IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ertl v. Morrison,*
2024 BCSC 1521

Date: 20240819
Docket: S227354
Registry: Vancouver

Between:

Martin Gunther Ertl

Plaintiff

And:

Diew Lansie Morrison and Angelina Lansie Morrison

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:	N. Mangan E. Yacout
Counsel for the Defendants:	A. Vulpe
Place and Dates of Hearing:	Vancouver, B.C. March 27-28, 2024
Place and Date of Judgment:	Vancouver, B.C. August 19, 2024

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Introduction

[1] The plaintiff applies to enforce a settlement agreement that he says he entered into with the defendants respecting litigation over a piece of real property located at 400 Marine Drive, Ucluelet, BC (the “Property”).

[2] The plaintiff argues that a settlement agreement reached between the parties was confirmed in a letter between counsel dated May 11, 2023 (the “Settlement Agreement”). The Settlement Agreement required the defendants to pay the sum of $912,500 representing damages up to the date of the Settlement Agreement. He submits that the settlement should be enforced under ss. 8 and 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[3] The defendants deny that any *consensus ad idem* was reached and submit that one of the defendants, Diew Lansie Morrison, no longer had capacity to provide instructions or enter into a contract as of the end of February 2023 as a result of developing a medical condition called reversible cerebral vasoconstriction syndrome (“RCVS”).

[4] The defendants submit that this matter should not be decided on a summary basis since pre-trial procedures need to be undertaken so that justice can be served.

[5] I will first summarize the facts as provided for in the affidavits and consider whether this is a matter that should be decided on a summary basis or whether this matter should be remitted to the trial list. I have concluded for the reasons that follow that I am not able to determine on the evidence before me whether an enforceable settlement agreement was reached and, as such, direct that this matter be set down for a trial.

Factual Background

[6] The plaintiff was the registered owner of the Property.

[7] The defendants are mother and daughter who share the same last name. I will refer to the mother, Diew Lansie Morrison, as Ms. Morrison, and the daughter, Angelina Lansie Morrison, as "Angelina", with no disrespect intended.

[8] On May 26, 2022, the parties entered into a contract of purchase and sale, pursuant to which the plaintiff agreed to sell, and the defendants agreed to purchase the Property for the sale price of $4,300,000 with a completion date of July 14, 2022 (the "Contract"). The Contract provided that time was of the essence.

[9] A term of the Contract was that the defendants would pay a deposit to be held by 460 Realty Inc. (UC) in the amount of $150,000 (the "Deposit") within seven business days of entering into the Contract, so by June 7, 2022.

[10] Pursuant to a contract of purchase and sale addendum and amendment dated June 10, 2022, the parties agreed to amend the deposit term to provide for the Deposit to be paid within 11 business days of May 27, 2022, not including weekends or statutory holidays, so by June 13, 2022.

[11] Pursuant to a second contract of purchase and sale addendum and amendment dated June 13, 2022, the Deposit was increased to $200,000, and had to be paid by June 17, 2022.

[12] The Deposit was not paid as required by the Contract, as amended.

[13] At the time of entering into the Contract, one of Angelina's daughters, Jane, was eight years old and had medical complications. Shortly after the defendants entered into the Contract, Jane's medical condition deteriorated. A summary of the tragic passing of Jane is summarized in Ms. Morrison's first affidavit at para. 4:

a. on or around June 7, 2022, Jane was admitted to British Columbia Children's Hospital for overnight sleep testing for sleep apnea and for possible surgery;
b. on or around June 8, 2022, Jane was sedated for a magnetic resonance imaging or "MRI" test;
c. after performing a number of tests, doctors suspected Jane had meningitis and provided her high doses of antibiotics and steroids;

d. on or around June 10, 2022, Jane regained consciousness and insisted on [Ms. Morrison and Angelina] being present with her at all times. We were unable to leave Jane's bedside for 17 hours straight;

e. between June 11 and June 13, 2022, the doctors decided to give Jane high doses of morphine, but she started to leak spinal fluid from her nose and ears. The doctors determined, however, that Jane was not a candidate for surgery. Instead, they opened the back of her skull to insert a drain;

f. on or around June 22, 20222, doctors determined that the inserted drain tube had caused an infection and needed to be surgically removed. At the same time, doctors considered the potential need for a pacemaker for Jane's heart;

g. on or around June 27, 2022, it was determined that a "shunt revision surgery", although risky, was the best option for Jane in the circumstances. We were told the surgery would take place soon but were not given a date;

h. on July 2, 2022, doctors carried out "shunt revision surgery" and administered medically induced coma on Jane;

i. on or around July 4, 2022, doctors ran further tests on Jane and decided to leave her sedated; on the same day, the doctors advised us that they did not expect Jane to recover;

j. on or around July 8, 2022, the doctors suggested that family members come and see Jane;

k. on or around July 10, 2022, upon the doctors' suggestion, we decided to turn off Jane's life support on July 14, 2022;

l. between July 10 and July 12, 2022, family members saw Jane for the final time; and

m. on July 14, 2022, Jane's life support was turned off.

(the "**Extenuating Circumstances**")

[14] Understandably, on account of the Extenuating Circumstances, Ms. Morrison and Angelina were unable to pay the Deposit and complete the transaction to purchase the Property pursuant to the Contract.

[15] On July 11, 2022, the plaintiff elected to treat the defendants in breach of contract and terminate the Contract without prejudice to his rights to pursue the defendants for damages and any other remedies under the Contract.

[16] The purchase of the Property did not complete on July 14, 2022.

[17] On August 5, 2022, counsel for the plaintiff provided notice that the breach was accepted and the Contract terminated.

[18] On September 8, 2022, the plaintiff filed a notice of civil claim asserting that the parties had entered into a valid and binding contract of purchase for the Property and that the defendants had breached the Contract by their failure to pay the Deposit. The plaintiff sought damages for the Deposit, any difference between the purchase price in the Contract and the eventual sale price of the Property, expenses related to the maintenance of the Property, and other damages relating to the carrying costs of the Property.

[19] On October 21, 2022, the defendants filed a response to civil claim. They confirmed they had entered into the Contract, but they were unable to pay the Deposit, or the increased Deposit, due to the Extenuating Circumstances. They asserted that they were still willing and able to purchase the Property on a completion date mutually agreeable between the parties. They denied that the expenses listed in the notice of civil claim constituted the plaintiff's loss or damage.

[20] Between October 2022 and November 2022, C. Nicole Mangan, counsel for the plaintiff, and Raminder Arora, former counsel for the defendants, exchanged 'with prejudice' communications contemplating the defendants completing the purchase of the Property and making some payment towards the plaintiff's damages.

