COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Angus v. CDRW Holdings Ltd.,*
2023 BCCA 330

Date: 20230815
Docket: CA48406

Between:

Mark Angus

Appellant
(Plaintiff)

And

CDRW Holdings Ltd. and John Williams

Respondents
(Defendants)

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated June 14, 2022 (*Angus v. CDRW Holdings Ltd.*, 2022 BCSC 1001, Vancouver Docket S208993).

Counsel for the Appellant:	A. Morrison
Counsel for the Respondents:	P. Kressock J. Andrews
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 15, 2023

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Voith

Summary:

The parties were negotiating the purchase and sale of property owned by the appellant. They came to agreement on a number of terms and signed a one-page document setting out those terms. The sale did not proceed and the appellant sued to recover a deposit referred to in the document but never paid. The trial judge characterized the one-page document as a term sheet, and concluded that the parties had not intended that the document would be a binding and enforceable agreement for the sale of the property. The appellant submits that the judge erred in concluding that a contract was not formed. Held: appeal dismissed. Whether a contract has been formed is a question of mixed fact and law. No extricable question of law has been shown. Accordingly, the appeal must be decided on the deferential standard of palpable and overriding error. No such error has been shown. It was open to the judge on the record before him to conclude that the parties had not intended to create binding legal obligations.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] On July 21, 2020, the appellant Mark Angus and the respondent John Williams signed a one-page document containing terms for the sale of property owned by Mr. Angus (the "Property") to the respondent CDRW Holdings Ltd. ("CDRW"), a company owned by Mr. Williams' wife. The document contemplated that a deposit of $600,000 would be paid into Mr. Angus's lawyer's trust account by July 24, 2020. The deposit was not paid and the sale did not proceed.

[2] Mr. Angus took the position that the document he and Mr. Williams had signed constituted a binding agreement for purchase and sale of the Property, and sued for recovery of the unpaid deposit. The respondents denied that the document was an enforceable contract and the dispute went to trial.

[3] In reasons indexed at 2022 BCSC 1101, the trial judge held that the document was most appropriately characterized as a term sheet, setting out the proposed terms for a contract that was never executed. The action for the deposit was dismissed. On appeal, Mr. Angus submits that the trial judge erred by failing to consider all the surrounding circumstances in concluding that the parties did not intend the one-page document to be an enforceable contract of purchase and sale.

[4] The question whether the requirements for formation of a contract have been satisfied is a question of mixed fact and law, reviewable for palpable and overriding error. On the record before the court, it was open to the trial judge to conclude that the parties had not intended that the document they signed created binding legal obligations. I am not persuaded that the judge made any reviewable error in his assessment of the evidence and his conclusions.

[5] For the following reasons, I would dismiss the appeal.

Background

[6] The trial judge summarized the background to this dispute in this way:

> [16] Mr. Angus first listed the Property for sale in early 2019 at an asking price of $7.7 million. Donna Williams, made a formal offer to purchase the Property on June 6, 2019, which was not accepted by Mr. Angus. In September and October 2019, and later in March 2020, Mr. Angus and Mr. Williams had further discussions concerning the potential purchase of the Property, including discussions with respect to price and what items of furniture and art could be included. On March 17, 2020, as a result of uncertainties to Mr. Williams' heavy equipment sales business resulting from COVID-19, Mr. Williams terminated discussions with Mr. Angus concerning the potential purchase of the Property.
>
> [17] In late May 2020, after noticing that the Property which at some point before was removed from real estate listings had been re-listed for sale, Mr. Williams reached out to Mr. Angus indicating a desire to recommence discussions regarding a potential purchase. On June 15, 2020 Mr. Angus emailed Mr. Williams and proposed to sell the Property for $6.8 million. Mr. Angus stated that he had a real estate agent who would be involved in the transaction if Mr. Williams decided to proceed with a purchase of the Property and would "deal with the 'papers' to bring this to a satisfactory conclusion for both parties". On June 16, 2020, Mr. Williams responded and made an offer to purchase the Property for $6.8 million including, for the most part, the furniture and items the parties had discussed could be purchased along with the Property in March 2020. Mr. Williams and Mr. Angus then exchanged additional proposals via email but ultimately, on June 21, 2020, Mr. Angus emailed Mr. Williams declining Mr. Williams' offer to purchase as it then stood.
>
> [18] On July 8, 2020, Mr. Angus met with Mr. Williams at his Langley office to discuss potential purchase and sale terms for the Property. Again, no agreement was reached at this meeting. On July 21, 2020, Mr. Angus and Mr. Williams exchanged further emails after Mr. Williams again reached out to Mr. Angus expressing a desire to purchase the Property. In an email sent that evening Mr. Angus indicated that Mr. Williams' daughter could move into the laneway house on the Property by mid-August "if or when we can get the

