IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bene (Oval) Development Ltd. v. 1148538 B.C. Ltd.,* 2024 BCSC 2080

Date: 20241119
Docket: S188485
Registry: Vancouver

Between:

Bene (Oval) Development Ltd.

Plaintiff

And

1148538 B.C. Ltd.

Defendant

And

Bene Capital (Group) Ltd., Da Bao International Holding Co. Ltd., Dragon Source Investments Ltd., Goband Investment Ltd. and Centron Investment Ltd.

Defendants By Counterclaim

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff and Defendants by Counterclaim:	M.L. Bromm D.M. Smart
Counsel for the Defendant:	R.B. Fraser S. Batkin
Counsel for Attendees, Samuel Cheung, Samuel Cheung Personal Real Estate Corporation and Seafair Realty Ltd. dba Sutton Group Seafair Realty:	D.M. Smart (July 20, 2023 and May 15, 2024)
Place and Dates of Hearing:	Vancouver, B.C. July 11-14, 17-20, 2023, and February 29 and May 15, 2024
Place and Date of Judgment:	Vancouver, B.C. November 19, 2024

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Introduction

[1] There are two summary trial applications before me. The plaintiff applies for judgment against the defendant in the amount of $20 million plus interest and for an order that a $5 million deposit be released forthwith on account of damages. The defendant applies for an order dismissing the claim of the plaintiff and for an order that the $5 million deposit be returned to it.

[2] There is also a document production application by the defendant requesting various documents between the plaintiff's tax adviser and the plaintiff's solicitors and other representatives. During the course of the hearing, the parties appeared to have resolved this document production issue, subject to claims of privilege. I therefore do not address the document production application. If it has not been fully resolved, the parties can bring it back on for a hearing.

[3] The parties entered into a contract for the sale and purchase of 6851 and 6871 Elmbridge Way, Richmond, British Columbia (the "Property") for $80 million on January 19, 2018 (the "Contract"). The Contract was on the standard form of the B.C. Real Estate Association and the Canadian Bar Association (BC Branch). The Contract contained a non-standard clause in the following terms:

> The Seller hereby agrees that the Buyer may complete the purchase of the Property by way of Purchasing all of the issued and outstanding shares of and in [the] company or companies on title to the property pursuant to a share purchase agreement in a form acceptable to both parties' solicitors acting reasonably and pursuant to such other documentation as determined suitable by the parties' solicitors.

[4] The above clause has been referred to as the "share purchase option" by the plaintiff and the "beneficial ownership option" by the defendant. The choice of nomenclature presages their respective submissions on the meaning and effect of the clause. I will refer to the added clause simply as the "option clause".

[5] The sale ultimately did not occur due to a disagreement between the parties as to the meaning and effect of the option clause.

[6] The defendant submits, *inter alia*, that the clause permitted it to separately acquire the plaintiff's beneficial and legal interests in the Property, something that involved a complex multi-stage procedure which it calls the "beneficial ownership option". The plaintiff submits that the option clause gave the defendant two options, namely, the right to purchase the Property by way of an asset or fee simple transaction or, the right to purchase the shares of the plaintiff's shareholders.

[7] Both parties say they were ready, willing and able to close the transaction in accordance with their respective views of the meaning and effect of the option clause. Both parties say the other repudiated or breached the Contract. The defendant also submits, in the alternative, that the option clause and the entire contract is void for uncertainty.

[8] Neither party has alleged that this matter is not suitable for summary trial. However, for the reasons that follow, I have determined that it is unsuitable for summary trial.

Applications History

[9] The applications have had a lengthy and tortured history. The defendant's application was originally filed on June 16, 2021 and amended on December 8, 2022. The plaintiff's application was originally filed on January 7, 2022 and amended on June 8, 2023.

[10] The applications initially came before me on July 11, 2023. I heard submissions for eight days and reserved judgment on July 20, 2023.

[11] Shortly after the conclusion of the hearing, on July 28, 2023, I received a request from counsel for the defendant to tender a newly produced email and to make brief submissions on same. Then, on November 28, 2023, plaintiff's counsel wrote to the court advising that the plaintiff also wished to introduce an email exchange and to make additional submissions. The November 28, 2023 letter specifically requested that I refrain from issuing reasons until after submissions were completed. The parties were advised that they could bring an application to re-open

the hearing and that I would refrain from releasing my reasons pending the hearing and the outcome of the application.

[12] On February 13, 2024, the plaintiff filed an application to re-open the hearing. On February 26, 2024, the defendant filed an application to strike parts of the plaintiff's application to re-open. The basis for the defendant's application was that the email sought to be introduced and the affidavits filed in support of the plaintiff's application contained privileged information. The two applications relating to the re-opening of the hearing came before me for a hearing on February 29, 2024. They were adjourned generally to allow the plaintiff time to prepare a response to the defendant's application. The parties were directed to re-set for hearing before me on a mutually convenient date and, if they were unable to agree, they could apply for directions.

[13] On April 11, 2024, counsel wrote to the court advising, *inter alia*, that: (1) the plaintiff would not proceed with its application to reopen which should be considered as abandoned; (2) the application to strike remained pending but would not be scheduled until after the issuance of reasons on the summary trial applications; (3) the court should not consider any aspect of the application to reopen; and (4) an order should be made sealing all materials filed subsequent to the materials relied on at the summary trial. Following receipt of the letter dated April 11, 2024, I directed that a case management conference be held. That conference was held on May 15, 2024. After hearing further submissions and explanations from counsel, orders were made along the lines requested and these applications for summary trial were again taken under reserve.

Facts

[14] The basic facts are not in serious dispute, although the completeness of the factual record is something to which I will return.

The Parties

[15] The plaintiff is a British Columbia corporation. It is the owner of the Property. The plaintiff operated a warehousing business on the Property and leased out space to various tenants.

[16] The president and sole director of the plaintiff is Mr. Ming Nan Li. He is also the sole shareholder, director and officer of Bene Capital (Group) Ltd., one of five shareholders of the plaintiff. Mr. Li swore an affidavit made January 6, 2022. He deposes that the other shareholders of the plaintiff are companies that are owned by his friends or relatives. Those shareholders are the various companies named as defendants by counterclaim.

[17] The defendant is also a British Columbia corporation. Rajnesh Dev Singh Mann is the sole director of the defendant. He has sworn three affidavits: affidavit #1 made December 29, 2020, which provides answers to various interrogatories; affidavit #2 made June 14, 2021; and affidavit #3 made November 15, 2022.

Other Individuals and Affiants

[18] Samuel Cheung and JT Mann are real estate agents. Samuel Cheung was the designated agent of the plaintiff and JT Mann was the designated agent of the defendant. Neither of them has filed an affidavit in this matter, a point of considerable significance.

[19] To avoid confusion between JT Mann and Rajnesh Dev Singh Mann, I will hereafter refer to the latter as Rajnesh Mann. I mean no disrespect in so doing.

[20] Dorwin Cho is a solicitor who acted for the defendant in respect of the closing of the transaction. He has filed two affidavits; one made June 11, 2021 and the other made November 30, 2022.

[21] Kenn Lui is a solicitor who primarily handled the transaction on behalf of the plaintiff. He has not sworn an affidavit. However, Paul Leung, a solicitor with the same firm, has sworn an affidavit made January 7, 2022. He deposes he was the

senior and supervising solicitor for the plaintiff in the transaction. His affidavit simply deposes to various communications in July 2018 from his office to Mr. Cho's office that were not responded to.

[22] It is to be noted that Mr. Cho and Mr. Leung have both deposed they were not involved in negotiating or drafting the Contract. It is apparent from their respective affidavits that they, and their respective offices, became involved well after the Contract had been negotiated and signed. Mr. Cho specifically deposed that his first involvement was in March 2018.

[23] Max Weder is a barrister and solicitor who was retained by the defendant in mid-July 2018 to provide tax advice with respect to the procedure for closing the transaction. He has sworn an affidavit made November 8, 2022.

[24] Frank Quo Vadis is a barrister and solicitor who was retained by the plaintiff in the summer of 2018 to provide tax advice with respect to the sale of the Property. He has sworn an affidavit made April 5, 2023.

Experts

[25] David Baxter is a barrister and solicitor who specializes in tax law. He was retained by the plaintiff and has prepared an export report dated May 15, 2023.

[26] Neil Davie is a barrister and solicitor who practices exclusively in relation to commercial real estate. He was retained by the defendant and has provided an expert report dated September 13, 2022, which is attached to his affidavit sworn October 25, 2022.

[27] Greg Umbach is a barrister and solicitor with particular expertise in relation to commercial real estate. He was retained by the plaintiff and has provided two expert reports; one dated January 6, 2022, and a supplementary opinion dated May 15, 2023.

