

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ball v. Eckhart*,
2025 BCCA 70

Date: 20250312
Docket: CA49730

Between:

Sheila Margaret Ball
also known as Sheila Margaret Perry
also known as Margaret Sheila Perry

Appellant
(Respondent)

And

Frances Paula Eckhart

Respondent
(Petitioner)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Winteringham
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated
February 9, 2024 (*Eckhart v. Ball*, 2024 BCSC 233,
New Westminster Docket S197113).

Counsel for the Appellant: D.H. Griffith

Counsel for the Respondent: M.G. Perry

Place and Date of Hearing: Vancouver, British Columbia
October 15, 2024

Place and Date of Judgment: Vancouver, British Columbia
March 12, 2025

Written Reasons by:

The Honourable Justice Donegan

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Winteringham

Summary:

The appellant challenges the chambers judge's determination that an agreement between the parties was binding, and the contractual claim for its enforcement accordingly not limitations barred. The appellant argues on appeal that the agreement was lacking essential terms, and was merely an "agreement to agree" in that it provided for the division of responsibility for repayment of the loan to be refined at a later meeting that never occurred. The appellant also submits that the chambers judge's reasons are inadequate to permit meaningful appellate review.

Held: Appeal dismissed. On the evidence that was before the chambers judge, it was open to him to determine that the agreement was a binding and enforceable contract, and that the associated claim was not limitations barred. Although the reasons, on their face, are inadequate to fully explain the judge's conclusions, when read in the context of the record, the reasons are factually and legally sufficient.

Reasons for Judgment of the Honourable Justice Donegan:**Overview**

[1] The primary issues on this appeal are whether the chambers judge erred in concluding that a written agreement between the parties constitutes a binding and enforceable contract, and whether his reasons for reaching this conclusion permit meaningful appellate review. While the focus of this appeal is narrow, the litigation journey to this point has been lengthy, and somewhat unusual.

[2] This appeal arises, generally, from a dispute between two sisters over their respective contributions to a residential property they jointly owned in Burnaby (the “Property”). In 2017, after many years of conflict, the respondent, Frances Eckhart, decided it was time to bring their co-ownership to an end, and commenced the underlying proceeding seeking relief under the *Partition of Property Act*, R.S.B.C. 1996, c. 347. Following a contested hearing in 2019, a judge ordered the Property to be sold and, to determine how the sale proceeds ought to be divided, directed that there be an inquiry, assessment and accounting of the parties’ contributions before the registrar.

[3] The Property sold in 2021, but the registrar’s inquiry has yet to occur. The delay arises from a controversy about whether certain of the parties’ contribution claims are barred by operation of the *Limitations Act*, SBC 2021, c. 13 [“LA”], and thus not subject to the registrar’s accounting. This appeal pertains to one such claim, arising from events that occurred about two decades ago.

[4] In 2004, Ms. Eckhart paid the balance owing on a mortgage encumbering the Property and the parties signed a written agreement containing terms addressing repayment by the appellant, Sheila Ball (the “2004 Agreement”). Ms. Eckhart takes the position that this agreement is a binding and enforceable contract that requires Ms. Ball to repay 80 percent of the amount Ms. Eckhart paid to discharge the mortgage, upon the sale of the Property. As Ms. Eckhart’s cause of action for repayment under the contract arose in July 2021 when the Property was sold, she

contends that her claim has been brought well within the prescribed two-year limitation period.

[5] Ms. Ball does not dispute that Ms. Eckhart paid the balance owing on the mortgage in 2004, or that the parties signed the 2004 Agreement. It is her position, however, that the 2004 Agreement was merely an “agreement to agree” and thus no contract at all. It was an agreement that required a second meeting to enable the parties to come to a meeting of the minds over an essential term: the repayment amount. In the absence of a valid contractual claim, Ms. Ball says the time limit for bringing any other cause of action expired long ago.

[6] At an impasse, the parties returned to court in 2022, where they obtained an order permitting them to apply to the court for a determination, prior to the registrar’s inquiry, as to whether any of their contribution claims were barred by operation of the LA. In 2023, Ms. Eckhart brought such an application in relation to her claim for repayment arising from the 2004 Agreement. Following a contested hearing, the chambers judge found in favour of Ms. Eckhart’s position. It is from this order that Ms. Ball now appeals.

