ostensibly in contravention of clause (a) of the 2009 Agreement (underlined and provided in the quotation above). The TD Bank registered its mortgage with the Land Titles Registry as the first and only interest in the Property. That interest was undischarged as of the date of the appeal hearing.

[12] As indicated, on February 7, 2015, the parties executed the 2015 Agreement. The essential terms are as follows:

> The Purchaser COVENANTS, promises and agrees with the Vendor as follows:
>
> > (a) That the balance remaining to be paid as of January 31, 2015 is One hundred six thousand seven hundred twenty one dollars and twenty seven cents ($106,721.27) and he will pay this balance and interest at the times herein provided for payment thereof;

> (b) The remaining balance of One hundred six thousand seven hundred twenty one dollars and twenty seven cents ($106,721.27) shall be paid by the Purchaser to the Vendor by way of monthly payments in the amount of Thirteen hundred dollars ($1,300.00) commencing of March 1, 2015 and monthly thereafter up to and including January 1, 2023. The final payment is due February 1, 2023 and shall be adjusted based on an actual calculation of the balance due at that time; and
>
> (c) Interest at the rate of Four percent (4%) per annum shall be calculated and then compounded semi-annually (on August 1st and February 1st), not in advance, on any amounts thereof outstanding. Interest rate subject to renegotiation effective February 1st of each year, if chartered bank mortgage rates increase dramatically compared to the current rates.
>
> …
>
> IF AND WHEN the Purchaser makes default in payment of any sum payable hereunder or in the performance of any covenant, promise, agreement or undertaking herein contained on their part, so much of the purchase price of the said property as is then unpaid to the Vendor hereunder shall, though not then due and payable, at the option of the Vendor become forthwith due and payable.
>
> IF AND WHEN the Purchaser makes default in payment of property taxes on the properly, the Vendor may pay the said taxes and the amount so paid shall be added forthwith to the principal owing and bear interest at the aforesaid rate.
>
> (Emphasis added)

[13] In January of 2016, Mr. Armstrong suffered a significant injury and was unable to work. The balance owing on the Property then was $96,433.32, including interest: see paragraph 40 of the *Summary Judgment*. After that, he made periodic payments. MJA made certain accommodations, but Mr. Armstrong was not able to become current with his payments.

[14] At some point, it appears that Mr. Armstrong borrowed funds from Northwest Community Futures Development Corporation [Northwest] or otherwise defaulted under an agreement with Northwest. On November 28, 2018, Northwest registered a judgment against Mr. Armstrong's interest in the Property in the amount of $144,315.75.

[15] On January 24, 2019, MJA applied for leave to commence legal proceedings seeking the cancellation of the 2015 Agreement. The application was originally set to be heard on July 4, 2019, but, on June 26, 2019, Mr. Armstrong paid $5,100 towards the 2015 Agreement. Leave to commence was dismissed due to the payment being made. Mr. Armstrong did not make any additional payments towards the 2015 Agreement until December of 2020.

[16] On September 6, 2019, Glenn Thompson registered a miscellaneous interest against Mr. Armstrong's interest in the Property in the amount of $150,000. The basis of this interest was a claim that Mr. Armstrong had "transferred title to Glenn Thompson".

[17] The Court of Queen's Bench, which it then was, ultimately granted MJA leave to commence an action on August 6, 2020. MJA filed its statement of claim on September 14, 2020. The named defendants were Mr. Armstrong, Northwest, and Mr. Thompson.

[18] On November 18, 2020, Mr. Armstrong filed his statement of defence and counterclaim. The statement of defence contains many allegations, but the essence of his claim is that the TD Bank mortgage was the root of his problem in that he could not obtain financing because of it. He also alleged that monies he had paid were used to pay the mortgage rather than to pay down the purchase price. In his counterclaim, he asked for the cancellation of the agreement for sale "and forfeiture of all monies paid under the agreement. Or a full and complete refund of the over Two Hundred Thousand Dollars paid to the Plaintiff" and "[i]mmediate transfer, of said land to Rodger Armstrong for exclusive possession".

[19] MJA applied to strike the statement of defence and the counterclaim. Mr. Armstrong applied to have MJA's statement of claim struck. Both applications were dismissed on February 25, 2021. In so ruling, the Chambers judge on that occasion noted that "it is not plain and obvious that the defence cannot succeed. This is a matter that is appropriately the subject of a pre-trial and trial. … It is not plain and obvious that the Counterclaim cannot succeed. Accordingly, the plaintiff's application to strike the Statement of Defence and Counterclaim is dismissed" (*M.J.A. Developments Inc. v Armstrong* (25 February 2021) Battleford, QBG 30 of 2019 (Sask QB) at paras 3 and 4).

