IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Latif v. Nair,*
2024 BCSC 398

Date: 20240308
Docket: S244040
Registry: New Westminster

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Between:

Abdul Sabour Mohammad Latif and Haris Azimuddin

Plaintiffs

And

Chandu Nair

Defendant

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Plaintiffs: G.T. Palm
J.S. Burg

Counsel for the Defendant: R. Robertson
T. Falcone

Place and Dates of Trial: New Westminster, B.C.
September 11-15, 25, November 17, and December 15, 2023

Place and Date of Judgment: New Westminster, B.C.
March 8, 2024

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OVERVIEW

[1] This dispute arises from certain disagreements in respect of a real estate transaction in Surrey, BC. In essence, the parties disagree as to whether a contract was formed with respect to the sale of a property located at 223-13308 76th Avenue, Surrey (the "Property"), and as to the contents of oral discussions and a document that the plaintiffs allege ultimately constituted and/or memorialized that contract.

[2] The plaintiffs, Abdul Sabour Mohammad Latif and Haris Azimuddin, allege that the parties agreed that they would purchase the Property for a certain price in an oral agreement, which, they say, was later memorialized in writing. The defendant, Chandu Nair, disagrees that any price—or more broadly, any oral agreement—was reached between the parties. The plaintiffs suggest that the agreement was, at one point, memorialized in a handwritten document, but the defendant disputes the veracity of parts of that document.

[3] In his counterclaim, the defendant alleges that the certificate of pending litigation ("CPL") registered by the plaintiffs in respect of the Property constituted an abuse of process.

[4] While this dispute is contractual in nature, it ultimately boils down to the credibility and reliability of the parties. This case demonstrates the challenges of memorializing a real estate deal absent a clear documentary record.

[5] For the reasons that follows, I find that the plaintiffs have not, on a balance of probabilities, proven the matters they allege, nor has the defendant demonstrated an abuse of process. The claim and the counterclaim are both dismissed.

THE DISPUTE

[6] The parties were acquainted through their small businesses, operating in a commercial complex in Surrey. The plaintiffs are mechanics and operated AFG Auto Sales Ltd., a company carrying on an auto repair and sales business at 219-13308 76th Avenue, Surrey ("AFG Auto"). The defendant works as an autobody painter and

detailer. He owned and operated a business at the Property. The defendant's business was located just a few units away from AFG Auto.

[7] In late August 2021, the plaintiffs learned the defendant was trying to sell the Property and decided they wanted to buy it. The parties discussed the plaintiffs' purchase of the Property, and although there is disagreement about the terms of any agreement, a few days later, the plaintiffs delivered a bank draft to the defendant for $15,000.

[8] Later and seemingly in response to a request from the defendant, the plaintiffs delivered $10,000 cash to the defendant. The parties disagree when this occurred.

[9] Eventually, the parties disagree as to when, a handwritten document was created. The plaintiffs assert there already existed an oral agreement for them to purchase the Property. They say the handwritten document formalized the oral agreement and constituted a contract that should be enforced by the Court. The plaintiffs contend that the only term that was uncertain was the completion date but that this does not detract from the fact there was a valid agreement. The plaintiffs rely on the notion that there was agreement regarding price, parties, and property and that such agreement is sufficient to prove a lawful and binding contract.

[10] The defendant says there was never a lawful and binding contract between the parties. He says that, at the outset of the arrangements under scrutiny, he accepted a deposit from the plaintiffs and agreed that he would not sell the Property to anyone else pending the formal documentation of the deal. The defendant says the handwritten document was nothing more than a receipt to acknowledge the delivery of the cheque and cash. He says that the plaintiffs delayed proceeding with the arrangement and that, as a result, he decided he would sell the Property to someone else.

[11] The handwritten document is a single sheet of paper (reproduced below). The parties do not agree about its contents, or, as noted, the time it was signed. The

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defendant takes the position that the plaintiffs altered the document after he signed it. The plaintiffs deny that they altered the document in any way after it was signed. They say the handwritten document constitutes the contract between them.

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[12] When the plaintiffs learned about the potential sale to another buyer, they commenced this action and registered a CPL against the Property. The plaintiffs seek an order for specific performance of the contract they allege, or, alternatively, damages for breach of contract.

[13] In response to the plaintiffs' claim, the defendant filed a counterclaim alleging that the CPL caused the sale of the Property (to a buyer other than the plaintiffs) to collapse and that he had to pay $50,000 as a result of this failed transaction.

POSITIONS OF THE PARTIES

[14] The plaintiffs plead in their most recent amended notice of civil claim dated December 15, 2023:

a) On August 27, 2021, Mr. Azimuddin, on behalf of the plaintiffs, and the defendant entered into a contract by which the defendant agreed to sell and the plaintiffs agreed to purchase the Property on October 20, 2021 for a price of $450,000;

b) On September 2, 2021, the plaintiffs paid a deposit of $15,000 to the defendant;

c) In late September 2021, the defendant requested an extension of the completion date to November 15, 2021;

d) In early November 2021, the defendant requested a further extension of the completion date to December 10, 2021;

e) In early December 2021, the defendant requested a further extension of the completion date to January 31, 2022;

f) In January 2022,

i. At the defendant's request, the plaintiffs paid a further deposit of $10,000 cash;

ii. Concurrently with the delivery of the cash, the agreement was reduced to writing in the form of a handwritten document identifying the plaintiffs and the defendant as the parties, identifying the Property by its civic address, identifying the purchase price as $450,000 and confirming receipt by the defendant of the first and second deposit and the document was signed by the defendant;

g) The defendant requested a further extension of the completion date to February 27, 2022 and the plaintiffs agreed but informed the defendant that they would not agree to any further request to extend the completion date.

h) A few days before February 27, 2022, the defendant anticipatorily breached and repudiated the agreement by informing the plaintiffs he was no longer willing to sell the Property to them for $450,000; and

i) In April 2022, the defendant offered to return a portion of the deposit to the plaintiffs.

[15] The plaintiffs seek relief, amongst other things:

a) Specific performance of the agreement; and

b) In the alternative, damages in lieu of specific performance or damages for breach of the agreement.

[16] The defendant denies doing more than discussing the possibility of a sale of the Property and that these discussions never amounted to a binding purchase and sale agreement. In his response to civil claim, the defendant pleads:

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a) An admission that there were informal discussions between himself and Mr. Azimuddin for the purchase of the Property in August 2021 and in those informal discussions, he indicated his willingness to sell the Property for $550,000;

b) An admission that the plaintiffs made two payments to him totaling $25,000 and the payments were to be used as deposits for the purchase of the Property;

c) That the plaintiffs informed him that they needed to obtain financing and that once their financing was arranged (in about one month), they would present the defendant a formal offer to purchase;

d) On account of the deposits and the promise to provide a formal offer to purchase, Mr. Nair agreed he would not sell the Property to any other person for two weeks;

e) Through September–December 2021, the plaintiffs requested more time to arrange financing and deliver the formal purchase offer and the defendant did not agree to do so;

f) In the alternative, if the informal discussions constituted a contractual obligation to sell the Property, it was an express term of that the sale was to complete within two weeks and any the plaintiffs breached this by failing to be ready, willing and able to complete;

g) In January 2022, the defendant told the plaintiffs he was not interested in selling the Property to them for $550,000 and asked them to accept the return of the deposits;

h) In February 2022 and again in April 2022, the defendant tried to return the deposits but the plaintiffs' refused to accept;

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i) In March 2022, the defendant listed the Property for sale and entered into a contract of purchase and sale for $880,000 with a closing date of May 13, 2022 with another buyer;

j) On May 10, 2022, the plaintiffs filed a CPL in this action on the Property; and

k) The CPL prevented the defendant from selling the Property.

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[17] In his counterclaim, the defendant sues for damages flowing from the failed real estate transaction that he alleges was caused by the presence of the CPL.