[7] The appellant alleges two errors:

- a) that the chambers judge erred in law in finding that the 2004 Agreement was a binding and enforceable contract; and
- b) that the chambers judge erred by failing to provide adequate reasons for this finding, thereby preventing meaningful appellate review.

[8] For the reasons that follow, I am not persuaded the chambers judge made any error that would warrant appellate intervention, and would dismiss the appeal.

Background Facts and Procedural History

[9] Ms. Ball and Ms. Eckhart jointly owned the Property between 1989 and 2021. It had previously been owned by Ms. Ball and the parties’ mother, Mary O’Callaghan, who purchased the Property together in 1980 for \$144,000.00.

[10] The Property is comprised of four living units, with two units located on one side of the Property (the “First Side”) and two units located on the other side (the “Second Side”). When Ms. Ball and Ms. O’Callaghan originally purchased the Property, it had only three living units: one on the First Side and two on the Second Side. Ms. Ball and her husband, Terry Ball, initially moved into the basement suite on the Second Side and Ms. O’Callaghan occupied the upstairs suite above them.

[11] In 1981, Ms. O’Callaghan moved into the First Side and Ms. Ball occupied the entirety of the Second Side. After this, Mr. Ball and a sibling of the parties constructed a basement suite on the First Side, increasing the number of living units on the Property to four. There is an ongoing dispute about whether Ms. Eckhart agreed to pay for the labour and materials for this new basement suite, but it is accepted that she moved into the new basement suite and Ms. O’Callaghan continued to live in the suite above her.

[12] Ms. O’Callaghan died in 1989 and left her one-half interest in the Property to Ms. Eckhart. Following this, Ms. Eckhart moved into the suite Ms. O’Callaghan had occupied on the First Side and began to rent out the basement suite. This arrangement remained in place until 2006, when Ms. Eckhart’s son and his family began to occupy the upstairs suite and Ms. Eckhart moved into the basement suite.

[13] In 1990, Ms. Ball and her husband purchased another home (the “Gilpin Property”) and moved out of the Property. After this, the Second Side was periodically occupied by tenants. In order to finance the purchase of their new home, Ms. Ball took out a second mortgage on the Property (with Ms. Eckhart’s apparent consent) in the amount of \$100,000. In 1997, this second mortgage and the earlier mortgage encumbering the Property were consolidated into a single mortgage (the “Consolidated Mortgage”). In addition, there were other, smaller mortgages from time to time.

[14] There is an ongoing dispute about whether Ms. Eckhart (and Ms. O’Callaghan before her) made contributions toward the various mortgages in amounts equal to those made by Ms. Ball. While the petition judge was satisfied that Ms. Eckhart

(and her mother before her) made regular monthly contributions of approximately \$300 to \$325, he found the evidence insufficient to determine if this amount was more or less than 50 percent of the total monthly payments: *Eckhart v. Ball*, 2019 BCSC 1530 (“2019 Decision”) at para. 17.

[15] There is also an ongoing dispute between the sisters about who has contributed more to the upkeep of the Property over the years.

[16] In the early 2000s, Ms. Ball and her husband experienced financial difficulties and they defaulted on the Consolidated Mortgage. When Ms. Eckhart eventually learned of the default in 2004, she paid the balance owing in the amount of \$34,951.00 (the “Payment Amount”).

[17] On October 30, 2004, the parties signed the 2004 Agreement, which reads as follows:

October 30/04

Meeting with Sheila, Terry Ball, Kitty O’Callaghan, Frances Eckhart, Steve Norman have agreed that

1. Frankie [Ms. Eckhart’s preferred name] will pay out the balance of the mortgage (estimated to be \$34,951 at Oct. 31/04);
2. Frankie and Sheila [Ms. Ball] agree that the responsibility with the \$34,951 is 80% Sheila and 20% Frankie;
3. It is also agreed that a further meeting needs to be held to refine the 80/20%;
4. The repayment is held in abeyance, but will be made if the property is sold or if other repayment agreements are made.

[18] The parties acknowledged in the 2004 Agreement that Ms. Ball was responsible for 80 percent of the Payment Amount and Ms. Eckhart was responsible for the remaining 20 percent. The 2004 Agreement also contained clauses that a further meeting was needed to “refine the 80/20%” and that Ms. Ball’s repayment obligation would be “held in abeyance” until the Property sold or the parties reached another agreement.