[20] This simple recitation of the facts does not cover all of the appearances in the lower court, but it does bring us to the two applications that were heard by the judge, resulting in the *Summary Judgment*. The two applications, for ease of reference, were as follows:

(a) on September 20, 2021, MJA applied for an order *nisi* for cancellation of the agreement for sale; and

(b) on October 12, 2021, Mr. Armstrong filed a notice of application to have MJA's statement of claim "fully dismissed", largely on the basis of the breach of the 2009 Agreement (this was an amended version of an application that had earlier been filed and repeated parts of the statement of defence and counterclaim).

[21] In the time leading up to the hearing of the above two applications, the Thompson interest was discharged as a result of a notice to lapse filed by MJA. Both Mr. Thompson and Northwest were named as defendants in MJA's claim against Mr. Armstrong, and MJA caused both of them to be noted for default.

[22] Following some delay in the Court of King's Bench, the judge granted MJA's application and denied Mr. Armstrong's. Having sought further submissions, the judge determined that the amount owing for principal and outstanding interest as of February 1, 2023, was $102,323.04.

[23] The judge released her decision on February 13, 2023. She granted Mr. Armstrong until May 30, 2023, to pay the above sum, i.e., $102,323.04, together with interest at the rate of 4% from February 1, 2023, and costs: otherwise, all sums paid by him would be forfeited. If Mr. Armstrong paid that amount, she directed MJA to "transfer title to the Property" to him (*Summary Judgment* at para 83(4)). No mention was made of the TD Bank mortgage.

III. The *Summary Judgment*

A. Parties' Arguments

[24] Mr. Armstrong was not represented by counsel in the Court of King's Bench. His primary defence, expressed in varying ways, was that MJA breached the 2009 and 2015 Agreements by encumbering the Property with the TD Bank mortgage in an amount exceeding what he owed and not obtaining his written consent to do so. In his own words (as expressed in an October 12, 2021, sworn statement), he described what the TD Bank mortgage meant to his situation:

> 5. The Mortgage to be carried via the Vendor as stated in Section {b} is ONE HUNDRED AND FORTY THOUSAND DOLLARS. {$140,000.00} In May of 2010, the Vendor made the choice to encumber said property with a mortgage of ONE HUNDRED AND SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS {$162.500.00} This is more than the Purchaser owed the Vendor. … This amount is clearly troubling, thus the start of the 'root cause' of this entire issue. The Purchaser owed the Vendor $140,000.00. Thus, the Vendor, borrowed more money on said property than the Purchaser owed the Vendor.

[25] In Mr. Armstrong's written submissions, he advised the judge that, as of February of 2017, he owed MJA $94,227.27, but the amount owing at that time on the TD Bank mortgage was $134,450.75. Mr. Armstrong argued that he could not obtain financing because of the gap between what he owed MJA and what MJA owed the TD Bank. In short, he contended that MJA was not entitled to cancel the 2015 Agreement because of the registration of the TD Bank mortgage in contravention of the 2009 Agreement.

[26] MJA agreed that it did not obtain Mr. Armstrong's written consent to the registration of the TD Bank mortgage but asserted that Mr. Armstrong knew of it and should be taken to have consented to it. MJA pointed to two pieces of documentary evidence in support of that latter position. First, on May 13, 2010, SGI entered into an insurance policy with Mr. Armstrong, Mr. Kyliuk, and MJA. That policy indicated that loss was payable to the TD Bank. Second, on January 1, 2017, the TD Bank mortgage was coming to the end of its term and had to be renewed. Mr. Kyliuk pressed Mr. Armstrong for payment so he could pay out that mortgage. Mr. Armstrong emailed Mr. Kyliuk, suggesting he should extend the TD Bank mortgage, "with a completely open term", as he believed the matter would be resolved within 15 to 30 days.

[27] Further, MJA took the position that the TD Bank mortgage had no effect on Mr. Armstrong's ability to refinance. MJA argued that Mr. Armstrong could not finance the Property in 2009 and his financial situation only deteriorated after his injury. It said that the situation was then exacerbated by his borrowing from Northwest.

B. *Summary Judgment* Reasons

[28] The judge held that the 2009 Agreement was effective according to its terms. It governed the parties' relationship until the execution of the 2015 Agreement, which then became the operative agreement.

[29] As noted, both agreements contained the following term, which was the crux of the dispute before the judge: "The Vendor acknowledges that it will not encumber the property [being sold herein] without written consent of the Purchaser".

