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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
APPLICANTS	LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT, ENCHARIS COMMUNITY HOUSING AND SERVICES, ENCHARIS MANAGEMENT AND SUPPORT SERVICES AND LUTHERAN CHURCH – CANADA, THE ALBERTA – BRITISH COLUMBIA DISTRICT INVESTMENTS LTD.
DOCUMENT	**APPLICANTS' BRIEF IN RESPONSE TO THE APPLICATION OF SHEPHERD OF THE VALLEY LUTHERAN CHURCH**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bishop & McKenzie LLP Barristers & Solicitors 1700, 530 – 8th Avenue SW Calgary, Alberta T2P 3S8 Attention: Francis N. J. Taman/Ksena J. Court Telephone: 403 237-5550 Fax: 403 263-3423 File: 103,007-003

I. FACTS

1. In 1984, Shepherd of the Valley Lutheran Church (the "Congregation") was the owner of lands located in Canmore, Alberta (the "Canmore Lands"). In order to purchase the Canmore Lands, Lutheran Church Canada – the Alberta – British Columbia District (the "District") provided a loan and a grant to the Congregation (the "First Loan").

Affidavit of Kurtis Robinson filed October 4, 2016 ("Robinson Affidavit") at para. 5; Affidavit of Daniel Stuehrenberg filed September 16, 2016 ("Stuehrenberg Affidavit") at para. 9

2. The Congregation was the recipient of subsidies from the District. A portion of the Congregation's subsidy from this program was applied by the District to payments against the First Loan. The District provided this financial support to the Congregation as it furthered its objectives of providing Ministry to church members. As this financial support was dependant on donations provided by congregations of the District, the District was at times unable to provide the levels of subsidy that they had previously indicated they would to the Congregation.

Robinson Affidavit at paras. 6 and 36; Stuehrenberg Affidavit at Exhibits C, E and G; Questioning of Philip Jorgensen filed September 27, 2016 ("Jorgensen Questioning") at page 4 lines 21-24, page 5 lines 2-4

3. In 1992, the Congregation decided that it wanted to build a church building on the Canmore Lands. The Congregation investigated obtaining a mortgage from third parties, but the Congregation's finances were not sufficient to support a mortgage. As such, it approached the District for financial assistance in order to do so. The District suggested that it would provide the funds for the church building through the Church Extension Fund ("CEF"). The Congregation would transfer the Canmore Lands to the District and the District would lease the Canmore Lands back to the Congregation for a nominal amount. When the Congregation was financially viable, then it would be able to purchase the Canmore Lands back from the District with the purchase price being set based upon a formula. The District wrote to the Congregation on July 16, 1992 outlining the above, and advised the Congregation that a formal agreement would be drafted (the "1992 Letter").

Stuehrenberg Affidavit at Exhibit J; Questioning of Stuehrenberg filed September 27, 2016 ("Stuehrenberg Questioning") at page 5 line 26 – page 6 line 5; Affidavit of Philip Jorgensen sworn September 16, 2016 at Exhibit C

4. In Questioning, Pastor Jorgensen confirmed that he understood that the 1992 Letter proposed two or three possibilities that were to be spelled out later. Mr. Stuehrenberg confirmed that he understood that the Congregation was prepared to enter into an agreement on substantially the same terms as proposed in the 1992 Letter.

Jorgensen Questioning at page 6 lines 7-20;
Stuehrenberg Questioning at page 9 line 19 – page 10 line 9

5. About a year later, on June 7, 1993, the Congregation wrote to the District and advised that it was now ready to proceed with the building. On August 17, 1993, the District provided its form of lease agreement.

Robinson Affidavit at Exhibits F and G

6. The arrangement and the District's form of lease agreement were acceptable to the Congregation. The District's form of lease agreement was signed on behalf of the Congregation and dated December 13, 1993 (the "1993 Lease"). Prior to signing the 1993 Lease, the Congregation had the opportunity to obtain legal advice. The 1993 Lease contained the following Option to Purchase at clause 15 (the "Option"):

> The Lessee shall have the option, upon the full payment of all indebtedness to the Lessor, to purchase the demised land and original building at a price established on the basis of an independent appraisal or the ABC District's purchase price of the demised land plus original building plus out-of-pocket expenses relative to the demised land plus not more than ten (10) percent per annum. At no time will the purchase price be less than the price paid by the Lessor for the demised land and original building. The option shall be exercised by the Lessee by writing to the Lessor requesting to exercise the option to purchase the demised land and original building. Upon receipt of this of this [sic] request, the Lessor shall obtain an independent appraisal and advise the Lessee of the purchase price within sixty (60) days of receipt of the said appraisal.

Robinson Affidavit at Exhibit H; Stuehrenberg Affidavit at Exhibit K; Jorgensen Questioning page 14 line 26 –page 15 line 3; Answers to Undertakings of Daniel Stuehrenberg, filed October 13, 2016, Answer #1

7. In response to inquiries from the Congregation, the District advised that the triggering event for the Option, "full payment of all indebtedness to the Lessor", meant all costs incurred by the District for the Canmore Lands or the building. The District also confirmed that it would be calculating interest at the same rate that they would for CEF loans, which at that time was 9 ¼%.

Robinson Affidavit at Exhibit J

8. Similar lease agreements were signed in 1999 and 2001. Although in the latter lease, the amount of rent amount was increased, it still remained a nominal amount ranging from $100 - $120/month. No changes were made to the Option except the last sentence was omitted in the lease dated 2001.

Robinson Affidavit at Exhibit Q

9. Pursuant to the arrangement, on February 28, 1994 the Congregation executed a Transfer of Land transferring title of the Canmore Lands to the District. The Transfer of Land was registered at the Land Titles Office on April 14, 1994.

Stuehrenberg Affidavit at Exhibit L; Robinson Affidavit at Exhibit K

10. The church building was built on the Canmore Lands using funds from the CEF. The District kept track of the building cost in a Cost Account. From time to time, further funds were paid by the District for building maintenance, and property taxes. The Account History is attached at Exhibit "M" to the Robinson Affidavit.

11. The District has provided significant financial assistance to the Congregation over the years. From 1994 – 2000, the Congregation received subsidies from the District. As occurred with the First Loan, a portion of the subsidies was applied to the Cost Account which covered the accumulating interest. In 2000, the Outreach Department of the District began to transfer funds to the CEF for the accumulating interest because the Congregation was not able to make any significant payments.

Robinson Affidavit at para. 19; Stuehrenberg Affidavit at Exhibit T; Questioning of Mark Lobitz filed September 27, 2016 ("Lobitz Questioning") page 4 lines 15-24; Stuehrenberg Questioning page 19 lines 4-13, page 20 lines 15-21

12. In 1990, the District also owned and paid for a neighbouring property to the Canmore Lands (the "Old Parsonage"). The Old Parsonage was purchased by the District for the pastor of the Congregation to live in. The cost of the loan to acquire the Old Parsonage and the ongoing expenses of maintaining the Old Parsonage building were borne by the District. The Old Parsonage was sold by the District in 1996. Although it had no obligation to do so, as further financial assistance for the Congregation, the District applied a portion of the sale proceeds from the Old Parsonage to the Cost Account. The application of approximately $57,000 on December 31, 1996 is evidenced in the Account History attached as Exhibit "M" to the Robinson Affidavit.

Jorgenson Questioning at page 15 line 7 – page 17 line 17

13. The District also provided financial assistance to the Congregation by permitting it to rent the house located on the Canmore Lands. The District also rented out the house from time to time, and as further financial assistance it applied the rental funds to the Cost Account. On October 1, 2008, and again on December 19, 2014, the District and the Congregation entered into an agreement which confirmed that the Congregation could rent out the house (the "Consent to Rent Agreements"). In the Consent to Rent Agreements, the Congregation

acknowledged that the District was the owner of the house on the Canmore Lands and that any alterations or improvements to the property became the District's without any compensation or indemnity to the Congregation.

Robinson Affidavit at paras. 26 – 28, 32 – 33, 35 and Exhibits M, X, Y; Lobitz Questioning page 4 line 25 – page 5 line 4

14. The only significant payment that the Congregation has made to the Cost Account was in April of 2002. At that time the Congregation used funds that it had saved in its CEF account to make a $10,000 payment. Otherwise, the Congregation's payments to the Cost Account have been nominal monthly amounts that have increased in regularity in latter years.

Robinson Affidavit at paras. 25 and 36 and Exhibit M

15. In 2016, the Congregation sent two cheques to the District. Although the cheques were marked that they were "donations", Pastor Lobitz confirmed when he was Questioned that it was the intention of the Congregation that the cheques be cashed by the District as donations so that it could claim that these amounts should be considered by the Court as payments toward the "loan" and taxes for the Canmore Lands. As the District was unsure whether these were true donations, the cheques were sent back to the Congregation.

Lobitz Questioning pages 10-11; Robinson Affidavit at para. 37

16. The District considered the Congregation to be a "Mission Congregation" meaning that the congregation was not self-sufficient and subsisted on financial support from the District to a large extent. Pastor Jorgensen confirmed that when he was pastor of the Congregation, the Congregation also considered itself to be a "Mission Congregation".

Robinson Affidavit at para. 36; Jorgensen Questioning at page 4 lines 17-24

17. According to the 2016 property tax assessment the Canmore Lands are valued at $1,139,500. The Court is also referred to the Sixth Confidential Affidavit of Cameron Sherban sworn September 28, 2016.

18. On January 23, 2015, the District obtained an Initial Order under the *Companies' Creditors Arrangement Act* (the "CCAA"). In March 2015, Mr. Robinson attended a Congregational council meeting and advised the Congregation that because of the CCAA, the Canmore Lands would have to be sold. The Canmore Lands are considered part of the Non-Core Assets in the District's Plan of Compromise and Arrangement (the "District Plan") that was approved by the Court on August 2, 2016. The District intends to sell the Canmore Lands and

the net sale proceeds will be distributed to the District's creditors in accordance with the District Plan.

Robinson Affidavit at para. 38; Lobitz Affidavit at para. 13

19. Mr. Robinson confirmed that he had discussions with the Congregation about their finances and about whether they would ever think of buying the Canmore Lands. During these conversations, the Congregation confirmed that it could not afford to do so, but Mr. Robinson was trying to work with the Congregation to think of creative ways for the Congregation to make such a purchase.

Questioning of Kurtis Robinson on September 30, 2016 ("Robinson Questioning") at page 27 line 27 – page 28 line 18

20. In the past three years, the Congregation's net income has been $6,817 for the first five months of 2015, ($68) for 2014, and ($1,553) for 2013.

Affidavit of Mark Lobitz filed September 19, 2016 ("Lobitz Affidavit") at Exhibit D

21. The Congregation states that it is able to obtain new financing for $200,000 and a further $50,000 in donations in order to payout the Cost Account. The loan commitment letter has a requirement for the Congregation to maintain a Debt Service Coverage ratio of no less than 1:1 times.

Answers to Undertakings of Mark Lobitz filed October 13, 2016 ("Lobitz Answers to Undertakings")

22. The Congregation has brought an application to prohibit the District from selling the Canmore Lands, seeking to enforce an "agreement", and claiming an interest in the Canmore Lands. The Affiants of the Congregation have alleged that the "agreement" between the Congregation and the District was that once the Congregation paid the balance outstanding on the Cost Account, then the District would transfer the Canmore Lands to the Congregation.

23. In Questioning on Affidavit, Pastor Jorgensen acknowledged that the arrangement proposed by the District was never concluded when he was with the Congregation. It is submitted that therefore Pastor Jorgensen has no personal knowledge of the alleged agreement. Mr. Stuehrenberg stated that what was stated in his Affidavit was his belief of the "agreement", but acknowledged that this was different than what the Option actually stated. Pastor Lobitz acknowledged that he had no personal knowledge of such "agreement", and that

his allegation of the "agreement" came only from what he believed was the general practice of the District.

Jorgensen Questioning at page 6 lines 7 – 20;
Stuehrenberg Questioning at page 12 line 16 – page 13 line 4; Lobitz Questioning at page 5 line 7 – page 6 line 3

24. The District cross-applies to seal the Sixth Confidential Affidavit of Cameron Sherban and to have the caveat filed by the Congregation discharged from the Canmore Lands.

II. ISSUES

A. Was there an intention to create legal relations between the parties?

B. If there was an intent to contract, what is the nature of the underlying legal relationship between the District and the Congregation?

C. Is the District estopped from denying that the Congregation is entitled to redeem the title to the Canmore Lands upon payment of the outstanding balance of the Cost Account?

D. If the Canmore Lands are sold, is the Congregation entitled to any of the sale proceeds?

III. ANALYSIS

25. In the case at Bar, we are not dealing with two businesses who negotiated their own business deal. We are dealing with two charities who worked collaboratively together to expand the Ministry of the Lutheran Church. In analyzing the legal relationship between the parties, we submit that the "labels" that the parties used in the various documents and correspondence should be ignored, and it is the substance of the relationship that should be examined.

Ford v. Keller, 1979 CanLII 1047 (Alta. Q.B.) ("*Ford*") at para. 19 (Tab 1)

A. Was there an intention to create legal relations between the parties?

26. It is well established that in order for parties to be contractually bound, there must be an intention to create a contract.

Rosscup v. Westfair Foods Ltd., 1999 CarswellAlta 754 (Alta. Q.B.) at para. 30 (Tab 2)

27. The issue of whether parties intended to create a legally enforceable contract was recently considered by the Court of Appeal in *Hole v. Hole,* 2016 CarswellAlta 145 (Alta C.A.)

("*Hole*") (Tab 3). In *Hole*, beginning at paragraph 33, the Court of Appeal reviewed the principles of contractual interpretation to apply to determine the parties' intention. The Court went on to state:

> The consideration of the surrounding circumstances allows a court to consider what a reasonable person would have thought was the aim of the transaction, if that person knew the facts available to the parties. It does not, however, allow a court to receive direct evidence of intent or allow such evidence to contradict the contract, evade a "whole contract" clause, or create ambiguities: *Gainers v. Pocklington Holdings Inc.,* 2000 ABCA 151 (Alta. C.A.) at paras 22-23, (2000), 255 A.R. 373 (Alta. C.A.).
>
> The relevant time for consideration of surrounding circumstances in the context of contractual interpretation is at the time the contract was made, and this contextual evidence of surrounding circumstances is part of the interpretive process: *Nexxtep Resources Ltd. v. Talisman Energy Inc.,* 2013 ABCA 40 (Alta. C.A.) at para 20, (2013), 542 A.R. 212 (Alta. C.A.); *Sattva* at paras 57-58. (at paras. 34-35)

28. In looking at all of the circumstances of the case at Bar, it is submitted that there was never an intention to create legal relations between the parties. The Congregation was established at the request of the District, which wished to "gather a congregation in the Canmore area." Thereafter, the District financially supported the Congregation through the Financial Support Agreement, and by providing "loans", grants and subsidies. Throughout, the Congregation was considered to be a Mission congregation, one which the District wanted established, and both the Congregation and the District knew would be almost entirely supported by the District. Moreover, due to the fact that the subsidies were dependent upon donations from congregations who were members of the District, there were times that the subsidies ended up being less than amounts initially represented to the Congregation in the Financial Support Agreement. Despite the parties attempting to put "legal" terms or use legal entities to structure their arrangements, when looking at the circumstances as whole, in reality the arrangement really is the District establishing a place of worship and using its own funds to pay for it.

Stuehrenberg Affidavit at paras. 2, 7-9, 14, Exhibits C, E and G; Robinson Affidavit at para.36; Jorgensen Questioning at page 4 lines 17-24

29. Accordingly, it is submitted that it was not the intention of the parties to create a legally binding contract with respect to the Canmore Lands, and the Congregation's application should be dismissed.

B. If there was an intent to contract, what is the nature of the underlying legal relationship between the District and the Congregation?

Option to Purchase

30. An optionee is in a very different position than a purchaser under an agreement for sale. A purchaser under an agreement for sale has an equitable interest in land, whereas an optionee does not. "Unless he complies strictly with the terms of the option the optionee cannot obtain the land."

259202 Alberta Ltd. v. Barnieh Investments Ltd., 1984 ABCA 99 (Alta. C.A.) at para. 31 (Tab 4)

31. In *Ford, supra* (Tab 1), the Court discussed the difference between an option to purchase and an agreement for sale. In order for there to be an agreement for sale, there must be a promise to sell in return for a promise to buy. The Court examined the documents between the parties and concluded:

> Again one must carefully examine Ex. 10. In it Keller promises to sell the land to Ford but nowhere in the document is there a counter-promise by Ford to purchase the land from Keller. It seems to me that the very basis of executory consideration, namely, a promise in return for a counter-promise, is absent from Ex. 10. If it is argued that Ford's counter-promise was to pay rent that was already provided for under the leases, then I have already found this to be past consideration which cannot be relied upon by the estate to establish consideration for this contract. On this ground alone I find the document to be unenforceable as an agreement for sale. (at para. 26)

32. A case similar to the case at Bar is *Kreick v. Wansbrough,* [1973] S.C.R. 588 (S.C.C.) (Tab 5). The appellant, Kreick, gave money to the respondent, Wansbrough. In order to be protected, Kreick took title to Wansbrough's property to secure the repayment. They entered into an agreement where Wansbrough could repurchase the lands at an amount higher than the amount of the indebtedness. Once Wansbrough had paid back the indebtedness, he was given the option to pay the outstanding purchase price within 10 months in order to have title transferred back into his name. Wansbrough paid back the indebtedness but did not pay the remainder of the purchase price within 10 months. Kreick took the position that the option was void.

33. Wansbrough made an application to have the Court declare that the agreement was in essence a mortgage, and therefore he could redeem even though the option had expired. Wansbrough did not dispute that he agreed to pay back a higher price than was initially lent. The trial court and Saskatchewan Court of Appeal held that it was in essence a mortgage and allowed Wansbrough to redeem. Kreick appealed to the Supreme Court of Canada.

34. The Supreme Court of Canada allowed the appeal and ruled that even though the initial purpose of the agreement was made as security for a loan, the words of the contract and intent of the parties were clear that it was a contract of sale with an option to repurchase. The contract was clear in regard to the option and was agreed to by the parties. Wansbrough could not now change the words or the intent of the agreement to a mortgage.

35. In the case at Bar, the Congregation wished to build a church building on the Canmore Lands. It did not have the funding to do so. It explored obtaining funding from third party sources, but was not financially able to obtain this funding. It then approached the District for financial assistance.

36. The District offered a creative solution to the Congregation. The Congregation would transfer the Canmore Lands to the District and pay nominal rent to the District. The District would then build a church building and permit the Congregation to use it for its ministry. The 1992 Letter clearly stated that when the Congregation was financially viable, then the Congregation would be able to purchase the Canmore Lands back from the District. However, none of the documents between the parties state that the purchase price was to be repayment of the current balance of the Cost Account as alleged by the Affiants for the Congregation.

37. Rather, the 1992 Letter states that the purchase price would be set according to the CEF policy, which was either the appraised value or the original cost, being the amount of funds provided by CEF for the Congregation's then indebtedness and the building funds, plus 10% per year.

38. The 1993 Lease, and the subsequent leases, which were agreed to and signed by the Congregation, state that once the Congregation pays all indebtedness to the District, then the Congregation would have the option to purchase the Canmore Lands at a price established by an appraisal or essentially the amount of money that the District expended with respect to the building and the Canmore Lands plus not more than 10% per annum. The letter from the District to the Congregation at Exhibit "J" of the Robinson Affidavit clarified that the interest rate at the time of the 1993 Lease was 9 ¼%.

39. In analyzing these written documents, it is submitted that although the initial purpose of the arrangement between the parties may have been because the Congregation could not afford traditional funding from a third party, the explicit wording of the 1992 Letter and the leases make it clear that the parties entered into a contract of sale, selling the Canmore Lands to the

District, with an option for the Congregation to repurchase the Canmore Lands at a later date. While the District made a promise to sell in the option, there is no corresponding promise to buy from the Congregation. As such, the arrangement cannot be characterized as an agreement for sale as alleged by the Congregation.

40. An agreement for sale is a contract just like any other, and in order for there to be a contract, there needs to be *consensus ad idem* between the parties. Despite what the written documents between the parties state, the Congregation argues that there was an unwritten agreement for sale stating that once the Congregation paid off the Cost Account, then the District would transfer the Canmore Lands to it. In support of this, the Congregation relies on the testimony of its Affiants. However, in the Congregation's brief, it appears to have ignored the responses that its Affiants gave when they were Questioned on their Affidavits, namely that the alleged agreement for sale was based solely on their belief which was contrary to the written agreements and letters between the parties. The Congregation also points to a letter written from the District, at Exhibit "P" of the Stuehrenberg Affidavit, where it was encouraged to pay off the Cost Account in the hope that one day it would again become the owner of the Canmore Lands. This letter is equivocal as it is equally consistent with the District encouraging the payments toward the Cost Account so that the Option could then be exercised. There cannot be a contract imposed based on the belief of one party.