The Contract

[28] The Contract is dated January 10, 2018, but the "Seller's acceptance" is dated January 15, 2018.

[29] The Contract is on the standard form of the B.C. Real Estate Association and The Canadian Bar Association (BC Branch). The Contract listed: the buyer as the defendant; the seller as the plaintiff; the brokerage as RE/MAX 2000 Realty; the buyer's designated agent as JT Mann of RE/MAX 2000; and the seller's designated agent as Samuel Cheung of Sutton Group Seafair. There are multiple entries on the front page of the Contract for the purchase price that are struck out, indicating there was some back and forth negotiation on the price. Ultimately the price is set out as "Eighty Million Dollars".

[30] The Contract is signed by the plaintiff as "seller" and the defendant as "buyer". Mr. Li deposes that he signed the Contract on behalf of the plaintiff. The person who signed on behalf of the defendant as buyer is not known.

[31] The standard terms include:

> 28. TIME: Time will be of the essence hereof …
>
> …
>
> 33. GOVERNING LAW: This Contract will be governed by the laws of the Province of British Columbia. The parties submit to the exclusive jurisdiction of the courts in the Province of British Columbia regarding any dispute that may arise out of this transaction.
>
> …
>
> 35. SURVIVAL OF REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out to this Contract and any attached Schedules. All of the warranties contained in this Contract and any attached Schedules are made as of and will be true at the Completion Date, unless otherwise agreed In writing.
>
> …
>
> 41. ADDITIONAL TERMS: The additional terms set out in Schedule 41 are hereby incorporated into and form a part of this Contract.

[32] The Contract contains a five-page schedule, again signed by the plaintiff and defendant. The schedule contains additional non-standard terms, most of which are not relevant. The additional terms that are relevant are: a term specifying the completion date as July 31, 2018; a term requiring a deposit of $5 million be paid by the buyer to the seller's solicitors upon removal of conditions; and, importantly, the option clause.

[33] It is undisputed that the option clause was drafted by the defendant. At Mr. Cho's examination for discovery on behalf of the defendant, he was requested to advise who drafted the option clause. The answer to that discovery request was "This clause was drafted by our client". No further particulars of exactly who drafted the clause were provided or are available to me. I do not know whether the clause was drafted by a single individual or a group. I do not know if the clause was reviewed or discussed in any manner during the drafting phase.

[34] I note that the shareholders of the plaintiff are not parties to the Contract, although Mr. Li has deposed that the shareholders instructed him to accept the offer on their behalf and to execute any and all documents necessary to complete the transaction.

[35] By an addendum to the Contract dated February 9, 2018, the plaintiff agreed to grant the defendant a vendor take back mortgage as a first mortgage in the principal amount of $20 million. All other clauses of the Contract were to remain the same.

[36] Although the application record before me comprises seven volumes and includes 17 affidavits or expert reports, there is relatively little evidence about what transpired during the discussions and negotiations leading to the Contract.

[37] Mr. Ming Nan Li, the president and sole director of the plaintiff, provided a single affidavit made January 6, 2022. In this affidavit, he deposes the plaintiff decided to sell the Property in 2017 and received an offer from the defendant in January 2018. Upon receipt of that offer, he held various telephone meetings with

the plaintiff's shareholders. They determined that the price offered of $71.5 million was too low and determined a plan to negotiate the price upwards.

[38] At para. 9 he deposes:

> 9. Bene exchanged a number of counteroffers with the defendant over a relatively short period, and during that time, I had a couple of calls with Bene's shareholders to discuss the negotiations. We ultimately agreed that Bene would accept the $80 million selling price, as well as the right for the purchaser to acquire the Property either by buying the land, or by buying the shares of Bene outright. The shareholders of Bene instructed Bene, via me as Bene's principal, to accept the offer on their behalves, and to execute on their behalves any and all documents necessary to complete the transaction, whether by way of share sale or land sale. This was typical of the way we handle such transactions.

[39] At para. 11 Mr. Li deposes:

> 11. I recall that, at some point between when I signed the contract of purchase and sale for the Property on behalf of Bene, the defendant proposed a third method of completing the sale (other than by way of buying the land or the shares of Bene), and I remember there was a lot of negotiation between the lawyers and tax advisors over this issue, which I recall involved trusts and such things. I did not really concern myself with these matters in detail; that is why I hire professionals. I do not mean that I ignored the negotiations completely, but so far as I was concerned, the important thing was that the Property be sold on the terms to which Bene had agreed in the contract of purchase and sale, and Bene's professional advisors were best situated to ensure that that happened while protecting Bene' s best interests.

[40] This is the extent of the plaintiff's evidence regarding what transpired leading up to the signing of the Contract.

[41] Rajnesh Mann, the sole director of the defendant, deposes in his affidavit #2 that he has purchased and developed numerous properties and projects over the past 24 years. He deposes that in the fall of 2017, he was told by JT Mann that the Property was potentially for sale. He instructed JT Mann to negotiate with the plaintiff's agent for the purchase of the Property. Paragraph 6 of his affidavit #2 provides:

> 6. In December, 2017, I instructed JT Mann to negotiate with Bene Oval's agent for the purchase of the Richmond Property. As is customary for such transactions, the contract for the purchase of the Richmond Property

> needed to include a provision (the "Beneficial Ownership Option") that would permit 114 (a numbered company incorporated for this purpose), at its sole election, to acquire the Richmond Property by way of a share purchase transaction whereby 114 would acquire (i) for the purchase price of the Property, the beneficial interest in the Property from Bene Oval, and (ii) for a nominal consideration, the shares of Bene Oval from its shareholders.

[42] At para. 8 of his affidavit #2, Rajnesh Mann deposes “[t]he Beneficial Ownership Option is a very common way by which commercial real estate is purchased and sold in British Columbia”. He explains that two benefits of this option are that no property transfer tax is payable and the Property is acquired at an adjusted cost base equal to the purchase price which results in a tax saving.

[43] At para. 9 of his affidavit #2 Rajnesh Mann deposes that the Contract was entered into on January 19, 2018. He then, at paras. 11-12, of his affidavit #2, sets out his understanding of the Contract.

> 11. By the fact that Bene Oval agreed to the inclusion of the Beneficial Ownership Option in the Purchase Contact, I understood that the shareholders of Bene Oval had agreed to sell their shares to 114 pursuant to the Beneficial Ownership Option.
>
> 12. I also understood that, as is commonplace in purchases of commercial real estate, to complete the transaction pursuant to the Beneficial Ownership Option, the parties' lawyers would need to prepare the necessary documents and agreements.

[44] In his affidavit #3 Rajnesh Mann expands on his evidence of the events leading to the purchase of the Property. He deposes that he became interested in the Property for the purpose of redeveloping it for mixed residential and commercial use. He notes in this affidavit that the Property had rented warehouses but was in an area that had been designated for redevelopment. He deposes the defendant was told by JT Mann that the plaintiff was looking for $200 per buildable square feet or a price of approximately $90 million. He deposes that “114 and Bene ultimately agreed on the $80,000,000 purchase price”.

[45] In his affidavit #3, Rajnesh Mann further deposes:

a) He could not recall if, before he executed the Contract, he knew the plaintiff had purchased the Property in 2014 for $31.5 million but, he was aware of

this fact before the defendant removed the conditions precedent to the Contract;

b) He assumed that the lawyers acting reasonably would be able to work out the necessary documents and terms "if [the defendant] elected to exercise the Beneficial Ownership Option";

c) On or about February 22, 2018, he learned that the plaintiff was a bare trustee of the Property, which he deposes "is a common manner in which companies hold commercial real estate";

d) "114 elected to proceed by way of the Beneficial Ownership Option" to avoid payment of property transfer tax and to acquire the Property at an adjusted cost base equal to the purchase price; and

e) The plaintiff's refusal to proceed in this manner was commercially unreasonable.

[46] There are several significant things to note about the affidavit evidence of Rajnesh Mann. First, he does not depose that he ever spoke with or corresponded with anyone from the plaintiff company in relation to the purchase of the Property. The only person he apparently spoke with regarding the purchase was his realtor, JT Mann. Second, although he deposes it is customary for such contracts to separately convey beneficial and legal ownership and that the Contract needed a clause to allow this, he does not depose that he advised JT Mann of this or provide any particulars of when, where or how this was conveyed to JT Mann. Third, although he deposes he understood the plaintiff's shareholders of Bene Oval had agreed to sell their shares pursuant to the "Beneficial Ownership Option", he provides no evidence of when, if or how the "Beneficial Ownership Option", as he understood it, was conveyed to the plaintiff and its shareholders during the negotiations.

[47] It is extremely noteworthy that the two real estate agents involved in the negotiations, J.T. Mann and Samuel Cheung, have not filed affidavits, a point to which I will return.