[30] The judge made no express finding as to whether there was a breach of the 2009 Agreement. Instead, she held that TD Bank's inclusion as the payee under the 2010 home insurance policy meant that Mr. Armstrong knew about the mortgage. From this aspect of her reasoning, it could be inferred she concluded that MJA had breached the 2009 Agreement, but, in her opinion, it did not matter because of Mr. Armstrong's knowledge of the mortgage.

[31] In that regard, the judge rejected Mr. Armstrong's arguments regarding the effect of the breach of the 2009 Agreement, saying the following (*Summary Judgment*):

> [60] First, Mr. Armstrong contends that he was not aware that MJA was placing the Mortgage on the Property and that, in doing so, MJA breached the 2009 Agreement that it would not encumber the Property without his consent.
>
> [61] Although Mr. Armstrong denies that he knew about the Mortgage, MJA tendered a copy of the home insurance package that Mr. Armstrong obtained on the Property which showed Mr. Armstrong as the policy holder and TD Bank as the first loss payable. I reject Mr. Armstrong's evidence that he was unaware of the registration of the Mortgage. His evidence about his lack of knowledge of the Mortgage is not credible.
>
> [62] Second, Mr. Armstrong appears to suggest that there was some sort of misconduct on the part of MJA and Mr. Kyliuk because the balance owing on the Mortgage exceeds what Mr. Armstrong owed and continues to owe under the Agreement for Sale. In my view, this is a red herring and raises no genuine issue for trial. The Mortgage was obtained with the Property being used as security. The amount of the Mortgage is in no way tied to what Mr. Armstrong owes under the Agreement for Sale.
>
> [63] In my view, Mr. Armstrong seized upon the Mortgage to avoid the consequences of his default under the Agreement for Sale. He has clung to the registration of the Mortgage as a purported defence. I reject his arguments in this regard.

[32] Mr. Armstrong submitted that the case should proceed to trial "in order to have MJA's accountant testify on various matters, including the circumstances surrounding the Agreement for Sale, the Mortgage and the calculation of the amounts owing under the Agreement for Sale" (at para 68). In the alternative, he asked that the principal paid under the two agreements be returned to him.

[33] The judge rejected this argument as well. She determined that the only controverted evidence was that associated with the TD Bank mortgage. With this as the only point of contention, she held that there was no genuine issue requiring a trial. She then determined if an order *nisi*, cancelling the 2015 Agreement, was the appropriate remedy to relieve against forfeiture. She acknowledged that "Mr. Armstrong stands to forfeit a significant amount of money that he has paid" (at para 74). She observed that Mr. Armstrong had not asked her to exercise her "discretion

and equitable jurisdiction to relieve him from forfeiture of the amounts that he has already paid" (at para 74). Nonetheless, given Mr. Armstrong's status as a self-represented litigant, she said she would "consider whether this is an appropriate case to grant relief from forfeiture" (at para 74).

[34] Relying on *Wilson v Welch*, 2019 SKQB 62, the judge held that "relief from forfeiture rarely is granted in the form of retention of monies paid under an agreement for sale of property. Rather, relief from forfeiture in the context of foreclosure or cancellation proceedings is granted by way of setting an appropriate redemption period" (at para 75). With that, she held thusly:

> [77] … The extent of the relief that I will grant to Mr. Armstrong is the opportunity to salvage the monies he has already paid pursuant to the Agreement for Sale and take title to the Property – on the condition that he pays the amount due and owing to MJA by the redemption deadline that I will set out below. If Mr. Armstrong does so, he will take title to the Property as provided for in the Agreement for Sale. If he does not, he will lose all monies paid to MJA and have to give up possession of the Property.
>
> [78] Though this may seem a harsh result at first blush, the reality is that Mr. Armstrong has had possession of the Property and yet, for significant periods of time since 2016, he has been paying a mere fraction of what he agreed to pay under the Agreement for Sale.
>
> …
>
> [80] … The interests of justice are met by granting the relief sought summarily and an order *nisi* for cancellation of the Agreement for Sale shall issue … .

IV. Positions of the Parties on Appeal

A. Mr. Armstrong's Position

[35] Mr. Armstrong takes similar positions to those taken in the Court of King's Bench, alleging as follows:

(a) the judge erred by not finding a breach of clause (a) of the 2009 Agreement;

(b) the judge erred by not turning her mind to the consequences of MJA's breach of the covenant not to encumber the Property;

(c) the judge did not consider the impact of the TD Bank mortgage on Mr. Armstrong's ability to prepay without penalty;

(d) a fair weighing of the equities, including the amount of the principal that he had paid prior to the breach, supported a remedy other than a redemption period; and

(e) the judge did not deal with the TD Bank mortgage in her order such that even if Mr. Armstrong had been able to pay the amount outstanding under the 2015 Agreement, he would have received title to the Property encumbered by the mortgage.

