IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Qi v. Qin,*
2024 BCSC 1830

Date: 20241007
Docket: S185066
Registry: Vancouver

Between:

Jun Qi and Bay Vista Development Corporation

Plaintiffs

And

Xipeng Qin aka "George" Qin and Lightray Development Corporation

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

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Place and Dates of Trial:	Vancouver, B.C. October 3-7, 11, 13-14, 2022 February 27-28, March 1-3, June 5-8, August 8-9, 11, November 14, 2023 March 4-6, 2024
Place and Date of Judgment:	Vancouver, B.C. October 7, 2024

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Overview

[1] This is a breach of contract claim brought by the plaintiffs Jun Qi and Bay Vista Development Corporation ("Bay Vista"), against the defendants Xipeng Qin a.k.a. George Qin and Lightray Development Corporation ("Lightray"). Mr. Qi and Mr. Qin are both experienced businesspeople who have been involved in various real estate development projects.

[2] Bay Vista is Mr. Qi's company. Mr. Qin also has a company: 1092511 B.C. Ltd. ("109"). In their submissions and evidence at trial, Mr. Qi and Mr. Qin generally treated themselves and their respective companies essentially interchangeably. Accordingly, I have done the same in these reasons.

[3] Lightray is a company that was incorporated by Mr. Qin. Bay Vista holds a 70% interest (700 shares) in Lightray and Mr. Qin holds the remaining 30% interest (300 shares). In August 2016, Lightray acquired a 130-acre residential development property in Duncan, British Columbia located at 1698 Maple Bay Road (the "Property").

[4] Ownership of the 300 shares currently registered in Mr. Qin's name (the "Disputed Shares") is the central issue in this action and turns on the interpretation of a written agreement made between Mr. Qi and Mr. Qin on November 10, 2016 (the "November Agreement"). The plaintiffs say that under the November Agreement, Mr. Qin agreed to sell the Disputed Shares to Mr. Qi for $700,000 CAD. Mr. Qin denies this. He says that either the November Agreement is too uncertain to be enforceable, or if not, then Mr. Qi paid him $700,000 to purchase his existing 70% interest in Lightray.

[5] The plaintiffs do not advance any claims against Lightray directly. It was named as a defendant solely for the purpose of being bound by any order resulting from this litigation and did not participate in the trial.

Background

[6] In July 2016, Mr. Qin became aware of an opportunity to purchase the Property though a friend in the lending industry, Clinton Wark. Mr. Wark provided Mr. Qin with information about the property, including its potential for redevelopment. Mr. Qin considered this to be a good investment opportunity and intended to redevelop it into subdivided parcels of land for residential sale. Mr. Qin presented this opportunity to Mr. Qi at some point in July 2016.

[7] The Property was listed for $2.5 million, but Mr. Qin told Mr. Qi that if they acted quickly, it could be purchased for $2.2 million. Mr. Qin understood that the Property had been appraised at $6.5 million conditional on it being rezoned. Rezoning was approved in July 2016. He testified that he was particularly interested in the Property because it had already been zoned for development and the necessary permits were in place.

[8] In July 2016, Mr. Qi and Mr. Qin viewed the Property with Mr. Wark. Mr. Qi has limited facility with English so Mr. Qin translated their discussions. Mr. Qi also returned to view the Property multiple additional times that month.

[9] After viewing the Property and considering the financial aspects of the Project, Mr. Qi decided to invest in purchasing and developing it with Mr. Qin. Mr. Qi testified that he and Mr. Qin agreed that Mr. Qi would invest 70% of the required funds and Mr. Qin would contribute the remaining 30%.

[10] Time was of the essence in submitting an offer to purchase the Property. Accordingly, Mr. Qin told Mr. Qi that he had a shell company—Lightray—that they could use to purchase the Property. Mr. Qi and Mr. Qin agreed that they would use Lightray to make an offer to purchase the Property for $2.2 million. In furtherance of this, Lightray entered into a contract of purchase and sale for the Property with 0918673 B.C. Ltd. as vendor for a purchase price of $2,200,000 dated August 2, 2016 (the “Maple Bay Contract”).

[11] The Maple Bay Contract required a $100,000 deposit and had a closing date of August 22, 2016. Mr. Qi paid the $100,000 deposit. On August 12, 2016, the vendor removed its conditions and the Maple Bay Contract became unconditional.

[12] The parties agree that Mr. Qi and Mr. Qin “entered into an oral agreement with respect to the purchase of [the Property], the terms of which are at issue in this litigation” (the “August Agreement"). It is unclear on the evidence precisely when Mr. Qi and Mr. Qin entered into the August Agreement beyond that it occurred at the end of July and before Lightray entered into the Maple Bay Contract on August 2, 2016. I find that Mr. Qi and Mr. Qin entered into the August Agreement in late July 2016.

[13] In mid-August 2016, Mr. Qin told Mr. Qi that he was experiencing cash flow issues and was not in a position to pay his 30% share of the purchase price for the Property, but would contribute the funds as soon as he had them available. Mr. Qin told Mr. Qi that he had a shipping container of goods arriving and expected to be able to sell those goods quickly to fund his contribution.

[14] Bay Vista was incorporated on August 19, 2016 with Mr. Qi as its sole director. That same day, Mr. Qin was appointed as director of Lightray.

[15] Mr. Qin was unable to come up with his portion of the funds prior to closing. Accordingly, Mr. Qi paid the balance of the purchase price for the Property. This was done by way of Bay Vista transferring $2,150,568.17 to Lightray’s solicitors: $1,390,000 on August 24, 2016 and $760,568.17 on August 25, 2016.

[16] Lightray’s purchase of the Property closed on August 25, 2016. Mr. Qin did not contribute any funds towards the purchase of the Property, but did execute the closing documents on Lightray’s behalf.

[17] On August 31, 2016, Mr. Mao engaged Mr. Forno to reorganize Lightray’s capital structure to reflect the share ownership contemplated in the August Agreement by issuing 700 shares to Bay Vista and 300 shares to Mr. Qi. Mr. Mao took direction from Mr. Qi and in turn provided instructions to Mr. Forno on behalf of

Mr. Qi and Bay Vista. Mr. Forno in turn retained a Vancouver solicitor, Ms. MacInnes, to assist with drafting Lightray's corporate documents.

[18] On September 2, 2016, Mr. Qin resigned as a director of Lightray, and Mr. Qi was appointed as Lightray's sole director in his place. Shortly thereafter, on September 10, 2016, Mr. Qin incorporated 109.

[19] By late October 2016, Mr. Qi learned that the vendor of the Property, Windcrest Homes Limited ("Windcrest Homes"), had certain consulting and appraisal reports prepared for the Property, but that these reports had not been included with the purchase. Mr. Qi requested that Mr. Qin obtain these documents from the vendor. An asset purchase agreement was therefore prepared to purchase the reports from Windcrest Homes for $10,500.

[20] Over the course of September and October 2016, steps were taken to restructure Lightray's share capital. Draft corporate documents were prepared and exchanged in furtherance of this. It was initially contemplated that Bay Vista and Mr. Qin would each be issued founder's shares in Lightray in accordance with their respective 70/30 interests under the August Agreement. However, Bay Vista could not receive founder's shares because it did not exist when Lightray was incorporated back in May of 2016.

[21] In early November 2016, Mr. Qin told Mr. Qi that his shipment of cargo had arrived, but the buyer had failed to pay him. Mr. Qin remained unable to contribute funds to Lightray. Shortly thereafter, on November 10, 2016, Mr. Qi and Mr. Qin then entered into the November Agreement.

[22] Lightray's corporate documents were eventually finalized by late November 2016 and were signed in December 2016.

Issues

[23] The plaintiffs claim that in breach of the November Agreement, Mr. Qin failed to transfer the Disputed Shares to Mr. Qi. This is the only cause of action to be

determined. If a breach is established, the plaintiffs seek specific performance of the November Agreement by way of Mr. Qin transferring his interest in Lightray to Mr. Qi. Alternatively, they seek damages to be assessed, though no claim for damages is pleaded in their amended notice of civil claim ("Amended NOCC").

[24] The plaintiffs also sought, in the further alternative, an order that Mr. Qin return the $700,000 paid to him pursuant to the November Agreement and, if the Court accepts Mr. Qin's evidence that he held 10% of his 30% interest in Lightray in trust for Mr. Qi, a transfer of that interest as well. This form of alternative relief is not pleaded in the Amended NOCC. It also flows from the plaintiffs' purported claim in unjust enrichment, but they abandoned that claim in closing submissions given that no such cause of action is advanced in the Amended NOCC.

[25] The Amended NOCC does plead that Mr. Qin breached his duty of good faith and honest performance of contractual obligations by, *inter alia*, failing to transfer shares to Mr. Qi. However, the plaintiffs abandoned this aspect of their claim in the course of closing argument.

[26] The parties' agree that Mr. Qi and Mr. Qin entered into the August and November Agreements. In light of this, the issues that must be determined to decide the plaintiffs' claim for breach of the November Agreement are:

(a) What were the terms of the August Agreement?

(b) What is the proper interpretation of the November Agreement, namely: was the $700,000 payment from Mr. Qi to Mr. Qin made for Mr. Qi to purchase an initial 70% interest in Lightray, or Mr. Qin's 30% interest in Lightray?

(c) Did Mr. Qin breach the November Agreement by failing to transfer his 30% interest in Lightray to Mr. Qi?

(d) If Mr. Qin breached his obligations under the November Agreement, are the plaintiffs entitled to specific performance thereof, or if not, can they

seek damages to be assessed despite having not sought damages in their pleadings or obtained a bifurcation order?

[27] Given the central role of the August and November Agreements in this litigation, the parties' respective positions regarding these agreements, as set out in their pleadings, provide important context. The parties agree that these two contracts were entered into, but disagree on the terms of the August Agreement and the interpretation of the November Agreement.

[28] In the amended notice of civil claim filed July 30, 2021 ("Amended NOCC"), the plaintiffs plead that the August Agreement was an agreement to purchase the Property on the following terms:

(a) Mr. Qi would pay the $100,000 deposit for the Property;

(b) Mr. Qi and Mr. Qin would each contribute their respective percentage of funds due on closing—Mr. Qi 70% and Mr. Qin 30%;

(c) Mr. Qi would hold 70% of the shares in Lightray and Mr. Qin would hold the remaining 30%; and

(d) Mr. Qin would help Mr. Qi incorporate a company—which subsequently became Bay Vista — to hold Mr. Qi's 70% interest in the Property and Lightray.

[29] In his amended response to civil claim filed July 21, 2021 ("Amended RTCC"), Mr. Qin advances a similar conception of the August Agreement, namely as one being entered into for the purpose of acquiring the Property through Lightray and providing for his and Mr. Qi's respective equity interests in Lightray. However, at trial, Mr. Qin asserted an entirely different conception of the August Agreement than that set out in his pleadings. Mr. Qin now takes the position that the August Agreement was a loan agreement whereby Mr. Qi agreed to loan Lightray the funds needed to purchase the Property, pending completion of due diligence to determine

whether he wished to be involved in the project, and that Mr. Qi did not acquire any interest in Lightray until the November Agreement was made.