[19] There is a dispute in the evidence about the attempts made by each of the parties to schedule the further meeting referred to in clause 3. Mr. Ball says he made six attempts to schedule a further meeting, but that his attempts were rebuffed. Ms. Eckhart denies this, and claims she was the one who followed up on a number of occasions, but to no avail. As examples of her efforts in this regard, Ms. Eckhart produced two letters she says went unanswered — one dated December 30, 2004 and the other dated September 3, 2006. Mr. Ball denies having seen these letters and Ms. Ball's evidence does not address the point. I will discuss these letters in greater detail later in these reasons.

[20] In late 2017, Ms. Eckhart commenced the underlying proceeding seeking an order for the partition and sale of the Property. Ms. Ball was opposed. In the 2019 Decision, released on September 11, 2019, the judge determined the Property should be sold, but granted Ms. Ball an option to purchase that she chose not to exercise. The judge also directed, with the consent of the parties, that there be an inquiry, assessment and accounting before the registrar regarding the relative contributions of the parties to the Property, in order to facilitate a determination about the distribution of the sale proceeds. Specifically, the judge directed that an inquiry be held in relation to the following (2019 Decision at para. 67):

- a) The contributions of the parties and of Ms. O'Callaghan towards the purchase of the Property;
- b) The contributions of the parties and of Ms. O'Callaghan towards the payment of any mortgages registered against title to the Property at any time;
- c) The portion of the mortgage payments that are attributable to the Gilpin Mortgage or the Gilpin Property portion of the Consolidated Mortgage;
- d) The costs of any repairs or additions made to the Property by either party and the contributions to such repairs or additions made by the parties;
- e) An assessment of whether any repairs or additions constituted improvements to the Property or ongoing maintenance;
- f) The costs and expenses incurred by the respondent in relation to investigating a replacement roof for the Property in 2016 and 2017; and

- g) The contributions of the parties to any other common expenses such as, for example, insurance, and property taxes.

[21] The parties disagreed about various matters related to implementation of the orders of the petition judge. This caused some delay, but on July 5, 2021, the Property sold to a third party for \$2,000,000. The parties agreed to a large interim distribution of the sale proceeds in the amount of \$940,000 each. They further agreed that the remaining proceeds would be held back, in equal amounts in their respective counsel's trust accounts, not to be distributed until further agreement or order of the court.

[22] Another year passed. Among the areas of controversy that remained was whether the registrar's inquiry ought to include an accounting for the Payment Amount and any repayment obligation by Ms. Ball pursuant to the 2004 Agreement. The parties disagreed about whether the 2004 Agreement was an enforceable contract or merely an unenforceable agreement to agree, and the effect either characterization would have on the applicable limitation period for a claim to be brought. To enable adjudication of this issue, and potentially other similar ones, the parties returned to court.

[23] On November 30, 2022, by consent of the parties, the petition judge amended the order arising from the 2019 Decision to include the following terms:

- a. Prior to proceeding with the inquiry assessment and accounting before the Registrar set out in paragraph 10 of the Order (the "Registrar's Inquiry"), the parties be at liberty [to apply] to the Court for a ruling on whether one or more of the parties' claims pertaining to the Property defined at paragraph 1 of the Order is barred by operation of the *Limitations Act*, SBC 2012, c. 13 (the "Limitation Period Application");
- b. Any ruling in relation to the Limitation Period Application [will] be binding on the Registrar for the purposes of the Registrar's Inquiry and on the Court for the purposes of the hearing related to the final determination of the apportionment of the sale proceeds of the Property referenced at paragraph 11 of the Order (the "Apportionment Hearing");
- c. Paragraph 11 of the Order [is] varied to delete the words "and whether any or all of the disputed amounts are subject to an expired limitation period".

The Hearing and Decision

[24] The application was heard by a judge sitting in chambers on June 21, 2023. Between them, the parties tendered five affidavits: one from Ms. Eckhart (made April 24, 2023); one from Ms. Ball (made April 10, 2023); and three from Mr. Ball (made January 26, 2018, April 10, 2023, and May 8, 2023).

[25] While their evidence conflicted about why there was no “further meeting” as contemplated in clause 3 of the 2004 Agreement, it was common ground that:

- a) neither of the parties had legal advice;
- b) Ms. Eckhart paid the Payment Amount in 2004, as per clause 1;
- c) no “further meeting” to “refine the 80/20%” was ever held, as contemplated in clause 3;
- d) no other repayment agreement was entered into, as contemplated by clause 4;
- e) the Property sold on July 5, 2021; and
- f) Ms. Ball had not repaid Ms. Eckhart any part of the Payment Amount.

