

Court of King's Bench of Alberta

Citation: Covey v Dueck, 2025 ABKB 78

Date: 20250211
Docket: 2401-10486
Registry: Calgary

Between:

Connie Covey

Appellant (Defendant)

- and -

Adriane Dueck

Respondent (Plaintiff)

- and -

Adam Kemble, Kevin Beutler, and 2 Percent Realty Inc

Respondents (Third Parties)

Reasons for Decision of the Honourable Justice M.A. Marion

Appeal from the Decision of
The Honourable Assistant Chief Justice D.B. Higa
Filed on the 26th day of June, 2024
Dated the 26th day of June, 2024
(Docket: P2390102156)

I. Introduction

[1] The appellant, Connie Covey (**Covey**) appeals (**Appeal**) the decision (**Decision**) of a Justice of the Provincial Court of Alberta (**Judge**) under section 46 of the *Court of Justice Act*, RSA 2000, c C-30.5 (*COJA*). The Decision:

- (a) granted summary judgment against Covey in favour of the respondent, Adriane Dueck (**Dueck**) for breach of a November 19, 2022 residential purchase contract (**Contract**) based on a standard form contract developed by the Alberta Real Estate Association (**AREA**);
- (b) dismissed Covey's cross-application for summary dismissal against Dueck; and
- (c) directed to trial the assessment of Dueck's damages and Covey's third party claims against Adam Kemble (**Kemble**), Kevin Beutler and 2 Percent Realty Inc (together, **Beutler**). (Kemble and Beutler are referred to as the **Realtors**).

[2] For the reasons set out below, the Appeal is dismissed.

II. Background

[3] The Appeal relates to the Contract. The Contract was for the purchase and sale of residential real property (**Home**).

[4] On November 19, 2022, Dueck (as buyer) offered to purchase the Home from Covey (as seller) pursuant to the Contract. Covey accepted the offer that day. Kemble was Dueck's real estate agent. Beutler was Covey's real estate agent.

[5] At the time of the Contract, there was a tenant (**Tenant**) living in the Home pursuant to a lease (**Lease**) which provided for a fixed term tenancy (**Tenancy**) expiring on May 31, 2023.

[6] Clause 2.3 of the Contract provided for a "Completion Day" of February 24, 2023, which was before the expiry of the fixed-term Tenancy, and which contemplated that the purchase price was to be paid, and vacant possession was to be given, to Dueck by that day.

[7] The fact that the Contract, as written, contemplated closing and vacant possession before the end of the Tenancy is the source of the dispute amongst the parties and the core of the Appeal.

[8] The existence of the Tenant and the Tenancy expiring at the end of May 2023 was disclosed in the MLS listing. Prior to Dueck's offer, Beutler had disclosed to Kemble that the Home was encumbered by a fixed term tenancy. Covey deposed that Beutler advised her that Dueck "wanted the tenants" (however, there was no evidence that this information came from Dueck). Prior to agreeing to the Contract, Dueck had attended the Home, knew tenants were living in the Home, and reviewed the MLS listing. Dueck never spoke to Covey or Beutler prior to signing the Contract. Based on her affidavits and questioning, Dueck appears to have been advised that the Realtors had discussed using the February 24, 2023 closing date so that Covey could give 90 days' notice to the Tenant to terminate the Lease (however, neither Realtor gave evidence about that discussion).

[9] The Contract included a home inspection condition in Dueck's favour. On November 28, 2022, Dueck attended the Home for the inspection. The Tenant was present. Dueck testified that the Tenant did not disclose to her at that time that he intended to stay in the Home past February 24, 2023. It appears that, at the home inspection, the Tenant discussed with Kemble the Lease had a fixed term until the end of May.

[10] On December 5, 2022, Dueck waived her closing conditions.

[11] On January 20, 2023, Dueck attended the Home to do measurements and was advised by the Tenant that the Tenant had not been contacted about terminating the Tenancy and that the Tenant intended to remain in the Home until the end of the fixed term (May 31, 2023).

[12] Subsequent attempts to resolve the matter were unsuccessful.

[13] On February 22, 2023, Covey's legal counsel was instructed to advise Dueck's counsel that "the transaction is no longer proceeding".

[14] On February 27, 2023, Dueck filed an originating application in urgent chambers for an order enforcing the Contract. Justice Devlin adjourned the matter until March 1, 2023 to allow Covey to file an affidavit.

[15] On March 1, 2023, Justice Devlin granted an order in the nature of specific performance (**Devlin Order**), ordering Covey to comply with the terms of the Contract and directing the parties to amend the Contract to change the closing date to March 24, 2023 (because the Completion Day had already passed, and it appears Dueck needed to get a new mortgage in place). The Devlin Order was not appealed, challenged, or sought to be clarified.

