Citation: *Cowell v. Sinclair*, 2018 YKSM 1

Date: 20180426
Docket: 16-S0055
16-S0081
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Seidemann III

CARL COWELL and
MARJORIE COWELL

Plaintiffs

v.

GORDON SINCLAIR

Defendant

Appearances:
Carl Cowell and Marjorie Cowell — Appearing on their own behalf
Mark Wallace — Counsel for Defendant

REASONS FOR JUDGMENT

[1] These are two proceedings between the same parties which were ordered to be heard together. The causes of action in the two proceedings are clearly distinct, but the factual background to both actions is inextricably intertwined.

[2] The first proceeding, file 16-S0055, is a claim by Mr. and Mrs. Cowell with respect to an agreement between the parties for Mr. and Mrs. Cowell to purchase a parcel of land (referred to hereafter as “the farm”) from Mr. Sinclair. That purchase did not complete. The Cowells claim that it did not complete because Mr. Sinclair was

unable to deliver a title free from claims by the Canada Revenue Agency which had been registered against the farm.

[3] The Cowells say that, in reliance upon the agreement, they spent time and money doing improvements to the farm, making changes to make the farm compliant with building or usage codes, and otherwise making the farm into a status that the bank would advance a mortgage on the security of it. They claim for reimbursement of their expenses and for the time which they spent trying to make the purchase complete.

[4] Mr. Sinclair replied to this action by saying that the reason that the sale did not complete was because the Cowells did not have a sufficient down payment and, in any event, he disputes the detail of time and expenses incurred by the Cowells. He then counterclaimed for the value of certain items which the Cowells removed from the farm and for an order that the Cowells should provide access to the cabin on the farm where they had previously resided, to Mr. Sinclair and his realtor for a potential other sale of the farm.

[5] The Cowells responded to the counterclaim by saying that they were told by Mr. Sinclair to remove all of their property from the farm and all of the items which they removed were their property.

[6] The second proceeding, file 16-S0081, is a claim made by the Cowells with respect to the eventual sale of the farm by Mr. Sinclair to a third party. There was on the farm a cabin which had been built by and occupied by the Cowells. They claim that there was an agreement, originally proposed by Mr. Sinclair, that he would subdivide the farm and transfer to the Cowells the cabin and 23 acres of land on which it was

situated, when such subdivision became possible. The Cowells say that they had performed their obligations under the agreement, which was to perform specific work on the farm and on a grazing lease acquired by Mr. Sinclair, and were beneficially entitled to ownership of the cabin and that portion of the land. Their claim is that, when the farm was sold to a third party, the cabin and land were transferred to the third party as part of the sale and that Mr. Sinclair was unjustly enriched as a result.

[7] Mr. Sinclair replied to this claim by denying that there was ever an agreement to subdivide and transfer the portion of the farm as claimed. In the filed reply, Mr. Sinclair said that the Cowells were permitted to live in the cabin rent free as a result of Mr. Cowell's labour and finishings for the construction of the cabin. Mr. Sinclair denied that there was ever any agreement of any kind to subdivide the land and transfer the cabin to the Cowells. Mr. Sinclair says that Mr. Cowell was paid cash for all of the work he performed on the farm and on the grazing lease.

[8] Mr. Sinclair claimed, in the event that he was found liable in the second proceeding, a set-off for a penalty which was deducted from the purchase price he eventually received for the farm from the third party. That penalty was a result of certain items not being removed from the farm by a specified deadline. Mr. Sinclair said that the penalty was imposed because the Cowells had failed to remove items they had left on the farm. Mr. Sinclair also claimed a set-off for the value of a dozer and an excavator which were removed from the farm by the Cowells.

[9] The Cowells responded to the claimed set-off by stating that Mr. Sinclair had left property of his own on the farm to the extent that he was not entitled to receive the

holdback in any event and their failure to remove any of their property had not caused him any additional loss. They also claimed that the dozer and excavator were their property and they were entitled to remove them from the farm.

[10] There are a number of facts about which there is no dispute. There are a number of facts about which there is serious dispute. Where that is so, I will attempt to set out each party's position.

[11] Mr. Sinclair and Mr. Cowell are related. Mr. Sinclair is Mr. Cowell's uncle, the brother of Mr. Cowell's mother. Mr. Sinclair and Mr. Cowell lived together in Whitehorse. In 2001, Mr. Sinclair purchased the farm and they both moved to live there. The farm is located on Takhini River Road, outside Whitehorse. I am told that it is approximately a 35 minute drive to Whitehorse. It is what is referred to as "off grid", meaning that there are no utilities such as electricity, water, sewer, or gas provided by any government body or public utility corporation.