[21] On October 26, 2022, Ms. Arora wrote a 'with prejudice' letter which stated in part:

> … the Defendants remain willing and able to purchase the Property, on essentially the same terms and conditions outlined in the Contract…
>
> While the Defendants deny that they are responsible for the alleged loss, damage, or expenses outlined at paragraphs 20(d) and 20(j) of the Seller's Notice of Civil Claim, they are willing to reconsider their position (except on legal fees) if the Seller is willing to provide documentation outlining the nature and extent of loss suffered by him as a result of the events that unfolded in June and July of this year. As you know, if this matter proceeds to trial, the Seller will be obliged to provide relevant documents to prove the said losses in any event.
>
> If the Seller is unwilling to provide documentary proof of his alleged expenses or losses at this time, the Defendants are willing to purchase the Property without prejudice to his right to continue his claim against them with respect to the said expenses or losses…

[22] On November 9, 2022, Ms. Mangan replied to the October 26, 2022 letter confirming that the plaintiff accepted the defendants' offer to purchase the Property in accordance with the Contract, as amended, with a completion date of November 22, 2022 and advising that the plaintiff:

> 2. Is willing to provide documentation supporting the nature and extent of his additional losses, damages and expenses to determine whether the parties can agree on an amount to compensate this loss.
>
> We further confirm that the plaintiff is willing to agree to the terms above for the purchase and sale of the Property without prejudice to his right to continue to pursue the amounts referenced in item 2 above and the defendants' corresponding right to dispute those amounts if they choose to do so. Unfortunately, without knowing the completion date for the sale of the Property, the plaintiff is unable to provide proper documentation and/or an accurate estimate of his total losses, damages and expenses which are ongoing as he tries to mitigate the loss that has occurred due to the defendants' failure to complete the purchase of the Property. Those losses will continue until the sale of the Property is completed…
>
> If the sale of the Property completes on the timelines proposed in this letter, our estimate of the losses, damages and expenses above is in the range of $300,000.

[23] The November 9, 2022 letter was not received by Ms. Arora until November 14, 2022 due to it being sent to the incorrect email address.

[24] The sale of the Property did not complete in November 2022.

[25] On November 29, 2022, Ms. Mangan emailed Ms. Arora providing a draft outline of her client's losses. She explained that Mr. Ertl had to use multiple loans and sell assets to finance his business venture when the sale of the Property did not occur.

[26] In December 2022, the defendants retained Wesley Berger to assist them with this matter.

[27] On December 13, 2022, Ms. Mangan's firm provided particulars of the plaintiff's losses to Mr. Berger.

[28] In early February 2023, settlement negotiations continued. The plaintiff says that a settlement agreement was reached that provided for the completion of the Contract and payment of damages calculated to February 2023.

[29] The defendants say that only an "agreement to agree" was reached regarding the purchase of the Property and the payment of some consequential damages, subject to agreeing to the amount of the consequential damages and the exact date of the conveyance.

[30] On February 9, 2023, the parties signed a contract of purchase and sale addendum to extend the completion date to February 14, 2023 and the adjustment and possession dates to February 15, 2023 (the "February Addendum").

[31] The defendants did not complete the purchase on February 14, 2023.

[32] Ms. Mangan, counsel for the plaintiff, swore an affidavit setting out that she reached a settlement agreement with Mr. Berger on March 2, 2023 and stating that:

> 3. The Settlement Agreement was one iteration of many settlement agreements and discussions that were negotiated and/or reached between myself and Mr. Berger over the course of several months. Due to the moving target for the completion date, and consequently the damages payable, the Settlement Agreement was not set out in a single written agreement before the completion date, rather, it was created through multiple communications.

[33] On September 23, 2023, the plaintiff entered into a contract of purchase and sale for the Property with a third-party purchaser for a purchase price of $2,775,000 and a completion date of October 13, 2023. The defendants were advised of the sale of the Property and that the plaintiff would be claiming damages from the defendants for the difference in the purchase price for the Property, along with all the other losses and costs the plaintiff had been claiming for in the Settlement Agreement, and those associated with his efforts to try and enforce the Settlement Agreement.

Ms. Morrison's Medical Condition

[34] Angelina says that her mother began to experience intense pain and spasms in February 2023 and was gradually losing capacity from the middle of February. Ms. Morrison attended the hospital in February and was prescribed morphine as needed. A copy of the discharge instructions was provided. It supports that Ms. Morrison was admitted for an overnight stay on February 19– 20, 2023. The reason for her being in the hospital is scratched out, but no explanation was given why this document was redacted. The medications provided were: morphine for pain (as needed), Ondansetron for nausea (as needed), and a medication for abdominal pain (as needed). The hospital records for this admission were not produced.

[35] Angelina claims that she told Mr. Berger that her mother was on morphine due to being recently discharged from the hospital. She further claims that she advised Mr. Berger that her mother exhibited the following symptoms from the middle of February onward:

a) thunderclap headaches,
b) confusion,
c) trouble speaking or understanding speech,
d) muscle weakness,
e) light sensitivity,
f) nausea and vomiting,
g) dizziness, numbness,
h) visions changes; and
i) she would not retain any new information, and could not answer simple questions about the daily activities.

[36] There is no evidence on how or when this information was communicated to Mr. Berger.

[37] Angelina says that from the beginning of May 2023, her mother could not remember things they talked about and was becoming easily confused. Angelina could not have a conversation with her about the litigation issues. Angelina says that she explained to Mr. Berger that her mother was confused and unable to understand

the issues in this matter. It is also unclear when or how this information was relayed to Mr. Berger.

[38] On or about May 7, 2023, Ms. Morrison went back to the hospital and a CT scan was done of her on May 11. No brain bleed was seen. On May 13, 2023, Ms. Morrison was evaluated for a stroke, but no diagnosis was reached. The hospital records for this admission were not produced.

[39] On May 20, 2023, doctors ordered a MRI, CT angio, and CT of Ms. Morrison's head. A note was signed by Dr. Eliza Chan that stated that from May 20, 2023 to June 3, 2023 Ms. Morrison was unable to make important decisions until further follow-up in two weeks.

[40] Angelina says that her mother was diagnosed with RCVS on or about May 20, 2023.

[41] From March to September 2023, Angelina began paying for her mother's utility bills.

[42] On May 23, 2023, Dr. Brennan McKnight provided the following report regarding Ms. Morrison's condition:

> Due to an ongoing neurological disorder, Diew is currently medically incapacitated and is unable to make important decisions and sign legal documents until this improves/resolves. Assessment and diagnosis is ongoing and she is being actively followed up. This will be updated as her condition evolves.