[30] The November Agreement was reduced to writing and its terms are not disputed. How this agreement is to be interpreted is the central issue in dispute. The plaintiffs say that Mr. Qin agreed to sell his interest in Lightray to Mr. Qi. More specifically, Mr. Qi asserts that the November Agreement ought to be interpreted in material part as providing that Mr. Qi would pay Mr. Qin $700,000 for the Disputed Shares by way of $100,000 CAD paid in Canada and $600,000 CAD paid in RMB in China.

[31] For his part, Mr. Qin pleads in his Amended RTCC that the November Agreement was not an agreement at all, but merely contained “points” pertaining to how a $700,000 finder’s fee (which he pleads was a material term of the August Agreement) would be paid. At trial, Mr. Qin abandoned his position that the November Agreement was not an agreement. He now asserts that either its terms are too uncertain to be enforceable, or that it ought to be interpreted as Mr. Qi agreeing to pay him $700,000 to acquire a 70% interest in Lightray.

[32] This theory was first advanced by Mr. Qin in his opening statement—which he gave immediately following the plaintiffs’ opening. However, it was not until midway through his closing submissions, that he applied to amend the Amended RTCC. I dismissed that application, with reasons indexed at 2023 BCSC 1678. The parameters of this action are thus dictated by the pleading, considered in light of the evidence, the parties’ agreed statement of facts and chronology, and the various admissions and concessions made over the course of trial.

[33] I also note that in various instances, Mr. Qin made submissions that appeared inconsistent with the agreed statement of facts entered into evidence at the outset of trial. However, at no point did he expressly resile from the agreed facts or seek to withdraw admissions made therein. Accordingly, I accept and have relied on the facts as set out in the agreed statement of facts.

Credibility Findings

[34] Because the August Agreement was made orally and the interpretation of the November Agreement is disputed, it is necessary to make findings with regard to Mr. Qi and Mr. Qin's credibility. There were significant differences between the parties' versions of events. Both Mr. Qi and Mr. Qin assert that the other's evidence is not credible or reliable. Mr. Qin also says that two witnesses called by Mr. Qi to corroborate his version of events, Raymond Mao and Yashuang Chen, fabricated aspects of their evidence to buttress the plaintiffs' position in this litigation.

[35] With the exception of Mr. Mao, the witnesses in this case all testified in Mandarin through an interpreter. While I am satisfied that the interpreter accurately interpreted the witnesses' words, I recognize that the assessment of credibility is rendered more difficult, at least to some degree, when the witnesses' words are filtered through the interpreter.

[36] In addition, and as this Court has recognized, Mandarin is a highly nuanced and context-dependent language that can be susceptible to different reasonable interpretations, which in turn complicates and makes the fact-finding process more difficult: *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416 [*Ai Kang*] at paras. 23-24. Accordingly, I have considered the whole tenor of the evidence and the documents before making findings: *Ai Kang* at para. 24, citing *Liu v. Westport Motor Cars Ltd*., 2018 BCSC 2127 at para. 39 and *Fu v. Zhu*, 2018 BCSC 9 at para. 40.

[37] I am cognizant of the principles that the Court must consider in dealing with credibility and reliability as set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252; *Bradshaw v. Stenner*, 2010 BCSC 1398; and *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 [*Youyi*], among other decisions and have applied them in my analysis of the parties' evidence in this case.

[38] A witness's evidence is first considered on its own, then analyzed to determine whether it is inherently believable in the context of the facts of the entire

case. The testimony is then evaluated based on consistency with the evidence of other witnesses—with disinterested witnesses being particularly helpful—and with documentary evidence. The overarching question is which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: *Youyi* at para. 91.

[39] Having heard Mr. Qi and Mr. Qin's evidence and compared it to that of other witnesses and the documentary evidence, I find that there is good reason to be concerned about each of their credibility. My reasoning in this respect is set out in further detail below. In short, each of them was, at times, less than forthright in their testimony and attempted to tailor their evidence to their respective positions in the litigation. This often resulted in their evidence being difficult to reconcile with the documentary evidence. Neither Mr. Qi nor Mr. Qin appeared to appreciate the importance of providing truthful and accurate evidence to the Court, or the impact of their failure to do so on the Court's ability to fairly decide the issues put before it.

[40] That said, credibility and reliability are not all or nothing propositions. I may believe all, part, or none of a witness's evidence and can attach different weight to different parts of that evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207 at para. 93. This is particularly germane in this case where I have concerns regarding some aspects of each of Mr. Qi and Mr. Qin's evidence on some points, but accept their evidence in other instances where it accords with the documentary evidence and commercially reasonable business practices. In this respect, and despite my finding that Mr. Qi was not an entirely credible witness as set out below, I find his evidence was as a whole generally more consistent with the preponderance of the possibilities and commercial reasonableness than Mr. Qin's, particularly with respect to his discussions with Mr. Qin which resulted in the August and November Agreements.

Assessment of Mr. Qi's evidence

[41] Mr. Qi's evidence suffered from inconsistencies on material points, he was evasive, longwinded and argumentative on cross-examination, and on more than one occasion, he refused to answer questions until directed to do so by the Court. Mr. Qi's ability to recall matters appeared better on direct examination than under cross-examination, and his testimony at times appeared contrived to advance his position in the litigation.

[42] However, considering his evidence as a whole, I am of the view that at least some of the inconsistences in Mr. Qi's evidence may have been the product of a lack of precision in the questions being asked of him coupled with the inherent difficulties arising from interpretation. While both he and Mr. Qin testified through interpreters, Mr. Qi's facility with English was notably poorer than Mr. Qin's. Mr. Qi appeared to have little ability to understand English, while Mr. Qin often appeared to comprehend, and sometimes even answered, questions before or as they were being interpreted for him.

[43] On balance, I find that there are portions of Mr. Qi's that I accept, and other portions that I reject. I remain mindful in this respect that credibility is not an "all or nothing" proposition. In this respect, I find that aspects of Mr. Qi's testimony—particularly his evidence about his discussions with Mr. Qin that led to the August and November Agreements—are consistent with the objective evidence, commercially reasonable business practices, and the preponderance of probabilities when considered within the evidence a whole. Accordingly, I accept his evidence on these issues, and prefer it to Mr. Qin's.

[44] That said, I find Mr. Qi's evidence of his purported sale of the Disputed Shares to Mr. Chen, his long-time friend and occasional business partner, particularly troubling. Mr. Qi and Mr. Chen testified that in January 2017, Mr. Chen travelled to Victoria and had various meetings with Mr. Qi and Mr. Qin which resulted in Mr. Chen acquiring a 30% interest in Lightray for the Project from Mr. Qi. Mr. Qi relies on this evidence as subsequent conduct which supports his interpretation of

the November Agreement. It is undisputed that Mr. Chen traveled to Victoria on January 9, 2017 and that he visited the Property with Mr. Qi, Mr. Qin and others on the morning of January 10, 2017 before leaving Victoria that evening.

[45] Specifically, Mr. Chen testified that on January 9, 2017, after arriving in Victoria, he and his assistant, Qian Bin, had dinner with Mr. Qi and Mr. Qin, and then went to the Westin Bear Mountain hotel, where Mr. Chen had three consecutive meetings in his hotel room that same evening:

(a) A private meeting with Mr. Qi where Mr. Qi showed him the November Agreement, told him Mr. Qin had withdrawn from the Project, and suggested they view the Property the next day;

(b) A second meeting with Mr. Qi and Mr. Qin where Mr. Qi again showed him the November Agreement, Mr. Qin said that he had signed it, and Mr. Qi said that by investing $1.5 million, Mr. Chen would receive the 300 shares in Lightray that Mr. Qin withdrew from; and

(c) A third meeting with Mr. Qi, Mr. Qin, Mr. Bin and “representatives from Toronto” in which Mr. Qi gave him a very detailed introduction to the Property and the proposed development, and he indicated that he was very interested in the Project.

[46] This evidence cannot be reconciled with the objective facts, namely Canada Border Services Agency (“CBSA”) records which confirm that Mr. Chen did not enter Canada until 9:51 p.m. on the evening of January 9, 2017. In light of that, I find it inconceivable that he travelled from the airport into Victoria, had dinner with Mr. Qin and Mr. Qi, then travelled to the Westin Bear Mountain hotel, and then had the three meetings he testified about, all in the same evening. Photographic evidence also shows Mr. Qin and Mr. Bin’s wife preparing dinner at 5:36 p.m., more than four hours prior to Mr. Chen’s arrival in Canada.

[47] Mr. Chen’s evidence about his alleged $1.5 million payment to Bay Vista for the shares in Lightray was lacking in detail and uncorroborated by any banking or

other documentary evidence. The temporal connection between the alleged share purchase and transfer of funds is also questionable: the deal was apparently made in January 2017, but Mr. Chen did not purportedly transfer any funds until months later, when he testified that he transferred $1.135 million USD to Mr. Qi between April and August 2017. Mr. Chen never received any shares from Mr. Qi, and in September 2019, Mr. Qi apparently repaid $1.689 million CAD to Mr. Chen as a return of his investment and interest.

[48] Aside from the remittance documentation showing the return of funds to Mr. Chen, there is no other documentary evidence of Mr. Chen's purported investment or share purchase. There are no documents corroborating Mr. Chen's alleged payments to Mr. Qi, Mr. Chen's purported attempts to follow-up with Mr. Qi about the shares thereafter, or any correspondence or WeChat messages or the like between Mr. Qi and Mr. Chen about Mr. Chen's alleged investment. Mr. Qi also gave inconsistent sworn evidence about whether Mr. Chen was to acquire a 20% or 30% interest in Lightray and at what price. He was likewise unable to provide a coherent explanation for the multiple inconsistences in his evidence about Mr. Chen's purported investment.

[49] Accordingly, I find that Mr. Chen was not a credible witness and in particular, that his evidence about the meetings he says took place on the evening of January 9, 2017 and his alleged investment in the Property by purchasing shares from Mr. Qi is incapable of belief. In my view, Mr. Qi and Mr. Chen likely fabricated this story in an effort to buttress the plaintiffs' position in the litigation. Mr. Chen's admission on cross-examination that he could not recall the details of the trip to British Columbia, that he required assistance from his assistant and Mr. Qi to "recall the events mutually", and that he and Mr. Qi "worked all together" in an attempt to recall and "brainstorm" the details of their meeting at the Westin Bear Mountain hotel in January 2017 is telling in this respect. It follows that I likewise reject Mr. Qi's evidence regarding Mr. Chen's purported acquisition of shares in Lightray.

