Date: 20241105
Docket: PR 21-01-23682
CI 22-01-38901
(Winnipeg Centre)
Indexed as: Tritthart v. Culligan et al.
Cited as: 2024 MBKB 165

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DOUGLAS WILLIAM TRITTHART, EXECUTOR OF THE ESTATE OF RONALD GORDON TRITTHART,	)	Debra Takeuchi for the applicant
applicant,	)	Ian Histed for the respondents
PATRICK CULLIGAN AND TYLENE ZEUCH,	)	
respondents.	)	Judgment Delivered: November 5, 2024

TOEWS J.

INTRODUCTION

[1] This trial was ordered as a result of a probate application in which Douglas William Tritthart, the brother and the executor of the estate of Ronald Gordon Tritthart (the deceased) applied to the court to settle certain questions related to the ownership of a piece of land standing in the name of the deceased at the time of his death. The trial proceeded in respect of both the executor's application in PR 21-01-23682 and an action

brought by the plaintiff, Patrick Culligan in CI 22-01-38901. The issues to be determined at trial are set out in an order of Madam Justice Suche as follows:

a) Was there an enforceable agreement between the deceased and Mr. Culligan to transfer a 10-acre parcel of land to Mr. Culligan?

b) If so, what are the terms of the agreement?

c) If not, what is the appropriate remedy?

d) Has the agreement, if any, been frustrated within the meaning of ***The Frustrated Contracts Act***, C.C.S.M. c. F190?

e) Was there an enforceable contractual joint venture between the deceased and Mr. Culligan to apply for subdivision of the land?

f) If so, what are the terms of the agreement?

g) If not, what is the appropriate remedy?

h) Has the contractual joint venture, if any, been frustrated within the meaning of ***The Frustrated Contracts Act****?*

i) Is Mr. Culligan entitled to specific performance of the contractual joint venture by the estate?

j) Is there a resulting trust of the land to the extent of either 10 acres or 20 acres in favour of Mr. Culligan?

k) If so, is Mr. Culligan entitled to a transfer of a 10 acre, or a 20 acre share of the land in default of performance of either agreement?

l) Is Mr. Culligan liable to the estate for occupation rent to the date of this decision?

[2] As a result of the position taken by counsel for Mr. Culligan in the closing arguments of these proceedings, it is not necessary to deal with all the issues set out in the order of Suche J. While reference will be made in these reasons to the entire parcel of land standing in the name of the deceased at the time of his death, it is only necessary to deal with the ownership or interest in a 10-acre parcel of land referred to as lot #1 in these reasons (see exhibit 15), as well as an incidental issue of a partial payment in the amount of approximately $1,500 allegedly made by Mr. Culligan towards the cost of the survey of the land.

THE EVIDENCE

[3] I should note that the parties are agreed that both the affidavit evidence filed in these proceedings as well as the *viva voce* evidence which was taken before me are admissible as evidence in these proceedings. The one exception to this evidentiary agreement is the opinion evidence of Ms. Brenda Petty, who prepared a report concerning the authenticity of the purported signature of the deceased on a bill of sale which on its face bears the date June 16, 2021. As I will set out later in these reasons, following a *voir dire*, I accepted the expertise of Ms. Petty and ruled her opinion evidence in respect of the purported signature of the deceased admissible.

[4] The evidence of the executor is that the deceased died on November 2, 2021, in a small trailer located on the 80-acre parcel of land registered in his name. It appears that only 10 acres of this land was developed to any extent, and it is this 10-acre parcel that is disputed. Both the deceased and Mr. Culligan resided on this parcel of land. While the deceased resided in a smaller recreational style of trailer, Mr. Culligan resided in a

separate trailer, one of two large semi-trailers which he brought onto the disputed 10-acre parcel and developed as his living quarters.