Post-Contract Events

[48] I summarize the chronology of events following the entering into of the Contract.

[49] On March 14, 2018, Mr. Lui asked Mr. Cho if the defendant was exercising its right to purchase the shares. Mr. Cho responded that the defendant had a "very strong wish to close via a share purchase and their final decision will be informed by the due diligence now underway".

[50] On March 22, 2018, Mr. Cho wrote to Mr. Lui advising his clients "have do wish [sic] to close via the purchase the shares" and asked if his clients could review the plaintiff's financial statements and tax returns.

[51] On April 20, 2018, Mr. Lui wrote to Mr. Cho confirming the defendant wished to proceed by way of a share purchase and provided a procedure for that to occur. He made the rather prescient comment that "the wording of the option in the purchase contract is silent on details which may become important".

[52] On May 14, 2018, Mr. Cho replied to Mr. Lui's April 20 email. He advised that he was still awaiting final comments from his client but had started a rough draft of a share purchase agreement. He requested copies of some corporate documents.

[53] On May 23, 2018, Mr. Cho emailed Mr. Lui as follows:

> I just got off a conference call with my client's Corporate Counsel and Controller.
>
> They are proposing that, on closing:
>
> 1. the Buyer acquires from Bene (Oval) Development the beneficial interest in the properties;
>
> 2. the shareholders distribute out from Bene (Oval) Development the net sale proceeds (inclusive of the VTB loan); so, distribution through repayment of shareholder loans and dividends to the corporate shareholders of Bene (Oval) Development, after an appropriate reserve for income taxes on the sale of the properties, etc.;
>
> 3. the Buyer acquires the shares of Bene (Oval) Development from the corporate shareholders for $100 [the paid up capital recorded on the books] ---now it is a nominee titleholder only; [of course the name of Bene (Oval) Development would be changed].

> 4. renamed Bene (Oval) Development executes and delivers a declaration of bare trust and agency agreement as bare trustee of the properties in favour of the Buyer;
>
> All of this would take place concurrently as of the Closing Date.
>
> Please review and give me your thoughts on this.

[54] I pause to note that this is the first time it was expressly suggested that the plaintiff's beneficial and legal interests in the Property should be separated and then conveyed separately.

[55] By letter dated May 31, 2018, Mr. Lui responded to the May 23 email advising that the proposal presented tax complications and that the restructuring proposed challenges "to cleanse a company that is not and was never intended to be a mere nominee". He further advised as follows:

> A. The purchaser may, if it wishes, exercise its option under the contract to acquire all the shares of the vendor. This option does not include any transfer of beneficial title. We note the completion date is July 31, 2018. Accordingly, please provide your form of share purchase agreement by June 15, 2018 if the purchaser does still intend to exercise this option in this form.
>
> B. Based on the purchase contract as it is currently constituted, the vendor will take no step whatsoever to transfer beneficial title to the property to anyone. Any transfer of beneficial title is solely and entirely for the purchaser to carry out after the closing. Such steps are not the responsibility of the vendor and are of no concern to the vendor in the absence of an addendum duly signed by both parties that calls for such a transfer, and then only to the extent of specific steps stated by addendum and accepted by the vendor in writing.

[56] Mr. Lui concluded his May 31 letter emphasizing that "time remains of the essence" and he requested "to have the purchaser's decision on point A as soon as possible".

[57] Mr. Cho did not immediately respond to Mr. Lui's May 31 letter so, on June 13 2018, Mr. Lui followed up. On June 15, 2018, Mr. Cho responded that his client was seeking external advice and he would revert. Mr. Lui responded that he would prepare the vendor take back documents based on an asset transaction as the defendant had not confirmed it was exercising the share purchase option.

[58] On July 4, 2018, Mr. Cho wrote a lengthy letter to Mr. Lui that begins as follows:

> I have reviewed your letter of May 31, 2018 with my clients.
>
> The Contract contains a clause providing our client with the option to purchase the shares of Bene (Oval) Development Inc. ("Bene (Oval)"). The intent and purpose of this clause is to provide for the purchase of the beneficial ownership of the Properties together with the right to acquire the shares of Bene (Oval), which will remain the legal owner of the Properties, rather than the filing of a Form A Transfer in the Land Title Office.
>
> Although, contrary to representations made prior to the execution of the Contract, Bene (Oval) does not presently hold the titles of the Properties as a bare trustee, the terms and conditions of the Contract can be achieved by the proposal outlined to you in our conference call on May 25, 2018. The steps required to implement that proposal are as follows.

[59] I pause to note that Mr. Cho implicitly states that a representation was made prior to the execution of the Contract that the plaintiff held title as a bare trustee. The alleged representation could not have been made to him since he had no involvement at the time the Contract was negotiated. He does not state the source of this information or who precisely made the representation.

[60] The letter goes on to list 13 individual steps to close the transaction, the main steps of which are:

a) The defendant purchases the plaintiff's beneficial interest in the Property for the purchase price agreed;

b) The vendor take back mortgage is initially an asset of the plaintiff but upon the assignment of the plaintiff's beneficial interest to the defendant, the defendant grants a beneficial mortgage and assignment of rents to the plaintiff;

c) Upon closing of the beneficial interest transaction, the plaintiff distributes its assets to its shareholders (including by assignment of the vendor take back mortgage and beneficial mortgage) and thereby becomes a nominee titleholder of the Property;

d) The defendant then purchases the shares of the shareholders for $100; and

e) The plaintiff is then renamed and executes a Declaration of Bare Trust and Agency Agreement in favour of the defendant.

[61] Mr. Lui responded to Mr. Cho's July 4, 2018, letter on the same day. He disputed: the assertion of the intent and purpose of the option clause; the allegation a representation was made to the effect the plaintiff held title as a bare trustee; and the assertion that dividends could be received by shareholders on a tax-free basis. He then, under an express reservation of rights, requested clarification of the various steps Mr. Cho had proposed. The reservation was expressed as follows:

> Therefore, nothing in this letter constitutes an admission or agreement that the process set out in Your Letter is in accordance with the Contract. Our client will continue to insist on performance in accordance with its terms as written. Your client has clearly rejected the simple share purchase option set out in the Contract[2]; therefore our client will be ready, willing and able to perform the Contract as an asset purchase transaction on July 31, 2018. Time will remain of the essence.
>
> Having said that, our client wishes to understand fully the proposal set out in Your Letter and to see if the parties can reach an agreement as to its terms and implementation (many critical details are not currently fleshed out). In that light, we furnish you with our Comments and Questions, below.
>
> …
>
> [2] If we are wrong in this, and your client intends to keep a simple share purchase transaction open as an option, please tell us immediately. It is critical that there be no surprises.

[62] Mr. Lui concluded his letter as follows:

> In view of the late date and the need to keep this matter moving forward towards closing, we would appreciate hearing from you as soon as you can manage.

[63] The tax lawyers, Mr. Weder and Mr. Quo Vadis then became involved.

[64] On July 24, 2018, Mr. Weder emailed Mr. Cho and advised him of discussions he had with Mr. Quo Vadis to address tax concerns. Mr. Weder advised that Mr. Quo Vadis would be recommending to the plaintiff that it obtain a warranty

from the purchaser in relation to deferred tax events. Mr. Cho forwarded this email to Anne Kwok of Mr. Lui's firm and concluded his email as follows:

> My understanding is that with this additional representation and warranty from my client as Buyer, the closing of the subject transaction will now proceed following the steps set out in my letter to your firm (addressed to Kenn Lui) of July 4, 2018---a copy of which is attached for your convenience.
>
> Next, I attach a draft closing agenda based closely on the steps outlined in my letter, with additional items which will be called for on closing such as Item 1.2-Assignment and Assumption of Lease and Item 1.3-Assignment of Contracts and various GST and residency certificates.
>
> I know Mr. Lui is away on vacation. At this time, I need input from your firm on the VTB loan and security documents and how the documents already sent over to me do or do not need revision prior to closing.

[65] On July 25, 2018, Paul Leung, also of Mr. Lui's firm, responded to the July 24 email from Mr. Cho. He advised that Mr. Cho's understanding the closing could proceed in accordance with his letter of July 4, 2018, was incorrect. He noted that Mr. Quo Vadis was still awaiting information from Mr. Weder and that the steps were much more complicated than represented. He advised that Mr. Cho's closing agenda was premature and noted the parties were engaged in without prejudice discussions. Finally, he asked to know whether the defendant was exercising the share purchase option.