41. It is submitted that the arrangement between the parties also is not a mortgage as the Congregation was to pay something more to the District than just the "debt" or Cost Account. The Affiants of the Congregation acknowledged during Questioning on Affidavit that their belief that the Canmore Lands would be transferred to the Congregation upon payment of the Cost Account was just that, their belief based upon what they had heard or what they thought was the general practice of the District. The Affiants acknowledged that their belief was different than what the documents actually state. As such, there was no agreement between the parties that the District would be obligated to transfer the Canmore Lands to the Congregation upon payment of the Cost Account and the Canmore Lands were not being held as security for repayment of "debt".

42. Accordingly, the arrangement between the parties was that the Congregation would have the Option to repurchase the Canmore Lands. In response to the Congregation's argument in paragraph 71 of its brief that there needed to be separate consideration for the Option, it is submitted that this is an incorrect statement of the law. In *Sail Labrador Limited v. Navimar Corp.,* [1999] 1 S.C.R. 265 (S.C.C.) at paras. 40-42 (Tab 6), the Supreme Court of

Canada held that an option can be an element of a bilateral contract and that options in lease agreements gain consideration through the payment of rent under the lease. In the case at Bar, at the time the Option was granted, there were mutual promises between the parties as part of the overall arrangement, including the transfer of the Canmore Lands from the Congregation to the District and the payment of rent by the Congregation to the District.

43. The repurchase price for the Canmore Lands was specified in the Option based upon a formula and the District was to advise the Congregation of the price. The 1992 Letter noted that the option price would be the lesser of the appraised value of the Canmore Lands or the original costs plus 10% per annum. The original cost was defined as the balance of the First Loan plus the costs incurred to build the church building. This was further clarified by the District to also include any other costs incurred by the District with respect to the Canmore Lands.

Stuehrenberg Affidavit at Exhibit C; Robinson Affidavit at Exhibits H & J

44. Indeed, after the 1993 Lease was signed, the parties have carried on as if the District is the owner of the Canmore Lands. The District kept track of its spending on the building, both the initial construction and maintenance costs, and other ancillary costs such as taxes, in the Cost Account. It permitted the Congregation to rent out the house located on the Canmore Lands from time to time. The Congregation acknowledged in the Consent to Rent Agreements that the District is the owner of the Canmore Lands and that any improvements made to the house would belong to the District.

45. Where a contract does not specify that it is terminable, then prima facie the contract is presumed to be perpetual. This presumption is rebuttable, but the Court has "to look at the relationship between the parties and the nature of the terms of the contract to determine whether there is a basis upon which to conclude that the contract is terminable upon reasonable notice."

Rapatax (1987) Inc.v. Cantax Corp., 1997 CarswellAlta 319 (Alta. C.A.) at para. 19 (Tab 7)

46. Although the term of the latter lease ended on December 31, 2004, it is submitted that the parties continued to carry on with the original arrangement after that date. The Congregation continued to make nominal rental payments to the District and the District continued to apply those amounts to the Cost Account. The District continued to supply the Congregation with subsidies by paying the interest that was accumulating on the Cost Account.

The District also continued to provide financial assistance to the Congregation through other means such as renting the house on the Canmore Lands and permitting the Congregation to also do so.

47. The parties carried on in the same manner for a total of 23 years. The Congregation was one of the missions of the District. Looking at the nature of the relationship, it is likely that but for the CCAA, the parties would have carried on in the same manner perpetually. As such, it is submitted that the Option is still in existence.

48. If it is found that the arrangement between the parties is terminable upon reasonable notice, then it is submitted that the Option was terminated by the District when Mr. Robinson attended the Congregational council meeting in March 2015 and advised the Congregation that the Canmore Lands would have to be sold because of the CCAA. Reasonable notice has been given to the Congregation and there is no evidence that the Congregation has exercised the Option either in writing or been in a position to tender payment of the purchase price under the Option. The Congregation has only made statements that it wished to pay the balance of the Cost Account, which it is submitted is insufficient to properly exercise the Option.

49. If the Congregation's argument that the Option has come to an end is accepted, then the Congregation clearly has no option to exercise. It can only obtain title to the Canmore Lands if it makes an offer to purchase that is acceptable to the District. Under the District Plan, such an offer would also be subject to the approval of the Monitor and the District Creditors' Committee.

Order (District Sanction Order) granted August 2, 2016

50. Again, the Congregation points to a letter written from the District to the Congregation, Exhibit "P" of the Stuehrenberg Affidavit, where the District encouraged the Congregation to make payments toward the Cost Account. However, nothing in this correspondence states what would happen once the Cost Account was paid. Rather than the District transferring the Canmore Lands outright to the Congregation, it is equally possible that the District would have entered into further negotiations with the Congregation. Indeed, in Questioning, Mr. Robinson confirmed that, he had discussions with the Congregation about their finances and about whether they would ever think of buying the Canmore Lands. The Congregation confirmed that

it could not afford to do so, but Mr. Robinson was trying to work with the Congregation to think of creative ways for the Congregation to make such a purchase.

Robinson Questioning at page 27 line 27 – page 28 line 18

51. The Congregation has never been in a position where it has been "financially viable", to use the wording from the 1992 Letter, to repurchase the Canmore Lands through the exercise the Option or otherwise. The Congregation is considered to be a "Mission Congregation" and has continually received subsidies from the District, which have included the District essentially making inter-departmental transfers to cover the interest that was accumulating in the Cost Account. The Congregation has only made payments totalling $30,139.98 to the Cost Account over the past 23 years.

Robinson Affidavit Exhibit M

52. Furthermore, if the Congregation is able to pay the balance of the Cost Account through its alternate financing, both the 1992 Letter and the leases clearly state that the purchase price is to be something in excess of the Cost Account balance. There is no evidence that the Congregation is able to pay either the appraised value of the Canmore Lands or the original cost plus the appropriate interest amount. Furthermore, it is unlikely that the Congregation will be able to meet the debt service requirements under the alternate financing that it is proposing to obtain. According to the financial statements that were provided by the Congregation, it was often operating in a deficit position. In analyzing the last 3 years of financial statements, it is clear that the Congregation will not be able to meet the Debt Service Coverage ratio that is a condition of the proposed alternate financing. As such, it is likely that the Congregation will be in default of the proposed new loan in the future.

Lobitz Answers to Undertakings; Lobitz Affidavit at Exhibit D

53. As the Congregation is unable to pay the Option purchase price or make a reasonable offer to repurchase the Canmore Lands, it is submitted that its application should be dismissed and its caveat removed from the Canmore Lands.

C. Is the District estopped from denying that the Congregation is entitled to redeem the title to the Canmore Lands upon payment of the outstanding balance of the Cost Account?

54. Equity will intervene through the application of proprietary estoppel or promissory estoppel where a person makes a promise, or behaves in such a fashion, that he will not insist upon his strict legal rights, and the other person relies upon that promise to his detriment. In such an instance, the Court then questions whether it is unconscionable to allow the promissor to go back on the assumption he has allowed the promissee to make.

Wincal Properties Ltd. v. Cal-Alta Holdings Ltd., 1983 CarswellAlta 5 (Alta. Q.B.) ("*Wincal*") at paras. 16-17 (Tab 8)
Scholz v. Scholz, 2013 CarswellBC 1956 (B.C.C.A.) ("*Scholz*") at paras. 30-31 (Tab 9)

55. In *Wincal,* the purchaser of a property, Cal-Alta Holdings Ltd. ("Cal-Alta") assumed the mortgages that were against the title. Cal-Alta subsequently sold the property. The subsequent purchaser failed to pay the mortgage and foreclosure proceedings were commenced. The mortgagee also sued Cal-Alta on the covenant to pay in the mortgage. At one point, a representative of the mortgagee was under the mistaken belief that the mortgagee would not be able to pursue a judgment against Cal-Alta. Cal-Alta claimed that the mortgagee was estopped from obtaining judgment against it.

56. The Court held that there was nothing in the evidence that amounted to a representation by the mortgagee to Cal-Alta that would provide a basis for estoppel nor had Cal-Alta altered its position in reliance upon any such representation. The mortgagee's mistaken belief as to its rights alone was not sufficient to make a finding of estoppel. Further, Cal-Alta's belief that it could limit its liability by transferring the property also did not provide a basis for estoppel.

Wincal, supra at 23

57. *Scholz* presents a somewhat analogous situation to the case at Bar. In *Scholz,* a son and daughter-in-law were the purchasers of property. They permitted the son's mother to build a coach house on the property. The mother did so and paid for the construction. She lived in the coach house rent free for nine years. The son and daughter-in-law paid for the property taxes, utilities, and insurance. The son and daughter-in-law then sold the property for a substantial profit. The mother claimed an interest in the property and claimed that a portion of the sale proceeds were hers.

58. The Court found that the circumstances under which the mother was invited to build the coach house did not give rise to a reasonable expectation that she would share in the profits from the sale of the property. She lived in the property for nine years without paying any rent or utilities and received other assistance from the son and daughter-in-law. These facts militated against finding any detrimental reliance or a finding that it would be unconscionable to deny the mother's claim.

Scholz, supra at para. 33

59. In the case at Bar, there is no evidence that there was any representation or promise from the District to the Congregation that once the Cost Account was paid, title to the Canmore Lands would be transferred to the Congregation. Indeed, the Affiants of the Congregation stated during Questioning that this was only their belief, and they acknowledged that this belief was contrary to what the written documents between the parties stated. There is also numerous correspondence from the District to the Congregation explicitly reminding the Congregation that the District is the owner of the Canmore Lands. When the District sold the Old Parsonage and advised the Congregation that it would apply a portion of the funds to the Cost Account, it explicitly advised the Congregation that such a payment did not affect the terms of the 1993 Lease. Further, in the Consent to Rent Agreements the Congregation explicitly acknowledged that the District was the owner and any improvements to the house on the Canmore Lands were the property of the District.

Robinson Affidavit at Exhibits O, V, and Y

60. The Congregation made only nominal rental payments to the District, and the District largely supported the Congregation through its subsidy programs. Additionally, for many years, the pastor of the Congregation lived in a house paid for by the District and when the Old Parsonage was sold, the District applied a significant portion of the sale price against the Cost Account despite having no obligation to do so. In these circumstances, it is not unconscionable for the District to be entitled to the Canmore Lands and the future sale proceeds.

61. It is submitted that the doctrine of estoppel is not applicable to the case at Bar.

D. If the Canmore Lands are sold, is the Congregation entitled to any of the sale proceeds?

62. Although not argued in its brief, in its Application the Congregation claims an interest in the Canmore Lands by way of a constructive trust. The remedy of constructive trust was most recently considered by the Supreme Court of Canada in *PIPSC v. Canada (Attorney General)*,

2012 CarswellOnt 15718 (S.C.C.) ("*PIPSC*") (Tab 10). The Court set out the grounds for imposing a constructive trust:

> Since this Court's decision in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217 (S.C.C.), there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment...
>
> In *Soulos,* McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.
>
> Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:
>
> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
> (3) The plaintiff must show a legitimate reason for seeing a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
> (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [*Soulos,* at para. 45]...
>
> In order to prove a claim in unjust enrichment, the plaintiff must establish: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pacific National Investments Ltd. v. Victoria (City),* 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.). ("*Pacific National*"), at para. 14). Where these elements are satisfied, the remedy of constructive trust may be available, if (1) "monetary damages are inadequate", and (2) "there is a link between the contribution that founds the action and the property in which the constructive trust is claimed" (*Peter v. Beblow,* [1993] 1 S.C.R. 980 (S.C.C.), at p. 988).
>
> As Binnie J. explained in *Pacific National,* at para. 15, "[a]n enrichment may 'connot[e] a tangible benefit'..., or it can be relief from a 'negative', such as saving the defendant from an expense he or she would otherwise have been *required* to make" (emphasis in original).
>
> Following this Court's decision in *Peter v. Beblow,* the enrichment must correspond with a deprivation from the plaintiff. While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in *Sorochan v. Sorochan,* [1986] 2 S.C.R. 38 (S.C.C.), cited by Cory J. in his concurring reasons in *Peter v. Beblow,* at p. 1012, the enrichment and the detriment are "essentially two sides of the same coin".
>
> The "straightforward economic approach", as described in *Pacific National,* to enrichment and detriment, is properly understood to connote a transfer of wealth from the plaintiff to the defendant (para. 20). As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant. (at paras. 144-152)

63. In *PIPSC*, the Court did not specifically discuss the "absence of juristic reason" part of the unjust enrichment test. In *Garland v. Consumer's Gas Co.,* 2004 CarswellOnt 1558 (S.C.C.) (Tab 11), the Court redefined and reformulated the "absence of juristic reason" part of the unjust enrichment test into a two stage process.

> Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery...The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. (at paras. 44-46)

64. This Court considered the implications of imposing a constructive trust over property in CCAA proceedings in *Re: BA Energy Inc.*, 2009 CarswellAlta 1818 (Alta. Q.B.) ("*BA Energy*") (Tab 12). In *BA Energy*, one of the creditors claimed a constructive trust over funds held in the insolvent company's bank account. The bank account was established as a method of payment for invoices rendered by the creditor, who was acting as an agent for the insolvent company.

65. The Court held that there was no equitable duty or obligation between the parties. While there were contractual obligations, such a relationship did not engage the wider considerations and deterrence factors for a constructive trust to be imposed. Further,

> It would be unfair to B.A. Energy's other creditors to impose a constructive trust in the circumstances. As noted in *Canada Deposit Insurance Corp. v. Principal Savings & Trust Co.,* [1998] A.J. No. 756 (Alta. Q.B.) at para. 44, because a constructive trust is an equitable remedy imposed by the court, the effects of imposing such a remedy on all parties must be considered prior to making such an order. (at para. 28)

66. The Court found that it was doubtful that there was any unjust enrichment because of the contract between the parties, and the creditor's failure to access the funds in the bank account in a timely fashion prior to the CCAA proceedings constituted a juristic reason. The creditor was not to be given priority over other unsecured creditors through the use of a constructive trust remedy.

67. Analyzing the case at Bar, the Canmore Lands have not been obtained "wrongfully" by the District. There is no evidence that the District was a fiduciary to the Congregation. There is no evidence that the District was acting as an agent for the Congregation. Rather, the Canmore Lands were only acquired by the Congregation receiving financial assistance from the District. With respect to the church building, the District suggested an arrangement under which it would be able to provide the Congregation with a church building to carry its ministry out of, and this was acceptable to the Congregation. Thus, the first two conditions referred to in *PIPSC* for "wrongful conduct" are not present. It is, therefore, unnecessary to impose a proprietary remedy as suggested by the third condition.

68. Further, considering the fourth condition from *PIPSC*, there are factors that would render the imposition of a constructive trust unjust in the circumstances. There are 988 intervening creditors, the remaining CEF Depositors, who will be adversely affected by the imposition of a constructive trust or the transfer of the Canmore Lands to the Congregation. Significantly less funds will be available for distribution to the remaining CEF Depositors if the District is not able to sell the Canmore Lands. It is submitted that this is not a situation where "good conscience" requires the Court to impose a construct trust remedy.

69. Turning to the analysis of the unjust enrichment test, it is submitted that there has been no enrichment of the District nor is there any corresponding deprivation of the Congregation. If anything, the Congregation has been enriched by the District's munificence. While it is correct that the Congregation initially purchased the initial portion of the Canmore Lands in its name, it only was able to do so by taking out the First Loan with and receiving a grant from the District. During the course of the First Loan the District, as part of its subsidy program, made payments against the First Loan. Over the past 23 years, the Congregation has continued to receive subsidies and financial contributions from the Outreach Department of the District. The Congregation was also permitted to continue to occupy the Canmore Lands and only has had to pay nominal rent amounts. It is submitted that the Congregation's application for a constructive trust fails on the first two parts of the unjust enrichment test.

70. Further, the Congregation's application also fails the third part of the unjust enrichment test as there is a juristic reason for any enrichment. The District and the Congregation entered into a financial arrangement to transfer the Canmore Lands to the District, with the District providing the Congregation the Option. This financial arrangement was reduced to a written contract between the parties in the 1993 Lease.

71. Under the juristic reason part of the test, the Court also needs to consider the intervening CCAA. Prior to the CCAA, the Congregation took no steps to claim that the Canmore Lands were held in trust, by registering a caveat or otherwise. Indeed, on more than one occasion, they advised representatives of the District that they would never be able to afford to purchase the Canmore Lands. Imposing a constructive trust upon the Canmore Lands would have an adverse affect upon the remaining CEF Depositors, and would result in the Congregation receiving a huge windfall when it has contributed very little financially to the Canmore Lands. Allowing the Congregation's application would be giving the Congregation priority over the unsecured creditors.

Robinson Questioning page 27, line 27 to page 28, line 18

72. Finally, it is submitted that if the Congregation is entitled to some interest in the Canmore Lands, then damages is an appropriate remedy. Although there is a church building on the Canmore Lands, it is not necessary for worship to take place in that particular building. Worship can be performed practically anywhere at any time. The Canmore Lands are not so unique that an order of specific performance is necessary in this instance.

Robinson Questioning, page 29, lines 16-22

73. The Congregation's application for a constructive trust fails all parts of the test for this equitable remedy and should be dismissed.

74. As the Congregation has no equitable interest in the Canmore Lands, the District is requesting an Order to have the Congregation's caveat discharged from title.

Land Titles Act, R.S.A. 2000, c. L-4, s. 140 (Tab 13)

IV. CONCLUSION

75. Considering the overall relationship between the parties and the circumstances under which the written documents were made, it is submitted that there was not an intention to create any legally binding agreement between the District and the Congregation. Rather, the District was setting up and paying for a "Mission congregation" in order to carry on its works of ministry.

76. If the Court finds that there was an intention to create contractual relations, then it is submitted that the Canmore Lands were transferred to the District and the District granted the Congregation an option to repurchase the Canmore Lands. The arrangement between the

parties cannot be characterized as an agreement for sale because while the District agreed to sell the Canmore Lands to the Congregation, there was no corresponding obligation from the Congregation to buy them. The arrangement also cannot be characterized as a mortgage because the clear wording of the 1992 Letter and the 1993 Lease state that payment of something more than just repayment of the Cost Account was required in order for the Canmore Lands to be transferred to the Congregation.

77. The District is not estopped from relying upon the Option. There is no evidence of any representations or promises being made by the District to the Congregation to the effect that the Canmore Lands would be transferred once the Cost Account was paid. The opposite occurred. The District made it clear in several pieces of correspondence and the Consent to Rent Agreements that the wording of the Option would be relied upon and that the District was the owner of the Canmore Lands.

78. The District is not holding the Canmore Lands in a constructive trust as there was no "wrongdoing" on behalf of the District in acquiring the Canmore Lands, and there has been no unjust enrichment. Furthermore, there is a juristic reason as the parties entered into the written leases. Holding otherwise, would be giving the Congregation priority over the other creditors in the CCAA proceedings in circumstances when it had not asserted any entitlement to the Canmore Lands previously.

79. In summary, the Congregation is asking this Court to award specific performance of an oral contract that is based upon the beliefs of the Congregation's Affiants. Before the Court can grant specific performance, the Court needs to consider all of the equities between the parties and whether in the circumstances of this case such an award would be unjust, unfair or highly unreasonable.

Makowecki v. St. Martin, 1990 CarswellAlta 433 (Alta. Q.B.) at para. 65 (Tab 14)
Roma Construction Ltd. v. Excell Venture Management Inc., 2007 CarswellAlta 820 (Alta. Q.B.) at paras. 33 and 38 (Tab 15)

80. The following circumstances militate against granting specific performance of the alleged contract put forward by the Congregation:

(a) The Congregation has paid only approximately $30,000 toward the Canmore Lands and stands to gain a property valued at in excess of $1 million according to the most recent tax assessed value.

(b) The Congregation attempted to induce the District to deposit its cheques under the guise of donations when they were really intended to be contributions toward the Cost Account and taxes in order to bolster the Congregation's application.
(c) The District has paid for the construction of the church building on the property and has contributed to maintaining the Canmore Lands.
(d) The District has provided significant subsidy and grant amounts to the Congregation.
(e) The Congregation has acknowledged in writing that the District is the owner of the Canmore Lands.
(f) The Congregation failed to assert any interest in the Canmore Lands, by filing a caveat or otherwise, until after the CCAA proceedings were commenced.
(g) If the Canmore Lands are awarded to the Congregation, the Congregation will be receiving a significant windfall to the detriment of the remaining CEF Depositors when the funds to build the church building came from the CEF.
(h) It is likely that the Congregation will not be able to maintain the payments and the debt servicing ratio on its proposed new financing and the Canmore Lands will have to be sold or foreclosed on in the future.