[5] It appears that the deceased was estranged from his family who did not approve of his lifestyle, which included associating with people they considered undesirable, as well as his consumption of alcohol and illicit drugs, including methamphetamine. The cause of the deceased's death was in fact an overdose of methamphetamine.

[6] The executor testified that he attended at the deceased's property a few times over the years and at the time of these visits, Mr. Culligan was not living on the property. His last conversation with the deceased was a telephone conversation on August 1, 2021. The deceased told the executor in that conversation that he wanted firearms that had been seized by the RCMP as he claimed that he was getting beaten up. The conversation was rather short and was ended by the deceased on a very negative note when the executor told him he would not assist him in obtaining the firearms.

[7] The executor testified that the deceased had an income of approximately $3,000 a month from three different pension sources. It was the executor's opinion that his brother would never sell his property and indeed had gone to some expense to ensure that he retained the property as a part of the divorce settlement with his former wife.

[8] After the death of his brother, the executor attended at the property in the company of a bailiff, as he was told by the RCMP that it would not be advisable to attend at the premises on his own. The executor took various pieces of his brother's property, including clothing and documents into his possession when he attended at the deceased's trailer. This included a subdivision application dated August 4, 2021, for the 80-acre

property owned by the deceased. The executor agreed this application was in his brother's handwriting and signed by him and admits that the application for subdivision was never initiated. The other documents which he took from the deceased's trailer included information related to the truck and camper trailer which Mr. Culligan testified was part of his agreement with the deceased for the purchase of the disputed 10-acre parcel.

[9] Over the course of the next few months following the death of the deceased, there was a dispute between Mr. Culligan and the executor in respect of the supply of hydro to the property. This dispute resulted in an order of this court in which the executor was ordered to restore the electrical service to the property, but that Mr. Culligan was responsible for all costs of the restoration of this service. (This order by Kroft J., as he then was, also included the order that these two proceedings be heard together.)

[10] The executor testified that after the death of the deceased, he met with Yvonne Tavares, a lawyer who Mr. Culligan had previous dealings with and to whom the deceased was referred to by Mr. Culligan for the purposes of the subdivision application. The executor states that Ms. Tavares acknowledged to him that she did meet with the deceased and that the deceased told her that there was "a gentleman's agreement" for $12,500 for the sale of the 10-acre parcel of land between him and Mr. Culligan. However, there was no bill of sale that was produced or any mention of "paperwork" at that time.

[11] In respect of the bill of sale purportedly signed by the deceased, and which bears the date of June 16, 2021, found at Tab A of Exhibit 3 of these proceedings (filed as

document 14 in court file no. PR 21-01-23682), the executor states that the signature purporting to be that of the deceased is not his brother's signature.

[12] Ms. Petty was the next witness produced on behalf of the executor. She was called by the executor to provide an expert opinion as to whether the author of 17 known signatures of the deceased was also the author of the Ronald Gordon Tritthart signature on the bill of sale found at Tab A of Exhibit 3. The expertise of Ms. Petty was contested by Mr. Culligan and accordingly the court conducted a *voir dire* in respect of the admissibility of the opinion evidence of Ms. Petty. The materials submitted through Ms. Petty on the *voir dire* included Ms. Petty's curriculum vitae, and the affidavit of Ms. Petty affirmed May 16, 2022.

[13] The criteria relevant to the determination of the admissibility of expert evidence are identified in ***R. v. Mohan***, 1994 CanLII 80 (SCC) as follows:

a) relevance;

b) necessity in assisting the trier of fact;

c) the absence of any exclusionary rule; and

d) a properly qualified expert.

