COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.,* 2024 BCCA 299

Date: 20240819
Dockets: CA48539; CA48540

Docket: CA48539

Between:

Ai Kang Yi Yuan Enterprises Corp.

Appellant
(Plaintiff)

And

1098586 B.C. Ltd.

Respondent
(Defendant)

-and-

Docket: CA48540

Between:

Wang Dong, Ai Kang Yi Yuan Enterprises Corp., and 1072709 B.C. Ltd.

Appellants
(Defendants)

And

AK (007) GP Management Ltd. and AK 007 Limited Partnership

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Voith
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2022 (*Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416, Vancouver Docket S-1812818).

Counsel for the Appellants:	C.C. Cheng
Counsel for the Respondents:	R.W. Cooper, K.C. S.J. Foweraker
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 19, 2024

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Winteringham

Summary:

This appeal concerns the legal status of a document signed in December 2016. One of the appellants, Dr. Wang, resiled from the document on the basis that it lacked essential terms and was therefore not a binding contract. At trial, the judge found the document was valid and ordered specific performance. On appeal, the appellants challenge the judge's order and primarily argue the document lacked essential terms pertaining to the share structure or control of the general partner of a limited partnership. They also challenge her specific performance order. Held: Appeal dismissed. The appellants do not challenge the judge's factual findings, nor do they argue the law requires a particular term that was absent from the document. It was open to the judge, based on the evidence before her, to conclude that management and control was not an essential term of the December document. The judge considered the particular circumstances of the case, including the financial and time pressures Dr. Wang faced, as well as the purpose of the document, to find that it was legally binding. The judge also had a proper basis on which to order specific performance.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal concerns the legal status of a document dated December 5, 2016 and described at trial as the December 5 Document. Two people signed that document: Dr. Wang, who held an interest in five properties that were necessary for a land assembly project; and Ms. Zhao, who ran the company that was to manage the land assembly project and that was defined at trial as GP7. GP7 was to act as the general partner of a limited partnership (LP7) in which new investors would buy "units" and share in profits. In the December 5 Document, Dr. Wang agreed to exchange his investment interest in the properties for units in the limited partnership.

[2] Dr. Wang later resiled from the December 5 Document. He did so on various bases, including that the December 5 Document was not a contract as it lacked various essential terms. The judge concluded the parties' agreement did not lack any terms considered essential by the parties or deemed essential by law and she ordered specific performance, including a transfer of title of one of the five properties to GP7.

[3] On this appeal, the appellants' main contention is that the parties did not agree on terms relating to matters they say were essential to the parties' bargain. They also challenge the judge's order for specific performance.

[4] For the reasons that follow, I would dismiss the appeal.

1. Background

[5] The trial of this matter involved two separate actions and occupied three weeks. At trial, Dr. Wang raised numerous issues in his effort to impugn the validity of the December 5 Document. Only Dr. Wang and Ms. Zhao gave evidence. They both gave a great deal of detailed evidence that related to earlier transactions they had been involved in together, to events that postdated the execution of the December 5 Document, and to the various issues the parties raised. The judge's reasons for judgment, indexed at 2022 BCSC 1416 (the "Trial Reasons"), carefully addressed each of these various issues over some 360 paragraphs. The judge thereafter conducted a further hearing to address the form of specific performance order that would be appropriate in the circumstances. The reasons that pertain to the judge's further orders are indexed at 2023 BCSC 363 (the "Specific Performance Reasons").

[6] The focus of the appellants' appeal circumscribes the facts and findings that remain relevant. The facts that follow are entirely based on the judge's uncontested findings. I have throughout used the same defined terms the judge did.

i) The general nature of the issues at trial and the principal legal entities that were involved

[7] The joint trial of the two actions before the judge concerned five lots (the "Properties") which are part of an ongoing land assembly in the 400 block of Alder and East 1st Streets in North Vancouver (the "Land Assembly"). The Properties are five of 39 residential lots on these blocks. A partnership was formed for the purpose of the Land Assembly, consisting of both a general partner, the respondent AK (007) GP Management Ltd. ("GP7"), and a limited partner, the respondent AK 007 Limited

Partnership (“LP7”), together the “Partnership”. Ms. Qun (Iris) Zhao is the sole director of GP7.

[8] In action S-194361, the Partnership sued the appellants Ai Kang Yi Yuan Enterprises Corp. (“AKYE”), AKYE’s wholly owned subsidiary 1072709 B.C. Ltd. (“107 Co.”), and AKYE’s principal and controlling mind, Dr. Dong Wang (collectively, the “Wang Parties”), for specific performance of the December 5 Document in which the Wang Parties agreed to invest their interest in the Properties into LP7 in exchange for units of LP7. The Wang Parties’ interest in the Properties consisted of $1.18 million in deposits paid by AKYE on four of the Properties (the “Deposit Properties”) and the title to the fifth property (“Lot 15”), held by 107 Co. at the time of the trial. The Wang Parties denied the December 5 Document was a contract. Instead, they contended it was an agreement to agree with uncertain terms.

[9] In action S-1812818, the appellant AKYE sought a resulting or constructive trust over the Deposit Properties in the amount of the deposits, or damages, on the basis that it did not enter into a contract to exchange the deposits for units in LP7.

[10] The central issue in both actions was whether the December 5 Document signed by Ms. Zhao and Dr. Wang created a binding contract.

[11] The trial judge found an enforceable contract existed between the respondent Partnership (GP7 and LP7) and the appellant Wang Parties, and ordered specific performance of the contract by way of a property transfer of Lot 15 from the Wang Parties to the Partnership, in exchange for the issuance to the Wang Parties of LP7 units for the deposit amounts and Lot 15, as agreed upon in the December 5 Document. The action regarding the Deposit Properties brought by AKYE was dismissed.

ii) The history of events and further relevant facts

[12] Ms. Zhao is a businesswoman who was born and educated in China. She moved to Vancouver in 2011, obtained an additional MBA, and developed an

investment management business identifying, advising and managing real estate investment opportunities, primarily for wealthy Chinese clients.