[26] The chambers judge was also provided with the 2019 Decision reasons, which set out many findings regarding the factual matrix he would have to consider on the application.

[27] At the hearing, Ms. Eckhart took the position that the 2004 Agreement was a binding and enforceable contract that constituted a “delayed demand contingent loan” that required Ms. Ball to repay Ms. Eckhart 80 percent of the Payment Amount either upon the sale of the Property, or upon the terms of some other repayment agreement. As the first of those contingencies, the sale of the Property, occurred on July 5, 2021, Ms. Eckhart argued before the chambers judge that her cause of action arose (and thus the limitation period began to run) on that date. As such, her claim

against Ms. Ball for repayment under the terms of the 2004 Agreement was not barred by operation of the provisions of the *LA*.

[28] Ms. Ball disagreed. She took the position that the 2004 Agreement was not a binding and enforceable contract, but was rather an incomplete and unenforceable “agreement to agree”. She argued that the 2004 Agreement was essentially a memorandum that set out the parties’ understanding of some of the terms surrounding the Payment Amount and provided for a mechanism (a second meeting) by which they could finalize a key term — the amount of Ms. Ball’s repayment obligation, if any — so that they could then create a binding agreement. As the second meeting meant to finalize this essential term never occurred, she argued that the parties did not come to a meeting of the minds and the 2004 Agreement could not constitute a valid contract.

[29] In the absence of a contractual claim, Ms. Ball asserted that the only potential cause of action remaining open to Ms. Eckhart for recovery of all or part of the Payment Amount would be based in principles of unjust enrichment. She argued that the limitation period for such a claim would have commenced running at the time of the payment in 2004 and had long since expired.

[30] On February 9, 2024, the chambers judge, in written reasons indexed as 2024 BCSC 233, ruled in favour of Ms. Eckhart’s position and made an order that Ms. Eckhart’s claim for repayment pursuant to the 2004 Agreement is not statute-barred. He also awarded costs of the application to Ms. Eckhart.

[31] The chambers judge began his reasons by outlining the background facts, including some earlier findings made by the petition judge. Following this, he summarized his understanding of Ms. Ball’s position and, implicitly, found the 2004 Agreement was a binding and enforceable contract:

[13] The respondent submits that there is a presumption that because the payment of the balance of the Consolidated Mortgage, by the petitioner, took place more than 20 years ago, that debt is “presumptively statute barred”. The respondent also asserts that the agreement between the parties is incomplete because the meeting in clause 3 thereof had not occurred.

[14] The respondent did not submit any authorities to support the presumption that 20 years was meaningful when, as in this case, there was a condition that the repayment was based on a delayed demand, that is, no payment was due to the petitioner until the Property was sold or there was another agreement between the parties. No other agreement was made between the parties. In the case at bar, the repayment was therefore contingent on the sale of the Property which, as noted, took place on July 5, 2021. Accordingly, the Limitation Period began to run on July 5, 2021.

[32] Next, under the heading “Claimant’s Submissions”, the judge considered the implications of such a finding to the limitations issue he was required to decide. He began by determining the nature of the indebtedness and the conditions for repayment:

[15] For the purpose of determining a limitation period for the bringing of a legal action, the nature of the indebtedness and the conditions for its repayment must be determined. A loan may have a fixed time period for repayment where the time for repayment is fixed to a date specified or repayment is on demand. In the case at bar, the requirement for repayment is based on a delayed demand or contingency, where the beginning of the limitation period is based on a demand or the occurrence of the contingency. The contingency in the case at bar is specified in clause 4, and the event which triggered repayment is the sale of the Property. It is noted, according to the language of the Reasons for Judgement above, that the respondent was unable to pay the regular monthly mortgage payments on the Consolidated Mortgage.

[33] Having determined the repayment obligation arose on the happening of a contingency (the sale of the Property), the chambers judge next considered several authorities that would guide his assessment about when the limitation period began to run, including: *Zeitler v. the Estate of Alfons Zeitler*, 2008 BCSC 775; *Ewachniuk Estate v. Ewachniuk*, 2011 BCCA 510; *Gavriel v. Gavriel*, 2017 BCSC 1653; *Kong v. Saunders*, 2014 BCCA 508; and *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33. The judge then concluded Ms. Eckhart’s claim was not statute-barred, reasoning:

[19] The contingency in the case at bar was the sale of the Property, a contingency clear from the language of the parties’ agreement. Another agreement between the parties might also have been a contingency but no such agreement came into being. The sale occurred on July 5, 2021, and the limitation period began to run from that date. The claim of the petitioner is clearly within the limitation period of two years from that date.