[36] Mr. Armstrong asks this Court to find that MJA had breached its covenant not to encumber the Property without written consent and, by way of remedy, to remit to the judge the determination of the consequences of the breach on such additional evidence that she might direct. He does not want the entire matter to be remitted to the Court of King's Bench for a full trial. In his words, "the important issues can be resolved in a more streamlined fashion".

[37] At the request of the Court, the parties were asked to consider the following: (a) the amount that would be forfeited by Mr. Armstrong if the appeal were dismissed, and (b) whether other remedies were available to the King's Bench in this matter.

[38] On the first point, Mr. Armstrong filed supplemental calculations – roughly in support of what the judge determined – such that, as of October 29, 2024, the balance owing was $100,000.17. As to other remedies, he urged a longer redemption period, having regard for *Woodbine Developments Ltd. v Tekarra Properties Ltd.* (1981), 12 Sask R 1 (QB) at para 12.

B. MJA's Position

[39] MJA submits the judge found as a fact that Mr. Armstrong consented to the TD Bank mortgage. With this as the foundation of its argument, MJA asserts that Mr. Armstrong could not defend against MJA's claim. In the alternative, if the judge erred in so finding, MJA argued that it did not matter because Mr. Armstrong caused a judgment of over $144,315.75 to be registered against the Property, which showed that it was his own financial instability that prevented him from obtaining funding to pay out the 2015 Agreement.

[40] In MJA's supplemental submissions, it provides a detailed argument directed to whether Mr. Armstrong was entitled to relief from forfeiture at all, given the long period of time he has been in possession of the Property and his failure to bring the arrears up to date, all of which has caused MJA to incur significant legal fees. In support of its position, MJA directs the Court's

attention to the following authorities: *Wilson*; *British Columbia Development Corporation v NAB Holdings Ltd.* (1986), 30 DLR (4th) 560 (BCCA); *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, [1994] 2 SCR 490 [*Saskatchewan River Bungalows*]; *Nordin v Metal Fabricating and Construction Ltd.*, [1995] 2 WWR 750 (Sask QB), aff'd (1996), 158 Sask R 172 (CA); *586903 Saskatchewan Ltd. v Dube Investments Ltd.* (1994), 123 Sask R 318 (CA); *Rana v Maduck*, 2000 SKQB 318, [2000] 10 WWR 70; *Saskatchewan v Mihalyko*, 2012 SKCA 44, 348 DLR (4th) 756; and Eric Andrews, "The Penalty Doctrine, Relief against Forfeiture, and Unconscionability in Anglo-Canadian Law" (2023) 86 Sask Law Rev 197.

[41] Specifically, MJA submits that there is nothing fundamentally unfair in treating the amount paid as constituting liquidated damages. In its further recitation of the facts, MJA provides its version of what is owing as follows:

> a) Notwithstanding the binding terms of the 2009 version, which Roger breached, the balance remaining to be paid as of 31 January 2015 was $106,721.27;
>
> b) The outstanding balance of $106,721.27 was to have been paid via monthly payments of $1300 commencing, 1 March 2015 – 1 February 2023; this did not occur;
>
> c) The interest rate was 6% "calculated and then compounded semi-annually (on August 1st and February 1st), not in advance" on the outstanding balance.

[42] Based on its interpretation of what is actually owed, MJA asserts the following:

> 7) The amount MJA has received pursuant to the Contract is $212,397.50. Against a purchase price of $230,000, the equity to be forfeited by virtue of breaching the Contract, is $17,602.50, or 7.6% of the purchase price. This is less than what people routinely pay for sales tax on large items, and is not out of all proportion to the amount to have been paid pursuant to the Contract.

C. Mr. Armstrong's Reply to MJA's Supplemental Position

[43] In Mr. Armstrong's supplemental reply brief, he asks the Court to consider ordering a judicial sale of the Property. In doing so, he relies on *Viking Holdings Ltd. v Basic Management Ltd.*, [1983] 2 WWR 155 (Sask QB) [*Viking Holdings*].

[44] With respect to MJA's calculation of the amount owing, Mr. Armstrong points out that it is based on 6% being the interest rate rather than the contracted for amount of 4%.

V. Issues

[45] After reviewing the submissions of the parties, I have concluded that the overarching issue is whether the judge erred by granting the order *nisi* cancelling the 2015 Agreement with a redemption period only, resulting in the forfeiture of Mr. Armstrong's equity in the Property. The particular questions are as follows:

(a) Did the judge overlook or misapprehend Mr. Armstrong's argument regarding the TD Bank mortgage?