> paperwork done." The evidence at trial is that the Williams had hoped that their daughter could move into the laneway house on the Property some time that summer.
>
> [19] On July 22, 2020, Mr. Angus again met with Mr. Williams at his Langley office to discuss potential purchase and sale terms for the Property. As a result of their discussions Mr. Williams prepared the Term Sheet.

[7] The document the judge refers to as a Term Sheet (and I will refer to as the "July 22 Document") is one page in length, and includes terms for both the sale of the Property and the sale of specific household items. The July 22 Document is untitled. The entirety of the text relating to the sale of the Property is as follows:

> **First Transaction: (Paperwork to be completed by your real estate agent per your previous email)**
>
> - Possession date: September 8, 2020
> - Seller: Mark Angus
> - Purchaser: CDRW Holdings Ltd. [address]
> - Purchase price: $6,400,000
> - Deposit: $600,000 into your lawyer's trust account by July 24, 2020
> - Our daughter would be allowed to move into the back house when the contract of purchase and sale is signed
>
> **Items included in the home sale**
>
> - Blinds and window treatments
> - All of the mechanical and electrical items to be in working order – including Hot tub and endless lap pool
> - Key fobs and gate mechanism's working – garage door openers included
> - Home to be cleaned prior to possession

[8] The balance of the July 22 Document dealt with the separate sale of the household items. The document concluded with the statement, "All of the items above have been agreed to by both parties", following which Mr. Angus and Mr. Williams signed the document.

[9] The deposit referred to in the July 22 Document was never paid. With Mr. Angus' concurrence, a building inspection was conducted. The inspection was concluded on July 28, 2020, at which point Mrs. Williams decided she did not wish to purchase the Property.

[10] On the same day, Mr. Angus executed a thirteen-page document entitled "Agreement of Purchase and Sale". This document was delivered to Mr. Williams by email from Mr. Angus' solicitor on July 29, 2020. The trial judge summarized the relevant portions of this document at para. 27:

> • Clause 1.2 states that fixtures and all appurtenances and attachments on the Property "as viewed by the Purchaser on July 25, 2020" are included.
>
> • Clause 2.2(a) states that a $600,000 deposit is payable directly to Mr. Angus [that is, no longer to his lawyer] on new dates, being the earlier of the date CDRW takes early occupation of the laneway house, or August 4, 2020 and under clause 2.2(b) the deposit is, subject to limited exceptions, non-refundable upon payment.
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> • Clause 3.1 includes a new completion date for the sale of the Property being September 8, 2020, and Clause 3.2 changed the possession date from September 8 to 10, 2020.
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> • Clause 6.7 includes an "Entire Agreement" clause which states that "[t]his agreement constitutes the entire agreement between the parties with respect to the sale and purchase of the Property and supersedes all other agreements, representations, warranties, promises, negotiations, and discussions – whether oral or written – of the parties respecting the same."
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> • Clause 6.13 states that "the agreement will become effective when all the parties have signed it."
>
> • Clause 6.15 states as follows:
>
> **6.15 Offer**
>
> This offer is open for acceptance until July 30/20 unless withdrawn in writing with notification to the other party of revocation before notification of this agreement's acceptance.