LEGAL PRINCIPLES

[18] The parties' claims result from the fact steps were not taken to properly document their arrangements, or at least what they believed the arrangements to be. As a result, this Court is faced with issues of credibility and reliability on material points; neither party's evidence was without some gaps or inconsistencies on material points.

[19] In these circumstances, strict adherence to the burden of proof is critical. The burden of proof in a civil dispute such as this is a balance of probabilities. Where there is conflicting testimony, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred": *F.H. v. McDougall*, 2008 SCC 53 at para. 49. In the main dispute, this burden rests on the plaintiffs.

Contractual Principles

[20] The nature and form of the alleged contract is essential to this dispute. The plaintiffs submit that an oral contract was formed between the parties, which was later reduced to writing. They suggest that, in that agreement, the "parties, price and property" were identified, and that the proposed agreement was properly accepted. To the extent that I accept these assertions, they suggest, the absence of a written

and properly executed agreement should not displace obligations flowing from the oral contract.

[21] The plaintiffs rely on contractual principles summarized by Justice Williams in *Salminen v. Garvie*, 2011 BCSC 339. A contract is typically the product of negotiation, where the terms of the proposed agreement are accepted by one party as presented by the other party: *Salminen* at para. 24. There must be a manifest meeting of the minds or *consensus ad idem* on all the essential elements of what that relationship will be: *Salminen* at para. 25. The absence of a formal signed and properly witnessed agreement does not change the binding nature of a contract so long as the contracting parties express themselves outwardly in a manner indicating an intention to be bound to mutually agreed and reasonably-certain terms: *Salminen* at para. 25. The burden of proving consensus is on the party seeking to prove the existence of the agreement, on a balance of probabilities: *Salminen* at para. 26.

[22] Justice Williams set out the test for determining proof of *consensus ad idem* as follows:

> [27] The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": Fridman, supra, p. 15; see also Smith v. Hughes (1871), L.R. 6 Q.B. 597 at 607 adopted in St. John Tugboat Co. Ltd. v. Irving Refining Ltd., 1964 CanLII 88 (SCC), [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and Remington Energy Ltd. v. B.C. Hydro & Power Authority, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: Hammerton v. MGM Ford-Lincoln Sales Ltd., 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, The Law of Contracts, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: Witzke (Guardian ad litem of) v. Dalgliesh, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.

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[23] The plaintiffs also refer to *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 79 D.L.R. (4th) 97, 1991 CanLII 2734 (O.N.C.A.), [*Bawitko*] where Justice Robins said the following about oral agreements:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

[24] The plaintiffs further rely on *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 [*Soleil Hotel*] for the proposition that oral contracts are to be analyzed using the same principles as written contracts: at para. 328. In other words, the assessment must have regard to the parties' words and actions in context and assessing whether they establish an intention to be bound.

[25] The plaintiffs rely on s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 which sets out:

> (3) A contract respecting land or a disposition of land is not enforceable unless
>
> (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
>
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties'

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> interests, can be avoided only by enforcing the contract or disposition.

[26] In *Soleil Hotel*, Justice Dickson explained the doctrine of part performance and its relation to s. 59(3) of the *Law and Equity Act* as follows:

> [343] Section 59(3) is rooted in the Statute of Frauds enacted in England in 1677. It provides an evidentiary threshold that proven contracts must reach before they will be enforced: 387903 B.C. Ltd. v. Canada Post Corp. (1995), 1995 CanLII 16122 (BC SC), 6 B.C.L.R. (3d) 370.
>
> [344] Like the original English statute, the Statute of Frauds, R.S.B.C. 1960, c. 369 provided that no agreement concerning an interest in land was enforceable unless evidenced in writing. Its purpose was to protect parties from fraudulent allegations of oral agreements affecting land, trusts or guarantees. Following its enactment, however, courts became concerned that, restrictively interpreted, it could be used as an instrument of fraud to avoid enforcement of an agreement when the plaintiff had already embarked upon performance. This concern led to adoption of the "part performance" equitable exception to the statute's writing requirement: The Law Reform Commission of British Columbia's 1977 Report on the Statute of Frauds ("LRC Report"), pp. 57-58 and 80-82[.]
>
> [345] In Schild v. British Columbia (Official Administrator), 1993 CarswellBC 2678 Cashman J. conducted an extensive review of the jurisprudence relating to s. 59(3)(b) of the Act. In so doing, he noted that the statute adopts a more liberal approach to what may constitute acts of part performance than the common law, which required acts unequivocally consistent with the alleged contract. This view was later confirmed by the British Columbia Court of Appeal in Olsen v. Gamache, [1995] B.C.J. No. 1614 and Johnson v. Breitkreuz, 2006 BCCA 30. The statutory requirement is "to prove acts indicating a contract has been made that is not inconsistent with the alleged contract and that the party to be charged has done or acquiesced in such acts": Olsen, supra, ¶ 13 & 16.

[27] The plaintiffs take the position that the alleged oral contract is protected by each of the three alternatives in the *Law and Equity Act*. Regarding, s. 59(3)(a), the plaintiffs say that "a reasonable indication of the subject matter" has been interpreted to include the parties (names), the property (address), and the price: *Currie v. Thomas*, 19 DLR (4th) 594, 1985 CanLII 769 (B.C.C.A.) at para. 8; *Suen v. Suen*, 2013 BCCA 313 at para. 43.

[28] The defendant does not dispute that the aforementioned authorities and legislation govern contract disputes. The defendant submits, however, that this case

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cannot be determined by the simple application of s. 59(3) of the *Law and Equity Act*, as follows:

> Other cases noted below occasionally refer to the requirement that a written contract confirm the Parties, Property, and Price. This developed in relation to writing requirements of …. Section 59(3)(a) of the Law and Equity Act. If "a writing" contained reference to Parties, Property and Price, it was generally considered sufficient for the Statute of Frauds' requirement.
>
> It is quite a different thing to suggest that mere reference to Parties, Property and Price constitutes the formation of an enforceable contract. Notwithstanding that in this case there was no agreement on price, the parties did not understand each other, were not ad item, and did not form a complete or certain contract that this court can enforce.

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[29] In result, the defendant submits that the central question for my adjudication should be: did the parties form a fully binding contract to purchase the Property, or merely an unenforceable agreement to agree? It is the defendant's position that the plaintiffs have not dispelled their burden in making out that a binding contract was formed.

[30] The defendant cites the following authorities in support of their submission. In *Berthin v. Berthin*, 2016 BCCA 104, the court iterated the test applicable to determining the validity of an agreement in this way:

> [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. As stated by Mr. Justice Williams in Salminen v. Garvie 2011 BCSC 339…

[31] The Court of Appeal made clear that the question for the court is whether the parties reached an agreement on all matters that are vital to that agreement or whether, instead, they merely intended to defer legal obligation until a final agreement has been reached: *Berthin* at para. 49.

[32] In *Berthin*, the court also referred to *Bawitko*, citing the paragraph referred to above, and emphasized the following passage at para. 48:

> [page 13] However, <u>when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not</u>

> been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. [At 103-4; emphasis added.]

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[33] In *Indotan Inc. v. Invincible Resources Corp*. 2009 BCSC 1482, aff'd 2010 BCCA 318, leave to appeal to S.C.C. refused, 33856 (10 February 2011) [*Indotan*], the parties had discussed—and agreed upon various details—in respect of the acquisition of a mining property. The plaintiff prepared a draft agreement and a letter agreement was subsequently executed. The Court held that, notwithstanding the preparation of these agreements, the agreements were incomplete and the parties had only entered into an agreement to agree. The Court in *Indotan* held:

> [54] ... an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all. A concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties ...
>
> [55] Moreover, as Professor Fridman writes in The Law of Contract in Canada, 5th ed. (Scarborough: Thomson Carswell, 2006), at pp. 21-22:
>
>> For the most part, where terms are missing or have not been finalized, or there is some ambiguity about the precise meaning of what the parties appear to have agreed to, the general tenor of the decisions is against any possibility of completing the parties' work for them and creating a valid contract out of the vague contractual intent that may be evidenced by their language or conduct.