[50] I also reject Mr. Qi's evidence that he signed the November Agreement on November 11, 2016, because I find it inconsistent with the preponderance of probabilities that if he had done so, he would nonetheless have taken a picture of the unsigned version and provided the unsigned version for translation in March 2018. Mr. Qi was also unable to explain why the signed version of the November Agreement did not materialize until years later, after litigation was already underway.

[51] With respect to Mr. Mao, his evidence, considered as a whole, appeared to be coloured by his loyalty to Mr. Qi to the point where it detracted from his credibility. This is exemplified by the contrast between Mr. Mao's ability to recall in detail matters which bolstered Mr. Qi's position, and his lack of recall of matters that were unhelpful to the plaintiffs, or which could be construed as inconsistent with Mr. Qi's testimony. Mr. Mao also admitted to deleting WeChat messages with Mr. Qi related to development expenses for the Property, initially testifying that they were not relevant, but eventually conceding that those messages should have been retained.

[52] Mr. Mao's attempt to blame legal counsel as a means of explaining the plaintiffs' failure to disclose documents was unpersuasive, particularly given the frequency with which he made such assertions. Considered in the context of the evidence as a whole, Mr. Mao's testimony is demonstrative of what I find to be at best, a cavalier attitude on the plaintiffs' part towards document disclosure in this litigation, or at worst, conduct intended to deceive the Court and frustrate the litigation process. Accordingly, I conclude that I must treat Mr. Mao's evidence with caution, particularly where it conflicts with documentary evidence.

Assessment of Mr. Qin's evidence

[53] Mr. Qin's evidence was replete with internal and external contradictions, and there were multiple instances where I conclude that he was untruthful when giving evidence under oath. Three examples are illustrative. First, Mr. Qin conceded that he was not truthful on examination for discovery when he testified that he was unable to identify his mother's name on a transfer of funds. He attempted to minimize his earlier lack of candor by suggesting the copy of the document provided

on discovery was blurrier than the version available at trial and that he feared for his mother's safety. I do not find these explanations believable.

[54] Second, during a break in the trial, after Mr. Chen testified that he travelled to Victoria in January 2017 and met with Mr. Qi and Mr. Qin to discuss potentially investing in the Property, Mr. Qin sworn an affidavit testifying that he did not meet with Mr. Chen in January 2017. After photographic evidence confirmed that the two men did in fact meet in January 2017, Mr. Qin changed his evidence to say that he had "no independent recollection" of meeting with Mr. Chen in January 2017. I do not accept Mr. Qin's evidence in either respect and find that his initial evidence was false, and his revised evidence an unsuccessful attempt to minimize the impact of his earlier untruthfulness. This also demonstrates a lack of carefulness and appreciation for the importance of giving true and accurate evidence in legal proceedings, which further undermines the weight that can be given to Mr. Qin's evidence as a whole.

[55] Third, I reject Mr. Qin's evidence that he and Mr. Qi signed a shareholder's agreement as shareholders of Lightray. Mr. Qin testified that he signed a draft version of a shareholder's agreement and that Mr. Qi retained the only copy, which he then failed to produce in this litigation. There is no evidence other than Mr. Qin's bare assertion confirming that a signed copy of the draft document exists. There is no evidence a shareholder's agreement was ever discussed and agreed to as between Mr. Qi and Mr. Qin. The agreement that Mr. Qin says he signed does not name him as a party. He attempted to explain this inconsistency by asserting that he signed it on behalf of Lightray rather than in his personal capacity, but he was no longer a director of Lightray at this point and signing on Lightray's behalf does not corroborate the assertion that he was a shareholder in his personal capacity. Finally, when Lightray's corporate documents were finalized and provided to the parties on November 23, 2016, no shareholder's agreement was included in the package of documents for signature.

[56] I also find the frequency with which Mr. Qin purported not to be able to recall material matters where it suited his purpose troubling. I find his lack of memory difficult to accept given that he was able to give detailed evidence at trial about matters that he said he could not recall anything about on examination for discovery. By way of but a few examples, on discovery Mr. Qin could not recall:

(a) whether he was supposed to pay any money towards purchasing the Property in August 2016, but testified at trial that Bay Vista advanced the funds as a loan to Lightray;

(b) why he was being paid $700,000 pursuant to the November Agreement, but testified at trial that it was for Mr. Qi to acquire a 70% interest in Lightray, despite having previously asserted that those funds were paid as a finder's fee;

(c) the January 2017 meeting with Mr. Chen in Victoria, but then later swore that this meeting did not occur, before changing his evidence again to say that he had no independent recollection of whether it occurred or not; or

(d) his February 2017 dealings with Mr. Qi's alleged mistress, Ms. He, but then testified at trial that he never transferred any shares to her despite agreeing to do so because Mr. Qi told him not to worry about it because Ms. He was no longer mad at Mr. Qi.

[57] Most notably, despite having the November Agreement before him on discovery, Mr. Qin testified that all he could remember about that agreement was that he wrote it; he could not even recall why he and Mr. Qi entered into the agreement. Mr. Qin admitted in cross examination that he "did not answer questions properly" on discovery, and that some of his answers were "not entirely accurate".

[58] Mr. Qin attempted to explain his ability to testify at trial about matters he could not recall anything about months earlier with a multitude of excuses including that he was nervous, opposing counsel was agitated, and that he was not prepared for discovery because he had to attend "suddenly". These assertions are unpersuasive

and in particular, his asserted lack of preparation is difficult to reconcile with the fact that Mr. Qin's attendance at discovery was required by court order, which alone provided him with over three weeks notice.

[59] Mr. Qin's lack of recollection and evasiveness on discovery presents as an attempt to avoid committing himself to a particular version of events prior to trial. His memory for details that supported his defence in the course of his testimony at trial presented a remarkable contrast to his evidence on discovery and other matters he struggled to recall at trial, particularly when under cross-examination. Mr. Qin's ability at trial to recall precise details of events or discussions that were favourable to his case, together with his poor ability to recall less favourable matters, negatively impacts his overall credibility: see e.g. *Huang v. Li*, 2020 BCSC 1727, at para. 326.

[60] The inconsistencies between Mr. Qin's discovery evidence and his testimony at trial are, in my view, further examples of what I conclude was a willingness to mislead where he deemed it useful to his defence. Most notable in this respect were the multiple changes in his evidence and shifting positions regarding the nature, terms and interpretation of the August Agreement, and the nature of the $700,000 payment he received in December 2016.

[61] In the circumstances, I find this is illustrative of a pattern of conduct by Mr. Qin of attempting to shape his evidence in the manner that he perceived to be most advantageous to his position in the litigation at various points in time, often with little regard for the truth. Considering Mr. Qin's evidence as a whole in the context of the evidentiary record adduced over the course of trial, I find that he was not a credible witness. His evidence does not accord with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Accordingly, I reject his evidence regarding the discussions between him and Mr. Qi leading up to and which resulted in the August and November Agreements, and prefer Mr. Qi's evidence on these issues.

Conclusions on credibility

[62] As will be evident from my credibility findings, the Court in this case is left in the difficult position where neither party has been found credible and there are significant concerns with both parties' evidence. Third party witnesses like Mr. Mao and Mr. Chen also lacked credibility such that their evidence is of little assistance to the Court in finding the facts necessary to determine the issue before it. I find this Court's commentary in *Moinzadeh v. Loblaws Inc.*, 2021 BCSC 793 at para. 17, is equally apposite here:

> Sometimes, however, witnesses deliberately lie and intend to deceive. When that occurs, it may be impossible to accurately separate truth from falsehood and the court may simply find the witness's testimony wholly unreliable. The more frequently the witness lies, the more likely that will be the case. If as a consequence a truth is not accepted as a fact by the court, the witness has only himself or herself to blame.

[63] In the circumstances, I have attempted to anchor my factual findings in the objective evidence where possible and harmonize it with the preponderance of probabilities. In some instances, however, there is simply no objective documentary evidence to which the parties' testimony can be tethered. I have therefore relied on the combined effect of the undisputed facts, the absence of contradictory evidence, independent evidence where available, common sense, commercial reasonableness, and my assessment of the probabilities affecting the case as a whole in making the factual findings necessary to determine the issues raised in this case.

Facts

November Agreement

[64] As noted above, by early November 2016, Mr. Qin still did not have the funds necessary to make his 30% contribution to Lightray. At this point, it became clear to Mr. Qi that Mr. Qin would not be able to make his financial contribution to Lightray.

[65] Mr. Qi testified that consequently, Mr. Qin offered to sell Mr. Qi his 300 shares in Lightray. This is disputed by Mr. Qin. However, considering the preponderance of

the evidence, I prefer and accept Mr. Qi's evidence on this point to Mr. Qin's because Mr. Qin making such an offer is consistent with the prevailing circumstances at the time, including in particular, his lack of funds and inability to contribute his share of the funds required to purchase the Property. It is also consistent with Mr. Chen's evidence, that when they visited the Property together on January 10, 2017, Mr. Qin told him that it was a good project, but he did not have the funds to invest in it. Despite my concerns about Mr. Chen's credibility, I accept his evidence on this limited point and find that it constitutes an admission by Mr. Qin that is admissible for its truth pursuant to the party admissions exception to rule against hearsay: *Egan v. Andrychuk*, 2022 BCCA 110 at para. 53.

[66] Mr. Qi and Mr. Qin valued Lightray at $4.35 million, which resulted in the value of Mr. Qin's 30% interest being $1.3 million. However, Mr. Qin's unpaid share of the purchase price for the Property of $640,000 needed to be deducted because Mr. Qi had paid the purchase price in full. This resulted in Mr. Qin's 30% interest in Lightray having a value of $660,000. Mr. Qin requested $700,000 for his shares, which Mr. Qi agreed to pay.

[67] On November 10, 2016, Mr. Qi and Mr. Qin entered into the November Agreement. Mr. Qin wrote and signed the November Agreement on that date, in accordance with instructions given to him from Mr. Qi. I do not accept that Mr. Qi signed the agreement on November 11, 2016, though he did sign it at some later point in time. Regardless, when Mr. Qi signed the November Agreement is not material for present purposes, as the parties agree that the November Agreement was made as between them on November 10, 2016.

[68] The November agreement is brief and the parties agree that it translates into English as follows:

> AGREEMENT
>
> 1. Prepare all necessary documents for registration of LightRay Development Corp. and 1092511 BC Ltd. by the end of the month.
>
> 2. Signed copy of Duncan Stonehill Land offer.

> 3. Of all the funds due for equity acquisition, a total of 100,000 Canadian Dollars will be paid in Canadian Dollars in Canada, and a total of 600,000 Canadian Dollars will be paid in RMB in China.
>
> 4. Confirm that 1092511 BC Ltd. owns 100% of equity of LightRay Development Corp.
>
> 5. 1092511 BC Ltd. authorizes Bay Vista Corp. to handle all matters related to equity arrangement on its behalf.
>
> 11.10.2016

[69] During the same meeting on November 10, 2016, Mr. Qin wrote and Mr. Qi signed two cheques from Bay Vista: a cheque in the amount of $10,500 payable to Windcrest Homes; and a cheque in the amount of $69,200 payable to Mr. Qin's numbered company, 109. The cheque to Windcrest Homes was to purchase the additional reports that were not included as part of the contract of purchase and sale.