[11] The trial judge summarized the events following delivery of this document in this way:

> [29] On July 30, 2020, Mr. Griffin wrote to Mr. Williams stating as follows: "Further to our phone call, please note that the offer is open for acceptance until end of business day today; please reply with the attached signed agreement by 5:00pm today." On July 31, 2020, Mr. Griffin wrote to Mr. Williams stating as follows: "Please note that the offer has expired". On August 4, 2020, Mr. Griffin wrote to Mr. Williams enquiring "whether [Mr. Williams] intended to move forward with [the] transaction".
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> [30] Mr. Williams did not respond to the correspondence sent by Mr. Griffin.
>
> [31] On August 12, 2020, Mr. Griffin wrote to Mr. Williams again and for the first time mentioned the Term Sheet, which he referred to as "the contract entered into on July 22, 2020". In this correspondence Mr. Griffin set out

> Mr. Angus' position that he considered the alleged agreement for purchase and sale of the Property to have been repudiated.

[12] On September 10, 2020, Mr. Angus filed suit against the respondents. In his notice of civil claim, he referred to the July 22 Document as a "Contract of Purchase and Sale" and the July 29 document as the "Formal Contract". The claim was for judgment against CDRW for breach of the Contract of Purchase and Sale in the amount of $600,000, the amount of the deposit.

Trial Judgment

[13] The trial judge began with a review of the principles applying to whether contract formation has been established. He observed that whether the parties intended their communications to constitute binding legal relations was to be assessed from the standpoint of the objective reasonable bystander and not the subjective intentions of the parties. The determination is contextual and must take into account all material facts, including communications between the parties and conduct before and after the purported agreement is made, citing this Court's judgment in *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34.

[14] The judge also referred to this Court's judgment in *Berthin v. Berthin*, 2016 BCCA 104, for the proposition that a set of guiding principles or an agreement to agree is not enforceable.

[15] The judge then considered the conduct of the parties prior to the execution of the July 22 Document, the wording of the document, and the conduct of the parties after the July 22 Document was executed.

[16] Prior to July 22, the judge concluded that the parties were still negotiating an agreement, although they had tentatively agreed to certain terms, including some of the items of furniture and art that the respondents would purchase.

[17] As to the terms of the July 22 Document, the judge observed that the Property is not identified in the document, although it was common ground that the Property was the only subject of negotiations. The document states that the

"paperwork" is to be completed by the appellant's real estate agent and that the Williams' daughter would be permitted to move into the back house "when the contract of purchase and sale is signed". Details of the intended deposit are omitted, including the identity of the appellant's lawyer to whom the deposit was to be paid and whether the deposit was refundable or non-refundable.

[18] The judge then reviewed the conduct of the parties after the execution of the July 22 Document, which was principally concerned with the form of Agreement of Purchase and Sale sent by the appellant's solicitor to Mr. Williams on July 29, 2020. This document took the form of an offer. No reference is made to the July 22 Document and the Entire Agreement clause states that the agreement "supersedes all other agreements … — whether oral or written — of the parties respecting the same." Some of the terms are different and the document includes a deadline for acceptance of July 30, 2020, stating that "the agreement will become effective when all the parties have signed it."

[19] The trial judge concluded as follows:

> [45] Considering all of the circumstances and material facts referred to above, I do not find that a reasonable objective bystander would find that the parties intended to be bound by the Term Sheet. Rather, I conclude that a reasonable objective bystander would conclude that the Term Sheet is too general or uncertain to be valid in itself and therefore dependent on the making of a formal contract. Further, even if there was no uncertainty as to the terms of an agreement, I find that a reasonable objective bystander would conclude that the understanding or intention of the parties was that their legal obligations were to be deferred until a formal contract had been approved and executed. For these reasons the Term Sheet, including the requirement for payment of a $600,000 deposit, is not an enforceable contract.

Position of the Appellant

Issues

[20] The appellant submits that the trial judge committed four errors of law by:

(i) ignoring or misconceiving the evidence;

(ii) failing to consider all the surrounding circumstances when assessing whether the parties intended to be bound by the July 22 Document;

(iii) misinterpreting the July 22 Document; and

(iv) improperly using subsequent conduct evidence.

[21] Alternatively, the appellant submits that by ignoring important and relevant evidence, the judge made a palpable and overriding error of fact.