[34] In *Berthin*, the court examined certainty with respect to a "hastily" written separation agreement, stating:

> [50] In my view, the standard of certainty required for a valid and enforceable contract was not met in the case at bar. Most lawyers would not regard the Agreement as an enforceable contract and would, like Ms. Duncan, seek amendments to the document to "clarify" at least the essential terms relating to the husband's undertaking to provide $500,000 and to refinance the Kiowa mortgage. The trial judge did not conclude that

> the Agreement was an unenforceable contract because of the lack of certainty of these terms, but did find that additional terms had to be supplied in order to "implement" the Agreement. With respect, it seems to me that the issue of whether the Agreement was a binding and enforceable contract and the issue of whether certain terms needed to be supplied to allow it to be "implemented" (i.e., enforced) were opposite sides of the same coin. The deficiencies found by the judge clearly indicate that the parties had not reached consensus on these essential terms, and that in fact the document was, as Ms. Berthin had originally thought, merely a set of guiding principles.

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[35] It is clear in the authorities that a party seeking to enforce a contract to purchase or sell land must show that all essential terms of the agreement were settled and agreed to. Moreover, the defendant relies on a number of authorities to suggest that the plaintiffs must prove something more than just agreement about parties, property and price.

[36] In *Beacock v. Wetter*, 2006 BCSC 951, aff'd 2008 BCCA 152, for example, Justice Smith was not satisfied that a binding contract had been proven, despite there having been agreement about the applicable parties, property and price stated:

> [43] The discussions between Mr. Beacock and Ms Wetter in June 2001 constituted at best an agreement or intention to enter into a contract of purchase and sale at some unspecified date in the future. A binding contract requires certainty. In this case, there was no definite offer that contained the specific terms of an agreement that could be accepted. The only terms agreed upon were the parties to the contract, the Property to be purchased and sold and the price. There was no agreement on the completion date or the terms for payment of the purchase price. Those terms were left for some future decision.

[37] Another case, *BCI Bulkhaul Carriers Inc. v. Wallace*, 2014 BCSC 885, aff'd 2017 BCCA 180 [*BCI*], concerned the transfer of several Richmond properties within a family. The plaintiff was a company incorporated by the defendants' son. The defendants were the plaintiff's parents, sister and brother-in-law. In 1981, the plaintiff's father had purchased three lots in Richmond.

[38] The matter in *BCI* related to an assertion by the plaintiff that there was an agreement that, if he paid off a certain mortgage, one of the properties would be transferred to him or a company incorporated by him. The plaintiff made payments on the mortgage for five years until the mortgage was paid off and also paid the

applicable property taxes. The defendants subsequently refused to transfer the property and litigation ensued.

[39] In *BCI*, Justice Brown found that the lack of a completion date and the lack of a confirmed price for the property were reasons to hold that agreement to transfer certain properties was unenforceable, stating:

> [40] I am not satisfied that there was an enforceable agreement to transfer the Smith properties to the plaintiff.
>
> [41] First, I am not satisfied that the terms of the agreement asserted by the plaintiff constitute an enforceable agreement. Second, I am not satisfied that the discussions between Eugene and Daniel were as detailed as Daniel now recollects them to have been. I will deal with each in turn.
>
> …
>
> [48] Here, like in Beacock, there was no written contract to comply with s. 59(3) of the Law and Equity Act; nor was there a completion date or a confirmed price for the property, which are necessary to meet the requirements for an enforceable contract. Further, I am not satisfied that Eugene’s acquiescence or request that the company pay the mortgage reach the threshold to permit the contract to be enforceable under s. 59(3)(b) of the Law and Equity Act: see also Beacock at para. 52. As noted above, in Eugene’s view the company should pay the mortgage. In the circumstances of this family and their businesses, that the company paid the mortgage does not indicate that the contract was made. Nor am I satisfied that it would be inequitable to not find a contract due to reliance under s. 59(3)(c) of the Law and Equity Act, as detailed below.
>
> [49] Second, I am not satisfied that the discussions went as Daniel now recollects.

[40] In *0827857 B.C. Ltd v DNR Towing Inc.*, 2020 BCSC 717 [*DNR Towing*], Justice Ehrcke addressed the sufficiency of reaching an “oral consensus on parties, property, and price”: at para. 53. Justice Ehrcke stated:

> [53] It is to be noted, however, that neither Birdi v. Luch nor First City Investments Ltd. v. Fraser Arms Hotel Ltd. stand for the proposition that whenever negotiating parties reach an oral consensus on parties, property, and price, they have thereby entered into a legally binding oral agreement. On the contrary, those cases make it clear that there must in addition be an intention to contract, which is manifest to an objective reasonable bystander. As Pearlman J. wrote at para. 53 of Birdi v. Luch:
>
>> [53] In Hoban Construction Ltd. v. Alexander, 2012 BCCA 75 at para. 35, the Court cited with approval following passage from G.H.L. Fridman, The Law of Contract in Canada, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 15:

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> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did …; it is whether a reasonable [person] in the situation of that party would have believed and understood that the other party was consenting to the identical terms. [Footnotes omitted.]

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[41] In *DNR Towing*, the plaintiff claimed there was a final and binding agreement with the defendant to buy its land and business assets. Justice Ehrcke summarized the plaintiff's position as follows:

> [48] The key component of the plaintiff's position is that through their oral discussions and negotiations, by the end of the Second Meeting in July 2017, the parties had reached agreement on the essential elements of a contract of purchase and sale. The plaintiff submits that even though some details may not have been finally settled, such as the date of closing and the terms of payment, the parties had reached a consensus on price, parties, and property, and that since there was agreement on these three essential elements, they had a binding oral agreement from which the defendants were not entitled to resile. While the plaintiff acknowledges that the parties intended to have the agreement reduced to writing, he submits that this was not a precondition to the agreement having binding effect. The plaintiff contends that the written document that was being prepared by the defendants' lawyer was only a written memorandum of what the parties had already legally bound themselves to. In effect, the lawyer's function was simply to act as a "scrivener" or scribe.

[42] Having considered applicable authorities, Ehrcke J. stated as follows:

> [57] Applying those principles to the case at bar, the issue is not whether Mr. Singh subjectively thought there was a legally binding oral contract at the end of the Second Meeting, but rather, whether a reasonable objective observer considering all the circumstances would have understood that the parties intended to be legally bound prior to the signing of a written contract.
>
> [58] On the basis of the evidence before me on this Rule 9-7 application, I am satisfied that a reasonable objective observer would conclude that the parties did not intend to be legally bound until they had signed a written contract.

[43] In assessing the parties' intentions, Ehrcke J. said the following about the fact that the parties' retained lawyers to draft agreements and give them advice:

> [60] … Clearly, the lawyers were not mere "scriveners", as suggested by the plaintiff in his submissions. On the contrary, the lawyers for both parties were involved in giving substantive legal advice about the contents of an eventual written contract. This is clear, not only from the evidence of the defendants, but also from the examination for discovery of the plaintiff.

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[44] The defendant relies on *DNR Towing*, in part, to demonstrate that the act of seeking out professional legal assistance in forming a contract can indicate that the parties anticipated the creation and use of formal legal documents in actuating the contractual arrangement. To this extent, reliance on an anticipatory oral agreement as fully enforceable would run contrary to actions taken to create and implement formal arrangements through the retainer of counsel.

[45] In *Booth v. Finch*, 5 R.P.R. (3d) 101, 1996 CanLII 3346 (B.C.C.A.), the court held that, if the real intentions of the parties can be collected from the language within the four corners of the instrument, then the court may give effect to such intentions by supplying anything necessary to be inferred. There was nothing in this case, however, to support an inference that the purchase price was payable on demand, and, consequently, the sale agreement was void for uncertainty. Justice Legg stated as follows:

> [12] In support of his first ground, counsel submitted that the evidence showed that there had been part-performance of the agreement alleged by the plaintiffs which was enforceable under s. 54(3)(b) of the Law and Equity Act. Counsel further submitted that under the provisions of s. 54(3)(c) of that Act, the plaintiffs had relied upon the agreement which they alleged and had changed their position and that therefore the agreement between the parties should be enforced.
>
> [13] In my opinion, s. 54(3)(b) and (c) of the Law and Equity Act are not of assistance to the plaintiffs. The evidence of the plaintiffs shows that there was uncertainty over the terms of the alleged agreement. I shall refer to that evidence later in discussing the third ground of appeal. At this point, it is sufficient to state that the discovery evidence of both plaintiffs established that even if their evidence was accepted, there was no agreement made with the defendants on when the agreement was made and when the sale was to complete.

