IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarkdale Motors Ltd. v. The Dilawri Automotive Group,* 2024 BCSC 1829

Date: 20241009
Docket: S213237
Registry: Vancouver

Between:

Clarkdale Motors Ltd.

Plaintiff

And

The Dilawri Automotive Group

Defendant

Before: The Honourable K. Loo

Reasons for Judgment

Counsel for the plaintiff:	D.P. Dahlgren
Counsel for the defendant:	K.A. Davies T. Roemer
Place and Date of Trial:	Vancouver, B.C. August 12-15, 19-21, 2024
Place and Date of Judgment:	Vancouver, B.C. October 9, 2024

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Introduction

[1] In this proceeding, Clarkdale Motors Ltd. ("Clarkdale") advances an action against The Dilawri Automotive Group ("Dilawri") for breach of contract. The dispute arises from a letter of intent (the "LOI") made between the parties in relation to the purchase and sale of a Volkswagen dealership owned by Clarkdale.

[2] Clarkdale asserts that it is entitled to two deposits, totalling $500,000, under the terms of the LOI. It does not seek any additional damages.

The Letter of Intent

[3] The key document in this proceeding is the LOI, made between Dilawri and Clarkdale, effective November 11, 2019.

[4] The subject line of the LOI is "Offer to Purchase Clarkdale Volkswagen." In its introductory paragraph, the LOI is described as a "non-binding letter of intent … for the purchase of the assets and operations of Clarkdale Volkswagen." In paragraph 3, the LOI refers to the purchase and sale of the shares of Clarkdale.

[5] The LOI contains the following terms, among others:

a) "The obligations of the parties shall be conditional upon the approval of [Dilawri] by Volkswagen Canada as the replacement franchisee for [Clarkdale]" (para. 10);

b) Dilawri had "45 days from the date of execution … to complete a satisfactory due diligence process and provide [Clarkdale] written notice of the waiver of its due diligence condition" (para. 11);

c) The parties agreed that immediately upon execution of the LOI, they would "work together diligently and in good faith to prepare and execute a formal purchase and sale, in a form acceptable to each party in its sole discretion…" (para. 12);

d) Neither party was permitted to "disclose or otherwise make public (other than to the franchisors, its Bankers and professional advisors, or as may be required by law) the existence of this Letter of Intent or any of its contents without the prior written consent of the other party" (para. 13);

e) Until December 31, 2019, Clarkdale was required to "deal exclusively with [Dilawri] with respect to the matters set out [in the LOI] and take no action which would impair [Dilawri's] ability to complete the proposed transaction" (para. 14);

f) Immediately upon mutual acceptance of the LOI, Dilawri was required to make an "Initial Deposit in the amount of $250,000, such Initial Deposit to be refundable in the event the that *[sic]* Due Diligence conditions are not satisfied or waived by the Purchaser" (para. 15); and

g) "Immediately upon satisfaction or waiver of all Due Diligence Conditions, [Dilawri] shall make a Second Deposit in the amount of $250,000, and both the Initial Deposit and the Second Deposit shall become non-refundable except in the event of default by [Clarkdale]" (para. 15).

Chronology

[6] Although the facts will be discussed in more detail below when addressing the legal issues, I will set out here a brief timeline of the events giving rise to the action.

[7] In 2019, the principal of Clarkdale, Denis Barnard, decided to sell the dealership. He also decided to sell separately the land upon which the dealership was situated. The land was owned by a holding company controlled by Mr. Barnard.

[8] On November 7, 2019, Dilawri signed and sent the LOI to Clarkdale.

[9] On November 9, 2019, Clarkdale signed the LOI, changing the purchase price from $4.5 million to $5.2 million. On November 11, 2019, Dilawri accepted the price change.

[10] Shortly thereafter, Dilawri paid the initial deposit to its solicitors in the amount of $250,000.

[11] Beginning at a “kickoff meeting” on November 19, 2019, Dilawri began asking for and Clarkdale began providing due diligence materials.

[12] The date 45 days from the making of the LOI (being the end of the due diligence period as defined in the LOI) ended on December 26, 2019.

[13] Under the terms of the LOI, the exclusivity period expired on December 31, 2019.

[14] On January 28, 2020, Dilawri provided Clarkdale with a first draft of a Share Purchase Agreement (“SPA”).

[15] In March 2020, the structure of the transaction changed from a purchase of the shares of Clarkdale to a purchase of the shares of a holding company.

[16] On June 4, 2020, the parties finalized the terms of a lease between them so that the holding company could sell the land subject to that lease.

[17] On June 10, 2020, Clarkdale advised Dilawri that it had received an offer from a third party to purchase the land, and that the third party had accepted the lease.

[18] In August 2020, the parties entered into a second LOI, the terms of which were identical to those of the first LOI except for the dates.

[19] On August 14, 2020, Mr. Barnard advised Mr. Matthews that he had contacted Volkswagen with respect to the proposed transaction. He advised Mr. Matthews that the Volkswagen president and Volkswagen’s other representative supported having Dilawri take over Clarkdale.

[20] On August 27, 2020, Dilawri sent an application to Volkswagen to be approved as a Volkswagen franchisee in place of Clarkdale.

[21] Sometime between September 10 and 14, 2020, Mr. Barnard advised Clarkdale's staff that the dealership was being sold to Dilawri.

[22] On September 24, 2020, the land purchaser and Clarkdale agreed to a holdback of $250,000 that would be forfeited by Clarkdale to the land purchaser if Dilawri did not complete the purchase.

[23] On September 29, 2020, Volkswagen advised Dilawri that its proposed share acquisition of the dealership was approved subject to conditions.

[24] On October 9, 2020, Volkswagen delivered a letter of intent regarding the proposed share acquisition. The letter of intent contained conditions required by Volkswagen.

[25] On October 21, 2020, Dilawri advised Clarkdale and Volkswagen that it would not be proceeding with the transaction.

[26] Dilawri's reason for refusing to proceed is not particularly relevant to the issues in this action, but it is apparent that Dilawri made that decision because Volkswagen required it to complete renovations to the dealership (referred to as the "white frame renovations") by May 31, 2021, as a condition of being entitled to sell the ID.4, Volkswagen's new electric car, in its first year.