[66] Mr. Leung also sent a letter to Mr. Cho on July 25, 2018, to "repeat (yet again) our position". He wrote that the Contract allows two options, a simple asset purchase or a simple share purchase. He wrote that the plaintiff required that the defendant be in a position to close by one of those methods on July 31, 2018. With respect to Mr. Cho's proposals, he noted that: they were made "late in the game"; in an effort to accommodate and without prejudice, the plaintiff has attempted to proceed as the defendant suggested; and, the plaintiff remained willing to attempt to close the transaction as the defendant wanted. He concluded his letter as follows:

> The purchaser's conduct has for a long time led us to suspect that it could not or would not be in a position to complete the purchase and sale of the Properties by the ECS. Nor have you advised us which of the two options available under the Contract – asset purchase or share acquisition – your client elects. In that state of uncertainty, therefore, we thought it best to prepare complete sets of the documents both for an asset sale and for a

> share purchase, which we have now done. We attach for your reference our draft tender letters in each case. It would be helpful if your client were to tell us now which of these options it elects. Our client is indifferent as to which.
>
> We reiterate that time will continue to be of the essence.

[67] Later on July 25, Mr. Leung forwarded an email from Mr. Quo Vadis to Mr. Cho. He noted that "[t]his appears to be a lot more complicated than the message we got from you yesterday".

[68] On July 30, 2018, Mr. Lui emailed Mr. Cho asking when he intended to provide documents for execution by the vendor and the signed vendor take back documents, which had been delivered on July 4. Mr. Cho did not reply to this letter.

[69] On the same day, July 30, at 7:00 p.m. Mr. Cho delivered closing documents to Mr. Lui. The covering letter stated:

> As you are aware, the position of our client, 1148538, has been from the time it entered into the Contract with your client, Bene (Oval), that it is entitled at its election to acquire the beneficial interest in the properties from Bene (Oval), and, following the steps required to cause Bene (Oval) to become a bare trustee of the Properties, to acquire the shares of Bene (Oval). The respective tax advisors of your client and our client have reached the conclusion that the subject transaction can be closed in this manner with appropriate representations, warranties and promises and the necessary documents in place for the transaction.
>
> I am instructed that our client has arranged for the required funds to close this transaction and is ready, willing and able to complete, subject to receipt from you of the closing documents listed as items 1.9 through 1.14 and items 1.27 through 1.29 on the Closing Agenda, and review and approval of such documents by our client and signature by them where required.
>
> [. . .]
>
> Although we consider the enclosed documents to be in final form, we will of course accommodate any reasonable comments or revision that you may have, as well as any further instructions from the tax advisors of our respective clients.

[70] At 9:24 p.m. on July 30, Mr. Lui wrote to Mr. Cho and attached an email chain between the tax advisers wherein a three-day closing sequence was discussed. He asked, "Where in the closing agenda the sequence of these steps is expected to occur?" He wondered if Mr. Cho could provide an explanation/correction. Mr. Cho did not reply to this email.

[71] At 11:23 p.m. on July 30, Mr. Lui again wrote to Mr. Cho. He repeated the plaintiff's objections as set out in his letter of July 4, objected to the late delivery of the closing documents, and again stated the plaintiff was reserving its rights. However, he advised the plaintiff's pre-occupation was to close the transaction, noting time remains of the essence. To that end, he enclosed two sets of documents to complete the transaction, one for a simple share purchase and the other for a simple asset purchase.

[72] On the day of closing, July 31, 2018, notwithstanding that the parties fundamentally disagreed on the nature of the transaction and had expressed their respective positions clearly, Mr. Lui's office continued to address the feasibility of closing the transaction in accordance with the procedure proposed by the defendant. At 11.45 a.m. Mr. Lui requested that changes/additions be made to the share transfer agreement Mr. Cho was preparing. The changes had been discussed by the tax advisers and included an indemnity from the defendant to the plaintiff in the event there was a loss of income tax deferral. Mr. Cho replied "Will do" at 11:52 a.m. Despite having said the changes would be made, the changes were not made. At his discovery, when asked if he had made the requested changes, Mr. Cho replied "I don't think that was done".

[73] Later on July 31, at 1:05 p.m., Annie Kwok, a paralegal in Mr. Lui's office, delivered documents related to the beneficial mortgage and assignment of rents and, at 1:15 p.m., requested amendments to various documents Mr. Cho had prepared in relation to his closing procedure. The amendments included changes to dates of shareholders' resolutions, which related to the three-day closing sequence Mr. Lui had addressed in his email of July 30 at 9:24 p.m.

[74] At 3:04 pm, on the day of closing, Mr. Lui delivered two "tender" letters to Mr. Cho; one to complete the transaction as a share purchase and the other to complete as an asset purchase. Both letters specified time was of the essence and that the deposit would be forfeit if the defendant did not close.

[75] At 4:46 p.m. on the closing day, after the 4:00 p.m. closing time, Mr. Lui delivered to Mr. Cho what he called “an additional and third tender”. The package included executed copies of documents required under Mr. Cho’s closing agenda, including an amended share transfer agreement to reflect the three-day closing sequence.

[76] At 6:13 p.m. on the closing day, Mr. Lui wrote to Mr. Cho noting that no payment had been tendered and that they had heard nothing from him about the status of the transaction.

[77] At 6:19 p.m. Mr. Cho wrote to advise that the documents in the third tender package differed materially from those in his closing agenda. He advised the Contract had been repudiated by the plaintiff and that such repudiation was accepted.

> Accordingly, by tendering closing documents which differ materially from the documents we have provided under our Closing Agenda as set out above, and which purport to delay the transfer of ownership and closing your client has shown an inability to complete the Contract and thereby has repudiated it. Our client hereby elects to accept your client's repudiation of the Contract, which puts the Contract at an end. Our client hereby demands the return of the deposit paid by them under the Contract. Our client reserves all of their rights and remedies to recover the full measure of damages suffered by them as a result of your client's breach. which was considered to be a repudiation of the contract.

[78] The within action was commenced the next day, August 1, 2018.

Other Evidence – Tax Advisors and Experts

[79] Max Weder and Frank Quo Vadis, the solicitors retained by the defendant and plaintiff respectively to provide tax advice, have both sworn affidavits attesting to their conversations and emails. Neither was presented as an expert witness.

[80] Mr. Quo Vadis deposes that he had two concerns related to the separate transfer of beneficial and legal ownership. His first concern was that there needed to be a restructuring of the share ownership after the sale of the beneficial interest and before the distribution of dividends to avoid tax liability under Part IV of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) [*ITA*]. His second concern was that, pursuant

to s. 55 of the *ITA*, a tax liability could be imposed on the plaintiff if: the defendant disposed of the shares to an unrelated person for less than fair market value before the purchase of the beneficial interest; or, if there was a significant increase in the interests of unrelated persons in the defendant before the purchase of the beneficial interest. In an email dated July 25, 2018 to Mr. Weder, he outlined his two areas of concern and his suggestions to address them. In point 1 he proposed that the closing occur over three days. In point 2 he requested various representations from the purchaser. Mr. Weder replied by email the same day. Mr. Weder wrote “Point 1 can be done” but did not agree on the representations that could be given in respect of point 2. Mr. Quo Vadis deposes that he understood Mr. Weder’s reply to be agreement to the three-day closing and that only the second concern was unresolved. He deposes he addressed the second concern on the closing date by way of inclusion of an indemnity in the share transfer agreement.

[81] Mr. Weder deposes that what he meant by “Point 1 can be done” was that the sequencing could be properly arranged on the closing date rather than over a three-day period. He deposes there was no need to extend the closing over several days. I note that Mr. Weder’s reply to Mr. Quo Vadis was very poorly worded if he intended to convey disagreement with a three-day closing. Mr. Weder further deposes that he saw no concerns with s. 55 of the *ITA*.

[82] David Baxter, the tax expert retained by the plaintiff, opined that the transaction structure proposed by the defendant was not free of risk of tax liability to the plaintiff, that the concerns raised by Mr. Quo Vadis were reasonable, and that the methods Mr. Quo Vadis proposed to address those concerns were reasonable. He additionally opined that the transaction could have exposed the plaintiff to liability under the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378.

[83] Greg Umbach provided two expert reports dated January 6, 2022, and May 15, 2023, on behalf of the plaintiff. In his first report, he was asked to provide his opinion on the following questions. A brief summary of his response to each question is provided in italics:

1. Have you been involved as counsel in transactions in which language like that in the Share Purchase Clause figured? Please describe that experience.

> *He opines that it is common for buyers of real property held by a corporation to seek to purchase the shares of the corporation, primarily to avoid property transfer tax but further opines that a clause as simple as the option clause is not common.*

2. Does the Share Purchase Clause suggest, by its express language or by convention in the profession, that the buyer has the right to acquire separately legal title to the shares of Bene and equitable title to the Property? In particular, does it suggest that the buyer has the right to complete the transaction contemplated by the [contract of purchase and sale] by means of the Numco Closing Procedure, or by the method embodied in the Beneficial Acquisition Package (to the extent that it differs from the Numco Closing Procedure)?