[16] On the March 24, 2023 closing date, the Tenant was still in the Home. The Tenancy had not expired. Dueck took possession of the Home subject to the Tenant's Tenancy under the Lease. Covey and Dueck entered into an Assignment and Assumption of Lease made effective March 24, 2023.

[17] On July 24, 2023, Dueck filed a civil claim against Covey seeking damages for breach of the Contract.

[18] On August 3, 2023, Covey defended and counterclaimed against Dueck, Kemble, Beutler, Parminder Sidhu (**Sidhu**), and eXp Realty of Canada, Inc (**eXp**).

[19] On September 27, 2023, Dueck applied for summary judgment against Covey.

[20] On March 1, 2024, Justice Shannon of the Court of Justice granted summary dismissal of Covey's counterclaim against Sidhu and eXp and permitted Covey to file an amended dispute note and third party claims against Kemble and Beutler.

[21] On March 7, 2024, Covey filed her amended dispute note, which alleged, among other things:

- (a) the existing of the Lease and its fixed term ending May 31, 2023 were expressly disclosed in the MLS listing;
- (b) Dueck was aware of the terms of the Lease or failed to make reasonable inquiries about its terms;

- (c) prior to the Contract, Dueck was made aware the Tenant intended to stay for the duration of the fixed term under the Lease;
- (d) the closing date was not chosen to give Covey an opportunity to terminate the Lease, and that Covey was not legally entitled to terminate the fixed term Lease;
- (e) the reference to vacant possession in clause 2.3 of the Contract was vague and ambiguous and the doctrine of *contra proferentum* applies against Dueck;
- (f) the failure to remove “vacant possession” or make any reference to the Lease in the Contract does not accord with the true agreement it was intended to record and, as such, was a mistake. Covey sought rectification of the Contract;
- (g) Dueck was granted specific performance of the Contract and therefore waived any non-compliance with the Contract; and
- (h) Dueck did not suffer damages, or failed to mitigate her damage, and has received a windfall.

[22] On March 7, 2024, Covey filed third party negligence claims against Beutler and Kemble which were defended on March 14 and 22, 2024, respectively.

[23] On April 30, 2024, Dueck filed another application for summary judgment. On May 10, 2024, Covey filed a cross-application for summary dismissal of Dueck’s claim and, alternatively, summary judgment against the Realtors.

[24] On June 7, 2024, the Judge heard the applications and on June 26, 2024 provided written reasons (**Reasons**) for the Decision.

[25] On July 25, 2024, Covey filed a Notice of Appeal of the Decision.

[26] I heard the Appeal on February 7, 2025 and reserved my decision.

[27] On February 10, 2025, I received an email from Covey directly, attaching a letter addressed to Associate Chief Justice Nixon and a PDF entitled “Covey Evidence File.PDF”. The email I received was not copied to anyone else, however, the letter indicates it was copied to various judges, among others. I also received an unfiled hard copy of the letter and attachment. On its face, Covey’s February 10, 2025 correspondence was not copied on her counsel or counsel for the other parties in this matter. It is not appropriate for one party, represented by counsel or otherwise, to unilaterally write to the Court *ex parte*: **Chang (Re)**, 2022 ONCA 346 at para 14.

[28] There was no application before me under section 51 of the *COJA*. Therefore, the appeal proceeded on the record before the Judge. I have not reviewed or relied upon the “Covey Evidence File.PDF” or the hard copy documents Covey sent me on February 10, 2025.

III. Grounds of Appeal

[29] Covey asserts that the Judge erred by:

- (a) determining that the parties agreed to vacant possession on February 24, 2023;
- (b) failing to apply the doctrine of mistake or determining that the elements of mistake were not made out, at least to the level required to send the matter to trial;
- (c) determining that Covey’s liability was suitable for summary determination; and
- (d) failing to summarily determine liability of the Realtors as third parties.

IV. Standard of Review

[30] As stated, no party applied to have the Appeal heard as a trial *de novo* under section 51 of the *COJA*, so it was heard as an appeal on the record.

A. Standard of Review: *COJA* Appeals

[31] The standard of review on an appeal from a decision of the Court of Justice under Part 4 of the *COJA* is well established: correctness on questions of law and palpable and overriding error on findings of fact, factual inferences or issues of mixed fact and law: *Sassine Construction Corp v Proserve Cleaning & Restoration Services Inc*, 2022 ABKB 832 at para 13; *Edwards Land Services Ltd v Semrau*, 2022 ABKB 641 at para 3; *Baran v Can To Can Inc*, 2021 ABQB 827 at para 5; *Morin v Edmonton (City)*, 2018 ABQB 104 at para 6.

