SUPREME COURT OF NOVA SCOTIA
Citation: *Genidi v. North 45 Orchards Limited*, 2026 NSSC 116

Date: 20260415
Docket: Hfx No. 514569
Registry: Halifax

Between:

Younis Ashraf Genidi

Plaintiff

v.

North 45 Orchards Limited and Hossam Elokda

Defendants

DECISION

Judge: The Honourable Associate Chief Justice Darlene A. Jamieson

Heard: November 27, 2025, in Halifax, Nova Scotia

Counsel: Mr. David Hutt and Mr. Thomas Morehouse for the Plaintiff

Mr. John Dicks, self representing as Vice President of the Defendant, North 45 Orchards Limited

Dr. Hossam Elokda, self represented Defendant

By the Court:

Background

[1] The Plaintiff, Mr. Younis Ashraf Genidi (referred to in the materials as "Mr. Younis" and also "Mr. Genidi"), moves for an order for partial summary judgment pursuant to Civil Procedure Rule 13.04 against the Defendant, North 45 Orchards Limited ("North 45"). The individual Defendant, Dr. Hossam Elokda ("Dr. Elokda"), is President of North 45.

[2] This matter concerns an alleged breach of contract, being the non-conveyance of land in Colchester County for use as a haskap berry farm pursuant to a written agreement of purchase and sale. Mr. Younis is seeking summary judgment solely on his claim for breach of contract against North 45 and damages equal to the monies paid plus interest, with the remaining claims to be determined at trial.

Procedural Background

[3] By way of procedural history, this action was commenced in April 2022. At an Appearance Day in November 2022, North 45 and Dr. Elokda were directed to provide an affidavit disclosing documents. Three separate orders were issued with respect to discovery examination attendance. On March 15, 2024, Mr. Younis brought a motion to strike the Defendants' Statement of Defence pursuant to Civil Procedure Rule 88.02 and enter judgment on the basis that Dr. Elokda had persistently failed to comply with orders compelling discovery examination. The motion was not determined on the scheduled date of July 18, 2024, as the judge gave Dr. Elokda until September to file a properly sworn affidavit with respect to the motion and to allow for his discovery in the interim. His discovery examination took place on August 28, 2024.

[4] Mr. Younis filed a motion for summary judgment on December 12, 2024. The initial hearing date of May 21, 2025, was adjourned after the Defendants discharged their lawyer. The Defendants had requested an adjournment but the matter was ultimately adjourned due to court conflict and no ruling was made on the adjournment request. A new hearing date for the summary judgment motion was set for November 6, 2025. The Defendant filed its materials on November 3, 2025, just one clear day before the hearing. The Plaintiff raised issues with the affidavit filed by Dr. Elokda, including that it did not comply with s. 67 of the *Evidence Act*, R.S.N.S. 1989, c. 154, as there was no evidence that the lawyer before whom it was

sworn, in Egypt, was a notary. The Plaintiff took the position that the Defendants knew the affidavit had not been properly sworn, since a similarly sworn affidavit had been in issue at the prior July motion to strike the defence. The Plaintiff also challenged the admissibility of portions of Dr. Elokda's affidavit.

[5] Mr. John Dicks, Vice President of North 45, appeared on its behalf and sought an adjournment, advising that an affidavit compliant with the *Evidence Act* would be filed by November 10, 2025. I granted the adjournment to November 27, and provided additional filing time, being until November 13, to ensure that the self-represented Defendant had sufficient time to file all materials upon which it wished to rely.

[6] The replacement affidavit of Dr. Elokda was not filed until November 24, 2025. An affidavit of Dr. Hossam Loutfy Hussein (also referred to in the materials as Dr. Loutfy or Loutfi or Dr. Hussein) was also filed by North 45 on November 24, 2025. An electronic copy of each was emailed to the court on November 19, 2025. North 45 did not seek leave to file the affidavits late.

[7] The Plaintiff objected to the late filing and although he did not seek an adjournment, he sought to have the affidavits excluded under Rule 23.12. He pointed to the above referenced procedural history and argued that allowing the late affidavits would reward the Defendants' continuous failure to comply with the court's directions.

[8] In the alternative, the Plaintiff sought to strike portions of the two affidavits on the basis that they contained inadmissible hearsay evidence, opinion evidence, irrelevant evidence, oath-helping evidence, and speculation. Mr. Younis submitted that regardless of the evidentiary objections, neither affidavit raised any genuine issues of material fact.

[9] In the specific circumstances of this matter, I allowed the late-filed affidavits, subject to the admissibility issues raised by the Plaintiff. After considering the factors set out in Rule 23.12, I concluded that without these affidavits, North 45, a self-represented litigant, would have no evidence before the court to respond to the summary judgment motion. This would result in significant prejudice. Further, the affidavit of Dr. Elokda was in essentially the same form as when it was filed on November 3, 2025, thereby giving Mr. Younis sufficient time to respond. The main difference was that the affidavit was now properly sworn before a notary in Egypt. The only new evidence was the affidavit of Dr. Hossam Loutfy Hussein. The Plaintiff did not seek an adjournment and the only prejudice identified was that he

would have to scramble to address the late filings. In allowing the late-filed affidavits, I concluded that North 45's casual approach to court-imposed deadlines warranted an award of costs of $500 against it, to be paid forthwith and in any event of the cause.

[10] With respect to the Plaintiff's position that various portions of the two affidavits were inadmissible, I concluded that many portions of the two affidavits contained inadmissible hearsay, opinion, speculation, and submissions. I advised the parties that I would not be considering any inadmissible evidence and I have not done so.

Evidence on the Motion

[11] Mr. Younis filed his affidavit sworn on April 25, 2025. It attaches a number of exhibits, including the transcript of Dr. Elokda's discovery examination. A solicitor's affidavit of Mr. Thomas Morehouse, sworn on November 20, 2025, was also filed by Mr. Younis. North 45 filed an affidavit of Dr. Elokda executed before a notary public in Cairo, Egypt, on November 18, 2025, and an affidavit of Dr. Hossam Loutfy Hussein executed on the same day before the same notary public in Cairo, Egypt.

[12] I note that Mr. Dicks, Vice President of North 45, appeared as the companies representative at the hearing. Dr. Elokda, appeared on his own behalf and in his capacity as President of North 45.

Facts

[13] Mr. Younis is originally from Cairo, Egypt. He moved to Canada in 2019 on a work permit and is now a Canadian citizen. His first language is Arabic.

