

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North Root Cannabis Ltd. v. 663466 B.C.  
Ltd.*,  
2023 BCSC 1395

Date: 20230811  
Docket: S2110430  
Registry: Vancouver

Between:

**North Root Cannabis Ltd. and Steven Baskott**

Plaintiffs

And

**663466 B.C. Ltd. and Gurmel Kainth**

Defendants

Before: The Honourable Mr. Justice Tindale

## Reasons for Judgment

### In Chambers

Counsel for Plaintiffs:

J. Sapers  
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Counsel for Defendants:

B. Kielmann  
B. Shebib

Place and Date of Hearing:

Vancouver, B.C.  
November 30, 2022;  
December 1, 2 & 7, 2022;  
January 20, 2023;  
February 1 & 15, 2023

Place and Date of Judgment:

Vancouver, B.C.  
August 11, 2023

[1] The plaintiffs North Root Cannabis Ltd. and Steven Baskott pursuant to a Notice of Application filed July 26, 2022 seek a number of orders on this summary trial application in relationship to commercial premises located at 416 East Columbia Street, New Westminster, British Columbia (the “Premises”).

[2] The defendants 663466 B.C. Ltd. and Gurmel Kainth are opposed to the relief sought by the plaintiffs.

**Background**

[3] The plaintiff North Root Cannabis Ltd. is a company incorporated on April 4, 2018 under the laws of British Columbia (“North Root”). The sole purpose of North Root is to own and operate a regulated cannabis retail store at the Premises.

[4] The plaintiff Steven Baskott is the sole director and officer of North Root.

[5] The defendant 663466 B.C. Ltd. (“663”) is a company incorporated under the laws of British Columbia.

[6] The defendant Gurmel Kainth is a businessman and the sole director of 663.

[7] At all material times 663 was the owner and landlord of the Premises.

[8] In September of 2018 North Root paid to the defendants \$8,400 in order to list the Premises as the proposed location for a Cannabis Retail Store License (the “License”) for North Root.

[9] In or about November 2018, North Root submitted an application to obtain a license to operate a retail cannabis store from the British Columbia Liquor and Cannabis Regulation Branch (the “LCRB”). The retail sale of cannabis requires a License issued by the LCRB as well as approval from the City of New Westminster (the “City”).

[10] On or about March 1, 2021 Mr. Kainth signed a Letter of Intent (the “LOI”) with Mr. Baskott and 761983 B.C. Ltd. to lease the Premises. 761983 B.C. Ltd. and North Root are the same company.

[11] The LOI reads as follows at paras. 4 – 6:

4. It is agreed between the parties that it is intended that the Lessees will sign the lease for the Premises upon the city of New Westminster rezoning the property for cannabis retail sales at a base rent of \$4700.00 monthly plus expenses (triple net expenses) at cost, plus a management fee of 5% of the triple net expenses, and that base rent shall be subject to an increase of 3% per year.

5. It is further agreed that the parties will execute the intended lease forthwith upon the city of New Westminster rezoning the property for cannabis retail sales or before November 1, 2021, and in consideration of payment by the Lessees of \$7500.00 (the “Deposit”, which amount shall be applied in full to the payment of future rent provided that the Lessee’s comply with the terms and timeline herein, and shall otherwise be forfeit to the Lessors), the receipt of which is hereby acknowledged by the Lessors, the Lessors will not lease the Premises to any other party or entity prior to preparation of the formal lease and its presentation for signing on or before November 1, 2021.

6. It is further agreed that, upon the signing of the lease, the Lessees shall at that time pay an additional amount towards rent to total 3 month’s pre-payment of rent.

[12] On June 7, 2021 the City rezoned the Premises to allow cannabis retail sales.

[13] On or about July 15, 2021 the LCRB gave North Root approval in principle for the License to operate a cannabis retail store on the Premises.

[14] Between August 2021 and the beginning of November 2021 the parties engaged in negotiations respecting the terms of a proposed lease agreement for the Premises.

[15] On November 7, 2021 Mr. Kainth purports to have sent an email to Mr. Baskott (the “November 7 Email”) which contained the following:

In addition, it was agreed that the lease would start on September 1, 2021, regardless of the date of signing of the lease. Accordingly, three months of the base rent and additional rent should already have been paid. So far you have paid only \$3800. You have a current deficit of \$12,463.00 must be received by 5 PM, November 8th, 2021. That deficit must be paid in full, by

certified cheque or bank draft, before I will now consider signing a lease with North Root Cannabis Ltd. for the premises.

[16] On November 9, 2021 Mr. Baskott delivered to Mr. Kainth two copies of a proposed lease for the Premises as well as a personal cheque for rent arrears.

[17] On November 11, 2021 Mr. Kainth signed the proposed lease with some revisions and provided a copy to be signed by Mr. Baskott (the "Lease"). Specifically, Mr. Kainth crossed out s. 17.15 (a) (iii) of that document which read:

indemnify and save harmless the Landlord from any and all loss, cost, damages, or liability whatsoever arising out of any failure by the Tenant to perform any and all of the terms, covenants, conditions, and provisions of this lease, PROVIDED HOWEVER THAT the liability of the Guarantor to the Landlord hereunder shall be at all times limited to an amount equal to six (6) months' Rent payable pursuant to Article 5 hereof at the time of such failure by the Tenant to pay any amount due and owing to the Landlord, PROVIDED FURTHER THAT the aforesaid limitation of liability of the Guarantor shall not apply costs or expenses incurred by the Landlord in relation to the repair of damage to the Leased Premises caused by the Guarantor or those for whom the Guarantor is responsible for at law.