81. It is submitted that the District is the owner of the Canmore Lands and should be entitled to sell them as part of the District Plan. As such, the Congregation's caveat should be discharged from the title to the Canmore Lands.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Bishop & McKenzie LLP

Per: _____
Francis N. J. Taman,
Solicitors for the Applicants

LIST OF AUTHORITIES

1. *Ford v. Keller,* 1979 CanLII 1047 (Alta. Q.B.)
2. *Rosscup v. Westfair Foods Ltd.,* 1999 CarswellAlta 754 (Alta. Q.B.)
3. *Hole v. Hole,* 2016 CarswellAlta 145 (Alta C.A.)
4. *259202 Alberta Ltd. v. Barnieh Investments Ltd.*, 1984 ABCA 99 (Alta. C.A.)
5. *Kreick v. Wansbrough,* [1973] S.C.R. 588 (S.C.C.)
6. *Sail Labrador Limited v. Navimar Corp.,* [1999] 1 S.C.R. 265 (S.C.C.)
7. *Rapatax (1987) Inc.v. Cantax Corp.*, 1997 CarswellAlta 319 (Alta. C.A.)
8. *Wincal Properties Ltd. v. Cal-Alta Holdings Ltd.,* 1983 CarswellAlta 5 (Alta. Q.B.)
9. *Scholz v. Scholz,* 2013 CarswellBC 1956 (B.C.C.A.)
10. *PIPSC v. Canada (Attorney General)*, 2012 CarswellOnt 15718 (S.C.C.)
11. *Garland v. Consumer's Gas Co.,* 2004 CarswellOnt 1558 (S.C.C.)
12. *Re: BA Energy Inc.*, 2009 CarswellAlta 1818 (Alta. Q.B.)
13. *Land Titles Act,* R.S.A. 2000, c. L-4, s. 140
14. *Makowecki v. St. Martin,* 1990 CarswellAlta 433 (Alta. Q.B.)
15. *Roma Construction Ltd. v. Excell Venture Management Inc.,* 2007 CarswellAlta 820 (Alta. Q.B.)

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Alberta Supreme Court
Ford v. Keller
Date: 1979-05-11

G. B. Gawne and C. C. Johnston, for plaintiff.

A. M. Rodnunsky, for defendant.

(Vegreville No. 2907)

11th May 1979.

[1] MILLER J.:— This is an action by the executrix of the estate of Francis Ford Jr. against Frank P. Keller for an order declaring the estate to be the purchaser of certain lands owned by the defendant and for an order directing the registrar of the North Alberta Land Registration District to cancel the existing certificates of title and to issue new ones in the name of the estate. The defendant denies that any enforceable sale of the said lands ever took place.

[2] The evidence disclosed that at all material times the defendant was the registered owner of the three parcels of farm land totalling approximately 400 acres which are the subject matter of this action. The defendant also owned and lived on other farm lands but these were located some distance away from the three parcels involved in this action. The defendant was interested in leasing the parcels as he found it difficult to farm them from a distance.

[3] In 1964 the late Francis Ford Jr. was farming in the same area as the three parcels owned by the defendant. The defendant and Ford entered into a lease agreement in writing dated 24th February 1964 whereby Ford agreed to lease 320 acres for nine years from 1st January 1964 at a monthly rental of $80 plus an undertaking to break 180 acres of the land by 1968. The defendant was to pay the taxes on the land and Ford was to receive all of the crops. On 13th March 1964 the parties entered into a similar lease agreement for an 80-acre parcel at a monthly rental of $20 plus an undertaking to break 60 acres by 1968, the same to be for a period of nine years from 1st January 1964.

[4] The evidence discloses that Ford lived up to the terms of the lease without incident.

[5] Alma Ford, the widow of Francis Ford Jr., testified that, in March of 1971, when the two leases still had over a year to run, her husband told her he was going to try and see if he could make a deal with the defendant to purchase the 400 acres. His daughter

then testified that she was living with her parents at the time and was able to use a typewriter. She said her late father asked her to type out a document for him one afternoon and she complied. The document she typed was entered as Ex. 10 in the trial and will be referred to later. Mrs. Ford then said that her late husband took the document, made a telephone call to the defendant, then told her he was going to visit the defendant at his farm house to talk a deal on the 400 acres. She testified that he returned a few hours later and she noticed a piece of paper sticking out of his shirt pocket. She said she understood from her husband that some arrangement had been made with Keller but she was unclear as to the details. She further testified that she noticed Ex. 10 amongst papers on her husband's desk a few days after he said he had been at the defendant's farm and found the document amongst his papers after his death when she was going through things for probate purposes.

[6] Exhibit 10 reads as follows:

> "March 27, 1971
>
> "I, Frank Kellar, agree to sell to Frank Ford the EV2 of 24-47-8 W4, 320 acres and the E½ of the NW¼ of 24-47-8 W4, 80 acres for the sum of $18,000.00. Rent to be paid by Frank Ford until payment is made. Taxes will be paid by Frank Kellar until payment is made.
>
> "Frank Kellar
>
> " 'Frank P. Kellar'
>
> " 'Frank Ford' "

[7] The terms of the first two leases were to have expired on 31st December 1972. Prior to the date of expiry, Ford and the defendant met again and negotiated a new lease for the 400 acres. The original two lease agreements and the new lease were all drawn up by a real estate agent doing business in the area where both parties resided. The new lease describes the lands and is for a period of six years from 1st January 1973 at a rental of $180 per month. No mention is made in the new lease of Ex. 10 although it was allegedly in existence at the time of the signing of the document lease on 18th August 1972.

[8] Ford paid the new rental up to the date of his death on 5th January 1976 and since that time the estate has paid all rentals. The lease expired on 31st December 1978.

[9] Alma Ford was appointed executrix of her husband's estate on 12th March 1976. Shortly after the death of her husband, Mrs. Ford said that Mr. Keller telephoned her and asked if the Ford family would be continuing with the lease. She informed Keller that the family intended to carry on with the lease and to make the monthly rental payments.

Nothing was said or done by her at that time or for several months thereafter about any agreement to purchase the property. Mrs. Ford later brought Ex. 10 to the attention of her solicitor. Sometime before 27th January 1977 a meeting was arranged with Keller at his solicitor's office in Wainwright, Alberta. On that occasion members of the Ford family attended along with their solicitor, Mr. Johnston. Mr. Johnston had already prepared transfers of the three parcels of land from Mr. Keller to Mrs. Ford, as executrix of her husband's estate. At the meeting held on 27th January 1977 Mr. Johnston tendered a certified cheque payable to Keller for $18,000 together with the transfers asking Keller to accept the cheque and sign the transfers. Keller refused to accept the cheque and to sign the transfers. He asked to see Ex. 10 and when he was shown it he promptly denied signing any such document and suggested that his signature on the same must be a forgery. Keller continues to refuse to sign any transfers and this has led to the present action.

[10] The plaintiff called a handwriting expert in the person of Donald Brown, a retired superintendent with 29 years' experience in the R.C.M.P., 22 of which were with the R.C.M.P. Crime Detection Laboratory doing handwriting comparison analysis. He was qualified as an expert in this field. Mr. Brown gave his opinion that the signature "Frank P. Kellar" on Ex. 10 was written by the same person who signed the three lease agreements as "Frank P. Kellar". Keller admits that he signed the lease agreements. Brown also testified that the same person signed "Frank Ford" on Ex. 10 and the lease agreements. He further gave the opinion that the figures written in on Ex. 10 stating the price to be of $18,000 were not written by Ford.

[11] Keller gave evidence at the trial. He admitted entering into the lease agreements. He further admitted discussing a possible sale of the three parcels to Ford and he thought that the discussion took place in the spring of 1971 at his home. Keller said he thought the going price for land in his area at that time was $100 per acre making the land involved worth approximately $40,000. He says he discussed this price with Ford who agreed that it was a fair price and said he would see if he could borrow enough from the Farm Credit Corporation to make the purchase. Keller testified that he never heard anything more from Ford regarding the purchase and assumed that Ford was unable to arrange for a suitable loan and had dropped the idea of buying the land. Keller says that nothing in reference to Ex. 10 was said by Ford at the time they negotiated the lease in 1972 except that Keller remembers Ford asking if an option to purchase might be included in the new lease and Keller says he refused to agree to any option. Keller suggested that

the same land on today's market would be worth approximately $350 per acre for a gross value of $140,000. He says there are presently 385 acres broken and the land is considered good farm land that produces excellent crops. Keller also testified that Mrs. Ford never mentioned anything after Ford's death about having an agreement to buy the land and that the first time he knew anything about a proposed purchase was the day he met with the Fords and Mr. Johnston at his lawyer's office in Wainwright. On cross-examination he said that he could not recollect any offer by Ford of $18,000 for the land.

[12] Mrs. Frank Keller also gave evidence. She recalled a time when Ford came to their home in the spring of 1971 and he discussed the purchase of the land with her husband. She said she remembers hearing a figure of $100 per acre mentioned by Ford. She further testified that as far as she knew her husband signed nothing that day and she says she never saw Ex. 10 before the day of the trial.

[13] Out of the evidence adduced at trial and the exhibits filed two questions emerge. Is there any document in writing sufficient to satisfy the Statute of Frauds signed by Keller in reference to a possible sale of the lands in question? If there is not then the matter should end. If there is such a document what then is the legal effect of the document insofar as a sale to the Ford estate is concerned?

[14] In answer to the first question I do not believe Keller's evidence that his signature on Ex. 10 is a forgery. I accept the evidence of the handwriting expert Brown and find that the memorandum Ex. 10 was indeed signed by the defendant Keller. This, then, leads to the second question because the memorandum itself identifies the parties, the land and the price and is signed by the person affected. It is a document that could possibly satisfy the Statute of Frauds and therefore should be considered by the court to determine whether a binding and enforceable contract came into existence at the time it was signed and, if so, whether the document is still in force.

[15] Counsel for the estate argues that the document is a binding agreement to purchase as opposed to any suggestion of its being an option. He suggests that the consideration binding the agreement was executory in nature and was based on mutual promises to be performed at a later date. The promise of Keller was to sell and transfer the land while Ford's promise was to pay the sum of $18,000 sometime in the future. Although the time of payment is not specifically mentioned in Ex. 10 the plaintiff's counsel argues that the court should imply a reasonable time and that this should be construed to be up to the expiry date of the last lease, namely, 31st December 1978. He further argues that the

rights of the purchaser under the agreement passed to his estate and that the estate, through the executrix, tendered the money within a reasonable time and is and was at all material times ready, willing and able to complete. It was also argued that s. 13 of the Alberta Evidence Act, R.S.A. 1970, c. 127, applied to this case and if so it would preclude the defendant from defeating the claim of the estate.

[16] Counsel for Keller contends that a close examination of Ex. 10 must lead the court to conclude that it was intended to be an option to purchase the lands. In support of this view counsel points out that the memorandum only purports to be binding upon Keller obligating him to sell the lands and there is no expressed obligation upon Ford to purchase. Payment for the land was to be made sometime in the future. Counsel argues that an option is a separate contract which must be supported by its own distinct consideration and that past consideration should not suffice. Even if the court does find some consideration for the option, it is argued that in the absence of specific provisions the option dies with the optionee and does not pass to his estate. It is further argued that if the option does not expire at some fixed time it may offend the rule against perpetuities.

[17] Counsel for the defendant then argued that if the court was to find that the document was not an option but purported to be an agreement for sale, again there was no consideration for the same and the document is so uncertain as to be void or at least unenforceable. In this regard counsel argues that the time for payment is unascertained and the question of when the price of $18,000 was inserted in the agreement is in doubt. Counsel further contends that laches applies as the price was only tendered six years after the memorandum was signed and then only after the land had appreciated substantially in value.

[18] For the purposes of this judgment I am prepared to examine the document from two points of view, namely, that it is an option or that it is an agreement for sale.

[19] A document need not be labelled or described as an option before the court can treat it as such. It is open to a court to examine the pith and substance of an agreement to determine its true nature. This principle is clearly stated by Dickson J. in the Supreme Court of Canada decision in *Politzer v. Metro. Homes Ltd.*, [1976] 1 S.C.R. 363 at 370, [1975] 5 W.W.R. 492, 3 N.R. 621, 54 D.L.R. (3d) 376:

> "The label which the parties give to an instrument will not necessarily determine its character. An instrument may be an option although stated therein to be an agreement for sale and the reverse is also true. The substance of the document, collected from its entirety, rather than the form, must determine its character. The

difference between a contract of purchase and sale and an option is, of course, that under a contract of purchase and sale one party is bound to sell and the other party is bound to buy, whereas an option merely gives a right to purchase without an obligation to do so."

[20] I am prepared, for now, to assume Ex. 10 was intended by the parties to be an option agreement. If that were to be the case I would find the document to be unenforceable on three grounds. Firstly, I cannot find, nor can I import any present consideration for the option. Certainly there is no separate sum of money or other valuable consideration referred to in the document which flowed from Ford to Keller at the time the document was signed. The only obligation imposed upon Ford in the document is to pay rent on the land until payment is made. No rent amount is mentioned but I think it is safe to assume that what is referred to in the document is the $100 per month rent that Ford was already obligated to pay Keller under the then existing lease agreements. In fact, the evidence discloses that the only payments ever made by Ford to Keller after the document was signed were the rental payments due under the existing leases and the subsequent lease. On 27th March 1971 Ford was already obliged to pay rent under the lease agreements and consequently, if it is argued that the undertaking to make these rental payments constitutes the consideration passing from Ford to Keller to bind the option contract, then it seems clear to me that such an obligation was past consideration which cannot be relied upon to bind the option contract. If it is argued that rental payments from subsequent leases which the parties might negotiate were contemplated as the consideration I would only comment that there was no obligation upon Ford to enter into any lease beyond the then existing leases and so I am unable to see how that possibility could constitute consideration.

[21] Secondly, the document does not provide a date or time when the option must be exercised. It may be argued that the court can infer a reasonable time for the acceptance of an option but it seems to me that this is such a critical part of an option agreement and that time is so important in such an agreement that the court should be very loath to make such an inference. Even if such an inference should be made I am of the view that the only ascertainable date which could have been in the minds of the parties on 27th March 1971 was the date when the two lease agreements expired, namely, 31st December 1972, and it is clear that no attempt to exercise the option was made by Ford prior to that date. Consequently the option would have expired long before the attempt was made to exercise it on 27th January 1977. This leads to the third ground, namely, the rule against perpetuities. If it is argued that the parties intended the option to remain open for acceptance so long as Keller was willing to lease the lands to Ford and Ford was prepared

to bind himself to lease the same, then it is obvious that the option at the time it was signed could remain open for more than 21 years and it becomes necessary to consider whether this course of conduct offends the rule against perpetuities. In my view the matter is resolved also in the *Politzer* decision, supra, where Dickson J. says at pp. 371-72:

> "The next question is whether the option infringes the rule against perpetuities... It can, I think, be taken as settled law in Canada since the judgment of Judson J. speaking for the majority of the Court, in *Frobisher Ltd. v. Can. Pipelines & Petroleums Ltd.,* [1960] S.C.R. 126, 21 D.L.R. (2d) 497, that an option to purchase land for a named consideration gives rise to an equitable interest in land. The interest is not, however, so vested as to be immune from the rule against perpetuities if the option can be exercised beyond the perpetuity period; in this case, since no life is specified, 21 years. In the recent judgment of this Court in *Can. Long Island Petroleums Ltd. v. Irving Indust. (Irving Wire Products Division) Ltd.,* [1975] 2 S.C.R. 715, [1974] 6 W.W.R. 385, Martland J. found the rationale to be accurately stated in the following passage from Morris and Leach, *The Rule Against Perpetuities,* 2nd ed., p. 219:
>
> " 'The reasoning by which this result was reached was as follows: An option to purchase land is specifically enforceable. This gives the optionholder an equitable interest in the land; this interest is contingent upon his election to exercise the option. Contingent interests in land are void unless they must vest (if at all) within the perpetuity period. Therefore, an option to purchase which may be exercised beyond the perpetuity period is void to the extent that it creates an interest in land.'
>
> "Metropolitan Homes obtained a contingent equitable interest, the contingency being the election to exercise its right to purchase Politzer's lands by making the payment and executing the mortgage referred to in para. 1(c) and (d) within 30 days of Metropolitan Homes (a) executing an agreement for residential and/or commercial subdivision and development with the City of St. Vital for the area of which Politzer's lands form a part and (b) obtaining the necessary governmental approvals on a plan of residential and/or commercial subdivision. Until the election to which I have referred was made, Politzer could not tell whether he would ever be obliged to convey the land. Nothing in the agreement assured that the election would be made within the perpetuity period. Metropolitan Homes indeed strenuously resisted every attempt by Politzer to have the agreement amended to state an expiry date. The effect of the agreement, as Solomon J. properly observed, was to oblige Politzer to hold the land for Metropolitan Homes in perpetuity or until Metropolitan Homes and the City of St. Vital were ready to sign a development agreement. Although it was very likely that the development agreement would be executed at some time within two to 15 years from the signing of the option agreement, the rule against perpetuities is concerned with the certainty of vesting, not with the likelihood of vesting. It is elementary that in Canada there is no wait and see rule: the interest must be good in its creation."

[22] I should mention that this whole area may now have been changed in Alberta by virtue of the passage of the Perpetuities Act, 1972 (Alta.), c. 121, which does specifically state that the courts may have to wait and see whether the contract is incapable of being performed within the perpetuity period. However, this Act did not come into force in Alberta until 1st July 1973 and s. 25 of the Act specifically states that a transaction of the sort

involved in the case at bar is only covered by the Act if the document giving rise to the problem comes into existence after 1st July 1973. It seems obvious that the document in issue in this case, having come into existence in March 1971, is not covered by the provisions of the Perpetuities Act.

[23] In the result if the document is an option, on either one of the three grounds already mentioned, it would not now give rise to an order for specific performance of the agreement. Having come to this conclusion I do not find it necessary to consider whether the option rights passed to Ford's estate.

[24] Let me now assume that the parties intended the document to be an agreement for sale. Again the question of consideration must be examined. Was there executory consideration in this transaction?

[25] Cheshire & Fifoot's Law of Contract, 9th ed., at p. 66, defines the term "executory consideration" as follows: "Consideration is called executory when the Defendant's promise is made in return for a counter-promise from the Plaintiff".

[26] Again one must carefully examine Ex. 10. In it Keller promises to sell the land to Ford but nowhere in the document is there a counter-promise by Ford to purchase the land from Keller. It seems to me that the very basis of executory consideration, namely, a promise in return for a counter-promise, is absent from Ex. 10. If it is argued that Ford's counter-promise was to pay rent that was already provided for under the leases, then I have already found this to be past consideration which cannot be relied upon by the estate to establish consideration for this contract. On this ground alone I find the document to be unenforceable as an agreement for sale.

[27] It further was argued that Ex. 10 cannot be enforceable as an agreement for sale as it is too uncertain in many of its key terms. There are problems such as: when and how was the price of $18,000 inserted in the document? when must payment be made by the purchaser? and does any of the rent apply on the purchase price? but I think those problems might have been resolved by a court if everything else was in order.

[28] There is one other point which I think must be considered. The remedy sought is the equitable relief of specific performance of the alleged contract. It must be noted that Ford lived for almost five years after the signing of Ex. 10 but did nothing to conclude the purchase at a price which, according to the evidence of Keller which was not disputed, would have amounted to a tremendous bargain for the lands. Nor did he apparently ever

discuss his deal with his wife and daughter after he obtained Keller's signature on Ex. 10. It seems almost inconceivable that nothing would be mentioned in the last lease signed over a year after Ex. 10 was executed if Ford thought he had already made a deal to purchase the property. No effort was made by the estate to act on the document until almost a year and a half after Ford died even though Mrs. Ford had legal authority to act when she was appointed executrix on 12th March 1976 and presumably, if I can take judicial notice of inflationary trends, the lands had appreciated still more in value after the date of Ford's death. I am of the view that this is not a case where the court should exercise its discretion to grant the equitable remedy of specific performance and I would decline to do so even if I am wrong in my finding on the lack of consideration.

[29] Having come to the conclusion that the document itself upon which the action is based is not a binding contract, I do not think s. 13 of the Alberta Evidence Act has any application to the matter.

[30] In the result the plaintiff's action is dismissed. Because of the position taken by the defendant in denying his signature of Ex. 10, a position which I have rejected, I do not allow costs to the defendant.