Failing to consider all the surrounding circumstances

[22] The appellant points to several pieces of uncontested evidence not addressed by the trial judge in support of the submission that the judge had erred by failing to take into account all the evidence concerning the circumstances surrounding the execution of the July 22 Document.

[23] The first piece of evidence was an email from Mr. Williams to Mr. Angus, dated June 18, 2019, more than a year before the execution of the July 22 Document. In this email, which conveyed an offer for the property that was not accepted, Mr. Williams stated that "…both of us have a mutual goal to make a deal and I hope we will be able to come to an agreement". He then stated, "(w)e can close the purchase at your convenience…". The appellant submits this statement is significant because it demonstrates that the closing date was not an essential term of what is said to be the eventual agreement.

[24] The second piece of evidence was an exchange of emails on July 21, 2020 between Mr. Williams and Mr. Angus, which contained advice from Mr. Angus that Mr. Williams' daughter could move into the rear house prior to possession "if or when we can get the paperwork done". The appellant contrasts this language with the language of the July 22 Document, which provided that Mr. Williams' daughter could move into the house "when the contract of purchase and sale is signed". The appellant submits that the change in language indicates that by July 22, the parties had agreed that the sale was no longer conditional.

[25] Third, the appellant cites a series of emails on July 21 in which Mr. Williams advised Mr. Angus that the Williams' were in the process of selling their home and asked Mr. Angus whether he had sold his house yet. Mr. Angus responded that he had not, but was actively negotiating with another party. At trial, Mr. Williams agreed he was hoping to conclude an agreement on July 22. The appellant submits that this evidence was important as indicating urgency to complete an agreement the next day.

[26] The appellant submits that this evidence, not addressed by the trial judge, was important contextual evidence to assess the terms of the July 22 Document, as indicating that both parties (and particularly Mr. Williams) were anxious to complete the agreement on July 22.

[27] Finally, the appellant submits that the judge gave no effect to the uncontested evidence that after July 22, Mr. Williams told his wife that "I've negotiated a price. It's all done. Possession date. Everything's done".

Misinterpreting the July 22 Document

[28] The appellant further submits that the trial judge erred in his interpretation of the text of the July 22 Document. He submits that the reference to "paperwork" in the July 22 Document is as consistent with the preparation of a formal document as it is with a conclusion that the agreed upon terms were subject to a formal agreement. He takes issue with the judge's interpretation of the move-in clause, arguing that the language is not conditional. He submits further that while the judge did address the significance of the language that "(a)ll the items above have been agreed to by both parties", he failed to give it the significance it merited.

Improperly using subsequent conduct evidence

[29] Finally, the appellant submits that the judge erred in his consideration of the subsequent conduct of the parties, particularly by reference to the Agreement of Purchase and Sale sent by Mr. Angus to the respondents on July 29. The appellant points out that the document was a standard form document: while it was drafted in

the form of an offer, that was a matter of form not substance. Further, while it was broader in scope than the July 22 Document and contained somewhat different terms, it in effect superseded the July 22 Document.

[30] In his factum, though not in oral argument, the appellant also submits that the use of subsequent conduct evidence in determining the contractual intention of the parties is inconsistent with the decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, which confirmed that the surrounding circumstances used to interpret a contract were confined to background facts and knowledge at the time of the contract. He suggests that to resolve this inconsistency, subsequent conduct should only be used in assessing contract formation when the conduct involves both parties and is consistent with only one interpretation.

Analysis

Standard of Review

[31] A conclusion that the requirements for the formation of a contract have or have not been satisfied is a question of mixed fact and law, reviewable for palpable and overriding error, unless the trial judge commits an extricable error of law: *Oswald* at para. 31; *Chhina v. Rebecca L. Darnell Law Corporation*, 2021 BCCA 430 at para. 18.

[32] In the seminal judgment of *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, the Supreme Court of Canada directed appellate courts to be cautious in determining that an extricable error of law can be extracted from a question of mixed fact and law, “as it is often difficult to extricate the legal questions from the factual”. This cautionary principle expressly applies to the determination of contract formation: *Oswald* at para. 32.