(b) Did the judge correctly recognize the scope of the discretionary powers available to her? In other words, did she narrow the remedies available to Mr. Armstrong, which would permit him to avoid the forfeiture of his equity in the Property?

VI. Analysis

A. The Effect of the Breach

[46] While Mr. Armstrong continues to make much of the TD Bank mortgage, it was clearly open to the judge to conclude that MJA was not precluded from asserting its right to recover the monies owing under the 2015 Agreement.

[47] As I indicated earlier, it may be fairly inferred from the judge's reasons that she found Mr. Armstrong's knowledge of the TD Bank mortgage could cure a breach of the requirement that written consent must be obtained. It is not necessary for this Court to determine whether the judge accurately stated the law because it appears, from the result of the *Summary Judgment*, that she decided that, even if MJA had breached the 2009 Agreement, it was entitled to recover what was owing in any event. While there is no express finding to that effect, this is a reasonable interpretation of the *Summary Judgment*, and one that is supported by the evidence.

[48] By its terms, the 2009 Agreement was only intended to be a two-year agreement, i.e., on December 11, 2011, $124,187 "shall be owing by the Purchaser to the Vendor". However, this amount was not paid, and the parties appear to have conducted themselves according to an oral arrangement, with Mr. Armstrong continuing to make payments in accordance with the 2009

Agreement until the 2015 Agreement became operant. At that point, which was before Mr. Armstrong's accident, he encouraged the refinancing of the TD Bank mortgage. Then, by the time MJA applied for leave to commence an action in 2019, Mr. Armstrong had conducted himself such that Northwest asserted a claim on Mr. Armstrong's interest in the Property, which was itself a breach of the 2015 Agreement. Further, and perhaps most importantly, Mr. Armstrong did not lead any evidence to show that he had been unable to obtain the financing necessary to payout the 2009 Agreement or, indeed, the 2015 Agreement because of the TD Bank mortgage. Thus, in these circumstances, I conclude that the judge did not commit a reversible error by holding that MJA was entitled to pursue the cancellation of the 2015 Agreement.

[49] As acknowledged by Mr. Armstrong's counsel on appeal, the real difficulty at the summary judgment hearing was Mr. Armstrong's lack of legal representation in the Court of King's Bench. As a consequence, irrelevant matters were stressed and important matters were overlooked or buried in a mass of material. Of particular note was that the judge received no help from Mr. Armstrong as to the appropriate remedy in the event his submissions were not accepted.

[50] To recap, Mr. Armstrong bought the property in 2009 for $230,000 pursuant to the terms of the 2009 Agreement. The balance owing at that time was $140,000. As of February 1, 2023, the amount owing under the 2015 Agreement was $102,323.04, notwithstanding significant interest accrual since 2016.

[51] The judge recognized that there was something inequitable about forfeiture of a large part of the accrued equity, but she stepped over it by saying (and I repeat), "Though this may seem a harsh result at first blush, the reality is that Mr. Armstrong has had possession of the Property and yet, for significant periods of time since 2016, he has been paying a mere fraction of what he agreed to pay under the Agreement for Sale" (*Summary Judgment* at para 78).

[52] On appeal, MJA seeks to support the *Summary Judgment* on the basis that Mr. Armstrong has had a home for which he has not been required to pay rent since he defaulted in 2016. However, in my respectful opinion, neither the holding of the judge on this issue nor the argument of MJA can be supported on the facts or law.

[53] Mr. Armstrong has not been a tenant. He has been a purchaser under an agreement for sale. According to the judge's calculations, Mr. Armstrong owes $102,323.04 under the 2015 Agreement and that amount is intended to be full compensation for what MJA is owed under that agreement. In other words, at the end of the court process, he will not have paid "a mere fraction of what he agreed to pay under the Agreement for Sale"; he will have paid what is owed under the agreement.

[54] That brings me to what amounts to a new argument on appeal, which is whether the judge erred by limiting the remedies available to Mr. Armstrong to the granting of a redemption period only. As this Court has said in a number of decisions, new arguments are rarely entertained on appeal: *Fibabanka A.Ş. v Arslan*, 2023 SKCA 13 at para 41, [2023] 6 WWR 624. In this appeal, the new argument is a legal one for which submissions from the parties have been sought. No new evidence is required for the consideration of the issue as stated. As I indicate below, insofar as its full consideration requires further evidence, the matter is being remitted to the Court of King's Bench.

B. Relief from Forfeiture on Default under an Agreement for Sale

[55] On the point of possible remedies, the judge wrote as follows (*Summary Judgment*):

> [75] As recognized by Scherman J. in *Wilson*, relief from forfeiture rarely is granted in the form of retention of monies paid under an agreement for sale of property. Rather, relief from forfeiture in the context of foreclosure or cancellation proceedings is granted by way of setting an appropriate redemption period.