> *He opines that it is common in commercial real estate for the buyer to acquire the shares of the corporate seller by way of a simple share purchase agreement. He further opines that the absence of language in the option clause about a transfer of beneficial interest suggested to him that the option clause gives the right to acquire the shares but no other rights. He further opines there is no language in the clause or a convention that would expressly or impliedly require the plaintiff to comply with the defendant's closing procedure.*

3. Does the Share Purchase Clause suggest, by its express language or by convention or principle within the profession, anything about whether the seller holds the Property as a bare nominee or otherwise?

> *He opines the option clause does not suggest the plaintiff holds title as a bare nominee or trustee.*

4. Does the Share Purchase Clause suggest, by its express language or by any convention or principle within the profession, anything about the permissible methods of completing the purchase and sale of the Property as contemplated by the [contract of purchase and sale]? If so, what does it suggest?

> *He opines that there are common elements or terms of a share purchase agreement that the commercial real estate bar would accept as reasonable and that a reasonable reference document would be the Continuing Legal Education Society of BC short form of share purchase agreement. He further opines the option clause does not require that beneficial and legal title be split.*

5. Are transactions whose sole purpose is the acquisition of commercial real estate sometimes structured such that the purchaser buys all of the shares of the seller, despite the fact that the purchaser does not directly acquire title to the land by this method? If so, what are the usual or common reasons for structuring a transaction in this way?

> *He again opines that it is common for buyers of real property held by a corporation to seek to purchase the shares of the corporation, primarily to avoid property transfer tax.*
>
> 6. If parties to a contract for the purchase and sale of commercial property wish to incorporate the right on the purchaser's part to acquire separately legal title to the shares of the property's owner, and equitable title to the land itself, by what language and/or contractual provisions would they normally do so?
>
> *He opines that, if parties intended to transfer legal and beneficial interest separately, there should be express language to this effect including that the beneficial interest would be transferred by a separate instrument and that there should be separate consideration for the shares and beneficial interest.*
>
> 7. Were the documents in the [plaintiff's] Asset Tender Package one reasonable way to complete the sale of the Property to Numco, having regard to the language of the [contract of purchase and sale]?
>
> *He opines that a reasonable solicitor might require alterations to the asset tender package but that the general form was acceptable*.
>
> 8. Were the documents in the [plaintiff's] Share Tender Package one reasonable way to complete the sale of Belle's shares to Numco, having regard to the language of the [contract of purchase and sale]?
>
> *He opines that a reasonable solicitor might require alterations to the share tender package but that the general form of documents would be acceptable*.

[84] Neil Davie provided an expert report dated September 13, 2022, on behalf of the defendant. He was asked to provide his expert opinion on the following questions. A brief summary of his response to each question is provided in italics:

> 1. When real property is being held by a corporate seller and is being purchased for redevelopment and sale at a price substantially higher than the corporate seller's adjusted cost base ("ACB"):
>
> (a) Do purchasers commonly seek to address both property transfer tax ("PTT") and the seller's ACB in the documents required to effect the purchase and sale of the property?
>
> *He opines that avoidance of property tax transfer is available to a buyer and that the seller's ACB needs to be considered because there will be a deferred capital gain for which the buyer will be responsible in the future.*
>
> (b) If so, is there a commonly used purchase structure to address both the PTT and the ACB where the corporate seller holds both the legal and beneficial interest in the property?

He opines that, where there is an active company that holds both beneficial and legal title, the share purchase agreement would need to be extensively negotiated.

2. Would a lawyer practicing in British Columbia having experience with the type of transaction at issue in this action, acting reasonably and in the context of the Assumed Facts (as defined in the Instruction Letter), understand the Share Purchase Option (as defined below) to require a particular form of share purchase agreement and other documentation?

He opines that there is no standard or generic form of agreement. He opines that a lawyer would recognize that the exercise of the share purchase option requires additional negotiations and agreements as the transaction would have to be restructured. He opines that a lawyer would conclude the option clause is an unenforceable agreement to agree.

3. With respect to the Share Purchase Closing Procedure (as defined below):

(a) Is the Share Purchase Closing Procedure consistent with the Share Purchase Option?

He opines that the defendant's closing procedure was reasonable and that another procedure would have been for the parties to negotiate and enter into a new agreement.

(b) Should the Share Purchase Closing Procedure have been acceptable to Bene's lawyer acting reasonably?

He opines that the defendant's closing procedure should have been acceptable.

(c) Did the Share Purchase Closing Procedure present any financial disadvantage to the corporate shareholders of Bene compared to transaction in which (i) 114 acquired the Property from Bene, which then distributed the proceeds to the shareholders of Bene while taking advantage of any tax provisions to maximize the distribution of proceeds to the shareholders; and (ii) 114 only acquired the shares of Bene rather than first acquiring an assignment of Bene's beneficial interest in the Property?

He opines that the defendant's closing procedure presented no financial advantage or disadvantage to the plaintiff's shareholders but a fee simple transaction would have presented a financial disadvantage to the defendant.

(d) In the case of any financial disadvantage to the Bene Shareholders in the case of the transaction described above in paragraphs c.(i) or c.(ii), what negotiations between the parties would a lawyer practicing in British Columbia having experience with the type of transaction at issue herein reasonably expect to address such disadvantage?

He opines that the defendant's closing procedure presented no financial disadvantage to the plaintiff's shareholders.

4. With respect to the Share Purchase Closing Documents:

   (a) Were they consistent with the Share Purchase Closing Procedure?

   > *He opines that the defendant's closing documents were consistent with the defendant's closing procedure*.

   (b) Should they have been acceptable to Bene's lawyer acting reasonably?

   > *He opines the defendant's closing documents were typical documents in commercial real estate practice in British Columbia and should have been acceptable to the plaintiff's lawyers.*

5. With respect to statements made by Mr. Umbach in his report:

   (a) Given the substantial difference between Bene's ACB of the Property and the Purchase Price, what was the relative importance of the PTT and the ACB to 114?

   > *He opines that both would be materially important to the defendant.*

   (b) Would splitting the registered and beneficial ownership after the acquisition of the Property by way of purchasing the shares of Bene, by creating a trust or nominee relationship between the corporate registered owner and an off-title beneficial interest owner, have addressed 114's objective with respect to the ACB of the Property?

   > *He opines that this would not have addressed the defendant's objective of adjusting the ACB.*

   (c) Would a CLE precedent share purchase agreement of the type discussed by Mr. Umbach have addressed 114's objective with respect to the ACB of the Property?

   > *He opines that the use of the CLE precedent is not reasonable where there is ACB and other potential outstanding liabilities.*

   (d) Is the CLE precedent or other simple share purchase agreements commonly used when both the registered and beneficial ownership is held by the same company, the property is being purchased for redevelopment and sale, and the corporate seller's ACB of the property is substantially less than the purchase price. If not, is there a form of a share purchase agreement and other documents commonly used for this type of transaction?

   > *He opines that the CLE precedent would have been a starting point but states that where there is an active company these agreements are heavily negotiated to address historic liabilities, working capital adjustments, employees, representations and warranties.*

   (e) Given the purchase of the Property for redevelopment and sale and Bene's ACB of the Property relative to the Purchase Price, would an experienced lawyer have interpreted the Share Purchase Option to

> suggest that Bene would transfer beneficial interest in the Property separate from the registered title?
>
> > *He opines that an experienced lawyer would have interpreted the intent of the option clause as being an option available to the buyer to avoid property transfer tax and that one way to accomplish this would be to separately transfer beneficial and legal title in the way set out in the defendant's closing procedure.*

[85] Mr. Umbach provided a supplementary report dated May 15, 2023. That report addressed the following question:

> Would a reasonable solicitor practicing in BC be able to draft and complete the necessary documents and instruments required to complete the transfer of shares of a corporation holding title to real property in a contract for the purchase of real property pursuant to the following contractual language:
>
> > The Seller agrees that the Buyer may complete the purchase of the Property by way of purchasing all of the issued and outstanding shares of and in the company or companies on title to the Property.

[86] In response to this question, Mr. Umbach opined that a reasonable solicitor would be able to complete such a transfer with common documents. He further opined that, although the clause did not contain the detail that a reasonable solicitor would prefer to have, the lack of detail would not prevent the completion of the transfer.

[87] Both parties have raised various issues with the expert reports of the other party. In view of my conclusions on the suitability of this matter for summary trial, I do not intend to address them.