[32] In terms of findings of mixed fact and law where the issue is the application of a legal standard to a set of facts, the standard of review is palpable and overriding error; however, if the judge made an extricable error of law or principle with respect to the characterization of the standard or its application, the standard of correctness may apply: *ISH Energy Ltd v Weber Contract Services Inc*, 2021 ABCA 281 at para 7; *Housen v Nikolaisen*, 2002 SCC 3 at para 37; *Baran* at para 5; *Morin* at para 3.

[33] In *ISH Energy*, the Court of Appeal (relying on *Benhaim v St-Germain*, 2016 SCC 48 at para 38) summarized palpable and overriding error, at para 8:

[8] With respect to identifying a palpable and overriding error, the Supreme Court in *Benhaim* reminds us that it is not in the nature of a needle in a haystack, but of a beam in the eye: (para 39). Or put another way, and citing from Stratas JA in *South Yukon Forest Corp v R*, 2012 FCA 165 at para 46:

“Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

Benhaim at para 38.

[34] See also *Radi v Audet*, 2024 ABKB 168 at paras 31-32.

[35] An appeal court will only intervene for palpable and overriding error if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: *ISH Energy* at para 68; *Morin* at para 6, citing *Toneguzzo-Novell (Guardian ad litem of) v Burnaby Hospital*, 1994 CanLII 106 (SCC) and *MacCabe v Westlock Roman Catholic Separate School District*, 2001 ABCA 257.

B. Standard of Review: Contract Interpretation

[36] In *Chemtrade Electrochem Inc v Superior Plus Corporation*, 2025 ABCA 31, the Court of Appeal recently summarized the applicable standard of review principles engaged in the context of contract interpretation, at paras 22-23.

[22] Applying legal principles of contractual interpretation to the words of a particular contract, viewed in light of the factual matrix, is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 21. If the trial judge applied incorrect principles in the interpretive exercise, failed to consider a required element of a legal test or failed to consider a relevant factor, those are extricable questions of law and lead to review on a correctness standard: *Sattva* at para 53.

[23] A palpable error is one that is obvious. An overriding error is one that had a material impact on the result. In the context of contractual interpretation, an interpretation that is unreasonable, or not reasonably available to the trial judge on the record, amounts to a palpable and overriding error: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 64; *Montrose Hammond & Co v CIBC World Markets Inc*, 2020 ONCA 219 at paras 8-9.

[37] For standard form contracts, the standard of review is correctness where the appeal involves interpretation of the contract, the interpretation is of precedential value, and there is no meaningful factual matrix to assist the interpretation process: *Bidell Equipment LP v Caliber Midstream GP LLC*, 2020 ABCA 478 at para 21; *EnCana Oil & Gas Partnership v Ardco Services Ltd*, 2017 ABCA 401 at para 3; *Ledcor Construction* at para 4.

[38] Standard form AREA real estate purchase contracts have been held to be standard form contracts subject to correctness review. In *Vallieres v Vozniak*, 2014 ABCA 290 at para 13, the Court of Appeal stated:

[13] The findings of fact in the decision presently under appeal are entitled to deference. In this case, the appropriate standard of review on the interpretation of the contract is correctness. It is a “standard form” contract developed by the Alberta Real Estate Association. It is used continuously by vendors, purchasers, and realtors in Alberta. Its interpretation is of general importance beyond this dispute, any decision on its proper interpretation has great precedential value, and the primary objective should be certainty. It is untenable for this contract to be given one interpretation by one trial judge, and another by a different one. The standard of

review analysis in *Housen* does not anticipate or require that kind of uncertainty or variability. Attempting to inject the circumstances surrounding the formation of the contract into the analysis, or any attempt to identify the intention of the parties, is nothing but a legal fiction. These parties were content to adopt the standard form agreement prepared by the Association, and essentially it is the intention of the committee that drafted it that prevails.

[39] The standard of review relating to the Judge’s interpretation of the Contract is correctness.

C. Standard of Review: Interpretation and Effect of Court Order

[40] The interpretation of the terms of an order is a question of law reviewed on a standard of correctness: *Manitok Energy Inc (Re)*, 2022 ABCA 260 at para 34; *Alberta Health Services v Pawlowski*, 2022 ABCA 254 at para 50; *Metcalfe Estate v Yamaha Motor Powered Products Co, Ltd*, 2012 ABCA 240 at para 24; *Wagner v Wagner*, 2014 ABCA 428 at para 21.