[14] Although it may be trite to reiterate the substance of these criteria in view of the widespread application of this decision by the courts, it is nevertheless instructive to provide a summary of these criteria. As set out in the headnote of the reported decision, the court stated in respect of these four criteria:

> … Relevance is a threshold requirement to be decided by the judge as a question of law. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact out of proportion to its reliability. The reliability versus effect factor has special significance in assessing the

> admissibility of expert evidence. Expert evidence should not be admitted where there is a danger that it will be misused or will distort the fact-finding process, or will confuse the jury.
>
> Expert evidence, to be necessary, must likely be outside the experience and knowledge of a judge or jury and must be assessed in light of its potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts.
>
> Expert evidence can be excluded if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. The evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.
>
> In summary, expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

[15] In holding that the evidence of Ms. Petty met the threshold criteria for admissibility, I have concluded that her opinion is logically relevant and that its probative value outweighs any prejudicial effect. In my opinion, it will clearly assist me in the fact-finding process and will not exert an influence out of proportion to its reliability.

[16] Furthermore, the analysis of handwriting is outside of my experience and knowledge. Her opinion is necessary to assist me in arriving at a determination as to whether it is the deceased's signature that appears on the bill of sale found at Tab A of Exhibit 3.

[17] There is no rule that would exclude my consideration of this evidence and provided that I do not allow her opinion to usurp my function as the trier of fact in these

proceedings, it is properly before the court, subject to my determination that Ms. Petty is properly qualified.

[18] As for her qualifications, I am satisfied that Ms. Petty has acquired special or peculiar knowledge through study and experience in respect of the matters on which she has undertaken to testify. Her qualifications include her training and her experience acquired over 20 years. She has also been qualified as an expert in this area by courts around the world including in Canada.

[19] While counsel for Mr. Culligan had argued that her expertise should not be relied upon, primarily based on concerns arising in respect of her testimony in ***Gangoo v. Toronto Standard Condominium Corporation No. 1737***, 2023 ONSC 260, I am satisfied that the concerns over the evidence in that case do not detract from her ability to provide me with her expert opinion in this matter.

[20] On the basis of the evidence provided on the *voir dire*, I have concluded that Ms. Petty is properly qualified to provide the opinion evidence in this matter. Counsel are agreed that should I rule she has the necessary qualifications to provide the court with her opinion evidence, the evidence given on the *voir dire* could be applied *mutatis mutandis* at the trial of this matter. Based on my findings and with the forgoing agreement of counsel, I have admitted the evidence provided on the *voir dire* as evidence at the trial itself.

[21] The conclusion which she arrived at in respect of the purported signature of the deceased on the disputed bill of sale is based on detailed observations in respect of the comparisons between 17 known signatures of the deceased and the signature on the

disputed bill of sale. The detailed analysis upon which her conclusions are based are set out in her report. Her conclusions following that analysis are:

a) The questioned signature of the deceased on the disputed bill of sale was written by a different person than those comparative signatures known to be written by the deceased;

b) The substantive document itself, namely the substantive portion of the disputed bill of sale itself, was written by a different person when compared to the known writing of the deceased. She opines that the writing in that document is a much higher writing skill than the deceased's skill set.

[22] In support of his case, Mr. Culligan testified that he met the deceased in May, or perhaps earlier in 2021, through some mutual acquaintances. Shortly after meeting the deceased, he testified that the deceased offered to sell him the land he owned for $100,000 because the deceased needed money. It appears they talked about the property and drove out together to view the property. Mr. Culligan testified the deceased made an offer to him to live there.

[23] Mr. Culligan stated he did not know much about the deceased other than he was an older man with medical problems. He stated that "red flags" started popping up in relation to the deceased's consumption of drugs and alcohol. He stated in his testimony that aside from the consumption of illicit drugs, the deceased would consume between 26 to 40 ounces of hard liquor a day, usually in the form of a poor-quality rye whiskey.

[24] After the death of the deceased, he stated that Manitoba Hydro shut off the electricity that serviced the property but as the court record sets out, the electricity was

restored by order of this court. Without getting into the back and forth of the dispute between the executor and Mr. Culligan it is only necessary to state that the issue of the supply of power has now been addressed by virtue of Mr. Culligan supplying his own power by the use of solar equipment.