[31] If the plaintiff does not discharge its caveat filed against the lands within 30 days of the date of entry of the formal judgment then there will be an order directing the registrar of the North Alberta Land Registration District to remove the said caveat from the titles.

Action dismissed.

2

1999 ABQB 629
Alberta Court of Queen's Bench

Rosscup v. Westfair Foods Ltd.

1999 CarswellAlta 754, 1999 ABQB 629, [1999] A.J. No. 944, [2000] 2 W.W.R. 125, 248 A.R. 275, 73 Alta. L.R. (3d) 208, 99 C.L.L.C. 210-048

Chris Rosscup, Plaintiff and Westfair Foods Ltd., Defendant

Clark J.

Judgment: August 6, 1999
Docket: Calgary 9801-03839

Counsel: *Kurt W. Stilwell*, for the plaintiff.
Victor C. "Dick" Olson, for the defendant.

Subject: Employment; Public

Headnote

Employment law --- Termination and dismissal — Notice — Effect of contractual terms regarding notice

Employee was employed by employer for more than 11 years — One year before her dismissal, employee signed document provided by employer, which attempted to vary employment contract by unilaterally reducing notice employee would be entitled to upon dismissal, without cause, and by setting out discretionary nature of bonus scheme, which constituted significant part of employee's wages — Document provided that employees entitled to two weeks' notice for every year worked up to maximum of 78 weeks' notice — Employee was given 10 months notice of changes before they became effective — Employee was dismissed, without cause, with 24 weeks' pay in lieu of notice — Employee brought action for damages for wrongful dismissal — Action allowed — Parties had implied agreement from beginning of employment relationship that employees entitled to one month's notice for each year worked — Document signed by employee one year prior to dismissal did not create contract — Employer simply handed document to employees and told them to acknowledge receipt by signing it — Parties did not share common intention to vary employment contract — Employer may make substantial and unilateral changes to terms of employment contract if employee is given reasonable notice of such changes — Employer was entitled to dismiss employee with 24 weeks' pay in lieu of notice, as it met minimum standards set out in Employment Standards Code — Employment Standards Code, S.A. 1996, c. E-10.3.

Contracts --- Formation of contract — Consensus ad idem — Certainty of terms — Consideration

Employee was employed by employer for more than 11 years — One year before her dismissal, employee signed document provided by employer, which attempted to vary employment contract by unilaterally reducing notice employee would be entitled to upon dismissal, without cause — Employer simply handed document to employees and told them to acknowledge receipt by signing it — Document provided that employees entitled to two weeks' notice for every year worked — Employee was dismissed without cause with 24 weeks' pay in lieu of notice — Employee brought action for damages for wrongful dismissal — Action allowed — Parties had implied agreement from beginning of employment relationship that employees entitled to one month's notice for each year worked —

Document signed by employee one year prior to dismissal did not create contract — Parties did not share common intention to vary employment contract — Employee gained nothing in return for accepting shortened notice period — Lack of both common intention and consideration, flowing from employer to employee, were sufficient grounds to find no bilateral variation of employment contract.

Employment law --- Termination and dismissal — Practice and procedure — Remedies — Damages — Calculation of quantum

Employee was employed by employer for more than 11 years — Employee was dismissed, without cause, with 24 weeks' pay in lieu of notice — In final year of employment, employee's base salary was $53,000 — For four consecutive years before termination, employee's base salary was increased by $1,500 each year — Employee also made bonuses that were reflection of management performance — Employee brought action for damages for wrongful dismissal — Action allowed — 24 weeks' pay in lieu of notice was appropriate notice in circumstances — Employee was entitled to unpaid bonuses at date of termination — Employee was entitled to base salary during notice period, in amount of $1,048 per week, for 24 weeks — Employee was entitled to bonus salary during notice period in amount of $46,138, which was derived from profit and loss statements from employer — Since employee was not working during notice period, bonus amounts she would have earned during notice period would have been amounts earned by employee's successor — Severance payments already made to employee were deducted from total wages owing to employee — Interest on unpaid wages, base salary and bonuses ran from date they were due until date paid.

Employment law --- Termination and dismissal — Practice and procedure — Remedies — Damages — Bonuses

Employee employed by employer for more than 11 years — One year before her dismissal, employee signed document provided by employer, which attempted to vary employment contract by unilaterally reducing notice employee would be entitled to upon dismissal, without cause, and by setting out discretionary nature of bonus scheme, which constituted significant part of employee's wages — Employee dismissed, without cause, and with 24 weeks' pay in lieu of notice — Employee brought action for damages for wrongful dismissal — Action allowed — Employee's quarterly bonus payments were discretionary in form only and, in substance, constituted integral part of her regular remuneration — Bonus payments fell under definition of "wages" in Employment Standards Code — Employee was entitled to unpaid bonuses at date of termination — Employee was entitled to bonus salary during notice period in amount of $46,138, which was derived from profit and loss statements from employer — Since employee was not working during notice period, bonus amounts she would have earned during notice period would have been amounts earned by employee's successor — Employment Standards Code, S.A. 1996, c. E-10.3.

Table of Authorities

Cases considered by *Clark J.*:

Farber c. Royal Trust Co. (1996), 145 D.L.R. (4th) 1, [1997] 1 S.C.R. 846, 97 C.L.L.C. 210-006, *(sub nom. Farber v. Cie Trust Royal)* 210 N.R. 161, 27 C.C.E.L. (2d) 163 (S.C.C.) — applied

Holland v. Midland Walwyn Capital Inc. (1993), 124 N.S.R. (2d) 204, 345 A.P.R. 204 (N.S. S.C.) — applied

Lyonde v. Canadian Acceptance Corp. (1983), 3 C.C.E.L. 220 (Ont. H.C.) — considered

Machtinger v. HOJ Industries Ltd., 40 C.C.E.L. 1, *(sub nom. Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, *(sub nom. Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022, [1992] 1 S.C.R. 986 (S.C.C.) — considered

Maier v. E & B Exploration Ltd., [1986] 4 W.W.R. 275, 69 A.R. 239, 44 Alta. L.R. (2d) 273 (Alta. C.A.) — distinguished

Schellenberg v. Marzden Artistic Aluminum Ltd. (November 10, 1986), Doc. CA004241 (B.C. C.A.) — distinguished

Turner v. Canadian Admiral Corp. (1980), 1 C.C.E.L. 130 (Ont. H.C.) — considered

Williams v. Westfair Foods Ltd. (1996), Doc. Calgary 9501-13571 (Alta. Q.B.) — considered

Statutes considered:

Employment Standards Code, S.A. 1996, c. E-10.3
Generally — referred to

s. 1(1)(x) "wages" — considered

s. 1(1)(x) "wages" (ii) — considered

s. 57(1) — considered

s. 61(1) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C [rep. & sub. Alta. Reg. 390/68] — referred to

ACTION by employee for damages for wrongful dismissal.

Clark J.:

1 This is an action for wrongful dismissal brought by Christine Rosscup against Westfair Foods Ltd. ("Westfair"). The issues to be decided include the length of notice period to which Ms. Rosscup is entitled and whether or not a management bonus should be included in the notice period wages. Cause of the dismissal and mitigation are not in issue.

2 Ms. Rosscup worked for Westfair for more than eleven years. When she was dismissed on January 2, 1998, she held the position of Front End Division Manager for Real Canadian Superstores and the Real Canadian Wholesale Club. Prior to her dismissal, Ms. Rosscup was never advised that her work was in any manner unsatisfactory. On the contrary, she was praised for her work and received regular salary increases and promotions.

3 One year prior to her termination, Ms. Rosscup signed a document provided by Westfair. The document was Westfair's attempt to vary the parties' employment contract. Specifically, the document purported to unilaterally reduce the notice period to which Ms. Rosscup would be entitled upon termination without cause. In addition, the document set out the discretionary nature of "participation plan" payments, a type of bonus scheme used by Westfair, which constituted a significant proportion of Ms. Rosscup's wages.

Issues

4 At trial, Westfair neither disputed Ms. Rosscup's contention that she was dismissed without cause, nor alleged that her efforts to mitigate were unreasonable. Prior to trial, Westfair paid Ms. Rosscup an amount in satisfaction of her

claim for unpaid wages. The only issues which remain to be decided are (i) the appropriate length of the notice period, and (ii) whether or not wages paid in lieu of notice should include bonus payments in addition to base salary.

5 In order to make a ruling on these two main issues, I must first determine whether a contract was created when Ms. Rosscup signed a "Terms and Conditions" document presented to her by her employer. I find that the signature did not create a contract. I must then go on to consider whether Ms. Rosscup acquiesced to changes in her employment contract as set out in the document she signed when, despite her awareness of the purported changes, she continued to work for Westfair. I find that Ms. Rosscup did not acquiesce. Finally, I must decide whether or not Westfair was entitled to unilaterally vary the employment contract it had with Ms. Rosscup by giving her reasonable notice of the changes. I find that it was so entitled.

Facts

6 When Christine Rosscup was dismissed by Westfair, she was 43 years old and held a grade 12 diploma. She and her husband have three children. Mr. Rosscup also was, and continues to be, employed by Westfair.

7 Ms. Rosscup first went to work for Westfair in July 1985. She was trained as a Front End Supervisor of a single store in Edmonton. In March 1986, Ms. Rosscup resigned from her position. She was hired back by Westfair to the same position at a different Edmonton store in September 1986.

8 Front end operations includes customer service counters and cashiers. Ms. Rosscup's responsibilities included ensuring that customers were properly served, that front end employees were well trained, and that money was collected and accurately accounted for.

9 As a supervisor, Ms. Rosscup's remuneration consisted of two parts. She received a fixed base salary as well as "participation plan" payments, which were commonly referred to as "bonus" payments. Bonus payments were calculated each month based on the profit and loss statements of the store where she worked. In later years as she was promoted through the ranks, the formula to calculate the bonus amount varied, but the concept remained the same.

10 Bonus payments were made quarterly. The dates on which the bonus was paid lagged the period during which it was earned as the payment calculation was a function of profit and loss figures that were not immediately available at the end of each quarter. Fifty percent of the bonus from one quarter was paid midway through the following quarter. The other fifty percent was paid midway through the next quarter.

11 In August 1987, Ms. Rosscup was asked to sign a document which set out, among other things, the eligibility requirements for receiving bonus payments (the "1987 Document"). The 1987 Document stated that any employee who resigned, was laid-off, was terminated or was fired for cause before the bonus payments were made would not be entitled to receive the payment unless "the Company, in its absolute discretion, makes a gratuitous payment to the employee". Signing the document was a pre-condition to receiving the bonus. Ms. Rosscup signed the document.

12 In 1988, Ms. Rosscup was promoted to the position of Assistant Division Manager for the Front End Division of the Real Canadian Superstores in Alberta. In 1990, she became the Division Manager.

13 In December 1995, Westfair commenced printing five policy statements at the bottom of every bonus calculation statement that its employees received. The five policy statements are as follows:

> 1. Employees are not considered to have earned any bonus until the day it is paid. Only non-union employees in confirmed positions are eligible. Relief employees do not qualify.
>
> 2. Any employee who resigns or is terminated before the day the bonus is paid will not be entitled to receive any monies, unless the company in its absolute discretion, makes a gratuitous payment to the employee.

3. If an employee is unable to work two or more weeks in a period, excluding earned vacation, no monies will be paid for this period.

4. If an employee is transferred or promoted during the first two weeks of the period, they will earn bonus for the entire period in their new position. If transferred or promoted in the last two weeks, they will earn bonus for the entire period in their previous position only if they are coming from a position that they were receiving bonus in.

5. Management reserves the right to discontinue or modify any or all of the provisions of the plan.

14 In November 1995, Ms. Rosscup signed a second document at the request of Westfair senior management (the "1995 Document"). The 1995 Document was very similar to the 1987 Document in that both stressed the discretionary nature of bonus payments.

15 In 1997, Ms. Rosscup's responsibilities were expanded to include management of the Front End Operations of the Real Canadian Wholesale Club in addition to Real Canadian Superstores. She held that position until the date of her dismissal the following year.

16 In 1997, Westfair management asked Ms. Rosscup and other employees to sign a third document (the "1997 Document"). The 1997 Document was significantly longer than either of the prior documents which Ms. Rosscup signed. The opening paragraph of the explanatory letter, which accompanied the 1997 Document stated:

Attached is notification of terms and conditions of employment that will apply to you in the future regarding hours of work, the bonus and participation plans and severance. We have determined this to be necessary due to legal precedents that create an unacceptable level of liability...

In consideration of your length of service with Westfair Foods Ltd., the terms and conditions will be effective on NOV 01/97. If you are unclear on the meaning and effect of this document, you may wish to seek independent legal advice...

Signing the document simply indicates that you have received notification of these terms and conditions.

17 Different employees received letters with different effective dates depending upon their lengths of service for Westfair.

18 The 1997 Document reiterated the contents of the 1987 Document and 1995 Document with respect to the discretionary nature of bonus payments. It stated that bonus monies were not earned prior to the payment date. Hypothetically, an employee who was terminated prior to a bonus payment date would not be entitled to payment of the bonus despite the fact that the bonus had been earned prior to the dismissal.

19 In addition to setting out the terms upon which bonus payments were made, the 1997 Document also set out Westfair's severance policy. It stated that employees who were terminated without cause would be entitled to two weeks of notice for every partial or completed year of employment up to a maximum of seventy-eight weeks notice. Prior to receiving this document, Ms. Rosscup had always understood her employment contract to entitle her to four weeks notice for every year of service.

20 The 1997 Document further stated that by virtue of the discretionary nature of the bonus plan, severance payments made in lieu of notice would include the employee's base salary only and would not include bonus amounts.

21 Ms. Rosscup reluctantly signed the 1997 Document as requested by Westfair management. She testified that in signing the document, she was not accepting the terms and conditions set out by Westfair, but was simply acknowledging that she had received notice of them.

22 Two months after the new provisions of the 1997 Document purportedly came into effect, Ms. Rosscup was fired. At the dismissal meeting, Tom Fraser, a vice-president at Westfair, stated that he was unhappy with her performance in 1997. Ms. Rosscup was paid an amount equivalent to 24 weeks of her 1997 base salary in lieu of notice. The termination payment included neither bonus amounts payable during the notice period, nor bonus amounts which would have been earned during the notice period.

23 Despite reasonable efforts to find alternative employment after she was terminated by Westfair, Ms. Rosscup remained unemployed throughout 1998.

24 Several days before trial in May of this year, Westfair made a payment of $40,117 to Ms. Rosscup on a "with prejudice" basis. This amount represented the bonus payments which Ms. Rosscup would have received in the normal course had she been working for Westfair during the 24 week notice period. Specifically it included bonus amounts which had been earned during the third and fourth quarters of 1997 but had not yet paid out, as well as the first half of the bonus amount which would have been earned during the first quarter of 1998. The payment included neither the second half of the bonus payment which Ms. Rosscup would have earned during the first quarter of 1998, nor any of the bonus payment which she would have earned during the second quarter of 1998.

Analysis - Period of Notice

25 The first issue to be decided is the length of the notice period to which Ms. Rosscup was entitled. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), two employees were dismissed by their employer, a car dealer, who provided a short period of notice which met the parties' prior contractual understanding. *Machtinger* stands for the principle that the presumption that an employee is entitled to reasonable notice before termination is rebuttable if there is evidence that the parties have contractually agreed to some other period of notice.

26 The parties in this action did not have a written employment contract dating back to the beginning of the employment relationship, but they did have an implied contract. Before Ms. Rosscup was presented with the 1997 Document, she had always understood that Westfair's policy was to give one month of notice for every year of service if an employee were dismissed without cause. Ms. Rosscup testified that she had followed the one month per year of service notice period policy in carrying out her duties of hiring and firing staff members under her management. I accept that the parties had an implied contract with respect to this understood notice period length.

(I) Contractual variation of the severance policy

27 By way of the 1997 Document, Westfair purported to clarify and formalize the severance guidelines it followed for all employees. The explanatory letter to employees that accompanied the 1997 Document contains contradictory statements as to whether Westfair was attempting to change the implied employment contracts it had with its employees or was simply clarifying the terms of its existing employment contracts. It reads, in part:

> Attached is notification of terms and conditions of employment that will apply to you in the future regarding hours of work, the bonus and participation plans and severance... The severance provisions contained in this document simply formalize the severance guidelines that we have used for several years.

28 The fact that both the 1997 Document and the letter which accompanied it specify a date upon which the provisions of the Document were to become effective shed light on the matter. There clearly would be no sense in specifying an effective date if the 1997 Document were merely a written expression of existing policies. I accept that the 1997 Document was an attempt by Westfair to unilaterally change the employment contract it had with its employees. With respect to the severance policy provision, I find that Westfair was attempting to shorten the contractually understood notice period from four weeks notice for every year of service to two weeks notice for every year or partial year of employment with Westfair.

29 The fact that Ms. Rosscup signed the 1997 Document is strong evidence that she agreed to the changes and that they then became enforceable terms of her employment contract. The position that her signature did not signify her acceptance of the contents of the document and thereby create a binding employment contract, however, is supportable on several different grounds.

30 First, the parties did not share a common intention to vary the employment contract. There is no evidence that Westfair management explained any of the new policies to its employees or attempted to negotiate with them to any extent. Employees were simply handed the 1997 Document and told to acknowledge receipt of it by signing it. It is well established that for parties to be contractually bound, there must be a common intention to form a contract. There must be a "meeting of the minds". There was no such meeting of the minds in this case.

31 I accept Ms. Rosscup testimony that in signing the 1997 Document, she was acknowledging that she had received notice of Westfair's policies, but not that she agreed with those policies and intended that they become terms of her employment contract. She points to the last sentence of the 1997 Document in support of her position. It reads:

> By signing below, I ***acknowledge*** that I have received notification of the above terms and conditions. [Emphasis added]

It seems that even Westfair did not seriously expect its employees to agree to the terms of the 1997 Document and to sign it with the intention of creating a new contract.

32 A second ground upon which the proposition that Ms. Rosscup's signing of the 1997 Document did not create a new employment contract may be based is the insufficiency of consideration flowing from Westfair to Ms. Rosscup. The 1997 Document attempted to shorten the length of notice period Westfair employees would receive upon termination without cause. This benefit reduction would clearly be of value to Westfair. Employees like Ms. Rosscup gained nothing in return for accepting a notice period which is literally half as long as the notice period to which they had previously been entitled.

33 The lack of both a common intention to form a contract and consideration flowing from Westfair to Ms. Rosscup are sufficient grounds upon which to find that the 1997 Document was not a bilateral variation of the parties' employment contract. It is therefore not necessary to discuss the parties' unequal bargaining power at great length. It should be noted in passing, however, that as a 43- year-old woman with a grade 12 education and an annual income in excess of $100,000, Ms. Rosscup was not in a position to risk antagonizing her employer by refusing to sign the 1997 Document.

(ii) Positive Duty on Employees

34 The defendant cited *Schellenberg v. Marzden Artistic Aluminum Ltd.* (November 10, 1986), Doc. CA004241 (B.C. C.A.) in support of its position that after management purports to change a term of the employment without providing reasonable notice of the change, an employee has a positive obligation to either advise the employer that he accepts the change or to resign. The plaintiff employee in *Schellenberg* was found to have accepted his employer's repudiation of his employment contract when he continued to work for the employer for a period of two months following a reduction in his income.

35 The facts that Ms. Rosscup did not openly contest the policies set out in the 1997 Document, and that she continued to work for Westfair after the new policies were put to her should not be construed as evidence of her acceptance of these policies. *Schellenberg* should be distinguished from the present case. In *Schellenberg*, the employee was faced with a significant change to the existing commission arrangement. The change affected him immediately and noticeably, yet he chose to simply accept the lower wages and continue with his work. The change which Ms. Rosscup faced in her employment was not nearly as apparent to her as the change which Schellenberg faced was to him. From Ms. Rosscup's perspective in 1997, the reduced severance provisions did not affect her employment. At the time when the changes were proposed, she was satisfied with her position and wages at Westfair. After more than ten years of service with this same employer, Ms. Rosscup should hardly be expected to allege constructive dismissal and risk permanently damaging or

even ending her employment relationship with Westfair over a new policy which, she felt, did not and would not affect her. This is consistent with *Lyonde v. Canadian Acceptance Corp.* (1983), 3 C.C.E.L. 220 (Ont. H.C.) where an employee who had worked for a company for more than 21 years was found not to have condoned his employer's new policy of a shorter notice period when he did not protest the change because he thought that it would not affect him.