[43] On June 20, 2023, Dr. McKnight provided the following update:

> Further to my previous letter, Diew remains incapacitated by an ongoing neurological condition. She remains unable to make important decisions and sign legal documents. Estimated duration until this clears is another 4-6 weeks. This will be regularly re-evaluated.

[44] On August 10, 2023, Dr. McKnight provided the following update:

> Diew continues to experience significant improvement in her cognitive capacity. She is well on her way towards being cognitively clear and capable

> of making important legal decisions. She will reach this point in an estimated 2-4 weeks from today.

[45] On September 7, 2023, Dr. McKnight provided the following update:

> Diew due to an ongoing medical condition, Diew remains incapable of making important legal decisions. The symptoms of her medical condition result in suboptimal cognitive functioning and state of mind. She is being assessed again in 2 weeks, and you will continue to be updated.

[46] On September 28, 2023, Dr. McKnight provided the following update:

> Diew continues to recover, but also experience symptoms, from an acute neurological condition. In my opinion, she should not be making legal and financial decisions while these symptoms persist as her brain function at present in [sic] not optimal for this. She is seeing a specialist in November and my opinion is unlikely to change prior to this consultation.

[47] On March 4, 2024, Dr. McKnight confirmed that Ms. Morrison had recovered her cognition and was now capable of making important decisions.

Efforts to Set Down an Application to Enforce the Settlement Agreement

[48] After commencing the action, the plaintiff served a notice of application dated May 15, 2023, to enforce the terms of the Settlement Agreement (the "May Application"). The May Application was returnable on May 29, 2023.

[49] On May 25, 2023, the defendants filed an application seeking to adjourn the May Application, also returnable on May 29, 2023 (the "Adjournment Application"). The basis for the adjournment was that Angelina was not able to obtain instructions from Ms. Morrison due to her incapacity.

[50] On May 29, 2023, the plaintiff filed a response to the Adjournment Application.

[51] On May 29, 2023, the parties appeared before Justice Milman and the following orders were made (the "Milman Order"):

1. The Plaintiff's application filed May 15, 2023 and set for hearing on May 29, 2023 be adjourned generally.

2. The Defendants shall file a response to the May 15, 2023 application by June 23, 2023, unless otherwise ordered.
3. Justice Milman is seized of any application to extend the June 23, 2023 deadline for the Defendants to file a response to the May 15, 2023 application.
4. Upon the Defendants' filing of a response, the Plaintiff shall be at liberty to set a hearing of the application.
5. The Plaintiff shall be at liberty to seek any damages and costs attributed to the delay of the hearing of the application filed May 15, 2023.

[52] On August 11, 2023, the parties entered into a consent ordered signed by Ms. Mangan, on behalf of the plaintiff, and Mr. Berger, on behalf of the defendants, providing for an extension of time for the defendants to file a response to the May Application, and that the defendants would file a response at least two weeks before the date set for the hearing of the May Application.

[53] On September 20, 2023, the May Application was set for a hearing and the parties appeared before Justice Thomas. At this time, the defendants were being represented by Anastasia Vulpe and the following orders were made (the "Thomas Order"):

1. The Plaintiff's application is adjourned generally.
2. Within five (5) business days, Angelina Morrison will file an application seeking to be appointed as litigation guardian for Diew Morrison or to have another person appointed as litigation guardian, be that a person who volunteers or a professional litigation guardian. A copy of Angelina Morrison's application is to be provided to the Plaintiff prior to filing in court.
3. Within five (5) business days, Angelina Morrison is to provide an update on Diew Morrison's medical condition. This update would ideally be in the form of a note from a doctor indicating Diew Morrison's ability to instruct counsel and manage her financial affairs.
4. Within five (5) business days, Angelina Morrison will provide, to the best of her knowledge, information explaining how Diew Morrison is currently managing her financial affairs.
5. Within seven (7) business days, Angelina Morrison will provide financial disclosure of her own financial affairs, specifically as they relate to her ability to close on the purchase of the house. The information prescribed in Family Law Form F8 would provide a good starting point to the extent of this financial disclosure.

6. Within five (5) business days, Angelina Morrison will file a response to the Plaintiff's application and will indicate in her response what element of the settlement agreement she takes issue with.
7. Special costs for the appearance and preparation of this hearing are awarded to the Plaintiff against Angelina Morrison.

[54] On September 26, 2023, Angelina swore a Form F8 financial statement which was delivered to plaintiff's counsel.

[55] On November 8, 2023, Ms. Mangan wrote to Ms. Vulpe advising that an estimate as to the costs for the preparation and appearance at the September 20, 2023 hearing was $12,305.40, representing fees and disbursements.

[56] On November 9, 2023, Ms. Vulpe responded noting that the bill was not provided in support of special costs. She sought an itemized list of tasks that were accomplished for the plaintiff for this appearance, as well as the copy of the file, citing in support *Gichuru v. Smith*, 2014 BCCA 414 at para. 104.

[57] On December 13, 2023, Ms. Mangan wrote to the defendants' counsel setting out her views that the Thomas Order had not been complied with since the F8 financial statement did not provide information on Angelina's financial assets that related to her ability to close on the purchase of the house. On the same day, Ms. Mangan provided particulars of the time and costs pertaining to the September 20, 2023 hearing.

[58] The allegation of a breach of the Thomas Order was disputed in Ms. Vulpe's letter of December 22, 2023, which states in part:

> The claims of non-compliance against Ms. Angelina Morrison ("Ms. Morrison") are unequivocally baseless. Ms. Morrison has scrupulously adhered to the court's directives, providing exhaustive financial information, including a thorough Form F8 encompassing expenses, debts, income, and enclosing the entirety of her information, including T1s and Notices of Assessment for the last three years.
>
> We confirm that Ms. Morrison has listed all of her assets on her financial statement. While Ms. Morrison has a chequing account, it does not have any significant value that would constitute an asset. Today the account is at $482.53. Ms. Morrison further confirms that she has no savings, GIC, term

> deposits, bonds, stocks, mutual funds or accounts receivables, or any other assets of any kind.
>
> This information is not new to your client, as Ms. Morrison has always maintained that it is Ms. Diew Morrison who intended to contribute the entirety of the funds towards the purchase of your client's property. While Ms. Angelina Morrison's financial disclosure may be disappointing to your client, it is not a reason to insinuate that she failed to comply with the court orders.
>
> …
>
> **Mr. Ertl's disclosure and examination**
>
> Our client would like to schedule an examination for discovery of Mr. Ertl. A lot of the damages that he is claiming require closer investigation. Please provide our office with your available dates in January, or early February of 2024. Should we not receive a response within two weeks time, by January 5, 2024, we will schedule it unilaterally.
>
> Please also provide your client's filed T1 for the year(s) that he is claiming the damages for his RRSP deductions.

