

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Mr. Justice David J. Kroft

BETWEEN:

<i>ANTONIO POLLICHIENI</i>)	<i>K. D. Toyne</i>
)	<i>for the Appellant</i>
)	
<i>(Plaintiff) Respondent</i>)	<i>J. A. Gietz</i>
)	<i>for the Respondent</i>
- and -)	
)	<i>Appeal heard and</i>
<i>6685821 MANITOBA INC.</i>)	<i>Decision pronounced:</i>
)	<i>April 14, 2026</i>
<i>(Defendant) Appellant</i>)	
)	<i>Written reasons:</i>
)	<i>April 27, 2026</i>

On appeal from *Pollichieni v 6685821 Manitoba Inc*, 2025 MBKB 77 [the *KB Decision*]

MAINELLA JA (for the Court):

Introduction

[1] This is an auction case that arises from the defendant's appeal of an order for summary judgment granted in favour of the plaintiff for \$106,857.52, plus interest and costs. After hearing the appeal, we dismissed it with reasons to follow, which now do.

Background

[2] In 2020, the plaintiff loaned \$200,000 to Edgar and Maryann Bruce (the Bruces) that was secured by a mortgage against the Bruces' property in St. Laurent, Manitoba (the property). In 2021, the Bruces defaulted on the loan. On April 3, 2023, based on the application of the plaintiff, the deputy district registrar granted an order for the sale of the property either by private contract or public auction pursuant to section 135(3) of *The Real Property Act*, CCSM c R30 [the *Act*].

[3] In accordance with section 135(3) of the *Act*, various conditions relating to the sale by public auction were stipulated in the order for sale, including that the highest bidder should be the purchaser; the property was being sold subject to a reserve bid, as announced at the sale; and the successful purchaser should, at the time of the sale, pay a deposit of \$25,000 and execute an agreement to complete the purchase according to the terms of the auction. In the event the successful bidder attended the auction by teleconference, the deposit and executed agreement were due within twenty-four hours of the sale.

[4] On May 23, 2023, a public online auction (the auction) of the property occurred in Winnipeg, Manitoba under the auspices of Mr. Jason Kaye of Kaye's Auctions (the auctioneer). The reserve bid for the auction was set at \$267,803.19, which was the approximate amount the Bruces owed the plaintiff.

[5] Prior to the commencement of the auction, the auction sale conditions were read aloud to all attendees by the auctioneer. The written documents were also made available for public view. One of the attendees of the auction, by way of teleconference, was the president of the defendant, Mr. Li Peng Yu (Mr. Yu). During the auction, Mr. Yu made a bid for the

property on behalf of the defendant in the amount of the reserve bid, \$267,803.19.

[6] On May 24, 2023, the auctioneer executed a solemn declaration as to the results of the auction of the property. He declared that the auction had been conducted “in a fair, open and proper manner and according to the best of [his] skill and judgment.” He further declared that the property had been “sold” to the defendant because the “highest” bid was made by Mr. Yu on the defendant’s behalf (the declaration).

[7] Following the auction, Mr. Yu drove from St. Laurent to Winnipeg for the purpose of providing to the plaintiff’s solicitor the \$25,000 deposit to satisfy the conditions of the auction. He stopped by the property and observed the Bruces removing items and fixtures from it. Mr. Yu became concerned. He contacted the plaintiff’s lawyer and advised that he had changed his mind and would not proceed with the purchase.

[8] On June 6, 2023, the plaintiff commenced an action against the defendant for breach of contract.

[9] Thereafter, the plaintiff moved for summary judgment (the motion). The defendant opposed the motion and said that the motion judge should dismiss the action in its favour (see the *KB Decision* at paras 1-6).

Discussion

Standard of Review

[10] The standard of review of an appeal as to an order relating to summary judgment was discussed by Burnett JA in *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at paras 32-33 as follows:

The decision to grant or deny a motion for summary judgment is a discretionary decision, reviewed on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust.

The determination as to whether there is a genuine issue requiring a trial is a question of mixed fact and law and will not be overturned absent palpable and overriding error.

The Sale of Goods Act, CCSM c S10 [the SGA]

[11] At the outset, the defendant says that the motion judge misinterpreted its position on the motion in relation to the *SGA*. It says it referred to provisions of the *SGA* because that statute codifies many principles of auctions recognized at common law. It submits the motion judge erred when he characterized the defendant's position to be that the plaintiff's action should fail for a failure to comply with section 59(b) of the *SGA* (see the *KB decision* at paras 15, 21).

[12] This is a case about the auction of real property, not personal property. While the *SGA* does codify many principles of auction at common law, the auction here was governed by the *Act* and the relevant common law. To his credit, counsel for the defendant conceded that any error the motion judge may have made about the applicability of the *SGA* was harmless as it had no real impact on the decision (see *Papasotiriou-Lanteigne v Tsitsos*, 2023 MBCA 66 at para 17). We agree. The motion judge ultimately decided there was admissible evidence before him that gave rise to an enforceable contract being formed at the auction. That decision is the real focus of this appeal.

Sale by Auction—General Principles

[13] Auction sales, even in relation to land, have a long mercantile history. Professor Waddams explains that “[a] sale by auction involves at least three steps — a putting up of goods for sale, a bid by the purchaser, and the fall of the hammer to indicate that the bidding is closed” (SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at 24).

[14] It is unnecessary in this appeal to get into a discussion of the type of contract that arises from a particular auction (for example, contract of sale versus collateral contract). It is sufficient to highlight that, once the auctioneer communicates acceptance of the highest bid offered for the property on behalf of the vendor and ends the auction (i.e., the fall of the auctioneer’s hammer in the nomenclature of auctions), the pivotal moment of contract formation has occurred (see *Olympic Building Systems Ltd v Total Leisure RV Manufacturing Ltd et al*, 1999 CanLII 4192 at para 23 (MBCA); *British Car Auctions Ltd v Wright*, [1972] 3 All ER 462 at 466 (QBD UK); John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 48).

