**In the Court of Appeal of Alberta**

**Citation: Kathryn Farms Ltd v 1572548 Alberta Ltd, 2022 ABCA 21**

**Date:** 20220120
**Docket:** 2101-0093AC
**Registry:** Calgary



**Between:**

**Kathryn Farms Ltd., Marion Randall, Nancy Kissinger, Patricia Harding and Lori Randall also known as Lori Chang**

Respondents
(Applicants)

- and -

**1572548 Alberta Ltd.**

Appellant
(Respondent)

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**The Court:**

**The Honourable Justice Thomas W. Wakeling**
**The Honourable Justice Jo'Anne Strekaf**
**The Honourable Justice Anne Kirker**

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**Memorandum of Judgment**

Appeal from the Order by
The Honourable Justice P.R. Jeffrey
Dated the 8th day of June, 2021
Filed on the 14th day of July, 2021
(2021 ABQB 245, Docket: 2101 01967)

## Memorandum of Judgment

**The Court:**

### Introduction

[1] This is an appeal from an order discharging a caveat and declaring that a tenancy has terminated. The appeal is dismissed for the reasons that follow.

### Background

[2] The purchaser, 1572548 Alberta Ltd. (157), expressed interest in purchasing some 4400 acres of farm land from the vendor, Kathryn Farms (the Lands). The parties discussed various options, and entered into a Purchase and Sale Agreement dated November 29, 2018, with a purchase price of $27,779,944.00 (the Agreement). 157 agreed to pay a deposit of $100,000.00 and the remainder of the purchase price (the Balance) on April 1, 2019, the Closing Date. The purchaser was to receive vacant possession of the Lands on the Closing Date, but could access the Lands prior to that date upon reasonable prior notice to the vendor for the purpose of conducting soil tests and obtaining soil samples.

[3] The parties understood that 157 intended to obtain the funds to complete the purchase from the sale of lands that it owned in Germany. The Agreement contemplated the possibility of a late closing in the event that 157 was unable to obtain those funds by the Closing Date. In that event, the following terms would take effect: 157 would have until November 30, 2019 (Extended Closing Date) to pay the Balance; 157 would pay interest on the Balance at 2% per annum until the sooner of the Extended Closing Date or payment of the Balance; and the vendor would not be obligated to transfer title until the Balance was paid. In addition, the Agreement states that 157 would enter into a lease agreement on the Closing Date to lease the Lands from the vendor from April 1, 2019 to December 31, 2019 at a specified rent, payable on July 2, 2019, which amount would be applied against the Balance if closing occurred after the rent was paid.

[4] The Agreement further provided that if the Balance was not paid by the Extended Closing Date, the Agreement "shall be deemed to have terminated then. The vendor shall be entitled to retain the deposit in addition to the rent for the lease of the land and neither the vendors nor the purchaser shall be obligated to complete the purchase and sale transaction contemplated herein."

[5] 157 registered a caveat claiming a purchaser's interest in the Lands on March 29, 2019.

[6] 157 was unable to pay the Balance on the Closing Date, and the parties entered into a lease of the Lands from April 1, 2019 to December 31, 2019 (Lease 1), as contemplated by the terms of the Agreement. Lease 1 incorporated some of the terms of the Agreement and modified others.

The Extended Closing Date passed without 157 being in a position to pay the Balance, and Lease 1 terminated on December 31, 2019.

[7] 157 was still unable to pay the Balance. The parties attempted to agree on terms to amend the Agreement, but no agreement was reached. The parties entered into a second Lease Agreement (Lease 2), with a term from April 1, 2020 to February 28, 2021. Lease 2 did not refer to the Agreement, and did not mention the Balance.

[8] Ongoing discussions between the parties continued, but did not result in a new or amended agreement. On December 21, 2020, the vendor advised 157 that they had received other unsolicited offers and they would need a binding Amending Agreement or a binding written commitment from 157 to justify not accepting such offers. 157 responded on January 7, 2021, when they provided a Draft 2021 Revised Amending Agreement with a new extended closing date of November 29, 2021. That was not acceptable to the vendor.