[59] On October 4, 2023, Angelina was appointed as litigation guardian for Ms. Morrison with the appointment to cease on March 5, 2023 [2024] or further order, whichever is earlier.

[60] On January 5, 2024, Ms. Mangan responded in respect to the discovery of Mr. Ertl, advising that it would be limited in scope to questions relating to damages from the breach of the Settlement Agreement made on March 2, 2023.

[61] On February 14, 2024, the plaintiff filed a second application seeking to enforce the Settlement Agreement, which was returnable on February 26, 2024 (the "February Application").

[62] On February 20, 2024, the defendants filed an application seeking to have the February Application heard on March 27 and 28, 2024, and for the plaintiff to produce his 2022 T1 and any notices of assessments within seven days of the order.

[63] On February 26, 2024, Justice Elwood heard the February Application and ordered that the hearing take place on March 27 and 28, 2024 on a peremptory basis on the defendants. Justice Elwood also ordered that the plaintiff file an amended application seeking to enforce the settlement, and set deadlines for the defendants' response, reply affidavits, and the exchange of written submissions.

[64] On March 8, 2024, the plaintiff filed the notice of application which I heard on March 27 and 28, 2024. The application response was filed on March 15, 2024.

Should this matter be decided on a summary basis?

[65] The key issue is whether the evidence clearly supports that a binding Settlement Agreement was entered into. If the evidence is not clear, then that would support the need for pre-trial procedures and potentially to have the matter determined at a trial.

Negotiations of the Settlement Agreement

[66] The parties do not dispute that settlement negotiations took place between Ms. Mangan, counsel for the plaintiff, and Mr. Berger, former counsel for the defendants.

[67] On December 21, 2022, Ms. Mangan emailed Mr. Berger stating:

> Further to our call the other day, while we would need to try and hash out agreeable terms, my client is agreeable to the structure we discussed. We look forward to receiving proposed terms from you.

[68] On January 10, 2023, Mr. Berger emailed Ms. Mangan stating:

> I forgot to follow up when I received your out-of-office last week. In light of the fact that you were away when I sent the attached, we are prepared to extend the deadline to accept our "subject-attached" offer to the close of business this Friday January 13, 2023. I trust this will be sufficient time to agree on these initial terms, but please advise if you disagree.

[69] I note that the attachment referenced in the January 10, 2023 email is not part of the evidentiary record as far as I could determine.

[70] On January 18, 2023, Mr. Berger emailed Ms. Mangan responding to the "proposed modifications to our offer". The main concern was relating to an acceleration clause which would give January 31, 2023 as the deadline to settle the damages claim. Mr. Berger states:

> …There are only 10 business days between now and January 31st, and I'm already concerned about there being enough time for you to finalize your proposal, for me to review it with my clients, and for us to have a bit of back

> and forth. When you factor in my clients difficulty with being available for communications from Friday to Monday (ie. family counselling etc.) I feel like we would be unable to respond fast enough if we agreed to your proposed terms today, and then your client received another offer before the end of this week, giving my client only one day to make the election, at which point we wouldn't have even got to the negotiation stage over the damages.
>
> …
>
> I think a 3 day acceleration might work, but my preference would really be just to waive it and give the negotiations adequate time to play out…

[71] Ms. Mangan responded on the same day respecting the acceleration clause issues and stated: "We are also actively working on numbers." Later that day, Ms. Mangan confirmed that her client was agreeable to a three-day option.

[72] On January 19, 2023, Mr. Berger confirmed, "we are in agreement with the 3 day acceleration option" and stated, "I look forward to receiving your settlement proposal".

[73] On January 25, 2023, Ms. Mangan sent over a damages calculation. Mr. Berger responded as follows:

> Thanks for sending this over.
>
> It occurred to me today that I haven't yet received my clients' file from their previous lawyer, and I'm wondering if there might have been some earlier correspondence between you and him that explained a bit of the context around your client's financial situation at the time the original contract was entered into. I was expecting to receive this as part of the proposal, which makes me think you've probably already laid this out for the previous lawyer. At this point, I am pretty vague on the details beyond it being my understanding that your client planned to use the proceeds of sale to participate in some kind of business opportunity.
>
> Before listing out all the details I'm curious about, I thought I might check to see if you already provided a summary to previous counsel, in which case I would appreciate you sending that to me. If not, please let me know and I can get back to you with more detail on what I'm looking to learn.

[74] On the same day, Ms. Mangan responded and provided a spreadsheet outlining most of her client's losses based on a February 14, 2023 completion date. The spreadsheet set out the total costs incurred at $1,217,683.21. The spreadsheet sets out that the majority of the total costs are associated with the plaintiff's sale of

"Coupa" shares, being the capital gains tax payable of $252,800.91 attributed to the selling of the shares, and the foregone gain on the shares sold of $813,060.71.

[75] On January 26, 2023, Ms. Mangan sent Mr. Berger another email, responding to Mr. Berger's questions regarding what information had been provided to the defendants' previous counsel:

> Sorry for the delay. Our systems were down for a bit towards the end of the day yesterday. In terms of that background, I am not sure I sent prior counsel information like what you were asking about. I think you are saying you want of proof of my client's financial circumstances necessitated getting financing and selling shares? I haven't had anyone request something like that before so I am trying to turn my mind to it a bit.
>
> At a high level, you are correct that this was a recreational property owned by my client. He had plans to pursue a business opportunity that required him to make a financial investment and he determined that the best way to obtain the funds was selling this property. He made the deal with your client and then moved forward with the business investment. When the sale didn't complete he had to borrow money and sell share to meet his commitments + carry the property.
>
> The only documentation I had sent to your clients' former counsel was some supporting documentation which I believe I resent to you earlier. I think you may need to give me specifics if you are looking for something more…

[76] Later the same day, Mr. Berger responded by email, setting out two main issues he had relating to: (1) whether the plaintiff was committed to the business venture before the breach; and (2) the reasonableness of Mr. Ertl's approach in raising money to substitute for the purchase funds. It appears that some explanations were given by Ms. Mangan, but that information is not part of the evidentiary record. Mr. Berger requested more information regarding the amount of money the plaintiff borrowed and Ms. Mangan responded advising that she needed an accountant to assist her with that figure and that she would ask for the number borrowed after the deal.