[41] For example, determining the legal effect of a court order including, for example, whether an issue is subject to *res judicata* (including issue estoppel), is reviewable for correctness: *Wagner* at para 21; *Alberta Treasury Branches v Opsteen*, 2012 ABCA 153 at para 15; *Sullivan v Ferguson*, 2017 ABCA 192 at para 12; *Ernst & Young Inc v Central Guaranty Trust Company*, 2006 ABCA 337 at para 26.

D. Standard of Review: Mistake and Rectification

[42] Identifying the correct test for mistake is a question of law. A judge’s findings about whether parties were mistaken is a question of fact which cannot be interfered with absent palpable and overriding error: *Ron Ghitter Property Consultants Ltd v Beaver Lumber Company Limited*, 2003 ABCA 221 at para 6. The application of a court’s findings to the law is a question of mixed fact and law.

[43] Rectification is an equitable discretionary remedy to which this Court must be highly deferential and may only intervene where there is an error in principle, a misapprehension of facts or the exercise of discretion is “so clearly wrong so as to amount to an injustice”: *Stikeman Elliott LLP v 2083878 Alberta Ltd*, 2019 ABCA 274 at para 63, citing *Husky Oil Operations Limited v Anadarko Canada Corporation*, 2004 ABCA 154 at para 9.

E. Standard of Review: Summary Judgment

[44] The standard of review applicable in reviewing a decision to grant or not grant summary determination of a civil action is deferential and is summarized in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, at para 10:

[10] The statement of the test for summary dismissal, and the interpretation of the applicable limitations statute and the *Rules of Court*, are questions of law which are reviewed for correctness. The findings of fact underlying the summary dismissal 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 v Mauldin*,

2014 SCC7 at paras. 81-4, [2014] 1 SCR 87; *Amack v AW Holdings Corp.*, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44, 602 AR 62.

See also: *Ma v Yang*, 2025 ABCA 35 at para 2; *Geophysical Service Incorporated v Plains Midstream Canada ULC*, 2023 ABCA 277 at para 7; *Saito v Lester Estate*, 2021 ABCA 179 at para 18. As per *Saito* at para 18: it is “not the role of this Court to second-guess the weight to be given to various pieces of evidence”.

[45] With respect to partial summary determination, the decision to grant or not grant it, either in respect of partial claims or against a particular party, is a matter of discretion which can involve numerous factors: *Kudzin v APM Construction Services Inc*, 2023 ABKB 425 at para 181-183; *DIRTT Environmental Solutions Ltd v Falkbuilt Ltd*, 2021 ABQB 252 at paras 23-35; *732311 Alberta Ltd v Paradise Bay Spa & Tub Warehouse Inc*, 2003 ABCA 362 at para 17; *1880499 Alberta Ltd v Warwick & Kent (Canada) GP Ltd*, 2022 ABQB 385 at para 28. Such discretionary decisions also invoke a deferential standard of review: *Weir-Jones* at para 10; *Learmont Roofing Ltd v Learmont Construction Ltd*, 2022 ONCA 894 at para 20, citing *Hryniak* at para 81; *AC Forestry Ltd v Big River First Nation*, 2023 SKCA 96 at 45; *Metcalf Estate* at para 24.

[46] In my view, this Court must also be mindful of the statutory purpose of the *COJA* in relation to civil claims under Part 4 of the *COJA*, which includes ensuring the expeditious and inexpensive resolution of matters before the Court of Justice: *COJA*, sections 8, 36.1. In furtherance of those purposes, the Court of Justice: (1) has the statutory power to apply or modify the *Alberta Rules of Court*, Alta Reg 124/2010 where the *COJA* or its regulations do not provide for a specific practice or procedure; (2) has the power to direct procedures to be followed in hearings; (3) has “great flexibility” to receive evidence in a manner the Court considers appropriate; and (4) is not bound by the laws of evidence applicable to judicial proceedings and may admit evidence whether admissible in a court of law or not: *COJA*, sections 8, 36, 36.1; *Nguyen v Darwin’s Moving and Deliveries Inc*, 2021 ABQB 944 at para 93.

[47] These features of the *COJA* regime further confirm that the Court of King’s Bench should give deference to Court of Justice decisions in summary determination applications.

V. Analysis

A. Did the Judge Err in Determining the Parties Agreed to Vacant Possession on February 24, 2023?

[48] Covey argues that the Judge failed to identify or apply the correct test for consensus *ad idem* respecting the vacant possession date of February 24, 2023 in the Contract, but rather “seems to have taken for granted” that the parties agreed to it. Covey also claims that the term “vacant possession” in clause 2.3 of the Contract is vague and ambiguous.