[46] In summary, in the main claim, the burden of proof rests on the plaintiffs. They must demonstrate, on the civil standard, that a binding agreement, in the form they suggest, was formed as between the parties. As the authorities set out, it could

well be that that agreement was concluded orally. The defendant disputes, however, that—*inter alia*—a *consensus ad idem* was reached between the parties. They suggest, and provide authoritative support, for the notion that the mention of ”parties, property, and price,” without more does not, necessarily, make for an enforceable contract.

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Credibility

[47] Many of the details surrounding the arrangement between the parties are in dispute, some of which require findings to be made by this Court. The parties agree, however, that:

a) Mr. Azimuddin and Mr. Nair discussed the sale of the Property to the plaintiffs in August 2021;

b) After the discussion in August 2021, the plaintiffs paid $15,000 to the defendant by way of bank draft in early September 2021;

c) The plaintiffs delivered $10,000 cash to the defendant;

d) The defendant acknowledged receipt of two deposits ($15,000 and $10,000) in a handwritten document; and

e) Though the parties’ engaged realtors and/or mortgage brokers for assistance with drafting a contract of purchase and sale, a traditional contract of purchase and sale for land was not signed by the parties.

[48] The plaintiffs contend that these points on which the parties agree form a sufficient evidentiary record for disposal of the claim, insofar as, in their submission, the only terms that mattered—price, property and the parties—were agreed to. In my view, however, the matter is not so simple. For one, the plaintiffs’ position ignores the very live dispute about purchase price. More specifically, and among other factual disputes, I must turn my mind to:

a) Particulars of the initial discussion in August 2021, including whether the purchase price was $550,000 or $450,000;

b) Payment of the first deposit of $15,000 (via bank draft);

c) Instructions to realtors and mortgage brokers;

d) Delivery of the second deposit of $10,000 (via cash);

e) Particulars surrounding the drafting of the handwritten document; and

f) Events surrounding the parties' dealings in early 2022.

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[49] In considering the instant factual disputes, I am cognizant of the law on credibility. Credibility assessment involves a determination of a witness's testimony based on their veracity or sincerity, in addition to the accuracy of the evidence they provide: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[50] Credibility assessment involves consideration of various factors, including:

a) the witness's ability and opportunity to observe events;

b) the firmness of the witness's memory;

c) the witness's ability to resist the influence of interest to modify his or her recollection;

d) whether the witness's evidence harmonizes with independent evidence that has been accepted;

e) whether the witness changes his or her testimony during direct and cross-examination;

f) whether the witness's testimony seems unreasonable, impossible or unlikely;

g) whether the witness has a motive to lie; and

h) the demeanour of the witness generally.

See *Bradshaw* at para. 186; *Gichuru v. Smith,* 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414.

[51] Ultimately, when assessing the truthfulness of the testimony of any interested witness, I am to be guided by the words articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[52] With those principles in mind, I will set out the evidence.

EVIDENCE

The Relationship Between the Parties

[53] Mr. Latif and Mr. Azimuddin were born in Afghanistan. Mr. Latif came to Canada in 2006 and Mr. Azimuddin came to Canada in 2012. They both completed grade 12 in Afghanistan.

[54] Both plaintiffs testified through a Dari speaking interpreter. Mr. Latif testified that he used a different alphabet and calendar than those commonly used in English-speaking countries, making it difficult for him to recall dates when using the English calendar system.

[55] Mr. Nair, the defendant, testified through a Hindi-speaking interpreter. He moved to Canada in 1990 and achieved a grade 12 education before arriving in Canada.

[56] The parties all testified that they typically conduct their day-to-day business in English and, thus, have a working level of English. The parties also agreed that they spoke English when dealing with one another.

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[57] The plaintiffs jointly own AFG Auto. The Property was just two units away from AFG Auto. The proximity of these locations was what initially led the parties to meet.

[58] Mr. Latif described the relationship with Mr. Nair as being “like brothers.” Mr. Nair disagreed. He testified that they never saw one another outside of their working days. Mr. Nair testified that they occasionally would buy one another coffee but this did not occur as often as suggested by Mr. Latif or Mr. Azimuddin.

[59] Regardless, it was clear that the parties had been friendly with one another and on occasion enjoyed a coffee together while they minded their shops.

Listing of the Property

[60] Mr. Nair listed the Property with a realtor, Navin Sahay, on March 17, 2021 at a listing price of $775,000. The listing initially had an expiry date of November 11, 2021. Before the listing expired, Mr. Nair lowered the purchase price of the Property to $585,000. The documents establish that the listing agreement with Mr. Sahay was cancelled on September 12, 2021.

Initiation of the Plaintiffs’ Purchase of the Property

The Plaintiffs’ Testimony

[61] Mr. Azimuddin testified that, in August 2021, while he was having coffee with Mr. Nair, he mentioned that he was selling the Property. Mr. Azimuddin then had a discussion with Mr. Latif and, together, they decided that they wanted to purchase the Property.

[62] I pause to note that it was sometimes difficult to determine who exactly was present at certain conversations; I am cognizant that details like these may have—to a certain extent—been lost in translation.

[63] In his examination-in-chief, for example, Mr. Latif testified about the above-noted conversation with Mr. Nair in August 2021 about purchasing the Property. When Mr. Latif testified, he presented the conversation in such a way as to suggest

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he was a party to the conversation. During cross-examination, however, he revealed that he had not been present during what would have been the first conversation about purchasing the Property. Regardless, Mr. Latif indicated that he “knew about it,” referring to that conversation.

[64] It remains unclear whether this apparent inconsistency was caused by the translation process or if there is some other explanation. It became clear in the testimony, however, that many of the conversations about the plaintiffs’ purchase of the Property occurred between Mr. Azimuddin and Mr. Nair. Later, as I ascertain, Mr. Azimuddin would inform Mr. Latif about the details of these discussions with Mr. Nair. Owing to these considerations, I find that the first conversation about purchasing the Property in August 2021 occurred between Mr. Azimuddin and Mr. Nair. Mr. Azimuddin then told Mr. Latif about the details of the conversation after it occurred.

[65] Mr. Latif testified that the plaintiffs conveyed to Mr. Nair that they wanted to buy the Property and that the parties agreed on a price of $450,000. Mr. Nair agreed that there was a conversation about the purchase of the Property, however, he disputed that he ever agreed to the $450,000 figure indicated by Mr. Latif. Rather, Mr. Nair testified that the agreed upon price was $550,000.

[66] According to Mr. Latif, Mr. Nair indicated that the closing date would be delayed because he wanted to move items from the Property and he had to finish some business matters. Mr. Latif testified that the plaintiffs were agreeable to the delayed closing and said he was “not in a rush” to finalize the deal.

[67] Despite the delayed closing, Mr. Latif made clear that the plaintiffs delivered a deposit to Mr. Nair on September 2, 2021, in the form of a bank draft for $15,000. Mr. Azimuddin testified that he had earlier taken a digital photograph of Mr. Nair’s driver’s license to confirm his legal name.

[68] Mr. Azimuddin’s recollection of theses events corresponded with that of Mr. Latif. Mr. Azimuddin testified that it was Mr. Nair who initially raised that he

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wanted to sell the Property. Without providing much detail, Mr. Azimuddin testified that the parties agreed on a price of $450,000 for the Property.