[77] On January 31, 2023, Mr. Berger emailed Ms. Mangan stating:

> Thanks for your comments. You certainly raise some good points, and I think now we at least know each other's positions should we be unable to get a deal done. That said, I'm feeling optimistic we can bridge this gap.

> To that end, I have instructions to reject your client's offer, and propose settlement in the amount of **the original purchase price of $4,300,000 plus $400,000**, for a total amount of $4,700,000.
>
> Given that you are in mediation today, we are also agreeable to extending the January 31st deadline as needed as we continue to negotiate. Rather than extend the deadline indefinitely, my preference would be just to extend it day by day as needed, which will hopefully serve our common goal of getting this resolved as soon as possible. For now, let's move the deadline to remove the subject to close of businesses on February 1, 2023, and if we need to extend it further, we can talk about that tomorrow.
>
> I look forward to hearing from you.
>
> [Emphasis in original].

[78] On February 1, 2023, Ms. Mangan made a counter-offer, stating in relevant part:

> I won't continue to carry on with positions. I have instructions to offer to resolve the damages component for $890,000, so the original purchase price + $890,000.

[79] On February 2, 2023, Mr. Berger responded to the counter-offer:

> Thank you for your most recent offer. I have instructions to reject that offer and propose settlement in the amount of the original purchase price of $4,300,000, plus $500,000, for a total of $4,800,000. I should mention that my clients have advised that they would be in a position to provide the deposit in the amount of $200,000 within 2-3 business days of the acceptance of their offer.
>
> I look forward to hearing from you.

[80] On February 3, 2023, Mr. Berger emailed at 3:47 p.m., stating:

> Sorry to leave you hanging until so late in the day, but I was waiting in hopes that I would hear back from my clients in response to your client's $4,300,000 plus $695,000 offer. Unfortunately, I did not receive a response, though this is entirely expected since, as you know, my clients enter into "radio silence" usually from about Thursday evening until Monday morning.
>
> Please assure Mr. Ertl that we remain eager to get this resolved, that we appreciate his patience, and that we will get back to him with a response as soon as possible next week.
>
> Have a nice weekend, and I'll be in touch soon.

[81] On February 6, 2023, Ms. Mangan emailed Mr. Berger stating:

> I understand from my client the structure proposed below, assuming you can confirm your instructions, is agreeable.

[82] On the evidentiary record before me it is not clear what Ms. Mangan is referring to as "the structure proposed below".

[83] On February 7, 2023 at 12:04 p.m., Mr. Berger emailed Ms. Mangan advising:

> That is great to hear. Unfortunately I did not hear from my clients last night or this morning, so I don't expect to hear from them now until this afternoon after 2pm …

[84] Later that day, at 6:50 p.m., Mr. Berger advised Ms. Mangan:

> My clients have wrapped up their appointments and are just getting their kids to bed. I will be getting on a call with them within the next few hours, after which I expect to be able to reply with a firm offer on the terms we previously discussed.

[85] At 6:56 p.m. on February 8, 2023, Mr. Berger emailed Ms. Morrison and Angelina stating:

> $133,000 of the closing costs are due at closing – we can hold off billing our fees for the conveyancing until after.
>
> If your hard number for the 14th is still being determined but is "just under $4,748,000", I would propose the following:
>
> Feb 14th
>
> - Paid to seller: $4,600,000
>
> - Paid to closing costs: $133,000
>
> - total funds required on Feb 14th: $4,733,000 (this gives you a $15,000 cushion if the amount available turns out to be a little less than $748K [or] if the final closing costs are a bit higher than $133,000. If you think you need a bigger cushion, please let me know what you think that would need to be)
>
> Feb 27th
>
> - Paid to seller: $395,000
>
> Please let me know if you think you can commit to this proposal.

[86] The following day, on February 9, 2023, the February Addendum was signed. Of significance, it was signed by all parties, including Ms. Morrison.

[87] On February 9, 2023, Laura Hohensee, conveyancing counsel for the defendants, emailed a letter to the plaintiff's counsel's firm, Richards Buell Sutton LLP ("RBS"), providing closing documents for execution by the plaintiff.

[88] On February 14, 2023, Kiran Dhesan, conveyancing counsel for the plaintiff, provided the executed closing documents to Ms. Hohensee, with the following closing statement:

> Please contact the conveyancer, Jill, at 604-595-2320 when the sale proceeds are ready to be picked up, together with which bank(s) and branch(es) your trust cheque(s) is(are) drawn on.

[89] On February 21, 2023, Ms. Mangan emailed Mr. Berger with the following offer and explanation:

> If your clients can close on the contract terms except for changes to the completion and possession date and pay all damages by Wednesday, February 22, 2023 then my client will accept $755,000 in settlement of his damages. If they can close and pay all damages by Friday, February 24, 2023 then my client will resolve this matter for $790,000 in damages. To provide some explanation, as you know, the $695,000 was already a compromise number that was premised on closing on February 14. My client has now incurred not only the additional per diem amounts beyond that closing date but has also had ongoing legal and accounting costs this week trying to assess his position and options. He also made arrangements to repay one of his lenders on February 17 on the expectation that closing would, at the latest, occur on February 16 and he has now had to renegotiate with that lender. I wanted to provide this explanation only to give you some context for our offer. If there are any questions please do not hesitate to contact me.

[90] On February 24, 2023, Ms. Mangan emailed Mr. Berger with the following offer:

> Further to our call today, I have spoken with my client. My instructions are that, if your client can close on Monday, February 27, for the purchase price in the contact and with adjustments continuing to be as of Feb. 14, then he will remain willing to resolve the damages at the same number as today, i.e. the $790,000. I anticipate instructions by Monday on what his number would be if this does not close on Monday (as he won't hold this damages number beyond Monday) and I anticipate that those instructions will be similar to the structure below where we would provide a figure assuming completion on Wednesday or Friday.

[91] On February 27, 2023 at 4:31 p.m., Ms. Mangan emailed Mr. Berger stating:

> I assume your clients are not closing today. If you clients can close on the contract terms except for changes to the completion and possession date and pay all damages by Wednesday, March 1, 2023 then my client will accept $862,500 in settlement of his damages. If they can close and pay all damages by Friday, March 3, 2023 then my client will resolve this matter for $912,500 in damages.
>
> If there are any questions please do not hesitate to contact me.