[18] Along with the Lease Mr. Kainth sent a letter to the plaintiffs which read in part:

Please sign the copies and return to me one signed copy by noon, Monday the 15th of November 2021.

[19] The Lease was for a period of five years commencing on September 1, 2021. The plaintiff agreed to provide a security deposit in the amount of \$14,900 to the defendants and that the plaintiff was required to provide a certified cheque or bank draft in the amount of \$12,463 to bring the rent up to date including for the month of November 2021.

[20] The Lease contains the following definition for Permitted Use & Exclusive Use:

(p) "Permitted Use" means a "Non-medical Marijuana Dispensary" as governed by the City of New Westminster including Provincial & Federal and its by laws without exclusion of any laws that govern this use or business under any provincial or Federal jurisdictions.

[21] The Lease contains the following Tenant's Covenant:

(a) The Tenant will not use or occupy the Leased Premises or any part thereof for any purpose other than the Permitted Use, under such name as the Tenant in its sole discretion elects

[22] The Lease under the heading Observance of Laws contains the following:

(p) The Tenant will observe and perform all of its obligations and all matters and things necessary or expedient to be done, observed or performed by the Tenant by virtue of any law, statute, bylaw, ordinance, regulation or lawful requirement of any governmental authority or any public utility which in any degree affect the exercise of fulfilment in any manner of any right or obligation of the Tenant arising under or as a result of this Lease [d] or affect the Leased Premises or the use thereof by the Tenant, and all demands and notices in pursuance of same whether made or served upon the Landlord by reason of anything done, admitted or permitted by the Tenant on the Leased Premises during the term or any renewal thereof the following provisions shall apply

...

[23] On or about November 12, 2021 the defendants deposited the personal cheque into their bank account.

[24] On November 13, 2021 Mr. Baskott signed the Lease.

[25] On November 15, 2021 Mr. Baskott arranged for a certified cheque in the amount of \$12,463 to be obtained and delivered to Mr. Kainth because he had put a stop payment on the personal cheque that he gave to Mr. Kainth on November 9, 2021.

[26] On or about November 15, 2021 Mr. Kainth learned that the personal cheque had been returned by reason of a "payment stopped".

[27] On or about November 18, 2021 the defendants provided written notice to the plaintiff that there was no agreement between the parties and that the defendants repudiated the Lease (the "November 18 Letter").

[28] The November 18 Letter reads:

I find it necessary to inform you that the dealings of yourself and your partner, Jay, with me have been entirely unsatisfactory and materially misleading. I

agreed to enter into a lease with you and your corporation based upon detailed and specific terms. You failed in the fulfilment of those terms and provided me with materially misleading information. It is in those circumstances that I find it necessary to inform you that you have no valid lease for the subject premises. I return herewith the payment in advance for rent past due and advise you that I will proceed to find a suitable tenant for the premises.

By way of context, I have been trying to sign a lease with you since July 2021. Further to the Letter of Intent to Lease, I made it clear to you throughout that the lease must be signed no later than November 1, 2021, and that, in any event, the deemed start date of the lease would be September 1, 2021.

In August 2021, I provided you with a template for the lease. I made it fully clear to you that the lease must contain your personal guarantee of the tenant's obligations. You said that, under no circumstances, would you sign a lease which contained a personal guarantee. I further told you that all rental payments must be up to date and paid by certified cheque or money order, or I would not sign a lease with you and your corporation.

Despite being clearly informed of these necessary criteria, you attempted to present me with a lease which lacked an explicit personal guarantee. When I pointed out this deficiency, you complained about not wanting to risk your home.

Despite not having met the terms of signing the lease and paying up the due rent by November 1, 2021, I told you that I would grant an extension to November 15, 2021 at noon, but this time and date would be strictly enforced.

On November 9, 2021, you presented me with two copies of a lease and with a personal cheque for the overdue rent. The lease you presented had a six-month escape clause for the tenant. I spoke with my lawyer November 10, 2021 who told me that term was wholly unsatisfactory to me and I told you so on November 10, 2021. I also pointed out that the payment was not in the form required. I did sign the lease on November 10, 2021, having crossed out the six-month escape clause, and in reliance upon your personal cheque. I sent you to get legal advice about the release as it would be varied. I again informed you that the lease must be signed and presented no later than noon on November 15, 2021.

On Friday, November 12, 2021, I deposited your personal cheque which you provided in payment of back rent. On November 15, 2021, your partner, Jay, told me that the bank would not honour your cheque. On November 16, 2021, the bank confirmed that a stop payment had been entered on your cheque. It follows that there is not a valid lease, nor would there possibly be a valid lease unless the overdue rent was paid by noon on November 15, 2021.

This was a matter of grave concern to me. It is entirely evident that you provided your personal cheque to me in order to induce me to sign the lease. It is also evident that you had no intention of having your cheque honoured by your bank. In effect, you engaged in a false pretense in order to induce me to sign the lease. At no time did you bother to even tell me that you had stopped

payment on your cheque. You have engaged thereby in highly misleading conduct, intended to your own advantage and contrary to my best interests.

Finally, on November 15, 2021, at about 8:30 PM, I was presented with a copy of the lease signed by you, and a replacement payment for the overdue rent. This was over 8 ½ hours after the time at which I made it clear to you, in writing, that was the absolute final moment for presentation of the lease and completion of the overdue rent payment.

It is in the totality of the circumstances that I inform you that you have failed to comply with the agreed terms for entry into a lease of the premises, and I decline to entertain the possibility of renting to you or your corporation moving forward.

Attached hereto please find the cheque advanced to me on November 15, 2021.