36 The defendant also cited *Maier v. E & B Exploration Ltd.*, [1986] 4 W.W.R. 275 (Alta. C.A.) in support of its position that Ms. Rosscup's continuation in her employment after Westfair purported to change the terms of the employment contract signified her acceptance of the changes. In *Maier*, the employer had unilaterally offered its key employees a stock option plan to induce them to continue in their employment. The court found that the employees' continuation at their jobs after their employer offered this benefit was both evidence of the employees' acceptance of the offer, as well as consideration flowing to the employer for the benefit. *Maier* should be distinguished from the present case where the employer's offer was to reduce an employment benefit rather than to increase one. Even if it could be said that Ms. Rosscup's continuation at her job was evidence of her acceptance of the change as the court found in *Maier*, there was still no consideration flowing from Westfair to Ms. Rosscup. I therefore find that Ms. Rosscup's continuation at work after the 1997 Document was disseminated was reasonable under the circumstances and does not prejudice her present contention that she did not accept the changes.

(iii) An employer's unilateral change to the employment contract when reasonable notice is given

37 Even if an employer and an employee fail to come to an agreement to vary the terms of their employment contract, *Farber c. Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 (S.C.C.) stands for the proposition that an employer may make substantial and unilateral changes to the terms of the employment contract if it gives the employee reasonable notice of such changes. During the notice period, the employee would of course be free to either accept the changes or to seek alternative employment. To disallow an employer to vary its contracts unilaterally upon giving reasonable notice would lead to a situation where an employer would be able to obtain the same result by simply terminating an employee with reasonable notice, then offering to re-hire that same employee at the end of the notice period upon the new terms.

38 When Westfair first introduced the changes to the severance policy, Ms. Rosscup had worked for Westfair for just over ten years. Based on her implied contract with Westfair at the time, it would be reasonable to infer that she was entitled to between ten and eleven months notice of any major changes to her employment contract. Westfair proposed to vary the terms of its employment contract with Ms. Rosscup in January of 1997. The 1997 Document stated that the changes would become effective on November 1, 1997. Ms. Rosscup was therefore given ten months notice of the changes to the severance policy before they became effective, and eleven and a half months notice before they became applicable to her. I find, therefore, that because Ms. Rosscup received reasonable notice of the new terms to her employment contract, the contract was effectively, albeit unilaterally, changed by Westfair prior to her dismissal. In addition, despite the fact that the newly stipulated severance policy provided for a notice period only half as long as that of the parties' prior understanding, it nevertheless meets provincially legislated minimum standards as set in the *Employment Standards Code* and is therefore enforceable.

39 On the date of her dismissal, Ms. Rosscup had worked continuously for Westfair for just over 11 years. The severance payment she received was calculated based on a 24 week notice period. This is consistent with the newly stipulated policy of providing two weeks notice for every year or partial year of service. I find that the notional notice period length Ms. Rosscup received complied with the parties' contract and was therefore adequate.

The plaintiff's entitlement to bonus payments

40 When Ms. Rosscup was terminated by Westfair, she was paid $24,462 in lieu of 24 weeks of notice. This amount was calculated using Ms. Rosscup's 1997 base salary. Ms. Rosscup claims that the severance payment should have included bonus income as well as base salary.

41 To determine the validity of this claim, the first step must be to consider the relevant provisions of the employment contract. I have already determined that the 1997 Document was a valid employment contract at the date of Ms. Rosscup's dismissal. Because the bonus payment provisions set out in the 1997 Document are consistent with, or more extensive than bonus payment provisions set out both in earlier documents as well as on the bottom of the monthly bonus calculation statement, I will only consider the provisions of the 1997 Document.

42 In support of the defendant's submission that Westfair was entitled to include only base salary in the severance payment, counsel pointed to provisions of the 1997 Document which clearly sets out the discretionary nature of bonus payments. His position is that bonus payments were not a regular and integral part of Ms. Rosscup's remuneration and therefore need not be included in her severance pay.

43 The defendant's argument is consistent with subsection 57(1) of the *Employment Standards Code* when it is read in conjunction with the definition of "wages". Subsection 57(1) states:

> Instead of giving a termination notice, an employer may pay an employee termination pay of an amount at least equal to the wages the employee would have earned if the employee had worked the regular hours of work for the applicable termination notice period.
>
> "Wages" is defined in subsection of s.1(1)(x) of the *Code* as follows:
>
> > "wages" includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include... (ii) a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency.

44 Whether or not bonus payments fall under the definition of "wages" and therefore must be included in termination pay turns on a determination of whether or not the bonus payments were actually discretionary and whether or not they related to hours of work, production or efficiency.

45 In determining whether or not the bonus was discretionary, I found the comments of Hutchinson J. in *Williams v. Westfair Foods Ltd.* (January 1, 1996), Doc. Calgary 9501-13571 (Alta. Q.B.), to be instructive when he quoted from *Turner v. Canadian Admiral Corp.* (1980), 1 C.C.E.L. 130 (Ont. H.C.) at 133:

> Persons at the plaintiff's level received an annual increase and bonus as a matter of course. Historically, increases and bonuses were forthcoming every year. The immediate past president of the company testified that these sums were regarded as part of the total compensation package of senior management. As I view the pattern, they formed and integral part of the applicable salary structure; and as far as the plaintiff and others in comparable positions were concerned, they were 'money in the bank' so to speak. The defendant is not entitled to deny the plaintiff the salary increase and bonus that would have accrued to him during the notice period. While technically there may be a discretion as the defendant argues as to whether these payments should be made to a particular employee, that discretion has never been exercised against an employee; and it would be unfair here in my opinion to deprive the plaintiff of these salary payments.

46 Hutchinson J. went on to find that:

> The size of the bonus as a component of the total remuneration package is a strong indication that it did form an integral part of the plaintiff's expected remuneration paid as it was over the past three years.

47 In the present case, Westfair's discretion to withhold or reduce a bonus payment had never been exercised in the eleven years of Ms. Rosscup's employment. The bonus was calculated using a widely known formula and duly paid every quarter. Ms. Rosscup testified that she believed the bonus was a part of her regular remuneration, and that she was therefore entitled to receive it. The fact that Westfair paid Ms. Rosscup the bonus both during her maternity leave

and on her final pay cheque after her 1986 resignation is evidence that the defendant also regarded the bonus as a nondiscretionary component of employee wages.

48 The bonus payments amounted to tens of thousands of dollars over the years. I find it difficult to believe that an employer would consistently make such large payments to its employees if the payments really were discretionary. The bonus was a very significant portion of Ms. Rosscup's total income. In her final year of employment with Westfair, the bonus amounted to more than half of Ms. Rosscup's total remuneration.

49 For all of these reasons I find that the quarterly bonus payments Ms. Rosscup received during her employment were discretionary in form only, but in substance were an integral part of her regular remuneration. Westfair's decision to designate the bonus as a discretionary payment has the appearance of a scheme used to minimize termination payments owed by Westfair to terminated employees. Westfair should not be permitted to circumvent the minimum employment standards set out in the *Employment Standards Code* by structuring its wages in this way. Because the bonus payments were not truly discretionary in nature, in the circumstances of this case they fall under the definition of wages set out in s. 1(1)(x) of the *Employment Standards Code* and must be included in Ms. Rosscup's termination pay.

50 Even if I had found that the payments were discretionary, they would still have come under the statutory definition of wages because they do not meet the second requirement set out in s. 1(1)(x)(ii) of the *Employment Standards Code*. This second requirement for payments to be excluded from the definition of wages is that the payments may not be related to hours of work, production or efficiency. Because the bonus payments in this case were calculated using figures from the company's monthly profit and loss statements, and because there is no evidence before me to suggest that the profit and loss statements are anything other than a reflection of the company's production or efficiency, I find that the bonus payments were in fact based on production or efficiency. These payments therefore fall under the definition of wages and must be included in Ms. Rosscup's termination pay in accordance with subsection 57(1) of the *Employment Standards Code*.

51 In support of its position that it was not required to include bonus amounts in Ms. Rosscup's termination pay, Westfair attempted to rely on the argument that it had an express contractual understanding with Ms. Rosscup that these payments would not be included in termination pay. Clause (e) from the 1997 Document states:

> If the Employee ceases to be employed by the Employer for any reason, including without limitation, if the Employee resigns, is laid off or his or her employment is terminated (with or without just cause), prior to the payment date, the Employee shall not earn any monies under the plan and shall not be entitled to any of the monies unless the Employer, in its absolute discretion, makes a gratuitous payment to the Employee.

52 It is noteworthy that the earlier wording of this provision, found in the 1987 Document, did not explicitly exclude bonus payments from an employee's termination payment if that employee had been terminated without cause:

> Employees who give a notice of resignation, receive notice of lay-off or termination, or are fired *for cause* before any of the monies listed above are earned or paid, shall be deemed not to have earned any of the monies and shall not be entitled to any of the monies unless the Company, in its absolute discretion, makes a gratuitous payment to the employee. [Emphasis added]

53 The decision to change the wording in the above provision is in line with Westfair's overall design of minimizing termination pay owed to employees who were fired without cause.

54 Because I have already found that the bonus payments should be included in the definition of wages, clause (e) of the 1997 Document is invalid as it conflicts with a plain reading of subsection 61(1) of the *Employment Standards Code* which states:

> Neither the wages, wage rate, nor any other term or condition of employment may be reduced by an employer between the time termination notice is given by the employer or employee and the date employment terminates, whether or not work is required to be performed during that period.

55 I therefore find that clause (e) of the 1997 Document is unenforceable to the extent that it purports to reduce a terminated employee's wages at the time a termination notice is given contrary to the *Employment Standards Code*. Bonus amounts which Ms. Rosscup would have earned during the notice period must be included in her severance pay.

56 I have serious concerns about the evidence I have heard concerning Ms. Rosscup's dismissal from Westfair. It is clear from Mr. Kent's memo, which accompanied the 1997 Document, that changes to employee contracts were introduced to minimize Westfair's liability to employees it chose to terminate. I am troubled by this scheme because, upon hearing the evidence, I have concluded that Westfair likely viewed Ms. Rosscup as a suitable employee upon whom to test the new policy because she was particularly vulnerable to her employer. Westfair management must have known that the fact that Ms. Rosscup's husband also worked for Westfair, and continues to work for Westfair, would likely make Ms. Rosscup hesitate before taking legal action in response to her dismissal. In addition, the timing of the dismissal appears orchestrated as it occurred very shortly after the reduction in her severance provisions became effective. The possibility that Westfair's senior management planned Ms. Rosscup's termination for a full year before it occurred cannot be dismissed. The evidence suggests that Ms. Rosscup had always been an exemplary employee. During the year before her dismissal, no senior manager ever advised Ms. Rosscup that her work was in any manner unsatisfactory or that she was in danger of being terminated. When she was ultimately dismissed, on the first day back at work after the New Year's holiday, it must have come as a terrible shock to Ms. Rosscup.

Damages

57 As a preliminary matter before I calculate the termination pay to which Ms. Rosscup is entitled, it should be noted that up until immediately before trial, Westfair withheld bonus payments which Ms. Rosscup had earned during 1997 but which were not payable until the first and second quarters of 1998. In an attempt to settle this matter immediately before trial, Westfair paid Ms. Rosscup $40,117. That amount covered the unpaid wages just mentioned as well as half of the first bonus amount Ms. Rosscup would have earned during the first quarter of 1998. These amounts are included in the somewhat complicated calculations which follow.

58 In determining the amount of termination pay to which Ms. Rosscup is entitled in lieu of notice, I am guided by the court in *Holland v. Midland Walwyn Capital Inc.* (1993), 124 N.S.R. (2d) 204 (N.S. S.C.). In that case, an employee with 31 years of service was constructively dismissed from his job at a stock brokerage firm when the company hired a new employee to essentially take over the plaintiff's job. The court calculated damages to be awarded in lieu of notice by determining what the employee's regular income would have been during the notice period, and then subtracting income earned from other employment during the same period.

59 In her final year of employment, Ms. Rosscup's base salary was $53,000. For four consecutive years before she was fired, Ms. Rosscup's base salary had increased by exactly $1,500 each year. For this reason I find that the most reasonable estimation of the annual base salary which Ms. Rosscup would have earned during the first 24 weeks of 1998 is $54,500. Because Ms. Rosscup did not find alternative employment during the notice period despite her reasonable efforts to do so, there is no question of reducing the award in this case.

60 Calculating the bonus which Ms. Rosscup would have earned during the first 24 weeks of 1998 is more complicated. Bonus amounts are, to some extent, a reflection of management performance as the final number is a function of profit and loss figures. Because Ms. Rosscup was not working for Westfair during her notice period, the bonus payments calculated for this time are a reflection of her successor's management performance. It is impossible to determine what the bonus would have been if Ms. Rosscup had continued to perform her duties. The bonus amount cannot be accurately extrapolated from payments in other years as there is no pattern to the increases and decreases of the payment.

61 In this instance, the best estimate of the bonus amounts which Ms. Rosscup would have earned during the notice period is the amounts earned by her successor during the notice period. While these figures are somewhat arbitrary, there is no evidence before me that the performance of Ms. Rosscup's successor made any significant difference to the bottom line of the profit and loss statements during the notice period. I will therefore use the bonus statements of the first two quarters of 1998, which counsel provided to me as an agreed exhibit, as the most appropriate estimates of the amount of bonus income Ms. Rosscup would have earned during the notice period.

Calculations

(I) Unpaid wages

62 The bonus amounts which follow were earned by Ms. Rosscup in 1997, but withheld until immediately before trial. The first figure in each line represents the bonus amount from the Real Canadian Superstore. The second figure is the bonus amount from the Wholesale Club.

Bonus earned during the third quarter of 1997:	$4,128 + $2,219
Bonus earned during the fourth quarter of 1997:	$18,152 + $2,925
Total unpaid wages at the date of termination:	$27,424

(ii) Base salary during the notice period

63 As previously stated, Ms. Rosscup would have earned an annual base salary of $54,500 during the notice period.

$54,500 / 52 weeks = $1,048 per week

$1,048 per week × 24 weeks notice = $25,154

Base salary portion of termination pay owed at date of termination: *$25,154*

(iii) Bonus salary during the notice period

64 Ms. Rosscup is entitled to bonus payments earned during the notice period. It is irrelevant that these payments would not normally have been made until later quarters. The total bonus payment earned during each quarter is the sum the bonus amount derived from the Superstores profit and loss statements and the bonus amount derived from the Wholesale Club profit and loss statements.

Bonus related to the first quarter of 1998: $19,775 + $5,610

Bonus related to the second quarter of 1998: $14,816 + $5,937

Total bonus related to the notice period: *$46,138*

(iv) Total amount of unpaid wages and termination pay owed to Ms. Rosscup on the date of termination

65 $27,424 + $25,154 + $46,138 = *$98,716*

(v) Deductions

66 When Ms. Rosscup was dismissed, Westfair made a severance payment of $24,462 in lieu of notice to her. Immediately before trial, Westfair paid Ms. Rosscup an additional amount of $40,117. This amount comprised bonus monies Ms. Rosscup had earned before her dismissal but which had not yet been paid out, as well as an amount representing the first half of the bonus payment Ms. Rosscup would have earned during the first quarter of 1998. The

calculation of this amount is set out on page 22 in the agreed statement of facts. These two payments must be deducted from the total award Westfair still owes Ms. Rosscup.

67 $98,716 - $24,462 - $40,117 = *$34,137*

I find that Ms. Rosscup is entitled to a further payment of $34,137 plus interest and costs.

Interest

68 Because Ms. Rosscup's award comprises a number of components, and because two payments were made to Ms. Rosscup in partial satisfaction of this award at different times, the interest calculations are somewhat complicated. They are further complicated by the fact that Westfair ordinarily paid out bonus amounts earned in one quarter over the following two quarters after the profit and loss figures from which they were calculated had been gathered. Interest on bonus payments related to the notice period will be calculated from the date of termination regardless of the fact that, in the normal course, these payments would not have been made until subsequent quarters. I have broken the interest calculations down to correspond with each element of the award set out in the prior calculations.

(I) Interest on unpaid wages

69 Interest on the $27,424 of unpaid wages will run from the date the wages were due, namely the date of termination, until the date the wages were paid, immediately before trial.

(ii) Interest on base salary portion of termination pay

70 The base salary portion of termination pay Westfair owed Ms. Rosscup on the date of termination was $25,154. On that date, Westfair only paid Ms. Rosscup $24,462. The difference of $692 is included in the total sum which Westfair still owes to Ms. Rosscup.

71 Interest on $692 will run from the date of termination until the date Westfair pays this judgment.

(iii) Interest on bonus salary portion of termination pay

72 The bonus salary portion of termination pay Westfair owed Ms. Rosscup on the date of termination was $46,138. One half of the bonus amount related to the first quarter of 1998, namely $12,693, was included in the $40,117 payment which Westfair made immediately before trial.

73 Interest on the $12,693 portion of the bonus component will run from the date of termination until the date it was paid, immediately before trial. Interest on the remaining $33,445 portion of the bonus component will run from the date of termination until the date Westfair pays this judgment.

Costs

74 Ms. Rosscup, having been successful, is entitled to costs. Costs will be calculated on the appropriate column of Schedule C of the Rules of Court. I am prepared to meet with counsel upon request should there be any question regarding the calculation of costs.

Action granted.

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2016 ABCA 34
Alberta Court of Appeal

Hole v. Hole

2016 CarswellAlta 145, 2016 ABCA 34, [2016] 6 W.W.R. 453, [2016] A.W.L.D. 611, [2016] A.W.L.D. 618, [2016] A.W.L.D. 619, [2016] A.W.L.D. 620, [2016] A.W.L.D. 621, [2016] A.W.L.D. 622, [2016] A.W.L.D. 623, [2016] A.J. No. 126, 262 A.C.W.S. (3d) 107, 27 Alta. L.R. (6th) 217, 393 D.L.R. (4th) 708, 53 B.L.R. (5th) 1, 612 A.R. 164, 662 W.A.C. 164

James F. Hole and Hole Consultants Ltd., Appellants (Plaintiffs) and James D. Hole, Jack Henry Hole, Harry Bruce Hole, Douglas Robert Hole, Hole Engineering Ltd., Kessa Holdings Ltd., Eloh Enterprises Ltd. and 512725 Alberta Ltd., Respondents (Defendants)

Ronald Berger, J.D. Bruce McDonald, Frederica Schutz JJ.A.

Heard: December 1, 2015
Judgment: February 8, 2016
Docket: Edmonton Appeal 1403-0154-AC

Proceedings: reversing *Hole v. Hole* (2014), 100 Alta. L.R. (5th) 186, 2014 ABQB 170, 2014 CarswellAlta 428, 583 A.R. 340, 25 B.L.R. (5th) 90, D.L. Shelley J. (Alta. Q.B.)

Counsel: J.K. McFadyen, Q.C., for Appellants (Plaintiffs)
W.J. Kenny, Q.C., D.C. Lister, for Respondents (Defendants)

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

Headnote

Contracts --- Construction and interpretation — Surrounding circumstances

Family business, originally owned by plaintiff and three others, transitioned to plaintiff's company carrying out projects with brother's company as separate joint ventures — Parties spent several years negotiating new transition agreement, in which plaintiffs' share of profits from project was contentious issue — Individual defendants, who were family members forming new leadership, refused to pay $1.6 million demanded by plaintiffs — Defendants provided letter of understanding (LOU) to plaintiffs, acknowledging obligation to pay $1 million via non-callable promissory note — Shortly afterwards, parties finalized and executed transition agreement with commitment to pay plaintiff $600,000 — Plaintiffs' requests that defendant discharge obligations under LOU were refused — Plaintiffs' action against defendants, individuals and their companies, was dismissed — Plaintiffs appealed — Appeal allowed — Trial judge gave weight to subjective intention of parties, including defendants' testimony that they understood LOU was to give plaintiff avenue for receiving remuneration if he brought more work to joint venture business, and to circumstances that came to light after contact was formed — Trial judge erred in law by applying incorrect principles in interpretation of LOU, as such evidence did not form part of surrounding circumstances to be considered in contract interpretation — Admissible evidence that trial judge was entitled to consider included defendants' agreement that plaintiffs' profit share was $1.6 million, made up by $600,000 under transition agreement and obligation to pay remainder dependent on success and financial stability of joint venture business — No language in LOU suggested that payment was also conditional on plaintiff bringing new work to joint venture business — Reasonable person with knowledge of surrounding circumstances reasonably understand that objective of LOU was to defer payment of $1 million until business became financially stable and that it was executed to induce plaintiffs to sign off on transition agreement — It was not commercially unreasonable to interpret

LOU in manner that would result in plaintiffs relinquishing entitlement to $1 million payment obligation that they had already earned as their share of profits of substantially complete project — LOU was intended to create legally enforceable obligation on defendants to pay plaintiffs $1 million, plus interest, at time that was dependent on success and financial stability of joint venture business.