[56] In analyzing paragraph 75 of the *Summary Judgment*, I must reiterate that the judge had no assistance from Mr. Armstrong. What follows is based on submissions made on appeal for the first time.

[57] In my respectful view, the judge construed *Wilson* too narrowly. *Wilson* stated the following:

> [31] [The plaintiff] is entitled to an order cancelling the agreement subject to this court's overriding statutory and equitable jurisdiction to provide relief from forfeiture. Absolute and unconditional relief from forfeiture is rarely, if ever, granted in either foreclosure or cancellation of agreement for sale proceedings. The usual nature of relief from forfeiture is to provide the party in default relief from forfeiture conditional upon paying what is due and owing to the mortgagor or vendor within a period of time the court assesses to be reasonable in such circumstances. There is substantial agreement among counsel that an

> order *nisi* for cancellation is appropriate in the circumstances. What I need to decide is the balance due and what is an appropriate redemption period of time for the [defendants] to pay.
>
> (Emphasis added)

[58] Relief from forfeiture *usually* entails the establishment of a redemption period, but at least one additional avenue presents itself in the form of a judicial sale. An order for judicial sale as a means of relieving against forfeiture under an agreement for sale is rarely granted in this jurisdiction, but it is available and fully supported by the applicable legislation and *The King's Bench Rules*.

[59] In that regard, it is proper to begin with the legislative base that provides protection to purchasers of residential property. Section 2 of *The Agreements of Sale Cancellation Act*, RSS 1978, c A-7 2, as repealed by s. 4 of *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001, used to govern the cancellation of agreements for the sale of land in this province. That provision required vendors to apply to "a court of competent jurisdiction" in order to bring such agreements to an end. Section 4 of *The Land Contracts (Actions) Act, 2018*, now governs those provisions and provides that "a vendor under an agreement for the sale of land may enforce, cancel, rescind or otherwise terminate the agreement only by commencing an action in the court". Section 10 of this latter Act grants the Court of King's Bench considerable power to make a variety of orders, including "any other order that the judge considers appropriate" (s. 10(2)(b)). Section 2(1) of *The Limitation of Civil Rights Act*, RSS 1978, c L-16, precludes action "on the covenant for payment" of the price of land as against a non-corporate vendor. A review of legislation such as this caused Professor Cuming to say, "notwithstanding that the vendor under an agreement for sale is the owner of the land, his or her remedies under Saskatchewan law are little different from those of a mortgagee" (Ronald C.C. Cuming, *Overview of Saskatchewan Real Property Security Law* (Regina: Office of the Queen's Printer, 2016) at §12.3).

[60] Much of this debtor-protection legislation has been in existence in one form or another almost since the creation of the province. In commenting on the breadth of the discretion afforded to trial judges by the 1917 equivalent of *The Agreements of Sale Cancellation Act*, Lamont J.A. offered the opinion that, since the vendor had to seek the aid of a court to bring the agreement for sale to an end, a court had "the right to lay down the terms upon which its aid will be granted", and the Legislature "was leaving the question of cancellation to the discretion of the Court" (*Provincial Securities Company v Gratias* (1919), 46 DLR 104 (CanLII) (Sask CA) at paras 7 and 8).

[61] Clearly, the Court of King's Bench has broad authority to order a judicial sale when the circumstances warrant it. Section 10-20 of *The King's Bench Act*, SS 2023, c 28, confers upon that Court the power to order the sale of real property, "if it appears necessary or expedient that the real property … should be sold". Rule 10-46(1) of *The King's Bench Rules* also states, "If in any cause or matter relating to real property the Court considers it necessary or expedient that all or any part of the real property should be sold, the Court may order the real property to be sold". In addition, s. 10 of *The Land Contracts (Actions) Act, 2018*, confers extensive powers on a judge hearing an application for the cancellation of an agreement for sale.

[62] The only written decision considering the issue directly in this jurisdiction is *Viking Holdings*. In *Viking Holdings*, the applicant for judicial sale was the mortgagee of the purchaser's interest under an agreement for sale. Justice Walker emphasized the differences between mortgages and agreements for sale and commented on the scarcity of orders for judicial sale in the latter context. He noted that the Supreme Court in *Davidson v Sharpe* (1920), 60 SCR 172, observed that the "anomalies introduced by Courts of Equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser" (at 84).