I will now post a sign advertising the premises for lease. I will pursue my best options as they arise.

...

[29] On November 30, 2021 the plaintiffs filed a Notice of Civil Claim.

[30] On December 22, 2021 the defendants filed a Response to Civil Claim.

[31] On August 12, 2022 Mr. Justice Milman pronounced an order that the plaintiff's summary trial which was scheduled for August 15, 2022 be adjourned to October 21, 2022. In addition to the defendants were to file any responding materials by August 26, 2022 and the plaintiffs were to file and serve any reply materials by September 2, 2022.

[32] On September 1, 2022 Mr. Justice Milman pronounced a further order that the summary trial application which was set for October 21, 2022 was pre-emptory on the defendants. In addition the defendants were to file and serve any responding materials on or before September 20, 2022 and the plaintiffs were to file and serve any reply materials on or before October 19, 2022.

[33] The summary trial application did not proceed on October 21, 2022 as there was no judge available.

[34] On January 18, 2023 the plaintiffs were notified by the LCRB that the approval in principle for the License was extended from April 15, 2023 to January 15, 2024.

**Preliminary Issue**

[35] The defendants take issue with the admissibility of a number of affidavits filed by plaintiffs in support of their summary trial application. The affidavits that the defendants are opposed to being used on this application are:

- (i) the 1st affidavit of Adrian Giberson filed on October 19, 2022;
- (ii) the 2nd affidavit of Karen Kan filed on October 19, 2022;
- (iii) the 2nd affidavit of Jay Teranishi filed on October 19, 2022; and
- (iv) the 3rd affidavit of Baskott filed on October 19, 2022.

(“Plaintiff’s Reply Affidavits”)

[36] The plaintiffs have also raised concerns with two affidavits that the defendant’s seek leave to file which are:

- (i) the 2nd affidavit of Dane Camley made on November 28, 2022; and
- (ii) the 2nd affidavit of Sharon Martin made on November 29, 2022.

(“Defendant’s Reply Affidavits”)

[37] The defendants argue that they were recently served with the Plaintiff’s Reply Affidavits which raise new questions and investigations that needed to be taken. As a result of these investigations the defendants seek to file the Defendant’s Reply Affidavits.

[38] The defendants argue that the plaintiffs are in fact splitting their case with the filing of the Plaintiff’s Reply Affidavits.



[39] The defendants argue that this summary trial application is more complex than originally thought. One of the arguments that the defendants now make is that the plaintiffs did not follow the proper regulatory requirements and submitted a false or incomplete application to the LCRB and as such the Lease is predicated on a falsehood.

[40] The defendants argue that the 2nd affidavit of Dane Camley has not been filed and they require leave to rely on this affidavit. This affidavit is required to explain the false application filed by the plaintiffs to the LCRB.

[41] The plaintiffs say that the 2nd affidavit of Dane Camley is not relevant because whether or not the plaintiff submitted an incomplete application to obtain the License only goes to credibility and does not touch on the issues of the Lease formation.

[42] The plaintiffs argue that the Plaintiff's Reply Affidavits were required because the defendants have changed the landscape of issues such as alleging a breach of duty of good faith.

[43] Mr. Baskott's 3rd affidavit attaches audio recordings between himself and Mr. Kainth which are the best evidence before the court with regard to credibility issues and the accuracy of the statements made between the parties.

[44] The plaintiffs say that Mr. Teranishi's 2nd affidavit is required to clarify dates and times of conversations and actions between himself, Mr. Baskott and Mr. Kainth.

[45] In *Proctorio Incorporated v. Linkletter* 2021 BCSC 1154 Justice MacNaughton in discussing whether to admit additional affidavits stated the following at para. 68:

[68] Whether to admit the additional affidavits is an exercise of discretion to be exercised sparingly, only in clearly meritorious cases, and where excluding the evidence would result in a substantial injustice: *Ivarson v. Lloyd's M.J. Oppenheim Atty. in Fact in Canada for Lloyd's Underwriters et al.*, 2002 BCSC 1627 at para. 25.

[46] The Plaintiff's Reply Affidavits were filed in accordance with the order of Mr. Justice Milman made on September 1, 2022.

[47] The defendants argued that the plaintiffs were in fact splitting their case by filing the Plaintiff's Reply Affidavits. I do not agree with that submission. The affidavits of Adriane Giberson, Mr. Baskott and Mr. Teranishi directly reply to the issue of the condition precedent, duty of good faith and misrepresentation issues raised by the defendants. In my view these affidavits are relevant and material to those issues on this summary trial application and are admissible.

[48] The affidavit #2 of Karen Kan simply attaches as an exhibit some of the excerpts from the transcript of the examination for discovery of Mr. Baskott which was held on July 26, 2022. It is not clear from that affidavit what the purpose of these excerpts are and as such this affidavit will be given little weight.

[49] The defendants seek leave to file the Defendant's Reply Affidavits. Both the affidavit of Mr. Camley and Ms. Martin provide evidence to support the defendants' contention that the plaintiffs have breached a duty of good faith or that there has been a misrepresentation with regard to the plaintiffs' application to the LCRB.

[50] In my view if the defendants were not able to rely on this evidence on this summary trial application that would result in a substantial injustice.

[51] The defendants have leave to file and rely on the Defendant's Reply Affidavits on this application.

### **Position of the Parties**

#### **Plaintiffs**

[52] The plaintiffs argue that the Lease is valid and binding and that the defendants have breached their obligations pursuant to the Lease.

[53] The plaintiffs argue that the Lease is a signed written contract which expresses the parties' mutual intention to contract.