1. Consensus Ad Idem

[49] *Consensus ad idem* is a doctrine that goes to the question of whether a valid contract has been formed. A valid contract requires, among other things, a “meeting of the minds” or *consensus ad idem* on all essential terms of the agreement: *Anderson v Anderson*, 2023 SCC 13 at para 58; *Jedfro Investments (USA) Ltd v Jacyk*, 2007 SCC 55 at para 16; *Ron Ghitter* at para 8.

[50] In determining whether the parties have reached agreement for legal purposes, the starting point must be the alleged contract itself: *Ron Ghitter* at para 8. The accepted objective test is whether a reasonable observer would infer from the words or conduct of the parties that a contract had been concluded and reached *consensus ad idem* on the essential terms: *Ron Ghitter* at paras 8-9. If the wording of the contract is plain and unambiguous that will ordinarily end the matter: *Ron Ghitter* at para 8; *Bidell Equipment* at para 22; *Mikkelsen v Truman Development Corporation*, 2017 ABCA 99 at paras 15-16; *Guarantee Company of North America v Pashley Farms Limited*, 2013 ABCA 102 at para 7; *Syncrude Canada Ltd v Western Sterling Trucks Ltd*, 2019 ABCA 465 at para 37.

[51] Covey's argument that the Judge erred in law by failing to set out and apply the test for *consensus ad idem* in the Decision is not well founded, for at least these reasons:

- (a) the issue of *consensus ad idem* was not before the Judge – it was not pleaded or raised in argument that there was no valid contract;
- (b) Covey's amended dispute note admitted paragraph 2 of Dueck's civil claim, namely that the parties entered into the standard AREA Contract;
- (c) Covey pleaded and argued that there was a mistake because the Contract did not reflect the "true agreement" of the parties about whether there was to be vacant possession, and sought rectification. A plea of rectification is founded upon there being *consensus ad idem*, because, whether founded on common mistake or unilateral mistake, the party seeking rectification must assert that there was a prior agreement that is not reflected in the written agreement: *Stikeman Elliott* at paras 32-36; *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 at paras 12-15 [*Fairmont*]; *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at para 31; and
- (d) Covey did not seek a declaration that the Contract was not valid.

[52] In any event, the Judge arrived at a reasonable (and the correct) conclusion about whether there was a valid contract. The standard form AREA Contract, as executed and initialled by the parties, provided these critical terms reflecting their objective intentions:

15. CONFIRMATION OF CONTRACT TERMS

15.1 The seller and buyer confirm that this contract sets out all the rights and obligations they intend for the purchase and sale of the Property and that:

- (a) this contract is the entire agreement between them;
- (b) unless expressly made part of this contract, in writing:
 - (i) verbal or written collateral or side agreements or representations or warranties made by either the seller or the buyer, or the seller's or buyer's

brokerage or agent, have not and will not be relied on and are not part of this contract; and

- (ii) any pre-contractual representations or warranties, howsoever made, that induced either the seller or buyer into making this contract are of no legal force or effect.

16. LEGAL OBLIGATIONS BEGIN

16.1 The legal obligations in this contract being when the accepted contract is delivered in person or sent by fax or email. The obligations bind the seller and buyer as well as their heirs, administrators, executors, successors and assigns.

17. OFFER

17.1 Buyer offers to buy the Property according to the terms of this contract.

[...]

18. ACCEPTANCE

18.1 Seller agrees to sell the Property according to the terms of this contract.

[53] Covey’s attempt to inject the circumstances surrounding the formation of an AREA standard form contract to suggest that there was no *consensus ad idem* based on conversations or dealings between the Realtors before it was signed, or based on what was disclosed in the MLS listing or to Dueck beforehand, is “nothing but a legal fiction” as contemplated by the Court of Appeal in *Vallieres* at para 13. Covey and Dueck each chose to execute the Contract. Any objective observer would conclude they had reached agreement and intended to be bound by its terms – it contains “all the other usual indicia of a fully binding contract”: *Mikkelsen* at para 16. To accept Covey’s argument could invite uncertainty into many real estate transactions.