[25] The scenario of events set out in the evidence of Mr. Culligan is more problematic. While a very specific scenario is set out in his affidavit of April 7, 2022, some five months after the death of the deceased, it appears that his recollection of certain dates and the order of events in his dealings with the deceased is not the same at trial.

[26] In respect of the disputed bill of sale itself, when cross-examined on this affidavit, Mr. Culligan stated that the date of June 6, 2021, which is set out in the body of his affidavit, is erroneous – a mistake or a typo, as he put it. He stated that the correct date was June 16, 2021, which corresponds with the date on the face of the bill of sale. Furthermore, while being cross-examined on his affidavit on May 13, 2022, he conceded that the date of the bill of sale could have been July 16, 2021, instead of June 16, 2021, and that "06" for the month was incorrectly written on the document rather than "07". He stated that the July date might make more sense as it corresponded with the day of the week he recalls the transaction evidenced by the bill of sale took place, namely a Friday.

[27] Mr. Culligan testified that the deceased signed the bill of sale in his presence, but that the substantive document itself was not in the handwriting of the deceased.

[28] In any event, Mr. Culligan testified that he purchased a 10-acre piece of the 80-acre property owned by the deceased, a lot described as lot #1 in the material and exhibit

15 for a purchase price of $12,500. The lot purchase took the form of $6,500 in cash, $1,500 in the form of a Ford F150 truck and an RV worth $3,500. He stated that the deceased agreed that the lot would be subdivided from the 80-acre parcel of land he owned. Mr. Culligan also testified that to assist with the costs of the subdivision, he would pay some of those costs amounting to $2,500 which amount would go towards the purchase of a second 10-acre lot. This second lot was also to be subdivided from the 80-acre parcel. Mr. Culligan stated in his affidavit that he was going to take care of the legal expenses "associated with our two bargains" and also stated that there was no written record of the agreement to purchase the second lot.

[29] In view of my findings in this case, it is not necessary for me to specifically set out my concerns with Mr. Culligan's testimony. I cannot say if the lack of specificity or recollection in Mr. Culligan's testimony in respect of key events relating to the sale of the 10-acre lot, including the timing and the nature of the consideration for that purchase, arises as a result of a lack of preparation or otherwise. Suffice it to say, that but for certain corroborating evidence of the other two witnesses produced on behalf of Mr. Culligan, I find his evidence on its own, both before me at trial and based on his affidavit, unreliable.

[30] Ms. Yvonne Tavares provided both affidavit evidence as well as *viva voce* evidence at trial. She is a barrister and solicitor who met with the deceased in her office on November 1, 2021, less than 24 hours before the deceased passed away in his trailer on his property. She had acted for Mr. Culligan on various real estate transactions in the

past and it was Mr. Culligan who referred the deceased to her for the purposes of moving ahead with the plan to subdivide the deceased's 80 acres into eight, 10-acre lots.

[31] She testified the deceased told her that he had an agreement with Mr. Culligan for the transfer of two of the lots to be created upon the registration of the subdivision and that Mr. Culligan had paid him $12,500, which represented the purchase price of one lot of the proposed subdivision. She states that the deceased advised her that he intended to transfer to Mr. Culligan a second lot in the subdivision at the same purchase price and that the purchase price was to be paid by Mr. Culligan paying various costs related to the application for subdivision including subdivision approval costs, survey and legal fees.

[32] Ms. Tavares indicated that the deceased looked quite ill and in poor physical health when they met on November 1, 2021. However, she testified she had no concern over his mental state. He wanted to get the subdivision done. She was provided with an aerial photograph of the property by the deceased, which included markings setting out the proposed subdivision of lots. This document has been marked as exhibit 15 in this trial.