[20] The application of the petitioner for a determination that the petitioner's claim for repayment, pursuant to the loan agreement entered into by the parties on October 30, 2004, is not statute barred is granted.

On Appeal

[34] Ms. Ball contends the chambers judge erred by: (a) finding the 2004 Agreement was a binding and enforceable contract; and (b) failing to provide sufficient reasons, preventing meaningful appellate review.

Positions of the Parties

[35] Ms. Ball accepts that, given his conclusion, the judge must have determined the 2004 Agreement was a binding and enforceable contract. She contends that this was clearly an error in light of the uncontested evidence that the second meeting never occurred. While her position assumes an error of law, Ms. Ball highlights how the absence of any explanation for this finding impedes her ability to precisely identify the source of the error. She argues that the reasons are inadequate and inscrutable, rendering it impossible for her to know what type of error was made.

[36] Ms. Eckhart asks that the appeal be dismissed. She first contends that the determination Ms. Ball disputes, the validity of the 2004 Agreement, was not an issue that was properly before the chambers judge. As Ms. Ball brought no cross-application seeking to challenge the validity of the 2004 Agreement, Ms. Eckhart says the judge cannot be criticized for failing to give reasons on an issue that was not before him. She argues that the judge proceeded appropriately, and without error, by analyzing what was properly before him: the applicable limitation period with regard to the nature of the indebtedness and the conditions for repayment set out in the 2004 Agreement.

[37] Alternatively, if it could be said that the validity of the 2004 Agreement was an issue before the chambers judge for determination, Ms. Eckhart submits that the appellant has failed to demonstrate any reviewable error. She contends that, in light of the record and live issues, meaningful appellate review is not precluded in this case. She points to portions of the record where the judge expressed an awareness,

and rejection, of Ms. Ball's position that the language of the 2004 Agreement and parties' subsequent conduct supported a finding that it constituted an unenforceable "agreement to agree" rather than a binding contract.

[38] Ms. Eckhart submits that the requirements for contract formation were clearly established on the evidence and that the judge made no error in reaching this conclusion. She emphasizes that the essential provisions intended to govern the contractual relationship were clearly agreed upon: the amount payable, the responsibility for same, and the contingencies for repayment. On its face, and in light of surrounding circumstances, the parties' acknowledgement in the 2004 Agreement that they should hold a further meeting does not create uncertainty as to its terms.

Standards of Review

[39] A conclusion that the requirements for contract formation have been satisfied is a question of mixed fact and law, reviewable for palpable and overriding error, unless the judge commits an extricable error of law: *Angus v. CDRW Holdings Ltd.*, 2023 BCCA 330 at paras. 31-36, citing *Oswald v. Start Up SRL*, 2021 BCCA 352. Appellate courts are to be cautious in determining that an error of law can be extracted from a question of mixed fact and law, "as it is often difficult to extricate the legal questions from the factual": *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. This cautionary principle expressly applies to the determination of contract formation: *Angus* at para. 32, citing *Oswald* at para. 32.

[40] A failure to give adequate reasons to permit appellate review is an error of law reviewable on a standard of correctness: *R. v. Sheppard*, 2002 SCC 26 at para. 28; *Hague v. Hague*, 2022 BCCA 325 at para. 15.

[41] I turn now to explain why the appeal should be dismissed.

Discussion

[42] In the civil context, reasons for judgment justify and explain the result, tell the losing party why they lost, provide for an informed consideration of possible grounds of appeal, and satisfy the public and the parties that justice has been done: *Hague* at

para. 18, citing *F.H. v. McDougall*, 2008 SCC 53 at para. 98, and *R. v. G.F.*, 2021 SCC 20 at paras. 68–69.

[43] However, there is no free-standing right of appeal based on the sufficiency of a judge’s reasons, and an appeal court cannot intervene with an order simply because it believes the court below did a poor job of expressing itself: *F.H.* at para. 99. Appellate intervention is only justified “where the reasons, when considered along with the record, do not permit meaningful appellate review”: *Zhao v. Fang*, 2022 BCCA 227 at para. 22. Meaningful appellate review is prevented where the reasons are both “inadequate and inscrutable”: *Zhao* at para. 22; see also *G.F.* at paras. 70, 79.