[54] The plaintiffs argue that the onus is on the defendants to rebut the presumption that no contract was intended.

[55] The plaintiffs say that on November 11, 2021 Mr. Kainth rejected the November 9 version of the Lease by crossing out s. 17.15 (a) (iii) and delivered a modified version of the Lease to Mr. Baskott with a letter that read “Please sign the copies and return to me on signed copy by noon, Monday the 15th of November 2021.”

[56] The plaintiffs argue that Mr. Kainth did not set out a mandatory or directory time or method of acceptance on November 11, 2021.

[57] In the alternative the plaintiffs argue that Mr. Kainth extended the deadline when he spoke to Mr. Teranishi on November 15, 2021 and said that Mr. Baskott could deliver the fully executed Lease and certified cheque by 5:00 pm that day. In addition Mr. Kainth invited Mr. Baskott to his home on November 15, 2021 to deliver the fully executed Lease and certified cheque.

[58] The plaintiffs argue that the Lease contains all of the essential elements of a lease which are the following:

- a) the parties;
- b) the lands demised;
- c) the commencement date;
- d) the term; and
- e) rent.

[59] The plaintiffs argue that the November 7 Email cannot be the basis for a condition precedent.

[60] The plaintiffs argue that the November 7 Email is a unilateral demand and in any event the email does not state that Mr. Kainth would not sign a lease if the monies were not paid in time

[61] The plaintiffs argue that this application is suitable for summary trial. The issue to be determined is whether or not the Lease is valid which is a narrow issue. The facts to make this determination are before the court.

[62] The plaintiffs argue that the defendants have raised a number of collateral issues that do not have to be decided on this application. In any event any conflicts on essential issues can be resolved with reference to audio recordings made by Mr. Baskott and by reviewing the inconsistencies in the defence affidavits.

[63] The plaintiffs argue that it would be unjust not to determine this matter at summary trial because there is a low potential for duplication or inconsistent fact findings.

[64] The plaintiffs say that the defendants' arguments relate to the remedy portion of the trial.

[65] The plaintiffs say that the issues are not unique or complex and there will be prejudice to the plaintiffs if this matter is not determined because North Roots approval in principle for the License will expire.

[66] The plaintiffs say that the determination of this issue may result in the resolution of the case because if the Lease is found to be invalid the matter will be disposed of.

[67] The plaintiffs argue that Mr. Camley's evidence suggests that he has an interest in North Root and the plaintiffs filed a false application to obtain the License. The plaintiffs argue that this evidence is not relevant to the issue of whether or not the Lease is valid.

**Defendants**

[68] The defendants argue that their position on this summary trial application has not changed. The defendants say that the plaintiffs falsely induced the defendants to sign the Lease by their misrepresentations and the plaintiffs failed to meet the condition precedent.

[69] The defendants argue that this application is not suitable for summary trial.

[70] The defendants argue that if the plaintiffs want to sever the issue of liability that issue must be considered first. The defendants argue that the courts are reluctant to decide cases in a piecemeal fashion and are wary of making determinations on one issue when that issue is intertwined with other issues.

[71] The defendants argue that the issue of liability should not be severed because there are credibility issues in this case.

[72] The defendants say that a significant credibility issue in this case is the fact that Mr. Baskott put a stop payment on the personal cheque that he had delivered to Mr. Kainth and then lied to Mr. Kainth saying that the bank had made a mistake in processing that cheque.

[73] The defendants argue that Mr. Baskott did not disclose material facts to the LCRB in order to obtain the License.

[74] The defendants say that a licensee must be forthright in providing information to the LCRB. Mr. Camley deposed that he entered into a partnership to obtain a cannabis retail store with Mr. Baskott and that he had provided funding in that regard.

[75] Mr. Baskott denies that Mr. Camley had any role with North Root.

[76] The defendants argue that nowhere in Mr. Baskott's affidavits or government application documents does he mention the funding from or involvement of Mr. Camley.

[77] Mr. Camley in his 1st affidavit made on September 20, 2022 deposes to the following at para. 18:

[18] It's my understanding that part of the Provincial application process is to complete an Associate Financial Integrity Form and a Business Financial Integrity Form (collectively, the "**Financial Integrity Forms**"), and for the applicant to provide a list of all funding sources and partners. I was a partner with Mr. Baskott and I was providing funding to North Root, but I was never asked to fill out an associate financial integrity form and it is my understanding one could not have been filled out on my behalf. Attached hereto and collectively marked **Exhibit "A"** is a copy of the Financial Integrity Forms downloaded from the government website.

[78] The defendants argue that they have not been provided several financial documents from the plaintiffs in relationship to how the plaintiffs finance their business expenses. The defendants say that the failure to disclose this information supports the theory that the plaintiffs provided false information to the LCRB.

[79] The defendants argue that the plaintiffs have breached the duty of good faith with the defendants by failing to follow the required legal steps to obtain the License. The reason for the Lease with the defendants is to operate a cannabis retail store. If the plaintiffs made material omissions in applying for the License they have compromised that fundamental purpose.

[80] The defendants argue that there is a clear conflict in the evidence between Mr. Camley and Mr. Baskott which effects the determination of the validity of the Lease as well as any damages for specific performance

[81] The defendants argue that the issue of the validity of the lease should not be severed from the trial itself as the plaintiffs have not demonstrated that severance will result in any substantial savings of time and expense nor that this issue would be determinative.

[82] The defendants argue that this matter is not suitable for summary trial because there is a large amount of money involved. The matter is complex given the numerous contradictory affidavits as well as audio recordings between the parties.

[83] The defendants say that there is no urgency in this matter as there is an option to extend the approval in principle for the License and credibility is a central feature in this litigation.