[63] Notwithstanding Walker J.'s concerns about the differences between mortgages and agreements for sale, he held that it was appropriate, in the circumstances of that case, to order the sale of property that was the subject matter of an agreement for sale:

> [16] Putting aside the law to the contrary and the practice in this jurisdiction, an attractive case can be made for an order for sale in an action for specific performance or cancellation in proper circumstances. If the vendor, in the final analysis, receives his contract price, interest and costs in full, and is, in the meantime, fully secured, ought he to be allowed to complain of a judicial order for sale? If the vendor obtains his money and his interest, he gets all he expected when he entered into the contract. It may well be that a court of equity is entitled, after searching well into the corners of its jurisdiction and putting that jurisdiction at its best and highest, to mould its decrees in such manner as the recognition of the equities and interests of all the parties, in justice and equity, demand in all the circumstances of the case.
>
> …
>
> [19] It is essential to preserve the principles of jurisprudence as settled and adopted. But, how far is it necessary that the rights of parties to mortgages, on the one hand, and agreements for sale, on the other, depend on historically based distinctions not that well understood by or logical to the parties? When applying these principles over the years, in changing circumstances, attitudes and directions, and in new and peculiar conditions of fact, the court has some flexibility, freedom and necessity to mould the forms of remedy to provide reasonably convenient and complete justice to all parties litigant, and dispose of as much litigation, current and prospective, as reasonably may be.

> [20] This court has the power and duty to grant certain relief, before the expiration of the "redemption" period, to a defaulting purchaser where the vendor is attempting to determine the contract and enforce a forfeiture. Elsewhere an order for judicial sale has been made in proper circumstances, often in light of particular statutory provisions or rules. It was done in *C.P.R.* v. *Meadows* [1908, 8 WLR 806], with an accent on "the form of prayer for relief in the action", and the plaintiff vendor "being confined to his remedy by sale". It has not been done, so far as I can determine, in this jurisdiction. It can certainly be said that it is very rare in this jurisdiction.
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> (Emphasis added)

[64] Justice Walker asked the question of whether a court has the power, "against the vendor's wishes … to restrict the vendor to an order for sale, by way of consequential relief" (at para 20). In answering that question affirmatively, Walker J. weighed the competing considerations in this way:

> [21] There is for consideration an apparent absence of orders for judicial sale in actions for specific performance or cancellation in this jurisdiction. On the other hand, there is much of justice and fairness in ordering judicial sale in an action for specific performance or cancellation where there is or may be equity in the purchaser and parties claiming through or under him. There is something of common sense in so ordering. The statutory provisions canvassed may extend to this area and, if they do not, they at least reflect a legislative intention that the court have considerable discretion in the general area. There are authorities, here and there, albeit some bound up with particular rules and statutes, in which the order for judicial sale is made and approved. All things considered, I have decided to look to the dictum of Beck J., in *C.P.R. v. Meadows* [1908, 8 WLR 806] at pp. 347–48, where he said:
>
> > I think the Court ought in every case to consider the interests of all parties who may be affected by its judgment, and, if it can do so without injustice to the plaintiff, it has power and ought to exercise it to refuse a form of relief to which the plaintiff is prima facie entitled, and give him another form of relief to which he is also entitled, if, by so doing, the interests of the other parties will thereby be better conserved.

[65] To my mind, Walker J. correctly analyzed the law and set out the weighing process a court must follow in determining whether a judicial sale should be ordered. The granting or refusing of a judicial sale is discretionary and heavily dependent on the equities in any given case. As Walker J. observed in *Viking Holdings*, many factors enter the mix when determining if a judicial sale is appropriate, including the value of the land and the amount of the equity.

C. Application to this Appeal

[66] Having regard for the above, it appears that a judicial sale may be the appropriate remedy. I say this for these reasons:

(a) the seemingly large amount of equity held by Mr. Armstrong;

(b) it was MJA's intention, as a development company, to build a home and sell it;

(c) according to the parties' bargain, MJA's compensation was to be the purchase price and interest; and

(d) at least until the litigation in 2020, the parties intended that Mr. Armstrong would become the owner of the Property, thereby retaining his equity.

[67] By limiting her discretion to relieve against forfeiture to granting a redemption period only, the judge committed an error of law justifying this Court's intervention: see *Swift River Farms Ltd. v Pillar Capital Corp.*, 2022 SKCA 89 at para 80, and *Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161.

[68] In coming to this conclusion, I am mindful of the authorities cited by MJA, including *Saskatchewan River Bungalows*. However, on the point being considered by the Court, which is whether a judicial sale is available in the circumstances of this case, I have not found them to be relevant. I take this jurisprudence to be directed at the point as to whether Mr. Armstrong was entitled to relief from forfeiture at all. On this issue, the judge made no error, and her finding in that regard is not under appeal in any event.