[33] The task before the trial judge was to determine whether, when they signed the July 22 Document, the parties intended this document to be an enforceable contract of purchase and sale. Determining the objective intentions of the parties is

inherently fact specific: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 55.

[34] The general rule is that where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error: *Housen* at para. 36. The fact that other interpretations of the evidence are available does not constitute palpable and overriding error.

[35] For an argument that the trial judge forgot or misapprehended evidence to succeed in raising an extricable question of law, more is required than pointing to evidence that was not referred to by the trial judge. In *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144, this Court explained the standard of review of a determination of the parties' objective intention to contract, with particular reference to the argument that the judge had overlooked important evidence:

> [90] [The appellant] does not take issue with the trial judge's legal analysis. Its arguments are directed entirely to the findings and inferences she drew from the evidence before her. [The appellant] accordingly faces a heavy burden in seeking to persuade this Court to reverse her decision. An appellate court approaches such findings with a high degree of deference, due to the trial judge's privileged position in assessing and weighing the evidence before her. It is not for this Court to second-guess her findings of fact or credibility, or the weight she assigned to various pieces of evidence. We may only interfere if she has made a palpable and overriding error in reaching her conclusions, that is, if they are identifiably wrong, unreasonable or unsupported by the evidence, and can be shown to have affected the result…
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> [91] In an effort to avoid this deferential approach, [the appellant] seeks to define an extricable question of law, reviewable on the stricter standard of correctness.…
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> …
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> [93] I am unable to agree. In my view, the question of whether two parties intended to form a binding contract is best characterized as a question of mixed fact and law, as it requires the application of the objective legal standard of the reasonable bystander to the facts as found by the trial judge. If, as [the appellant] suggests, the trial judge ignored, misapprehended or over-emphasized aspects of the evidence, this must reach the level of palpable and overriding error before this Court may interfere.

[36] The standard of review is particularly significant on this appeal because of the appellant's focus on the assessment of the evidence by the trial judge.

Applicable Principles

[37] The trial judge began his analysis by summarizing the principles that apply to determining whether a communication between two parties was intended to constitute a binding and enforceable agreement, or a non-binding arrangement referred to variously as an agreement to agree, or a statement of guiding principles, or a letter of intent, or a term sheet. The appellant does not suggest that the trial judge erred in his statement of the principles that apply, but it may be useful to summarize these principles as they provide the foundation for the judge's analysis.

[38] For communications between parties to constitute a binding and enforceable agreement, the parties must intend to be legally bound by what they have agreed. The test for a binding and enforceable agreement is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23. This inquiry is an objective one, such that the actual state of mind and personal knowledge of the parties is not relevant: *Voitchovsky v. Gibson*, 2022 BCCA 428 at para. 33. The question is not what the parties subjectively had in mind, but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 37.

[39] The trial judge referred to a passage from *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), frequently cited in this Court to explain the difference between an enforceable contract and a preliminary agreement in which the parties' legal obligations are to be deferred until a formal contract has been approved and executed:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended

> written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself.
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> [Emphasis added by trial judge.]

[40] To determine intention to contract, a court may look at all the circumstances: *Leemhuis v. Kardash Plumbing Ltd*., 2020 BCCA 99 at para. 17. Subsequent conduct of the parties can be relevant to ascertain whether, objectively, they had entered into a binding and enforceable contract: *Oswald* at para. 50.

Allegations of Error

[41] The central allegation that the trial judge committed an extricable error of law, as opposed to simply an unreasonable assessment of the evidence, is that the judge did not consider all of the circumstances before making his determination. The appellant has set out some portions of the record not referred to by the trial judge for this submission. I am not persuaded that the judge committed such an error.

[42] The fact that the trial judge did not refer to all of the evidence supporting the appellant's position is in no way determinative. A judge is not obliged to identify and discuss in reasons for judgment every piece of evidence tendered by the parties. Rather, a judge must show that he or she grappled with the substance of the live

issues: *McKenzie v. Lloyd*, 2018 BCCA 289 at para. 35; *R. v. R.E.M.*, 2008 SCC 51 at para. 64.