[92] On February 27, 2023 at 4:36 p.m., Mr. Berger replied:

> I was halfway through an e-mail to you when yours came through. Sorry for the delay in reaching out.
>
> - I was in XFD today and I didn't connect with the Morrisons until about an hour ago.
>
> Thank you for the adjusted figures based on a Wednesday and Friday closing. My clients are hopeful that they will be in a position to make Wednesday happen. I will keep you posted if anything changes.
>
> Please feel free to give me a call if you'd like to discuss.

[93] On March 1, 2023 at 4:28 p.m., Mr. Berger sent an email to Ms. Mangan with the Subject line reading "No luck today" and stating:

> Sorry for the late and short note: long story short, things didn't pan out today, but they're still working to get it done this week.
>
> Hopefully I'll have some good news soon.

[94] On March 2, 2023 at 10:43 a.m., Ms. Mangan emailed Mr. Berger as follows:

> I sent your update to my client and he is curious about the status of where things are at. Are your clients agreeable to his offer of a Friday closing and the damages as of that date in the amount of $912,500?

[95] On March 2, 2023 at 1:41 p.m., Mr. Berger emailed Ms. Mangan stating:

> Yes, my clients are agreeable to the $912,500 damages for the Friday closing. I am **hoping to get further confirmation** later this evening that the closing will FINALLY happen tomorrow, so I will keep you posted on any new information as I get it.
>
> Please feel free to give me a shout if you'd like to discuss further.
>
> [Emphasis added].

[96] On March 3, 2023, Ms. Mangan had a telephone discussion with Mr. Berger and made handwritten notes, which appear to read:

> He texted her w emph to
> get draft tras to firm
> asap
> Helpful if wld send a
> Pic asap.
> Has cleared sched for Mon.
> Phone seems dead.
> Anyway – hopes its legit.
> I'll update cli.

[97] On March 6, 2023, Mr. Berger emailed Ms. Mangan advising:

> Unfortunately my clients have not come through with the bank draft today. Without boring you with the details, I am told that one of their children was admitted to hospital over the weekend over mental health concerns. Both my clients are now preoccupied with that situation and as such, I don't have a ton of information to share about how they expect the rest of the week to play out. Diew did mention she will be attending her bank tomorrow, but I'm not sure what level of confidence to have in that statement in the circumstances.
>
> At this time, I don't have any instructions to propose further terms of resolution, but I am hopeful I will have some clarity on that what [sic] I speak to them tomorrow.

[98] On or about March 24, 2023, counsel for the plaintiff received two screenshots from Mr. Berger, the first being a confirmation addressed to Angelina from Tangerine confirming that their draft order had been received, and a second screenshot confirming that a draft for $5,505,210.45 had been ordered payable to BTM Lawyers LLP in Trust. Angelina explains why the bank draft was ordered in her affidavit #3 made on March 15, 2024:

> 15. We did order a bank draft in March of 2023 for $5,505,210.45, which was borrowed from a family member. This money was in excess of the damages requested because we never had the final figure. Mr. Berger asked us to bring approximately $150,000 in order to anticipate the future damages the Plaintiff may ask for. While we did order the bank draft, we never agreed on the final amount.

[99] Angelina says the bank draft was provided to Mr. Berger on the understanding that he still must be able to obtain instructions from Ms. Morrison. She claims that since her mother lacked capacity to make any decisions, her consent could not be obtained and she could not sign the conveyance documents, so the negotiations ended.

[100] On May 5, 2023, Ms. Mangan sent a letter to Mr. Berger noting:

> As you are aware, on March 2, 2023, the parties to the above referenced action entered into a final and binding agreement to resolve the matters between them, as follows:
>
> 1. Your clients, Diew and Angelina Morrison (the "**Buyers**") agree to purchase [the Property] on substantially the same terms as set out in the Contract of Purchase and Sale dated May 26, 2022 (the "**Original CPS**") for the purchase price of $4.3 million (the "**Purchase Price**");
> 2. The completion date shall be extended to Friday, March 3, 2023;
> 3. The possession date shall be extended to the day following the completion date;
> 4. The Seller agrees to settle his claim for damages for bridge financing and carrying costs arising from the Buyers' failure to complete on the Original CPS, in exchange for payment in the amount of $912,500 (the "**Damages Settlement Funds**") payable in addition to the Purchase Price;
> 5. The Seller will execute a release in favour of the Buyers; and
> 6. The Seller will instruct his counsel to endorse and deliver a consent dismissal order;
>
> (the "**Settlement Agreement**").
>
> At all material times, the Seller was ready, willing and able to perform the Settlement Agreement. However, the Buyers failed to deliver the Purchase Price or the Damages Settlement Funds on March 3, 2023 or any point thereafter.
>
> Please be advised the Seller has no intention of terminating the Settlement Agreement.
>
> Our client, the Seller, hereby elects to affirm the Settlement Agreement and to claim specific performance and consequential damages, or damages in lieu of specific performance, without limiting his rights to pursue other relief, remedies, damages and costs arising from the Buyers' breach of the Settlement Agreement.
>
> Please be advised that our client intends to bring his application to enforce the Settlement Agreement on May 29, 2023, and have reserved a full-day in long chambers for this purpose.
>
> [Emphasis in original].

[101] On May 11, 2023, Ms. Mangan sent a letter to Mr. Berger that the plaintiff claims sets out the terms of a final and binding settlement agreement reached on March 2, 2023 (the "May 11 Letter"). The May 11 Letter provides:

> We write to request your written confirmation and acknowledgement that on March 2, 2023, the parties to the above referenced action entered into a final

and binding settlement agreement to resolve the matters between them, as follows:

1. Your clients, Diew and Angelina Morrison (the "**Buyers**") agree to purchase [the Property] on substantially the same terms as set out in the Contract of Purchase and Sale dated May 26, 2022 (the "**Original CPS**") as amended by an addendum dated February 9, 2023 (the "**February Addendum**"), for the purchase price of $4.3 million (the "**Purchase Price**");
2. The completion date shall be extended to March 3, 2023 (the "**Completion Date**");
3. The possession date shall be extended to the day following the Completion Date;
4. The Seller agrees to settle his claim for damages arising from the Buyers' failure to complete on the Original CPS, as amended by the February Addendum, up to the Completion Date, in exchange for payment in the amount of $912,500 (the "**Damages Settlement Funds**") payable in addition to the Purchase Price;
5. The Seller will execute a release in favour of the Buyers; and
6. The Seller will instruct his counsel to endorse and deliver a consent dismissal order;

(the "**Settlement Agreement**").

As you know, the Seller intends to bring an application to enforce the Settlement Agreement by way of a chambers application scheduled to proceed on May 29, 2023. In order to limit the issues between the parties and prevent unnecessary legal expenses or expenditure of the court's resources, we intend to provide a copy of this letter, with your signed acknowledgment, as evidence to establish the existence of the Settlement Agreement.