[14] North 45 owns and operates haskap berry farms for itself and other clients in Nova Scotia. As noted earlier, Dr. Elokda is President of North 45 and is also a defendant in his personal capacity. He immigrated to Nova Scotia in 2004. His first language is also Arabic.

[15] In November 2017, Mr. Younis and Dr. Elokda first met each other at the Best Western Hotel on St. Margaret's Bay Road. Dr. Hossam Loutfy Hussein was also in attendance.

[16] The parties disagree as to who approached the other regarding an investment in a haskap farm. Dr. Elokda says Mr. Younis approached him expressing interest in purchasing a farm from North 45. He says he understood Mr. Younis' primary motivation was to use this business as a means to immigrate to Canada.

[17] Mr. Younis says he initially met with Dr. Hossam Loutfi (who I understand to be the Dr. Loutfy referenced above) at the Best Western Hotel because a mutual friend put them in touch so that Mr. Younis could meet with another person from Egypt while he was visiting Nova Scotia. Dr. Loutfy wanted Mr. Younis to meet with Dr. Elokda, who was also from Egypt. Dr. Loutfy is a long time friend of Dr. Elokda. It is not in dispute that Dr. Loufty stood to earn a commission from North 45 if Mr. Younis became a client.

[18] The three met at the Best Western Hotel in late November 2017. Mr. Younis stated in his affidavit that during this meeting, Dr. Elokda told him about his haskap berry business (North 45), advised that it could be a significant source of revenue for Mr. Younis, and asked if he was interested in making an investment. Initially, Mr. Younis declined Dr. Elokda's invitation to invest. After several more meetings with Dr. Elokda, Mr. Younis agreed to check out North 45's haskap business. He visited the properties and viewed the operations.

[19] Mr. Younis said there were representations made to him concerning the revenue he would receive per acre and that the 10 acres to be conveyed to him pursuant to the proposal would be subdivided from the parcel of land bearing PID Number 20441911 ("PID 911"). Mr. Younis had viewed PID 911 with Dr. Elokda during his visit to North 45's properties.

[20] There is no dispute that Mr. Younis and North 45 entered into a Purchase and Sale Agreement on December 6, 2017. Schedule B to the Purchase and Sale Agreement is a Management Services Agreement ("MSA"), also executed on December 6 by the Plaintiff and by Mr. Elokda on behalf of North 45. The two agreements together are referred to as "the Agreement".

[21] There is no dispute that between January 2018 and June 2019, Mr. Younis made a series of payments to North 45 equaling $540,000. The parties further agree that in 2020, the Plaintiff made a further payment of $30,000 to North 45 with respect to HST.

[22] On December 6, 2017, Mr. Younis and Dr. Elokda went to the office of North 45's then-counsel, Mr. Bryce Morrison, at Boyne Clarke LLP. At this meeting, Mr.

Younis was presented with the written Purchase and Sale Agreement and the Management Services Agreement. Mr. Younis did not seek any legal advice before signing the documents.

[23] There is no dispute that Dr. Elokda had authority to bind North 45 when he signed the Agreement. Dr. Elokda gave evidence that the Agreement was a standard one they had used with other clients of North 45. He stated that he explained the terms of the Agreement in full detail to Mr. Younis. He added that Mr. Morrison acted as a witness for signing the Agreement.

[24] There is no dispute that the Agreement was for the purchase of 10 acres of PID 911. Prior to the execution of the Agreement, there was no discussion about substituting different lands for PID 911.

[25] The Purchase and Sale Agreement includes the following provisions:

> **CONTEXT:**
>
> A. The Vendor owns and operates farmland to grow Haskap berry plants located in Lanesville, Cholchester [sic] County, Province of Nova Scotia, more particularly described as PID Number 20441911 Stewiacke Road, Lanesville, Nova Scotia, and legally described in Schedule "A" hereto (collectively, "**Property**").
>
> B. The Vendor has agreed to sell and Purchaser has agreed to buy 10 acres of the Property as designated by the Vendor free and clear of all liens, mortgages, hypotecs, or other encumbrances of any nature whatsoever, other than Permitted Encumbrances (the "**Lands**") as well as all improvements and fixtures constructed or located on the Lands and all easements and rights benefiting or appurtenant to the Lands.
>
> C. The Vendor has agreed to sell and Purchaser has agreed to buy 10,000 Haskap berry plants, as more particularly identified in the attached Schedule "C" (the "**Haskap Plants**"). The Haskap Plants will be grown by the Vendor, during the 2017, 2018, and 2019 growing seasons, in the Vendor's nursery (which is not on the Property) until the Haskap Plants have reached least 18 to 30 months of age. After the Haskap Plants have reached that age, the Vendor will plant the Haskap Plants on the Lands.
>
> D. The Parties to this Purchase and Sale Agreement will enter into a Management Services Agreement in substantially the form attached to this Agreement as Schedule "B". The execution and delivery of the Management Services Agreement is agreed to be a condition to the purchase of the Lands.
>
> …
>
> **DEFINITIONS**

(1) In this Agreement, unless there is something in the subject matter or context inconsistent therewith:

…

"**Closing**" means the closing of the purchase of the Lands by the Purchaser, which will take place on the closing date specified in the Closing Notice.

"**Closing Date**" has the meaning set out in Section 4.2 hereof.

"**Closing Notice**" has the meaning set out in Section 4.2 hereof.

…

"**Event of Default**" has the meaning set out in Section 7 hereof.

…

"**Lands**" means the lands described in section Context paragraph A.

…

"**Property**" has the meaning set out under Context paragraph **Error! Reference source not found..** (sic)

…

PRICE & PAYMENT SCHEDULE

2.1 Price. The aggregate purchase price is $540,000 plus HST (or $54,000, plus HST per acre) (the "**Purchase Price**"). The Purchase Price shall include the following:

(a) The purchase price for the Lands;

(b) The costs of purchasing and growing the Haskap Plants until they are ready for planting on the Lands;

(c) Preparation of the Lands for use as an orchard for the Haskap Plants, including all related improvements and fixtures;

(d) Full establishment of the orchard, including all expenses and management fees for the whole of 2017, 2018, and 2019 growing seasons, and including the planting of the Haskap Plants in the Lands of the Purchaser at the end of the Nursery Period (around 18 to 24 months of proper growth of the Haskap Plants in proper plant pots in the Vendor's nursery).