[54] Covey’s heavy reliance on *Karroll v Silver Star Mountain Resorts*, 1988 CanLII 3094 (BCSC) does not assist her as argued. *Karroll* is part of a line of cases dealing with whether waivers or exclusions of liability are binding on parties signing contracts, which is distinguishable from this case. The passage from *Karroll* that is germane to this case is at para 19, where Chief Justice MacLachlan (as she then was) confirmed that in commercial situations it is not usually necessary for one party to advise the other to read a contract: “it is safe to assume that the party signing the contract intends to be bound by its terms”. This is consistent with the general principle that there is no stand alone duty of care owed to the opposite side in contract negotiations: *Martel Building Ltd v Canada*, 2000 SCC 60 at paras 66-68; *H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd*, 2024 ABKB 423 at para 75; *The Power Limited Partnership v OEFC*, 2016 ONSC 4415 at para 91; *Gross v Great-West Life Assurance Co*, 2002 ABCA 37 at para 25.

[55] In any event, there is another fatal problem with Covey's argument under this ground of appeal. By the time this matter was before the Judge, the question of whether there was *consensus ad idem* and a valid contract had already been decided by Justice Devlin in the Devlin Order, when he granted specific performance of the Contract.

[56] As very recently summarized by the Court of Appeal in *Brothers v Kirwan*, 2025 ABCA 37 at para 8:

[8] The law frowns upon re-litigation of matters that have already been adjudicated. Doctrines imposing finality such as cause of action estoppel, issue estoppel, abuse of process and *functus officio* operate collectively to ensure that the legal system avoids conflicting decisions and permits coherent and orderly appellate review. These doctrines preserve scarce judicial resources and prevent parties from wasting time and money fighting over matters that have already been litigated and decided. Preventing re-litigation also emphasizes that parties must put their best foot forward at the outset, advancing relevant claims and defences, and bringing the evidence necessary to support their positions.

[57] The doctrine of *res judicata* has two overlapping branches: issue estoppel and cause of action estoppel: *Condominium Corporation No 0828219 v Carrington Holdings Ltd*, 2023 ABCA 222 at para 9 [*Carrington Holdings*]; *Ernst & Young Inc* at paras 29-31; *Boucher v Stelco Inc*, 2005 SCC 64 at para 33; *Toronto (City) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63 at para 23.

[58] Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which is adjudged in a previous court proceeding: *Carrington Holdings* at para 9. Issue estoppel may also apply to determinations of fact, law and mixed fact and law that were essential to earlier conclusions: *Thai v Kernick*, 2021 ABCA 236 at para 20; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 24.

[59] Litigation can be found to be barred respecting issues either directly or implicitly raised or that could have been raised, or where allowing the litigation to proceed would be an abuse of process violating principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Thai* at para 20; *Carrington Holdings* at para 10; *864503 Alberta Inc v Genco Place Properties Ltd*, 2019 ABCA 80 at para 27; *Toronto (City)* at paras 35-37.

[60] Further, under the doctrine of collateral attack, a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Toronto (City)* at para 33; *Danyluk* at para 20; *Piikani Nation v McMullen*, 2020 ABCA 366 at para 41; *Ernst & Young* at para 47.

[61] It is axiomatic that for a court to grant specific performance, it must be established that there is a valid contract, which in turn requires that the parties had reached *consensus ad idem* on its essential terms. The Devlin Order, but not the evidence before Justice Devlin, was before the Judge (and me). The Devlin Order could not be clearer: it granted specific performance of the Contract.

[62] Accordingly, the Devlin Order conclusively and finally decided the issue of whether there was *consensus ad idem*. For the Judge, or this Court now, to allow Covey to argue otherwise would be a collateral attack on the Devlin Order and would offend the principles of issue estoppel and abuse of process as noted above.

[63] The Judge correctly identified the significant and binding nature of the Devlin Order in the Decision: Reasons at paras 29 and 38.

2. Interpretation of “Vacant Possession”

[64] Covey argued or claimed that clause 2.3 of the Contract and the term “vacant possession” is vague and ambiguous. I also find this argument to be unpersuasive.

[65] Contrary to this pleading, in oral argument on the Appeal Covey stated that “vacant possession” is not ambiguous because everyone knows what vacant possession means, but then backtracked to say that the term “vacant possession” is ambiguous in (or in light of) the factual matrix (surrounding circumstances).

[66] “Vacant possession” in the context of a residential real estate transaction is not ambiguous. It means the ejection of tenants and trespassers and the removal of chattels and personal property so that the purchaser enjoys undisturbed enjoyment and quiet possession of the property: *BDM v MMM*, 2020 ABQB 288 at paras 77-79; *Bevark Holdings Ltd v Toronto Harbour Commissioners*, 1987 CanLII 4393 (ON SC); *Laurentian Bank of Canada v Mobile City Estates*, 1994 CanLII 8960.

[67] In my view, while surrounding circumstances can be relevant and important in interpreting contracts, Covey’s argument and position offends several contractual interpretation principles.