[27] Dilawri took the position that the deadline for white frame renovations was impossible to meet and declined to proceed with the purchase because, in its view, the economics of the purchase would be significantly impacted if it were not able to sell the ID.4 immediately upon the vehicle's release.

Issues

[28] In my view, the following issues are to be determined:

a) Was the LOI a binding agreement?

b) Was the due diligence condition waived or satisfied?

c) If it was satisfied, was written notice required within 45 days? In this regard:

   i. did the writing requirement apply to both satisfaction and waiver, or both?

   ii. were the writing requirement and the 45-day requirement waived, or is Dilawri estopped from relying on them?

d) Did the LOI contain implied terms?

e) In light of the foregoing, is the first deposit payable to Clarkdale?

f) Is Dilawri required to pay the second deposit to Clarkdale?

Witnesses and credibility

[29] There were three witnesses called to give evidence at the trial: Mr. Barnard, the principal of Clarkdale; Mr. Matthews, the chief financial officer of Dilawri at the relevant time; and David Boots, the vice-president of strategic development for Dilawri.

[30] Although I found some of the positions taken by the witnesses to be unreasonable, there were not many meaningful conflicts in the evidence. I observe that although Mr. Barnard testified that he understood that the LOI was binding and that due diligence was complete by December 26, 2019, and Mr. Matthews testified that his understanding regarding both points was to the contrary, their assertions about what they subjectively understood to be their legal rights and obligations are of very limited use to the Court. The proper focus must be on what was expressed between the parties, either by words or conduct.

[31] This case will not turn on whether the evidence of one witness is generally preferred over that of the other. To the extent that I must make comments or findings about the credibility or reliability of witnesses regarding specific issues, I will do so below when analysing those issues. For the most part, in determining the factual

issues in this case, I will be guided by the words of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.) who stated:

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

Discussion

Was the LOI a binding agreement?

Legal principles

[32] The law relating to contract formation is well-known. The Court's task is to discern the mutual and objective intentions of the parties as expressed in the words of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57.

[33] In *Berthin v. Berthin*, 2016 BCCA 104, the Court of Appeal held as follows:

> [46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:
>
> > The test for determining *consensus ad idem* at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": *Fridman*, *supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC), [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Witzke (Guardian ad litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC

> 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.
>
> [Emphasis added]

Discussion

[34] In this case, the LOI states that it is a "non-binding letter of intent" for the purchase of the assets and operations of Clarkdale. Further, there are certain parts of the LOI that appear on their face to contain only expectations, or agreements to agree on terms in the future, and therefore, do not appear to be binding.

[35] For example, paragraph 3 provides that "*it is expected* that the form of the transaction will be the purchase and sale of the shares of the Vendor…" [emphasis added].

[36] As discussed above, paragraph 12 provides that immediately upon execution of the LOI, the parties would "work together diligently and in good faith to prepare and execute a formal purchase and sale, in a form acceptable to each party *in its sole discretion*…" [emphasis added].

[37] On the other hand, the LOI uses the word "offer" on two different occasions. The document is signed by both parties, and Clarkdale's signature is found under the words: "We are in agreement with the above terms and conditions outlining the purchase and sale of the assets of the Vendor."

[38] Further, there are certain terms which appear, on their face, to evince an intention to contract. For example, paragraph 13 is a confidentiality clause which prohibits the parties from disclosing the contents of the LOI without prior written consent of the other party. Paragraph 14 is an exclusivity clause which requires Clarkdale to deal exclusively with Dilawri regarding the purchase and sale of the dealership until December 31, 2019. Paragraph 15 requires Dilawri to make an initial deposit in the amount of $250,000, and provides that such initial deposit is to be refundable in the event that the "Due Diligence Conditions are not satisfied or waived by [Dilawri]."

[39] As I understand it, Dilawri takes three alternative positions on the issue of whether the LOI is a binding legal agreement. First, it submits that the LOI's terms are not and were never intended to be binding. Second, it submits that the LOI terminated on December 31, 2019, and had no legal effect after that. Third, it submits that the entire LOI was conditional upon the approval of Dilawri by Volkswagen as the replacement franchisee for Clarkdale, and that it is not binding on Dilawri for that reason.

[40] I will address each of these positions in turn.

Was the LOI intended to be binding at all?

[41] Dilawri submits that the LOI is simply a "non-binding letter of intent" as stated in the document. In his testimony, Mr. Matthews took the position that the terms of the document were "optional" – that the purpose of the LOI was to set out expectations that may or may not be met.

[42] In my view, on the basis of the words of the LOI and the conduct of the parties, viewed objectively, it cannot be said that there were no legal obligations in the LOI at all or that the LOI was entirely "optional" as argued by Dilawri.

[43] The decision primarily relied upon by Dilawri in relation to this issue – *Eleoff v. Adamczyk,* 2024 ONSC 3167 – is distinguishable from this case. In *Eleoff*, no deposit was paid (although one was contemplated by the LOI), and there was no language in the LOI about the deposit being refundable or not. The reasons for judgment do not mention a confidentiality clause. The LOI expressly stated that there were no obligations of exclusivity.

[44] In my view, the initial deposit which was paid by Dilawri in this case created a legal relationship. That deposit either became refundable or not based on the terms of the LOI. If the due diligence clause had been expressly waived in writing within 45 days, Dilawri would not have been entitled to demand its deposit back on the basis that the entire LOI was "optional."

[45] Further, as discussed, the exclusivity and confidentiality terms appear on their face to be legally binding. It is difficult to imagine that Dilawri would not have sought legal recourse if Clarkdale had breached either of these provisions, for example, by entering into an agreement to sell the dealership to a third party before the end of the exclusivity period, or by publicizing its negotiations with Dilawri.

[46] I note that in its argument regarding whether the LOI is binding, Dilawri relies on evidence regarding the negotiation of the SPA and terms that were included in the drafts being exchanged between the solicitors. In my view, this evidence is of limited or no assistance. Negotiations undertaken for the purposes of reaching a new agreement and/or settling a claim cannot be used to resolve ambiguities in a contract: *Ridgeway-Pacific Construction Ltd. v. United Contractors Ltd*., [1978] B.C.J. No 478, 1978 Carswell BC 668 cited with approval in *Peterson v. 446690 B.C. Ltd. (Seymour Arm Hotel & Restaurant)*, 2016 BCSC 158 at para. 42.

Did the legal obligations in the LOI come to an end in December 2019?