[69] Mr. Azimuddin was cross-examined about the purchase price. It was suggested to him that the plaintiffs tried to convince Mr. Nair to accept $100,000 cash in addition to the $450,000 purchase price, which would be reflected in the yet-to-be drafted contract. Mr. Azimuddin adamantly rejected this suggestion. He remained firm that the parties agreed that the purchase price would be $450,000.

[70] Mr. Azimuddin subsequently offered to provide a deposit and Mr. Nair requested that it be in the amount of $15,000. Mr. Azimuddin testified that he discussed all of this with Mr. Latif and that they agreed to provide the deposit in the form of a cheque (or bank draft) for $15,000, which was provided to Mr. Nair on September 2, 2021 in the parking lot of a Tim Horton's close to the Property.

[71] Mr. Nair admitted that he received the $15,000 deposit for the Property, and expected that it would form part of the ultimate purchase price.

[72] Mr. Azimuddin's testimony about events subsequent to delivery of the $15,000 deposit was vague. He testified that when that deposit was delivered, Mr. Nair requested that he be afforded a couple days before he would tell Mr. Azimuddin when the parties could complete the purchase of the Property. In response to the question, "did you discuss the date when the purchase might take place," Mr. Azimuddin testified:

> When we gave him the draft, he asked for a couple of days. And said, I will let you know after that.

[73] Mr. Azimuddin was next asked, "did you discuss the date on which the transfer of the property would occur – complete the purchase?" Mr. Azimuddin testified:

> At that time, I am not ready for now for the closing date. When I gave him the draft, so possibly tell you in December for the closing date.

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The Defendant's Testimony

[74] Mr. Nair's testimony on the inception of the deal contrasts that of Mr. Latif and Mr. Azimuddin.

[75] Broadly, Mr. Nair testified that he listed the Property for sale in March 2021 for $775,000, which the listing agreement confirms. Mr. Nair testified that he received an offer on the Property during the listing agreement but no sale was completed, and he then reduced the listing price of the Property to $585,000.

[76] After the reduction in price, in August 2021, Mr. Nair engaged in discussions with Mr. Azimuddin about the plaintiffs purchasing the Property. He testifies that there were two or three discussions with Mr. Azimuddin in late August on this topic. Mr. Nair testified (and was adamant) that it was determined in this meeting that the purchase price for the Property would be $550,000, and that the only terms discussed were price and that this would be a "private deal."

[77] Subsequently, Mr. Nair testified that he told his listing agent that he wanted to cancel the listing agreement. In doing so, Mr. Nair disclosed his conversation with Mr. Azimuddin to the listing agent. According to Mr. Nair, Mr. Azimuddin suggested they not involve real estate agents in the transaction for the Property.

[78] Mr. Nair disagreed that he provided the plaintiffs with his drivers license at this time. He testified that he gave the plaintiffs a business card so that they could use it to prepare the bank draft. Mr. Nair testified that the only time he gave his driver's license to the plaintiffs was when they later gave him $10,000 in cash. He said that, at that time, the plaintiffs took a picture of his driver's license while they were in their office.

[79] Mr. Latif agreed that he took a photograph of Mr. Nair's drivers license in the meeting when the $10,000 deposit was paid. I will address this point further below, but for now, note that a copy of Mr. Nair's drivers license was provided to Paulie Bhambra, a paralegal retained by Mr. Latif to prepare the legal documents for the transaction, in an email dated October 6, 2022.

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[80] Mr. Nair was firm that he received $10,000 cash from the plaintiffs only a few weeks after the bank draft of $15,000 was received. At the examination for discovery, Mr. Latif was questioned about this timing and said he was unable to remember the date the second payment was made. When confronted with this inconsistency at trial, Mr. Latif stated:

> I realized the dates are important so I and [Mr. Azimuddin] sat down and refreshed our memory about dates…we tried to refresh our memory and we made the contract and that's how we got the dates, it came back to our memory.

[81] At trial, Mr. Latif recalled that, at the noted point in January, Mr. Nair needed cash for construction that he was doing at his house, and that this, at least in some degree, precipitated the $10,000 payment being made at this time.

[82] Regarding next steps, Mr. Nair was adamant that he expected to receive "paper work" or "something in writing" from the plaintiffs. Mr. Nair testified that he had offered to have a friend of his, who was a real estate agent, prepare this paperwork. According to Mr. Nair, Mr. Azimuddin declined this offer and said he had a "mortgage broker friend" who would handle the paper work.

[83] The evidence about the creation of this paper work was, itself, curious. Before discussing that evidence, however, I turn first to the paper work that was, in fact, created: the handwritten document.

The Handwritten Document

[84] The plaintiffs assert that the handwritten document was prepared in January 2022, at the same time they delivered the $10,000 cash, and signed between January 10–12, 2022. Mr. Nair adamantly disputes this timing. He submits that the handwritten document was created a few weeks after he received the $15,000 bank draft.

[85] At this point, it is useful to describe the handwritten document.

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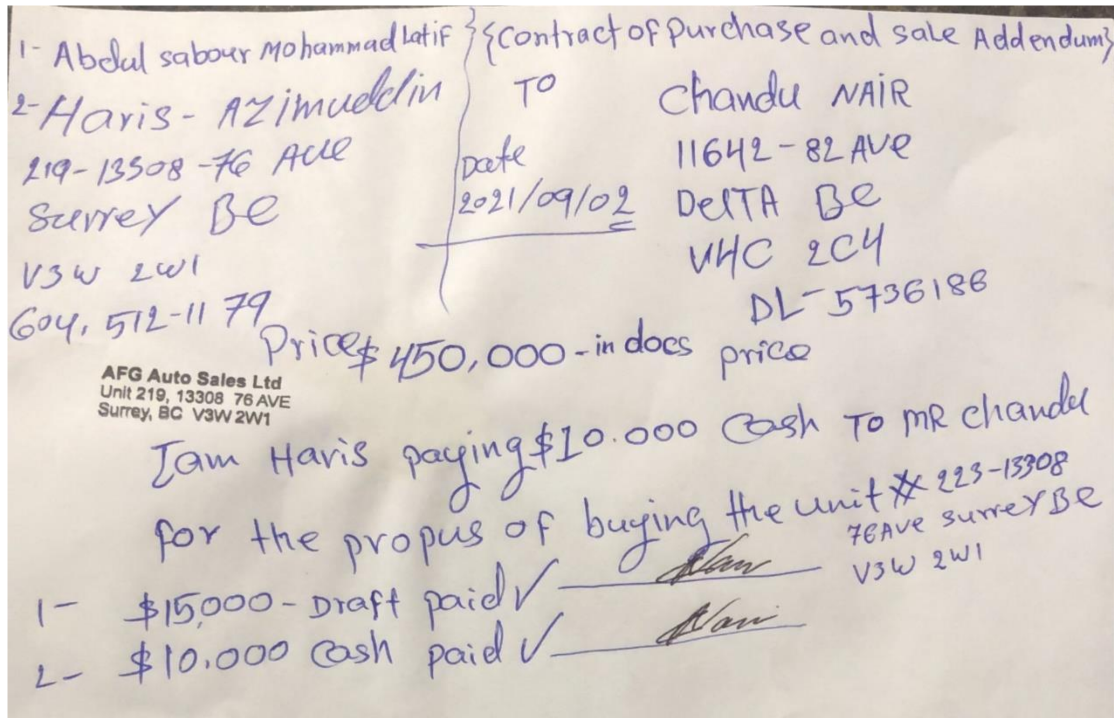
[86] The plaintiffs tendered the following handwritten document and it was entered as an exhibit at the trial:



1- Abdul sabour Mohammad latif } {Contract of Purchase and sale Addendum}
2- Haris- Azimuddin
219-13308-76 Ave
Surrey BC
V3W 2W1
604, 512-11 79

TO

Date
2021/09/02

Chandu NAIR
11642-82 AVe
DelTA BC
V4C 2C4
DL-5736188

Price $450,000 - in docs price

AFG Auto Sales Ltd
Unit 219, 13308 76 AVE
Surrey, BC V3W 2W1

I am Haris paying $10.000 Cash To MR chandu
for the propus of buying the unit # 223-13308
76 Ave surrey BC
V3W 2W1
1- $15,000 - Draft paid ✓
2- $10.000 Cash paid ✓

[87] The defendant testified that the document was altered after he signed it in that additional information was added to it. He testified that the only information on the piece of paper was the following:

> I am [Mr. Azimuddin] paying $10,000 cash to Mr. Chandu
> For the [purpose] of buying the unit XX 223-13308
> 76 Ave Surrey BC
> V3W 2W1
> 1 -- $15,000 – draft paid ____________
> 2 -- $10,000 – cash paid ____________

[88] Mr. Nair says that there was nothing written above “I am [Mr. Azimuddin] paying….” when he signed the document. Essentially, Mr. Nair says that the document was nothing more than a receipt acknowledging that he had received and accepted two payments.