[70] The $69,200 paid by Bay Vista to 109 represented the $100,000 CAD contemplated in the November Agreement, less deductions that the parties subsequently agreed to, namely: Mr. Qin's portion of the property transfer tax owing in respect of Lightray's purchase of the Property in the amount of $11,800; the remaining property tax owing for the year in the amount of $8,500; and the $10,500 paid to Windcrest Homes to acquire the reports that Mr. Qin had failed to obtain as part of the initial contract of purchase and sale for the Property.

Post-November Agreement events

[71] Mr. Mao subsequently corresponded with Bay Vista's solicitors on Mr. Qi's behalf regarding matters related to Lightray's corporate restructuring. On November 21 and 22, 2016, Mr. Forno, Ms. MacInnes and Mr. Mao exchanged e-mail correspondence relating to changes that were required to be made to Lightray's corporate documents to account for the fact that Bay Vista could not receive founder's shares in Lightray because it did not exist when Lightray was incorporated on May 5, 2016.

[72] In his November 21, 2016 email to Mr. Forno, Mr. Mao wrote that a loan agreement between Bay Vista and Lightray would need to be prepared for the funds

that Bay Vista advanced to Lightray, secured by a mortgage against the Property. Mr. Mao testified that he later called Mr. Forno and told him no loan agreement was needed, and no such loan documentation was ever executed.

[73] In an effort to address the issues arising from Bay Vista's incorporation date, Mr. Forno made the following proposal:

> Could we have the 30% holder (Xipeng Qin) sign as initial incorporator as of May 5th and then have paper work reflect an issuance of 700 shares to Bay Visa on August 24th to reflect the 70/30 split on the date the transaction was agreed to? In other words only have Bay Vista signing and Mr. Qi coming on as director on August 24th?

[74] Mr. Mao confirmed that this was acceptable and revised documentation was prepared to that effect, confirming issuance of 300 founder's shares to Mr. Qin effective May 5, 2016, and 700 shares to Bay Vista from treasury effective August 24, 2016. It is clear that the parties were still dealing with Lightray's capital restructuring based on the August Agreement, and that the documents signed in December 2016 were not intended to reflect their respective interests in Lightray following the November Agreement. This is particularly the case as at this time, Mr. Qin had not yet received the full $700,000 payment contemplated in the November Agreement.

[75] On November 23, 2016, Lightray's corporate documents were provided for Mr. Qi and Mr. Qin's signature, reflecting the following: Lightray's initial incorporation with share capital consisting of 1000 shares and Mr. Qin as incorporator and director in May 2016, the issuance of 700 shares to Bay Vista effective August 24, 2016, and a change of directors from Mr. Qin to Mr. Qi effective September 2, 2016.

[76] Lightray's corporate documents were executed by Mr. Qi and Mr. Qin on December 16, 2016.

[77] On December 19, 2016, Mr. Qin's mother received ¥3,060,000 RMB (equivalent to approximately $590,000 CAD) in China from Zhengzhou TianChengShuangRun Modeling Company Ltd. The parties agree that this payment was made on behalf of the plaintiffs. It followed an earlier unsuccessful attempted

payment to Mr. Qin's mother on December 10, 2016, representing the balance due to be paid by Mr. Qi pursuant to the November Agreement.

[78] In December 2016 and January 2017, Mr. Qin continued to be involved in the Project. He coordinated with third parties to obtain drawings of the existing house on the Property and have them converted into digital drawings, corresponded with the City of Duncan regarding repairing the house, obtained a toxicology report for the Property, and coordinated with J.E. Anderson & Associates to discuss and obtain quotes for civil engineering for the first phase of development.

[79] In February 2017, Mr. Qi contemplated bringing on another investor, Ms. Xiaohua He. On February 8, 2017, Mr. Qi, Mr. Qin and Ms. He signed a document in which Mr. Qin agreed to transfer 33% of 109 to Ms. He for $1 (the "February Commitment"):

> Commitment
>
> 1092511BC Ltd. hold 30% share of Lightray development corp.Mr. Qi Jun and Mr Qin Xipeng agreed to sell 33.3% share of 1092511 BC Ltd to Ms. He Xiaohua at $1 cost. [sic]

[80] The parties agree that had 109 in fact held 300 shares of Lightray, a 33% interest in 109 would have represented a 10% interest in Lightray. However, it is undisputed that 109 never held any shares in Lightray, whether in February 2017 or at any other time.

[81] Mr. Qin never transferred the 300 shares in Lightray that he held personally to 109, nor did he transfer any shares in Lightray or 109 to Ms. He. Mr. Qin testified that the February Commitment was made to appease Ms. He—who was Mr. Qi's mistress—when she was angry with Mr. Qi. Mr. Qin said that he never transferred any shares to Ms. He because Mr. Qi later told him not to worry about it because Ms. He was no longer mad at Mr. Qi. I do not accept Mr. Qin's evidence on this point.

[82] There is simply no cogent explanation as to why the November Agreement and February Commitment both refer to 109 holding Mr. Qin's interest in Lightray

when Mr. Qin never in fact transferred his 300 shares to 109. At best, this reflects an instance of Mr. Qin treating himself and his companies interchangeably, or being careless in the representations he made to Mr. Qi. At worst, it may have been intended to mislead. In any event and in the circumstances, I find that whether 109 or Mr. Qin personally held Mr. Qin's shares in Lightray does not impact my analysis in a material way.

[83] Finally, Mr. Qin took the position at trial that he held 10% of Lightray (100 of his 300 shares) in trust for Mr. Qi. I do not accept this assertion as it is inconsistent with the preponderance of the evidence. There is no documentary evidence to this effect, and I do not accept Mr. Qin's testimony on this point.

Summary of factual findings regarding August and November Agreements

[84] In summary, I find as follows regarding Mr. Qi and Mr. Qin's dealings which resulted in the August and November Agreements:

(a) Mr. Qi and Mr. Qin entered into an oral agreement—the August Agreement—prior to August 2, 2016 for the purpose of purchasing and redeveloping the Property;

(b) Lightray's purchase of the Property completed on August 26, 2016, with Bay Vista paying the full purchase price by way of the initial deposit and the full amount of the funds due on closing;

(c) Mr. Qin did not contribute any funds towards Lightray's purchase of the Property;

(d) Mr. Qin was issued 300 shares (a 30% interest) in Lightray effective May 5, 2016, which shares were issued as founder's shares;

(e) Bay Vista was issued 700 shares (a 70% interest) in Lightray effective August 24, 2016, which shares were issued from treasury;

(f) On November 10, 2016, Mr. Qi and Mr. Qin entered into the November Agreement pursuant to which Mr. Qin agreed to sell his 300 shares in Lightray to Mr. Qi for $700,000 CAD;

(g) The payment contemplated in the November Agreement was to be made in two parts, $100,000 in CAD and a further amount equivalent to $600,000 CAD payable in RMB;

(h) The $100,000 payment contemplated in the November Agreement was subsequently reduced by agreement between Mr. Qi and Mr. Qin to account for Mr. Qin's share of property taxes and the cost of acquiring certain documentation from the vendor of the Property, resulting in a net payment to Mr. Qin of $69,200 CAD;

(i) Mr. Qi made the $700,000 payment contemplated in the November Agreement to Mr. Qin by way of a cheque in the amount of $69,200 CAD from Bay Vista to 109, and ¥3,060,000 RMB paid to Mr. Qin's mother in China on December 19, 2016; and

(j) Mr. Qin never transferred any of his shares in Lightray or 109 to Mr. Qi, Bay Vista or Ms. He.

What are the material terms of the August Agreement?

[85] The plaintiffs do not advance a claim for breach of the August Agreement. However, it forms part of the surrounding circumstances within which the November Agreement was made, and its nature and terms are relevant to the interpretation of the November Agreement.

[86] The plaintiffs say that the August Agreement was made for the purpose of Mr. Qi and Mr. Qin jointly purchasing the Property through Lightray. The plaintiffs say that under the August Agreement, Mr. Qi and Mr. Qin agreed that they would contribute 70% and 30% of the capital necessary to purchase and redevelop the Property respectively, and each obtain a corresponding interest in Lightray.

[87] Mr. Qin advances a fundamentally different conception of the August Agreement. He says that it was a loan agreement pursuant to which Mr. Qi agreed to loan Lightray the funds to purchase the Property and that Mr. Qi did not acquire his 70% interest in Lightray until the November Agreement was made. Mr. Qin's position that the August Agreement was a loan agreement is necessary to support his proposed interpretation of the November Agreement.

[88] The terms of the August Agreement are disputed. The plaintiffs assert that the material terms were as follows:

(a) The Property would be purchased through a corporate entity—Lightray;

(b) Mr. Qi would contribute 70% of the funds required to purchase the Property and Mr. Qin would contribute 30%;

(c) Mr. Qi and Mr. Qin would each receive interests in Lightray equivalent to their contributions, namely 70% for Mr. Qi and 30% for Mr. Qin; and

(d) Mr. Qi's interest in Lightray would be held by a company to be incorporated—which later became Bay Vista.

[89] Despite my concerns regarding Mr. Qi's credibility, I prefer his evidence regarding the terms of the August Agreement to Mr. Qin's because it is more consistent with the preponderance of probabilities and commercial reasonableness. Indeed, Mr. Qin initially agreed on a general characterization of the August Agreement as one made for the purpose of purchasing the Property, and on some of the material terms for the August Agreement. Based on the pleadings, the dispute centered around whether it was a term of the August Agreement that Mr. Qin held 10% of his 30% interest in Lightray in trust for Mr. Qi; and whether the $700,000 was paid as a finder's fee for Mr. Qin having brought the investment opportunity to Mr. Qi.

[90] Mr. Qin pleads that it was a term of the August Agreement that Mr. Qi would pay him "$700,000 as a 'finder's fee' for having brought the investment opportunity

to [Mr. Qi]". He also pleads that the November Agreement "does not contain any provision that [Mr. Qi] would pay [Mr. Qin] $700,000 to acquire his shares in Lightray, but rather sets out "how the previously agreed upon finder's fee of $700,000 would be paid". Mr. Qin maintained this position at all material times leading up to trial, including in various affidavits and in his sworn evidence on examination for discovery.