[33] Ms. Tavares stated that she could not specifically recall how she described the agreement between Mr. Culligan and the deceased in her conversation with the executor a few weeks later, other than perhaps referring to it as "verbal agreement" rather than using the term "gentleman's agreement" as stated by the executor in his testimony. She stated that she did not recall stating that the agreement would be "held up" in court, but thought she could have used words to the effect that verbal agreements could be held up in court.

[34] Ms. Tavares also testified that she did not have a copy of the June 16, 2021, bill of sale, but stated she probably would have made a copy of that document if it had been brought to her meeting with the deceased on November 1, 2021. However, she stated that the document "looked familiar".

[35] Ms. Tavares testified that she received a telephone call from Mr. Culligan on the morning of November 2, 2021, which would have been a few hours after the death of the deceased. There was no discussion about the subdivision during that telephone call, but the conversation apparently had more to do with Culligan's concern about whether he could stay on the property now that the deceased had passed away.

[36] It is unfortunate that Ms. Tavares did not bring her file notes of the meeting with the deceased to court, as those notes may have assisted her in recalling with more particularity what was said at the meeting, including whether the disputed bill of sale was in fact referred to by the deceased at the meeting of November 1, 2021.

[37] Mr. Allan Fineblit, also a practicing lawyer and well known in the Manitoba legal community for his former role as the executive director of Legal Aid as well as his former position with the Law Society of Manitoba, also testified at the trial. He advised that he owns property in Molson, Manitoba, next to the 80-acre property of the deceased whom he knew as a neighbour. He also knows Mr. Culligan, in part, owing to some unfortunate experiences involving people who were staying with Mr. Culligan on the deceased's property who broke into the residence on Mr. Fineblit's property and stole some of his chattel.

[38] Mr. Fineblit advises he got to know the deceased after the deceased's residence burned down in 2015 (one of a few fires that occurred on the deceased's property) and that the deceased used to come over to his property to borrow tools to assist in the clean-up and restoration of his property in the aftermath of the 2015 fire.

[39] Mr. Fineblit testified that he spoke to the deceased during a casual conversation in 2021, while Mr. Fineblit was out at his property. Although the deceased had not been doing very well on earlier occasions when they had spoken, Mr. Fineblit testified that he looked better than he had in the past in terms of his health and the quality of his clothing. During this conversation, the deceased told him that he had sold 10 acres of land adjacent to Mr. Fineblit's property to Mr. Culligan. Mr. Fineblit stated that he saw the deceased a few more times after that, but beyond that conversation, Mr. Fineblit could not provide any additional information regarding the sale of the property to Mr. Culligan.

ANALYSIS AND DECISION

[40] I have concluded that despite my concerns regarding Mr. Culligan's testimony, there is an enforceable agreement between the deceased and Mr. Culligan to transfer a 10-acre parcel of land to Mr. Culligan. My conclusion is based primarily on the testimony of Ms. Tavares and Mr. Fineblit that the deceased not only told each of them that he had sold the 10-acre parcel of land referred to as lot #1, but that Mr. Culligan had paid the purchase price of $12,500 in the form of cash and property to the deceased. It is not necessary for me to determine the sufficiency of that consideration as I am satisfied that whatever the form of the consideration, the deceased believed it to be sufficient and accepted it in full satisfaction of the purchase price of $12,500 for the 10-acre lot.

[41] I do have concerns about the deceased's mental capacity to properly enter into the agreement to subdivide his land and sell the 10-acre lot to Mr. Culligan. My concern is partly based on the health of the deceased during the few months after his release from hospital in April or May of 2021 and his death in November of that year. My concerns about the deceased's health includes an admission by Mr. Culligan at trial that the deceased would drink 26 to 40 ounces of whiskey in a day and that the cost of the liquor (although not a good quality rye whiskey) and the illicit drugs that the deceased was consuming was a substantial expense. However, the deceased's capacity to enter into this agreement is not at issue before the court.