[13] Dr. Wang is a businessman who was born and educated in China. He moved to Vancouver in 2013. Dr. Wang incorporated AKYE in 2015 to make investments in Canada. Dr. Wang controls AKYE.

[14] In 2015, Ms. Zhao joined Dr. Wang as a partner and the CEO of a British Columbia company called Ai Kang Capital ("AKC"). From the outset, Ms. Zhao's duties included identifying, analyzing, and pursuing investment opportunities.

[15] In her role as CEO, Ms. Zhao identified two investment opportunities for AKC in the first half of 2016 that came to be known as Fund 6 and Fund 7. Fund 6 involved the acquisition of commercial lands in East Vancouver. Fund 6 was relevant because it relied on a structure, a partnership with a general and limited partner (GP6 and LP6 respectively), that both Ms. Zhao and Dr. Wang hoped might apply to the Land Assembly. Fund 7 was the Land Assembly transaction.

[16] In early 2016, Ms. Zhao advised Dr. Wang of the Land Assembly opportunity, in which 39 residential lots would be assembled in North Vancouver to build higher density multi-family housing. In April 2016, Ms. Zhao, as the CEO of AKC, incorporated 107 Co. as a subsidiary of AKYE. On May 30, 2016, she signed offers to purchase Lots 9, 10, and 11 on behalf of AKC, for which AKYE paid three deposits of $100,000 each. On June 30 and July 22, 2016, Ms. Zhao signed offers to buy Lot 15 and Lot 35 through 107 Co.

[17] In August 2016, the British Columbia government enacted a foreign buyers' tax. This was a 15% surtax on non-residents buying residential property in various areas including Metro Vancouver. Dr. Wang instructed Ms. Zhao to move the closing date for Lot 15 up to July 29, 2016 so the transaction could close before the foreign buyers' tax came into effect.

[18] On Dr. Wang's direction, Ms. Zhao negotiated an extension to the completion dates of the four Deposit Properties from September 2016 to late 2016 and early 2017. This was done so that Dr. Wang or AKC could find a way to pay for those properties. In September 2016, Dr. Wang paid the second deposits owed on the Deposit Properties, resulting in AKYE having advanced a total of $1.18 million. 107 Co. had earlier funded the purchase of Lot 15 in the amount of $2.255 million.

[19] By September 2016, both Dr. Wang and Ms. Zhao realized that AKC lacked the funds to complete the purchase of the Deposit Properties let alone the remaining lots needed for the Land Assembly. Both knew the success of the Land Assembly was contingent on attracting other investors and both expected the Land Assembly would proceed in the form of a general and limited partnership structure. They understood that AKC would not be the manager of the Land Assembly as a different control and equity structure would be required to attract the significant investment needed to proceed.

[20] On November 25, 2016, Ms. Zhao incorporated GP7 to act as a general partner of a limited partnership, LP7. She was the initial shareholder with 100 common shares. She instructed corporate counsel to prepare the LP7 agreement, though that agreement was not executed until December 15, 2016.

[21] In the fall of 2016, the Land Assembly required more than $10 million to close the purchase of the four Deposit Properties. Both Ms. Zhao and Dr. Wang wanted to complete the purchases so the Land Assembly could proceed and Dr. Wang did not want to lose the more than $1 million in deposits he had paid. Importantly, by the end of November 2016, both Ms. Zhao and Dr. Wang, as well as the investors Ms. Zhao had spoken to, expected Dr. Wang would "… formalize Lot 15 and the Deposits as investments in the Land Assembly in exchange for units in the anticipated LP7": Trial Reasons at para. 102.

[22] Between November 27, 2016 and December 5, 2016, Ms. Zhao sent various drafts of what would become the December 5 Document to Dr. Wang to effect the transfer of the deposits and Lot 15 to the partnership in exchange for units in the

anticipated LP7. The parties agreed the December 5 Document was initially drafted by Ms. Zhao without legal assistance and then likely redrafted by her in response to Dr. Wang's comments.

[23] Dr. Wang and Ms. Zhao signed the December 5 Document on that date. A copy of the certified English translation of the agreement is appended to the judge's Trial Reasons as Schedule 2. The judge summarized the December 5 Document as follows:

> ***The Parties***
>
> [105] The parties to the December 5 Document are identified as:
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> Party A: WANG Dong and 1072709 BC Ltd.
>
> Party B: AK (007) GP Management Ltd. and Aikang Fund VII Partnership
>
> [106] In the original Chinese version of the December 5 Document, Dr. Wang signed the bottom right of the first page, and beside his name and 107 Co. on the second page. Ms. Zhao signed for both the GP7 and the aspect of Party B referred to as "AK Fund VII Partnership". "December 5, 2016" is handwritten as the date of all four signatures.
>
> ***The Exchange of Investments for LP Units***
>
> [107] The December 5 Document provides for "Party A" to do as follows:
>
> Party A agrees to invest in Party B with 1072709 BC Ltd. Company owned by Party A as well as the property at 473/475 E 1st, North Vancouver held by Party A…
>
> [108] I suspect that some of the grammatical issues with this provision have more to do with the translation than the original document. I discuss the meaning to be given to this provision below.
>
> [109] The value of Party A's investment in the Partnership is set out in a table and is clearly based on the amounts Dr. Wang paid for the Deposits and the purchase of Lot 15, as well as the approximate date of these transactions. The table shows a total investment of $3,529,019. Dr. Wang testified that this table was an important aspect of the December 5 Document for him.
>
> [110] The table in the December 5 Document also sets out the number of LP Units, or shares, that Party A is entitled to, based on the timing of Dr. Wang's contribution to the Deposits and purchase price. Party A is credited with a beneficial subscription price of $1 less 3 cents for every month before December 2016 that he advanced his investment funds. Thus, for the May 30 deposits, his subscription unit price is discounted to 79 cents, and for his purchase of Lot 15 in July 2016, his subscription price is 85 cents. In total, the December 5 Document sets out that for his $3,529,019 investments in 2016, Dr. Wang is entitled to 4,110,332 LP7 units.