2.2 Initial Payment Schedule during Nursery Period. The Parties agree that the Purchase Price will be paid in instalments (non-refundable deposit) as set out below and upon meeting the described milestones, as follows:

(a) First Deposit: $240,000 to be paid on signing of the agreement;

(b) Second Deposit: $150,000 to be paid after 12 months from signing this Agreement;

(c) Final Payment: $150,000 to be paid against the planting of the Haskap Plants in the Lands of the Purchaser.

…

VENDOR COVENANTS

4.1 The Vendor confirms that the conveyance of the Lands shall be by Warranty Deed, drawn at the expense of the Vendor, to be delivered on the Closing Date. The Lands are to be conveyed free from encumbrances. liens or hypotecs of any nature whatsoever other than Permitted Encumbrances, all of which do not materially affect the Purchaser's use of the Lands and the fixtures and chattels thereon.

4.2 The Closing Date for the conveyance of the Lands shall be on or before 30 days from the date the Vendor gives notice to the Purchaser (the "**Closing Notice**") that subdivision approval has been granted with respect to the Lands and new PID numbers have been issued in respect of the Lands (the "**Closing Date**"). On the Closing Date, vacant possession of the Lands shall be delivered to the Purchaser. In all cases, the Closing Date shall be no later than 18 months from the date of signing of this Agreement.

…

EVENTS OF DEFAULT

6.1 The occurrence of any one or more of the following events or circumstances shall constitute a default by the Vendor under this Agreement:

(a) the non-occurrence of the Closing within 18 months from the date of signing of this Agreement;

(b) failure to plant, grow, and transplant the Haskap Plants onto the Lands at the end of the Nursery Period provided that default is not remedied within the 60 days cure period;

(c) any material default under the Management Services Agreement that is not remedied within the 60 days cure period;

(d) if the Vendor shall default in the due performance or observance of any covenant, term or provision of this Agreement and its annexes or the repeated or recurring breach by it of any of its obligations having a cumulative effect of constituting a material breach;

…

REMEDIES

7.1 In addition to any other remedies the Purchaser may have under the provisions of this Agreement, in the event that one or more of the events or circumstances

specified in Article 6 of this Agreement shall occur, the Purchaser, at his or her option, may:

(a) terminate this Agreement, if the Vendor is not in a position to close within 18 months of the date of signing of this Agreement, then on such date the amounts paid by the Purchaser to the Vendor to the date of termination, without interest, shall be returned to the Purchaser;

(b) cease the payment of any unpaid amounts due hereunder;

(c) retake immediate possession of the Haskap Plants from the Vendor's nursery without a court order or other process of law and for such purpose: the Vendor hereby consents that the Purchaser may enter upon any premises where the Haskap Plants may be and remove same therefrom with or without notice of its intention to do so without being liable to any suit or action or other proceeding by the Vendor;

(d) proceed by appropriate court action or actions, either at law or in equity to enforce performance by the Vendor of the applicable covenants and terms of this Agreement along with its annexes and/or to recover damages for the breach thereof;

(e) recover from the Vendor any and all damages which the Purchaser has sustained by reason of such default, failure or breach by the Vendor; and

(f) pursue any of its other remedies which it may have at law or in equity.

…

GENERAL

8.1 Entire Agreement. This Agreement together with the Schedules and annexes hereto, when executed by both Vendor and Purchaser, shall contain the entire understanding and agreement between the Vendor and Purchaser, if any, with respect to the matters referred to herein and shall supersede all prior or contemporaneous agreements, representations and understanding with respect to such matters. No supplement, modification, amendment or waiver of this Agreement shall be binding unless executed in writing by all of the parties.

…

8.10 Rights and Remedies Cumulative. All rights and remedies hereunder are cumulative and not alternative and, in particular, the Purchaser shall be entitled to pursue all of its rights hereunder and at law either consecutively or concurrently and no right or interest in the Lands, the Haskap Plants and Products shall be extinguished or merged by the commencement of action or the taking of judgment for all or any part of the monies which are or may become due and owing pursuant to this Agreement or extension of same or any subsequent agreement made between the Purchaser and the Vendor.

8.11 Waiver. No delay or omission to exercise any right, power or remedy accruing to the Purchaser upon any breach or default of the Vendor under this Agreement

> shall impair any such right, power or remedy of the Purchaser nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein or of any similar breach or default thereafter occurring, nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default thereto occurring. Any waiver, permit, consent or approval of any kind or character on the part of the Purchaser of any breach or default under this Agreement, or any waiver on the part of the Purchaser of any provision or condition of this agreement, must be in writing and shall be effective only to the extent in such writing specifically set forth.
>
> …
>
> **8.15** **Timing.** Time is in all respects the essence of this Agreement. In the event of a written agreement of extension, time shall continue to be of the essence.
>
> **8.16** **Notices.** Any communication must be in writing and either:
>
> (a) delivered personally or by courier; or
>
> (b) transmitted by facsimile, e-mail or functionally equivalent electronic means of transmission, charges (if any) prepaid.
>
> …
>
> **8.19** **Amendment.** No modification or amendment of any of the terms of this Agreement shall be valid unless in writing and signed by each of the parties hereto.
>
> [Emphasis added]

[26] The Agreement references a Schedule "A" Legal Description of the Property. Schedule "A" is a property online drawing of PID 911.

[27] With respect to the purchase price of $540,000 plus HST, section 2.2 sets out a payment schedule with the first deposit of $240,000 due at the time of signing. Between January 21 and February 21, 2018, Mr. Younis paid the initial $240,000. On September 15, 2018, he paid the $150,000 due one year after signing. Mr. Younis paid the final sum of $150,000 on June 19, 2019. The Agreement calls for it to be paid "against the planting of the Haskap Plants in the Lands of the Purchaser." There is no evidence before me concerning what, if anything, was planted on PID 911 by this date. There is no dispute that Mr. Younis paid the $540,000 purchase price and the $30,000 toward HST.

[28] The parties agree that at no time after execution of the Agreement did North 45 give notice that subdivision approval had been granted for a 10-acre portion of PID 911 nor that a new PID Number had been issued with respect to the 10-acre

portion. The parties agree that at no point in time did North 45 offer to convey to Mr. Younis a 10-acre portion of PID 911.