[12] There was on the farm one large house. Initially Mr. Sinclair, his girlfriend, and Mr. Cowell all lived in the house. At some time, Mr. Sinclair's girlfriend left and, at some subsequent time, a new girlfriend moved in. Mr. Sinclair suggested to Mr. Cowell that he would provide building materials for a cabin to be occupied by Mr. Cowell, if Mr. Cowell built it. Mr. Sinclair provided the detailed plans for the cabin and provided materials for the foundation, framing, roof trusses and insulation. Mr. Cowell dug the hole for the basement and the septic system, and Mr. Sinclair provided the piping and tank for that. Mr. Cowell placed footings for the foundation.

[13] At approximately that time, Mr. and Mrs. Cowell met and became involved with

each other. Mr. Cowell moved into Whitehorse and the Cowells then lived in Whitehorse until 2004. In 2004, the Cowells determined to complete the cabin and commenced seriously to work on it. The foundation was made of cinderblock, laid by Mr. Cowell. The Cowells lived on the farm in a camper and a wall tent. Mr. Cowell worked on the cabin and Mrs. Cowell worked at employment to support them. A third person was hired for some time to help with the framing and the installation of the roof trusses. Mr. Sinclair shared in that expense and provided the building materials.

[14] In the fall of 2004, when it was too cold to continue to live in the camper and tent, Mr. and Mrs. Cowell returned to Whitehorse, then to Alberta for the winter. They returned to the farm in the late summer of 2005. At that time there was still no heating in the cabin, or electric power or running water. Mr. Sinclair said at that time that he would not fund any further work on the cabin. The Cowells say that they lived in the cabin, commencing that winter. They say that they had installed an oil barrel stove for heat which almost asphyxiated them and they then cut a hole in the roof to install stovepipe and a wood stove that Mr. Sinclair gave them.

[15] In 2006, the Cowells added a 10 foot by 16 foot addition to the cabin, which was originally 16 feet by 20 feet. They paid for all the materials for that. Through 2007, the Cowells worked on finishing the cabin, including setting up a solar electric system, a generator, and storage batteries.

[16] In 2007 occurred what is one of the major areas of disagreement. Several years earlier, Mr. Sinclair had applied for and received a grazing lease over a large parcel of land which adjoined the farm. In 2007, he had to complete the conditions which were

part of that grazing lease. The most onerous condition was that the area of the lease had to be fenced. There was clearly urgency to complete the fencing or the lease would be at risk.

[17] Mr. Cowell says that Mr. Sinclair came to him with a written proposal that Mr. Cowell should complete the fencing and do several other specified jobs on the farm, and, when he legally could, Mr. Sinclair would subdivide a 23 acre parcel from the farm, which included the cabin, and transfer it to Mr. Cowell. Mr. Cowell says that, attached to the proposal, was an aerial photo of the farm, on which the 23 acre parcel was marked out. Both Mr. Sinclair and the Cowells were and are of the view that it was not legally possible to subdivide the farm until Mr. Sinclair had owned it for ten years.

[18] The fencing was completed. Initially it was to be a Russell fence and was started as such, but it was determined that that would require too much material and take too long to complete. Several other workers had been hired for that portion of the fencing. It was determined to complete the fencing as a post and wire fence. That was done by Mr. Sinclair, Mr. Cowell, and Mr. Leiske, a friend of Mr. Cowell's who also testified. The other workers hired initially and Mr. Leiske were paid by Mr. Sinclair. Mr. Cowell says he was not paid, doing the work pursuant to the agreement to acquire the cabin, and Mr. Sinclair claims that he did pay Mr. Cowell for this work.

[19] Mr. and Mrs. Cowell claim that the proposal by Mr. Sinclair was in writing and was kept by them but, in their subsequent moves, has gone missing and cannot now be produced.

[20] In his filed Reply, Mr. Sinclair denies that there was ever any agreement to

subdivide the farm or transfer 23 acres to the Cowells. In giving his evidence, Mr. Sinclair acknowledges that there was such an agreement, but says that it was different than what Mr. Cowell claims. Mr. Sinclair testified that the agreement was that Mr. Cowell would work on the farm and not receive pay, but would build up a bank of credit which could be used to purchase the cabin for its then (at the time of subdivision) market value. Mr. Sinclair says that that transfer would occur when the farm could legally be subdivided and the credit had built up to the then value of the cabin. Mr. Sinclair says that Mr. Cowell always insisted upon being paid cash for his work on the farm and never built up any credit towards the purchase.

[21] The Cowells say that, after 2011, when Mr. Sinclair had owned the farm for ten years, they approached him about the subdivision and transfer of the cabin on several occasions. They say that he always put them off with some excuse, but never denied the existence of the agreement or their entitlement to have the property transferred. They say that, because of the familial relationship, they saw no urgency to the subdivision and transfer. Mr. Sinclair denies that this issue was ever raised until the action was commenced.