Representations

[111] The December 5 Document also contains the following statements regarding the future LP:

> Party B's basic issue price is C$1.00 per unit. Starting from December 1, 2016 and by the end of each calendar month, the issue will increase by C$0.03. Because Party A made its contribution earlier, the subscription price is discounted accordingly.
>
> Party B will charge all partners including Party A 1% of their contributions as operational management fee, and when the project profit exceeds 10% annual simple interest, 20% of the exceeding portion of the project profit will be charged as profit sharing.

Mortgage Guarantee

[112] The December 5 Document further states:

> After Party B owns the property, if Party B needs to mortgage the property for loan(s), and needs to acquire a personal guarantee from Party A, Party B shall pay Party A 1.5% of the amount guaranteed as a guarantee.

[113] In the context of the December 5 Document, it is fairly uncontentious that this provision contemplated a mortgage over Lot 15, and that Dr. Wang might be required to personally guarantee such a mortgage. In that event, this provision provided for Dr. Wang to receive a 1.5% fee for his services as guarantor.

Further Agreements

[114] Towards the end, the December 5 Document states:

> Both parties will further sign a partnership subscription agreement and other related agreement(s). Without explicit consents by both parties, any future agreements shall not be in conflict with this agreement.

[115] In his testimony at trial, Dr. Wang suggested that he considered that this clause contemplated the formal share subscription agreement in LP7, similar to the one he signed for the Renfrew Street project in October 2016. On the stand, he was visibly pleased that this clause was included, because it meant that he was not bound to comply with the December 5 Document until he signed that share subscription agreement. By the time he testified with respect to that provision, I find that he was keenly aware of his litigation position in this regard, and that it informed his testimony.

[116] On the whole of the evidence, I find that, in addition to the share subscription agreement in LP7, the "other related agreement(s)" would necessarily also include the transfer documentation and assignments required to effect the transfer of Dr. Wang and 107 Co.'s interests in the Properties to the Partnership.

Other Terms

[117] Finally, the December 5 Document concludes with a statement to the effect that the laws of BC will apply to "this agreement".

[24] The judge then addressed various events that followed the execution of the December 5 Document. Many of those events are not relevant to the issues raised on appeal. However, the judge found it was relevant that Dr. Wang assigned contracts to purchase the four Deposit Properties to 1098586 B.C. Ltd., a company Ms. Zhao incorporated on November 30, 2016 in anticipation of the fact that the Deposit Properties would be funded by outside investors and not by Dr. Wang. The assignment of the contracts, the judge found, was consistent with the parties' intentions in signing the December 5 Document. The purchases of the Deposit Properties were completed from December 2016 to February 2017, with funding coming from a third party.

[25] Further, in anticipation of Lot 15 being assigned to the partnership, and with the consent of Dr. Wang, Ms. Zhao arranged for a mortgage from the Bank of China against Lot 15, owned by 107 Co., with $700,000 of the proceeds going to LP7.

[26] In June 2017, Ms. Zhao had the share subscription agreement and share transfer documents, contemplated by the December 5 Document, prepared for Dr. Wang's execution. Under those agreements, he was to receive the agreed-upon units in LP7 in exchange for his 2016 investments in the Deposit Properties and in Lot 15.

[27] However, by that time and on account of various events, Dr. Wang believed Ms. Zhao had "betrayed" him and he refused to sign the documents. At the end of March 2018, Dr. Wang fired Ms. Zhao as the CEO of AKC.

2. Further Relevant Findings

[28] The following findings are relevant to the issues on appeal.

i) Credibility and reliability

[29] The judge generally accepted "… that Dr. Wang strove to tell the truth from his perspective, albeit filtered through his own sense of what was important for the Court to know, and limited by his lack of recollection": Trial Reasons at para. 31. However, the judge had significant concerns with the reliability of Dr. Wang's

evidence. She found that Dr. Wang "… provided little reliable testimony specific to the time of signing the December 5 Document" and that he had "… little independent recollection of the events of 2016 …": paras. 25, 28. She found that he "… had little recollection of events or his own state of mind, beyond those records": at para. 26. She further found he had "… almost no independent recollection, beyond very broad strokes, of his financial position at that time, the investments he approved, how they were funded, or their structure": at para. 29.

[30] The judge further found that when Dr. Wang testified about aspects of the December 5 Document "… he was keenly aware of his litigation position in this regard, and that it informed his testimony", and that he "… appeared to understand his testimony as a debate, rather than an exposition of factual information": at paras. 27, 115. She concluded that "… Dr. Wang's testimony about his actions and state of mind in 2016 [were] wholly unreliable": at para. 243.

[31] Conversely, she found Ms. Zhao's evidence, for the most part, to be both reliable and credible. She found that Ms. Zhao was "… significantly more responsive to the questions put to her …" and that her "… recollection of the relevant events of 2016 and 2017 [was] far clearer": at para. 39. She determined that where there was a conflict between Dr. Wang's and Ms. Zhao's evidence she "… generally prefer[red] the evidence of Ms. Zhao because it [was] more complete and reliable": at para. 41.

ii) Ms. Zhao "betrayed" Dr. Wang

[32] The judge identified that Dr. Wang was unable to precisely identify "… why or when he ceased to trust and rely on Ms. Zhao …" as CEO of AKC: at para. 30. She found that Dr. Wang's evidence was "… coloured by his conviction that Ms. Zhao had stolen from him": at para. 30. She found the evidence before her did not support Dr. Wang's beliefs. She further considered it unfortunate that "… Dr. Wang's convictions about the truth of these false allegations affected his ability to provide clear or useful evidence about Ms. Zhao's actions or related events throughout 2016 and the first half of 2017": at para. 30.

iii) Further relevant findings

[33] The judge made several further findings that are relevant.

a) Concerning the purpose of the December 5 Document

[34] The judge found:

> [137] Considering all of Dr. Wang's testimony (in the context of the events leading up to it, the documentary evidence and written communications, and his difficulties with specific recollection), I find that when Dr. Wang signed the December 5 Document he believed he had reached an agreement with Ms. Zhao with respect to the value of his contribution to the Land Assembly to that point. Dr. Wang trusted that Ms. Zhao was doing what she could to save his Deposits and find investors to complete the Deposit Properties' purchases at that time, though conflicts arising after that date led to a loss of confidence in Ms. Zhao.
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> [138] On all the evidence, I find that, at the time the December 5 Document was signed, the mutual purpose of the document was for Dr. Wang to exchange the money and real estate he had invested into the Land Assembly for a negotiated number of units in an anticipated partnership. Essentially, Dr. Wang was exchanging his personal interest (whether through AKYE or 107 Co.) in the Properties for a partnership interest in the LP7 for the Land Assembly more broadly. At that point, I find that both Dr. Wang and Ms. Zhao believed that Dr. Wang's equity in Lot 15 and the Deposit Properties would be transferred to an LP managed by GP7, in exchange for which Dr. Wang (or perhaps a company he controlled) would have an interest proportionate to his monetary investment at an agreed upon rate, upon the completion of the LP7 registration and related documentation.
>
> [139] I also find that Ms. Zhao believed, and Dr. Wang was aware, that if this was not done and, in particular, if Lot 15 was not transferred to the Partnership, Dr. Wang's $1.18 million in Deposits would likely be lost. This was because it would be impossible to convince new investors to invest over $10 million to complete the Deposit Properties purchase unless they were assured that the Partnership, and not Dr. Wang, owned and controlled Lot 15. I find that Mr. Bin Chen was the primary focus of this concern, but other investors also may have been waiting to see if the property held by Dr. Wang's companies would be formally turned over to the Partnership.

b) Concerning the parties' objective intention to be bound

[35] At trial, the appellants argued the December 5 Document provided "… minimal indication of an intention to be bound …". The judge, the appellant accepts, correctly described the legal principles that governed this enquiry. She found:

> [230] I find that the immediate factual context of the December 5 Document, and the urgency of reaching such an agreement, tends to support, rather than detract from, the binding nature of that Document. The immediate factual context was that the Partnership needed to secure nearly $2 million to close the purchase of Lot 35 only ten days later, and more than $10 million in total for transactions closing in the next 60 days. Securing those funds required the assignment of 107 Co.'s interest in Lot 35, as well as the Wang Parties' binding commitment to transfer their interest in the other Deposit Properties and Lot 15 to the Partnership.
>
> …
>
> [236] I find that the whole of the evidence indicates that the parties objectively intended to bind each other to these terms, knowing that the documents required to effect this exchange would still have to be prepared and signed. I also find that both signatories believed that they had reached final and binding terms for this exchange. Moreover, I find that on the continuum of contract formation set out in *Bawitko*, an objective observer would conclude that the parties had agreed to the terms in the December 5 Document and that the requirement of further documentation to effect these agreements did not undermine this binding intent.
>
> …
>
> [251] Overall, I am satisfied on all the evidence, including the December 5 Document on its face and the parties' prior and subsequent conduct, that both parties objectively intended to be bound by their agreement and to sign further documentation whereby Dr. Wang (or one of his companies) would transfer his interests in the Properties to the Partnership, and the Partnership would formally recognize his subscription to the agreed number of LP7 units.

[36] The foregoing findings, which are not appealed, are relevant because, as the judge correctly noted, "[w]here there is an intention to contract, the court will make a significant effort to give meaning to that agreement": at para. 260. She recognized, however, that "… a court cannot create an agreement on essential terms where none exists …": at para. 260.

c) Concerning "essential" terms

[37] As the central issue on appeal concerns whether the judge erred in finding the December 5 Document contained the essential terms that were necessary to give the agreement binding effect, I intend to return to those findings in greater detail. At this point, it is sufficient to refer to the judge's conclusion:

> [325] In conclusion, I find that the Partnership Parties have established on the evidence that the December 5 Document was complete on its face; that it was not missing essential terms; and that its essential terms were sufficiently certain to create a binding and valid contract.

d) Concerning specific performance

[38] At trial, the appellants argued that the respondents' claim for specific performance should fail because they had not established that Lot 15 was unique. The judge disagreed and said:

> [353] I find that Lot 15 is essential to the Land Assembly. It is not unique from other lots still to be acquired in the Land Assembly, but other properties are not equally suited to fulfill its unique role in the Land Assembly. Lot 15 is located such that it is specifically required for the Land Assembly. If the Partnership is unable to include it in the Land Assembly, I accept Ms. Zhao's evidence that the development plans that have been approved by the City for this block will not be possible. Although I am not in a position to determine whether the Land Assembly will be successful even with Lot 15, because there are additional lots still to be purchased, I find that Lot 15 is essential to the Land Assembly and all the investments made in it to date, which currently exceed $40 million. Lot 15 is necessary, though not sufficient, to complete the Land Assembly. Without Lot 15, the Land Assembly will fail.
>
> [354] Overall, I find that Lot 15 is sufficiently unique that no award of damages could properly compensate if it is not delivered to the Partnership. I find that an order for specific performance of the December 5 Document is warranted.

[39] For various reasons that were explained by the judge, and that I will develop more fully, she directed the parties to appear before her "… to address how to best give effect to the remedy …" she had ordered: at para. 356.

[40] In the Specific Performance Reasons, and following the further hearing, she concluded:

> [46] Overall, on the evidence and submissions before me, I am satisfied that the closest and most equitable means to transfer the 107 Co. shares, as they were contemplated to be transferred by the parties in December 2016 before the agreement was breached, is to order the transfer of Lot 15 itself, with the Partnership to pay for the costs of that transfer, including any applicable property transfer tax.