[29] Mr. Younis said in his affidavit that in January 2022, he communicated to Dr. Elokda that he intended to terminate the Agreement and commence legal action against North 45 if he did not get his $570,000 back. He said he then received a February 1, 2022, email from Dr. Elokda offering to convey 10 acres of the Honey Berry Lane property being PID 20480802 ("PID 802") instead of 10 acres of PID 911.

[30] Mr. Younis said he was not prepared to accept, four years after the Agreement was executed, a 10-acre piece of land from an entirely different property.

[31] Dr. Elokda said he advised Mr. Younis, in person, on three occasions that Mr. Younis would get a more favourable agricultural lot, an earlier phase lot than the one that was supposed to be subdivided from PID 911. In his affidavit of November 18, 2025, Dr. Elokda said that, to his best recollection, the first of these verbal notifications was in January/February 2019. He said the third notification was in or around March 2020. The second notification was at some point between the first and second notification.

[32] Dr. Elokda said Mr. Younis refused these offers, stating that he wished to delay the transfer so as not to jeopardize his immigration status. Dr. Elokda further said that Mr. Younis advised that he was not truly interested in the haskap business or in receiving ownership of the property. Dr. Elokda gave evidence that while Mr. Younis unequivocally refused to accept the alternate lot, he insisted that North 45 was ready, willing, and able to transfer it to him.

[33] On March 29, 2019, Dr. Elokda received correspondence from the Nova Scotia Office of Immigration advising him that his application for Mr. Younis under the High-Skilled stream of the Atlantic Immigration Program had been approved. There is no dispute that, for a period of time, Mr. Younis was employed by a construction-related business of Dr. Elokda called East Coast Cedar Homes and Cottages ("East Coast"). Dr Elokda's affidavit attaches correspondence referencing a ROE and a T4 for the year 2020.

[34] Dr. Elokda gave evidence that on February 1, 2022, he sent an email requesting, for the first time in writing, that Mr. Younis take ownership of the alternate property at Stewiacke bearing PID 802. The email indicated that the land assigned to Mr. Younis was 10 acres and a fraction after being subdivided and was

ready for ownership to be transferred to him. Although there is no expert evidence before me comparing the suitability of each of the two properties for haskap berry farming, Dr. Elokda maintained that PID 802 was superior, being non-forested, more fertile, and an older agricultural parcel.

[35] Dr. Elokda said it was only after this February 2022 email that Mr. Younis pointed out that the allotted property had a different PID than the one in the Agreement. Mr. Younis replied to the email the same day indicating the offered PID was not the one set out in the contract.

[36] Mr. Younis's evidence was that there were no verbal offers to convey a different property. He further stated that in January/February 2019, he was not even in Canada; he did not arrive until August of that year. He said the February 1, 2022, email from Dr. Elokda was the first time that he was asked to accept the transfer of 10 acres from a different property.

[37] There is no dispute that on February 15, 2022, Mr. Younis, through his lawyer, provided notice to North 45 that he was terminating the Agreement for North 45's failure to convey the 10-acre portion of PID 911 within the Agreement's 18-month deadline. He also demanded a return of all of the monies paid to North 45.

[38] Although the timeline is not clear from the record, North 45 eventually subdivided portions of 911 and sold the lots to other buyers.

Issues

[39] The following questions must be determined by this court:

1. Should partial summary judgment be granted, allowing Mr. Younis's claim of breach of contract against North 45?
    (a) Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
    (b) If the answer to (a) is No, then does the challenged pleading require the determination of a question of law, either pure or mixed with a question of fact?
    (c) If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?

(d) If there is a real chance of success, should I exercise my discretion to finally determine the issue of law?

Parties' Positions

[40] The Plaintiff seeks summary judgment solely with respect to his claim for breach of contract against North 45, which he submits is clearly severable from the remaining issues for determination. He cites section 8.10 of the Agreement, which states that "[a]ll rights and remedies hereunder are cumulative and not alternative." He says judgment can be awarded to him for damages equal to what he paid under the Agreement without impacting his claims against Dr. Elokda in his personal capacity or against North 45 for loss of profits.

[41] Mr. Younis says there is no genuine issue of material fact, as all the facts necessary to support a claim of breach of contract are undisputed, including the nature of the contract, the parties to the contract, the existence of privity of contract, the relevant terms of the contract, the terms which were breached, and the quantum of damages flowing from the breach.

[42] Mr. Younis says there are disputes of fact concerning Dr. Elokda's pre-contractual representations which are material to his other claims against the Defendants but are not material to the breach of contract claim. Further, he submits that even if Dr. Elokda did make a verbal offer to provide a substitute property, only the January/February 2019 offer would fall within the 18-month period under the Agreement. Regardless, it is undisputed that Mr. Younis refused any substitute property offer.

[43] The Defendant says partial summary judgment is inappropriate because the alleged breach of contract is intertwined with credibility, motive and interpretation, and that the alleged breach of contract and interpretation of the Agreement cannot be separated from the broader factual disputes. It says granting partial summary judgment would fragment the case and create the risk of inconsistent findings.

[44] North 45 submits that there are numerous genuine issues of material fact that can only be determined at trial through oral testimony and cross-examination, including the true purpose of the parties' dealings, the nature of their contractual obligations, and the credibility of the Plaintiff's evidence.

[45] North 45 further submits that after execution of the Agreement, the Plaintiff maintained cordial relations with Dr. Elokda for several years; sought his personal

assistance on employment, housing, and tax matters among many others; and never once claimed breach or requested repayment until 2022. North 45 says the Plaintiff's conduct is inconsistent with the position now advanced and severely undermines his credibility.

[46] It also argues that the Plaintiff was not truthful in his initial dealings with Dr. Elokda, that he concealed his immigration motive, and that his persistent refusals to accept conveyance of the substitute property render his claim fundamentally inequitable. North 45 further says the claim for breach of contract disregards the doctrine of good faith and honest performance.