[22] Then, in 2013, Mr. Sinclair was in some financial difficulty. The Cowells discovered this when the sheriff or the police appeared on the farm and were posting notices of seizure or something similar on various items on the farm. As a number of the items on the farm were the property of the Cowells and not of Mr. Sinclair, they were concerned. Mr. Sinclair told them that it was a problem with the Canada Revenue Agency (“CRA”), but that he had resolved it and that they need not worry.

[23] In 2015, again notices of seizure were placed on everything of apparent value on the farm, including items which were the property of the Cowells. The Cowells say that they became concerned and offered to pay for the subdivision of the farm, so that transfer of the cabin could take place. They say that Mr. Sinclair said that there was not sufficient time to do that and that, to satisfy CRA, he would probably have to sell the whole farm. They say that, in the fall of 2015, Mr. Sinclair first raised the possibility that they might buy the whole farm from him for a discounted "family rate" with an agreement that he could continue to reside on the farm for as long as he wanted.

[24] The Cowells commenced negotiations with their bank for financing and retained a lawyer. That lawyer, quite properly, insisted that in these circumstances he could not provide any advice to Mr. Sinclair, who would have to retain his own lawyer. The Cowells attempted to determine how much money would have to be paid to ensure that they got a clear title, but were unable to obtain details of some of the encumbrances because of privacy concerns by the people to whom Mr. Sinclair owed money. They were told that that information could only be provided to Mr. Sinclair or his counsel.

[25] Mr. Sinclair wanted to keep things as simple as possible, and minimize the involvement of lawyers. In March, 2016, he prepared and presented to the Cowells a form of offer by them to buy the farm and chattels for a purchase price of $275,000. They all went to the Cowell's lawyer's office, where Mr. Sinclair was told that that amount was not sufficient to clear title, but it was signed by all the parties anyway.

[26] The Cowells were concerned that the deal could not be completed until a way could be found to guarantee a clear title to the farm and pressed Mr. Sinclair to get a

lawyer who could settle that matter. Mr. Sinclair was reluctant to do this and, at one point, advised the Cowells that he had retained a lawyer, gave a name, and when their lawyer contacted that person, he had not had any contact from Mr. Sinclair. In giving his evidence, Mr. Sinclair acknowledged that he deliberately lied to the Cowells at that time, because he felt they were getting aggressive about the issue.

[27] There were at least two appraisals done of the farm. In order to obtain financing for the purchase of the farm, the Cowells had to have a down payment. Eventually, their lawyer prepared a proper purchase and sale agreement which provided for a larger purchase price, for Mr. Sinclair to agree to gift to the Cowells an amount which would act as their down payment, and which would provide a balance payable which would be sufficient, according to the information provided by Mr. Sinclair, for Mr. Sinclair to provide a clear title. The total purchase price in this agreement was $415,000.00, the gift to be made by Mr. Sinclair to the Cowells was $83,000.00, and the net amount actually to be paid to Mr. Sinclair, subject to the normal adjustments, netted out at $332,000.00.

[28] The bank providing the financing to the Cowells provided the form of gift letter which they required to confirm the down payment and, on that basis, was prepared to finance the balance by a mortgage on the farm. Mr. Sinclair wanted to be assured that he did not have to actually pay any of the amount of the gift out of pocket and, with that assurance, the agreement was signed by all parties. That agreement is Exhibit 1 in these proceedings and is the agreement relied upon by the Cowells in their first action.

[29] Before the bank would advance funds on a mortgage of the farm, there were a number of details that had to be attended to. Because the farm was in a remote location, construction had not necessarily been done at all times in accordance with the building code or other regulations which might have applied. These all had to be attended to, the property inspected to confirm compliance, and the information passed on to the bank before the completion date. The Cowells say that they did that and it is expenses incurred in doing that that are a large part of their first claim.

[30] The original and continuing deal with Mr. Sinclair was that he could continue to reside on the farm. He wanted some documentation of that. Eventually it was agreed that there would be a tenancy agreement between Mr. Sinclair and the Cowells and their lawyer prepared that. The Cowells say that they signed it and it was provided either to Mr. Sinclair or his lawyer. They believe that Mr. Sinclair signed it but, in any event, they say that they had done everything they were required to do in that regard.

[31] The Cowells say that they did everything which they were required to do to complete the purchase. They paid to their lawyer all the funds that they were required to pay before the sale closed. They understand that the bank actually advanced the funds from the mortgage to their lawyer, because one or two payments on the mortgage were taken from their bank account before the funds were apparently returned.