[47] Dilawri argues, in the alternative, that even if the LOI were initially binding on the parties, any legal obligations came to an end following the expiration of the exclusivity period on December 31, 2019. Dilawri submits that after December 31, 2019, there was “nothing left” of the LOI, and all of the communications and steps taken thereafter occurred in the context of the parties making a good faith effort to negotiate a binding SPA. Dilawri submits that this effort failed when Dilawri found the terms of the letter of intent issued by Volkswagen to be unacceptable.

[48] However, this position is inconsistent with the evidence. In this regard, the parties’ subsequent conduct, including communications between them, can be relevant in determining whether there was a binding and enforceable contract between them. In *Oswald v. Start Up SRL,* 2021 BCCA 352, the Court of Appeal held:

> [50]… it is incontrovertible that subsequent conduct of the parties can be relevant to ascertain whether, objectively, they had entered into a binding and enforceable contract. Among the subsequent conduct in this case are emails from Start Up confirming the existence of a binding agreement.

[49] First, if the LOI had come to an end and the due diligence condition under the LOI had not been waived or satisfied, as Dilawri asserts, it seems unlikely that Dilawri would have continued with the negotiation of the SPA. Presumably, if Dilawri had refused to waive the due diligence condition or declare it satisfied, this meant that it had uncovered concerns that made it wary about purchasing the dealership.

[50] Second, Dilawri's position on this issue is inconsistent with the fact that the parties felt the need to and did enter into the second LOI in August 2020. It appears clear on the evidence that the parties agreed to make a second LOI to present to Volkswagen so that the Volkswagen would not be aware that the LOI had been extant since the previous August but, regardless of the reason, it is difficult to understand why the parties would have believed it necessary to enter into a replacement LOI if the first LOI had been terminated almost nine months previously.

[51] Finally, and perhaps most importantly, in November 2020, following its decision not to proceed further with the transaction, Dilawri wrote to Clarkdale through counsel as follows:

> Further to your letter of November 24, 2020 in respect of this matter, we write to inform you that to date Dilawri has neither satisfied nor waived the conditions in its favour in the LOI.
>
> In the circumstances, it would seem sensible for the parties to terminate the LOI and allow your client to pursue other dealership sale opportunities.
>
> [Emphasis added]

[52] In relation to this letter, one might ask: if the LOI ended on December 31, 2019, or was an unenforceable "optional" agreement, why was it necessary to satisfy or waive the conditions in that document? Why was it necessary to "terminate" the LOI? If the exclusivity clause in the LOI ended on December 31, 2019, or was never binding, why was it necessary to "allow" Clarkdale to pursue other dealership opportunities? In all of these ways, this letter from Dilawri's solicitor is inconsistent with the position that Dilawri now takes.

[53] For these reasons, I have concluded that the legal obligations in the LOI did not end on December 31, 2019, as argued by Dilawri.

Was the entire LOI conditional upon Volkswagen approval?

[54] Dilawri argues that the entire LOI is "conditional upon the approval of the Purchaser by Volkswagen Canada as the replacement franchisee for the Vendor." As Dilawri points out, paragraph 10 of the LOI states that *the obligations* of the parties shall be conditional upon Volkswagen approval.

[55] However, in my view, not *all* of the obligations in the LOI were subject to this condition. In particular, the due diligence obligations, the payment of the first deposit, the confidentiality obligation, and the exclusivity obligation had to be operative well before the parties would have known whether Volkswagen would approve the share purchase.

[56] In my view, paragraph 10 should be read as stating that Dilawri's obligation to purchase Clarkdale, and Clarkdale's corresponding obligation to sell to Dilawri, was subject to the approval of Volkswagen. As a result, paragraph 10 and the condition set out in it have no legal impact on this case, since Clarkdale does not seek specific performance of the LOI or damages in lieu; this case is only about whether the deposits payable under the LOI ought to be forfeited to Clarkdale.

[57] The condition in paragraph 10 does not assist Dilawri in any event, as Dilawri *was* approved by Volkswagen as the replacement franchisee for Clarkdale. Ultimately, Dilawri decided not to proceed with the transaction because it could not accept the conditions placed on the transaction by Volkswagen regarding the white frame renovations, but paragraph 10 of the LOI does not say that the transaction is subject to Volkswagen's *unconditional* approval of Dilawri. Mr. Boots, on cross-examination, admitted that he knew from the outset of the process that the letter of intent from Volkswagen would contain conditions.

Conclusion regarding whether LOI was a binding legal agreement

[58] For all of the reasons set out above, I find that the LOI was a legally binding agreement, in respect of certain terms.

[59] To be clear, I do not find that the LOI was an unconditionally binding agreement for Dilawri to purchase Clarkdale's dealership. In that sense, I agree with Dilawri that the document is a "non-binding letter of intent." If Dilawri had advised Clarkdale on December 26, 2019, that it was not prepared to waive the due diligence requirement, it would not have had any obligation to proceed any further and the first deposit would have been refundable. If Volkswagen had refused to approve Dilawri, the transaction would not have proceeded. If the parties had been unable to agree to a formal agreement of purchase and sale (which had to be in a form acceptable to each party in its sole discretion), it is arguable that neither party would have been able to compel the transaction. It is likely for these reasons that Clarkdale did not advance a claim for specific performance or damages in lieu.

[60] All of that said, the LOI did contain legal obligations. The exclusivity and confidentiality provisions were binding. Once the initial deposit was made, it was refundable only on certain conditions. Whether Dilawri can rely on those conditions to require the deposit's return is the primary issue to be determined at this trial, and it will be addressed below.

Was the due diligence condition waived or satisfied?

The contractual provisions

[61] This Court's assessment of the issue regarding waiver or satisfaction requires it to interpret and apply paragraphs 11 and 15 of the LOI, which provide in part:

> 11. The Purchaser shall have 45 days from the date of execution hereof (the "Waiver Date") to complete a satisfactory due diligence process and provide the Vendor written notice of the waiver of its due diligence condition …
>
> …
>
> 15. Immediately upon mutual acceptance of this Letter of Intent, the Purchaser shall make an Initial Deposit in the amount of $250,000, such Initial Deposit to be refundable in the event the that [*sic*] Due Diligence Conditions are not satisfied or waived by the Purchaser. Immediately upon satisfaction or waiver of all Due Diligence Conditions, the Purchaser shall make a Second Deposit in the amount of $250,000, and both the Initial Deposit and the Second Deposit shall become non-refundable except in the event of default by the Vendor.