[91] As noted above, Mr. Qin advanced different and inconsistent positions regarding both the August and November Agreements in his opening statement at trial, and resiled from his assertion that the $700,000 was a finder's fee. At trial, Mr. Qin asserted that:

(a) the August Agreement was a loan agreement whereby Bay Vista would loan Lightray the funds necessary to purchase the Property;

(b) Mr. Qi wanted to conduct due diligence prior to committing to purchasing the Property, and did not commit to investing in the Property until he entered into the November Agreement; and

(c) the $700,000 was paid not as a finder's fee, but rather for Mr. Qi to purchase a 70% interest (700 shares) in Lightray.

[92] In this respect, Mr. Qin persisted in his attempt to defend the plaintiffs' claim by advancing a theory of his case predicated on the assertion that the August Agreement was a loan agreement. In this respect, Mr. Qin submits that the "only possible enforceable agreement" made in August 2016 was a loan agreement. He then goes on to say that the August 2016 "loan agreement" was amended and replaced by the November Agreement. This submission is difficult to reconcile with his pleadings.

[93] Mr. Qin maintains that the Court can find a different August Agreement than that advanced on the pleadings. As set out below, I find that I need not determine this issue because regardless of whether this is the case, I do not accept Mr. Qin's

evidence regarding the nature and terms of the August Agreement. The evidence I accept simply does not support his position.

[94] As set out in *Oswald v. Start Up SRL*, 2021 BCCA 352 [*Oswald BCCA*] at para. 34, the requirements of a binding contract are: (a) an intention to contract; (b) the essential terms must be agreed to by the parties; and (c) essential terms must be sufficiently certain. This determination is contextual, and must consider all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

[95] The test for a binding contract is objective, namely whether 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: *Oswald BCCA* at para. 38, citing *Berthin v. Berthin*, 2016 BCCA 104 [*Berthin*] at para. 47. Ultimately, the question is whether an objective, reasonable bystander would conclude the parties intended to contract: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 123 [*Oswald BCSC*]. The test in this respect is set out in *Berthin*, as cited in *Oswald BCCA* at para. 38:

> [46] The test, of course, is not what the parties subjectively intended but "whether 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": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. …

[96] It is agreed that Mr. Qi and Mr. Qin entered into the August Agreement as an oral agreement with respect to the purchase of the Property. It is the second branch of the test—what essential terms were agreed to—that is in dispute. Because the August Agreement is an oral agreement, Mr. Qi and Mr. Qin's credibility is a significant factor in determining whose version of the material terms prevails. As set out above, I prefer Mr. Qi's evidence regarding what was discussed and agreed to between him and Mr. Qin in late July and early August resulting in the August Agreement. In my view, the surrounding circumstances within which the August Agreement was entered into, assessed objectively from the perspective of a

reasonable bystander, are consistent with the plaintiffs' position and the terms that Mr. Qi testified to.

[97] I find that objectively assessed from the perspective of a reasonable bystander, Mr. Qi and Mr. Qin made the August Agreement for the purpose of jointly acquiring and developing the Property on the following material terms:

(a) Lightray would be the corporate entity to purchase the Property;

(b) Mr. Qi would contribute 70% of the funds required to purchase the Property and Mr. Qin would contribute 30%;

(c) Mr. Qi and Mr. Qin would each receive interests in Lightray equivalent to their contributions, namely 70% for Mr. Qi and 30% for Mr. Qin; and

(d) Mr. Qi's interest in Lightray would be held by a yet to be incorporated corporate entity—which later became Bay Vista.

[98] In so concluding, I reject Mr. Qin's submission that the plaintiffs' assertion of the August Agreement fails for lack of agreement on essential terms. It is only the lack of a term so essential to the contract that without it, the court cannot collect the real intentions of the parties and so cannot give effect to such intentions by supplying anything necessary to be inferred that will render a contract, whether written or oral, unenforceable: *First City Investments Ltd. v. Fraser Arms Hotel Ltd.* (1979), 104 D.L.R. (3d) 617, 1979 CanLII 606 (B.C.C.A.) at para. 25, as cited in *Papageorgiou v. Seyl* (1990), 45 B.C.L.R. (2d) 319, 1990 CanLII 779 (C.A.) at para. 14. Such is not the case with respect to the August Agreement as established by the plaintiffs on the terms set out above.

[99] The same cannot, however, be said for Mr. Qin's assertion that the August Agreement was a loan agreement. Too many essential terms are missing that would be required for an enforceable loan agreement to have been made, including the applicable interest rate and repayment terms. In the circumstances, I find that accepting Mr. Qin's conception of the August Agreement would be tantamount to the

Court impermissibly making an agreement for the parties in the absence of any evidence that the necessary essential terms were agreed to.

[100] It is telling, in my view, that despite being questioned extensively on discovery about the August and November Agreements, Mr. Qin did not testify that Bay Vista advanced the funds to purchase the Property as a loan, that the August Agreement was a loan agreement, or that the plaintiffs' participation in the Project was conditional on completion of due diligence. If any of this was in fact the case, one would have expected Mr. Qin to have given that evidence on discovery. It is no answer, in my view, for him to say that he was not aware of these facts until Mr. Forno's file was disclosed shortly before trial. If those were material terms of the August Agreement, then they would by necessity have to have been discussed and a meeting of the minds reached with Mr. Qi back in August 2016, long before Mr. Mao gave instructions to Bay Vista's solicitors, emails sent, balance sheets created, these proceedings commenced, and Mr. Qin examined for discovery.

[101] Mr. Qin's evidence regarding who the money would be loaned to is also inconsistent with his own conception of the August Agreement. He testified that Mr. Qi would loan the money to him personally—not that Bay Vista would loan the funds to Lightray. This may have resulted from a lack of precision in the evidence or the parties' tendency to treat themselves and their corporations interchangeably. Nonetheless, Mr. Qin's evidence on this point was not tested as he was not cross-examined on this inconsistency. Because the terms of the August Agreement he now seeks to advance are not pleaded, this issue did not become material until Mr. Qin fully articulated his theory of the case in his closing argument.

[102] Mr. Qin relies heavily on the parties' subsequent conduct in support of his assertion that the August Agreement was a loan agreement. Specifically, he relies on subsequent documentation which referred to the funds advanced through Bay Vista as a loan, and says that these documents are admissible for the truth of those statements. The documents relied on in this respect are:

(a) email correspondence between Mr. Mao and Mr. Forno dated November 21, 2016, which mentioned loan documentation being prepared; and

(b) Lightray and Bay Vista's January 2017 balance sheets, which characterized the funds used to purchase the Property as a loan from Bay Vista to Lightray.

[103] Mr. Qin says that the balance sheets are admissible for their truth as business records under s. 42 of the *Evidence Act,* R.S.B.C. 1996, c. 124. Section 42(2) of the *Evidence Act* provides that:

> (2) In proceedings in which direct oral evidence of a fact would be admissible, a statement of a fact in a document is admissible as evidence of the fact if
>
> (a) the document was made or kept in the usual and ordinary course of business, and
>
> (b) it was in the usual and ordinary course of the business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that.
>
> (3) Subject to subsection (4), the circumstances of the making of the statement, including lack of personal knowledge by the person who made the statement, may be shown to affect the statement's weight but not its admissibility.

[104] For the balance sheets to be admitted into evidence under this provision, Mr. Qin must prove all the elements of s. 42, namely that they were: (a) made contemporaneously; (b) by someone having personal knowledge of the matters recorded; (c) by someone who has a duty to record the information or communicate it to someone else to record as part of the usual and ordinary course of their business; and (d) that the matters recorded are of a kind that would ordinarily be recorded in the usual and ordinary course of that business: *Oswald v. Start Up SRL*, 2020 BCSC 205 [*Oswald Voir Dire*] at para. 17, citing *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 859 at para. 16.

[105] None of the above-noted criteria are established on the evidence before me. Mr. Qin had no knowledge of the necessary facts, and all that Mr. Qi was able to say was that the balance sheets "must have been prepared by our accountant". It is

unclear when they were prepared, though the earliest this could have occurred—January 10, 2017—would still have been approximately five months after the August Agreement was made and the funds advanced. The contemporaneity requirement that the balance sheets were prepared at the time the funds were advanced or within a reasonable time thereafter is not met: see e.g. *Edmondson v. Payer*, 2011 BCSC 118 at para. 27; *The Owners et al v. Homer Street et al v. O'Neill Hotels et al*, 2007 BCSC 1265 at paras. 30, 45.

[106] It is also unclear who prepared the balance sheets or for what purpose. Unlike *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.,* 2017 BCSC 1593 at para.122, the accountants who prepared Lightray's balance sheets did not testify. Mr. Qi identified Mr. Junhao Zhang as the individual responsible for coordinating Bay Vista and Lightray's accountants regarding preparation of the balance sheets. Mr. Qin obtained an order permitting him to call Mr. Zhang as an adverse party, but chose not to do so.

[107] The common law exception for business records is similar, but not identical, to s. 42 of the *Evidence Act*: *Oswald Voir Dire* at para. 19. The point of distinction relates to whether the maker of the record is required to have personal knowledge. However, the distinction is of no import here, as regardless of who the maker of the balances sheets was, they would not have had personal knowledge of whether Bay Vista advanced the funds to Lightray as a loan or not.

[108] In the circumstances, I find that the balance sheets are not admissible for the truth of Bay Vista having advanced the funds as a loan under either s. 42 of the *Evidence Act* or the common law exception.

[109] Mr. Mao's November 21, 2016 email does contemplate loan documentation being prepared. However, no such documentation was ever finalized or executed by the parties. In the circumstances, Mr. Mao's email does little to assist in establishing that the August Agreement was in the nature of a loan agreement.

[110] In my view, the August Agreement having been entered into on the terms as set out above is consistent with the parties' subsequent conduct, namely: Lightray submitting an offer of purchase and sale for the Property on August 2, 2016 and eventually purchasing the Property for $2.2 million on August 25, 2016; Bay Vista's incorporation; and the corporate documentation created to reflect the ownership structure agreed to in the August Agreement by issuing 70% of Lightray's shares to Mr. Qi and 30% to Mr. Qin. To the extent that the parties' respective shareholdings in Lightray subsequently changed, I find that occurred because of Mr. Qin's inability to contribute his 30% of the capital required for the Project which resulted in the November Agreement being made, not because the terms of the August Agreement were uncertain or still under negotiation.

[111] I also reject Mr. Qin's assertion—made at various points in his evidence, but not advanced on his pleadings—that the plaintiff's conception of the August Agreement fails because Mr. Qi's investment or decision to invest in the Property and participate in the Project was conditional on him conducting some form of due diligence to satisfy himself that it was a good project. Mr. Qin resiled somewhat from this submission in closing argument, shifting his position yet again to say that due diligence was not a condition precedent to or term of either the August or November Agreements, but merely formed part of the factual matrix within which those agreements were entered into. Regardless, I simply do not accept Mr. Qin's evidence on this point. In my view, it is nothing more than yet another instance of Mr. Qin shifting his position and tailoring his evidence to what he perceived to be most beneficial to his position in the litigation with little regard for the truth. If Mr. Qi's participation in the acquisition and development of the Property was conditional on him performing due diligence, then this requirement would have been expressly discussed as between them. There was no evidence establishing that to be the case.