[32] The purchase and sale did not complete, on the date when it was supposed to, or ever. By an email 2 days after the sale was supposed to complete, Mr. Sinclair's lawyer advised that CRA was not prepared to clear their writ on the basis of this deal and that Mr. Sinclair might have to sell the farm to a third party for market value to

satisfy them. The Cowells say that the inability of Mr. Sinclair to give a clear title was the reason the sale did not complete and was a breach of his obligations under the agreement.

[33] Mr. Sinclair says that, when he was advised of this by his lawyer, he was unable to contact CRA immediately, but, within five days, had worked things out with them and so advised Mr. Cowell. Mr. Sinclair says that Mr. Cowell told him that they were done and would no longer complete the purchase. The Cowells say that the first time they ever heard that Mr. Sinclair had worked things out and that the sale could have completed as agreed was when Mr. Sinclair testified to that on the last day of the trial. They acknowledge that Mr. Sinclair sent them a couple of emails saying that the deal might not be dead, but providing no details, and they were not prepared to dicker further.

[34] The reply filed by Mr. Sinclair when the claim was first brought, does not say that the Cowells refused to complete, but says that the sale did not complete because the Cowells did not have sufficient down payment and CRA would not accept the gift letter. Although I will deal with credibility later in this judgment, I will say now that I absolutely disbelieve Mr. Sinclair's evidence that he, within days of the intended completion, had made a final accommodation with CRA which would have allowed the sale to complete on the terms previously agreed and that the Cowells refused to complete after being told that.

[35] When it was clear that the purchase was not going through, the Cowells commenced to move to Whitehorse. The Cowells communicated with Mr. Sinclair,

requesting compensation for the expenses they had incurred relying upon the purchase. Mr. Sinclair responded that he was prepared to consider the compensation and asked for a list. The Cowells provided to Mr. Sinclair the list of expenses they claimed. In addition, the Cowells advised Mr. Sinclair that they felt they were entitled to compensation for their time spent on the matter and provided an estimate of what they said that amounted to. The total was $12,835.00. The Cowells also offered to Mr. Sinclair that they would forego reimbursement of the expenses, if he would provide written authority for them to separately sell the cabin on their own. When they filed the first claim and at trial, the Cowells say that the actual amount of their expenses and time was $17,853.08.

[36] Mr. Sinclair requested documentation of the expenses claimed. The Cowells provided invoices or other documentation for the expenses. Mr. Sinclair replied that the list of expenses did not match the total, but said that he was prepared to resolve the matter for $12,800.00. That was expressed to be on the condition that the Cowells would remove all of their personal belongings from the cabin, remove all of their vehicles and other things from the farm property, and confirm that they would not remove anything from the structure of the cabin, all by October 10, 2016. Any costs he incurred to remove any of their property from the farm after that date would be deducted from the payment to be made by him and any expenses incurred by the Cowells in removing their property from the farm would be at their expense, not his. That offer was not accepted and the first action was commenced.

[37] Mr. Sinclair listed the farm for sale with a real estate broker. He wanted access to the cabin, so that it could be shown as part of the sale. He again requested the

Cowells' assurance that they would not remove the cabin before he would compensate them for their lost expenses. The Cowells did not give that assurance, did not give access to the cabin to the real estate agent, and the Cowells have never been reimbursed for their wasted time or expenses.

[38] The Cowells moved out of the cabin into Whitehorse. Over a period of several months, they removed most of their personal property from the farm. They removed from the cabin several items which they had placed there or which they otherwise took the position was their property. They removed from the farm a large part of the items which they had placed on the property which were no longer of any value or use. There is no doubt that they left on the farm some items which they had placed there which were no longer of value or use. The items removed from the cabin and some of the items removed from the farm form the subject matter of the counterclaim brought by Mr. Sinclair in the first action.

[39] In the counterclaim, Mr. Sinclair claims for what he says is the value of a variety of items. The Cowells take the position that, because of the agreement to subdivide the property and transfer the cabin to them, anything which was in the cabin or on that portion of the farm was their property. They say that would apply to all of the items referred to in the counterclaim, although there are additional considerations for some of the items. In most cases, they disagree with the values placed on the items by Mr. Sinclair.

[40] With respect to the snow machine and Honda motorbike referred to in the counterclaim, Mr. Cowell says that both of those items had been disposed of long

before the proposed sale of the farm and, in any event, claims that they were both his property, having been given to him by his grandfather's estate. Mr. Sinclair claims that both were given to him by his father's estate. With respect to the trailer, Mr. Cowell acknowledges removing it, but says that it was on the 23 acres at the time of the 2007 agreement, remained there since, and he was entitled to it pursuant to that agreement. The Cowells say that the remaining items were all in the cabin at the time of the 2007 agreement.