[62] The LOI does not define “due diligence” or “due diligence condition.”

Evidence relating to waiver or satisfaction of the due diligence condition

[63] The parties never specifically discussed whether the due diligence obligation in the LOI was waived or satisfied until Dilawri’s lawyer asserted in a letter on November 27, 2020, that the condition had not been waived or satisfied. Following the making of the LOI through to Dilawri’s refusal to proceed, the parties had no communications about exclusivity or confidentiality. No one raised any issue about the first deposit, and no one suggested that the second deposit ought to be paid.

[64] Because the parties never had any direct communications regarding these issues, the Court is left to draw inferences from the circumstances. The evidence that I have considered in relation to waiver or satisfaction of the due diligence condition includes the following:

a) On November 13, 2019, two days after the parties entered into the LOI, Mr. Matthews wrote to Mr. Barnard and others, stating:

> Prior to meeting on Tuesday, Greg and I will try to put together and circulate a list of the types of information, discussion and documentation that we would like to address during due diligence, with the objective of assigning responsibility for each task in our meeting.
>
> We will arrange to transfer deposit funds to our lawyer’s trust account today, and will circulate his confirmation of receipt when complete.

b) As promised, Dilawri issued a list of items that needed to be produced or discussed. The list (the “Due Diligence List”) is entitled “Info requests for due diligence” and comprised two typewritten pages containing 29 items. These items included references to specific documents, such as “current YTD internal dealer statements,” tax return statements, and historic financial statements; information, such as “employee details,” “details of any fleet business,” and “identification of vendor and purchaser lawyers and accountants”; and discussion items, such as “discussions on status of

facility reimaging," and "discussions on proposed terms of premises lease."

c) It is important to emphasize the latter category of items on the Due Diligence List is comprised of points for "discussion." I infer from the words used that the parties wished to have conversations about issues such as the proposed term of a premises lease so that Dilawri could be assured that it and Clarkdale did not have significantly different perspectives regarding those issues. In my view, it would not be reasonable to conclude that such matters had to be finalized - within 45 days - in order to satisfy the due diligence condition in the LOI.

d) As indicated, on November 19, 2019, there was a "kickoff meeting" attended by representatives of both parties. At that meeting, the parties met each other in person for the first time and discussed some of the items on the due diligence list.

e) Clarkdale provided materials on the Due Diligence List to Dilawri almost immediately after, and in the week following, the kickoff meeting. On November 20, 2019, Mr. Barnard sent an email to Mr. Matthews stating, "Here is the information requested so far." That email attached many of the items on the list. That same day, he sent a further email attaching bank statements, and on November 21, 2019, he sent an email attaching the offsite leases. These items were also on the Due Diligence List.

f) On November 26, 2019, Mr. Matthews replied to Mr. Barnard's email attaching the offsite leases, saying "Thanks Denis." There is no evidence of any subsequent communications specifically regarding the Due Diligence List. Mr. Matthews never told Mr. Barnard that he was dissatisfied with the due diligence materials provided to him or that he was waiting for anything further in the Due Diligence List.

g) In late November 2019, the parties' attention turned almost immediately to the lease terms to which Dilawri would be subject if it purchased the dealership and to the preparation of a SPA.

h) Mr. Matthews was particularly concerned about the lease. Mr. Matthews testified that Dilawri needed a lease for "the right amount of time and at the right price" in order for the business to be profitable. In November 2019, Mr. Barnard, and later Mr. Matthews, had discussions with a potential purchaser of the dealership land regarding the terms of the lease to which Dilawri would be subject if it purchased the dealership.

i) On November 28, 2019, the parties were far enough along in the process under the LOI that Mr. Matthews was of the view that they were "generally clear" to inform Clarkdale's staff and Volkswagen of the purchase, subject only to being confident that the potential landlord would accept certain lease terms proposed by Dilawri. On that date, Mr. Matthews wrote to Mr. Barnard, stating:

> With respect to informing staff and VW, I think we are generally clear to do that as soon as we are confident landlord will accept the lease basically with the terms included in this draft, but lets be sure to all be in agreement before anyone says anything.

j) There was no reference to due diligence under the LOI, even though the parties were still four weeks away from the end of the 45-day due diligence period.

k) The 45-day due diligence period under the LOI ended on December 26, 2019. On December 31, 2019, the exclusivity period under the LOI expired.

l) Mr. Barnard testified that in February 2020, Mr. Matthews told him that he would "eat his shoe" if the sale did not close. Mr. Matthews did not deny saying this.

m) On February 20, 2020, Clarkdale's solicitor sent an email to Dilawri's solicitor attaching a file entitled "due diligence consent forms – signed."

n) On March 5, 2020, Mr. Matthews wrote that, other than a deficiency holdback issue, "I think we're generally agreed on the form of SPA. We'll try to get you as much on the Schedules as possible over the next while."

o) In the spring of 2020, the parties continued to negotiate with the potential purchaser of the lands regarding the terms of a lease between the land purchaser and Dilawri. Ultimately, the potential purchaser decided not to proceed with the purchase.

p) In early June 2020, Mr. Matthews and Mr. Barnard agreed on a lease between Dilawri and Clarkdale, thereby eliminating the need to negotiate a lease with a potential purchaser of the land. On June 10, 2020, Mr. Barnard advised Mr. Matthews that he had received an offer for the land from a new purchaser, and that the new purchaser had accepted the lease made between Dilawri and Clarkdale.

q) On August 11, 2020, Mr. Barnard sent a series of ten emails to Mr. Matthews, attaching information and documents. Dilawri submits that these emails support its position that due diligence under the LOI was ongoing in August 2020 because the introductory message states: "As promised this will be 1 of 10 emails with the items for due diligence."

r) On August 17, 2020, Mr. Matthews texted Mr. Barnard, suggesting an effective date for the transaction of September 30, 2020, instead of October 15, 2020, as previously contemplated.

s) In August 2020, the parties turned their attention to two remaining issues of importance: the application process with Volkswagen by which Dilawri would ask to be approved as the dealership's franchisee, and the decision to notify Clarkdale's staff about the transaction.

t) In this regard, on August 27, 2020, Dilawri sent a completed application to Volkswagen. Between September 10 and 14, 2020, Mr. Barnard advised the Clarkdale staff, with Mr. Matthew's concurrence, that Dilawri was going to purchase Clarkdale.