D. Remedy in this Court

[69] On hearing an appeal under *The Land Contracts (Actions) Act, 2018*, this Court has broad powers:

Decision by Court of Appeal

13 On hearing an appeal, the Court of Appeal may:

(a) dismiss the appeal;

(b) allow the appeal;

(c) allow the appeal subject to terms and conditions;

(d) vary the order of the court; or

(e) make any other order that it considers appropriate.

[70] To be clear, the only error of any consequence relates to the limitation the judge placed on her discretion to grant relief from forfeiture. Specifically, none of the following reveals an error justifying the intervention of this Court:

(a) the decision to grant summary judgment;

(b) her rulings regarding the interpretation of the 2009 and 2015 Agreements;

(c) her finding that Mr. Armstrong's claim that the purported breach of the 2009 Agreement did not constitute a defence to MJA's action;

(d) her determination that Mr. Armstrong was entitled to relief from forfeiture; and

(e) her conclusion to dismiss Mr. Armstrong's application to strike MJA's statement of claim.

[71] It is only the remedy portion of the *Summary Judgment* that must be addressed.

[72] In determining the appropriate course of action in the exercise of these powers, I have considered whether this Court should itself order a judicial sale, with the terms, conditions, and management of the sale to be set by the judge. I have decided against this course of action for these reasons:

(a) First, Mr. Armstrong's request for a judicial sale comes at the last moment, i.e., in the reply to the supplemental brief submitted by MJA. Further, given the timing of the request in this Court, MJA has not had an opportunity to indicate its position on whether a judicial sale is the appropriate remedy other than as part of its general opposition to the granting of any relief from forfeiture.

(b) Second, it appears that there has never been an appraisal of the Property. MJA advised the Court that Mr. Armstrong would not cooperate so as to allow the Property to be appraised. Be that as it may, for a judicial sale to be ordered, failing an agreement as to value, there would have to be evidence of value acceptable to the judge justifying the ordering of a judicial sale – see s. 10(1) of *The Land Contracts (Actions) Act, 2018*.

(c) Third, for whatever reason, MJA did not name TD Bank as a party to the statement of claim. There may be a legitimate basis for this, but, in any event, before an order for sale is made, the position of the TD Bank will have to be known and – depending on what, if anything, remains owing under the mortgage – that consideration will have to be addressed in any terms of sale, in addition to resolving any priority issues that may arise.

(d) Fourth, some inquiry will have to be made regarding whether Northwest continues to have a registered interest in the Property, and, if so, its priority position vis-à-vis any claim that Mr. Armstrong may have to the equity in it.

(e) Fifth, a determination will have to be made regarding the costs of sale and any other outstanding costs order, if any, and their effect on the amount potentially available to Mr. Armstrong.

[73] Having regard for the above list of questions, requiring factual determination and perhaps legal resolution, I conclude that this matter should be remitted to the Court of King's Bench rather than being decided in this Court. But, in the interests of judicial economy, it should be returned to the same judge for her to hear argument as to whether, in the circumstances, a judicial sale is appropriate. The parties have expended considerable resources and energy on litigating this matter. For the most part, MJA has had counsel and, given the number of applications in the Court of King's Bench, the legal bill will be considerable. While Mr. Armstrong has not had comparable expenditures associated with legal counsel, it is clear from the materials that he has spent considerable time trying to preserve what he perceives to be his equity in the Property. A partial rehearing by the same judge should reduce transactional and other costs.

[74] In allowing the appeal in part, and remitting it to the same judge, I do not rule out the possibility that the ultimate solution will be the identical result as in the *Summary Judgment*: i.e., a further redemption period. Much will depend on the facts as found by the judge and her assessment of the equities based on those findings. It will also be important that Mr. Armstrong cooperate in obtaining an appraisal and in moving matters along.

[75] That brings me to the question of costs in the Court of King's Bench and here. The effect of this decision is to set aside the order *nisi*. Nonetheless, some of those costs should, ultimately, be payable by Mr. Armstrong, given that the remedy portion of the decision is the only aspect being varied. I leave the determination of the amount of costs to the remittal judge. In this Court, success has been divided, so I will make no order as to costs.

VII. Conclusion

[76] In the result, the appeal is allowed in part only, with no order as to costs.

[77] The matter is remitted to the same judge who decided the *Summary Judgment* to determine on whatever evidence she deems necessary to consider whether a judicial sale is appropriate and to make all remaining orders.

"Jackson J.A."

Jackson J.A.

I concur. "McCreary J.A."

McCreary J.A.

I concur. "Bardai J.A."

Bardai J.A.