[42] For the purposes of this trial, I can only assume the deceased had the appropriate mental capacity at the time the agreement was entered into. Furthermore, the evidence of Ms. Tavares, and to some extent that of Mr. Fineblit who knew the deceased on a casual basis, supports a finding that he did indeed have the mental capacity to enter into this agreement with Mr. Culligan (despite his substantial consumption of drugs and alcohol as acknowledged by Mr. Culligan).

[43] I am not satisfied that the bill of sale relied upon by Mr. Culligan in these proceedings is genuine. It seems unlikely to me that the deceased would not have produced this bill of sale in his meeting with Ms. Tavares when he met with her on November 1, 2021, if it actually existed on that date, but only produced a copy of the aerial photograph of his property, along with the markings on it delineating the proposed lots. There appears to have been no mention of the bill of sale dated June 16, 2021, at their meeting, and I agree with Ms. Tavares that this is a document that she would also

have copied had it been produced by the deceased. I also find it difficult to believe that when Mr. Culligan telephoned her the day after the deceased passed away, that he would not have mentioned the existence of this document while he was expressing concerns to her about whether he would be able to stay on the property after the death of the deceased.

[44] Furthermore, I also find it odd that Ms. Tavares would not have raised the issue of the existence of a written bill of sale if she was familiar with or had knowledge of the existence of such a document when she discussed the property with the executor during her conversation with him on or about November 19, 2021. The executor stated that there was no mention of any paperwork and specifically no mention of a bill of sale during that conversation. Rather the conversation focused on the existence of a "gentleman's agreement" or a "verbal agreement" and whether a verbal agreement of that nature could be "held up" in court.

[45] In respect of the disputed bill of sale, I note the concerns of counsel for Mr. Culligan regarding the expertise of Ms. Petty and the reliability of her evidence regarding the purported signature of the deceased on the bill of sale. However, as stated earlier in these reasons, I am satisfied that in accordance with the criteria set out in ***Mohan***, Ms. Petty is qualified to provide the court with an expert opinion that denies the authenticity of the purported signature of the deceased. Furthermore, I am satisfied upon a review of her report and her *viva voce* evidence, along with my concerns about the evidence of Mr. Culligan, and the lack of any reference to a bill of sale in the course of any meetings or conversations following the death of the deceased as referenced in

the preceding paragraphs, that the purported signature of the deceased on the bill of sale is not a genuine signature of the deceased. I find that the bill of sale was drafted and purportedly executed by someone else sometime after the deceased's death.

[46] It is noted that Mr. Culligan did not put forward any expert evidence in respect of the disputed bill of sale.

[47] As a result of my determinations, the bill of sale is not evidence that I can rely on in determining whether there is an agreement between the deceased and Mr. Culligan to transfer a 10-acre parcel of land to Mr. Culligan. However, as stated earlier in these reasons, my determination that there is such an agreement for the sale of lot #1 is based primarily on the evidence of Ms. Tavares and Mr. Fineblit and their conversations with the deceased.

[48] I am also satisfied that despite the failure of the deceased to formally commence a subdivision application with the appropriate authorities had he had undertaken to do, the case law supports Mr. Culligan's request that the estate of the deceased as represented by the executor is under an obligation to commence a *bona fide* application to subdivide the property so as to give effect to the agreement between the deceased and Mr. Culligan for the sale of the 10 acres described as lot #1 in these proceedings. As Mr. Culligan's counsel noted in his closing argument, Mr. Culligan is now only pursuing specific performance in respect of a subdivision for the 10-acre parcel of land described as lot #1 in these proceedings. Accordingly, I do not need to consider the other questions set by Suche J. in respect of dealing with an alleged joint venture or any land comprising

the 80-acre parcel owned by the deceased other than the 10-acre parcel described as lot #1.