Contracts — Construction and interpretation — Resolving ambiguities — Contra proferentem

Family business, originally owned by plaintiff and three others, transitioned to plaintiff's company carrying out projects with brother's company as separate joint ventures — Parties spent several years negotiating new transition agreement, in which plaintiffs' share of profits from project was contentious issue — Individual defendants, who were family members forming new leadership, refused to pay $1.6 million demanded by plaintiffs — Defendants provided letter of understanding (LOU) to plaintiffs, acknowledging obligation to pay $1 million via non-callable promissory note — Shortly afterwards, parties finalized and executed transition agreement with commitment to pay plaintiff $600,000 — Plaintiffs' requests that defendant discharge obligations under LOU were refused — Plaintiffs' action against defendants, individuals and their companies, was dismissed — Plaintiffs appealed — Appeal allowed — Defendant JD drafted words in LOU on behalf of defendants and presented it to plaintiffs, without benefit or input of legal advisors — Any ambiguities should be interpreted against defendants and in favour of plaintiffs.

Contracts — Formation of contract — Consensus ad idem — Certainty of terms — Miscellaneous

Family business, originally owned by plaintiff and three others, transitioned to plaintiff's company carrying out projects with brother's company as separate joint ventures — Parties spent several years negotiating new transition agreement, in which plaintiffs' share of profits from project was contentious issue — Individual defendants, who were family members forming new leadership, refused to pay $1.6 million demanded by plaintiffs — Defendants provided letter of understanding (LOU) to plaintiffs, acknowledging obligation to pay $1 million via non-callable promissory note — Shortly afterwards, parties finalized and executed transition agreement with commitment to pay plaintiff $600,000 — Plaintiffs' requests that defendant discharge obligations under LOU were refused — Plaintiffs' action against defendants, individuals and their companies, was dismissed — Plaintiffs appealed — Appeal allowed — It was clear that parties objectively understood term "company" to refer to operating vehicles by which defendants carried out their businesses — Identity of new group was readily understood by all parties to LOU and thus certain — Phrase "by way of non-callable promissory note" was not essential term of obligation reflected in LOU that respondents would pay $1 million to plaintiffs — Vehicle by which that promise would otherwise be recorded was entirely severable and not essential part of covenant to pay — Trial judge erred by determining that these particular words were so uncertain that they rendered entire LOU unenforceable — Reference to dates for payment being dependent on "success and financial stability" of company was reflection of parties' intention to work reasonably and cooperatively in determining that financial stability would be achieved — Success and financial stability was ascertainable from review of surrounding circumstances and was simply intended to allow defendants to make repayment when they were in financial position to do so.

Civil practice and procedure — Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Family business, originally owned by plaintiff and three others, transitioned to plaintiff's company carrying out projects with brother's company as separate joint ventures — Parties spent several years negotiating new transition agreement, in which plaintiffs' share of profits from project was contentious issue — Individual defendants, who were family members forming new leadership, refused to pay $1.6 million demanded by plaintiffs — Defendants provided letter of understanding (LOU) to plaintiffs, acknowledging obligation to pay $1 million via non-callable promissory note — Shortly afterwards, parties finalized and executed transition agreement with commitment to pay plaintiff $600,000 — Plaintiffs' requests that defendant discharge obligations under LOU were refused — Plaintiffs' action against defendants, individuals and their companies, was dismissed — Plaintiffs appealed — Appeal allowed — LOU was contract subject to condition precedent, with obligation to pay $1 million not arising until joint venture companies were successful and financially stable — Trial judge erred in determining that that limitation period

commenced in 1994, as companies were in challenging financial situation such that payment could not have been due that point — There was no evidence that plaintiffs clearly and unequivocally accepted repudiation so trial judge erred in effectively treating contract as repudiated and limitation period starting to run in 1994 — Plaintiffs could not know they had claim that warranted bringing action until defendants denied any obligation to make payments to plaintiffs under LOU, despite information that companies were successful and financially stable — On application of two-year limitation period under Limitation of Actions Act, claim was not statute-barred — Plaintiffs were entitled to judgment of $750,000, as they had settled with one of four original defendants.

Contracts --- Performance or breach — Breach — Miscellaneous

Family business, originally owned by plaintiff and three others, transitioned to plaintiff's company carrying out projects with brother's company as separate joint ventures — Parties spent several years negotiating new transition agreement, in which plaintiffs' share of profits from project was contentious issue — Individual defendants, who were family members forming new leadership, refused to pay $1.6 million demanded by plaintiffs — Defendants provided letter of understanding (LOU) to plaintiffs, acknowledging obligation to pay $1 million via non-callable promissory note — Shortly afterwards, parties finalized and executed transition agreement with commitment to pay plaintiff $600,000 — Plaintiffs' requests that defendant discharge obligations under LOU were refused — Plaintiffs' action against defendants, individuals and their companies, was dismissed — Plaintiffs appealed — Appeal allowed — LOU was contract subject to condition precedent, with obligation to pay $1 million not arising until joint venture companies were successful and financially stable — Trial judge erred in determining that that limitation period commenced in 1994, as companies were in challenging financial situation such that payment could not have been due that point — Defendants could not have been in breach of LOU in 1994 — Trial judge appeared to have treated situation as one of repudiation or anticipatory breach but there was no evidence that plaintiffs clearly and unequivocally accepted repudiation — Trial judge thus erred in effectively treating contract as repudiated and limitation period starting to run in 1994.

Contracts --- Formation of contract — Consensus ad idem — Intention of parties

Contracts --- Remedies for breach — Effect of delay in seeking remedy

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Cases considered:

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Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — considered

Brown v. Belleville (City) (2013), 2013 ONCA 148, 2013 CarswellOnt 2605, 114 O.R. (3d) 561, 8 M.P.L.R. (5th) 169, 302 O.A.C. 354, 30 R.P.R. (5th) 167, 359 D.L.R. (4th) 658, 13 B.L.R. (5th) 1 (Ont. C.A.) — referred to

Catalyst Paper Corp. v. Companhia de Navegação Norsul (2008), 2008 BCCA 336, 2008 CarswellBC 1835, 83 B.C.L.R. (4th) 226, (sub nom. *Norske Skog Canada Ltd. v. Companhia de Navegaçao Norsul)* 296 D.L.R. (4th) 513, 258 B.C.A.C. 273, 434 W.A.C. 273 (B.C. C.A.) — referred to

Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176, 1979 CarswellQue 157, 1979 CarswellQue 157F (S.C.C.) — referred to

Continental Insurance Co. v. Law Society (Alberta) (1984), [1985] 1 W.W.R. 481, 14 D.L.R. (4th) 256, 56 A.R. 98, 8 C.C.L.I. 13, [1985] I.L.R. 1-1860, 34 Alta. L.R. (2d) 214, 1984 CarswellAlta 151, 1984 ABCA 261 (Alta. C.A.) — referred to

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.*) [2014] 2 S.C.R. 633 (S.C.C.) — followed

Gainers Inc. v. Pocklington Holdings Inc. (2000), 2000 CarswellAlta 508, 255 A.R. 373, 220 W.A.C. 373, 81 Alta. L.R. (3d) 17, 2000 ABCA 151 (Alta. C.A.) — referred to

Guarantee Co. of North America v. Gordon Capital Corp. (1999), 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, [1999] 3 S.C.R. 423, 39 C.P.C. (4th) 100 (S.C.C.) — referred to

Hillas & Co. v. Arcos Ltd. (1932), [1932] All E.R. Rep. 494, 147 L.T. 503, 43 Ll. L. Rep. 359, 38 Com. Cas. 23, [1932] UKHL 2 (U.K. H.L.) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

James H. Meek Trust v. San Juan Resources Inc. (2005), 2005 ABCA 448, 2005 CarswellAlta 1880, 52 Alta. L.R. (4th) 1, 376 A.R. 202, 360 W.A.C. 202, 52 Alta. L.R. (4th) 2 (Alta. C.A.) — referred to

Klemke Mining Corp. v. Shell Canada Ltd. (2008), 2008 ABCA 257, 2008 CarswellAlta 874, 71 C.L.R. (3d) 1, [2008] 9 W.W.R. 203, 93 Alta. L.R. (4th) 225, 433 A.R. 172, 429 W.A.C. 172 (Alta. C.A.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2015), 2015 ABCA 121, 2015 CarswellAlta 511, [2015] I.L.R. I-5714, [2015] 8 W.W.R. 466, 386 D.L.R. (4th) 482, 47 C.C.L.I. (5th) 218, 599 A.R. 363, 643 W.A.C. 363, 16 Alta. L.R. (6th) 397, 42 B.L.R. (5th) 190 (Alta. C.A.) — referred to

Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. (2000), 2000 NSCA 95, 2000 CarswellNS 235, 4 C.L.R. (3d) 155, 189 N.S.R. (2d) 1, 590 A.P.R. 1 (N.S. C.A.) — referred to

Nexxtep Resources Ltd. v. Talisman Energy Inc. (2013), 2013 ABCA 40, 2013 CarswellAlta 147, 542 A.R. 212, [2013] 9 W.W.R. 568, 82 Alta. L.R. (5th) 273, 566 W.A.C. 212 (Alta. C.A.) — referred to

Pedersen v. Soyka (2014), 2014 ABCA 179, 2014 CarswellAlta 848, 373 D.L.R. (4th) 372, 99 Alta. L.R. (5th) 139, 575 A.R. 217, 612 W.A.C. 217 (Alta. C.A.) — referred to

R.P. Choma Financial & Associates Inc. v. McDougall (2008), 2008 ABQB 359, 2008 CarswellAlta 790, 94 Alta. L.R. (4th) 191, 451 A.R. 278 (Alta. Master) — referred to

Stewart Estate v. 1088294 Alberta Ltd. (2015), 2015 ABCA 357, 2015 CarswellAlta 2110, 25 Alta. L.R. (6th) 1 (Alta. C.A.) — referred to

Stuffco v. Stuffco (2006), 2006 ABCA 317, 2006 CarswellAlta 1483, 34 C.P.C. (6th) 95, 44 C.C.L.T. (3d) 28, 68 Alta. L.R. (4th) 91, 397 A.R. 111, 384 W.A.C. 111 (Alta. C.A.) — referred to

Swan Group Inc. v. Bishop (2013), 2013 ABCA 29, 2013 CarswellAlta 84, 29 R.P.R. (5th) 36, [2013] 7 W.W.R. 130, 542 A.R. 134, 566 W.A.C. 134, 78 Alta. L.R. (5th) 217, 10 B.L.R. (5th) 175 (Alta. C.A.) — referred to

Tien Lung Taekwon-Do Club v. Lloyd's Underwriters (2015), 2015 ABCA 46, 2015 CarswellAlta 143, [2015] I.L.R. I-5698, 599 A.R. 39, 643 W.A.C. 39, 49 C.C.L.I. (5th) 52 (Alta. C.A.) — referred to

Tran v. Kerr (2014), 2014 ABCA 350, 2014 CarswellAlta 1960, [2015] 1 W.W.R. 70, 584 A.R. 306, 623 W.A.C. 306, 6 Alta. L.R. (6th) 213 (Alta. C.A.) — referred to

Statutes considered:

Judgment Interest Act, R.S.A. 2000, c. J-1
Generally — referred to

Limitation of Actions Act, R.S.A. 1980, c. L-15
Generally — referred to

s. 4(1)(c) — referred to

Limitations Act, R.S.A. 2000, c. L-12
s. 2(2) — referred to

s. 3 — considered

APPEAL by plaintiffs from judgment reported at *Hole v. Hole* (2014), 2014 ABQB 170, 2014 CarswellAlta 428, 100 Alta. L.R. (5th) 186, 25 B.L.R. (5th) 90, 583 A.R. 340 (Alta. Q.B.), dismissing their action against defendants for breach of contract.

Per curiam:

Introduction

1 The dispute underlying this appeal arises from the appellants' withdrawal from a family business. The appellants claim that the respondents have not fulfilled their legal obligation to pay $1 million, as outlined in a Letter of Understanding (LOU) the respondents signed and delivered to the appellants as an inducement to agree to a separate Transition Agreement. The respondents assert that their only legal obligations to the appellants were contained in the Transition Agreement, which they have discharged, and that the LOU is not legally enforceable.

2 The trial judge dismissed the appellants' action for breach of contract because the appellants failed to establish that the LOU intended to create legal relations, some terms of the LOU were too uncertain to enforce, and the limitation period had expired: *Hole v. Hole*, 2014 ABQB 170, 583 A.R. 340 (Alta. Q.B.). The appellants argue on appeal that the trial judge erred in her conclusions on each of those issues. For the reasons that follow, the appeal is allowed.

Facts

The Parties

3 The appellants, James F. Hole (JF) and his corporation, Hole Consultants Ltd. (Consultants), started an action for breach of contract against the following respondents:

(a) James D. Hole (JD), and his corporation, Hole Engineering Ltd. (Engineering);

(b) Jack H. Hole (JH), and his corporation, Kessa Holdings Ltd. (Kessa), referred to in the 1993 Transition Agreement as "512726 Alberta Ltd." and "JHHCO";

(c) Harry B. Hole (HB), and his corporation, Eloh Enterprises Ltd. (Eloh), referred to in the 1993 Transition Agreement as "512724 Alberta Ltd." and "HBHCO"; and

(d) Douglas R. Hole (DR), and his corporation, 512725 Alberta Ltd. (512725), referred to in the 1993 Transition Agreement as "DRHCO".

4 The individual parties are all relatives. JH and DR are JF's sons. HB is JF's nephew. JD is JF's brother.

5 Sometime after starting the action, but before trial, the appellants settled with DR and 512725, and did not seek judgment against them at trial.

6 Although JF initiated the originating action, DR currently holds power of attorney over JF's corporate financial affairs, including Consultants, and co-power of attorney over JF's personal financial affairs. JF's current condition rendered him incapable of participating in the trial, so DR prosecuted the action at trial. The respondents agreed that no adverse influence was to be drawn against JF for not appearing at trial. JF's evidence was limited to portions of examination for discovery transcripts read in at trial.

1980 Transition Agreement

7 Prior to 1980, JF held a 25% interest in a mechanical contracting business, Lockerbie and Hole Western Ltd., along with three other family members who owned the remaining 75% in equal proportions (the "original shareholders"). In 1980, ownership of the business transitioned from the original shareholders to Consultants and Engineering, with Consultants holding 80% of the shares and Engineering holding 20% of the shares of the business.

8 After 1980, Consultants and Engineering carried out construction projects as separate joint venture contracts in the name of Lockerbie and Hole Co. Ltd. (Lockerbie and Hole), a new corporate entity. Consultants participated in the joint ventures with an 80% equity interest, and Engineering participated in the joint ventures with a 20% equity interest. The companies recognized profits on a completed contract basis.

9 One of the agreements that facilitated the transition in 1980 included a retirement age provision for the individual shareholders. The provision required all individual shareholders to sell their shares and cease being a director within a year of turning 60. JF turned 60 in November 1987. By 1991, he had not yet retired or withdrawn.

The Westcan Project

10 In late 1991, Lockerbie and Hole became involved in contracts to build a malting plant (the Westcan Project). Consultants and Engineering were to participate, as always, on an 80/20 equity interest basis. JF was a shareholder and chair of the board for Westcan Malting Ltd., and was instrumental in bringing this business to Lockerbie and Hole, Consultants, and Engineering. The Westcan Project started in 1991, and was completed in February 1993. Profits from the Westcan Project are at the center of this dispute.

1993 Transition Process

11 In 1991, JF was over 60 but had not retired, as mandated in the 1980 Transition Agreement. JD and the individual respondents wanted to encourage his retirement, and sought advice from one of the original shareholders, H.H. Hole (HH). HH suggested that JF and JD might consider seeking legal counsel, and that while the parties may have negotiated in good faith previously the matter may require more formality than letters of agreement.

12 JF provided an initial draft of the new transition agreement (the 1993 Transition Agreement) to the respondents on March 17, 1992. JF had some input from legal counsel and an accounting advisor in this first draft, but contended at trial that this involvement was minimal. Negotiations over the transition process and documents spanned nearly two years. The 1993 Transition Agreement underwent over 20 drafts before the parties signed it on February 9, 1993. It was anticipated throughout the drafts that the individual respondents, other than JD, would gain an equity interest in the joint ventures because of JF's retirement.

13 Profits from the Westcan Project were a key contentious issue in finalizing JF's transition out of the joint ventures. Consultants held an 80% interest in the project, and wanted to be paid $1.6 million for its share of the profits on the project. The respondents were adamant throughout negotiations that they could not pay any more than $600,000. The projected profits were around $3.4 million.

14 Shortly before the 1993 Transition Agreement was finalized and executed, the individual respondents provided a "Letter of Understanding and Obligation for Payment of One Million Dollars" (LOU) to Consultants and addressed to JF's attention. The LOU provided:

> February 1, 1993
>
> Hole Consultants Ltd.
>
> [postal address]
>
> ATTENTION: MR. J.F. HOLE
>
> LETTER OF UNDERSTANDING AND OBLIGATION FOR PAYMENT OF ONE MILLION DOLLARS
>
> We, as the new group, fully recognize your efforts and contribution to the success of the Westcan project. We also acknowledge that your profit share for this project would be $1,600,000.00. In the Transition Agreement $600,000 of this amount is to be paid by the agreement of the Successor Companies.
>
> It is our intention and obligation to retire the Promissory Notes on July 31, 1993. Considering the financial position of the new group, we would like an extension of the obligation time period to pay you the balance of $1,000,000.00 by way of a non callable promissory note.
>
> The dates for partial and final payment and amount of interest will be dependent on the success and the financial stability of the Company. Interest will be at prime rate. We look forward to a successful future and anticipate you will continue your association with the Company on an advisory basis. It is our intention to keep you advised of our progress and will provide requested financial or other information on request until all obligations to you are retired.
>
> Sincerely,
>
> [J.H. Hole]
>
> [J.D. Hole]
>
> [H.B. Hole]

[D.R. Hole]

Following receipt of the LOU, JF executed the 1993 Transition Agreement on February 9, 1993, with an effective date of September 1, 1992.

15 The 1993 Transition Agreement provided in part:

> 5.2 Consultants will continue to participate in the earnings and claims associated with the various existing and future contracts which comprise the "Westcan" project. The Successor Companies covenant and agree to pay to Consultants a participation in the earnings relating to these contracts for the period ended February 28, 1993, a fixed amount of $600,000.00. Such participation shall be payable by the Successor Companies to Consultants as funds are available but, in any event, no later than July 31, 1993.
>
> . . .
>
> 7.1 This Agreement constitutes the entire agreement between the parties hereto and there are no oral statements, representations, warranties, undertakings or agreements between the parties modifying the provisions of this Agreement.

Post-1993 Transition Conflict

16 In early 1994, JF suggested that he and the individual respondents review the 1993 Transition Agreement, and upwardly adjust the amounts payable to him and Consultants from the Westcan Project. The respondents rejected JF's request by letter on February 28, 1994, where they stated they were in a very challenging financial situation that they expected to continue for some time. With respect to the LOU, the respondents wrote:

> [T]his obligation is in the form of a non-callable promissory note. Our intentions for retirement of the obligation remain the same as when we signed the document and as referenced in the text of the document "The dates for partial and final payment and amount of interest will be dependent on the success and financial stability of the Company."

17 Throughout 1994, JF sent follow-up letters and a memorandum to the respondents, proposing to increase the outstanding obligation to $1.8 million with payment still due on the success and financial stability of the companies. Those requests were denied. The respondents sent an unsigned memorandum and revised LOU dated September 20, 1994, stating that the respondents were prepared to pay JF from profits obtained from future projects acquired because of his efforts, which would not include the Westcan Project. The memorandum also accepted the higher amount JF proposed and extended the resources of the new joint venture to allow JF "the opportunity of influencing the amount of work available to us from which profit can be generated and payment made to you."

18 Shortly after the execution of the 1993 Transition Agreement, major disagreements arose between DR and the other respondents. By the end of 1994, DR terminated his and his company's participation in the joint venture projects. Two new companies were formed for joint venture contracts entered into after August 15, 1994, and the original companies of Lockerbie and Hole and Lockerbie Management were not used again.

19 JF did not receive any financial information regarding the two new successor companies. In November 2000, JF sent a memorandum to the respondents, noting their recent acquisition of other companies and requesting they discharge their obligations under the LOU. The respondents refused this request by letter dated January 30, 2001.

20 The respondents did not make any payment to satisfy the $1 million obligation. JF and his company commenced the action under appeal by filing a statement of claim on February 27, 2001. The action proceeded to trial against the remaining respondents, excluding DR and his company.