3. Errors in Judgment

[41] At trial, and again on appeal, the appellants' "central argument" regarding the insufficiency of the December 5 Document was that it failed to set out the share structure or control of GP7, including whether Dr. Wang would be able to control GP7 through his veto power in AKC.

[42] At trial, the appellants also argued that three further terms were essential to the December 5 Document: the parties to the investment; the timing of the investment; and whether the intended transfer was a share or property transfer. The appellants accept the judge's findings with respect to the parties to the December 5 Document, but they appeal her other findings. They also raise a new issue and assert that LP7 lacked certain essential features. Though these various issues are raised in the appellants' factum, and though the appellants maintain they remain live issues on appeal, they formed no part of the appellants' submissions at the appeal hearing. Instead, the appeal hearing was focused on a single issue, whether management and control of GP7 was an essential term.

[43] Similarly, though the appellants' factum contests the orders the judge made in relation to the remedy of specific performance, that issue was not addressed or developed at the appeal.

[44] The appellants describe the errors they rely on in the following terms:

a) Did the judge err in finding the December 5 Document was a contract?

b) Did the judge err in ordering a form of specific performance adjusted by abatement?

4. Analysis

[45] I have said the primary issue raised on appeal concerns whether the December 5 Document contained the essential terms it was required to, and in particular, whether it addressed the intended management of GP7.

[46] The judge correctly identified that what "… constitutes an 'essential' term in an agreement will depend on both the nature of the agreement and the circumstances of the case": at para. 262, citing *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 at para. 341, aff'd on appeal *Concord Pacific Acquisitions Inc. v. Oei*, 2022 BCCA 16; leave to appeal to SCC ref'd [2022] S.C.C.A. No. 71; see also *Chhina v. Rebecca L. Darnell Law Corporation,* 2021 BCCA 430 at para. 27. She correctly recognized that "[u]nderstanding the purpose and nature of the contract can assist with determining its vital terms and is also essentially fact-driven": at para. 266, citing *Concord Pacific Acquisitions Inc.* [BCCA] at para. 20.

[47] In *RTS Flexible Systems Ltd. v. Molkerei Alois Müller Gmbh & Company KG (UK Production)*, [2010] UKSC 14, the U.K. Supreme Court explained that essential terms are those terms that (a) the parties regarded as essential, or (b) which the law deems essential "… for the formation of legally binding relations": at para. 45.

[48] This emphasis on what the parties either regard as essential (a finding of fact) or on what the law deems to be essential (a question of law) is useful and important in the context of the present appeal. That is because the appellants do not generally challenge the judge's factual findings. Nor do they argue the law requires a particular term that was absent from the December 5 Document. These concessions significantly circumscribe what arguments remain open to the appellants.

i) Management of GP7

[49] The appellants contend the judge engaged in two "logical fallacies" that led her into error on this central issue. First, they submit the judge engaged in such false reasoning when she relied on the fact that Dr. Wang allowed Ms. Zhao to oversee the operational details of his business to then conclude that the question of his management and control of GP7 was not essential to him. Counsel argued "[j]ust because [Dr. Wang], as a practice, allowed Ms. Zhao to structure [or] engage in the operational details of his business to manage his capital, doesn't mean that here, the parties didn't have in their minds the idea that management and control were important and yet she equated the two … that is a faulty syllogism".

[50] The appellants primarily rely on para. 250 of the Trial Reasons in aid of this submission:

> [250] I find scant reliable evidence for the Wang Parties' central assertion that Dr. Wang could not have objectively intended to bind himself to the December 5 Document when he did not yet know the extent of his shares or control over GP7, or how the foreign buyers' tax issue would be settled. On the evidence before me, Dr. Wang had a history of authorizing Ms. Zhao to hold, manage, and control his investments and help him avoid the foreign buyers' tax, and he signed a different LP agreement before the final share structure of its GP was known only a couple of months prior. In 2016, he did not have a history of forgoing over $1 million in deposits in order to maintain direct control over his investments or to ensure that Ms. Zhao did not have that control. I find that this issue did not emerge until later, though it now appears to be at the centre of this litigation.

[51] Respectfully, I do not consider that a fair reading of para. 250, in the context of the judgment as a whole, supports the appellants' submissions. Paragraph 250 addresses two points: the issue of management and control of GP7 and the issue of the foreign buyers' tax. The judge's reference to Dr. Wang having a history of authorizing Ms. Zhao to manage and control his investments pertains to the foreign buyers' tax and not to the issue of control over GP7. This is clear from para. 250 and from other parts of the judgment where the judge explains how Ms. Zhao, on Dr. Wang's instructions, sought to navigate the foreign buyers' tax.

[52] The issue of the management of GP7, in para. 250, is addressed differently. With respect to this latter issue, the judge pointed to i) the fact Dr. Wang had earlier signed the LP6 agreement before the final share structure of GP6 was known; ii) Dr. Wang was reluctant to lose his deposits on the Deposit Properties; and iii) perhaps most importantly, the issue of management control, that Dr. Wang now asserted was "central", was an issue that did not emerge until later. Each of these circumstances was logically related to whether management and control of GP7 was essential to Dr. Wang at the time the parties signed the December 5 Document.

[53] The second "logical fallacy" the appellants point to is based on the judge's repeated reference to Dr. Wang's inability to secure further funds in the short term and to the very real risk he faced that he would lose the deposits he had paid, through different entities, for the Deposit Properties. They contend the fact Dr. Wang faced exigent circumstances does not necessarily mean he did not continue to consider management and control of GP7 essential to the transaction that underlay the December 5 Document.

[54] Several considerations undermine this further submission. First, the judge's emphasis on the general circumstances, including urgency and financial risk, facing Dr. Wang in the weeks leading up to December 5 do not, in my view, give rise to any logical incoherence. Rather, the appellants seek to attack the inferences the judge drew from these circumstances. However, absent palpable and overriding error, those inferences are entitled to deference: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 72–74.