[68] First, as noted above, surrounding circumstances are less relevant when parties adopt the standard form AREA real estate purchase contract. In those instances, by adopting the standard contract, the parties’ objective intentions are taken to be the intention of the drafters of the standard contract: *Vallieres* at para 13.

[69] I note that the Judge did in fact make a palpable factual error by referencing that the Contract was prepared by Beutler when, as agreed by all parties at the Appeal (and consistent with the evidence before the Judge), the standard form Contract was in fact first filled out by Kemble on behalf of Dueck who made the offer that was accepted by Covey. However, because the terms of the Contract were clear and unambiguous, which of the Realtors “drafted” the Contract was not material to whether Covey was liable to Dueck. The Judge’s minor error about who drafted the Contract was palpable but was not overriding.

[70] Second, and in any event, surrounding circumstances does not include the parties’ subjective intentions and cannot be used to add to, detract from, vary or otherwise overwhelm the written words: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 57-60; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 81-82; *Talwandi Video Lab Inc v 1441419 Alberta Ltd*, 2024 ABCA 140 at para 11. Surrounding circumstances are to inform the mutual objective intentions of the parties as expressed in the words

used but must “never be allowed to overwhelm the agreement.” *Chemtrade Electrochem* at para 25.

[71] Third, in light of the entire agreement (or whole contract) clause, Covey cannot rely upon her intentions, the intentions of both parties, their respective thoughts, or suggestions that were voiced but never agreed to: *Ko v Hillview Homes Ltd*, 2012 ABCA 245 at para 26. Commerce, and ordinary Canadians in house transactions, need predictability: *Ko* at para 3.

[72] Covey’s attempt to overwhelm the plain and unambiguous reference to “vacant possession” in the standard form Contract by attempting to infuse her subjective intentions is not persuasive. In my view, it is an attempt to have the Court rewrite the parties’ agreement under the guise of contract interpretation. As confirmed by the Court of Appeal, courts must be cautious that they are not actually re-writing the agreement through interpretation of the words: *Chemtrade Electrochem* at para 39, citing *Jedfro* at para 34.

[73] There was no error in the Judge’s interpretation that the Contract obligated Covey to provide the Home unencumbered by the Lease, and without the Tenant, on February 24, 2023.

3. Conclusion

[74] Covey’s ground of appeal based on *consensus ad idem* or the interpretation of the Contract fails.

B. Did the Judge Err By Failing to Apply or Properly Apply the Doctrine of Unilateral Mistake?

[75] Covey argues that the Judge failed to apply or properly apply the doctrine of unilateral mistake to Covey’s claim that the Contract should be rectified.

[76] In the context of an agreement like the Contract, unilateral mistake occurs where one party says the signed instrument does not accurately reflect their agreement while the other party says it does: *Fairmont* at para 15; *Stikeman Elliott* at para 34.

[77] The requirements to establish rectification based on unilateral mistake are: (1) the existence and content of a prior oral agreement that is inconsistent with the written instrument; (2) the party seeking to uphold the written instrument knew or ought to have known about the mistake and permitting that party to take advantage of the mistake would amount to fraud or the equivalent of fraud; (3) the party seeking rectification must be able to establish the “precise form” in which the written instrument can be made to express the prior intention/agreement: *Fairmont* at para 15; *Shafroon v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6 at para 53; *Performance Industries* at paras 31, 37-41; *Stikeman Elliott* at paras 32-34.

[78] The standard of proof upon the party seeking rectification is the usual civil standard (balance of probabilities), although the evidence must be sufficiently clear, convincing and cogent: *Fairmont* at para 36; *Stikeman Elliott* at para 35.

[79] Ultimately, the decision whether to grant rectification is discretionary: *Fairmont* at paras 21 and 36; *Performance Industries* at para 43.

[80] In the Decision, the Judge did not expressly state the elements of unilateral mistake. However, he was responding to the pleadings and submissions of the parties, which referenced mistake (and, therefore, could include both common mutual mistake and unilateral mistake). At para 31 of the Decision, the Judge found that “from the evidence tendered, Ms. Covey failed to prove the elements of mistake in contract”. This finding encompasses both types of mistake.