[112] Moreover, Mr. Qi was not expressly asked whether his initial investment in Lightray was conditional on additional due diligence being conducted. When counsel for Mr. Qin suggested in cross-examination that additional "due diligence" materials

had to be purchased from Windcrest Homes, Mr. Qi expressly rejected that characterization. He testified that those were not "due diligence" materials, but rather consulting work that the seller had completed, which was supposed to have been included in the sale of the Property, but was not, and therefore had to be subsequently purchased separately. I accept his evidence on this point.

[113] In the result, I reject Mr. Qin' assertion that Mr. Qin's investment in Lightray and the Property was contingent on due diligence.

[114] I find that the plaintiffs have established on a balance of probabilities that the August Agreement was entered into on the terms as set out above.

Did Mr. Qin breach the November Agreement?

[115] The plaintiffs claim for breach of the November Agreement and seek specific performance thereof. The party relying on a contract must prove the existence of the contract by satisfying the Court that its existence is more probable than not. If the Court is unable to determine which party to believe, the plaintiff will not have met its burden of proof: *Go Transport Ltd. v. Moore*, 2021 BCSC 1099 at para. 16; see also *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 [*Concord BCSC*] at paras. 82-83 and *Gulf Management Inc. v. Burbank*, 2022 BCSC 471 at para. 94.

[116] Where a contract has been wholly reduced to writing, the outward expression of the parties' intention to be bound is the contract itself, not the subjective views of the parties: *1001790 B.C. Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321 at para. 41.

[117] The parties must have agreed on the essential terms of the contract for it to be enforceable. However, the courts will be reluctant to find a contract void for uncertainty: *Oswald BCSC* at para. 125. As the Court of Appeal noted in *Berthin*:

> [47] Of course, the terms in question must be enforceable – i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd*. (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of*

Contracts (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick, supra*:

> An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd.* v. *Outston*, [1941] A.C. 251.
>
> If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.
>
> Lambert J.A. observed in *Griffin* v. *Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."

[Emphasis added.]

[118] While Mr. Qin denied that the November Agreement constituted a contract in his Amended RTCC, it was agreed at trial that Mr. Qi and Mr. Qin entered into the November Agreement on November 10, 2016, on the terms set out therein. Mr. Qin maintains, however, that the terms of the November Agreement are not sufficiently certain to make an enforceable contract. I disagree. I find that the criteria for an enforceable contract as set out in *Oswald BCCA* are met for the November Agreement. The parties accept that there was an intention to contract and, in my view, an objective reasonable bystander would conclude that they agreed on the essential terms of the contract and those terms were sufficiently certain.

[119] This is particularly the case as what constitutes an essential term of a contract will depend on the nature of the agreement and the circumstances of the case: *Concord BCSC* at para. 341, *Concord Pacific Acquisitions Inc. v. Oei*, 2022 BCCA 16 at paras. 38 and 39. Considered "through the eyes of reasonable

businesspeople stepping into the parties' shoes", the question is "was there something essential left to be worked out?". I find that when read as a whole within its surrounding factual matrix, the essential terms of the November Agreement were sufficiently certain and there was nothing left to be worked out.

[120] Clause three of the November Agreement is the material term. It provides:

> 3. Of all the funds due for equity acquisition, a total of 100,000 Canadian Dollars will be paid in Canada, and a total of 600,000 Canadian Dollars will be paid in RMB in China.

[121] It is common ground that the parties to the November Agreement are Mr. Qi and Mr. Qin. Clause three, considered objectively from the perspective of a reasonable bystander looking at all of the circumstances, addresses what I conclude are the balance of the essential terms Mr. Qi's purchase of Mr. Qin's interest in Lightray, namely:

(a) the subject matter: acquisition of Mr. Qin's interest in Lightray; and

(b) the price: $700,000 CAD to be paid in two installments, $100,000 CAD in Canada and $600,000 CAD to be paid in RMB in China.

[122] Mr. Qin relies on *Frye v. Sylvestre*, 2023 ONCA 796, to submit that the identity of the person or entity that will hold the shares in issue is an essential term of a share purchase agreement, and that the November Agreement fails because it does not include a term to that effect. I disagree. I do not interpret *Frye* as standing for that proposition. And even if it did, the facts in *Frye* were such that the manner in which the transaction would be structured was an essential term because it directly affected the amount of tax generated by the sale, and therefore what the respondent would have received to clear the intended purchase price net of taxes. The structure of the transfer—and by consequence the entity that would hold the shares—was essential because it impacted the purchase price, not essential in and of itself. Here the purchase price for Mr. Qin's interest in Lightray is not dependent on who would hold the Disputed Shares or how the transaction was structured.

[123] In my view, clause three of the November Agreement encompasses the essential terms for Mr. Qi's purchase of the Disputed Shares. The balance of the terms of the November Agreement are not material, and therefore the nature of how Mr. Qin held his shares in Lightray—namely, whether personally or through 109—does not render the November Agreement sufficiently uncertain as to be unenforceable. Indeed, to the extent there was uncertainty in this respect, it is of Mr. Qin's own making by either misrepresenting the accurate state of affairs in terms of whether 109 held his 30% interest in Lightray or not, or failing to take the necessary steps to have the shares he held personally transferred to 109 so as to render his own representations accurate. This is particularly the case given that the courts will lean heavily against finding a contract void for uncertainty and instead, will attempt to give effect to the agreement that the parties created for themselves.

[124] I therefore conclude that the essential terms of the November Agreement are sufficiently certain to constitute an enforceable agreement.

Interpretation of the November Agreement

[125] The parties advance diametrically opposed interpretations of the November Agreement. The plaintiffs say that clause three contemplates Mr. Qi purchasing the Disputed Shares, namely the 30% interest in Lightray held by Mr. Qin, for $700,000. Mr. Qin says that the November Agreement should be interpreted as Mr. Qi paying him $700,000 to acquire an initial 70% interest in Lightray, namely the 700 shares that were issued to Bay Vista from treasury. Mr. Qin also asserts that if I do not accept his interpretation of the November Agreement, then it must be void for uncertainty as it is incapable of being interpreted in the manner proposed by the plaintiffs.

[126] The overriding goal of contractual interpretation is to determine the intent of the parties and the scope of their understanding at the time the contract was made. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, and consistent with the surrounding circumstances known to

the parties at the time the contract was formed: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 [*Sattva*] at para. 47.

[127] The surrounding circumstances within which the contract was made are considered when interpreting its written terms, regardless of whether the terms disclose any ambiguity: *Sattva* at paras. 56-58; *Wade v. Duck*, 2018 BCCA 176 [*Wade*] at para. 26. However, as *Sattva* makes clear, evidence of surrounding circumstances has limits and must not be allowed to overwhelm the words of the contract within the interpretation exercise:

> [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. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[128] The surrounding circumstances do not, however, include subsequent conduct. They consist only of objective evidence of the background facts at the time of execution of the contract; knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva* at para. 58; *Shewchuck v. Blackmont Capital Inc*., 2016 ONCA 912 [*Shewchuck*] at paras. 58, as cited in *Wade* at para. 29.

[129] The central question is what was the parties' mutual and objective intention as expressed by the words of the contract: *Sattva* at para. 57. The meaning of the words used is derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement: *Sattva* at para. 48.

[130] Contractual interpretation also requires consideration of commercial reasonableness and efficacy: *Resolute FP Canada Inc. v. Ontario (Attorney*

General), 2019 SCC 60, at para. 79. Accordingly, the commercial purpose of a contract is also relevant to its interpretation, which in turn presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties are operating: *Sattva* at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K.H.L.) at p. 574, per Lord Wilberforce.

[131] When interpreting the November Agreement, the surrounding circumstances include the facts known to both parties at the time that contract was entered into on November 10, 2016, namely: the August Agreement; the ongoing reorganization of Lightray's share capital to issue shares in accordance with the August Agreement; Mr. Qi having advanced the full amount of funds necessary to purchase the Property; and Mr. Qin's inability to contribute his 30% share of the required funds.

[132] Interpreting the November Agreement as a whole within the surrounding circumstances known to the parties at the time it was entered into, and giving the words used their ordinary and grammatical meaning, I agree with the plaintiffs' interpretation of the November Agreement and find that it contemplates Mr. Qi purchasing the Disputed Shares from Mr. Qin for $700,000. This interpretation prevails because, in my view, it is most harmonious with the preponderance of the objective evidence and the surrounding circumstances within which the November Agreement was entered into. It is also consistent with sound commercial principles and good business sense, and avoids a commercially absurd interpretation: *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 at para. 20, citing *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., [1980] 1 S.C.R. 888, 1979 CanLII 10 at 901.

[133] In so concluding, I reject both Mr. Qin's interpretation of clause three and his alternative submission that the November Agreement is incapable of being interpreted as the plaintiffs suggest and is therefore void for uncertainty.

[134] First, Mr. Qin does not plead that the November Agreement is void for uncertainty. This is a significant impediment to advancing this position and does not provide the plaintiffs with an opportunity for meaningful response: see e.g.

Mostertman v. Abbotsford (City), 2024 BCSC 906 at para. 28; citing *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 [*Mercantile Office*] at paras. 21-23.

[135] The same test applies for proving a contract as part of a claim or defence: *Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.*, 2009 BCSC 1499 and *Greyline Trucking Ltd. v. Fletcher Challenge Canada Ltd.*, [1997] B.C.J. No. 2498, 1997 CanLII 3794 (C.A.). Mr. Qin has not pleaded, let alone proven the version of the November Agreement he advanced at trial. If Mr. Qin wished to assert a different conception of the November Agreement than set out in the Amended NOCC or his Amended RTCC, then it was incumbent on him to plead and prove the material facts supporting his position: see e.g. *Neudorf v. Nettwerk Productions Ltd*., [1999] B.C.J. No. 2831, 1999 CanLII 5293 (S.C.) [*Neudorf*] at para. 16(g). He does not plead that the November Agreement is void for uncertainty, or the material facts in support of his proposed interpretation of that agreement.

[136] Second, and in any event, the objective surrounding circumstances support the plaintiffs' interpretation, not Mr. Qin's. This includes Mr. Qin's own evidence: Mr. Qin agreed in cross-examination that clause three of the November Agreement referred to Mr. Qi purchasing his 30% interest in Lightray. He then attempted to correct himself in response to the next question by saying that the money was paid to purchase "my 70% of the shares". This is difficult to reconcile with two undisputed facts: first, the fact that Mr. Qin never held more than 300 of the 1000 shares that constituted Lightray's share capital; and second, the fact that the 700 shares that were issued to Bay Vista were issued from treasury, not transferred from Mr. Qin.