[55] Second, and likely more importantly, the appellants' submission does not fairly address the judge's principal findings relating to whether management and control of GP7 was considered essential to the parties at the time they executed the December 5 Document. I have quoted from the judge's reasons at some length because of the importance of this issue to the appeal and because those reasons demonstrate how carefully and fully the judge grappled with the evidence and the position of the appellants:

> [315] I have found that on December 5, 2016, both Dr. Wang and GP7 objectively agreed to the transfer Dr. Wang's interest in the Properties to the Partnership in exchange for the number of LP7 units agreed to in the December 5 Document. I have also found that there was considerable urgency to both parties reaching this agreement, as Dr. Wang risked losing over $1 million that he had invested in the Deposits to date, and the Partnership risked losing the prospect of securing the Properties that were key to establishing itself as the main contender for the Land Assembly.
>
> [316] I have also found that both signatories understood that the share structure of GP7 was somewhat fluid at that time, but believed it would be "similar to" GP6.

[317] The Wang Parties say that, at the time Dr. Wang signed the December 5 Document, he expected that the Partnership would be structured like Fund 6, with AKC as the majority shareholder of the general partner. I find that this is likely, but I also find that he was aware that it was not possible to know what that share structure would be in a month or a year's time.

[318] While Dr. Wang wanted AKC to control GP7, he also wanted to secure value for his current investments and attract further investment so that the Land Assembly could proceed. Ms. Zhao also wanted AKC to have the majority stake in GP7 and also wanted to attract investment to complete pending and future purchases for the Land Assembly. Both understood that attracting further investment would likely require a distribution of GP7 shares.

[319] In many respects, the parties to the December 5 Document were aligned in their hopes for the future GP7 share structure. To the extent that they may have had different subjective ideas about how GP7 would be controlled—with Ms. Zhao believing she would be able to act both as the CEO of AKC and the director of GP7, and Dr. Wang believing that his veto power under the JVA gave him control over AKC and anything that AKC invested in—I find that these subjective hopes were neither contemplated in, nor essential terms of, the December 5 Document.

[320] I agree with the Wang Parties that the parties had not reached an agreement on the final share structure or control of GP7 at the time they signed the December 5 Document. Nor is it clear to me that they could have.

[321] This is not a case where the parties were agreeing to incorporate a corporation without agreeing on the proportionate shareholdings of the various investors. This was an agreement to issue units in a limited partnership, where it was known that other partners were actively being recruited to make substantial investments, and the final number of LP units and partners was not expected to be known for some time.

[322] Although I can imagine other cases where the share structure of the general partner would be an essential term to investment in a limited partner, such that a lack of agreement on this issue might render an agreement regarding the issuance of LP units uncertain, I find that is not the case on the facts and evidence before me.

[323] Instead, the evidence in this case establishes that both signatories objectively accepted that they did not know what the final GP7 share structure would be when they signed the December 5 Document, but that they still intended the terms of their exchange to be binding upon them.

[324] On the evidence before me, Dr. Wang signed the December 5 Document knowing that the LP7 was not yet registered and that the share structure of the GP7 was fluid and would depend on external investment and other longer-term issues. He had previously signed an agreement to subscribe in LP6 units before the share structure of GP6 was known. Finally, he was under considerable time and financial constraints to reach an agreement on the value of his contributions to LP7 or risk losing the value of his investments. On the evidence before me, I find that Dr. Wang objectively agreed to be bound by the terms of the December 5 Document

> notwithstanding that the share structure of the GP7 was not known and might not be known for some time (and could change in the future depending on investor requirements).

[56] The foregoing findings and analysis reveal that the judge's conclusions were based on numerous considerations. Certainly, the financial and time pressures Dr. Wang faced were relevant. But it is apparent that numerous other factors were material. This included a proper understanding of the purpose of the December 5 Document which, the judge found, served to transfer Dr. Wang's interest in the Deposit Properties and in Lot 5 to the proposed partnership in exchange for the number of LP7 units prescribed in the agreement. It included the finding, and the reality, that at the time the December 5 Document was executed, neither Dr. Wang nor Ms. Zhao knew, or could know, what the share structure of GP7 would be. Further, and importantly, the judge found that Dr. Wang's "hopes" or "subjective ideas" about management were not an essential term of the December 5 Document. None of these findings are challenged.

[57] In my view, there is no merit to this ground of appeal.

ii) Timing

[58] The appellants argue the judge erred when she found that agreement on timing for the exchange contemplated in the December 5 Document was not an essential term. They primarily rely on the findings of different courts, in different cases, in what they submit are similar circumstances.

[59] The judge referred to a number of authorities and correctly identified that "[t]iming has been found in some cases to be essential, but not in others …": Trial Reasons at para. 305. In the circumstances of the present case, she found:

> [306] I find the that agreement on the timing of the exchange contemplated in the December 5 Document was not an essential term. Rather than set a time limit, the parties agreed that the terms of the December 5 Document would be binding, and would be dependent on the timing of the preparation of the share subscription agreement and the transfer documentation.
>
> …

> [308] Similarly, I find that the parties to the December 5 Document intended that the issue of Dr. Wang's interest in the Deposit Properties, and the terms upon which his interests in all five Properties would be transferred to the Partnership, needed to be determined immediately, to secure outside investment, protect the Deposits, and complete the purchases. To achieve its purpose, that agreement could not wait for the preparation of the share subscription agreement or the transfer documentation which would have to be completed later. Nothing could be done until the value of Dr. Wang's investments had been agreed to in a binding manner between the parties, and I find that the timing of the preparation and signature of the subscription agreement and share transfer documentation was not an essential term.

[60] I see no error in these conclusions. They are based on findings of fact that are closely tied to the evidence and the particular circumstances of the case before the judge.

iii) Was Lot 15 to be transferred as a property or a share transfer?