[9] The vendor entered into an agreement on January 9, 2021 to sell the lands to a third party for $28.5 million, closing March 5, 2021. The vendor advised 157 on January 10, 2021 that they were not prepared to proceed further and had accepted a conditional offer from a third party. They requested that 157's caveat be discharged.

[10] 157 refused to discharge its caveat, claiming that the Agreement was an "agreement for sale" and that 157 was entitled in equity to an opportunity to redeem the title to the Lands.

**Chambers Decision (2021 ABQB 245)**

[11] The vendor did not follow the process set out in section 138 of the *Land Titles Act*, RSA 2000, c L-4, which would require 157 as caveator to take proceedings to substantiate its interest in the Lands, nor the process set out in section 141 of the *Land Titles Act* to ask the court to discharge a caveat, which would require notice to 157 to show cause why the caveat should not be discharged. Instead, the vendor applied by Originating Application in the Court of Queen's Bench for an order directing the Registrar of Land Titles to discharge the caveat.

[12] The chambers judge applied the summary dismissal test, as set out in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49, to the application. He was satisfied that it was possible to fairly resolve the dispute summarily, as it was primarily an issue of contractual interpretation and did not require a trial.

[13] The chambers judge reviewed the agreements and conduct of the parties in detail and set out his findings and conclusions in written reasons. He concluded that the Agreement was a 'purchase and sale agreement', and not an agreement for sale as argued by 157, that the Agreement terminated in accordance with its terms on November 20, 2019, and that a communication from the vendor on December 21, 2020 was sufficient notice that it treated the Agreement as terminated. He concluded that 157's interest in the Lands was that of tenant under Lease 2, that the lease had

expired and 157 was overholding. He rejected 157's submission that the vendor was repudiating the Agreement or that it had failed to perform its obligations under the Agreement. He stated that he was "convinced (that is, I am not just persuaded on balance), therefore, that 157 had no purchaser's interest after November 30, 2019, presently no longer has any caveatable interest in the Lands, and that the caveat must be removed." He granted a prohibitory injunction enjoining 157 from attending the Lands and a mandatory injunction requiring 157 to remove all its property from the Lands (excluding crops currently stored on the Lands).



**Grounds of Appeal**

[14] On appeal, 157 submits that the chambers judge erred:

1. in law in deciding on summary judgment rather than as a "show cause" application;
2. in mixed fact and law in granting relief where genuine issues existed;
3. in mixed fact and law in failing to find that the Agreement was an agreement for sale which had not been terminated for default and would require foreclosure;
4. in law in using the test for an interlocutory rather than a permanent injunction; and
5. in mixed fact and law in granting injunctions on the evidence.

**Standard of Review**

[15] Contractual interpretation, which requires applying the principles of contractual interpretation to the words of the contract in light of the factual matrix, involves issues of mixed fact and law: *Sattva Capital Corp. v Creston Moly Corp.*, [2014] 2 SCR 633 at para 50. Deference is accordingly owed on appeal to the contractual interpretation of the court below. Where an extricable question of law (such as statutory interpretation or the application of an incorrect principle) can be identified, the standard of correctness applies to that question of law, but the palpable and overriding error standard continues to apply to the interpretation of the contract: *Heritage Capital Corp. v Equitable Trust Co.*, 2016 SCC 19 at paras 21-24.

**Analysis**

*Did the chambers judge apply the incorrect test?*

[16] 157 submits that the chambers judge applied the incorrect test to assess the interest claimed in the caveat. It argues that, as s 141 of the *Land Titles Act* contemplates a "show cause" hearing, it was sufficient for 157 to establish a *prima facie* claim.