[137] Mr. Qin went on to testify that "On the very day when I signed, I knew that I had 300 shares and he had 700 shares and he gave me the money". This also supports the plaintiffs' position. Mr. Qin was being questioned about clause three of the November Agreement, and accordingly, the "day when he signed" must by necessity be a reference to November 10, 2016, at which point in time Mr. Qi and Mr. Qin held 70% and 30% of Lightray respectively under the August Agreement.

[138] In reaching this conclusion, I reject Mr. Qin's submission that clause three should be interpreted as Mr. Qi agreeing to pay him $700,000 to acquire an initial 70% interest in Lightray. Mr. Qin was unable to point to any documentation reflecting this theory, and it is difficult to reconcile with the fact that he was never entitled to more than a 30% interest in (300 shares of) Lightray and therefore could not have sold a 70% interest to Mr. Qi in November 2016. Mr. Qin's interpretation only makes sense if the August Agreement was a loan agreement, and if Mr. Qi's initial investment was subject to him conducting due diligence. I have rejected both of these theories.

[139] Mr. Qin's interpretation of clause three is also inconsistent with the surrounding factual context within which the November Agreement was entered into. By that point in time:

(a) Mr. Qi and Mr. Qin agreed to make equity contributions of 70% and 30% respectively towards the purchase of the Property and obtain corresponding interests in Lightray pursuant to the August Agreement;

(b) As of early September 2016, Lightray's corporate documents were being drafted, reflecting the issuance of 70% of its share capital to Bay Vista and 30% to Mr. Qin under the August Agreement;

(c) Mr. Qi advanced the full amount of funds necessary to purchase the Property, including the deposit, to Lightray through Bay Vista;

(d) Mr. Qin failed to contribute his 30% share of the funds required to complete the Property purchase; and

(e) Mr. Qin told Mr. Qi that he was not going to be able to make his 30% contribution because the party from whom he was expecting to receive payment for a shipment of goods had not in turn paid him.

[140] In these circumstances, I do not accept Mr. Qin's submission that it was commercially reasonable for Mr. Qi to pay him $700,000 in December 2016 despite

having already paid the full purchase price for the Property in August 2016 because Mr. Qin had found such an “amazing” property.

[141] Mr. Qin’s interpretation of clause three is also difficult to reconcile with his prior positions: first, that there was no November Agreement and the $700,000 was paid as a finder’s fee; and then, that the November Agreement was entered into and it dealt with how the previously agreed $700,000 finder’s fee was to be paid. Leaving aside the constantly shifting nature of Mr. Qin’s position, clause three of the November Agreement expressly references “of all the funds due for equity acquisition” (emphasis added). Payment of a finder’s fee and acquisition of equity are fundamentally different matters, and there is simply nothing in the express wording of clause three which could be interpreted as pertaining to how a finder’s fee would be paid.

[142] Nor do I accept Mr. Qin’s submission that Mr. Qi agreeing to pay an additional $700,000 to purchase a 70% interest in Lightray in November 2016 is commercially reasonable because, despite having paid the full purchase price for the Property, his involvement in the Project was contingent on having the opportunity to conduct due diligence. This assertion is not supported in the evidence. There is no suggestion in any of the correspondence with the solicitors or other contemporaneous documentation that Mr. Qi’s investment in the Property and corresponding acquisition of 700 shares of Lightray was conditional on due diligence being completed.

[143] Finally, Mr. Qin’s interpretation of the November Agreement rests in material part on the Court drawing adverse inferences against Mr. Qi as a result of Mr. Qi’s alleged destruction of WeChat messages, cavalier attitude towards document production, and failure to call Mr. Forno as a witness. An adverse inference may be drawn from the deliberate destruction of evidence in circumstances where a party intentionally destroys evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises

that the evidence would have been unfavourable to the party who destroyed it. However, the presumption can be rebutted by other evidence through which the alleged spoliator proves his case, repels the case against him, or shows that his actions were not aimed at affecting the litigation: *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361 at para. 91.

[144] While I agree that the plaintiffs' approach to document production can be fairly characterized as cavalier in some respects, and Mr. Qi candidly admitted to deleting WeChat messages that he felt were not useful, I am not satisfied that he did so with the intention to affect the litigation. Regardless and in any event, I find that the presumption that those records would be unhelpful to him has been rebutted on account of the other evidence as set out above by which the plaintiffs proved their interpretation of the August and November Agreements.

[145] Mr. Qin also says that an adverse inference should be drawn because the plaintiffs failed to call Mr. Forno to corroborate Mr. Mao's testimony that the inconsistencies between his and Mr. Qi's evidence and the corporate documents arose from Mr. Forno's mistaken understanding of the instructions given to him. I decline to do so. Mr. Qin agreed that Mr. Forno would not be called as a witness in exchange for production of his files. In the circumstances, I find that having taken the benefit of the strategic bargain he made, it is not now open to Mr. Qin to ask for adverse inferences to be drawn against Mr. Qi on account of failure to call witnesses that he agreed would not be called.

[146] Moreover, drawing the adverse inferences Mr. Qin seeks would, in my view, amount to the Court finding an agreement on terms different than those pleaded. This is not permissible. The existence of a contract and its terms are material facts that must be pleaded if a party seeks to rely on that contract as a defence: *Neudorf,* at para. 16(g); see also *Mercantile Office* at paras. 21-23 regarding the foundational nature of pleadings and the important role they play in litigation.

[147] The notion that Mr. Qin was holding 10% of his shares in Lightray in trust for Mr. Qi is also inconsistent with his assertion, as set out in his closing submissions,

that in August 2016, he "suggested a purchase price of $700,000 for 70% of shares [sic] in Lightray…". This is yet another example of the multiple inconsistencies in Mr. Qin's evidence and positions taken in the litigation which, cumulatively considered, render his position as a whole unbelievable and untenable.

[148] In summary, Mr. Qin's version of events, particularly as it relates to his attempt to explain the $700,000 Mr. Qi paid to him, defies business logic and common sense. I find that having already paid the full purchase price for the Property, it would be illogical and commercially unreasonable for Mr. Qi to have agreed in the November Agreement to pay an additional $700,000 to acquire the 70% interest in Lightray that he was already entitled to under the August Agreement. Mr. Qin's assertion that this makes sense because he found such an amazing development opportunity in the Property does not have a ring of truth to it and is unpersuasive.

[149] Mr. Qin's interpretation of clause three does not have the air of commercial reality. To the contrary, I find that it would give rise to a commercial absurdity: see e.g. *Shepherd v. Lundin Gold Inc*., 2020 BCSC 258 at para. 203. There is simply no cogent or commercially reasonable explanation on the evidence which could support Mr. Qin's interpretation of clause three of the November Agreement.

Post-November Agreement Conduct

[150] Mr. Qin relies heavily on the parties' subsequent conduct to support his interpretation of the November Agreement. Evidence of subsequent conduct is only admissible if the contract is found to be ambiguous after one has considered its texts and the factual matrix surrounding the creation of the contract: *Wade* at para. 28.

[151] The circumstances in which subsequent conduct can be properly used are set out in *Re Canadian National Railways and Canadian Pacific Ltd.*, 95 D.L.R. (3d) 252, 1978 CanLII 1975 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668, 1978 CanLII 1964 at page 262, as cited in *Wade* at para. 28:

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.
>
> [Emphasis added.]

[152] Accordingly, evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and factual matrix: *Wade* at para. 31, citing *Shewchuk* at para. 46.

[153] Mr. Qin submits that the plaintiffs' interpretation of clause three cannot prevail when considered in light of the parties' post-contractual conduct. In particular, he says that interpreting the November Agreement as Mr. Qi purchasing his 30% interest in Lightray is inconsistent with:

(a) a December 7, 2017 email from Mr. Mao to Mr. Qin in which Mr. Mao refers to Mr. Qin as a 30% shareholder in Lightray (the "Mao Email");

(b) a February 9, 2018 letter from Harvin Pitch, the plaintiffs' former litigation counsel, referring to the December 2016 payment as a finder's fee and stating that Mr. Qin was still involved in the Project (the "Pitch Letter"); and

(c) Mr. Qin's continued involvement in the Project post-November 2016.

[154] I disagree. While subsequent conduct can be relevant to ascertain whether, objectively, a binding and enforceable contract was entered into, its role in contractual interpretation is much more limited: see e.g. *Angus v. CDRW Holdings Ltd.*, 2023 BCCA 330 at paras. 40, 51. In the present case, the parties' post-contractual conduct is therefore only potentially relevant to contractual interpretation, and even then, only if two reasonable alternative interpretations arise. I am not satisfied that considering the particular words used in their immediate context and in

the context of the agreement as a whole, that there are two reasonable alternative interpretations to clause three of the November Agreement. As set out above, I have concluded that Mr. Qin's proposed interpretation of the November Agreement is not commercially reasonable when considered with the surrounding circumstances within which that agreement was made. Accordingly, recourse to post-contractual conduct is not permissible: *Wade* at para. 31, citing *Shewchuk* at para. 46.

[155] Second and in any event, even if there were two reasonable alternative interpretations such that recourse to the parties' subsequent conduct was appropriate, their conduct does not establish Mr. Qin's proposed interpretation as the correct one. The conduct presents, at best, an ambiguous picture and would lend little certainty to the interpretation of the November Agreement even if considered.

[156] First, the continued reference to Mr. Qin as a shareholder of Lightray post-November Agreement is, in my view, understandable in light of the delay in communicating instructions to counsel and in completing the reorganization of Lightray's share capital and corporate documentation. Corporate documentation for the Project—including the share capital reorganization—continued to be worked on by the solicitors and was eventually back dated, and therefore did not necessarily reflect the current state of affairs when they were being drafted and eventually signed by Mr. Qi and Mr. Qin in December 2016. Issues pertaining to the initial purchase of the Property remained outstanding, including acquiring the additional reports from Windcrest Homes, and steps needed to be taken to retain local consultants to assist with the Project. Mr. Qin had the existing relationships, local proximity, and facility with English necessary to assist with these matters.

[157] Second, the Property was but one of three developments that Mr. Qi and Mr. Qin were involved in together at the time; the other two being a property in Colwood, BC and a property in Youbou, BC. In light of this, it is not inconceivable or unreasonable that Mr. Qin would have continued to assist Mr. Qi with the Project, whether as a gesture of goodwill, as a means of preserving their business

relationship in respect of the other projects, or in anticipation of Mr. Qi funding future development projects.

[158] Mr. Qi and Mr. Qin subsequently had a falling out arising from funding issues with the Youbou project in July 2017, which resulted in Mr. Qi initiating legal proceedings against Mr. Qin in order to obtain repayment of a deposit he advanced for that project. Mr. Qi also initiated legal proceedings and obtained a writ of possession for the Colwood property on August 27, 2020 after Mr. Qin refused to vacate it. This action was also commenced by Mr. Qi in April 2018.