[41] Mr. Sinclair made an agreement to sell the farm to a third party. The purchase price was $576,250.00. The sale was to conclude November 30, 2016, but provided that Mr. Sinclair could reside in the house until March 30, 2017. The agreement provided that Mr. Sinclair was to remove from the farm a large number of enumerated items that might colloquially be referred to as "junk", and set out a number of items which were to remain on the farm and belong to the purchaser. The agreement provided for a holdback of $10,000.00 of the purchase price, which was payable after March 30, only if the "junk" had been removed.

[42] The agreement specifically included in the list of items which were to belong to the purchaser "1 outhouse by small house, propane tanks and generator shed by small house, all fixtures/systems/amenities at small house". The "small house" refers to the cabin which had been occupied by the Cowells. The agreement specifies that the property and all included items are to be in substantially the same condition on completion as when viewed by the purchaser on October 20, 2016. That date is significant because it is clear that the Cowells had already before that date removed

from the cabin those items Mr. Sinclair refers to in his counterclaim to the first action and which the Cowells claimed were their property as I have referred to earlier.

[43] Mr. Sinclair lived on the farm until March 30. He cleaned up much of the "junk", including removing some which had been placed on the property by the Cowells. The Cowells continued to remove items from the farm which had been placed there by them. When the purchasers took possession, they took the position that there remained on the farm items which were supposed to have been removed to such a degree that they refused to pay the holdback of $10,000.00. Mr. Sinclair claims that, if he is liable at all on the claim for unjust enrichment, that he should be entitled to set off against the amount of any such liability the $10,000.00 he lost on the holdback.

[44] The Cowells acknowledge that they did not remove from the farm everything which they had placed upon it and which, by the terms of the purchase agreement with the third party, Mr. Sinclair was obligated to remove. They say that, however, there remained on the farm property of Mr. Sinclair such that, even if all of their property had been removed, Mr. Sinclair would not have been entitled to payment of the holdback. Accordingly, they say, Mr. Sinclair has suffered no loss by reason of their failure to remove their property and he is not entitled to any set-off.

[45] I will deal with credibility of the parties. In many areas which I have identified, the parties have diametrically opposed versions of what occurred. For a variety of reasons which I will detail more fully, Mr. Sinclair is simply not credible. He is not capable of belief. He will do or say whatever suits his purposes, without regard to the truth or

honesty of his words or actions. Wherever his version of events differs from that given by the Cowells, I prefer and believe their version of events.

[46] The first point in time where the parties seriously disagree is the terms or existence of the 2007 agreement. Mr. Cowell says that Mr. Sinclair came to him with a written proposal in the terms I have previously referred to. Mr. Leiske says that, at the time he worked on fencing the grazing lease, he understood that Mr. Cowell was not getting paid and was earning an interest in the cabin and 23 acres of the farm. He acknowledged that that was based on what he was told by Mr. Cowell, but it was his understanding at that time. He says that he at some point saw an aerial photo that had a portion of the farm marked out on it.

[47] Mr. Sinclair's reply denies that there was any agreement regarding transfer of the cabin and any land. The reply says that the only agreement was to permit the Cowell's to live rent-free in the cabin if they built it. When Mr. Cowell was cross examined, it was never suggested to him by Mr. Sinclair's counsel that there was an agreement in the terms testified to by Mr. Sinclair.

[48] When Mr. Sinclair testified, he said that he had proposed an agreement about the cabin, but that it was different from what Mr. Cowell said. Mr. Sinclair said that the agreement was that Mr. Cowell would earn a credit towards purchase of the cabin and the 23 acres by his work on the farm, starting with the fencing of the grazing lease. The purchase, when it occurred, would be at the then market value of the property to be transferred. Mr. Sinclair says that Mr. Cowell insisted on being paid for the work on the

grazing lease and all other work he did on the farm, and never built up any credit towards the purchase of the cabin.

[49] There are several problems with that position. First of all, the rule set out in *Browne v. Dunn* requires that such a position be put to the Cowells on cross examination. That was not done. Mr. Cowell was cross examined on the question that there was no agreement, not that there was an agreement as described by Mr. Sinclair. Both Mr. and Mrs. Cowell testified to the fact that Mr. Cowell did work both on the grazing lease and otherwise on the farm without pay and were not cross examined with the position that Mr. Cowell insisted on cash payment for all of his work. One of Mrs. Cowell's complaints was that Mr. Cowell was constantly leaving paid employment to do unpaid work on the farm, leaving her to try and support the family. Mr. Sinclair's claim that Mr. Cowell was being paid cash for all his work on the farm was never put to her.