[84] The defendants are concerned that if the court finds that the Lease is valid but the LCRB does not grant the License by reason of material nondisclosure then that could generate new legal issues and disputes.

[85] The defendants argue that this matter is not suitable for summary trial because the plaintiffs disclosed several hundred pages of new documents on October 18, 2022 and there is further evidence to uncover.

[86] The defendants argue that the Lease is not valid in any event because the plaintiffs failed to comply with the condition precedent set out in the November 7 Email being the satisfaction of the rent arrears by certified cheque or bank draft.

[87] The defendants argue that they could not waive the condition precedent on the basis of a false assumption. The plaintiffs knew that the personal cheque was cancelled and never informed the defendants about that for approximately four days.

[88] The defendants required the plaintiffs to deliver the executed Lease and certified cheque by November 15, 2021 at 12:00 pm which they did not do.

### **Decision**

[89] The Issues on this application are:

- a) Is this matter suitable for summary trial;
- b) Should the issue of the Lease's validity be "hived off" from the remaining issues in this action;
- c) Is the Lease valid; and
- d) Was there a condition precedent to signing the Lease?

[90] The three requirements that must be established for a binding contract are (i) there must be an intention to contract, (ii) the essential terms must be agreed (iii) and the terms must be sufficiently certain: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 121.

[91] The Court of Appeal for British Columbia in *1001790 BC Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321 in discussing whether a written agreement reflected the parties' intentions stated the following at para. 36:

[36] For a very long time, the law has been clear that where a document containing contractual terms has been signed, whether one of the parties was aware of its terms and conditions is irrelevant. In the absence of fraud or misrepresentation, the signing party is bound and it is immaterial whether that party has read the document: *L'Estrange v. F. Graucob, Limited*, [1934] 2 KB 394 at 403 (CA).

[92] The Court in *1001790* went on to say the following at para. 41:

[41] Where a contract has been wholly reduced to writing, as in this case, that outward expression is the contract itself, not the subjective views of the parties. This was discussed by Justice Newbury in *Berthin v. Berthin*, 2016 BCCA 104:

[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* (6<sup>th</sup> ed. 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

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. 6Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. V. Irving Refining Ltd.*, [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 to 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*, 5<sup>th</sup> ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, is 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. Dalglish*, [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. [At para. 27.]

[Emphasis added.]

[93] There is no conflict in the evidence that on November 9, 2021 Mr. Baskott delivered to Mr. Kainth two copies of the proposed lease as well as a personal cheque for rent arrears. There is also no conflict in the evidence that on November 11, 2021 Mr. Kainth after making a minor revision to the Lease signed it and forwarded it to Mr. Baskott for his signature.

[94] The conflict in the evidence surrounding the execution of the Lease begins on November 7, 2021. Mr. Kainth deposes that he sent the November 7 Email to Mr. Baskott. Mr. Baskott in his affidavit #3 deposes at para. 8 that the first time he saw the November 7 Email was when he read Mr. Kainth's #1 affidavit.

[95] There is also disagreement in the evidence between Mr. Kainth, Mr. Baskott and Mr. Teranishi surrounding the deadline for providing the rent arrears payment and executed Lease to Mr. Kainth.

[96] In *Beese v. Beese*, 2004 BCSC 792 Melnick J. in discussing extending the time for acceptance of an offer stated the following at para 20:

[20] Although Mr. Beese relies on the fact that he did not receive notification of acceptance within the time limit he specified in his March 19 letter, that is the least of Ms. Beese's problems. This is especially so given Mr. Berris's April 25, 2002 assertion on Mr. Beese's behalf that Mr. Beese was going to withdraw his offer if things were not finalized right away. That comment certainly implies an intention to extend the date for the acceptance of the offer. In *Imperial Oil Ltd. v. C&G Holdings Ltd.* (1986), 58 Nfld. & P.E.I.R 326 (Nfld. T.D.) Mr. Justice Goodrich had this to say about extending the time for acceptance of an offer at para. 86:

[86] If an offer is made by one party to another and they afterwards by their own conduct enter upon a course of action which has the effect of leading the [offeree] to suppose that the offer remains open although the time limited for acceptance as expired, the offeror will not be allowed to insist on the time limitation where it would be inequitable having regard to the conduct of the parties.

[97] There are significant credibility issues on this summary trial application. Not the least of which is the fact that Mr. Baskott stopped payment on the personal cheque that he delivered to Mr. Kainth with the two copies of the proposed lease and then misled Mr. Kainth as to why the personal cheque needed to be replaced

[98] It is clear on the evidence that Mr. Kainth extended the time for providing an executed Lease and the rent arrears payments on a number of occasions.

[99] There is however a considerable divergence in the evidence as to what occurred on November 15, 2021 and whether or not Mr. Kainth extended the 12:00 pm deadline to a later time.

[100] Mr. Kainth in his 3rd affidavit made on September 20, 2022 deposed to the following at paras. 20 - 24:

(20) In the early evening on November 15, 2021, Mr. Baskott called me and asked if he could drop by my house with the November 15 Cheque that he had received from Mr. Teranishi and the November 11 Lease. He told me that he had an issue with his bank. He told me that the bank messed up the Personal Cheque that he gave me. I told him that he needed to get a letter from them. He told me that he got the bank manager to put notes on my account that they messed it up and he told me that he had a meeting with another manager on Friday of this week because of the problem that this has created for him. I told him to tell the bank that he needed a letter for your creditor so that he could give a copy of that letter to me explaining what happened. Mr. Baskott agreed to do that.