The Pleadings

[88] In the amended notice of civil claim filed July 22, 2021, the plaintiff pleads:

a) The plaintiff is the owner of the Property;

b) By contract dated January 10, 2018, the plaintiff agreed to sell the Property to the defendant on terms including,

   i. The purchase price was to be $80 million,

ii. The defendant was to pay a non-refundable deposit of $5 million, upon removal of subjects,

iii. The closing date was to be July 31, 2018, and

iv. The defendant was entitled to acquire the Property, at its election, by a simple asset purchase or by purchasing the shares of the plaintiff;

c) The defendant paid the deposit as required;

d) The defendant advised the plaintiff it wished to acquire the Property through a mechanism that required (1) the plaintiff to incorporate a wholly owned subsidiary (2) the plaintiff to transfer legal title to the Property to the subsidiary as bare trustee and (3) the defendant would then acquire title to the shares of the plaintiff and equitable title to the Property;

e) The plaintiff responded by advising the defendant that it was not entitled to the procedure requested under the terms of the Contract;

f) The plaintiff insisted that the defendant be ready, willing and able to close the transaction on the closing date by one of the methods permitted by the Contract, asset purchase or share purchase;

g) On the closing date, the plaintiff was ready willing and able to close the transaction by one of the permitted methods but the defendant insisted on its alternative proposal and was not ready willing and able to close the transaction;

h) The defendant repudiated the Contract;

i) The plaintiff accepted the repudiation; and

j) The property was subsequently sold for $60 million.

[89] The relief sought in the amended notice of civil claim is damages for breach of contract, interest, and an order entitling the plaintiff to retain the deposit paid. The

measure of damages is pleaded to be $20 million, the difference between the agreed purchase price and the ultimate selling price.

[90] In its further amended response to civil claim, the defendant admits the Contract, the agreed price of $80 million, the deposit of $5 million and the closing date of July 31, 2018. It further admits that the subject conditions were removed on February 9, 2018 and that the deposit was paid. However, in respect of the option clause, the defendant pleads

> 11. The intent and effect of the Beneficial Ownership Option was that it gave 114 an ability complete the purchase of the Property under the Purchase Agreement by acquiring the beneficial interest in the Property from the owner of said beneficial interest, and by acquiring the registered legal title to the Property via the purchase of the shares of the company or companies on title to the Property i.e. holding the legal interest in the Property, but this acquisition would be conditional upon, or subject to, *inter alia,* the parties' respective solicitors, acting reasonably and prudently, determining the form of the required share purchase agreement and other documentation suitable and required for this transaction.

[91] The defendant further pleads at para. 13

> 13. In order to accomplish the Beneficial Ownership Option, Bene Oval and the Shareholders understood and agreed that steps would have to be taken by them, on or before the Completion Date, to, among other matters, cause Bene Oval to assign its beneficial interest in the Property to 114 for the Purchase Price, such that Bene Oval would become a bare trustee of the Property, divest itself of all other assets and settle its liabilities or to set aside an appropriate reserve for the settlement of its liabilities.

[92] At para. 17, the defendant pleads the plaintiff was advised on July 4, 2018 of the “reasonable and prudent” steps required to complete the transaction.

> 17. On or about July 4, 2018, 114's solicitor, acting reasonably, outlined to Bene Oval's and the Shareholders' solicitor the following, and other, steps required for the Completion Procedure, which steps were reasonable and prudent:
>
> (a) 114 would acquire the beneficial interest in the Property and ancillary operating asserts from Bene Oval;
>
> (b) Bene Oval would distribute to the Shareholders the net assets of the company (inclusive of the VTB Mortgage) after satisfying all current liabilities and making an appropriate reserve for income tax on the sale of the Property;

> (c) 114 would then acquire the shares of Bene Oval from the Shareholders for $100;
>
> (d) Bene Oval would be renamed; and
>
> (e) renamed Bene Oval would execute and deliver a declaration of bare trust and agency agreement as bare trustee of the Property in favour of 114.

[93] The defendant further pleads that:

a) On or about July 25, 2018, in anticipatory breach of the Contract, the plaintiff advised it would not follow the completion procedure outlined by the defendant but rather provided documents to complete the transfer by way of a Form A transfer in the Land Title office or a purchase of the shares;

b) The defendant refused to accept the anticipatory breach by the plaintiff;

c) On the completion date, the defendant tendered documents and funds to complete the transaction in accordance with its procedure;

d) In breach of the Contract, the plaintiff and its shareholders refused to execute the documents and provide the necessary undertakings required for closing in accordance with the defendant's procedure;

e) On July 31, 2018, at 3:05 pm, in breach of the Contract, the plaintiff tendered closing documents for completion of the transaction by way of a Form A transfer in the Land Title office or a purchase of the shares;

f) On July 31, 2018, at 4:45 pm, the plaintiff tendered closing documents that generally followed the defendant's procedure but, in breach of the Contract, did not tender all required documents and the documents that were provided included material changes that were not prudent and reasonable, were not accepted by the defendant and involved an extension of the completion date. In the alternative, the documents tendered by the plaintiff constituted an offer which was not accepted; and

g) The defendant promptly advised the plaintiff that it accepted the plaintiff's repudiation of the Contract and demanded the immediate return of the deposit.

[94] In the alternative, the defendant pleads that there was no enforceable agreement between the parties or it was rendered void because there was no agreement on the material or essential terms, the terms were too uncertain, and the agreement was conditional.

> 41. In the alternative, there was no enforceable agreement between the parties, or any agreement was void, due to the fact that:
>
> (a) there was no agreement between the parties on the material or essential terms of the Purchase Agreement;
>
> (b) the terms of the Purchase Agreement and, in particular, the Beneficial Ownership Option, were uncertain; and
>
> (c) the Purchase Agreement was conditional upon, or subject to, concluding the terms of a share purchase agreement acceptable to both parties' solicitors and any other documentation necessary to give effect to the Beneficial Ownership Option.

[95] The defendant filed an amended counterclaim on November 2, 2020, against the plaintiff and its shareholders. The counterclaim repeats much of what is contained in the response to civil claim including that the Contract was brought to an end by the defendant's acceptance of the plaintiff's repudiation of the Contract or, alternatively, that the Contract was void or unenforceable due to lack of agreement on, or uncertainty of, material terms. The relief requested in the counterclaim is the return of the deposit plus interest.

[96] The amended response to counterclaim repeats much of what is in the notice of civil claim. It is noteworthy, however, that the defendants by counterclaim admit they are the shareholders of the plaintiff and plead the plaintiff executed the Contract in its capacity as their agent. Additionally, they deny any terms of the Contract are uncertain, conditional or ambiguous but plead, if there is ambiguity, that the rule of *contra proferentem* applies.

Positions of the Parties

[97] I intend to only very briefly summarize the positions of the parties. Their respective written applications and submissions are lengthy. The plaintiff's notice of application is 39 pages in length and its written submissions comprise 43 pages. The defendant's notice of application is 82 pages in length and its written submissions comprise 106 pages. In addition, the defendant has provided supplementary written submissions on the issue of severance that are 14 pages in length.

[98] In summary, the plaintiff submits that on a proper interpretation, the option clause gave the defendant the right to acquire the Property either (1) by way of an asset purchase or fee simple transaction or, (2) by acquiring the shares of the plaintiff from its shareholders. The plaintiff says that on a proper interpretation of the clause it did not give the defendant a right to insist on a separation of the plaintiff's legal and beneficial interests and the separate conveyance of those interests. The plaintiff says it was ready, willing able to close the transaction by way of a simple asset purchase or a simple share purchase. It says the defendant repudiated the Contract by insisting on a complex procedure to separately acquire the plaintiff's beneficial and legal interests.

[99] The defendant submits, *inter alia*, that the option clause, when properly interpreted in view of the surrounding circumstances, permitted it to acquire the plaintiff's beneficial interest in the Property for the purchase price agreed on and to acquire the plaintiff's legal interests in the Property by acquiring the shares of the plaintiff's shareholders for nominal consideration, all via the closing procedure that it proposed and that was rejected by the plaintiff. It effectively submits that such an interpretation is usual and customary and necessary to give business efficacy to a commercial real estate transaction where the Property is held by a corporation and there is an adjusted cost base that needs to be taken into account. It submits the plaintiff's rejection of its closing procedure and documents and the plaintiff's last-minute amendments to the closing documents constituted a repudiation of the Contract which it accepted.

[100] The defendant also submits, *inter alia*, that the Contract is void for uncertainty.

[101] The interested non-parties filed an application response in response to the notice of application of the defendant. They support and adopt the positions advanced by the plaintiff. They also submit that, if the option clause is vague or unenforceable, it is severable.

Issues

[102] The fundamental issue in the action is the meaning and effect of the option clause, if a meaning can be properly ascribed to it. If a meaning cannot be ascribed to the option clause, the issue then becomes whether it can be severed from the Contract or whether the entire contract is void for uncertainty.