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[89] At trial, the plaintiffs tendered a report regarding the authenticity of the handwritten document. The plaintiffs' expert, Kenneth Davies, was shown to have special expertise in determination of authorship, authenticity, alteration, and identity profiling of handwriting and signatures. After performing his examination, Mr. Davies reported the following conclusions:

a) The handwritten document is an original document. Within a reasonable degree of certainty, the body of handwriting of the handwritten document, with the exception only of the black signatures, was written entirely with the same ink and written by the same person.

b) Within a high degree of certainty, there were no erasures or writing replacement or over-writing on the handwritten document.

c) With a high degree of certainty, the black ink signatures were written after the signature lines were affixed.

[90] These conclusions are consistent with the parties' testimony. That is, Mr. Latif testified that he wrote the document and then it was signed by Mr. Nair, and that he completed all of the writing in blue ink and everything was written before Mr. Nair signed it.

[91] Mr. Nair did not challenge the qualifications of the plaintiffs' expert to provide an opinion about the document. The defendant asserts, however, that the opinion offers little insight on the disputed aspects of the document, including opinion on, first, when Mr. Nair signed it and second, when the document was created.

[92] Mr. Davies was not able to provide an opinion to answer Mr. Nair's theory that the top half of the document was added after Mr. Nair signed the handwritten document. Mr. Davies stated:

> In studying the spatial arrangement and logic of the body of handwriting of the [handwritten agreement] this analyst was unable to determine to any supportable degree that any handwriting had been added to the [handwritten document] after the document had been signed.

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[93] In other words, Mr. Davies was unable to determine, one way or another, whether the top half of the handwritten document was added after Mr. Nair signed it.

[94] Mr. Latif was adamant that he did not alter the document in any way after Mr. Nair signed it. He agreed that he did not provide a copy of the handwritten document to Mr. Nair. Had such a copy been provided, this litigation may well have been avoided.

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Professional Assistance Sought

[95] Mr. Latif testified that after the delivery of the $15,000 bank draft, he spoke to Ishma Alvi about the Property and the plaintiffs' purchase of it. Ms. Alvi is a realtor and mortgage broker. She was the first professional the plaintiffs contacted regarding the purchase of the Property.

[96] Mr. Latif testified he discussed some of the terms of the purchase with Ms. Alvi and that it was clear, following these discussions, that the deal was to close at some point in December. He told Ms. Alvi that the plaintiffs were not in a rush to close.

[97] Ms. Alvi testified about her communications with Mr. Latif. Ms. Alvi testified that Mr. Latif texted her on August 26 or 27, 2021 and that he mentioned that he wanted to speak. She testified that she and Mr. Latif set up a meeting during the first week of September at a Tim Horton's. Mr. Latif told her that they had entered into a contract with their friend and that they "made a deal" to buy his warehouse for $450,000. Mr. Latif told Ms. Alvi that the plaintiffs had $150,000 for a down-payment.

[98] Ms. Alvi agreed that she told Mr. Latif that she would be away for much of December and that this could impact the proposed timing. She testified that she made clear to Mr. Latif that she could not act as their realtor because this was a commercial transaction and she did not do commercial transactions. She testified that she indicated to Mr. Latif that she could assist with financing because the plaintiffs both had a lot of equity in their residential properties and could access financing in that way.

[99] Ms. Alvi further testified that that the plaintiffs conveyed to her that they had given a $15,000 bank draft to the seller of the Property. Ms. Alvi subsequently offered to refer the plaintiffs to a lawyer so that they could receive assistance in drafting a contract in respect of the transaction.

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[100] Ms. Alvi testified that she asked Mr. Latif why he gave a bank draft without a contract. In response, Mr. Latif told her there was a verbal contract, that the parties were close, and that the seller was like a brother to him.

[101] On October 2, 2021, Mr. Latif sent the following text message to Ms. Alvi:

> Hi [Ms. Alvi]
>
> Did you find out about [lawyer] to make a proper letter please.
>
> Cause the guy can change his mind anytime.

[102] Mr. Latif testified that he subsequently contacted Ms. Bhambra to prepare the applicable legal documents. He testified that he knew Ms. Bhambra from a previous transaction and reached out to her after he had spoken with Ms. Alvi.

[103] Ms. Bhambra testified about her initial contact with Mr. Latif. She confirmed that after she was retained, she had an initial call with Mr. Latif to receive instructions. She testified that she was told during the call that Mr. Latif had already paid a cash deposit to the seller. Ms. Bhambra responded by telling Mr. Latif that he should not have paid that deposit. Ms. Bhambra also testified that Mr. Latif told her about the handwritten document. Moreover, Ms. Bhambra confirmed that there was a bank draft for the $15,000 deposit and added that the plaintiffs "had already paid $10,000 in cash when they did their handwritten contract."

[104] On October 6, 2021, Mr. Latif sent an email to Ms. Bhambra stating:

> I spoke with you about the [Property] that I'm buying. Address of shop 223/13308/76ave V3W2W1, Surrey.
>
> ….
>
> I'm buying it through my business
>
> [AFG Auto]
>
> Please make the paper work if anything needed, contact me anytime.

[105] Ms. Bhambra testified that at the end of October 2021, she emailed Mr. Latif a draft contract of purchase and sale for the Property. In her email, she wrote, “please review and ensure the seller signs and has a witness also.” In the contract, Ms. Bhambra included the following information:

a) Civic address of the Property;

b) Parties: Mr. Nair (seller) and Mr. Latif and AFG Auto (buyers);

c) Purchase price: $450,000;

d) Amount of deposit: $15,000;

e) Completion date: December 10, 2021;

f) Possession date: December 11, 2021.

[106] Ms. Bhambra testified that the completion date was an arbitrary date and that it was based on her earlier discussions with Mr. Latif.

[107] Ms. Bhambra testified that she sent another contract to Mr. Latif where additional terms were added as an addendum. The following statement was included in the addendum:

> Further to the Contract of Purchase and Sale dated October 21, 2021 made between [Mr. Latif] as buyer and [Mr. Nair] as seller and covering the [Property]…

[108] Ms. Bhambra recalled having waited for “quite a bit” for follow up from the plaintiffs in respect of the materials she sent to them, and followed up herself with Mr. Latif. She stated that she did not have contact with the seller or a representative of the seller. She stated that, ultimately, her office became too busy for her to follow up and she therefore put this matter “on the backburner.”

[109] Ms. Bhambra testified that she believed the deal did not close in December 2021 because “there was no signed contract.”

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[110] The record indicates that Mr. Latif sent the draft contract to Ms. Alvi for her review. On October 21, 2021, Ms. Alvi sent a text to Mr. Latif advising him to have the contract made in his name but to include a clause that there could be an assignment to his company without further consent of the seller.

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[111] Ms. Bhambra's only contact with a representative for Mr. Nair came in February 2022. She testified that she spoke to a woman from the office of Ajaypal Dhaliwal, a lawyer in Surrey, after Mr. Latif texted her a copy of Mr. Dhaliwal's business card. In what seems to have been a later discussion with a woman from Mr. Dhaliwal's office, Ms. Bhambra learned that Mr. Dhaliwal was not representing Mr. Nair. She also had email communication with Mr. Dhaliwal's office because she believed that he was acting for Mr. Nair, but was later told not to contact his office.