Discussion regarding waiver or satisfaction of the due diligence condition

[65] On the basis of the communications between the parties, the structure and words of the LOI, and the facts and circumstances set out above, I have concluded that the due diligence condition was satisfied, probably before December 26, 2019, but at least by September 2020, when the announcement was made to the staff and the application was made to Volkswagen.

[66] Dilawri submits that by December 2019, "there had been no disclosure in terms of contracts, legal entity info and other things and that it was an ongoing process. As well, the terms of the lease with the land purchaser had not been agreed to."

[67] However, this submission ignores a distinction that, in my view, ought to be drawn between the due diligence that was intended to be completed within the 45-day period described in paragraph 11 of the LOI and due diligence in a more general sense.

[68] In my view, the fairly attenuated 45-day period allocated to due diligence is an indication that its purpose was to permit Dilawri time to "kick the tires" and to determine whether there were any matters of significant concern associated with the potential purchase. Mr. Matthews' November 13, 2019, email demonstrates, in my view, that he viewed due diligence as a discrete process involving the provision of "information, discussion and documentation."

[69] As indicated above, by the end of November 2019, the parties had turned their attention to the lease issue and the drafting of the SPA. It is clear that no lease had been finalized by December 2019, and contracts and legal entity information

were still being provided by Clarkdale in 2020; however, in my view, these matters were not part of the initial due diligence under the LOI.

[70] While the due diligence list includes “discussions on proposed terms of premises lease,” it does not say that the lease must be agreed to as part of due diligence.

[71] Further, I find that once the parties started preparing the SPA, information requests for that SPA were not “due diligence,” as that term is used in the LOI. In my view, it is untenable to suggest that the provision of information and documents by Clarkdale for inclusion in the SPA constituted due diligence under the LOI. If correct, that suggestion would require the due diligence condition in the LOI to be left open until the SPA was signed. As a result, the LOI would essentially be an option in favour of Dilawri, under which it could decide to proceed with the transaction or not at any time, and under which it would suffer no consequences if it decided not to proceed up until the SPA was finalized. In my view, such a commercially unreasonable outcome ought to be avoided.

[72] In support of its argument that due diligence under the LOI continued in 2020, Dilawri relies on the email sent by Clarkdale’s solicitor to Dilawri’s solicitor on February 20, 2020, attaching a file entitled “due diligence consent forms – signed.”

[73] There was no specific evidence advanced regarding this email, but I infer that the search forms were being provided so that information could be obtained for the SPA. I note that both the February 20 email and a previous email requesting that the search forms be signed were exchanged between the solicitors, who were preparing the SPA, while the earlier correspondence specifically dealing with due diligence under the LOI was between Mr. Matthews and Mr. Barnard directly.

[74] Dilawri also relies on the communications from Mr. Barnard to Mr. Matthews in August 2020, wherein ten emails containing information, forwarded under an initial email referring to “due diligence.”

[75] However, Mr. Barnard testified that his reference to due diligence in that email was inadvertent. More importantly, it is evident that the attachments to the emails relate to schedules which were to be attached to the SPA. For example, the first email contained information for "Schedule S – Inhouse Warranty and Free/Reduced Price Service Commitments." The second contained information for "Schedule R – Licenses and Permits." The subject line of each of the ten emails refers to a specific schedule. In view of these subject lines and the contents of the emails, I find that these documents and information delivered in August 2020 were provided for inclusion in the SPA upon which the parties' solicitors were working.

[76] Dilawri argues that when the structure of the transaction was changed so that the shares of a holding company were to be purchased rather than the shares of Clarkdale, that change necessitated further due diligence to be provided in March 2020. It may well be that Dilawri required information and due diligence in a general sense about the holding company after the structure was changed, but in my view, this was not due diligence under paragraph 11 of the LOI either. A change to the deal structure such as this could have happened at any time – including after the initial due diligence condition was specifically waived or satisfied. It would not make commercial sense for such a change to restart the due diligence timeline under paragraph 11.

[77] Further, Dilawri relies on a conversation between Mr. Matthews and Mr. Barnard in September 2020, in which they discussed the holdback demanded by the land purchaser, which would be forfeited to the purchaser if Dilawri did not end up taking over the dealership. Although the precise content of that discussion is disputed, it is my view that even on Dilawri's version of the discussion, it is of little assistance to Dilawri. Dilawri submits that Mr. Matthews told Mr. Barnard that there was no certainty that the deal would ever close, that there was no share purchase agreement, there were outstanding issues, there was no Volkswagen approval, and Clarkdale was at risk if it agreed to the holdback. All of these statements were true, but none of them leads this Court to conclude that due diligence under the LOI was still ongoing at this date.

[78] Given the lack of communication from Dilawri asking for further information or complaining about any outstanding items on the Due Diligence List after November 2019, the shift in the parties' focus to the SPA and the lease after November 2019, and Mr. Matthews' statement on November 28, 2019, that they would be "generally clear" to inform Volkswagen and the staff about the transaction "as soon as we are confident landlord will accept the lease," it is my view that the due diligence condition was probably satisfied by the 45-day due diligence deadline on December 26, 2019.

[79] If I am incorrect in this regard, I find that Dilawri must have been satisfied with its due diligence by September 2020, when Mr. Barnard informed the Clarkdale staff of the transaction, with Mr. Matthews' concurrence, and when Dilawri made its application to Volkswagen to become the replacement franchisee.

[80] I read Mr. Matthews' November 28, 2019 email as opining that Volkswagen should not be approached and staff should not be informed of the transaction until the parties were quite certain that the deal was going to happen. The fact that Mr. Matthews was content to have both of these steps taken in September 2020 leads me to conclude that Dilawri was confident in the deal by that date.

[81] Further, I infer that once Dilawri was confident in the deal, due diligence under the LOI was no longer a concern. In my view, Dilawri would not have permitted its name to be publicized as the purchaser of a dealership, and it would have undertaken the expense and work of an application to the manufacturer if it still had not finished "kicking the tires" on the potential purchase.