The Law

[47] The analytical framework applicable on a motion for summary judgment on the evidence is set out in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, at paragraph 34, where the court interpreted Civil Procedure Rule 13.04 to pose five sequential questions. In *SystemCare Cleaning & Restoration Limited v. Kaehler*, 2019 NSCA 29, Bourgeois J.A. summarized the five questions from *Shannex* as follows:

> [34] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 (paras. [34] through [42]):
>
> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[48] In *Burton Canada Co. v. Coady*, 2013 NSCA 95, the court commented on the purpose of summary judgment:

> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.
>
> [Emphasis added]

Genuine issue of material fact, either pure or mixed, with a question of law

[49] The first issue for the court to resolve is whether Mr. Younis has met his burden of showing by evidence that there is no genuine issue of material fact, whether on its own or mixed with a question of law. Determining whether a genuine issue of material fact exists is based on both the pleadings and the evidence. As Fichaud J.A. stated in *Shannex*, *supra*: "Each party is expected to 'put his best foot forward' with evidence and legal submissions on all these questions, including the 'genuine issue of material fact'..." (para. 36).

Material fact

[50] What is a material fact? This question has been answered in various cases, including *Burton*, *supra*, where Saunders J.A. described material facts as "important factual matters that anchor the cause of action or defence" (para. 42). Further, at para. 87, the court defined a "material fact" as "a fact that is essential to the claim or defence", and a "genuine issue" as "an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded." In *Shannex*, *supra*, Fichaud J.A. described a "material fact" as "one that would affect the result" (para. 34). As Fichaud J.A. noted in *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, "[a] dispute over an incidental fact will not derail a summary judgment motion at Stage 1" (para. 27).

[51] In *Halifax Regional Municipality v. Annapolis Group Inc.*, 2021 NSCA 3, reversed but not on this point, 2022 SCC 26, Farrar J.A. proposed a two-step approach to determining whether there is a genuine issue of material fact:

> [36] To decide whether an allegation of fact is material, a court must consider whether the allegation is essential to establish a pleaded cause of action. The first step in the analysis, therefore, is to identify the essential elements of that cause of

> action. The second step is to consider whether the allegations of fact in support of those elements are the subject of a genuine dispute.

[52] In *Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4, Hamilton J.A. said:

> [21] It is agreed there are facts in dispute. The question is whether any of these disputed facts are **material** as found by the judge. This requires us to consider the disputed facts in the context of the pleadings, the evidence presented and the applicable legal principles—to determine whether their resolution could affect the outcome of the trial; *Shannex, supra*, at paras. 34, 36; *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 at paras. 35, 37 and 39.
>
> [Bolding in original – my underlining added]

[53] Justice Bourgeois in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, also discussed material facts:

> [37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.
>
> [38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.
>
> [Emphasis in original decision]

[54] In addition, Justice Bourgeois discussed the further question of whether the challenged pleading required a determination of a question of law, either pure or mixed with fact and, if so, whether the challenged pleading has a real chance of success:

> [39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question – does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton,* Justice Saunders explained how to ascertain if there is a "real chance of success":

> [42] . . . Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**
>
> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation**. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*
>
> the answer would be yes.
>
> [Emphasis in original decision]

Contractual Interpretation and Surrounding Circumstances

[55] As the Court of Appeal said above, in order to identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. Mr. Younis claims that North 45 breached the Agreement. There is no dispute that there is a valid and enforceable contract between the parties. There is no dispute that Mr. Younis paid the purchase price of $540,000 plus $30,000 HST. North 45 argues that under the wording of the contract it was entitled to substitute a property other than PID 911 and that Mr. Younis was obliged to accept the substitution when it was offered to him. The dispute between the parties concerns contractual interpretation. Did North 45 breach the terms of the contract between the parties?

[56] In the interpretation exercise, the words of the agreement are always the starting point. In *Singapore Technologies Marine Ltd. v. Attorney General (Nova Scotia),* 2025 NSSC 140, I discussed contractual interpretation and surrounding circumstances:

> [99] …The Supreme Court of Canada said in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, that the overriding concern is to determine the objective intent of the parties, through the application of legal principles of interpretation and consistent with the surrounding circumstances…
>
> > [125] … In *Sattva*, the court noted that the overriding concern in contractual interpretation is to determine the objective intent of the parties and the scope of their understanding. The court emphasized that consideration of the surrounding circumstances is essential to the search for intent:
> >
> > > [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning …
> > >
> > > [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the

> nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Emphasis added]

[126] The Supreme Court of Canada confirmed in *Corner Brook (City) v. Bailey,* 2021 SCC 29, that *Sattva* "explicitly directs decision-makers to consider the meaning of the words in the surrounding circumstances when interpreting any contract" (para. 28). In *The Law of Contracts,* 8th ed. (Toronto: Thomson Reuters, 2022), at ¶334, S.M. Waddams notes that this approach "elevates the 'factual matrix' to a central place in contractual interpretation."

[127] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words chosen by the parties. There are also limits to the evidence that can be properly considered under the rubric of "surrounding circumstances." The Supreme Court of Canada explained in *Sattva*:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc. (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only

> of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]
>
> [128] As the surrounding circumstances consist only of objective evidence of the background facts known to both parties at the time of the deed's execution, evidence of the parties' subjective wishes, motives or intent is inadmissible (*Knock v. Fouillard*, 2007 NSCA 27, at para. 27).

[57] *Sattva*, *supra*, confirmed that contractual interpretation is a fact-specific exercise that involves issues of mixed fact and law. In *Corner Brook*, *supra*, the Supreme Court of Canada also noted that "[w]hether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact" (para. 44). See also *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, for a useful restatement of the modern principles of contractual interpretation.

[58] Contracts are not made in a vacuum. The case law is clear that the surrounding circumstances (context or factual matrix) must be considered alongside the actual words used in the contract to properly discern the objective intent of the parties. Whether simple or complex, the background to a contract is essential in determining its intended meaning. The factual matrix includes more than simply the purpose of the contract. It is the background of relevant facts that the parties must be taken to have known and to have had in mind when they drafted their agreement. The subjective intent of the parties is not a consideration. Contractual interpretation is an objective endeavour, not a subjective one.