[49] The ability of the court to make an order for specific performance as well as the consequences of a failure by the executor to make a *bona fide* application or the rejection of a *bona fide* application by the appropriate planning authority is set out in ***Dynamic Transport Ltd. v. O.K. Detailing Ltd.***, [1978] 2 S.C.R. 1072 (S.C.C). In that case, the court considered an action for specific performance brought by the appellant, Dynamic Transport Ltd., to enforce a contract between the respondent, O.K. Detailing Ltd. as vendor, and the appellant as purchaser, for the sale of land in the City of Edmonton.

[50] In ***Dynamic Transport Ltd.***, the respondent refused to complete the transaction, maintaining that the contract was unenforceable on two grounds: (i) the description of the land is so vague and uncertain as to make identification impossible; and (ii) the contract is silent as to which party will obtain the subdivision approval required under the terms of ***The Planning Act***, R.S.A. 1970, c. 276.

[51] In allowing the action, the court in ***Dynamic Transport Ltd.*** held:

> … the appellant is entitled to a declaration that the contract between the parties mentioned above is a binding contract in accordance with its terms, including the implied term that the respondent will seek subdivision approval. The appellant is further entitled to an order that the respondent make and pursue a *bona fide* application as may be necessary to obtain registration of the approved plan of subdivision, including registration of the approved plan with the Registrar of the North Alberta Land Registration District if approval is obtained. Such application shall be at the expense of the respondent and shall be made within sixty days following delivery of this judgment, or such extended period as may be ordered by a judge of the Trial Division of the Supreme Court of Alberta in Chambers. In the event that the respondent does not make such application within the time stated, or does not pursue such application with due diligence, the appellant shall be entitled to damages for loss of its bargain … . Upon the application for subdivision being successfully made and completed, including registration of the approved plan, the remaining provisions of the agreement, concerning the actual sale and purchase of the land, shall be specifically performed and carried into

> effect. The date of closing, date of adjustments, and any other matters incidental to closing the transaction shall be as ordered by a judge of the Trial Division of the Supreme Court of Alberta in Chambers. In the event that the respondent makes and pursues a *bona fide* application as aforesaid, and such application is rejected, then the appellant's claim for specific performance of the provisions concerning sale and purchase stands dismissed, as does the claim for damages in the alternative, and the caveat filed by the appellant shall be discharged. Until that time, the caveat may be maintained.

[52] A similar type of order was made by a trial judge in ***Stefan v. Lichter***, 2005 SKQB 383, and substantially upheld by the Court of Appeal in its reasons found at ***Stefan v. Lichter***, 2006 SKCA 74 (QL). In that case, the appellants, Timothy and Catherine Lichter, agreed to sell some ranch land to the respondent, Barry Stefan. The sale was not completed and Mr. Stefan successfully sued for specific performance of the agreement for sale. In brief, the facts of the case were:

> 3 The Lichters and Mr. Stefan signed the agreement for sale on September 4, 2001. It said the transfer date was November 15, 2001 and provided that "time shall be of the essence". The same lawyer acted for both sides of the transaction. An addendum to the agreement was signed in late September. It provided that the Lichters would reserve approximately 10.2 acres from a particular quarter section. A sketch of the proposed site was annexed to the addendum. A metes and bounds description of the site, prepared by the lawyer, was typed on the sketch. That description contained an error which was not discovered until some time in November.
>
> 4 The addendum provided that the agreement for sale was conditional on approval of the subdivision by the responsible authorities. The Lichters were to bear the costs associated with the approval. Various issues then arose. Significantly, the provincial Heritage Assessment Unit had concerns about the location of the subdivision in relation to a heritage site. Tim Lichter advised the lawyer to return the deposit to Mr. Stefan and the sale did not go through.
>
> 5 The trial judge concluded there was no mistake as among the Lichters and Mr. Stefan as to the land involved in the proposed subdivision. They had identified and agreed upon the 10.2 acre plot. The trial judge also accepted Mr. Stefan's argument that the Lichters had failed to make honest and reasonable efforts to obtain approval for the subdivision and found that, as a result, the Lichters could not rely on the fact that approval had not been obtained by November 15 to escape their obligation to sell. She found that the land which was subject of the agreement

> for sale was unique. Therefore, she made an order for specific performance, requiring the Lichters to make and pursue an application for subdivision.