Decision Below

21 The trial judge found that the appellants' action must fail on three grounds. First she considered the intention to create legal relations. The trial judge found that the LOU appeared on its face to evidence the respondents' intention to create legal relations with the appellants, and the fact that the individual respondents signed the LOU and delivered it to Consultants was highly suggestive of an intention to create legal relations: at para 55. However, she ultimately found that the appellants failed to meet the burden of proof for establishing that the LOU intended to create legal relations because the parties' evidence on the context and intent of the LOU conflicted in several key respects: at para 73.

22 The trial judge noted that there was significant, competing evidence about the events surrounding and following the execution of the LOU that created uncertainty about the intention of the parties: at para 71.

23 In favour of the appellants' argument that the respondents intended to create legal relations through the LOU, the trial judge found:

(a) The LOU acknowledged Consultants' share of the Westcan profits "would be" $1.6 million, but the 1993 Transition Agreement provided for only $600,000 (para 57);

(b) The LOU was signed by the individual respondents, not their successor companies, suggesting it was created outside the terms of the 1993 Transition Agreement to facilitate the transition (para 57);

(c) The 1993 Transition Agreement was signed within a matter of days of delivery of the LOU, suggesting inducement by the respondents (para 59);

(d) The "entire agreement clause" in the 1993 Transition Agreement may only preclude additional oral representations, or only obligations between the parties listed on the 1993 Transition Agreement who are not the same as the parties to the LOU (para 60); and

(e) Correspondence in early 1994 affirms JF's position that he only accepted the $600,000 limitation in the 1993 Transition Agreement because of the separate obligation for the balance in the LOU (para 61).

24 In favour of the respondents' argument that the LOU did not create legal obligations, the trial judge found:

(a) The four individual respondents did not have any legal obligation to pay the balance of the Westcan Project profits, only the purchasing corporations did (para 58);

(b) Payment was to be through a "non-callable promissory note" contingent on the success and financial stability of "a Company", with reference to JF's continued association on an advisory basis (para 58);

(c) The 1993 Transition Agreement terms fixed Consultants' share of the Westcan Project at $600,000, however only for profits up to February 28, 1993 (para 59);

(d) The 1993 Transition Agreement included an "entire agreement clause" (para 60); and

(e) JF himself in later correspondence acknowledges the LOU depends on the integrity of each individual respondent (para 62).

25 The trial judge noted that there was considerable animosity between the parties demonstrated at trial, and she concluded that the parties' differing views and interpretations of the intent behind and the terms of the LOU "were likely affected and shaped by the conflict that had developed within months of the execution of the [1993] Transition Agreement and the [LOU]": at para 63.

26 The trial judge agreed with the appellants that no particular form of words is necessary to create a covenant to pay, and she found that the respondents' acknowledgment of the obligation to pay $1 million with a request for an extension

of time to pay would be sufficient to constitute a covenant to pay, but for other obvious problems with the wording of the LOU: at para 68.

27 However, she found that this was not a case where she could prefer one party's evidence to the other, because their accounts conflicted in many key respects and it was clear that their perceptions as presented at trial were significantly affected by the 1994 relationship breakdowns: at para 71. On this basis, the trial judge was left with more than one possible interpretation of events. Accordingly, she reasoned that the appellants failed to meet the burden of proof to establish that the LOU was intended to create a legally enforceable agreement: at paras 72-73.

28 Next, the trial judge found key phrases in the LOU were too uncertain to be enforced. The phrase "non-callable promissory note" was uncertain because the parties disagreed on what the phrase meant, and there was no evidence to establish that the phrase had any independent or business meaning: at para 86. The phrase "the Company" was uncertain because it was not clear to which company it referred, and in the context of this dispute, "Company" could have been more than one corporation, especially because the signatories to the LOU were different from the parties to the 1993 Transition Agreement: at para 87. Finally, the trial judge found the phrase "success and financial stability" was very uncertain because it was undefined and was not capable of being ascertained, and further that the appellants had failed to adduce sufficient evidence of when success and financial stability was reached by the "Company": at para 88. As a result, the trial judge found that these phrases caused uncertainty of when full or partial payments would be due, and when interest would begin to accrue: at para 89.

29 Lastly, the trial judge found the action was statute barred because it was filed outside the six-year limitation period under the *Limitation of Actions Act*, RSA 1980, c L-15. The limitation period began to run from September 1994 at the latest, when the respondents communicated their position that the $1 million obligation in the LOU referred to future payments contingent on new work: at para 93. The trial judge noted that JF when examined at pre-trial admitted he was aware of the respondents' position in September 1994, so he appreciated that the respondents were in breach of his understanding of their obligation under the LOU.

Grounds of Appeal

(a) The trial judge erred in law by failing to apply the appropriate principles of contractual interpretation to the LOU, and thereby concluding that the parties did not intend to create a legally enforceable contract in this case.

(b) The trial judge erred in law by failing to apply the appropriate principles of contractual interpretation to the LOU, and thereby concluding that the LOU was too uncertain to be enforceable.

(c) The trial judge erred in law by failing to apply the appropriate limitation period to the appellants' breach of contract claim, and thereby concluding that the appellants' claim against the respondents was time-barred.

Standard of Review

30 Contractual interpretation is a question of mixed fact and law that involves the application of interpretive principles to the words of a written contract, considered in light of the factual matrix: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 50, [2014] 2 S.C.R. 633 (S.C.C.). Unless a pure question of law can be readily extricated, questions of mixed fact and law are reviewed for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 36-37, [2002] 2 S.C.R. 235 (S.C.C.).

31 Because the goal of contractual interpretation is inherently fact specific, the circumstances in which a question of law can be readily extricated from the interpretation process are relatively rare: *Sattva* at paras 54-55. However, applying incorrect legal or interpretive principles (such as considering the subjective rather than objective intentions of the parties at contract formation), failing to consider a required element of a legal test, or failing to consider a relevant factor in interpreting contracts remain legal errors reviewable for correctness: *Sattva* at paras 53-54; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121 (Alta. C.A.) at para 13, (2015), 386 D.L.R. (4th) 482 (Alta.

C.A.); *Tien Lung Taekwon-Do Club v. Lloyd's Underwriters*, 2015 ABCA 46 (Alta. C.A.) at para 20, [2015] A.J. No. 107 (Alta. C.A.).

32 Determining the applicable limitations legislation, the proper tests to be applied thereunder, and the interpretation of limitations legislation generally are questions of law reviewable for correctness: *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357 (Alta. C.A.) at para 160, [2015] A.J. No. 1227 (Alta. C.A.); *Stuffco v. Stuffco*, 2006 ABCA 317 (Alta. C.A.) at para 10, (2006), 397 A.R. 111 (Alta. C.A.). Absent legal error, whether the limitation period has expired is a question of mixed fact and law to which this court owes deference: *Tran v. Kerr*, 2014 ABCA 350 (Alta. C.A.) at para 12, (2014), 584 A.R. 306 (Alta. C.A.).

Analysis

1. Did the Parties Intend to Create a Legally Enforceable Contract?

33 Based on the Supreme Court's direction in *Sattva* at paras 47-48 and 57-60, the following principles of contractual interpretation apply to this issue:

> (a) The decision maker must read the contract as a whole giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract;
>
> (b) Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. In a commercial contract, it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties are operating;
>
> (c) The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement;
>
> (d) While surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. A court cannot use surrounding circumstances to deviate from the text such that it effectively creates a new agreement;
>
> (e) The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, information that was or reasonably ought to have been within the knowledge of the parties at or before the date of contracting;
>
> (f) While the parol evidence rule does not preclude evidence of surrounding circumstances when interpreting a contract, this rule does preclude evidence of the subjective intentions of the parties.

34 The consideration of surrounding circumstances allows a court to consider what a reasonable person would have thought was the aim of the transaction, if that person knew the facts available to the parties. It does not, however, allow a court to receive direct evidence of intent or allow such evidence to contradict the contract, evade a "whole contract" clause, or create ambiguities: *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151 (Alta. C.A.) at paras 22-23, (2000), 255 A.R. 373 (Alta. C.A.).

35 The relevant time for consideration of surrounding circumstances in the context of contractual interpretation is at the time the contract was made, and this contextual evidence of surrounding circumstances is part of the interpretive process: *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2013 ABCA 40 (Alta. C.A.) at para 20, (2013), 542 A.R. 212 (Alta. C.A.); *Sattva* at paras 57-58.

36 Having reviewed the trial judge's decision, it is clear that weight was given to the *subjective* intentions of the parties and to circumstances which only came to light *after* the contract was formed. For example, the trial judge considered:

(a) The testimony from the respondents JD, JH and HB to the effect that they understood the contract was not to create legal relations but was to give JF an avenue by which he could receive remuneration if he brought more work to the joint venture business, and to do so in a way that the new group could control and determine (para 48);

(b) Correspondence from JF dated August 29, 1994 which indicated his subjective belief that the retirement of the obligation was solely dependent on the integrity of each individual and was not legally enforceable (para 62);

(c) Correspondence from JD, JH and HB dated September 20, 1994 which purported to show that it was their intention only to pay the $1 million to JF out of profits obtained by future projects acquired as a result of his efforts and initiated by him (para 62);

(d) The disagreement among the individual respondents which arose within three months following the execution of the 1993 Transition Agreement and which resulted in DR formally withdrawing from the respondents' joint venture projects, and the fact that this may have shaped the respondents' recall of what they intended and what occurred prior to the falling out (para 72).

37 Evidence regarding what occurred after the LOU was signed or the subjective intentions of the parties is irrelevant and does not form part of the "surrounding circumstances" to be considered in contractual interpretation. The trial judge therefore erred in law by applying incorrect principles in her interpretation of the LOU.

38 Admissible evidence that the trial judge was entitled to consider includes the following:

(a) The respondents agreed that the appellants' profit share in the Westcan Project would be $1.6 million. The Westcan Project was substantially complete at the time the LOU and the 1993 Transition Agreement were signed, such that it is reasonable for the appellants to have expected to be fully compensated for their share of the profits from that project as part of the transition process. JF remained adamant that the appellants be fully compensated for the Westcan Project throughout the negotiations leading up to the execution of the LOU and the 1993 Transition Agreement. The respondents were adamant during negotiations that they could only afford to pay $600,000.00 for the Westcan Project at that time.

(b) Consistent with the foregoing, the obligation to pay $600,000.00 on or before July 31, 1993 was contained in the 1993 Transition Agreement, while the obligation to pay the remaining $1 million, set out in the LOU, was extended and dependent upon the success and the financial stability of the respondents' joint venture or successors.

(c) The negotiation of the 1993 Transition Agreement was a lengthy process involving the exchange of over 20 drafts among the parties over the course of two years of negotiations. The parties executed the LOU a mere eight days *before* the 1993 Transition Agreement was finally executed by all parties.

(d) The LOU was a business transaction involving family members, which was drafted by the respondent JD on behalf of the other respondents, without the advice or input of legal counsel into the technicalities of the language used therein.

(e) The LOU itself was headed "Letter of Understanding and Obligation for Payment of One Million Dollars".

(f) The LOU contained a single condition for payment, being that such payment was dependent on the success and the financial stability of the Company. There is no language within the LOU to suggest that payment of the $1 million was also conditional on the appellant JF bringing new work to the respondents' joint venture business, as suggested by the respondents in their correspondence with the appellants after the LOU was executed.

39 In light of the foregoing, we cannot say that regardless of any consideration of the inadmissible subjective intentions of the parties or circumstances subsequent to the execution of the LOU, the conclusions drawn by the trial judge would have been the same.

40 To the contrary, a reasonable person having knowledge of the admissible surrounding circumstances would have reasonably understood that the objective of the LOU was to defer payment of $1 million until the business of the respondents became financially stable, and that the signatories had agreed to pay and had a continuing obligation to pay $1 million plus interest to the appellants. This is supported by the fact that the Westcan Project was substantially complete and that the appellants were adamant that they be fully compensated for their share of the Westcan Project profits, which was then estimated to be $1.6 million, while the respondents were adamant that they could not pay more than $600,000.00 at that time due to financial difficulties.

41 Moreover, given that the LOU was signed only eight days before the 1993 Transition Agreement was finally executed by all parties, after the exchange of multiple drafts over the course of two years, it can reasonably be inferred that the LOU was executed to induce the appellants to sign off on the 1993 Transition Agreement.

42 We also agree that courts should choose an interpretation which promotes a sensible commercial result and should discard an interpretation which defeats the intentions and objectives of the document, if construed fairly and broadly in the context of the surrounding circumstances: *Hillas & Co. v. Arcos Ltd.*, [1932] All E.R. Rep. 494 (U.K. H.L.) at 499, (1932), 147 L.T. 503 (U.K. H.L.); *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at 901, (1979), 112 D.L.R. (3d) 49 (S.C.C.); *Catalyst Paper Corp. v. Companhia de Navegação Norsul*, 2008 BCCA 336 (B.C. C.A.) at para 27, (2008), 296 D.L.R. (4th) 513 (B.C. C.A.); *Swan Group Inc. v. Bishop*, 2013 ABCA 29 (Alta. C.A.) at paras 22-23, (2013), 542 A.R. 134 (Alta. C.A.).

43 In this case, it is not commercially reasonable to interpret the LOU in a manner which would result in the appellants relinquishing their entitlement to a $1 million payment obligation. It is further commercially unreasonable that the $1 million obligation arising from the Westcan Project would be subject to a condition that the appellants bring new business to the respondents. Simply put, the appellants had already earned the $1 million as their share of the profits of the Westcan Project, which they brought to the joint venture companies and financed for two years by paying 80% of the overhead costs.

44 In viewing the relevant and admissible contextual evidence surrounding the execution of the LOU, and disregarding the irrelevant and inadmissible evidence of subjective intention and circumstances which arose after the signing of the LOU, it is clear that the LOU represented more than a moral obligation. The LOU was intended to create a legally enforceable obligation of the respondents to pay the appellants $1 million, with interest, at a time that was dependent on the success and financial stability of the joint venture companies.

45 In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), the Supreme Court of Canada had this to say about "entire agreement" clauses at paras 72 and 75:

> ... [A] party almost always has some amount of discretion in how to perform a contract. It would [be] difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.
>
> . . .
>
> [T]he entire agreement clause in [the Agreement] is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it.

[Emphasis added].

46 The LOU is not an oral agreement. The word "oral" is the primary qualifying adjective in the entire agreement clause of the 1993 Transition Agreement. Moreover, the 1993 Transition Agreement, although signed later in time, was on its face deemed effective September 1, 1992, that is, the agreement including the "entire agreement" took effect September 1, 1992; therefore, by operation of its own terms, the 1993 Transition Agreement cannot capture the LOU, a separate agreement effective February 1, *1993*.

2. Was the LOU too Uncertain to be Enforceable?

47 The trial judge found that the following words or phrases in the LOU were so uncertain as to be unenforceable:

- "the Company"
- "non-callable promissory note"
- "the dates for partial and final payment and amount of interest will be dependent on the success and the financial stability of the Company"

48 It is important to note that the respondent JD drafted the words in the LOU on behalf of the other individual respondents and presented the content of the LOU to the appellants, without the benefit or input of legal advisors who might otherwise have used more clear and precise language. Thus, the *contra proferentum* rule dictates that any ambiguities in the LOU ought to be interpreted against the respondents and in favour of the appellants.

49 An agreement that is otherwise enforceable does not fail for uncertainty simply because some of the words in it may be vague or difficult to interpret: *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 95 (N.S. C.A.) at para 52, (2000), 189 N.S.R. (2d) 1 (N.S. C.A.). In determining whether the terms of a contract are sufficiently certain, a court is entitled to consider the surrounding context that is known to all the parties: *Klemke Mining Corp. v. Shell Canada Ltd.*, 2008 ABCA 257 (Alta. C.A.) at para 18, (2008), 433 A.R. 172 (Alta. C.A.). Uncertain terms that are not an essential part of the contract will not be fatal to its enforcement; uncertain or meaningless terms that are subsidiary may be severed from the contract: *Continental Insurance Co. v. Law Society (Alberta)*, 1984 ABCA 261 (Alta. C.A.) at para 25, (1984), 56 A.R. 98 (Alta. C.A.). It is unclear what legal tests the trial judge applied to her analysis on certainty of terms and she does not appear to have considered any of the foregoing principles.

50 In considering the relevant surrounding circumstances and the 1993 Transition Agreement, it is clear that the parties objectively understood that the term "the Company" referred to the operating vehicles by which the respondents carried out the mechanical and industrial contracting businesses that they purchased under the 1993 Transition Agreement. Consider the actual language of the LOU: it begins by saying "We, as the new group..." and goes on to say "We also acknowledge..."; "It is our intention and obligation..."; "Considering the financial position of the new group..."; "we would like an extension..."; and ending with "The dates for partial and final payment ... will be dependent on the success and financial stability of the Company"; "We look forward to a successful future..."; and "... you will continue your Association with the Company..."

51 It is clear from a contextual analysis that the individuals who signed this LOU were referring to that company or group of companies that would join together to form the new joint venture going forward, without JF (and, later, without DR and his company). Given the family context, it was contractually and commercially reasonable for these signatories to give their "word as their bond" and to promise to honour their commitment to pay the $1 million obligation when the new joint venture entity or combination of entities was successful and financially stable. At the time the LOU was signed, we are satisfied that every person who signed it, and Consultants, was clear about what the Company referred to, because the signatories in the document they had created said so: "the Company" was a generic term that referred to "we", "the new group". The fact that the new group later assigned their respective interests to successor corporations is immaterial. The

new group continued after the falling out, the new group through its corporation and successor corporations succeeded, and the new group achieved financial stability. The identity of the new group was readily understood by all parties to the LOU, and ascertainable; thus, certain.

52 The phrase "by way of non-callable promissory note" was not an essential term of the covenant to pay or the obligation reflected in the LOU that the respondents would pay $1 million to the appellants. The promise to pay was clear on the face of the LOU. The vehicle by which that promise would otherwise be recorded is entirely severable and not an essential part of the actual covenant to pay. Although the trial judge correctly accepted that no particular form of words is necessary to create a covenant to pay, she erred by then determining that these particular words were so uncertain that they rendered the entire LOU unenforceable.

53 The reference in the LOU to there being an "extension of the obligation time" is sufficient to give commercial effect to the objective intentions of the parties that the respondents were promising to pay to the appellants $1 million.

54 Furthermore, the phrase "the dates for partial and final payment and amount of interest will be dependent on the success and the financial stability of the Company" was, at the very least, a reflection of the intention of the parties to work reasonably and cooperatively in determining that the financial stability of the Company would be achieved so that partial and final payment could be made when that "financial stability of the Company" had been achieved.

55 It is incontestable that the respondents required additional time to pay the appellants' profits from the Westcan Project due to other financial challenges facing them at the time the LOU and the 1993 Transition Agreement were executed in February 1993.

56 From an objective perspective, "success and financial stability" is ascertainable from a review of the surrounding circumstances, including the fact that at the time the LOU and 1993 Transition Agreement were executed the respondent companies were *not* financially stable based upon a review of their financial statements. We agree that the impugned phrase was simply intended to allow the respondents to repay the $1 million obligation when the respondents were in a financial position to do so.

57 Evidence of the "success and financial stability" is available on the evidentiary record before the trial judge, and on any reasonable interpretation of the factual matrix, the respondents' obligation to pay the appellants was triggered by the year 2000, because:

(a) Lockerbie & Hole Inc. was incorporated in 2000 and the company became an employee-owned business;

(b) In 2000, Lockerbie & Hole Inc. made a number of acquisitions, including the acquisition of Industra Services Corporation for $12,000,000.00, and became a national industrial contracting company;

(c) Lockerbie & Hole Inc. was the first to create a large prefabricated and modular facility at a site in Sherwood Park that is now the centre of all the major fabricators involved in the Alberta oil sands;

(d) In 2007 Lockerbie & Hole Inc. did an IPO and went public on the Toronto Stock Exchange; and

(e) On April 1, 2009, Lockerbie & Hole Inc. was purchased by Aecon for $220,000,000.00.

3. When Did the Limitation Period for Breach of Contract Arise?

58 Contrary to the trial judge's statement at para 90 of her decision, the appellants did not agree that the limitation period applicable to their claim was six years from the time the cause of action arose. It is undisputed that if the appellants knew or ought to have known of their claim before March 1, 1999, then the applicable limitation period would be six years pursuant to s 2(2) of the *Limitations Act*, RSA 2000, c L-12 and s 4(1)(c) of the *Limitation of Actions Act*, RSA 1980, c L-15. The key issue is when the appellants knew or ought to have known of their claim.