[103] However, a preliminary issue in any summary trial application is whether the matter is suitable for summary trial, at all. Although neither party has said that this action is not suitable for summary trial, a summary trial judge has an important gatekeeping function to perform. They must be satisfied that they can find the facts necessary to decide the issues and that it would not be unjust to decide the matter summarily. In *Main Acquisitions Consultants Inc. v. Yuen,* 2022 BCCA 249, at paras. 88-89, Justice Goepel reminds us of the importance of performing this gatekeeping function, regardless of the positions of the parties.

> [88] This case was decided on a summary trial. On a summary trial pursuant to *Supreme Court Civil Rules*, B.C. Reg. 168/2009 Rule 9-7(15) the court may grant judgment unless:
>
> > (i) the court is unable, on the whole of the evidence, before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> >
> > (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so. As noted by Justice Southin in her typically forthright language in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited,* 2002 BCCA 138 [*Bacchus*]:

> [28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants. [Emphasis added.]

[104] It is in performance of my gatekeeping function that I embark on a consideration of whether the matter is suitable for summary judgement.

Suitability for Summary Trial

Legal Principles

[105] Summary trials are governed by Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Rule 9-7(15) expressly provides:

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

[106] Since *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (BC CA) [*Inspiration Management*], the test to be applied to determine if a matter is suitable for summary trial is whether the evidence is sufficient to find the facts necessary to give judgment and whether it would be unjust to do so. Put differently, the test is two-fold: first, the court must be satisfied that it can find the necessary facts to determine the case summarily; second, the court must be satisfied that it is just to decide the case summarily. These are separate but related questions. If the court cannot find the necessary facts, the application is dismissed. If the court can find the necessary facts, the application will be allowed only if the court also considers it is just to do so: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366, 1985 CanLII

147 (C.A.) at 385-386; *Inspiration Management*, at para. 48; *Creyke v. Creyke*, 2016 BCCA 499 at para. 45.

[107] It is well established that upon an application for a summary trial, the parties must put their best foot forward, meaning, they must take every reasonable step to put themselves in the best position possible. A respondent to a summary trial application cannot simply insist on a full trial in the hope that something might turn up: *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 32-33 [*Gichuru*], citing *Everest Canadian Properties Ltd. v. Mallmann,* 2008 BCCA 275, at para. 34.

[108] Although the parties are required to put their best foot forward, gaps in the evidence can nevertheless render a matter unsuitable for summary trial: *Degelder Construction Co. v. Dancorp Developments Ltd*., 2002 BCCA 479, at para. 53 [*Degelder Construction*]; *North Root Cannabis Ltd. v. 663466 B.C. Ltd*., 2024 BCCA 105, at para. 47; *Deo v. Vancouver School District No. 39*, 2017 BCSC 1089, at paras. 28-30.

[109] Conflicting affidavits on a summary trial may render a matter unsuitable for summary trial. The court should not decide an issue on a summary trial solely on the basis of preferring one conflicting affidavit over the other, but may decide the issue where there is other admissible evidence or some other basis for preferring one affidavit over another: *Inspiration Management*, at para. 56; *Cory v. Cory*, 2016 BCCA 409 at para. 10; *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 27.

[110] Similarly, issues of credibility may also render a matter unsuitable for summary trial but not always. In appropriate circumstances, credibility findings can be made on a summary trial: *Tolzmann v. Royal Bank of Canada*, 2023 BCCA 366, at para. 27, citing *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34 at paras. 39-42.

[111] The case law has identified a non-exhaustive list of factors to consider in determining whether a matter is suitable for summary trial. Some of the factors

appear to go to the first part of the test, some go to the second part of the test, and some overlap. The factors include:

a) the amount involved;

b) the complexity of the matter;

c) the urgency of the matter and any prejudice likely to arise from delay;

d) the cost of taking the matter forward to a conventional trial in relation to the amount involved (i.e. proportionality);

e) the course of the proceedings and whether the evidence presented is sufficient to resolve the dispute;

f) the cost of the litigation and the time of the summary trial;

g) whether credibility is a critical factor in the determination of the dispute;

h) whether the summary trial may create an unnecessary complexity in the resolution of the dispute;

i) whether the application would result in litigating in slices; and

j) any other factors that affect the justice of deciding the case summarily.

(See: *Inspiration Management*, at para. 48; *Gichuru* at paras. 30-31; *Cepuran v. Carlton*, 2022 BCCA 76, at paras. 149–50; *White Square Development Inc. v. Tympanum Construction and Project Management Ltd.,* 2024 BCCA 66, at para. 49).

Analysis

[112] Despite the parties' insistence that this matter is suitable for summary trial, I reluctantly conclude that it is not. First, I do not agree that I can find the facts necessary to resolve the issues. Second, even if I could find the necessary facts, I

am not satisfied that it is just to decide the case summarily. I expand on these reasons below.

[113] The primary issue in this case is the interpretation of the option clause in the Contract. The parties are in substantial agreement on the legal principles that apply to this issue, although they refer me to different authorities. The plaintiff refers me primarily to *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, at paras. 19-22, for the relevant principles. The defendant refers me primarily to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at paras. 47-48 and 60 [*Sattva*], and to *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, at paras. 142-144. Some of the relevant principles from these authorities may be summarized as follows:

a) The goal is to determine the intent of the parties to the Contract at the time the Contract is made;

b) The subjective intention of a party is not a relevant consideration;

c) The words used in the Contract must be given their plain and ordinary meaning, unless to do so would result in an absurdity;

d) The words must be interpreted in light of the whole of the Contract and the intentions of the parties expressed therein;

e) The words must be read in the context of the surrounding circumstances prevalent at the time of contracting;

f) The words should be interpreted in accordance with sound commercial principles and good business sense; and

g) The meaning of the words used must not be distorted beyond their actual meaning.

[114] In *Sattva* Justice Rothstein, wrote:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Emphasis added.]

[115] Most recently, in *Hardy v. Graham*, 2024 BCCA 67, at para. 23, Horseman J.A. summarized the principles of contract interpretation as follows:

> [23] The principles that govern the interpretation of a contract are well-established. The interpretation of a written contract must be grounded in the text of the contract. While surrounding circumstances may be considered, they cannot be allowed to overwhelm the wording of the agreement so that the court effectively creates a new agreement for the parties: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. Because contractual interpretation is an objective exercise, the relevant surrounding circumstances consist only of objective evidence of the background facts at

> the time of the execution of the contract; that is, what the parties mutually knew or ought to have known as of the date of the contract: *Sattva* at paras. 49, 58. One party's subjective state of mind or intention has no independent place in the analysis: *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 30.

[116] From the foregoing, it is apparent that the surrounding circumstances are a relevant and an important consideration in the interpretation of a contract. In my view, this evidence is either absent from the materials before me or is contradictory.

[117] I have no evidence from the two real estate agents, JT Mann and Samuel Cheung, who were involved in the transaction. These agents were, presumably, the mediums through which the parties communicated in relation to the transaction. The communications between each agent and their principal and the communications between the agents is critical to ascertaining what the parties knew at the time the Contract was entered into.

[118] The defendant relies on the affidavit #2 of Rajnesh Mann where he suggests in para. 6 that JT Mann was advised of the need for a clause that separately conveyed the plaintiff's beneficial and legal interests in the Property. However, his affidavit falls short of directly deposing to this. JT Mann's evidence is needed to show whether a separation of beneficial and legal interest was discussed between them and exactly what instructions he was given. Samuel Cheung's evidence would similarly show what was discussed between him and Mr. Li, or whoever his liaison was, whether a separation of legal and beneficial interests was discussed and what instructions he was given. Additionally, the evidence of JT Mann and Samuel Cheung is required to establish what was said between them.

[119] In *Inspiration Management,* at para. 55, Chief Justice McEachern noted that an absence of evidence from a principal player might result in the dismissal of an application for summary judgment.

> [55] In deciding whether the case is an appropriate one for judgment under R. 18A, the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately

> explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so.

[120] The real estate agents are principle players in this piece. Their evidence should be before the court.

[121] Related to the absence of evidence from the real estate agents, there is minimal evidence of what transpired during the negotiation period before the Contract was executed. The affidavits of Mr. Li and Rajnesh Mann provide only token specifics of actual discussions or communications with their respective real estate agents or with others within their respective companies. In this regard, I note that during submissions I was advised by counsel that other individuals, including a Mr. Winston Zhang, may have been involved and that legal counsel may have been involved.

[122] The only evidence of who drafted the option clause is that it was drafted by the defendant. The identity of the person who drafted the option clause is not before me. This person's evidence is relevant and important. They could provide evidence of who told them to draft the clause and what they were told. Such evidence is part of the surrounding circumstances which could shed light on the mutual intentions of the parties, objectively determined.