(21) Despite Mr. Baskott's assurance to me that he would get that letter from the bank he never did.

(22) On November 15, 2021, at or about 8:00 PM, Mr. Baskott attended my home and dropped off a signed copy of the November 11 Lease and the November 15 Cheque issued by the Golf and Fraser Fisherman's Credit Union as replacement for the Personal Cheque.

(23) Mr. Baskott asked me for the keys to the Premises, but I refused to provide them to him. I told him that I needed to think about things, and he left.

(24) At no time did I tell Mr. Baskott that I was accepting the November 11 Lease. I was upset and frustrated with what had transpired with the Personal Cheque, and my belief that Mr. Baskott had lied to me, but I did not want to get into a confrontation with Mr. Baskott at my home.

[101] In contrast to Mr. Kainth's evidence about November 15, 2021 Mr. Baskott in his 3rd affidavit made on October 18, 2022 deposed to the following at paras. 30 - 32:

(30) In further reply to paragraphs 20 and 21 of Kainth Affidavit #3, Mr. Kainth's description of our phone call at around 7:30 PM on November 15 is inaccurate. I recorded this phone call and produced the recording to the Defendants as Plaintiffs Document #52. The recording is accurate, complete, and I have not modified it in any way. Attached to my affidavit as Exhibit "A" is a USB stick containing a true copy of the recording.

(31) In reply to paragraphs 22, 23 and 24 of Kainth Affidavit #3, when I asked Mr. Kainth for keys to the Leased Premises on November 15, he said he could not give them to me because he did not have the keys with him at home. Contrary to paragraph 23 of Kainth Affidavit #3, Mr. Kainth did not tell me he "needed to think about things", or otherwise that he was not accepting the Lease. Our meeting went smoothly, and Mr. Kainth did not communicate that he was upset or frustrated, or otherwise indicate any reservations about the Lease. If Mr. Kainth had expressed reservations about the Lease, I would not have given him at the Lease and Certified Cheque.

(32) Attached to my affidavit as Exhibit "B" are true excerpts from the Kainth XFD Transcript (pages 52 and 75-81) where Mr. Kainth explains why he met me on November 15 to get the Lease, where Mr. Kainth says that he was "so happy" to have the Lease in his hands on November 15.

[102] It is generally accurate that Mr. Kainth said during his Examination for Discovery that he was "so happy" to have the Lease in his hands on November 15. Mr. Kainth also said he was concerned that the Lease which was in a binder with loose pages could have been changed as a reason for him wanting the Lease in his hands. It is also clear that Mr. Baskott continued to mislead Mr. Kainth about the difficulties with the personal cheque during this conversation.

[103] An executed Lease and certified cheque for the rent arrears was provided to Mr. Kainth by the plaintiffs by approximately 8:00 pm on November 15, 2021.

[104] In determining whether a lease is capable of interpretation Mr. Justice Metzger in *666465 B.C. Ltd. v. Concord International Lands Ltd.* 2009 BCSC 52 stated the following at para. 16:

[16] To determine if the lease is capable of interpretation, the Court will consider whether the essential elements of a valid agreement for lease exists as per *Canada Square Corp. Ltd. v. Versafood Services Ltd.* (1981), 130 D.L.R. (3d) 205, at p. 214, 15 B.L.R. 89 (Ont. C.A.):

There is no disagreement between the parties to this appeal on the requisite terms of a valid agreement for lease. Both rely on the following passage in Williams' *The Canadian Law of Landlord and Tenant* (4<sup>th</sup> ed. 1973), at p. 75 as follows:

To be valid, an agreement for a lease must show (1) the parties, (2) a description of the premises to be demised, (3) at the commencement and (4) duration of the term, (5) the rent, if any, and (6) all the material terms of the contract not being matters incident to the relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.

[105] There is no disagreement in this case between the parties and that the Lease contains the essential elements as required by law.

[106] The issues raised by the defendants are not that the parties signed the Lease but that there was a condition precedent that was not adhered to; there was misrepresentations made by the plaintiff to Mr. Kainth; and there was a breach of a duty of good faith by the plaintiffs all of which invalidate the Lease.

[107] In discussing conditions precedent the Court of Appeal for British Columbia in *Peier v. Cressey Whistler Townhomes Limited Patnrship* 2012 BCCA 28 stated the following at para. 21:

[21] The majority in this Court agreed with the trial judge's reasoning and upheld the decree he granted the purchaser. While he disagreed in the result on the basis of the subject clause was not sufficiently certain, Mr. Justice Lambert recognize three kinds of conditions precedent at 298 - 99:

Each "condition precedent" case must be considered on its own facts. As Bouck J. indicated, some conditions precedent are so imprecise, or depend so entirely on the subjective state of mind of the purchaser, that the contract process must still be regarded as at the offer stage. An example would be "subject to the approval of the president of the corporate purchaser." In other cases, the condition precedent is clear, precise and objective. In those cases, a contract is completed; neither party can withdraw, but performance is held in suspense until the parties know whether the objective condition precedent is fulfilled. An example would be "subject to John Smith being elected as Mayor in the municipal election on 15 October of this year."

But there is a third class of condition precedent. Into that class fall the types of conditions which are partly subjective and partly objective. An example would be "subject to planning Department approval of the attached plan of subdivision". This looks on objective, but it differs from a truly objective condition in that someone has to solicit the

approval of the planning department. Perhaps some persuasion of the planning department will be required. Can the purchaser prevent the condition from being fulfilled by refusing to present the plan of subdivision to the planning department? This type of case has been dealt with by implying a term that the purchaser will take all reasonable steps to cause the plan to be presented to the planning department, and will, at the proper time and in the proper way, take all reasonable steps to have a plan approved by the planning department.