[61] Though the judge accepted that the translation of the opening paragraph of the December 5 Document was problematic, she found:

> [295] However, I do not find this wording so unclear that the Court is not capable of interpreting it, as part of the exercise this Court is required to undertake where it is determined that both parties intended to enter into a binding contract.
>
> [296] I find that the best interpretation of this provision is that Party A, which expressly includes Dr. Wang and 107 Co. (and which I have found also includes AKYE), is agreeing that it will invest 107 Co. into Party B (the Partnership). In other words, I find that "with 107 Co." refers to how and what Party A will invest. I find this describes a share transfer of 107 Co.'s shares into the Partnership, which Dr. Wang could and did agree to on behalf of AKYE.
>
> [297] I find that the best interpretation of this provision, taking into account the guidance in *Sattva*, is that the words "as well as the Property at 473/475 E 1st" clarifies that the transfer of 107 Co. would include the transfer of Lot 15.
>
> [298] Even if I am incorrect in this regard, at worst, the December 5 Document contemplates that 107 Co. will transfer Lot 15 to the Partnership, or it leaves both options open. While uncertainty as to whether a share or property transfer is contemplated certainly has the potential to be an essential term in some agreements, I find that in this case, the means of transfer was not essential to the bargain between the parties.
>
> [299] For example, neither party presented evidence as to the implications for either party with respect to one transfer mechanism over the other. While the Wang Parties argue that there would be significant tax consequences for one type of transfer over another, no such evidence was led. Furthermore, Dr. Wang raised no concerns at all over the form of the documentation (by

> way of share transfer of 107 Co.) that was ultimately prepared to effect these transfers.
>
> [300] In conclusion, I find that the December 5 Document requires Dr. Wang, as the controlling mind of AKYE, to transfer Lot 15 by way of the transfer of the shares in 107 Co., to the Partnership. Even if the December 5 Document had contemplated a property transfer by 107 Co., or contemplated the possibility of both methods of transfer, I would not have found that the December 5 Document was uncertain with respect to an essential term in this respect.

[62] The appellants do not challenge any aspect of this analysis or these findings. Rather, they contend that notwithstanding these findings, the judge, in the Specific Performance Reasons, ordered that Lot 15, rather than the shares of 107 Co., be transferred to the respondents. I understand the appellants to argue the judge's reasons are therefore inconsistent.

[63] I disagree. The judge's initial findings were based on the evidence at trial. At that point, the question before her required her to interpret the December 15 Document. Her interpretation is entitled to deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 54–55; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 43–45. Further, the judge's interpretation is not challenged.

[64] The judge's final order, in the Specific Performance Reasons, followed a further hearing that took place after she issued the Trial Reasons. That final order had nothing to do with the interpretation of the December 5 Document or the binding effect of that document. Rather the judge's specific performance order sought to give effect to her earlier findings while concurrently addressing the reality that 107 Co. had, in the intervening years, become burdened with significant debt.

[65] Finally, the appellants do not address the judge's alternate finding (at para. 298 of the Trial Reasons) that the means by which Lot 15 was to be transferred "… was not essential to the bargain between the parties". That alternate finding is dispositive of this ground of appeal.

iv) Features of LP7

[66] As noted earlier, the fourth issue the appellants advanced before the judge was that there was uncertainty regarding the parties to the December 5 Document. The judge did not accept that submission and her findings are not challenged on appeal.

[67] Instead, the appellants now argue that LP7 lacked various specific features that were essential terms that should have been in an agreement to obtain units in LP7. In particular, they argue that where a bargain involves limited partnership units, even when a unit price has been agreed to, some features of the underlying investment vehicle will also be essential terms.

[68] The respondents assert, and the appellants do not contest, that this issue is raised for the first time on appeal.

[69] This Court will not generally entertain a new issue on appeal: *R. v. Gill*, 2018 BCCA 144 at paras. 9–12; *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at para. 44. Courts may depart from this rule where the court has a sufficient evidentiary record and the findings of fact to do so or where failing to do so would risk creating an injustice: *Quan v. Cusson*, 2009 SCC 62 at para. 37, quoting from *Wasauksing First Nation v. Wasausink Lands Inc.*, 184 O.A.C. 84 at para. 102, 2004 CanLII 15484 (Ont. C.A.). However, leave is required to raise a new issue and the onus lies with the applicant to establish "… that the record in the court below is as complete as it would have been had the issue been raised in a timely way": *Gill* at para. 11, relying on *Zeligs v. Janes*, 2016 BCCA 280 at para. 66.

[70] We have seen that what contractual terms constitute "essential" terms in a particular agreement, made between two parties in particular circumstances, will often be a fact-specific inquiry. In this case, the judge made extensive findings based on the detailed record before her when she addressed the specific concerns the appellants raised. She did not, however, make findings that address the issue the appellants now raise. Further, the appellants have not sought leave to raise the

issue or addressed the requirements of any such application. Indeed, the issue is simply raised in their factum and was never spoken to further.

[71] In such circumstances, I do not consider it would be appropriate to address this further issue.

v) The specific performance issue

[72] The appellants contend the judge erred in granting an order for specific performance "… that was not pleaded, on a theory of abatement that was neither pleaded nor argued [*sic*] at trial, and without any evidence to prove the abatement". They contend the respondents, in their Notice of Civil Claim, sought to enforce "a share transfer agreement". They did not seek the transfer of Lot 15 nor did they plead "… that specific performance of the December [5] Document would require an abatement of the value of 107 Co.'s shares".

[73] The issue the appellants raise must first be put into context. As noted earlier, the judge had ordered the parties to reappear before her "… to give effect to the remedy …" she had ordered: at para. 356. The judge expressed concern that "… 107 Co. no longer simply holds Lot 15, but substantial other potential liabilities …": at para. 355. Elsewhere, she expressed the concern that "… 107 Co. may now be encumbered by additional debts beyond what was contemplated in December 2016…": at para. 356.