Admissibility of the Declaration and the Existence of a Contract

[15] The motion judge stated that the combination of the admission made by Mr. Yu at the motion that he made a bid of \$267,803.19 at the auction and the declaration that this was the highest bid that gave rise to the sale of the property to the defendant was sufficient evidence to conclude a contract existed between the parties, which the defendant subsequently breached.

[16] The plaintiff was not present at the auction. He has no personal knowledge of the facts set out in the declaration that the plaintiff attached as

an exhibit to his affidavit on the motion. The declaration is hearsay evidence; its admissibility is a question of law (see MB, *King's Bench Rules*, Man Reg 553/88, r 4.07(2) [the *KB Rules*]; *R v Youvarajah*, 2013 SCC 41 at para 31).

[17] The motion judge stated that rule 39.01(4) of the *KB Rules* allowed for the admissibility of the declaration as an exhibit to the plaintiff's affidavit for the motion to establish the existence of the contract.

[18] The motion judge rejected the defendant's arguments that there were several deficiencies in the plaintiff's affidavit in terms of the requirements of rule 39.01(4) and, because the exhibit to the affidavit was a copy of the declaration, as opposed to the original, there were questions as to its admissibility under section 58 of *The Manitoba Evidence Act*, CCSM c E150.

[19] Rules 39.01(4) and 39.01(5) of the *KB Rules* are not exclusionary rules; they are rules designed to supplement the regular law of evidence to allow for the admission of evidence on motions and applications that would otherwise be inadmissible (see *Fawley et al v Moslenko*, 2017 MBCA 47 at paras 56-76). It is unnecessary to resort to these rules if the evidence in question is otherwise admissible under the law of evidence.

[20] In our view, the declaration was admissible, without resort to rule 39.01(4), under the common law exceptions to the hearsay rule. Justice Gleason gives a succinct statement of the relevant law in a situation of a business record being relied upon in a motion for summary judgment in *Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 25 as follows:

At common law, statements made by a person under a duty to perform an act and to record it in the ordinary course of the

declarant's business are admissible so long as the statements were made contemporaneously with the facts they record and were made without motive or interest to misrepresent the facts: *Ares v. Venner*, [1970] S.C.R. 608 at p. 626, 14 D.L.R. (3d) 4; Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th edition (Markham, Ontario: LexisNexis, 2014) at p. 295.

[21] The auctioneer was clearly operating under a duty to perform the auction in conformity with the conditions set because of the power of sale of the property under the *Act*. He was paid for that service and was a disinterested party in terms of the outcome of the auction. There is also no dispute that the record he created, evidencing what occurred at the auction, was in the ordinary course of his business—auctioneering. An auctioneer is no different than any other professional making a contemporaneous record of what occurred in their day-to-day duties. Moreover, on cross-examination, Mr. Yu, who attended the auction, conceded he had no reason to not accept the accuracy of the declaration that the defendant was the successful bidder. In fact, he personally believed that that is what happened at the auction, as evidenced by his conduct of preparing to deliver a deposit to the plaintiff's solicitor to honour the successful bid until he saw the activities of the Bruces and had second thoughts.

[22] The only issue of substance raised by the defendant on the motion was whether there was admissible evidence of its offer to purchase the property being accepted at the auction, such as to give rise to the formation of a contract. In our view, there was. That evidence, in the form of the declaration, was not only reliable, but it was uncontested by any evidence to the contrary on the motion. We see no basis to disturb the motion judge's conclusion that, “[a]t the point that the auctioneer declared the defendant to be the successful bidder, the contract was formed” (the *KB Reasons* at

para 21). In our view, his decision is legally correct as to contractual formation (see *Sinclair v Venezia Turismo*, 2025 SCC 27 at paras 41-42). The declaration makes abundantly clear that the defendant's bid was the highest bid and that the auctioneer communicated his consent to accept the offer by declaring the property sold to the defendant, thus concluding the auction (i.e., the fall of the hammer).

The Damages Award

[23] The motion judge found that the plaintiff failed to mitigate his damages in part (see the *KB decision* at paras 31-34). On the damages award, the motion judge assessed interest at the rate of fourteen per cent based on the auction sale conditions set by the deputy district registrar.

[24] The defendant says the motion judge's calculation of interest was beyond the confines of the auction sale conditions. It argues that, pursuant to those conditions, interest after June 23, 2023 should have been at the lower rate of prejudgment interest under the *KB Rules* as the higher rate of fourteen per cent ended thirty days after the date of the sale. It also argues that interest should not have been assessed on the property tax arrears. While this Court was not provided with the specific adjusted calculation, we were advised that the amount of adjustment requested is nominal.

[25] Damage calculations are highly deferential (see *Dansereau v The City of Winnipeg*, 2014 MBCA 18 at para 6). We are not persuaded that there is a basis to interfere with the motion judge's calculations. He interpreted the relevant terms of the auction sale conditions in light of the circumstances of the breach of contract and the plaintiff's efforts at mitigation.

Costs

[26] The plaintiff asks for elevated costs on this appeal based on the assertion that the defendant's defence to the claim is "wholly without merit" and this appeal is "without any foundation."

[27] The plaintiff makes no assertion of any unproven allegation of misconduct or litigation misconduct by the defendant.

[28] We are not persuaded that this is an appropriate case to award elevated costs simply on the basis of its merits.

Disposition

[29] In the result, the appeal was dismissed with tariff costs.

Mainella JA

Monnin JA

Kroft JA