What he said has been recognized as the most helpful statement of the law on the various kinds of conditions precedent: *Mark 7 Development Ltd. v. Peace Holdings Ltd.* (1991), 53 B.C.L.R. (2d) 217 (C.A.) at 223-24, leave to appeal refused, [1991] 3 S.C.R. ix.

[108] Where there are conditions precedent that are partly subjective and partly objective the court will imply a term whereby the party responsible for having the condition fulfilled promises to make a *bona fide* effort to have it done. Until the condition is fulfilled or waived, the obligations of the parties to complete the transaction will be suspended: *Peier* at para. 23.

[109] In this case the defendants argue that the condition precedent was established in the November 7 Email which Mr. Baskott denied receiving.

[110] Section 17.12 of the Lease requires the plaintiffs to provide a deposit of \$14,900 and s. 17.14 of the Lease requires the plaintiffs to provide a certified cheque or bank draft in the amount of \$12,463 for any arrears of rent.

[111] Each condition precedent must be determined on its own facts and there may be partly subjective and partly objective components to the condition precedent. While Mr. Kainth clearly extended the deadline to provide the executed Lease and certified cheque in order to determine whether this was a condition precedent or just a unilateral demand by Mr. Kainth all of the facts must be capable of determination. In this case there is a direct conflict in the evidence which I cannot resolve on affidavit evidence as to whether or not Mr. Baskott received the November 7 Email.

[112] I also cannot reconcile the various versions of events of November 15, 2021 between Mr. Baskott, Mr. Kainth and Mr. Teranishi in determining whether or not the 12:00 pm deadline was extended or waived by Mr. Kainth.

[113] The November 7 Email is the starting point for the analysis as to whether or not there was a condition precedent. The events of November 15, 2021 are also significant to this analysis. I am unable to find the facts necessary on this application to determine whether or not there was a condition precedent to the signing of the Lease.

[114] The more difficult issue on this summary trial application is that the defendants say that Mr. Baskott provided at best incomplete information to the LCRB and at worst provided false information to the LCRB respecting his relationship with Mr. Camley by not disclosing any funding provided by Mr. Camley for this project.

[115] The plaintiffs' position is that it is not necessary to make findings of fact regarding the defendants' theory about the regulatory application as those issues are not germane to the essential question of contract formation.

[116] I do not agree with that argument because the Premises were leased to the plaintiffs for the purpose of operating a "Non-Medical Marijuana Dispensary as governed by the City of New Westminster including Provincial & Federal and its by laws without exclusion of any laws that govern this use or business under any provincial or Federal jurisdictions." If the regulatory process was circumvented by the plaintiffs that would go to the core purpose of the Lease.

[117] Mr. Camley deposes that he was partners with Mr. Baskott and provided money for North Root. Mr. Baskott denies this and in fact deposes to the following in his #3 affidavit at para. 41:

[41] I intend to provide a full answer to Dane's allegations if that becomes necessary, or at any time it would assist the Court. In this affidavit, I do not address all of Dane's allegations and I reserve the right to do so in the future.

[118] Sharon Martin in her 2nd affidavit made on November 29, 2022 attaches as Exhibit D an Associate Financial Integrity Form listed at document number 143 in the Plaintiffs' Second Amended List of documents. On a review of that document Mr.

Baskott does not state that Mr. Camley has provided financing to Mr. Baskott or North Root.

[119] I cannot resolve the conflict in the evidence between Mr. Camley and Mr. Baskott in this regard based on their affidavit evidence. In my view it would also be unfair to the plaintiffs to do so given the fact that Mr. Baskott has not fully addressed the issues raised by Mr. Camley.

[120] Summary trial applications are governed by Rule 9-7 of the *Supreme Court Civil Rules* which reads:

- (15) On the hearing of a summary trial application, the court may
  - (a) grant judgment in favour of any party, either on an issue or generally, unless
    - (i) the court is unable, on the whole of the evidence before the Court on the application, to find the facts necessary to decide the issues of fact or law, or
    - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.
  - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
  - (c) award costs.

[121] Mr. Justice Veenstra in *McClay Estate v. Douglas*, 2021 BCSC 2295 reviewed the applicable law with regard to summary trial applications at paras. 52 - 54:

[52] The rule was discussed at length by Griffin J. (as she then was) in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BC SC 45 at paras. 49 and 57 - 61:

[49] The summary trial rule provides that a party may apply to the court for judgment on an issue or generally, and may tender any of affidavit evidence, answers to interrogatories, discovery evidence, admissions and expert evidence in support: R. 9-7 (2), (5). The court may allow for a party who has sworn an affidavit or an expert who is provided report to be cross-examined either before the court or another person: R. 9-7 (12).

...

[57] The fact that the summary trial rule permits a court to decide triable issues on an application was the focus of the Court of Appeal's judgment in *Inspiration [Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*

(1989), 36 B.C.L.R. (2d) 202 at 211 (C.A.)]. In *Inspiration Management* the chambers judge found conflicts on the affidavits that she could not resolve and so dismissed the application. The Court of Appeal held that the chambers judge applied the incorrect test by concluding that she should not give judgment “unless it was ‘clear that a trial in the usual way could not possibly make any difference to the outcome’”: at 210.

[58] the Court of Appeal in *Inspiration Management* found that the chambers judge was correct in concluding she could not resolve the conflicts in the evidence. However, the Court of Appeal felt that the conflicts were sufficiently narrow that they could have been resolved by ordering cross-examination on the affidavits before a judge, rather than dismissing the application: at 271.