[17] Where there are several different procedural options available, as is the case where the interest claimed by way of a caveat is being challenged, a judge is required to apply the applicable test for the procedural approach in question. As the vendor elected to seek a declaration, rather

than bring an application under ss 138 or 141 of the *Land Titles Act*, the applicable standard is the summary judgment test. In this case, the chambers judge was more than satisfied that test had been met.

[18] In any event, even if the application had been brought under s 141, that section provides that the court "may make any order in the premises and as to costs that the court considers just".

*Was summary determination appropriate?*

[19] 157 submits that the matter was not amenable to summary determination because there were factual disputes which raised a material issue. The chambers judge disagreed. He stated (para 31):

> I am satisfied, having regard to the state of the record and the issues, that it is possible to fairly resolve the dispute now. There are no disputes about the facts, the record or the law, just about the law's application to the record. The core issue is one of contractual interpretation and the effect at law of the events and the parties' communications since, based on an undisputed record. There is no genuine issue here requiring a trial.

[20] The sufficiency of the record for summary judgment, the assessment of the facts, and the choice of remedy are entitled to deference: *Weir-Jones* at para 10; *PetroBakken Energy v Northridge Energy*, 2020 ABCA 470 at paras 21-22. We agree with the assessment by the chambers judge that this matter was appropriate for summary disposition.

*Did the parties enter into an agreement for sale?*

[21] 157 submits that the law distinguishes between the remedies available with respect to a contract for purchase and sale of land and "agreement for sale" of land. The latter is subject to s 40 of the *Law of Property Act*, RSA 2000, c L-7, which restricts the vendor to the land and the remedy of foreclosure.

[22] An "agreement for sale" in this context is a contract for the sale of an interest in land under which one party agrees to pay the purchase price over time, and on full payment, the other party is obliged to convey the title to the buyer: *Lutheran Church Canada (Re)*, 2017 ABQB 307 at para 35.

[23] Under an agreement for sale, title to the land remains with the vendor: Francis C R Price & Marguerite J Trussler, *Mortgage Actions in Alberta*, (Calgary: The Carswell Company Ltd, 1985) at 417. However, upon entering into the agreement, and making the initial payments as required under the contract, the purchaser is granted an equitable interest in the land. Once all the

conditions of the contract are met, the purchaser is entitled to have the title transferred to them from the vendor: *Lutheran Church Canada (Re)* at para 37; Price & Trussler at 434-435.

[24] Agreements for sale are, in essence, a financing arrangement between the vendor and purchaser.[1] There is, practically and procedurally, little difference between the sale of land under an agreement for sale and a mortgage back to the vendor: Price & Trussler at 433. The purchaser's right to enforce the agreement through specific performance is "akin to, and synonymous with" the right to redemption held by mortgagees: *Lutheran Church Canada (Re)* at para 46, and the enforcement mechanisms under Part 5 of the *Law of Property Act* refer both to mortgages and agreements for sale.

[25] 157 argues that the Agreement is an agreement for sale, noting that 157 took possession of the Lands on April 1, 2019, irrespective of whether it had paid the full purchase price. 157 says, further, that the "Extended Closing Date" was akin to the date on which the final payment was due under the agreement for sale.

[26] On reviewing the Agreement as a whole and the context in which it was made, we do not accept the appellant's interpretation of the Agreement. Rather, we agree with the conclusion of the chambers judge that "the Agreement is not an 'agreement for sale' but remained a 'purchase and sale agreement'". There is no indication in the dealings between the parties that they intended to enter into a form of financing arrangement, whereby the purchaser would pay the almost $28 million purchase price over a period of time. The intent was that the purchase price would be paid in full by the Closing Date, or the Extended Closing Date if the relevant terms of the Agreement were triggered. Article 2.4 of the Agreement expressly provides that the Agreement would be "deemed to have terminated" if the full purchase price was not paid by the Extended Closing Date, and, in that circumstance, "neither the Vendor nor the Purchaser shall be obligated to complete the purchase and sale transaction contemplated herein"

[27] 157 acquired possession of the Lands pursuant to Lease 1, which was described in Clause 2.4 of the Agreement as "a written Lease Agreement with the Vendors, in a form satisfactory to the Vendors acting reasonably, pursuant to which the Purchasers shall lease the Land from the Vendors from April 1, 2019 to December 31, 2019". The parties subsequently entered into Lease 2 for the period from April 2, 2020 to February 28, 2021; Lease 2 made no reference to the Agreement. While the parties continued to negotiate for some time, they never reached an agreement to extend or replace the Agreement.