[59] Evidence of surrounding circumstances generally excludes evidence of post-contractual conduct. In *Grafton Developments Inc. v. Allterrain Contracting Inc.*, 2022 NSCA 47, the Nova Scotia Court of Appeal held that post-contractual conduct should only be considered if there is an ambiguity that supports different reasonable alternative interpretations:

> [22] The law treats post-contractual conduct with greater circumspection. In *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, Chief Justice Strathy reviewed the dangers associated with reliance on evidence of subsequent conduct, cautioning against admitting such evidence at the outset of any interpretive exercise:
>
> > [46] These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at the outset of the interpretive exercise. ***Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix***.
> >
> > [Emphasis by Bryson J.A.]
>
> [23] Accordingly, post-contractual conduct should only be considered if, following interpretation of the provision that is in dispute, in light of the contract as a whole and the circumstances that existed at the time of contractual formation, there remains an ambiguity that supports different reasonable alternative interpretations (*Shewchuk*, at ¶46; *Magasins Hart Inc. v. 3409 Rue Principale Inc.*, 2020 NBCA 49, at ¶50-52). Even if admitted, the weight of such evidence varies in accordance with the degree to which its inherent dangers are mitigated in the circumstances, which may include deliberate conduct by one party to lend support to its preferred interpretation of the contract (*Shewchuk*, ¶45).
>
> [Emphasis added]

[60] North 45 asserts there is an ambiguity in the contract. It says that paragraph B in the Context section of the Purchase and Sale Agreement which states "…to buy 10 acres of the Property as designated by the Vendor…" conferred discretion on North 45 to designate a suitable and equivalent parcel of land to PID 911. It argues that a restrictive interpretation would ignore the commercial purpose and context, which was to manage farmland collectively for shared revenue.

[61] As I will explain, I am satisfied that when the actual words of the contract are considered together with the surrounding circumstances, the parties' objective intentions are clear.

Analysis

Genuine issue of material fact

[62] Mr. Younis bears the burden of illustrating that there is no genuine issue of material fact. As the earlier recitation of the parties' evidence reveals, there are

factual matters in dispute. But the question is whether any of the disputed facts are material.

[63] Mr. Younis alleges in his statement of claim that North 45 breached its contract with him when it refused to return all of the monies paid after it failed to convey title to PID 911 within 18 months. North 45 says the Agreement allowed it to substitute PID 802, a superior property offered in good faith. It says Mr. Younis' refusal to accept PID 802 cannot be classified as North 45's breach of contract.

[64] The following facts are not in dispute:

(a) On December 6, 2017, Mr. Younis and Dr. Elokda signed the Agreement;

(b) Dr. Elokda had authority to bind North 45 when he signed the Agreement as President of North 45;

(c) Dr. Elokda was familiar the terms of the Agreement when he signed it. He had legal advice at the time. The Agreement was in a form that had been used by North 45 on a number of other occasions for similar transactions;

(d) Mr. Younis did not receive legal advice on the terms of the Agreement;

(e) The Agreement was about the sale of a portion of PID 911;

(f) There was no discussion prior to the Agreement being signed about North 45 possibly substituting other lands for the lands described in the Agreement, being the 10 acres from PID 911;

(g) There were no supplements, modifications, or amendments to the Agreement made in writing after its execution;

(h) Between January 21, 2018, and June 12, 2019, Mr. Younis paid North 45 the purchase price of $540,000. Between January 21 and February 21, 2018, Mr. Younis paid $198,200 US. On September 15, 2018, he paid $150,000 CDN and on June 12, 2019, he paid $150,000 CDN. There is no dispute that with the exchange, this represented a total payment of $540,000 CDN;

(i) Mr. Younis paid North 45 an additional $30,000 in HST on the purchase price;

(j) North 45 never gave notice to Mr. Younis that subdivision approval had been granted with respect to PID 911;

(k) North 45 never offered to provide title to Mr. Younis of a subdivided parcel of PID 911. North 45 never prepared and did not offer a Warranty Deed for any portion of PID 911 to Mr. Younis;

(l) The closing of the purchase of the lands by Mr. Younis did not take place within 18 months of the signing of the Agreement, or at all;

(m) Mr. Younis never agreed to North 45's offer to accept a subdivided parcel from a different PID (PID 20480802) rather than the PID specified in the Agreement;

(n) On February 15, 2022, Mr. Younis, through counsel, provided notice to North 45 that he was terminating the Agreement and demanded immediate repayment of the monies he paid to North 45. He did not take any steps to give notice of termination of the Agreement prior to 2022;

(o) North 45 has never returned or offered to return to Mr. Younis the money he paid.

[65] North 45 says there are numerous material facts in dispute and points to the following:

- Who initiated the business relationship between the parties;
- The Plaintiff's true purpose – immigration facilitation versus investment;
- The number, timing, and nature of the Defendants' offers to transfer ownership;
- The Plaintiff's post-contractual conduct, including years of cordial relations with Dr. Elokda and the absence of any complaint until 2022.

[66] Regardless of who initiated the discussions, the parties entered into a valid contract on December 6, 2017. This is not in dispute. Whether Mr. Younis's motive for entering the contract was to assist with his immigration application or simply to make a profitable investment is not a genuine issue of material fact. His subjective motivation is irrelevant to the interpretation of the Agreement. Nor does it have any

connection to whether North 45 was entitled under the Agreement to substitute a different property for PID 911.

[67] North 45 says that the year following the execution of the Agreement, Mr. Younis switched immigration streams and was no longer part of the entrepreneurial stream. It says he was employed by one of Dr. Elokda's construction companies under the Atlantic Immigration Pilot Program. It argues that Mr. Younis then believed that owning a business would harm his immigration prospects.

[68] While this proposition, if true, may explain why Mr. Younis did not terminate the Agreement earlier, it is post-Agreement conduct and is certainly not a material fact in dispute. Nothing in the Agreement turns on his immigration status. There were no amendments to the Agreement after it was executed that took into account Mr. Younis's immigration status.

[69] North 45 also says that only after Mr. Younis secured his immigration status in Canada did he start what appears now to have been a premeditated plan to obtain a refund of the funds paid for his farmland. I note there is no evidence before me as to when Mr. Younis became a Canadian citizen or had "immigration status." I reiterate that Mr. Younis' immigration status is immaterial to whether the contract was breached by North 45.

[70] North 45 says Dr. Elokda and Mr. Younis developed a personal friendship after the contract was executed. It argues that this somehow creates a genuine issue of material fact. North 45 says Dr. Elokda assisted Mr. Younis with viewing houses, supported him with his personal taxes, and, when Mr. Younis left the employ of East Coast, Dr. Elokda assisted him with his CV, reference letters, and job applications. Again, evidence of a personal friendship may explain why the contract was not terminated immediately following expiration of the 18-month period, but the existence or non-existence of this post-contractual friendship is not a genuine issue of material fact.