[59] The following principles emerge from *Inspiration Management*:

1. The intention with the summary trial rule is to shortcut some of the normal processes involved in a trial in order to expedite the administration of justice. The rule substitutes other safeguards:
  - a. first, a lengthy notice period of the application;
  - b. second, a chambers judge cannot give judgment unless she can find the facts necessary to decide the issues of fact or law; and
  - c. third, a chambers judge who can decide the issues may decline to give judgment if she thinks it would be unjust to do so: at 214.
2. In determining whether the judge can find the necessary facts, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits. However, there may be other admissible evidence which will make it possible to find the necessary facts, such as evidence which corroborates one side’s affidavit and contradicts the other side, or, there may be other procedures which allow the judge to find the necessary facts, such as cross examination of the persons who gave the affidavits: at 216.
3. In deciding whether it would be unjust to decide the issues, the chambers judge can consider amongst other things:
  - a. the amount involved;
  - b. the complexity of the matter, although use of the rule is not limited to simple or straightforward cases;
  - c. its urgency;
  - d. any prejudice likely to arise by reason of delay;
  - e. the cost of a conventional trial in relation to the amount involved; and
  - f. the course of the proceedings; at 214



[60] The case of Inspiration Management sent a strong signal that the summary trial procedure could be used in complex cases and even where there were conflicting affidavits. The procedure became widely used in BC for all sorts of disputes.

[61] Where credibility is a material issue, and cannot be resolved by the body of written evidence, the courts have repeatedly found it difficult to find the necessary facts based on the contradictory affidavit evidence of the witnesses alone, and have also found it unjust to decide the issues without allowing for the right of cross examination: see *Mayer v. Mayer*, 2012 BCCA 77 at paras. 78-83.

[53] The question of when it is appropriate to give judgment on an issue was canvassed in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83 at paras. 22 to 34. In that judgment, Groberman J.A. concluded that the approach taken in *Coast Foundation v. Currie*, 2003 BCSC 1781 at paras. 13 to 18, and in *Bilfinger* at para. 110 was the appropriate one.

[54] *Bilfinger* distilled, from a detailed review of the law, a list of factors to be considered in determining whether it is appropriate to “hive off an issue” in a summary trial. That list appears at para. 110:

[110] In summary, the authorities in BC, including Hryniak, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

- a) whether the court can find the necessary facts to decide the issues of fact or law;
- b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
  - i. The implications of determining only some of the issues in the litigation, which requires consideration of such things as:
    - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with the issues remaining for trial;
    - (2) the potential for multiple appeals; and
    - (3) the novelty of the issues to be determined;
  - ii. the amount involved;
  - lii. the complexity of the matter;
  - iv. its urgency;
  - v. any prejudice likely to arise by reason of delay; and
  - vi. the cost of a conventional trial in relation to the amount involved.

[122] Absent good reason, a court should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation: *Ferrer v. 589557 B.C. Ltd.* 2020 BCCA 83 at para. 33.

[123] The parties made lengthy submissions with regard to whether or not there is a conflict in the law regarding the analysis on a summary trial application with regard to a single issue being determined. The defendants argued that *Quartet Forest Investments Corporation v. MacKenzie Fibre Management Corporation* 2022 BCSC 1354 was applicable however the plaintiffs argue that *Ferrer* is the law in British Columbia. I will simply say that the decision by the British Columbia Court of Appeal in *Ferrer* in my view is the law in British Columbia.

[124] On this summary trial application I am unable to resolve the conflict in the evidence with regard to the condition precedent alleged by the defendants nor am I able to resolve the conflict in the evidence regarding whether or not there have been misrepresentations in relationship to the plaintiff's regulatory application.

[125] I appreciate that there is some urgency in this matter being concluded however the plaintiffs have been successful in obtaining extensions for the License in the past and currently there is an extension to January 15, 2024.

[126] In my view this matter is complex. This case does not involve a simple determination of whether or not the Lease was signed. There are many credibility issues and nuanced arguments with regard to the condition precedent and potential misrepresentations on the plaintiffs' regulatory application.

[127] I am also of the view that the credibility issues are intertwined with the issue of whether or not the Lease is valid and any remedies that would be sought if the plaintiffs are successful.

[128] Determining whether the Lease is valid on a summary trial application may reduce the length of the trial however I am not satisfied that a conventional trial would still not be necessary given the position of the parties on this application. It is still likely that there would be a prolonged trial for damages or specific performance of the Lease.

[129] I am also concerned that if the issue of the Lease's validity is determined in isolation of the other issues in this action which include a claim by the plaintiffs for

specific performance of the Lease this could result in further court actions and appeals if it is ultimately determined that the plaintiffs' application for the License was flawed.

[130] In my view there are further investigations which need to be taken particularly with regard to the regulatory process that the plaintiffs participated in.

[131] It is also clear to me based on the number of affidavits that were filed by both parties shortly before this application commenced and after now having time to consider all of the extensive arguments made by the parties this matter was not ready to proceed as a summary trial application.

[132] For all the above noted reasons in my view there is no good reason to decide the issue of the Lease's validity in isolation from the other issues in this trial.

[133] This matter is not suitable for summary trial primarily because I am not able to find the facts necessary to determine the issues of the condition precedent nor the alleged misrepresentations by the plaintiffs in their application to the LCRB.

[134] It would be unjust to determine the issue of the Lease's validity on a summary trial application for all of the above noted reasons.

### **Conclusion**

[135] The plaintiffs Notice of Application filed July 26, 2022 is dismissed.

[136] Costs of the application will be in the cause.

"The Honourable Mr. Justice Tindale"