By signing a copy of this letter, you agree, confirm and acknowledge the Settlement Agreement is valid and enforceable, without prejudice to the Buyers' ability to raise any other defences or objections at law or in equity regarding its implementation.

[Emphasis in original].

[102] On May 12, 2023, Mr. Berger signed the acknowledgement on the May 11 Letter which stated:

CONFIRMATION AND ACKNOWLEGEMENT OF SETTLEMENT AGREEMENT

DATE: May 12, 2023

SIGNATURE OF WESLEY A. BERGER, COUNSEL FOR THE BUYERS	[SIGNED BY MR. BERGER]

[103] The defendants claim that a copy of the May 11 Letter was not provided to them and that Mr. Berger never obtain their instructions to return the May 11 Letter with the acknowledgement signed. In support, the defendants have produced a redacted copy of a legal account from BTM Lawyers LLP dated May 15, 2023, with the following entries:

> | | |
> |---|---|
> | May 11/23 | Messages from and to Diew and Angelina regarding **attempt to coordinate a meeting today**; telephone call to opposing counsel Jessie Skinnider regarding update – 2.00 |
> | May 12/23 | Conference with Ms. Stanbury regarding update on transfer; e-mail and telephone calls from Ms. Skinnider regarding acknowledgment of agreement – .30 |
>
> [Emphasis added].

[104] On May 17, 2023, Jessie Skinnider, another lawyer at RBS, emailed Mr. Berger in respect to the May Application stating, in part:

> Thanks for taking my call just now. Further to our discussions, I understand your client is willing to consent to all of the orders sought in our application subject to an agreement that provides for a fixed amount for our client's claim for costs. …

[105] On May 23, 2023, Mr. Berger emailed Ms. Skinnider advising that he was not be able to get instructions to respond to the May Application since he has not been able to get in contact with Ms. Morrison and he has received a doctor's note dated May 20, 2023, that advised that Ms. Morrison was "unable to make important decisions until further follow up in two weeks". He further noted:

> As mentioned in your letter of May 11th, Diew may wish to raise other defences or objections at law or in equity regarding the implementation of the Settlement Agreement, but I have been unable to receive instructions from her on that one way or the other due to her medical status.

[106] The Adjournment Application, filed May 25, 2023 by Mr. Berger as counsel for the defendants, states at para. 9:

> In March 2023, the parties entered into a new settlement agreement that provided for the completion date of the Original CPS, as amended by the February Addendum, to be further extended to March 3, 2023, in addition to payment of damages calculated to March 2023 (the "Settlement Agreement").

[107] On June 8, 2023, Ms. Mangan advised Mr. Berger that Mr. Ertl would be continuing his efforts to mitigate his loss and would be marketing the Property.

Position of the Parties

Position of the Plaintiff

[108] The plaintiff argues that the effective administration of justice and other policy reasons support the enforcement of settlement agreements, relying on the Court of Appeal's statement in *Kuo v. Kuo*, 2017 BCCA 245 at para. 37.

[109] The plaintiff submits that there was a binding settlement agreement entered into between counsel. He disputes that there is any cogent evidence supporting that Ms. Morrison lacked the requisite capacity to contract at the time the Settlement Agreement was made.

[110] In the alternative, he argues that even if Ms. Morrison lacked capacity, the relevant question is whether the plaintiff had notice of Ms. Morrison's lack of capacity. Relying on jurisprudence that "a party seeking to escape the terms of a contract must show not only mental incompetence, but also that the other party knew about the incompetence": *Binng v. Gill*, 2022 BCSC 1479 at paras. 55–56, citing *Lougheed v. Ponomareva*, 2013 ONSC 4347 at para. 43. The plaintiff argues that his lack of knowledge of any incapacity is a complete defence.

[111] The plaintiff points out there was no limitation on the apparent authority of Mr. Berger as the defendants' former solicitor. It is in the interest of justice that solicitors should feel free to complete settlements with other solicitors without having to enquire or be concerned about the actual authority of the solicitor. If the defendants wish to assert that Mr. Berger exceeded his authority or was negligent,

that should be a matter between the defendants and their former solicitor, and not one that impacts the validity of the Settlement Agreement.

Position of the Defendants

[112] The defendants say that the parties exchanged settlement offers but there was never a meeting of the minds as to the final award of damages. They argue that the last email from Mr. Berger of March 2, 2023 does not confirm all essential terms of the contract. They argue that, at best, there was an agreement to agree, which never crystallized.

[113] They further claim that Ms. Morrison lacked the capacity and Mr. Berger was no longer acting within the scope of his authority as her agent, and ought not to be allowed to bind her to any agreements.

[114] In the alternative, the defendants argue if there was a settlement agreement, the Court should exercise its discretion to refuse enforcement of it on the basis that there was a misapprehension by the solicitor making the settlement of the instructions of the client or the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement.

[115] The defendants further submit that there is a triable issue of whether Ms. Morrison had capacity and whether Mr. Berger could bind a person under a disability to an agreement. As such, they argue that the matter should be referred to trial.

Legal Principles

[116] Section 8(3) of the *Law and Equity Act* reads:

> Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.

[117] The enforceability of a settlement agreement ought to be decided upon an application in the action made pursuant to s. 8 of the *Law and Equity Act* if justice can be done by proceeding summarily. The court should proceed summarily unless the judge is satisfied that there is a genuine issue as to whether the settlement agreement is binding on the parties to the action pursuant to the law of contracts: *Carlton v. Carlton*, 2017 BCSC 603 at paras. 20–23, 44; *Hutton v. Hutton*, 2020 BCSC 2046 at paras. 26–30.

[118] A settlement agreement is a form of a contract. As Justice Donegan describes in *1001790 BC Ltd. v. 0996530 BC Ltd*., 2020 BCSC 2270:

> [83] I am not satisfied there was ever a valid and binding agreement to settle. A settlement agreement is a form of contract and, as such, it is made when the terms of a proposed agreement are accepted, without qualification, by one party, as presented by the other party. A contract is formed when parties reach a meeting of the minds, or *consensus ad idem,* about its essential terms. There must be evidence of an intention to be bound and sufficient clarity or certainty of the essential terms: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 322; *Tham v. Bronco Industries Inc.*, 2017 BCSC 282 at para 75; and *Berthin v. Berthin*, 2016 BCCA 104 at para. 47.