[159] Third, Mr. Mao's December 2017 email demanding Mr. Qin contribute to development expenses as a shareholder of Lightray and threatening legal action if he did not do so, was sent only months after the falling out regarding the Youbou property and this was the first—and only—demand the plaintiffs made that Mr. Qin contribute funds following the November Agreement. This action was commenced four months later and the plaintiffs' position has remained consistent ever since.

[160] Further, while the plaintiffs' solicitor, Mr. Pitch, characterized the $700,000 payment as a "finder's fee" in his February 2018 correspondence, this appears to have been done without having the November Agreement translated. On March 28, 2018, after the plaintiffs obtained a certified translation of the November Agreement, Mr. Pitch again wrote to Mr. Qin and characterized the $700,000 payment as being made to purchase Mr. Qin's interest in Lightray. The plaintiffs have maintained that position ever since.

[161] Accordingly, even if recourse to the parties' subsequent conduct was permissible in interpreting the November Agreement, I do not find that it establishes Mr. Qin's proposed interpretation of the November Agreement as the correct one in place of Mr. Qi's. Rather, in my view, Mr. Qin is attempting to rely on the parties' post-contractual conduct as a means of inviting the Court to find an agreement that was not in fact made between him and Mr. Qi, and on terms that an objective, reasonable bystander would find commercially unreasonable.

[162] In the result, I conclude that the plaintiffs have established that pursuant to the November Agreement Mr. Qi agreed to purchase Mr. Qin's interest in Lightray, namely the Disputed Shares.

Breach of the November Agreement

[163] The elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 91.

[164] As set out above, the parties agree that the November Agreement was entered into, and I have concluded that clause three thereof provides that Mr. Qin agreed to sell and Mr. Qi agreed to purchase Mr. Qin's 30% interest in Lightray for $700,000 CAD.

[165] I find that the plaintiffs performed their obligations under the November Agreement by making the contemplated payment to Mr. Qin by way of the $69,200 CAD payment by cheque dated November 10, 2016, and the ¥3,060,000 RMB payment made to Mr. Qin's mother in China on December 19, 2016.

[166] Mr. Qin did not transfer his 30% interest in Lightray that he continued to hold—the Disputed Share—to Mr. Qi, Bay Vista or anyone else.

[167] Mr. Qi submitted in closing argument that Mr. Qin "breached the November Agreement when he failed to transfer the [Disputed Shares] once he had been paid for them in December 2016". This assertion differs somewhat from the breaches of the November Agreement set out in Mr. Qi's Amended NOCC, where he alleges that Mr. Qin breached the November Agreement by failing to: (a) transfer 20% of his shares in Lightray to Mr. Chen; and (b) failing to transfer 10% of his shares in Lightray to Ms. He.

[168] This discrepancy between the pleadings and the position advanced at trial was not brought to the Court's attention. In any event, the same conduct underlies both conceptions of the breach: Mr. Qin's failure to transfer the Disputed Shares to

Mr. Qi or at his direction. In the result, I find that Mr. Qin breached the November Agreement when he failed to transfer the Disputed Shares to Mr. Qi.

Are the plaintiffs entitled to specific performance of the November Agreement?

[169] The primary award for breach of contract is generally monetary damages: *Munro v. James*, 2020 BCSC 1348 [*Munro*] at para. 193. However, the Amended NOCC does not seek damages as a remedy for breach of the November Agreement. Rather, the only relief that the plaintiffs seek is an order for specific performance by way of a declaration that Mr. Qi is the sole director and shareholder of Lightray, and an order compelling Mr. Qin to transfer his 300 shares in Lightray in accordance with the November Agreement.

[170] Specific performance is an exceptional remedy that should not be granted as a matter of course, absent evidence that the property is unique to the extent that its substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 1996 CanLII 209 at para. 22, as cited in *Lal v. Grewal*, 2024 BCCA 149 at para. 42; see also *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2014 BCCA 388 [*Youyi BCCA*] at para. 43. The fundamental question is whether the plaintiff has shown that the land, rather than its monetary equivalent, better serves justice between the parties: *Youyi BCCA* at para. 45, citing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd*. (2001), 56 O.R. (3d) 341 (S.C.), aff'd (2003), 63 O.R. (3d) 304 (C.A.), leave to appeal to SCC ref'd, [2003] S.C.C.A. No. 145.

[171] The onus is on the party seeking specific performance to establish that the property is unique: *Youyi BCCA* at para. 45. There is no longer a presumption that real estate is unique; each case must be considered in light of the specific property and purchaser: *Guraya v. Kaila*, 2019 BCCA 367 at para. 52. In this context, uniqueness has both subjective and objective components, with the subjective component playing a lesser role in commercial transactions than residential transactions: *Culos Development (1996) Inc. v. Baytalan*, 2024 BCSC 1037 [*Culos*]

at para. 154. Investment properties are often considered candidates for damages: *Youyi BCCA* at para. 45; *Imraj Holding Enterprises Ltd. v. 650273 Alberta Limited*, 2023 BCSC 256 at para. 41.

[172] The court will determine objectively whether the plaintiff has demonstrated that the property has characteristics that make an award of damages inadequate for that particular plaintiff: *Youyi BCCA* at para. 45. The question of whether damages will be an adequate remedy in any given case is a largely factual inquiry that is broader than an assessment of the uniqueness of the land in question: *Youyi BCCA* at para. 44.

[173] Mr. Qin first takes issue with the fact that the Amended NOCC does not plead that damages are inadequate. That is not, however, an impediment to an award of specific performance because, as the Ontario Court of Appeal concluded in *Lucas v. 1858793 Ontario Inc*. *(Howard Park)*, 2021 ONCA 52 at para. 92, a failure to plead inadequacy of damages does not preclude the court from exercising its remedial discretion:

> Second, the Lucases were not required to specifically plead the "inadequacy of damages", as the appellants contend. A claim for specific performance, by its nature, requires a court to inquire into whether damages would be an adequate remedy in the circumstances. While choosing not to plead damages as an alternative to specific performance may, in some circumstances, be a risky litigation strategy, it does not preclude a court from assessing the circumstances surrounding the transaction and subsequent litigation in exercising its remedial discretion. Accordingly, 185's contention that it was "taken by surprise" when the application judge considered inadequacy of damages is not tenable given the Lucases' claim for specific performance.

[174] Both parties focussed their submissions regarding uniqueness on the Property itself, rather than the shares in Lightray that Mr. Qi seeks to have transferred. I adopt the same approach, which is, in my view, appropriate given that Lightray's purpose is simply to hold legal title to the Property; see *Ai Kang* at paras. 351-354.

[175] Mr. Qin argues that in the circumstances, the plaintiffs have not satisfied the test for specific performance because they have adduced no evidence establishing that the Property is unique or that damages would be inadequate. I disagree.

[176] I recognize that the Property is an investment property and therefore a candidate for damages, but am nonetheless satisfied that the evidence establishes that it is sufficiently unique to justify an award of specific performance. My conclusion in this respect is based largely on Mr. Qin's evidence, which I accept, that the Property was "located right beside the best community in Duncan", "all the government approvals [had] been obtained and the planning or zoning had been approved, and the infrastructure already were [sic] there and made available", and it "was a piece of land that could be developed immediately".

[177] The plaintiffs assert that this evidence constitutes an admission of uniqueness by Mr. Qin, and that having so testified, he cannot now take the position that the Property is not unique to defeat an order for specific performance. I agree. I also find Mr. Qin's assertion that Mr. Qi agreed to pay him the additional $700,000 because he had found such an "amazing piece of land" stands on similar footing and provides further support for a finding that the Property is uniquely advantageous as a development property.

[178] Mr. Qi also testified that the Property was attractive to him because it was very similar to a project he had previously completed in Xinyang, China. Relatedly, the parties understood that the Property had been appraised at $6.5 million once rezoned and that rezoning had been approved in July 2016, yet they were still able to purchase it at a significantly lower, pre-rezoning, price of $2.2 million.

[179] In my view, the decisions relied on by Mr. Qin—*Arbutus Gardens Homes Ltd. v. Arbutus Gardens Apartments Corp.,* [1996] B.C.J. No. 456, 1996 CanLII 2294 (S.C.), and *Earthworks 2000 Design Group Inc. v. Spectacular Investments (Canada) Inc.,* 2005 BCSC 22—are of limited assistance as they predated *Youyi BCCA,* and they are not reflective of the approach to the uniqueness analysis as set out by the Court of Appeal therein and in *Lalani v. Chow,* 2011 BCCA 499, the

Ontario Court of Appeal in *Lucas*, and recently applied by this Court in *Culos*. Moreover, each of those decisions is distinguishable on the facts in terms of the nature of the properties in issue and the plaintiffs' intended uses.

[180] I find that the present circumstances are akin to those in *1247249 B.C. Ltd. v. 1098212 B.C. Ltd*., 2022 BCSC 1230, where an investment property that the plaintiff intended to subdivide was found to be sufficiently unique to warrant an order for specific performance. In that case, the fact that the property was the largest subdivision site in Nanaimo, was located in an attractive area close to amenities, and had zoning promoting development of multi-family housing were features that combined both subjective and objective elements of uniqueness: at para. 250.

[181] Mr. Qi performed his obligations under the November Agreement. In exchange, he is entitled to have Mr. Qin perform his end of the bargain and transfer his interest in Lightray to Mr. Qi. I therefore conclude that specific performance is an appropriate remedy in the circumstances of this case and grant an order to that effect. To the extent that this represents an order for partial specific performance of the November Agreement, this is a form of relief that is open to the Court to grant: *Munro* at para. 228, citing G*aspari v. Creighton Holdings Ltd*., (1984), 52 B.C.L.R. 30, 1984 CanLII 709 (S.C.) at para. 113.

[182] I am satisfied that Mr. Qin's obligation to transfer his interest in Lightray to Mr. Qi was independent of and severable from the other provisions of the November Agreement, and that an order for partial specific performance fosters the reasonable expectations of the parties: *Munro* at para. 229-230.

Conclusion

[183] In the result, I find that the plaintiffs have established that Mr. Qi and Mr. Qin objectively intended to be bound by the terms of the November Agreement, and that it was a valid and binding agreement as between them. I have found that the purpose and essential term of the November Agreement was that Mr. Qin agreed to sell his 30% interest in Lightray to Mr. Qi.

[184] Mr. Qi performed his obligations under clause three of the November Agreement, but in breach thereof, Mr. Qin failed to transfer his shares in Lightray to Mr. Qi.

[185] The plaintiffs are entitled to an order for specific performance of clause three of the November Agreement and I therefore:

(a) declare that Mr. Qi is the sole director and shareholder of Lightray; and

(b) order that Lightray and Mr. Qin transfer the Disputed Shares to Mr. Qi.

[186] The plaintiffs are presumptively entitled to their costs at Scale B. If either party seeks an alternative costs award, they have leave to request a further hearing before me within 30 days of the date of this judgment.

"Hughes J."