[43] In this case, the trial judge focussed on the text of the July 22 Document and the subsequent conduct of the parties to determine whether, objectively, the parties had manifested an intention to create binding legal relations on July 22, the live issue before the Court.

[44] I do not consider that the circumstances cited by the appellant as important raise extricable questions of law that derogate from the deferential standard applicable to review of a trial judge's assessment of the evidence.

[45] The June 18, 2019 email, sent more than a year before the July 22 Document was signed, referred to Mr. Williams' flexibility in setting a closing date. To the extent the point is of importance, it was mitigated the next day, when Mr. Angus responded with a reference to "a closing date to be mutually agreed between us." The exchange of emails on July 21 indicates ongoing negotiations, but throws little light on the interpretation to be placed on the document signed the next day.

[46] Finally, the fact that Mr. Williams subjectively believed that he had negotiated a price and that it was "all done" is not determinative of the objective question before the Court. In *Bawitko*, after signing the document in question, one of the parties said to the other, "You've got a deal". That statement did not prevent the Ontario Court of Appeal from concluding, after considering all the circumstances including the subsequent conduct of the parties, that the agreement was subject to a formal written contract.

[47] While the trial judge did not refer to Mr. Williams' statements, the judge was careful to assess the evidence from the perspective of an objective reasonable bystander, and not to be drawn into the subjective views of the parties, as can be seen from these passages:

> [12] …The question is not whether the parties subjectively believed that they were entering into a binding agreement but rather whether an objective

> reasonable bystander would consider, in all of the circumstances, that the parties intended to be bound by the alleged contract in question…
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> …
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> [36] …I do not find that the wording of the Term Sheet itself establishes, when viewed from the standpoint of a reasonable objective bystander, that the parties intended to be bound by its terms.
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> …
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> [40] …I find that a reasonable objective bystander would not consider that the bullet points in the Term Sheet concerning sale of the Property would constitute a binding agreement.
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> …
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> [42] I do not find, when viewed objectively, that the conduct of the parties after the Term Sheet was signed provide any support for a finding that the parties intended that Term Sheet would constitute a binding agreement.…
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> …
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> [45] Considering all of the circumstances and material facts referred to above, I do not find that a reasonable objective bystander would find that the parties intended to be bound by the Term Sheet. Rather, I conclude that a reasonable objective bystander would conclude that the Term Sheet is too general or uncertain to be valid in itself and therefore dependent on the making of a formal contract.

[48] I am not persuaded that the trial judge committed an extricable error of law by failing to consider all the circumstances relevant to the issue at hand.

[49] The appellant also disputes the trial judge's interpretation of the significance of the text of the July 22 Document. I can see no question of law arising from the judge's comments on the language of the document. The interpretation of the language in the document, particularly the significance of the phrase "when the contract of purchase and sale is signed" is not unreasonable.

[50] Finally, the appellant submits that the judge erred in his consideration of subsequent conduct of the parties. This submission is somewhat inconsistent with the principle relied on by the appellant that the Court should consider all the circumstances in assessing the objective intention of the parties.

[51] As I have indicated, it is settled law that to determine contract formation (as opposed to contract interpretation), the Court may consider subsequent conduct of

the parties. In many cases, when the subsequent conduct is proximate in time to the disputed agreement, this will be the best evidence of the parties' intentions.

[52] I can see no error in the judge's consideration of the parties' subsequent conduct, with particular reference to Mr. Angus' subsequent formal offer to the respondents, and the respondents' refusal to execute the new agreement sent to them.

[53] I conclude that the appellant has failed to establish that an extricable question of law arises in this appeal.

[54] The result is that the standard of appellate review is the deferential standard whether the judge committed a palpable and overriding error in his assessment of the evidence. In my opinion, there is no basis to conclude that the judge committed such an error. There was evidence that pointed to an intention to reach a binding agreement and evidence that pointed in the other direction. It was for the trial judge to assess this evidence and reach a conclusion.

[55] I am not persuaded that the trial judge committed any error that would warrant appellate review on the deferential standard of review that applies to this appeal.

Conclusion

[56] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Voith"