[119] In *Son v. Kim*, 2009 BCSC 776, the Court set out the considerations that come into play when considering whether a summary procedure should be followed:

> [47] In the case before me, the applicant does not seek to set aside a consent order or a settlement agreement. Rather, he seeks to enforce a settlement agreement that compromises an originating application. I interpret the caselaw to stand for the proposition that in determining whether justice can be done under such a summary procedure, the court must consider various matters involving (1) that degree to which extraneous matters are involved, (2) how substantial the questions are to be determined, and (3) whether other pre-trial procedures such as pleadings and discoveries may be desirable.

Analysis

[120] I am persuaded that I should exercise my discretion not to decide this matter on a summary procedure since it would not be in the interest of justice to do so.

[121] I am persuaded that there are triable issues and I am unable to make a just determination of the issues, including whether the essential terms of a contract to

settle were agreed to, since the evidence is not “manifestly clear” or “clear beyond a reasonable doubt” as required by law: *Dhillon Estate (Re)*, 2023 BCSC 2301 at para. 10; *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65. In the proceeding analysis, I will briefly address some of the cases relied on by the plaintiff, which in my view can all be meaningfully distinguished from the circumstances before me on this application.

[122] In *Carlton*, the Court found that there was no doubt that all the necessary elements to create a contract were present, the terms of the agreement were clear and unambiguous, and there was no claim advanced by the objecting party otherwise: at para. 35. As the Court noted, the claimant initialed each of the pages of the settlement agreement and it had been partially implemented: *Carlton* at para. 41.

[123] In *Baldissera et al v. Jeffrey Tobin Wing et al*, 2000 BCSC 1788, the Court found that there was no concern that the settlement agreement was unfair, vague, or otherwise unenforceable, noting that the only issue was the failure of one brother to sign it: at para. 28.

[124] In *Hutton*, the Court concluded that the evidence supported that the plaintiff made an offer to settle at a judicial settlement conference that was left open for acceptance until February 28, 2020. That offer had not been withdrawn and was accepted on February 27, 2020.

[125] In the present case, the defendants deny that they entered into a settlement agreement and specifically raise the issue that their former lawyer did not provide them with the May 11 Letter nor seek instructions from them to sign it. The email communications which were part of the evidentiary record before me is not clear on its face that the essential terms of an agreement were reached. I am not making any determination of that issue since that will be an issue for the judge hearing the trial of the issue of whether a binding settlement agreement was entered into.

[126] In addition to the issue of whether the essential terms of a contract were agreed to, there are a number of extraneous matters involved including issues

relating to the extent of Ms. Morrison's legal capacity at the time the terms of the alleged settlement agreement were being negotiated; the legal authority of Mr. Berger to act as agent for the defendants in light of the alleged legal incapacity of Ms. Morrison; any misapprehension by Mr. Berger of the instructions from his clients; the extent of Mr. Berger's knowledge of Ms. Morrison's legal incapacity; any misrepresentations made by the plaintiff on damages that may have misled Mr. Berger; the investigations conducted by Mr. Berger into the alleged damages of the plaintiff; and the application of the doctrine of frustration arising from Ms. Morrison's lack of capacity.

[127] On the issue of Ms. Morrison's legal capacity, the plaintiff relies on the *Lougheed* case. In *Lougheed*, the Court recognized that evidence that supported a party was mentally incapable of understanding what was going on could be a legally sustainable ground for attacking minutes of settlement; however, the Court found that that ground was not satisfied on the facts and that the "respondent's bald assertion that she did not know what was going on must be assessed as against the surrounding circumstances": *Lougheed* at para. 36.

[128] The plaintiff also relies on the *Binng* decision, which involved a dispute between siblings over their father's estate that was subject to a number of separate court proceedings. Eventually, the parties settled all litigation by executing a settlement agreement, pursuant to which an interim distribution was made to each sibling. All parties signed the minutes of settlement which provided that the agreement was a full and final settlement of all matters, claims, potential claims, and court actions arising between the parties: at para. 25. One and a half years after the agreement was executed and about a year after an interim distribution, one of the parties, Mr. Basi, advised that he intended to bring an application to set aside the agreement on the basis that he did not have the requisite mental capacity at the time it was executed: para. 6. The other siblings filed an application to enforce the agreement. Mr. Basi's position on the application was that his legal capacity was a triable issue. The Court found that the plaintiffs had no knowledge of Mr. Basi's alleged psychological problems, and there was no evidence that they were aware he

was taking any medication, or that supported any knowledge on the part of his sisters of any capacity issues. The Court found that the mental health challenges that Mr. Basi suffered from did not necessary equate to a lack of capacity at the time the agreement was being negotiated and executed, but ultimately, declined to make a finding on Mr. Basi's capacity. The agreement was held to be valid and enforceable and Mr. Basi's application to set it aside on his asserted lack of capacity was not allowed to proceed.

[129] The factual circumstances in the case at hand are distinguishable from those before the Court in *Binng*. Importantly, the form of the agreement and its essential terms were not in dispute in *Binng*, whereas the defendants specifically argue there was no *consensus ad idem* with respect to the final damage award. Further, in the case at hand, there is a complicating factor in that the defendants assert that their lawyer, Mr. Berger, was specifically advised of Ms. Morrison's capacity issues, although on the evidentiary record before me it is not clear how and when this information was conveyed to him.

[130] In this case, I am satisfied that the evidence goes beyond "bald assertion[s]" by the defendants (*Lougheed* at para. 36); there is evidence that Ms. Morrison developed RCVS, a condition that impacted her cognitive abilities, at the relevant time. However, in order to assess the extent of Ms. Morrison's disability and Mr. Berger's knowledge of it, pre-trial procedures are necessary. These include the need for production of a complete copy of Ms. Morrison's hospital and medical records, and all documents relating to the communication of medical status to Mr. Berger.

[131] In addition, there are questions arising respecting the calculation of the plaintiff's damages and the production of documents in support. In particular, the issues surrounding the sale of the Coupa shares need to be canvassed and full disclosure by the plaintiff of his tax information needs to be made. Finally, the plaintiff relies on an accountant in support of the claim for consequential damages. The defendants should be entitled to cross-examine that expert.

[132] Finally, I note that there is no doubt that the matter at issue is substantial in that the plaintiff is seeking the alleged settlement amount of $912,500. In addition, the plaintiff seeks further damages consisting of consequential damages in the range of $240,000 as well as the difference between the sale price to the defendants and the price he ultimately received for the Property. The total claim exceeds two million dollars.

Conclusion

[133] In all of the circumstances, it is in the interest of justice for this matter to be remitted to the trial list. Although the defendants were successful in having the matter remitted to the trial list, in my view, the costs relating to this application should be in the cause.

"Forth J."