[50] The agreement suggested by Mr. Sinclair is not one that any rational person would agree to. It is clear that, by 2007, the Cowells had provided most of the labour for the construction of the cabin and all of the material for the addition to the cabin and the agreement as claimed by Mr. Sinclair would have given them no credit for any of that. The suggestion that Mr. Cowell would work for free for some indeterminate amount of time, for the chance to purchase the cabin for a price which was not set and for which no formula was proposed other than a vague "fair market value at the time", is simply not believable

[51] In his claim for a set-off, Mr. Sinclair claims that Mr. Cowell removed from the farm a D6 Caterpillar bulldozer and a Kobelco excavator. In the filed Reply, Mr. Sinclair

says that these items have not been paid for and estimates their value as being $35,000.00. When Mr. Cowell was cross examined about these items, he freely acknowledged that he removed them from the farm. He said that they were his property and that he had a Bill of Sale from Mr. Sinclair for them. He produced Exhibit 6, which is a Bill of Sale dated October 18, 2010, signed by Mr. Sinclair. The stated value is $10,000.00.

[52] Mr. Cowell says that the purchase price was paid by him by doing additional work on the farm and that the purpose of the bill of sale was to transfer the items to him. When Mr. Sinclair was questioned about this Bill of Sale, he acknowledged that he had made it. The only explanation he could give for why he would have given it if it had not been paid for and was not intended to transfer ownership was that he thought maybe Mr. Cowell was going to move the items somewhere for use in mining. If that was to be done with his permission, no Bill of Sale would be required. He was simply unbelievable.

[53] These items stayed on the farm. They were removed when the Cowells left the farm. The only rational reason for the existence of the Bill of Sale is to document that the items have been paid for and ownership is to transfer. This was done six years before it became an issue. When Mr. Sinclair prepared the offer to purchase the farm which all the parties signed in March, 2016, he included a detailed list of the farm related equipment which was included in the sale. It included tractors, combine and trucks. It did not include the dozer and excavator and the conclusion I come to is that they were not included because they had already been sold to the Cowells.

[54] When cross examined about why he had included various items or values in his Reply, Mr. Sinclair responded to the effect that “when sued, everybody tries to balance out the claim”. He displayed no sense of the wrongness of that response. It simply illustrates my earlier comment about his lack of credibility. He will do or say what suits his purpose, and accuracy or truthfulness is not the determining factor. His placing a value of $35,000.00 on the dozer and excavator, when he had placed a value of $10,000.00 on them in the Bill of Sale signed six years earlier is another example of that attitude.

[55] Mr. Sinclair’s counsel submits that I ought not to be satisfied that Mr. Sinclair was in breach of the purchase agreement for the farm. He says that there is no evidence that, on the date fixed for completion, the Cowells or their lawyer tendered the purchase price to Mr. Sinclair or his lawyer. He suggests that, absent that evidence, I cannot conclude that it was Mr. Sinclair’s breach which defeated the agreement. I do not accept that proposition. This is not a criminal case where I must be convinced beyond a reasonable doubt. This is a civil case where I must be convinced on the balance of probabilities.

[56] The evidence is clear that, two days after the date fixed for completion, Mr. Sinclair was unable to deliver a clear title as required by the agreement. As nothing of any significance is alleged to have occurred in those two days, it is a reasonable inference that, on the date fixed for completion, Mr. Sinclair could not give a clear title. He acknowledged as much, when giving his evidence. The Cowells say that they had done everything that they were required to do before completion and that the mortgage

funds had been advanced, so that their lawyer was in a position to complete on the day required. That evidence has not been challenged.

[57] When one party has evidence that they were ready, willing and able to complete, and there is evidence that the other party was not, it is reasonable to infer that the failure to complete is as a result of the party who was not able to perform their obligations. I am satisfied that the reason that the purchase did not complete was because of the breach by Mr. Sinclair of his obligation to deliver a clear title.

[58] Mr. Sinclair says that the reason the sale did not complete was because the Cowells did not have a sufficient down payment and relied on the gift letter for that purpose, and CRA would not accept that. In one sense, that is true. That is why Mr. Sinclair was unable to deliver a clear title. That would have been a reason for Mr. Sinclair not to have entered into the purchase agreement. It is clear that the purchase price was fixed after discussion with Mr. Sinclair as to what was going to be required by CRA to clear title. The Cowells were trying to determine that and could not get the information. Mr. Sinclair wanted to keep things between himself and CRA private. That was his right. But no one forced him to enter this agreement.

[59] In an email dated April 10, 2016, Mr. Sinclair requested that the price be set at $375,000.00, saying that that would “prevent CRA from refusing to participate”. The purchase price was eventually set at $415,000.00, a greater amount, and yet CRA did not approve. Clearly, Mr. Sinclair had not actually obtained their agreement at the time he sent this email to the Cowells.