[53] In this case, I have similarly concluded that Mr. Culligan is entitled to specific performance. The 10-acre parcel of land which was subject to the agreement between Mr. Culligan and the deceased is clearly defined and is also unique. In this respect the evidence discloses the extent of the development to the 10 acres which Mr. Culligan has undertaken, including the extension of the road on the property, the living quarters and the other development consistent with a subsistence farming operation. (See exhibit 16 video evidence on a USB stick)

[54] I note specifically that I have found that the purported written bill of sale dated June 16, 2021, does not bear a genuine signature of the deceased and that I do not believe Mr. Culligan when he states that the deceased signed that document in his presence. Accordingly, I have considered whether Mr. Culligan has conducted himself in a manner that might disentitle him from the equitable remedy of specific performance. After due consideration, I have concluded that although I have found that the bill of sale is not genuine, and that its introduction into the evidence has unnecessarily complicated this dispute, adding to the expense of this trial, there is a valid verbal agreement for sale between the two parties. I am of the opinion that specific performance can be ordered for the subdivision and the legal transfer of the disputed 10 acres, but that the extra costs incurred by the executor in contesting this matter can be addressed by reducing the award of costs that Mr. Culligan would otherwise be entitled to as the successful party in this matter.

CONCLUSION

[55] In the result I make the following order, modelled substantially after the order made by the court in ***Dynamic Transport Ltd.***:

a) Mr. Culligan is entitled to a declaration that the agreement between the parties in respect of the 10-acre parcel of land referred to as lot #1 of the 80-acre parcel of land owned by the deceased at the time of his death, is a binding contract and includes a term that the deceased would, and therefore the executor of the estate will seek subdivision approval for the 10-acre parcel of land referred to as lot #1 of the 80-acre parcel of land owned by the deceased at the time of his death;

b) Mr. Culligan is further entitled to an order that the executor make and pursue a *bona fide* application as may be necessary to obtain registration of the approved plan of subdivision, including registration of the approved plan with the appropriate planning authority if approval is obtained.

c) Such application shall be at the expense of the estate of the deceased and shall be made within 60 days following delivery of this judgment, or such extended period as may be ordered by the court or as may be agreed to by the parties;

d) In the event that the executor does not make such application within the time stated, or does not pursue such application with due diligence, Mr. Culligan shall be entitled to damages for loss of his bargain;

e) Upon the application for subdivision being successfully made and completed, including registration of the approved plan, the remaining provisions of the

agreement, concerning the actual sale and purchase of the land, shall be specifically performed and carried into effect;

f) In the event that the executor makes and pursues a *bona fide* application as aforesaid, and such subdivision application is rejected, then Mr. Culligan's claim for specific performance of the provisions concerning sale and purchase stands dismissed, but that in view of the consideration paid by Mr. Culligan and the improvements made to the 10-acre parcel described as lot #1 in these proceedings, Mr. Culligan will be entitled to his damages in an amount to be determined by the court upon application to the court;

g) I am not prepared to order any additional costs and/or damages in favour of Mr. Culligan in respect of certain payments which are claimed in respect of any other surveyor or legal fees and which Mr. Culligan submits would have been applied to the purchase of Lot #2, set out in exhibit 15;

h) In view of my determinations, I find that the estate is not entitled to any rent from Mr. Culligan for the use of the disputed 10 acres; and

i) If the issue of costs in these legal proceedings cannot be settled between the parties, including any appropriate reduction in the amount of costs that Culligan would be entitled to on a tariff basis, but for the reliance on the disputed bill of sale in these proceedings, the parties may submit a written submission as to costs for the consideration and determination of the court.

_____ J.