[81] Even if it is assumed for the sake of discussion that the Judge erred by not specifically stating and addressing each element of unilateral mistake, the error was not palpable and overriding and, in any event, he reached the correct decision, for at least these reasons:

- (a) Covey failed to adduce evidence of what exactly the prior oral agreement was. Since Covey and Dueck never communicated directly, any prior agreement could only have been between the Realtors. However, there was no evidence the Realtors reached an oral agreement different than the plain language of the Contract. Covey could have adduced evidence from Kemble under rule 6.8 but did not. Further, Beutler’s affidavit does not speak to a prior oral agreement but rather vaguely referenced discussions and Beutler’s assumptions. Covey did not question Beutler on his affidavit;
- (b) Covey failed to adduce evidence that Dueck knew or ought to have known that Covey was operating under a mistake, or that it would be equivalent to fraud for Dueck to rely on the plain language of the Contract that was vetted through both Realtors. In any event, the evidence of Covey’s beliefs and Beutler’s assumptions regarding the Tenancy did not support a finding that there was a prior oral agreement not reflected in the Contract;
- (c) while Dueck may have known about the existence of the Tenant from the MLS listing or otherwise, this alone does not mean there was a mistake or that Dueck knew or ought to have known Covey operated under a mistake. Dueck was entitled to make an offer that put the risk of having the Tenant removed on Covey. While Covey could not have legally ejected the Tenant by February 24, 2023, it was not necessarily impossible to have the Tenant voluntarily agree to vacate by that date. Clause 2.3 of the Contract provided for vacant possession by February 24, 2023 and clause 10.7 provided that the “costs to end an existing tenancy of the Property” was Covey’s responsibility. Covey was not obliged to accept these terms;
- (d) Covey was unable to consistently articulate precisely what needed to be fixed in the Contract. The inability to clearly state exactly what needed to be fixed, and how, undermined her position that rectification is appropriate; and
- (e) in any event, the Devlin Order, which confirmed the Contract, was a complete answer to Covey’s rectification argument. Covey had the opportunity to raise mistake and rectification before Justice Devlin (and may have done so). Justice Devlin confirmed the binding terms of the Contract.

[82] Covey’s ground of appeal based on unilateral mistake and rectification fails.

C. Did the Judge Err in Determining that Covey’s Liability Was Suitable for Summary Determination?

[83] The Judge made no error in deciding that there was no genuine issue requiring a trial to determine Covey’s liability, and that he could make the necessary findings of fact and fairly resolve the issues of her liability on a summary basis (and to summarily dismiss Covey’s counterclaim against Dueck). The Judge was aware of, cited and applied the test from *Weir-Jones*.

[84] Given the plain and unambiguous Contract, the Devlin Order, and the lack of Covey putting her best foot forward to adduce evidence to support the required elements of mistake, the Judge committed no palpable and overriding error in exercising his discretion to grant summary judgment against Covey (and refusing her cross-application for summary dismissal). In fact, he was wise and pragmatic in doing so – it eliminated a main source of discord between the parties which would have been a wasteful and unnecessary distraction at trial.

[85] This ground of appeal fails.

D. Did the Judge Err in Failing to Summarily Determine the Realtors’ Liability Under the Third Party Claims?

[86] The Judge also made no error in exercising his discretion to refuse to summarily find the Realtors liable to Covey. In my view, this is supported by Covey’s concession on the Appeal that the third party claim against Kemble required a trial. It would be impractical to decide liability of one of the negotiating Realtors without the other. In any event, Beutler was not questioned, and Kemble provided no affidavit.

[87] Again, the Judge’s approach was not erroneous but rather pragmatic and consistent with the underlying purposes of the *COJA*. He provided the parties helpful guidance in his *obiter* comments, which in my view were designed to encourage all parties to focus on the real issues (to hopefully avoid trial): what are Dueck’s actual damages arising from Covey’s breach of the Contract, and who should be responsible to pay them and in what proportion?

[88] I disagree with Covey that it is appropriate for this Court to interfere with the Judge’s exercise of discretion and to decide the Realtor’s third party liability on the Appeal record.

[89] In my view, the parties should focus on the real issues and see if they can resolve them, failing which the remaining real issues will go to trial as directed by the Judge.

[90] This ground of appeal fails.

VI. Conclusion

[91] The Appeal is dismissed.

[92] With respect to costs, I *strongly* urge the parties to take this opportunity to attempt to resolve all remaining matters in this dispute, including costs of this Appeal, rather than continuing the expensive process of litigating these matters. However, if the parties are unable to reach

agreement on the costs of this Appeal within two months of these reasons, any party may write to me, and I will set a process for costs submissions.

Appeal heard the 7th day of February, 2025.

Dated at the City of Calgary, Alberta this 11th day of February, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Stephen Panunto
for the Appellant (Defendant)

Natalie Reeder
for the Respondent (Plaintiff) and Adam Kemble (Third Party)

James M Doyle
for Kevin Beutler and 2 Percent Realty Inc (Third Party)