[82] In summary, I find that due diligence under paragraph 11 of the LOI was satisfied, probably before December 26, 2019, but at least by September 2020, when Mr. Barnard made the announcement to the staff and Dilawri made the application to Volkswagen.

If the due diligence condition was satisfied, was written notice of satisfaction required within 45 days?

[83] Given my findings above, two questions arise. First, in order for the first deposit to be non-refundable, did there have to be written notice that the due diligence conditions were satisfied? Second, in order for the first deposit to be non-refundable, did the due diligence conditions have to be satisfied within 45 days?

As a matter of construction, was written notice of satisfaction required?

[84] The LOI expressly states that notice of waiver must be in writing, but it does not say that notice of satisfaction must be in writing. Rather, it simply says that the Purchaser shall have 45 days "to complete a satisfactory due diligence process and provide the Vendor written notice of the waiver of its due diligence condition."

[85] In my view, the word "and" is important to this analysis. If the parties had used the disjunctive "or," it would have been reasonably clear that waiver required writing, but satisfaction did not.

[86] Strictly speaking, if the due diligence process was satisfactory, there was no need for waiver; indeed, waiver and satisfaction are inconsistent concepts. However, the use of the conjunctive "and" demonstrates, in my view, that the authors of the LOI treated waiver and satisfaction as being the same, or least interchangeable. As a result, the written waiver of the due diligence condition is treated as a consequence of a satisfactory due diligence process: the LOI requires that upon the completion of a satisfactory due diligence process, written notice of waiver be given. Although this requirement does not make sense as a matter of law, the Court must do its best to discern the mutual and objective intentions of the parties as expressed in the words of the contract.

[87] As the document treats waiver and satisfaction as the same or interchangeable, it is not reasonable, in my view, to read the document as requiring written notice for one and not for the other. I find that the mutual and objective intention of the parties was to require written notice in respect of either waiver or satisfaction.

Is Dilawri barred by principles of waiver or estoppel from seeking to strictly enforce the requirement of written notice within 45 days?

[88] I have concluded above that the due diligence condition was probably satisfied within the 45-day deadline set out in the LOI. However, as it is clear that no notice was given in writing, and in case I am incorrect that the 45-day deadline was met, I must determine whether the requirement of written notice within 45 days ought to be enforced.

[89] In relation to this issue, the principles of waiver, estoppel, and amendment arise. They all overlap to some degree.

[90] In *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 15 [*Trial Lawyers*], the Supreme Court of Canada cited with approval the following passage from *Maracle v. Travellers Indemnity Co. of Canada,* [1991] 2 S.C.R. 50, 1991 CanLII 58 at 57, setting out the law in respect of promissory estoppel:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position.

[91] The Court in *Trial Lawyers* went on to summarize the elements of promissory estoppel as follows:

> [15] … The equitable defence therefore requires that (1) the parties be in a legal relationship at the time of the promise or assurance; (2) the promise or assurance be intended to affect that relationship and to be acted on; and (3) the other party in fact relied on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.

[92] In *Crossview Developments Inc. v. 22624443 Ontario Limited*, 2016 ONSC 647 [*Crossview*], the Ontario Superior Court applied the law set out in *Maracle*. The plaintiff sought specific performance of a contract for a leasehold interest in land. The defendant's position was that the contract was null and void because it had not waived a condition, called the solicitor review condition, in writing.

[93] The Court found that the defendant had made "unambiguous representations," which led the plaintiff to believe that failure to waive the solicitor review condition would not end the agreement. Such representations included the fact that the defendant cashed a deposit cheque and did not return the deposit to the plaintiff, and the fact that the parties continued to have discussions regarding the agreement and possible amendments. In this context, the Court held that the parties had proceeded on the basis that the agreement had not been terminated, and the defendant was therefore barred from taking the position that the agreement was null and void because it did not waive the solicitor review condition in writing: see paras. 62–70.

[94] Similarly, in *Peterson*, this Court found that the plaintiff was satisfied with the progress of an official community plan and "fully intended to proceed with the purchase" of the subject lands, although he did not directly communicate this to the defendants. At para. 84, the Court held that "[t]o the extent that his satisfaction was a condition precedent to the March 2007 Agreement, it had been waived by his conduct."

[95] In *ID Inc. v. Toronto Wholesale Produce Association*, 2023 ONSC 4770, the Court explained the equitable doctrine of estoppel as follows:

> [263] Estoppel is closely related to waiver. It is an equitable doctrine that prevents a party from relying on a contract where it did not intend to rely on the strict terms and led the other party to believe that it would not rely on the contractual provision.

[96] Further, explaining the principle of waiver in *North Elgin Centre Inc. v. McDonald's Restaurants of Canada Limited*, 2018 ONCA 71, the Court held:

> [8] The principle of waiver provides that if one party leads another party to believe that its strict legal rights under a contract will not be insisted upon, intending that the other party will act upon that belief and the other does so, then the first party may not afterwards insist on its strict legal rights when it would be inequitable to do so: *Petridis v. Shabinsky*, 1982 CanLII 1829 (ON SC), 35 O.R. (2d) 215 (H.C.), at para. 20.

[97] In a decision with analogous facts but applying the law of amendment, it was held that the parties varied the terms of a contract which required extra costs to be authorized in writing. In *Ekum-Sekum Incorporated c.o.b. as Brantco Construction v. Lanca Contracting Limited*, 2023 ONSC 7535, the Court concluded:

> [47] … I agree with Brantco that in these circumstances, Lanca cannot rely on the niceties of the contract to avoid payment to Brantco. The parties have, by their conduct, varied the terms of the contract (*Colautti Construction, supra*) and Lanca has acquiesced in the provision of these extras, which it must have understood would entail additional expense….

[98] Clarkdale relies on the principles set out in these cases and submits that the requirement for written notice within 45 days was waived or amended, or that Dilawri is estopped from relying on the strict terms of the LOI.

[99] In response, Dilawri argues that waiver cannot be made out in the circumstances of this case. It emphasizes that the threshold in respect of waiver is difficult to meet.

[100] In *Kypriaki Taverna Ltd. v. 610428 B.C. Ltd*., 2021 BCSC 1711 at para. 16, the Court cited the well-known decision in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 500, 1994 CanLII 100 [*Saskatchewan River*] for the proposition that the party seeking to establish the existence of waiver must demonstrate that the waiving party had:

a) full knowledge of the rights being waived; and

b) a conscious and unequivocal intention to abandon those rights.