[74] A review of the Specific Performance Reasons reveals the judge's concerns were not notional or speculative. She referred to disclosure during the trial "… that 107 Co. had been significantly altered in its purpose and wasted in terms of its liabilities and encumbrances…": Specific Performance Reasons at para. 30. She noted the appellants had argued that an obstacle to ordering specific performance was that "… in the more than five years since entering the contact, 107 Co. had been substantially encumbered by the Wang Parties, and was no longer simply an investment vehicle to hold and transfer Lot 15": at para. 4. She observed that the appellants, in their closing submissions, disclosed "… that the subject matter of the specific performance claim had been significantly altered since December 5,

2016…": at para. 33. She also identified that at the further hearing that took place, the appellants acknowledged "…that by the time of trial and [the further hearing], 107 Co. ha[d] been substantially altered in ways unrelated to the holding and transferring of Lot 15": at para. 39.

[75] The Specific Performance Reasons are careful and thorough. They identify the positions of the parties and the judge's conclusions on the various issues that were raised by the appellants before her. Most of her conclusions are not appealed.

[76] The judge identified that in making an order for specific performance, the court exercises its powers in equity. She considered it "… well-established that where real property that is the subject of a specific performance order has been damaged between the date of contract and the date of trial, a series of equitable principles apply to allow for equity be done…": para. 31. At para. 32, she referred to the Hon. Robert Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters) (loose-leaf update 2021, release 1), at 11.7, where the author states:

> In ordering specific relief, the courts will often impose terms or conditions which alter the letter but not the spirit of the agreement, where the situation makes it inappropriate to grant a straightforward and unqualified order.

[77] It is noteworthy that the appellants do not argue the judge erred in her application or extension of these principles or that it was not open to her, on a principled basis, to make the orders she did.

[78] Instead, they raise the narrow points I have identified and to which I now turn.

i) Disclosure

[79] The appellants argue that at the further hearing before the judge, she neither re-opened the trial nor admitted further affidavit evidence. They appear to argue the judge lacked the evidence necessary to make the order she did.

[80] Based on the findings I have referred to, this is simply inaccurate. There was evidence before the judge, indeed the appellants conceded, that 107 Co. had been "substantially encumbered" and "substantially altered". The judge identified "… there

was some evidence at trial regarding 107 Co.'s corporate and financial status …", though it was not what she would have expected: Specific Performance Reasons at para. 33. She also said "… by the end of 2020, 107 Co. owed over $4 million dollars to 'related parties' or 'shareholders'": at para. 34.

[81] It was, however, not necessary for the judge to know the precise extent to which 107 Co. was encumbered. This was not a case where, for example, specific performance for the sale of a property is ordered subject to an abatement for a specific sum to accommodate for damage to that property. At the time the December 5 Document was signed, 107 Co. only held Lot 15. In the intervening years, the judge found 107 Co. had been "altered" or "wasted". Ordering the transfer of 107 Co. on an "as-is where-is" basis, as the appellants sought, would not, the judge found, give effect to the December 5 Document.

[82] A further consideration is relevant. In the Trial Reasons, and again in the Specific Performance Reasons, the judge expressed both surprise and frustration that the appellants had not made more complete disclosure of the financial condition of 107 Co. The appellants apparently responded they were under no obligation to do so based on the respondents' notice of civil claim. I disagree.

[83] Assume a plaintiff seeks specific performance of a contract for the sale of property. Imagine the defendant is aware the property has, since the contract was signed, been damaged in a fire. The failure to disclose the fire, and ensuing damage to the property, would not be consistent with the defendant's disclosure obligations and would arguably be improper.

[84] The same is true in this case. The failure to disclose the altered financial condition of 107 Co., which in this case was caused by the appellants and known only to them was, at a minimum, inconsistent with the appellants' disclosure obligations.

[85] Finally, it is relevant that the judge considered obtaining further disclosure of 107 Co.'s financial condition. Apparently, the judge was led to understand that disclosure orders might "… have complex implications for both this litigation and the related litigation between [the] parties …" that was not before her: Specific Performance Reasons at para. 37. The judge then addressed her proposed order and said:

> [44] This resolution also averts apparent concerns of the Wang Parties around disclosure and the provision of information regarding their business dealings involving 107 Co. in the last five to six years. Although counsel for the Wang Parties indicated that he would likely not be able to get instructions to agree to this mechanism of compliance with the order for specific performance of the shares, counsel stated that he would have difficulty opposing such an order (provided that his client was not required to pay the PPT), and couldn't "think of how [he] could oppose that" order on behalf of his client. I also note that in written submissions at trial, the Wang Parties took the position that any order for specific performance ought to be of Lot 15 only (though they also argued such an order was not open to me on the pleadings).
>
> [Emphasis added.]

[86] Accordingly, I am satisfied the judge had a proper evidentiary basis before her on which to make the order for specific performance she did.

ii) Pleadings

[87] The appellants contend the judge granted a form of relief that was not advanced in the respondents' pleadings.

[88] The respondents' notice of civil claim sought specific performance of the December 5 Document (defined as the "Share Transfer Agreement"). They pleaded that the "… sole asset of 107 Co. is title to [Lot 15]" and that "… 107 Co. holds title to [Lot 15] in trust for the benefit of the Plaintiffs".

[89] I have identified that the appellants did not disclose they had encumbered 107 Co. and that these facts did not emerge until the trial, including during the appellants' closing submissions.

[90] The appellants are correct that a plaintiff is normally required to plead the specific relief they seek. However, that broad rule is intended to assist a defendant, and the court, in understanding the claim being advanced and the relief being sought. Proper pleadings enhance efficiency and prevent either party from being surprised at trial. Reliance on a plaintiff's pleadings is not, however, intended to insulate a defendant from the strategic or other decisions they may make after pleadings are exchanged and while a trial is pending.

[91] In this case, there is little doubt it would have been open to the respondents to apply to amend their claim after learning the appellants had encumbered 107 Co. This is particularly so where the appellants had failed to comply with their disclosure obligations. However, the fact the respondents did not make any such application, in the circumstances of this case, is of no moment.

[92] Ultimately, both the disclosure and pleadings issues the appellants complain of are of their own making and a product of their business and litigation decisions. I would not accede to this ground of appeal.

5. Disposition

[93] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Winteringham"