[123] There is no evidence before me of who signed the Contract on behalf of the defendant. The value of this evidence is debatable but its absence exemplifies the extent of the missing evidence.

[124] There is a conflict in the evidence of Rajnesh Mann and that of Mr. Li. Mr. Li deposes that the so-called "Beneficial Ownership Option" was only raised after the Contract had been signed. In contrast, Rajnesh Mann deposes he understood the plaintiff's shareholders of Bene Oval had agreed to sell their shares pursuant to the "Beneficial Ownership Option". Although Rajnesh Mann's subjective understanding is irrelevant, his reasons for this understanding could be relevant if they were conveyed to the plaintiff such that both parties had a mutual intention, objectively determined.

[125] There is also minimal evidence on whether it is customary in transactions for the purchase of commercial real estate for the buyer to acquire a property by way of separate acquisitions of the beneficial and legal interests. Rajnesh Mann states baldly in his affidavit #2, that this is customary. However, he does not expressly depose that his prior transactions were done in this way. Additionally, the evidence of Mr. Umbach suggests that it is not customary. He deposes that simple share purchase agreements are common and that there is no “convention” requiring separate conveyances of beneficial and legal interests. Mr. Li is silent on the point.

[126] The evidence is incomplete on whether the defendant was aware of the plaintiff’s adjusted cost base for the Property at the time of contracting. This is an important fact relied on by the defendant as part of the surrounding circumstances. However, without better evidence of what transpired before the Contract was signed, it is unclear whether this was known during the negotiations. The only direct evidence on this point is that of Rajnesh Mann who could not recall if he knew the price at which the plaintiff had purchased the Property at the time the Contract was entered into.

[127] Similarly, although it is now known that the plaintiff held both legal and beneficial title to the Property, it is unclear whether this was known by both parties at the time the Contract was negotiated. Mr. Cho in his letter of July 4, 2018, which was written after consultations with the defendant, states there was a representation made prior to the execution of the Contract to the effect the plaintiff held title as a bare trustee. Although I am told the defendant has abandoned any misrepresentation argument, this raises question of what was said during the negotiations about the nature of the plaintiff’s ownership. Relatedly, Rajnesh Mann deposed that he learned the plaintiff was a bare trustee of the Property on or about February 22, 2018. Rajnesh Mann would appear to be incorrect in this, however, his evidence deepens the confusion about what the defendant knew at the time the Contract was entered into.

[128] A further conflict in the evidence is that Mr. Quo Vadis and Mr. Weder, the tax specialists, disagree on the interpretation of their emails to one another. Specifically, Mr. Quo Vadis understood Mr. Weder to agree to a three-day closing whereas Mr. Weder says he was merely agreeing to sequencing the various steps on the single day of closing. This is a critically important disagreement since it gave rise to the plaintiff's last-minute amendments to the closing documents under the defendant's closing procedure, amendments which the defendant says were not agreed to.

[129] Finally, there are significant conflicts in the evidence of the experts Mr. Davie and Mr. Umbach. Mr. Umbach essentially opines that the closing documents provided by the plaintiff to the defendant were reasonable to close the transaction in accordance with the Contract. Mr. Davie, in contrast, essentially opines that the closing documents provided by the defendant to the plaintiff were reasonable to close the transaction.

[130] I now turn to a consideration of the various factors that have been identified in the caselaw as relevant in determining whether a matter is suitable for summary trial.

The Amount Involved

[131] The first factor is the amount involved in the action. Here the amount is very significant. The plaintiff's claim is for more than $20 million.

[132] In *Degelder Construction*, at para. 56, Justice Rowles observed that a claim in the amount of several million dollars weighs heavily in the balance.

> [56] In this case, the amount involved is large. The amounts claimed by Metropolitan as expenditures relating to the Degelder Settlement alone exceeded two million dollars. Metropolitan was ultimately granted judgment in the Foreclosure Proceeding (including judgment against McDaniel personally) in the amount of $2,912,063.02. The Degelder Settlement represented the bulk of the shortfall recovered against Dancorp and McDaniel. In these circumstances, it was incumbent upon the trial judge to ensure that he had before him sufficient evidence to assess whether Metropolitan had fulfilled its duties as mortgagee. As this Court recently stated, "... the amount of the claim is one of several proper considerations set out in *Inspiration*

> *Management* and puts context to the scale of possible efficiencies that may flow from the summary procedure": *Foreman v. Foster*, 84 B.C.L.R. (3d) 184, 2001 BCCA 26, at para. 24. A claim in the amount of several million dollars should weigh heavily in the balance. [Emphasis added.]

[133] In my view, the amount at issue in this case weighs heavily in favour of a conventional trial.

Proportionality

[134] The next factor I consider is proportionality which is a principle that is reflected in two of the factors I have set out above, namely: the cost of taking the matter forward to a conventional trial in relation to the amount involved; and the cost of the litigation and the time of the summary trial.

[135] The proportionality objective in the *Rules* weighs heavily in favour of a conventional trial. A conventional trial will undoubtedly require several weeks and will be expensive for the parties, however, balanced against the amount at issue, the costs of a conventional trial will not be disproportionate.

Complexity

[136] Although in one sense this case could be described as a simple matter of contractual interpretation, this would be an oversimplification. The case requires a fulsome consideration of the circumstances surrounding the entering into of the Contract, a consideration of the standard or usual practices in transactions of this sort, a consideration of the tax implications of the various options, and a consideration of what constitutes a form of share purchase agreement that solicitors would find reasonable. In the circumstances of this case, these are not simple issues as reflected in the differing views of the specialists and experts.

[137] The complexity of this matter is further reflected in the size of the application record before me (seven volumes for the summary trial applications), in the time required to hear the summary trial (eight days of argument not including the time spent on the application to re-open) and in the length of the written arguments of the parties (over 160 pages in total).

[138] The complexity of the matter weighs in favour of a conventional trial.

Urgency and Prejudice

[139] There is no, or minimal, urgency to this matter since the property has been sold.

[140] The only prejudice is that there is a $5 million deposit currently being held by solicitors which neither party has the use of. That amount is, however, presumably earning interest.

[141] In my view the lack of urgency and minimal prejudice favour a conventional trial.

Sufficiency of Evidence

[142] I have already addressed whether the evidence is sufficient to resolve the dispute and have expressed my view that the evidence is not sufficient. This factor heavily favours a conventional trial.

Importance of Credibility

[143] There are credibility concerns raised in the evidence that are best resolved at a conventional trial where the witnesses testify in person before a justice and are subject to cross-examination. In particular, the affidavits of Rajnesh Mann appear to me to be self-serving and particularly carefully drafted to suggest things that he does not directly depose to. Also, the failure of both Rajnesh Mann and Mr. Li to provide a complete and fulsome explanation of the events leading to the signing of the Contract causes me to be skeptical of the evidence of both. Another credibility issue concerns the exchange between Mr. Quo Vadis and Mr. Weder about whether there was an agreement on a three-day closing.

Added Complexity and Case Splitting

[144] Other factors to consider are whether the summary trial may create an unnecessary complexity and whether the application would result in litigating in slices. Neither of these factors are currently of particular relevance. The case is

complex with or without the summary trial applications. It is regrettable that so much time has already been spent on the summary trial applications but this is not a reason to proceed with them.

[145] Insofar as litigating in slices or case splitting is concerned, this is not a relevant factor in the circumstances. Adjudicating the merits of the dispute summarily would not have resulted in litigating in slices.

Other Factors

[146] There is a related action that will be affected by the result in this action. Specifically, in action S1911112, between the interested non-parties and Bene Oval, the interested non-parties claim $1.89 million in commission plus interest. By order dated May 19, 2021, Master Cameron ordered that action S1911112 be tried at the same time as this action. However, by order dated July 13, 2023, Chief Justice Hinkson (as he then was), ordered, on consent, (1) that the order of Master Cameron be set aside and (2) that the plaintiff's in action S1911112 were to be bound by any judicial determination in this action. Consequently, the result in this action will have a direct affect on the result in action S1911112.

[147] Additionally, during the course of the hearing, submissions were made regarding the sufficiency of pleadings. In particular, it was argued that severance was not properly pleaded by the plaintiff and that the defendant had not pleaded the Contract was unenforceable because the plaintiff's shareholders were not party to it, an argument that was vaguely advanced before me in oral submissions. In a matter where there is so much at stake, the pleadings should be fully compliant with the *Rules*.

Conclusion

[148] Considering the various problems and deficiencies with the evidence that has been submitted in support of the summary trial applications, and considering the various factors as outlined above, I conclude that this matter is not appropriate for

summary trial. I cannot find the facts necessary to resolve the dispute and it would be unjust for me to resolve the dispute summarily.

[149] Accordingly, both applications for summary trial are dismissed.

"Giaschi J."