[101] Dilawri submits that the Court ought not to find that Dilawri had full knowledge of the rights being waived along with a conscious intention to abandon its rights in this case. With this submission, I agree. Indeed, I cannot find on the evidence that either party specifically thought about their rights and obligations regarding written notice or the 45-day due diligence period at all.

[102] It appears superficially that the law in *Saskatchewan River* is inconsistent with the law in *Manacle*. However, in my view, any apparent inconsistency is explained in *Terasen Gas Inc. v. Utzig Holdings (B.C.) Ltd. (No. 2)*, 2010 BCSC 1225 at para. 16 [*Terasen Gas*], wherein this Court quoted the following passage from H.G. Beale, ed., *Chitty on Contracts*, vol. 1, 30th ed. (London: Thomson Reuters (Legal) Limited, 2008) at para. 24-008:

> **Similarities and differences.** Both waiver by election and waiver by estoppel share some common elements. The principal similarity is that both would appear to require that the party seeking to rely on it (i.e. the party in default) must show a clear and unequivocal representation, by words or conduct, by the other party that he will not exercise his strict legal rights to treat the contract as repudiated. But there are also important differences between the two types of waiver. In the case of waiver by election the party who has to make the choice must either know or have obvious means of knowledge of the facts giving rise to the right and possibly of the existence of the right. But in the case of waiver by estoppel neither knowledge of the circumstances nor of the right is required on the part of the person estopped; the other party is entitled to rely on the apparent election conveyed by the representation.
>
> [Emphasis in original quotation from *Terasen Gas*]

[103] In my view, this case falls into the latter category described in this passage. It is not necessary in the context of waiver by estoppel or promissory estoppel for the party relying on these doctrines to show that the other party had full knowledge of the rights being waived or a conscious intention.

[104] Rather, the case law regarding promissory estoppel and estoppel by waiver speaks of fairness and reasonable reliance. These are the principles upon which Clarkdale relies. Clarkdale submits that it would not be fair for Dilawri to be able to rely on the strict terms of the LOI to obtain the release of the first deposit, having not raised any issue about due diligence under the LOI previously and having led Clarkdale to believe that the due diligence was not an issue.

[105] By contrast, Dilawri submits that the real issue is commercial certainty, and that businesspeople ought to be able to rely on the strict words of contracts into which they enter.

[106] In my view, in the circumstances of this case, the pursuit of certainty is rather illusory. Neither of the parties appears to have paid any attention to the terms of the LOI at all. No one discussed the expiry of the deadlines. Rather, the parties both pressed forward with the expectation of achieving a deal. The objective of certainty does not weigh heavily when it involves upholding a provision in a document to which the parties did not pay any attention.

[107] Dilawri relies on the decision in *Kwan v. LSN Investments Inc.,* 2022 ONSC 3174, which in my view stands for the proposition that the expiry of a deadline and subsequent silence cannot by itself result in a waiver by conduct. I agree with that broad legal proposition, but in this case, the conduct in question was comprised of more than mere delay and silence.

[108] Following on that point, Dilawri seeks to distinguish the decisions relied upon by Clarkdale, on the basis that the clarity of the conduct which supported findings of estoppel in those cases was more apparent than in this case. While comparisons with the facts in other cases is helpful, the question to be answered is whether I am able on the evidence to find that Dilawri led Clarkdale, in the words of *Maracle*, to suppose that the strict rights under the LOI would not be enforced.

[109] Turning then to the test for promissory estoppel set out in *Maracle,* Dilawri argues that the law of promissory estoppel does not apply because there was no legal relationship between the parties. However, I have found that the LOI was a binding legal contract, at least in respect of some of its terms.

[110] I find that by its conduct, Dilawri assured Clarkdale that it would not rely on the requirement in the LOI that written notice of satisfaction or waiver be given within 45 days, that this assurance was intended to lead Clarkdale to continue to negotiate a lease and the SPA and to continue to observe the confidentiality and exclusivity provisions in the LOI, and that it had that effect.

[111] Dilawri did so by not raising any issues regarding due diligence under the LOI after November 2019, and in that context by advising Mr. Barnard in November 2019

that “we are generally clear” to advise Volkswagen and Clarkdale’s staff about the transaction subject to settling the lease issue, by negotiating and finalizing the lease, by making and almost finalizing the SPA, by concurring in the announcement to the Clarkdale staff, and by making an application to Volkswagen.

[112] To be clear, I have not concluded that Dilawri waived its rights regarding the due diligence condition generally. I have found above that the due diligence condition was satisfied. Rather, I have concluded that Dilawri led Clarkdale to believe that it would not insist on the strict terms of the LOI regarding written notice of waiver or satisfaction within 45 days, and that it is disentitled now from seeking to revert to those strict terms.

Does the LOI contain implied terms?

[113] Given my findings above, it is not necessary to address Clarkdale’s argument as to implied terms, but I will do so briefly.

[114] The parties do not dispute the principles applicable to the issue of implied terms. In *Kruger v. PortLiving Properties Inc*., 2024 BCSC 1046, the Court held:

> [43] There are three means by which a term can be implied into a contract: based on custom or usage, as the legal incidents of a particular class or kind of contract, or based on the presumed intentions of the parties where the implied term must be necessary “to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a which the parties would say, if questioned, that they had obviously assumed”: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 S.C.R. 619 at para. 27, 1999 CanLII 677 [*M.J.B. Enterprises*]. …
>
> [44] The onus is on the party seeking to establish an implied term of a contract: *Athwal v. Black Top Cabs Ltd*., 2012 BCCA 107 at para. 48. The device of implying terms into a contract is to be used sparingly and with caution: *Kaban Resources Inc. v. Goldcorp Inc*., 2020 BCSC 1307 at para. 85, aff’d 2021 BCCA 427, leave to appeal to SCC ref’d 39940 (28 April 2022) [*Kaban*], citing *High Tower Homes Corp. v. Stevens*, 2014 ONCA 911 at para. 39. An implied term cannot be inconsistent with the express terms of a written agreement: *Kaban* at para. 80.
>
> [45] The focus is not on the intentions of reasonable parties, but rather on what the actual parties intended in the actual circumstances of the contract in issue: *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 at para. 58. The introduction of an implied term relies on the shared intentions of both parties, not the subjective intentions of one or the other: *Kaban* at para. 88.