[71] North 45 submits that the number, timing, and nature of its offers to transfer ownership of a substitute property are material facts in dispute. Mr. Younis acknowledged that he received a written offer of conveyance of PID 802 in February 2022, after he advised that he would be terminating the Agreement, and that he refused to accept the substitute property. Dr. Elokda said North 45 made a verbal offer to Mr. Younis in January or February 2019, prior to expiration of the 18-month period. Mr. Younis said he was not even in Canada at the time of these alleged

verbal offers. North 45 submits that the court cannot grant summary judgment in the face of this factual dispute.

[72] As noted earlier, a material fact is one that would affect the result. On a motion involving competing interpretations of a contractual provision, the responding party cannot avoid summary judgment by proposing an interpretation that is completely untenable on even the most cursory assessment of the merits and argue that a disputed fact upon which it relies in advancing that interpretation is material. To find otherwise would be contrary to the purpose of summary judgment, which is to put an end to claims or defences that have no real prospect of success.

[73] As I will explain in my analysis under the third *Shannex* question, even if North 45 was found at trial to have made the alleged verbal offers, this fact would not affect the result of the breach of contract claim.

[74] While unclear, it appears that North 45 is also arguing Mr. Younis breached the implied contractual term of honest performance by not accepting the alleged verbal and written offers to convey PID 802. Such a breach was not pleaded in the defence. Regardless, failure to accept a property not specifically referenced in the Agreement cannot rise to a breach of honest performance. This allegation by North 45 is simply a bald assertion unsupported by any documents and not corroborated by any evidence (*Arguson, supra*, at paras. 37 and 38).

[75] As an aside, I note that the inadmissible portions of the affidavits of Dr. Elokda and Dr. Hussein, if found admissible, would not have raised a genuine issue of material fact.

Is there a question of law to be determined?

[76] The motion materials in this case raise a question of law. As I have noted above, *Sattva*, *supra*, confirmed that contractual interpretation is a fact-specific exercise that involves issues of mixed fact and law. The application of contractual provisions to the factual context is a question of law mixed with fact. As Justice Bourgeois said in *Arguson Projects*, *supra*, at para. 39:

> …For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[77] Here, the question of law (mixed with fact) is:

1. Did North 45 breach the Agreement, thereby entitling Mr. Younis to terminate the Agreement and seek the return of all monies paid?

The answer to the above requires the Court to consider whether the Agreement should be interpreted as allowing North 45, at its discretion, to transfer 10 acres of a property other than PID 911, along with the impact, if any, of Mr. Younis' delay in seeking to terminate the Agreement.

Is there a real chance of success?

[78] Because I have answered "No" to question 1 and "Yes" to question 2, I must now determine whether North 45's defence to the claim has a "real chance of success". As the Respondent on the motion, North 45 has the onus to establish that their pleading has a real chance of success based on the undisputed facts. As the court said in *Shannex*, *supra*, at para. 34, if there is no real chance of success, "then summary judgment issues to dismiss the ill-fated pleading."

Did the Agreement allow North 45 to substitute another property for PID 911?

[79] North 45 says that even if the Court finds no genuine issue of material fact, its defence has a real chance of success on the merits. It says the phrase "10 acres of the Property as designated by the Vendor", when properly interpreted, conferred discretion on North 45 to designate and convey a suitable and equivalent parcel. North 45 further says that the restrictive interpretation proposed by Mr. Younis ignores the commercial purpose and context of the Agreement, which was to manage farmland collectively for shared revenue.

[80] North 45 further says that Clause 2.6 of the MSA provides that produce from all client farms would be intermingled and the revenues distributed pro-rata. It says this confirms that the purpose of the Agreement was to create a cooperative farming enterprise, not to convey a discrete piece of land from a specific property. North 45 says the substitution of PID 802 was made in good faith, that PID 802 was a superior property, and that Mr. Younis' refusal to accept it cannot be characterized as a breach by North 45.

[81] In my view, North 45's proposed interpretation flies in the face of the most basic principles of contractual interpretation. The words of the Agreement, considered in the context of the Agreement as a whole and together with the surrounding circumstances, are entirely unambiguous. North 45 cannot rely on an alleged purpose of the Agreement, or any other surrounding circumstance, to utterly

overwhelm the words chosen by the parties and effectively rewrite the Agreement. The parties' objective intention, as evidenced by the language they chose, was for North 45 to sell 10 acres of PID 911 to Mr. Younis upon which a haskap berry farm would be operated. North 45 would manage the haskap operation for Mr. Younis and conduct the farming operation on the lands pursuant to the MSA that was part of the overall Agreement.

[82] There is no ambiguity in the Agreement concerning the property to be conveyed. The word "designated" in section B cannot reasonably be interpreted as permitting North 45 to substitute a different property for PID 911, regardless of the quality of the substitute property. The Context or opening paragraphs of the Purchase and Sale Agreement state:

> **CONTEXT**:
>
> A. The Vendor owns and operates farmland to grow Haskap berry plants located in Lanesville, Cholchester [sic]County, Province of Nova Scotia, more particularly described as PID Number 20441911 Stewiacke Road, Lanesville, Nova Scotia and legally described in Schedule "A" hereto (collectively, "**Property**").
>
> B. The Vendor has agreed to sell and Purchaser has agreed to buy 10 acres of the Property as designated by the Vendor free and clear of all liens, mortgages, hypotecs, or other encumbrances of any nature whatsoever, other than Permitted Encumbrances (the "**Lands**") as well as all improvements and fixtures constructed or located on the Lands and all easements and rights benefiting or appurtenant to the Lands.
>
> [Emphasis added]

[83] The Property is defined as PID 911 and the Vendor is to designate 10 acres of "the Property" – PID 911 – to convey to Mr. Younis. There is no discretion to substitute another property.

[84] Further, the definition section of the Agreement of Purchase and Sale defines "Lands" and "Property":

> "**Lands**" means the lands described in section Context paragraph A.
>
> …
>
> "**Property**" has the meaning set out under Context paragraph **Error! Reference source not found** .. (sic)

[85] "Lands" are therefore defined as PID 911 which is specifically set out in the Context section at paragraph A. While the "Property" definition indicates it has the

meaning set out under "Context paragraph" there is then an error reference. However, it is absolutely clear, when all of the above is read together, that the property to be conveyed was 10 acres of PID 911.

[86] In my view, the Agreement is capable of only one interpretation regarding the property to be conveyed. Mr. Younis was to receive 10 acres from PID 911. This property was not yet subdivided. The only discretion open to North 45 was to determine which 10 acres within PID 911 would be conveyed to Mr. Younis.