[44] Reasons must be read functionally and contextually. They must be read generously and as a whole, in the context of the live issues at the hearing, informed by the positions of the parties. They are not to be finely parsed in search for error: *G.F.* at para. 69; *Hague* at para. 20. They must also be read bearing in mind the presumption that judges know the law. Where reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred: *G.F.* at paras. 78–79.

[45] Reasons must be both factually sufficient — describing what the judge decided and why — and legally sufficient, such that the aggrieved party may determine the viability of an appeal and an appellate court may determine whether an error occurred: *Zhao* at para. 23.

[46] A judge is not required to detail every aspect of their factual deliberations or discuss all of the evidence on a given point. Rather, the reasons must demonstrate that the judge grappled with the substance of the live issues and, on appeal, the reasons will be considered in the context of the record below: *Kakavelakis v. Boutsakis*, 2017 BCCA 396 at para. 46. Even if the judge’s reasons do not explain the “what” and the “why” of the decision, there will be no reviewable error where those answers are clear from the record: *G.F.* at para. 70; see also *Ecobase*

Enterprises Inc. v. Mass Enterprise Inc., 2017 BCCA 29 at para. 9; *Hague* at para. 21.

[47] To answer the limitation period question that was before him, the chambers judge first had to determine whether the 2004 Agreement was a valid and enforceable contract constituting a contingent loan as Ms. Eckhart argued, or merely an unenforceable agreement to agree as Ms. Ball argued. I do not accept Ms. Eckhart's position that this issue was not before the chambers judge for determination. It clearly was. It was the focus of the application response and occupied much of counsel's submissions.

[48] The parties' materials and submissions outlined the key evidence in relation to this issue, referred to some of the applicable legal principles and authorities, and contained thorough argument. While it is true that the chambers judge did not expressly reference the legal principles or leading authorities, did not refer to some of the evidence and did not make his finding explicitly, I am nevertheless satisfied that he made the necessary findings of fact, that those findings were supported by the record, and that he gave substantive effect to the applicable legal principles: *Hague* at para. 26.

[49] Respectfully, I agree with Ms. Ball that on their face, these reasons are objectively inadequate. While the finding of the chambers judge that the 2004 Agreement is a valid and enforceable contract (the "what") can be discerned from paras. 14 and 19 of the reasons, as read in the context of the reasons as a whole, it is the "why" — the explanation for the logical connection between the evidence and the finding — that cannot. However, I am nevertheless satisfied that meaningful appellate review is possible because the answer to that question is clear from the record.

[50] Factually, when considered in the context of the evidence, the submissions of counsel and the history of how the application, in the context of the proceeding as a whole, unfolded, I am satisfied the foundations of why the chambers judge reached his decision are discernable: *R. v. R.E.M.*, 2008 SCC 51 at para. 17. Read

functionally and contextually, and recognizing that judges are presumed to know the law, I am also satisfied the reasons are legally sufficient.

[51] The record indicates the judge was aware of the test to determine whether communications between parties constitute a binding and enforceable contract, as set out in *Angus*:

[38] The test for a binding and enforceable contract 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”: *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23. The inquiry is an objective one, such that the actual state of mind and personal knowledge of the parties is not relevant: *Voitchovsky v. Gibson*, 2022 BCCA 428 at para. 33. The question is not what the parties subjectively had in mind, but whether their conduct was such that a reasonable person would conclude that they intended to be bound: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 37.

[52] To determine intention to contract, a court may look at all the circumstances: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at para. 17. Subsequent conduct of the parties can be relevant to ascertain whether, objectively, they had entered into a binding and enforceable contract: *Oswald* at para. 50.

[53] The requirement that the terms of any agreement must be enforceable was explained by Madam Justice Newbury in *Berthin v. Berthin*, 2016 BCCA 104, a decision brought to the attention of the chambers judge (at para. 47):

[47] Of course, the terms in question must be enforceable – i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will “lean heavily against finding contracts void for uncertainty” (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so “that their meaning can be determined with a reasonable degree of certainty”: *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.

Lambert J.A. observed in *Griffin v. Martens* (1988), 1988 CanLII 2852 (BC CA), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: “As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves.” [At paras. 30-32; emphasis added.]