[60] As far as the Cowells knew, it had been approved by CRA. If Mr. Sinclair had said that CRA would not accept a deal structured in this way, it is possible that the purchase price, the gift and the mortgage could all have been altered in a way that satisfied them. He did not say that. He signed the agreement in its final form, committing that, on that basis, he would be able to deliver a clear title. In many ways, that action was a lie, as Mr. Sinclair had not taken steps to confirm that he would be able to perform. It is another example of Mr. Sinclair just not being concerned about the truth or honesty of his actions.

[61] Mr. Sinclair claims a set-off against any amount I find would be payable to the Cowells on their unjust enrichment claim. He says that the holdback on the sale of the farm was not paid to him because of the items left on the farm by the Cowells. Mr. Sinclair acknowledged that he had left items on the farm that were supposed to be removed. He said that of the items left on the farm that were supposed to be removed, approximately 80% was from the Cowells and 20% was from himself. He asks that, accordingly, he be entitled to a set-off of at least 80% of the holdback.

[62] The problem facing Mr. Sinclair is that he has not provided any proof that, but for the material left by the Cowells, he would have been entitled to receive the holdback, or at least part of it. The onus of proof for the claimed set-off is Mr. Sinclair's. Mr. Cowell says that the purchaser told him that, regardless of the items left by the Cowells, Mr. Sinclair had left sufficient items on the farm that he was not going to be paid the holdback. That being hearsay, I cannot rely upon it for its truth. However, for Mr. Sinclair to succeed in his claim for a set-off, he must establish on a balance of probabilities that it is not true. He must prove that, but for the failure of the Cowells to

remove their property, he would have been paid the holdback. There is simply no evidence upon which I could reasonably come to such a conclusion.

[63] I am satisfied that there was an agreement in 2007 with respect to the cabin and 23 acres substantially in the terms as described by the Cowells. I am satisfied that the services to be performed by Mr. Cowell included other work beyond the fencing of the grazing lease, as described by Mrs. Cowell and, I think, acknowledged by Mr. Cowell. I am satisfied that Mr. Cowell performed all of the services required to be done by that agreement, was not otherwise paid for those services, and was beneficially entitled to the cabin, the 23 acres, and anything which was on those lands.

[64] I am satisfied that Mr. Sinclair was in breach of his obligation to deliver a clear title as required by the purchase agreement. I am satisfied that that breach is the reason why that purchase and sale did not complete and the Cowells are entitled to recompense for their damages suffered thereby, as claimed in the first action. I will deal later with the quantification of those damages.

[65] Based on my findings of credibility and the existence of the 2007 agreement as claimed by the Cowells, I am satisfied that all of the items referred to in Mr. Sinclair's counterclaim to the first action were the property of the Cowells or assets to which they were beneficially entitled. The Cowells were entitled to deal with them as they wished, and the counterclaim to the first action is dismissed.

[66] I am satisfied that the Cowells, based on the 2007 agreement as I have found it to be, were beneficially entitled to the cabin and the 23 acres around it. There is no doubt that the cabin and those lands were sold with the rest of the farm and included in

the purchase by the third party. The cabin is specifically referenced in that purchase agreement. Mr. Sinclair received all of the proceeds of that sale. I am satisfied that Mr. Sinclair has been enriched by being able to sell something that beneficially belonged to the Cowells and that there is no legal reason why he should be entitled to do so.

[67] Unjust enrichment requires three elements:

1. An enrichment;
2. A corresponding deprivation; and
3. The absence of a juristic reason for the enrichment.

[68] In this case, Mr. Sinclair has been paid for the sale of the cabin and the 23 acres with the farm. Mr. and Mrs. Cowell have lost the cabin and the 23 acres without any compensation. Mr. Sinclair had entered into an agreement to transfer the cabin and 23 acres to the Cowells and they had performed the tasks required to pay for that. Essentially, Mr. Sinclair has been paid for the cabin and 23 acres twice. There is no legal reason why he should be entitled to that double payment. I find that the claim for unjust enrichment, as claimed in the second action, has been made out. Again, I will deal with the quantification of that claim later.

[69] Mr. Sinclair claims a set-off if I find that the unjust enrichment claim is established. I am not satisfied that Mr. Sinclair has established that he would have received the holdback, or any part of it, but for the items left on the farm by the Cowells. He has not established any loss attributable to their actions and the claim for a set-off is denied.

[70] With respect to the amount of the loss suffered by the Cowells in the first action, Mr. Sinclair's lawyer points out that much of the time claimed by them is for time before the final sales agreement was signed. That is a valid point. Had the parties not come to the final agreement, much of the time spent by the Cowell's before that would have been wasted, but compensation for that time, if any, could only have been as a result of a breach by Mr. Sinclair of the earlier agreement. In their accounting of the time spent, the Cowells say that each of them spent 80 hours in July and August. That is a total of 160 hours, and they request compensation at the rate of $30.00 per hour. That rate and those hours were not seriously challenged by Mr. Sinclair. That would amount to $4,800.00 for their time.