59 A cause of action for breach of contract, and the consequent running of the limitation period, arises when the breach occurs: *James H. Meek Trust v. San Juan Resources Inc.*, 2005 ABCA 448 (Alta. C.A.) at para 48, (2005), 376 A.R. 202 (Alta. C.A.). The trial judge in this case found that the limitation period commenced, and thus that the breach had occurred, in September 1994 when the appellants became aware that the respondents were taking the position that the $1 million under the LOU was only a potential future payment rather than an outstanding amount owing to the appellants.

60 The LOU is in effect a contract subject to a condition precedent. The obligation to pay $1 million did not arise until the joint venture companies were successful and financially stable. The trial judge did not make a finding that the companies were successful and financially stable in 1994, and there was no such evidence before her; in fact, the evidence was specifically that the companies were "in a very challenging financial situation that they expected to continue for some time" in early 1994. The payment under the LOU could not have been due in 1994, and the respondents therefore could not have been in breach of the LOU at that time. The trial judge instead appears to have treated this as a situation of anticipatory breach or repudiation of contract, without expressing it in those specific terms.

61 Anticipatory breach of contract occurs when one party to the contract repudiates his contractual obligations before they fall due: *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733 (Ont. C.A.) at para 22, (2013), 118 O.R. (3d) 321 (Ont. C.A.). As this Court has previously noted, it is trite law that the innocent party need not accept the wrongdoer's repudiation: *Pedersen v. Soyka*, 2014 ABCA 179 (Alta. C.A.) at para 21, (2014), 99 Alta. L.R. (5th) 139 (Alta. C.A.). The innocent party can refuse to accept the repudiation and the contract will continue in full force and effect: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para 40, (1999), 178 D.L.R. (4th) 1 (S.C.C.). An election by the innocent party to accept the repudiation must be clearly and unequivocally communicated to the repudiating party; if not, the contract continues in full force: *Ali* at para 24; *Brown v. Belleville (City)*, 2013 ONCA 148 (Ont. C.A.) at paras 53-54, (2013), 114 O.R. (3d) 561 (Ont. C.A.).

62 Although the trial judge essentially treated this as a situation of repudiation or anticipatory breach, she did not consider whether the appellants elected to accept or reject the repudiation. There is no evidence on the record that the appellants clearly and unequivocally accepted the repudiation, and the appellants' November 2000 request for the respondents to complete their obligations under the LOU supports the conclusion that the appellants considered the original LOU as subsisting in full force and effect. It was therefore an error for the trial judge to effectively treat the contract as repudiated, and conclude that the limitation period started running, in September 1994.

63 The appellants could not have known of their claim until the payment under the contract came due and the respondents refused to honor it, which would cause the limitation period to begin running: *Ali* at paras 19, 26. Although there is limited evidence regarding when the joint venture companies became "successful and financially stable", thus triggering the respondents' obligation to pay under the LOU, the limitations legislation is contingent on knowledge. The evidence at trial was that the respondents stopped providing any financial information about the successor companies in August 1994, hindering the appellants' ability to determine when the condition in the LOU was satisfied sufficient to trigger the repayment obligation. The only evidence regarding the appellants' knowledge about the success and financial stability of the companies arises in November of 2000, when the respondents acquired two new businesses. On November 28, 2000 the appellant JF wrote to the respondents, and it was thereafter, by respondents' memorandum dated January 30, 2001, that the respondents denied any obligation to make any payments to the appellants under the LOU.

64 It was only upon being notified of this refusal to pay in light of the information about the "success and financial stability of the Company" that the appellants knew or ought to have known that legal proceedings against the respondents were warranted: *R.P. Choma Financial & Associates Inc. v. McDougall*, 2008 ABQB 359 (Alta. Master) at para 51, (2008), 451 A.R. 278 (Alta. Master). The appellants therefore did not know of their claim before March 1, 1999, and s 2(2) of the *Limitations Act* has no application in this case. The applicable limitation period is found in s 3 of that *Act*, which provides for two years after the date on which the appellants first knew, or ought to have known, that injury had occurred, was attributable to the respondents, and warranted bringing a proceeding.

65 Accordingly, we conclude that the LOU was not breached in 1994, the appellants did not accept the respondents' repudiation of the LOU, the appellants did not know they had a claim that warranted bringing a proceeding until January 30, 2001, the two-year limitation period under the *Limitations Act* applies to the appellant's claim, and their claim was therefore not filed outside the applicable limitation period.

Conclusion

66 For the reasons above, the appeal is allowed and the judgment of the trial judge is set aside.

67 In light of the pre-trial settlement between the appellants and D.R. Hole and 512725 Alberta Ltd., the appellants are entitled to judgment in the sum of $750,000.00.

68 There being no agreement between the parties in the LOU respecting interest, interest shall be paid commencing January 30, 2001 at the prime rate advertised by the Bank of Canada, from time to time, or pursuant to the provisions of the *Judgment Interest Act* and its regulations, whichever is the lesser amount payable.

69 Costs shall follow the event.

Appeal allowed.

4

In the Court of Appeal of Alberta

Citation: 259202 Alberta Ltd. v. Barnieh Investments Ltd., 1984 ABCA 99

Date: 19840424
Docket: 14939
Registry: Calgary

Between:

259202 Alberta Ltd.

Appellant
(Plaintiff)

- and -

Barnieh Investments Ltd.

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Prowse
The Honourable Mr. Justice Stevenson

Reasons for Judgment of The Honourable Mr. Justice McDermid
Concurring Reasons of The Honourable Mr. Justice Stevenson

Dissenting Reasons for The Honourable Mr. Justice Prowse

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE D.H. MEDHURST OF THE COURT OF QUEEN'S BENCH OF ALBERTA DATED THE 13th DAY OF OCTOBER, 1982.

COUNSEL:

A.H. Trawick, Esq., for the Appellant

J.C. Major, Q.C. and Ms. J. Strekaf, for the Respondent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE McDERMID

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[1] This action relates to the sale and purchase of commercial property in the City of Calgary and the trial was held on an agreed. Statement of Facts. I shall refer to the parties and the other persons concerned by the same designations as was adopted therein.

[2] Chariot Holdings Ltd. (referred to as Chariot) was registered as owner of an estate in fee simple in the Land Titles Office for the South Alberta Land Registration District of the following described lands:

"FIRST: Lots One (1) to Nine (9) inclusive in Block Four (4) on Plan Calgary 4714 N.

Excepting out of Lots One (1) and Two (2) all mines and minerals.

SECONDLY: Lots Three (3) to Seven (7) inclusive in Block Two (2) on Plan Calgary 4714 N.

THIRDLY: The North half of Lot Eleven (11) and the whole of Lots Twelve (12), Thirteen (13) and Fourteen (14) all in Block Six (6) on Plan Calgary 4935 O.

FOURTHLY: The South half of Lot Two (2) and the whole of Lot Three (3) in Block Six (6) on Plan Calgary 4935 O.

FIFTHLY: Lot One (1) and the North half of Lot Two (2) in Block Six (6) on Plan Calgary 4935 O."

[3] All of the above lands, with the exception of Lots 3 to 7 inclusive, Block 2 Plan Calgary 4714, are referred to as the Time lands and are the lands which are mainly the subject of this litigation. The balance of the land Lots, 3 to 7 inclusive, are referred to as the Amfac lands and were not included in the sale agreement between the litigants.

[4] By an agreement in writing dated April 9, 1979, Chariot agreed to lease all of the Time lands and all of the Amfac lands lands for a term of 5 years from May 1, 1979 to Amfac Development Ltd. (herein referred to as Amfac) at an annual rental of $70,000 for the first year of the term and increasing annual rentals thereafter. The lease also contained the following provisions:

(a) the right to renew for a further 5-year term;

(b) a clause preventing the lessee from transferring, assigning or subletting all or any part of the demised property without the prior written consent of the Lessor, which consent was not to be unreasonably withheld;

(c) an exclusive option to purchase the said lands for $2, 500,000 in consideration of $100,000.

The said $100,000 was to be applied on the purchase price if the option was exercised. If the option was not exercised before March 30th, 1982 the $100,000 was to be forfeited. If the option was exercised, $500,000 was to be paid with the notice exercising the option. The sale was to be closed 30 days thereafter. The balance of the purchase price was to be "carried by" the lessor and secured by a second mortgage. From this amount was to be deducted the "value" of a first mortgage to Fowlie Investments Limited which was registered against the lands. The agreement also provided for certain other credits which reduced the principal amount of the second mortgage. This second mortgage could be paid off at any time without notice, penalty or bonus.

[5] We are given no information as to the terms of the Fowlie mortgage and we do not know its maturity date or the terms on which it could be paid off.

[6] By a document headed Assignment, Lease and Option to Purchase, dated September 30, 1980, Amfac assigned its interest in the Time lands to Time Motors (1968) Ltd. (referred to as Time) with the written consent of Chariot, but retained its interest in the Amfac lands. The consideration to be paid was $692,417. Provision was then made as to what each of Amfac and Time was to pay of the rental for the lands each was to possess. Further, provision was made that if the option to purchase was exercised, Time was to pay $1,907,583 and Amfac was to pay $492,417.

[7] On March 23, 1981 Barnieh Investments Ltd., Respondent in this appeal and the Defendant at the trial, (referred to as Barnieh), made a written offer to purchase the Time lands which was accepted by the agents for Time Motors, Cowley & Keith Ltd. Closing was set for September 30, 1981. This agreement provided; inter alia:

"1. PURCHASE PRICE

The total purchase price for the Property shall be Three Million and Forty Three Thousand ($3,043,000.00) Dollars to be paid as follows:-

(a) One Hundred Thousand ($100,000.00) Dollars Canadian by way of a deposit to Cowley & Keith Ltd., as a cheque accompanying this Offer. The sum of One Hundred Thousand ($100,000.00) Dollars shall be credited to the Purchaser as part of the purchase price on closing.

$ 100,000.00

(b) Two Hundred Thousand ($200,000.00) Dollars Canadian on or before July 31, 1981. The sum of Two Hundred Thousand ($200,000.00) Dollars shall be credited to the Purchaser as part of the purchase price on closing.

$ 200,000.00

(c) One Million Nine Hundred and Seven Thousand Five Hundred and Eighty Three ($1, 907,583.00) Dollars Canadian by way of assumption of the Vendor's lease and option to purchase for the subject property. The option to purchase is exercisable on or before March 30, 1982. Subject lease and option to Purchase attached hereto as Schedule "A".

$1,907,583.00

d) Seven Hundred and Thirty Five Thousand Four Hundred and Seventeen ($735,417.00) Dollars Canadian payable on closing.

$ 835,417.00

TOTAL PRICE $3,043,000.00

2. CLOSING

The Vendor shall deliver vacant possession, free and clear of all but permitted encumbrances. The transfer of land, the Bill of Sale and all other conveyances contemplated by this Agreement shall be prepared at the expense of the Vendor. This transaction will close at the offices of the Vendor's Solicitor in Calgary, Alberta on or before 5:00 o'clock p.m. on the 30th day of September, 1981.

3. TITLE

Upon closing of this transaction, the Vendor warrants, covenants and agrees to deliver registerable Bill of Sale and Transfer of Title to the Purchaser in freehold fee simple free and clear of all but permitted encumbrances.

9. DEFAULT

It is agreed that if the Purchaser shall fail to pay the balance of the total purchase price or comply with the terms and conditions of this Agreement, the said deposit of One Hundred Thousand ($100,000.00) Dollars shall be forfeited to the Agent and Vendor as liquidated damages and the Agreement herein shall be considered null and void."

[8] On April 29, 1981, the Plaintiff (Appellant herein), 259202 Alberta Ltd. (herein referred to as 259202), made a written offer to Barnieh to purchase the Time lands and the buildings located thereon. This offer, which was accepted on the same day by Barnieh, was initially made subject to confirmation of the chain of title by May 1, 1981 but this condition was waived on April 30, 1981.

[9] This agreement provided; inter alia:

"1. PURCHASE PRICE

The purchase price shall be Three Million Seven Hundred Thousand ($3,700,000.00) Dollars payable as follows:

A. Two Hundred Thousand ($200,000.00) Dollars as deposit payable to M. Lobsinger Real Estate Ltd. trust account upon acceptance of this Offer. This deposit shall be released to the Vendors and credited against the purchase price as part of the purchase price on closing.

$ 200,000.00

B. Six Hundred Thousand ($600,000.00) Dollars payable in cash upon closing of this transaction.

$ 600,000.00

C. Two Million Nine Hundred Thousand ($2,900,000.00) Dollars by way of an agreement for sale with the following terms and conditions:

i. Principal $2,900,000.00

ii. Term 7 months

iii. Interest 12% simple interest calculated annually

iv. Payments (a) April 1, 1982 Interest of $203,000.00

(b) April 1, 1982 Principal of $2,900,000.00

v. This Agreement for Sale shall be assignable. The Purchaser reserves the right to pay out this Agreement for Sale upon 90 days notice in writing to the holder of the Agreement for Sale wherein all outstanding principal and accrued interest shall be paid at that time without penalty or bonus. Provided notice is given anytime after closing.

$2,900,000.00

TOTAL PURCHASE PRICE: $3,700,000.00

2. CLOSING

This transaction will close at the office of the Vendors solicitor at 2:00 p.m. on the 1st day of October A.D. 1981

3. TRANSFER OF TITLE

The Vendor agrees to transfer title free and clear of all encumbrances upon payment in full of the Agreement for Sale, not later than April 30, 1982.

4. POSSESSION

The Vendor agrees to deliver up possession to the Purchaser on closing of this transaction at the option of the Purchaser.

..."

[10] The acceptance of the offer was as follows:

> " ACCEPTANCE
>
> WE, BARNIEH INVESTMENTS LTD., being legal owners of the property noted herein hereby agree to the terms and conditions as contained herein.
>
> DATED at Calgary this 29 day of April A.D. 1981.
>
> BARNIEH INVESTMENTS LTD.
> 1035 Durham St. S.W. Calgary,
> Alberta"

[11] On May 6, 1981 R.D. Tingle, solicitor for 259202, wrote a letter to the solicitor for Barnieh the body of which was as follows:

> "We would confirm our telephone advice to you of May 4, 1981 wherein we indicated you were at liberty to release to your client the deposit forwarded with our letter of May 1, 1981 to your office.
>
> We would thank you for the documentation outlining the chain of title under which Barnieh Investments Ltd. claims an interest in the lands. We note that under the Offer to Purchase between our client and Barnieh Investments Ltd. vacant possession is to be given on October 1, 1981 and that an agreement for sale will be entered into between our client, or nominee, and your client, and presumably at that time title will be registered in the name of your client free and clear of all encumbrances excepting our client's caveat."

[12] On July 8, 1981 another letter was written the body of which was as follows:

> "Further to our letter of May 6th, 1981 in connection with the above file, we have now had the opportunity of reviewing the various sale Agreements relating to the property being purchased by 259202 Alberta Ltd. from Barnieh Investments Ltd. We note:-
>
> 1. The original Option to Purchase granted by Chariot Holdings Ltd. provides that the Option may be exercised at any time before the 30th of March, 1982, by delivering written notice to Chariot Holdings Ltd. accompanied by the sum of $500,000.00. The sale by Chariot Holdings Ltd. is to be completed 30 days after the date of delivery of such notice.
>
> 2. The Assignment Agreement dated the 30th of September, 1980 entered into between Amfac Developments Ltd. as Assignor and Time Motors (1968) Ltd. as Assignee, provides in paragraph 2.:-
>
> > 'In the event that the Assignee chooses to exercise its option to purchase as it relates to the Time Lands prior to March 30th, 1982, they shall be required to give the Assignor notice in writing of their intention to do so at least 60 days prior to the date set for the execution of the Option. '

3. Pursuant to the Offer to Purchase entered into between Time Motors (1968) Ltd. and Barnieh Investments Ltd., the purchase of the lands by Barnieh Investments Ltd. is to close September 30th, 1981. It is provided in paragraph:-

> 'Upon closing of this transaction, the vendor warrants, covenants and agrees to deliver registerable Bill of Sale and Transfer of Title to the Purchaser in freehold fee simple free and clear of all but permitted encumbrances.'

The only permitted encumbrance referred to in the Offer to Purchase is the mortgage registered as instrument number 741029451 in favour of Fowlie Investments Limited.

4. Pursuant to the Offer to Purchase entered into between Barnieh Investments Ltd. and our client, the sale to our client is to close on the 1st of October, 1981 by way of an Agreement for Sale and there is no mention of the lands being subject to any mortgage or other encumbrance.

We have the following concerns:-

1. Pursuant to paragraph 2. of the Agreement between Amfac Developments Ltd. and Time Motors (1968) Ltd. referred to above, 60 days notice in writing must be given to Amfac Developments Ltd. prior to the date set for the execution of the Option. It will accordingly be imperative that Time Motors (1968) Ltd. advise Amfac Developments Ltd. prior to July 31st, 1981 that it intends to exercise its Option as it relates to the 'Time Lands'.

2. Amfac Developments Ltd. will in turn be required to exercise the original Option to Purchase prior to August 31st, 1981 in order that the sale can be completed '30 days after the date of delivery of such notice'.

3. Amfac Developments Ltd. will be obligated in exercising its Option to deliver the sum of $500,000.00 to Chariot Holdings Ltd. at the time it delivers its notice exercising its Option.

4. Time Motors (1968) Ltd. will be obligated pursuant to paragraph 4. of the Assignment to pay Chariot Holdings Ltd. the sum of $1,907,583.00 immediately on September 30th, 1981 when the sale closes.

5. Pursuant to the provisions of the Offer to Purchase between Time Motors (1968) Ltd. and Banieh Investments Ltd., we note that Barnieh Investments Ltd. will be in turn required to pay $1,907,583.00 to Time Motors (1968) Ltd. since it has agreed to assume 'the vendor's Lease and Option to Purchase for the subject property'.

Our review of the various Agreements indicates that a series of notices and payments will be required before Barnieh Investments Ltd. will be in a position to sell the subject lands to our client under an Agreement for Sale as contemplated in the Offer to Purchase entered into between our client and Barnieh Investments Ltd. We would appreciate your early confirmation that arrangements have been made by the various companies to give the required notices and make the required payments in order that the sale to 259202 Alberta Ltd. can proceed as contemplated in the Offer to Purchase entered into between Barnieh Investments Ltd. and 259202 Alberta Ltd. Thank you."

[13] In reply the solicitor for Barnieh wrote the solicitor for 259202 on September 23, 1981. The body of the letter was as follows;

> "Please be advised that, after discussions with our client, our client has indicated that he will not in fact be paying out the items as contemplated in your July 8, 1981 letter. Our client, we understand, has discussed this with your client's agent and he will be giving to your client an Agreement for Sale with an undertaking to maintain in good standing the existing encumbrances on the property. He has advised and we will undertake to insure that notice is given pursuant to the clauses contained therein to terminate the Lease and deliver the property free and clear to your client not later than April 30, 1982."

[14] On September 24 the solicitor for 259202 replied. Part of his letter is as follows:

> "We would acknowledge receipt of your letter of September 23, 1981. It would be very much appreciated if you could clarify the suggestion that 'our client has indicated that he will not in fact be paying out the items as contemplated in your July 8, 1981 letter'. Presumably Barnieh Investments Ltd. is not in a position to enter into an agreement for sale as long as their interest is under a lease option agreement. Presumably, therefore, Barnieh Investments Ltd. will have to purchase an interest in the land in order to in turn sell the land to our client. We are of the view that unless the option to purchase is exercised, your client cannot sell the land under an agreement for sale to our client. The offer to purchase and interim agreement provides for 'possession to the purchaser on closing'. Your letter seems to suggest that the lease to Time Motors can only be terminated as of April 30, 1982 and that is not acceptable to our client. Pursuant to the provisions of the offer to purchase our client expects vacant possession of the property. It may well be that they will negotiate arrangements with Time Motors to extend the occupation by that company of the subject lands, but those negotiations are a matter between our client, or its nominees, and Time Motors."
>
> (emphasis added)

[15] 259202 subsequently agreed to sell the property to one Joseph Sefel for $4,400,000 but this sale was aborted. Time and Barnieh also entered into a further assignment agreement which provided for the payment of rental and for the manner in which the option from Chariot was to be exercised. As neither counsel made any point with respect to those matters in his argument, I shall disregard them.

[16] The $600,000 payable by 259202 under the terms of its agreement with Barnieh was forwarded to the solicitor for Barnieh on October 1, 1981 subject to certain trust conditions.

[17] On November 9, 1981 Barnieh tendered to the Appellant a draft agreement for sale for the Time lands and stated that unless the $600,000 was released on or before November 13, 1981 his client would "... consider the transaction to have been aborted and the funds forwarded as deposit forfeit".