Dissolution of the Deal

[112] Mr. Nair testified that, since September 2021, he had been waiting for the plaintiffs to deliver a contract to him. He stated, "I was waiting for them when they get the documents and I will sign." Mr. Nair's position was that he wanted the purchase of the Property to conclude as soon as possible and that he expected they would give him a form of contract within one or two days from the time he received the deposits.

[113] Mr. Nair testified that he contacted a notary public, Mr. Randhawa, in October 2021, but subsequently decided to retain Mr. Dhaliwal because Mr. Randhawa appeared to be too busy. During the fall 2021, Mr. Nair testified that he asked both Mr. Azimuddin and Mr. Latif about the status of the contract and was told that their lawyer was working on it. During the fall, Mr. Nair believed that the delivery of the contract would be forthcoming.

[114] Mr. Nair ultimately decided not to sell the Property to the plaintiffs for, in his submission, $550,000. He testified that he received an assessment of the value of the Property and it was significantly higher than $550,000. This was in addition to the fact that he had not received a contract from the plaintiffs. In these

circumstances, Mr. Nair determined that it did not make sense to continue to hold the Property for a deal that was not finalized.

[115] At this point, Mr. Nair said that he told the plaintiffs that he could no longer sell the Property to them. He testified that upon making this determination, he tried to return the deposits to the plaintiffs and they refused to accept.

[116] Mr. Nair described his efforts to return the deposits to the plaintiffs. He testified that he told the plaintiffs three or four times that he was not going to wait for them to conclude the transaction and that he just wanted to return their deposits. On January 19, 2022, Mr. Nair texted Mr. Dhaliwal's business card to the plaintiffs. There was no covering message about why Mr. Nair had transmitted the business card. In his testimony, Mr. Nair explained that the text was in the context of his conversations with the plaintiffs wherein he indicated to them that no contract had been received for his lawyer to review. He testified that he sent the business card to confirm the law office.

[117] In response, the plaintiffs assert that Mr. Nair kept delaying the closing of the transaction. In their testimony, it was Mr. Nair who asked that the completion date be pushed back on several occasions and the plaintiffs agreed. This evidence, however, seems somewhat inconsistent with the limited written communication available in this case. The plaintiffs assert that Mr. Nair's request for extensions occurred during conversations with him, but there is nothing in writing that reflects that it was Mr. Nair initiating these delays. Mr. Latif suggested, however, that he told Ms. Bhambra that Mr. Nair wanted to extend the closing date to January 2022, having indicated that December 10, 2021 was too early.

[118] Mr. Latif was cross-examined about Mr. Nair's purported need for an extension of the closing date. He was asked why it is not apparent that he told Ms. Alvi or Ms. Bhambra about Mr. Nair's request to extend the closing date. The gist of Mr. Latif's testimony on this point was that it was unnecessary. He and Mr. Azimuddin were dealing with a person who was like a brother so they simply acquiesced to Mr. Nair's request for additional time.

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[119] Despite the various drafts prepared by Ms. Bhambra and sent to Mr. Latif, the parties agree that Mr. Nair was not provided with a copy of a contract until February 2022. This is so even though Ms. Bhambra, in her initial email, told Mr. Latif that "[the seller] needed to sign the contract." While Mr. Latif admitted that he never gave a copy of the contract to Mr. Nair, he testified that he told Mr. Nair about the draft contract and provided a few explanations as to why he did not provide a paper copy of the contract to Mr. Nair.

[120] Fabian Saul testified as part of the defendant's case. Mr. Saul is a realtor and met Mr. Nair after Mr. Nair serviced his car. In March 2022, Mr. Nair asked Mr. Saul to list the Property. During his discussion with Mr. Nair, Mr. Saul learned about the situation with the plaintiffs, as well as that Mr. Nair had tried, unsuccessfully, to return the deposits.

[121] Mr. Saul proceeded to take steps himself to return the deposits to the plaintiffs. He testified that in April 2022, he attempted to return the deposits but the plaintiffs rejected the money. Ultimately, Mr. Saul testified that he tried to return the money to the plaintiffs on three separate occasions.

[122] I note that in their amended notice of civil claim, the plaintiffs assert that the efforts by the defendant and Mr. Saul to return the deposits included only return of a portion of those deposits.

[123] Mr. Saul further testified that he listed the Property and assisted in arranging for a transaction in respect of an offer of $880,000, not made by the plaintiffs. Two days before the closing date on that transaction, the plaintiffs filed a CPL and the transaction did not complete.

[124] Mr. Saul was cross-examined about his meetings with the plaintiffs, in the spring of 2022. He testified that during those interactions, the plaintiffs referred to the handwritten document as a "receipt" and not as a "contract." He was challenged on this point but did not resile from his testimony that the plaintiffs referred to the handwritten document as a "receipt."

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ANALYSIS

[125] Prior to my analysis, I wish to reiterate that the burden of proof in this matter rests on the plaintiffs.

[126] I also think it important to begin with a comment about the language differences that arose in this case. The parties agree that neither speaks the first language of the other party and that their mutual communications were in English. English is not the first language of Mr. Nair, Mr. Azimuddin, or Mr. Latif. All three testified at the trial with the assistance of an interpreter. Mr. Nair speaks Hindi and the plaintiffs speak Dari. It was clear during parts of the testimony that there were some issues with translations and counsel was required to clarify aspects of the witness' testimony.

[127] With that said, the parties were testifying through interpreters about conversations that occurred in English. The testimony about the August 2021 conversations, described above, is a prime example of how the testimony in this matter sometimes became convoluted.

[128] I have taken into account these considerations on language and translation as I assess the credibility of the parties.

Credibility

[129] At the outset, I found the testimony of Mr. Latif and Mr. Azimuddin to be curious on points that mattered. I identify two interrelated issues in particular that give me pause in accepting their evidence: the price and the handwritten document.

The Price

[130] First, and despite the plaintiffs' position throughout the proceedings that the parties agreed on price, property and parties, I am not so convinced. On this point, Mr. Nair was adamant that he believed their conversation in August 2021 was that he would receive $550,000 for the Property. He never changed his position in this regard. He relied on evidence that he had listed the Property for $775,000 in March 2021 and reduced it thereafter to $585,000. He adamantly denied ever agreeing to a

price of $450,000. I am satisfied that he was never provided with the draft contract of purchase and sale where he would have had a chance to comment on the purchase price in the draft.

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[131] The plaintiffs, for reasons that are not entirely apparent, did not to share a copy of the contract of purchase and sale with Mr. Nair. Moreover, Mr. Latif's testimony that he told Mr. Nair "verbally" about the contents of the contract is curious. Ms. Bhambra's instructions to Mr. Latif were clear: the seller needed to sign (and witness) the contract. I am satisfied that Mr. Nair was not provided a copy of the draft.

[132] The early drafts of the contract of purchase and sale state the purchase price to be $450,000. It is clear that the communications occurred between Mr. Nair and Mr. Azimuddin in respect of the purchase of the Property. Although Mr. Azimuddin may have wanted to deliver an offer for $450,000, I am not satisfied that the evidence establishes that Mr. Nair was prepared to accept $450,000. Indeed, his testimony was that he would not have accepted this price, which was well below the assessed value of the Property and well below the already reduced listing price. This was so, he testified, even in light of the fact that they were intending a "private deal" without realtors' commissions.

[133] Moreover, Mr. Latif's testimony was problematic on the point of price. During his examination-in-chief, Mr. Latif testified as if he was present during the conversation about the purchase of the Property when price was allegedly established. It was only during cross-examination that he, at least at first, conceded that he was not present during that initial meeting. He testified, however, that he knew about that meeting because Mr. Azimuddin told him about it. He also stated that he "knew" about the price because he participated in some of the associated conversations.