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[1] The British Columbia Law Reform Commission described an agreement for sale as "a common and effective security device which may be used as an alternative to a sale with a mortgage back to the vendor": *Report on Security Interests in Real Property: Remedies on Default* (LRC 24), Vancouver, British Columbia Law Reform Commission, 1975 at c III, A; see also *Hanif v TJM Management Consultants Ltd*, 2012 BCCA 485 at para 32.

[28] In view of all of the circumstances, the chambers judge's conclusion that the Agreement was a purchase and sale agreement, and not an agreement for sale, was not only reasonable, but correct.

*Did the chambers judge err in his findings regarding the termination of the Agreement?*

[29] The chambers judge concluded that the Agreement terminated automatically on November 30, 2019 as contemplated in Article 2.8 which stated:

> [I]f the Purchaser fails to perform any provision of this Agreement then … this Agreement shall terminate.

[30] He went on to find that in any event, the December 21, 2020 notice by the vendor was sufficient notice that it treated the Agreement as terminated.

[31] These findings of the chambers judge disclose no reviewable error.

*Alleged Breach by Kathryn Farms*

[32] 157 submits that the vendor was in breach of the Agreement when it failed to deliver closing documents prior to April 1, 2019 and that as a result it can no longer claim that time was of the essence.

[33] The chambers judge rejected this submission. He found that the vendor's failure to deliver closing documents was "solely and entirely because 157 admitted at the time it would not tender the funds Balance." He further found that "Kathryn Farms remained at all times poised and ready to close; 157 was not".

[34] The findings by the chambers judge, which are entitled to deference, disclose no reviewable error.

*Injunctive Relief*

[35] 157 submits that the chambers judge erred by applying the tripartite test applicable for an interlocutory injunction, rather than the test for a permanent injunction.

[36] We agree.

[37] The vendors sought a permanent injunction and the chambers judge should have applied the test for a permanent injunction.

[38] As one would expect, given that the test for a permanent injunction governs a final disposition of a proceeding and the test for an interlocutory injunction is only temporary in nature,

the two tests are fundamentally different. This Court explained the differences in *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303 at para 17:

> Since an interlocutory injunction is, by definition, only in place until trial, it involves a consideration of the prospect of irreparable harm occurring before trial, and the balance of convenience. On the other hand, before a permanent injunction can be granted, whether summarily or after trial, the plaintiff must fully prove its rights; demonstrating a "serious issue to be tried" is not sufficient. Once it has conclusively established its rights, the plaintiff must also demonstrate that it is entitled to the equitable remedy of a permanent injunction.

[39] The vendors were entitled to a permanent injunction. Lease 2 had expired and the appellant was overholding. The vendors had clearly established their rights. The vendors did nothing – delay or any other conduct on which equity frowns – that would deprive them of the equitable right to remedy. An order directing the appellant to vacate the land was the only effective remedy available.

[40] While it is regrettable that the chambers judge applied the wrong test, his error is of no consequence. The vendors clearly met the test for a permanent injunction – the very remedy the chambers judge granted. No other remedy would have been suitable.

**Conclusion**

[41] The appeal is dismissed.

Appeal heard on November 8, 2021

Memorandum filed at Calgary, Alberta
this 20th day of January, 2022

Wakeling J.A.

Strekaf J.A.

Kirker J.A.

**Appearances:**

T.L. Czechowskyj, Q.C.
for the Respondents

C.M. Smith
M.G. James (no appearance)
for the Appellant