[87] Even Dr. Elokda himself does not seem convinced of the argument that the Agreement allowed North 45 to convey a substitute property. Pages 113 and 114 of his discovery transcript state:

> Q. Okay. So is it your position that there is any language in this contract that gives you, as vendor, the right to substitute different land than the land in PID 911?
>
> A. I did not say that. I don't think so.
>
> Q. I'm asking you if your position is that there are any words in this agreement?
>
> A. No, it was…there is only which is a bit ambiguous, to be frank but we also reviewed that. It's a bit ambiguous.
>
> Q. Okay. Tell me where you're looking when you say it's ambiguous?
>
> A. I will. It's in context (B).
>
> Q. Okay.
>
> A. "The vendor has agreed to sell and the purchaser has agreed to buy ten aces of the property as designated by the vendor."
>
> Yeah, designated by the vendor. It's a bit ambiguous because you may say it has to stay…to remain in the property, you can read it as that what we designate, we do, of course for the benefit of the client or the purchaser and not against his benefit.
>
> Q. Okay. So when it says ten acres of the property, are you saying that that might refer to property other than PID 911?
>
> A. Yes. That's why I'm saying it's a bit confusing.

[88] Moreover, even if the Agreement did give North 45 the discretion to substitute a different property, the one alleged offer made by Mr. Elokda within the 18-month closing period was verbal. Section 8.16 of the Agreement requires all communication between the parties to be in writing.

[89] In short, North 45's argument that it could designate a substitute property has no real chance of success.

[90] Finally, I note that there are typos and some apparent errors in the Agreement, including, for example, a reference in the MSA to a purchase of five acres, these errors have no impact on what is the clear and unambiguous intent of the parties.

Mr. Younis' delay in seeking to terminate the Agreement

[91] Mr. Younis waited close to three years after the closing date deadline to advise North 45 that he was terminating the Agreement and seeking return of all monies paid. The Agreement contains a Time of Essence clause. However, section 8.11 clearly states that the Purchaser's delay in exercising a right of default does not impair such a right, power or remedy. Delay by the Purchaser in enforcing its rights is not to be considered a waiver of such rights:

> **8.11 Waiver.** No delay or omission to exercise any right, power or remedy accruing to the Purchaser upon any breach or default of the Vendor under this Agreement shall impair any such right, power or remedy of the Purchaser nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein or of any similar breach or default thereafter occurring, nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default thereto occurring. Any waiver, permit, consent or approval of any kind or character on the part of the Purchaser of any breach or default under this Agreement, or any waiver on the part of the Purchaser of any provision or condition of this agreement, must be in writing and shall be effective only to the extent in such writing specifically set forth.
>
> [Emphasis added]

[92] Even though the non-occurrence of the closing by June 2019 (18 months from the date of signing the Agreement) was an event of default under section 6.1, Mr. Younis waited until February 2022 to terminate the Agreement. This delay of more than two years and eight months is excused by section 8.11. As a result of this provision, known to North 45 and its lawyer, any delay in terminating the Agreement could not be treated as a waiver of the right to terminate without a specific agreement in writing to that effect.

[93] Regardless of the above, I note that Mr. Younis' delay in terminating the contract did not cause any prejudice to North 45. It had the full purchase price during the 18 months and the subsequent delay. It is undisputed that it did not tender a deed

for 10 acres of PID 911, it did not advise that the subdivision of PID 911 was complete, and there is no evidence before me that any haskap plants were planted on PID 911. North 45 has had the use of the purchase monies for many years and Mr. Younis has received absolutely nothing in return under the Agreement. North 45 not only breached the Agreement, it chose not to comply with the terms of the Agreement while maintaining the $570,000 paid by Mr. Younis.

[94] North 45 entirely failed to perform under the Agreement. There is no breach more fundamental under an Agreement to convey land than for the vendor to fail to convey the land after being paid the purchase price.

[95] The non-occurrence of the closing is a default event under the Agreement, enabling Mr. Younis to terminate. Section 7.1(a) states that on the default the amounts paid to North 45, without interest, are to be returned to Mr. Younis.

[96] It is North 45's burden to establish, on the evidence, that its defence has a real chance of success. It has not done so. Based on the *Shannex* analysis, summary judgment must follow.

Partial summary judgment

[97] In allowing the motion, I recognize that the court should only exercise its discretion in granting partial summary judgment in the clearest of cases, where the claim is clearly severable from the remaining claims (*Proost v. Ferncroft Equities Ltd.*, 2014 NSSC 99). I am of the view this is such a case.

[98] In addition to the claim of breach of contract, Mr. Younis alleges that there were various representations made to him prior to execution of the Agreement. In particular, he alleges that Dr. Elokda represented that Mr. Younis would receive a certain income from the haskap berry farm between 2020 and 2023 and subsequent years.

[99] Mr. Younis pleads fraud, conversion, fraudulent misrepresentation, negligent misrepresentation, breach of contract, unjust enrichment, money had and received, and the principle of equitable tracing. He further pleads that Dr. Elokda conducted himself in bad faith and in breach of trust.

[100] I find that the breach of contract claim against North 45 can be severed from the other claims and will not affect the determination of liability in the other claims. The remaining claims are distinct. Determining the claim of breach of contract will

not make the remaining proceeding more complex. See *Proost*, *supra*, at paras. 26-27.

[101] I make no comment with respect to the other claims advanced by Mr. Younis against North 45 and Dr. Elokda on a joint and several basis.

Conclusion

[102] Mr. Younis' motion for partial summary judgment for breach of contract against North 45 is granted with damages equal to the amounts paid. The parties do not dispute that Mr. Younis paid a total of $570,000 (the purchase price of $540,000 and $30,000 in HST). Consistent with the Agreement there is no interest payable prior to termination of the Agreement. Pursuant to the default and remedy provisions of the Agreement, the monies should have been repaid to Mr. Younis immediately on notice of termination. They were not. As claimed by Mr. Younis, I award prejudgment interest at 5% per year calculated simply (*Rule* 70.07). Prejudgment interest is payable from the date of termination, being February 15, 2022.

[103] If the parties are unable to agree on costs, I will accept very brief (no more than 5 pages) written submissions to be filed within 30 days of the date of this decision. I would ask that counsel for Mr. Younis prepare the Order.

Jamieson, ACJ