[134] When Mr. Azimuddin testified, he seemed to suggest that Mr. Latif was in fact present during the conversation about the purchase price. During his direct examination, he was specifically asked whether there was a discussion about price.

Mr. Azimuddin responded that "[Mr. Latif] and I were present." He testified that "when [Mr. Nair] offered us and we offered him and we both agree on $450,000 and he accepted."

[135] The examination then moved to the delivery of the $15,000 bank draft. Mr. Azimuddin described preparing and delivering the bank draft. When asked about the date of which the purchase would complete, Mr. Azimuddin stated, "at that time, [Mr. Nair] said I am not ready for now for the closing date…so possibly tell you in December for the closing date." Mr. Azimuddin went on to say that the plaintiffs trusted Mr. Nair, so there was no rush.

[136] In the light of the above, I do not find that the plaintiffs have dispelled their burden in establishing that Mr. Nair accepted the offer to sell the Property for $450,000. That figure, in light of the applicable circumstances, is below what I am prepared to accept that Mr. Nair would have accepted for the Property, and, insofar as no written contract was provided by the plaintiffs, it has not been shown that Mr. Nair ever had a sufficient opportunity to review and refute the $450,000 figure. I make this finding in association with my finding in respect of the handwritten document, which follows.

[137] The handwritten document states $450,000. I will deal with this document next.

The Handwritten Document

[138] In the form submitted to this Court, the handwritten document includes a price of $450,000. In respect of this document, however, I find that the testimony of Mr. Azimuddin and Mr. Latif to lack credibility and reliability.

[139] The plaintiffs have both said different things at different times in respect of the handwritten document. Their testimony at trial, that the handwritten document and cash were dealt with at the same time—in January 2022—was different than what they said on prior occasions about when these matters occurred. I am of the view

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that these discrepancies are significant insofar as the plaintiffs relied on the handwritten document as confirming their verbal agreement.

[140] Moreover, there are several issues surrounding the creation of this document and its validity.

[141] First, Mr. Nair was not provided with a copy of the handwritten document. Had the plaintiffs given Mr. Nair a copy, the conflict about its contents would not have arisen.

[142] Second, Mr. Saul testified repeatedly that the plaintiffs referred to the handwritten document as a "receipt". This description is consistent with how Mr. Nair described the handwritten document and how, in his testimony, it was presented to him for signature. On this point, I accept Mr. Nair's explanation about why he signed the document. He was receiving a cash deposit and signed his name to acknowledge receipt of that money.

[143] Third, Ms. Bhambra testified that the plaintiffs told her about the handwritten document in fall 2021 when she was preparing the initial drafts of the contract of purchase and sale. The plaintiffs suggest that Ms. Bhambra was mistaken about this timing. Despite having been challenged on this point, however, Ms. Bhambra testified that she was told about the handwritten document during her initial discussions with the plaintiffs, and did not agree that she learned about it in January 2022. I am satisfied that the plaintiffs told Ms. Bhambra about the handwritten document in fall 2021, well before January 2022 when, in their evidence, it was created.

[144] The timing of the $10,000 cash payment is also relevant in respect of the handwritten document. Both parties were asked about banking records that might substantiate the timing of this payment. Neither party, however, produced such records, and both provided explanations about why their banking records would not show a withdrawal or deposit of $10,000.

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[145] The plaintiffs testified they had gathered the cash from several sources and, it would seem, not from one or more bank accounts.

[146] The defendant explained that he used the cash to pay for the garage he was making at his residence. He testified that he “used some money for the finishing work for the insulation.” However, Mr. Nair denied that he told the plaintiffs that he needed cash to expand his garage so that he could move his business to his residence. He testified that the sort of business he was involved in was not permitted in his residential neighborhood. Mr. Nair added that he could not have received the cash in January because it would have been too cold for the construction work he was doing.

[147] I accept that the handwritten document, in whatever form, was created at the same time the $10,000 in cash was delivered to Mr. Nair. This makes sense because of the nature of a cash transaction. The Court heard testimony of the plaintiffs’ concern regarding handing over cash to Mr. Nair, even though they were friends, without some form of acknowledgement that the money had been received.

Conclusions

[148] Based on my findings of fact and my assessment of credibility, and having considered the law set out above, I am not satisfied that the plaintiffs have proven, on a balance of probabilities, that the discussions in August 2021 culminated in a binding verbal agreement. The plaintiffs have not sufficiently demonstrated that a *consensus ad idem* was reached amongst the parties. Critically, as I have set out above, I am not satisfied that the agreed upon price was $450,000. Moreover, although the plaintiffs take the position that the closing date was not necessary to the agreement, having a closing date would have prevented the problem that later arose.

[149] In reaching this finding, I accept Mr. Nair’s testimony that he intended to do a deal with the plaintiffs for the Property. I also accept his timeline of events: that the parties discussed the plaintiffs purchasing the Property in August 2021, that the

plaintiffs delivered the $15,000 bank draft on or about September 2, 2021, and that the plaintiffs delivered $10,000 to Mr. Nair, likely at the end of September 2021.

[150] Moreover, I agree with Mr. Nair's submission that the plaintiffs' payment of the deposits to him did not resolve any uncertainties in respect of terms of the transaction. To this extent, this case is similar to others where the payment of the deposits did not resolve uncertainties in contractual relations: *Booth*; *Middleton v. Howard*, 2012 BCSC 1089 at para. 164; *Constantine v. Hall*, 2017 NSSM 90 at paras. 39-40; *Erikson v. Svendsen*, [1982] B.C.W.L.D. 711, 1982 CarswellBC 1359 at paras. 11–14.

[151] Despite these deposits, the dispute about purchase price remained, as well as that on the closing date. Mr. Latif's communication to Ms. Alvi on October 2, 2021 reflects the state of affairs as I have found them to be. In that communication, Mr. Latif acknowledged that the plaintiffs needed a "proper letter" insofar as Mr. Nair could "change his mind anytime." This communication indicates that at the time, Mr. Latif was of the view that any agreement (to agree) was predicated on the preparation of a written contract.

[152] The plaintiffs have failed to establish on a balance of probabilities that there was an oral or written agreement as alleged, and I would dismiss their claim against the defendant.

COUNTERCLAIM

[153] The defendant seeks damages for the loss of the sale of the Property in April 2022. He submits that if the Court finds the handwritten document was manipulated by the plaintiffs—given its centrality to the claims advanced in this case—it ought to be found that the CPL was an abuse of process.

[154] I accept that the defendant has established a loss flowing from the collapse of the April 2022 deal. As I set out above, however, I have not found that the handwritten document was manipulated by the plaintiffs. Rather, uncertainties surrounding the creation of the handwritten document and its timing have led me to

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conclude that the plaintiffs have failed to meet their evidentiary burden in proving the existence of an agreement, oral or otherwise, to purchase the Property.

[155] Having considered the totality of the evidence, it is clear that this case demonstrates what can go wrong when individuals—even friends—try to organize their interests without documenting them. Resultant issues may arise from distrust, but may just as easily arise from communication issues, such as here.

[156] The record before me does not establish that the plaintiffs' actions were nefarious, nor does that record reveal an abuse of process.

[157] The counterclaim is dismissed.

CONCLUSION/ORDERS

[158] The plaintiffs' claim and the defendant's counterclaim are both dismissed.

[159] The parties agree that the plaintiffs' failure to establish that there was an enforceable contract entitles the plaintiffs to the return of their deposits in the amount of $25,000. By agreement, the defendant will forthwith return $25,000 to the plaintiffs.

[160] Unless there are circumstances relevant to the issue of costs, as the successful party, the defendant is entitled to his costs in defending the action. As the successful party on the counterclaim, the plaintiffs are entitled to their costs in defending the counterclaim. The counterclaim occupied comparatively less time than the main claim, however, there was some overlap with the issues raised. If the parties wish to make submissions about costs, they have leave to do so. If the parties request to make submissions, they must indicate their intention within 30 days of the date of these reasons for judgment.

"Winteringham J."

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