> Accordingly, the term a party seeks to have implied must have a degree of obviousness to it and may not be implied if there is evidence of a contrary intention on the part of either party: *M.J.B. Enterprises* at para. 29.

[115] Clarkdale takes the position that to give business efficacy to the LOI, the Court should imply the following terms:

> [a] The Defendant was not required under the November LOI to provide written notice to the Plaintiff that it was satisfied with the Due Diligence Condition;
>
> [b] If the Defendant was silent about the Due Diligence Condition and did not provide written notice to the Plaintiff that the Due Diligence Condition had been waived, but moved forward with the sale of the Dealership after December 26, 2019 and take significant steps to complete the sale, this would constitute notice to the Plaintiff that the Defendant was satisfied with the Due Diligence Condition and the Deposits were non-refundable; and
>
> [c] The Defendant would continue to have exclusivity if the parties moved forward in good faith with the transaction after December 31, 2019.

[116] In my view, these proposed implied terms all fall afoul of the principles set out in the case law. The first and second proposed terms are both contrary to my findings regarding the parties' intentions: I have already found, as matter of construction of the contract, that written notice was required by the terms of the LOI in respect of both satisfaction and waiver. The third proposed term is inconsistent with the express term in the LOI that Clarkdale would deal exclusively with Dilawri until December 31, 2019.

[117] I am not prepared to give effect to the implied terms proposed by Clarkdale. None has the requisite degree of obviousness and, in respect of all three, there is evidence of a contrary intention in the written document.

In light of the foregoing, is the first deposit forfeited to Clarkdale?

[118] I have concluded above that the due diligence condition in the LOI was satisfied. I have also concluded that Dilawri is barred by the doctrines of waiver by estoppel or promissory estoppel from relying on the strict terms of the LOI regarding written notice within 45 days.

[119] For these reasons, the initial deposit is not refundable pursuant to paragraph 15 of the LOI and is payable to Clarkdale.

Is Dilawri required to pay the second deposit under the LOI to Dilawri?

[120] Clarkdale relies on the decision in *Argo Ventures v. Choi,* 2020 BCCA 17 at para. 36, cited in *Sewell v. Abadian*, 2024 BCSC 1116 at para. 122, for the uncontroversial principle that where a seller's right to a non-refundable deposit has accrued before it accepts the buyer's repudiation, the seller can sue for an amount equal to the unpaid deposit.

[121] Clarkdale submits that it is entitled to recover the full $500,000 deposit if the Court finds that Dilawri breached the LOI. However, this Court has not found that Dilawri *breached* the LOI. The initial deposit funds were paid to Dilawri's solicitors, subject to the terms of the LOI, and they became non-refundable in accordance with the terms of the LOI.

[122] In my view, the appropriate questions to be answered in relation to the second deposit are whether the second deposit became payable in accordance with the terms of the LOI and, if so, whether the terms of the LOI in this regard ought to be enforced.

[123] The answer to the first of these questions is straightforward.

[124] Paragraph 15 of the LOI provides, in part, that "[i]mmediately upon satisfaction or waiver of all Due Diligence Conditions, the Purchaser shall make a Second Deposit in the amount of $250,000, and both the Initial Deposit and the Second Deposit shall become non-refundable except in the event of default by the Vendor."

[125] I have found that the due diligence condition was satisfied. Therefore, subject to the analysis below, Dilawri is obliged under paragraph 15 to make a second deposit in the amount of $250,000.

[126] The second question is determinative in relation to this issue. In my view, Clarkdale is barred by the doctrines of waiver by estoppel and promissory estoppel from relying on the terms of the LOI to compel payment of the second deposit, in the same way that Dilawri is barred from relying on the provisions requiring written notice within 45 days.

[127] Clarkdale said nothing to Dilawri at any time about payment of the second deposit. It did not demand payment of the second deposit, and it did not mention the fact that it was payable upon satisfaction or waiver of the due diligence condition.

[128] It is common ground between the parties that they never contemplated more than a total of $500,000 in deposits. If the SPA had been finalized, a total of $500,000 in deposits would have been paid, and the parties would have been in the same position in relation to deposits that they originally intended under the LOI. In my view, the parties, believing that a deal would be made, put off dealing with the second deposit in the expectation that the deposit would be raised to $500,000 upon the making of the SPA.

[129] In my view, Clarkdale led Dilawri to believe that no second deposit was necessary pending the negotiation of the SPA. I find that by participating with Dilawri in the negotiation of the lease, the making of the SPA, the announcement to the staff, and the application to Volkswagen, all the while not raising the issue, Clarkdale represented to Dilawri that it was content to move toward the completion of the share purchase transaction without insisting on a second deposit.

[130] When Dilawri decided not to proceed with the transaction, it was, in my view, too late for Clarkdale to seek to revert to the strict terms of the LOI by insisting on the payment of the second deposit, in the same way that it was too late for Dilawri to seek to revert to the strict terms of the LOI by insisting upon compliance with the terms regarding written notice within 45 days.

[131] Counsel for Clarkdale argues that there was no conscious and unequivocal intention to abandon its rights in respect of the second deposit, but this is the same

argument that Dilawri makes in respect of the written notice issue and the 45-day deadline. As discussed above, *Maracle* does not require the Court to find a conscious intention to waive with full knowledge of the rights being waived. Rather, the doctrines of promissory estoppel and estoppel by waiver have regard to fairness and reasonable reliance. It would be particularly unfair to hold Dilawri to the strict terms of the LOI regarding the second deposit while not holding Clarkdale to the strict terms in relation to written notice of the satisfaction of the due diligence condition within 45 days.

[132] For these reasons, Clarkdale's claims for an order requiring Dilawri to pay the second deposit or for damages in the amount of that deposit are dismissed.

Conclusions and costs

[133] The initial deposit paid by Dilawri in the amount of $250,000 is not refundable and shall be paid to Clarkdale.

[134] Clarkdale's claims in relation to the second deposit are dismissed.

[135] Unless there are settlement offers or other considerations relevant to costs of which I am not aware, in which case the parties shall arrange through the registry to make brief written submissions, costs of this action shall be payable by Dilawri to Clarkdale at Scale B.

"The Honourable Justice K. Loo"