[71] The Cowells provided a list of the expenses they say they incurred and for which they are seeking reimbursement. At trial, Mrs. Cowell acknowledged that two of the expenses claimed had been incurred either early in the spring, or the prior year. I am satisfied that the remainder of the expenses claimed were for this purchase, or as a result of the failure to complete, and are appropriate.

[72] The Cowells paid their lawyer just over $3,500.00 prior to the intended completion and were claiming that amount. Reviewing their statement of adjustments, part of that sum was for the tax adjustment and part was for title insurance, both of which should not have been ultimately required. The lawyer's disbursements on the statement of adjustments include $504.00 in non-taxable disbursements, which would have been registration fees which would not have been incurred. Unless the lawyer charged additional fees or disbursements, of which I have no evidence, the lawyer's fees and disbursements thrown away by the failure to complete would total $2,029.75.

[73] The Cowells rented storage in Whitehorse for their belongings until they purchased a different home. I accept their evidence that the costs of the move to town and storage totalled $1,130.30. They paid $733.00 for the proper installation of the propane system and $671.08 for propane and tank rental. They paid $110.00 for water delivery. They paid $25.00 to renew the building permit. They paid $580.00 for the structural engineer inspection and I accept their estimate of $70.00 for gas paid for the visits when the structural engineer inspections occurred. They paid a $250.00 mortgage processing fee to the Royal Bank.

[74] All of these expenses total $5,599.13. Together with compensation for their time in the amount of $4,800.00, the Cowells are entitled to judgement in the first action in the total amount of $10,399.13, together with their costs, including any costs incurred with respect to replying to the counterclaim which was dismissed.

[75] The calculation of the loss suffered by the Cowells in the second action is more difficult. They claim for $25,000.00, the limit of small claims jurisdiction. The Cowells say that they were offered $40,000.00 for the cabin, but could not sell, since CRA took the position that it was on a fixed foundation and was part of the land subject to their writ. The person who is supposed to have made that offer was not called as a witness.

[76] There were two appraisals of the farm in connection with the proposed sale to the Cowells, but neither was put before me and I do not know if either ascribed any separate value to the cabin. Since the cabin and its contents are specifically referred to in the agreement for the final sale of the farm, it is reasonable to infer that the purchaser

ascribed some value to the cabin. In any event, I have found that the Cowells were beneficially entitled to the subdivision of 23 acres from the total property of 160 acres.

[77] The Cowells say that they put substantial funds into the cabin, plus their work, plus all of the material provided by Mr. Sinclair originally, to which they were beneficially entitled. Although the Cowells did not keep receipts for their expenditures, as they saw no need to, they claim that they spent at least $16,000.00 on the cabin since 2013. They say that they can say that because they received approximately $8,000.00 in wedding gifts when they were married in 2013 and they applied all of that to work on the cabin. In addition, they say that they won $8,000.00 in a radio bingo in April, 2014, and all of that was spent on the cabin.

[78] The description by the Cowells of the time spent by Mr. Cowell on the construction of the cabin would amount to several hundred hours every year. Even if his time was charged out at only $20.00 per hour, a minimum rate, his labour would amount to over $20,000.00. I am satisfied that the monetary value of the Cowell's input into the cabin since 2007 would be well over $36,000.00

[79] The Cowells acknowledge that they removed from the cabin the cook stove, the bathroom vanity, some light fixtures, and the Toyostove Laser monitor heater. Mr. Sinclair in his counterclaim to the first action valued that latter item at $2,500.00. I am satisfied that the actual present value of all the items removed would not possibly have exceeded $5,000.00. The net value of the Cowells' contribution to the cabin when it was sold by Mr. Sinclair would still have been well over $30,000.00.

[80] Alternatively, the cabin and its associated land could be valued as a portion of the final sale of the farm. If the cabin and 23 acres were valued proportionately as part of the 160 acre total farm, based on the final selling price of $576,250.00, even if reduced to $566,250.00 because of the unpaid holdback, the value of the 23 acres and the cabin would have been $81,398.44.

[81] By any means of calculation, I am satisfied that, at the time of the sale of the farm, the value of the cabin and the 23 acres upon which it was situated was something greater than $25,000.00. Mr. Sinclair was paid for the cabin and those 23 acres as part of the sale of the farm and he was unjustly enriched by an amount that would exceed $25,000.00. In the second action, the Cowells are entitled to judgment in the amount of $25,000.00 plus their costs, including any cost of replying to the set-off claimed, which was denied.

[82] Judgment accordingly.

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SEIDEMANN III T.C.J.