[54] The judge’s attention was also drawn to what Newbury J.A. described in *Berthin* as “trite law” that a court will not attempt to enforce what is effectively an “agreement to agree”, or a “list of guiding principles to be negotiated into specific rights and obligations”. With reference to another leading authority relied upon by Ms. Ball at the hearing below, Newbury J.A. held:

[48] It is also trite law, however, that a court will not attempt to enforce what is effectively an ‘agreement to agree’ or a list of guiding principles to be negotiated into specific rights and obligations. One of the leading Canadian cases is *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991) 1991 CanLII 2734 (ON CA), 79 D.L.R. (4th) 97 (Ont. C.A.), where Mr. Justice Robins summarized the law:

As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may “contract to make a contract”, that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a

contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the “contract to make a contract” is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. [At 103-4; emphasis added.]

In *Bawitko*, the Court concluded that the case was not one in which the missing terms were “mere formalities or routine language”; nor was the purported contract one that required merely the “completion of minor details which the parties can impliedly be taken to have agreed upon.” (At para. 106.) The “original contract” was found not to “satisfy the standards of certainty which the law requires as a prerequisite to incurring binding and enforceable contractual relations.” (See also *May & Butcher Ltd. v. The King* [1929] All E.R. Rep. 679 (H.L.); *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.* 2009 BCSC 1303; *Tether v. Tether* 2008 SKCA 126; *United Gulf Developments Ltd. v. Iskandar* 2008 NSCA 71; *Rana v. Nagra* 2011 BCCA 392.)

[55] Ms. Ball argued that the 2004 Agreement was incomplete because an essential provision intended to govern the contractual relationship had not been settled or agreed upon (their respective contributions to the Payment Amount); or, alternatively, that the 2004 Agreement was too general or uncertain to be valid in itself. Her position was grounded in the construction of the document in light of the surrounding circumstances, as well as the subsequent conduct of the parties. Regarding construction of the document, she referred the chambers judge to several authorities, including *Berthin*.

[56] Regarding subsequent conduct, Ms. Ball placed particular reliance on statements made by Ms. Eckhart in the two letters she wrote following the 2004 Agreement.

[57] Ms. Ball argued the court should infer that Ms. Eckhart herself believed that the parties required a second meeting and had not yet formalized the subject matter of the 2004 Agreement when she wrote on December 30, 2004:

[...]

We should also meet, as agreed to in the document we signed, to figure out our past expenses and how financial responsibilities will be divided. I would suggest early February.

I think it is necessary to formalize our agreements in writing. This should avoid any future misunderstandings and construct a clear business arrangement. If you have any suggestions regarding these issues please let me know.

[58] Similarly, from statements made by Ms. Eckhart in her second letter dated September 3, 2006, Ms. Ball argued the court should infer that Ms. Eckhart herself understood there were key terms, such as the amount to be repaid and the rate of interest, that had not yet been agreed upon when she wrote:

I agreed to payout the mortgage, but because, in 1991, they had asked me to co-sign a new mortgage on the Irving St. house to increase it by about \$100,000 so they could buy the Gilpin St. house, a paper was drawn up indicating:

- A. – 80% of the mortgage payout amount (\$35,008.91) is Sheila and Terry's responsibility and,
- B. – the remaining 20% would be the subject of a future meeting(s) to assess financial responsibility

...

I sought legal advice regarding the money owed and was advised that the most practical route would be for Sheila and myself to develop a mortgage that would formalize the amount. This agreement would not expect any money to change hands, until such a time as the property was sold. The letter also asks for a meeting to finalize the amount and interest rate that would apply.

[59] The judge was aware of the legal principles that would inform his determination. The record shows that he was not only alive to Ms. Ball's arguments about how construction of the document and Ms. Eckhart's subsequent conduct should inform the analysis of contract formation and enforceability, it also shows that he did not accept these arguments. For example, after Ms. Ball's counsel recited the

statements he wished to highlight from the first letter, the following exchange occurred:

CNSL D. GRIFFITH: So in this letter, Ms. Eckhart is effectively noting that they need to figure out past expenses and figure out financial responsibilities and their division. Given the subject matter of the letter, the division or how they will be divided, I would submit, most likely refers to the refinement of the 80/20 split, which is referenced in the letter. So there's a clear indication in this letter on behalf of the petitioner herself that there are key issues which haven't been figured out and need to be dealt with. The second paragraph suggests that the agreement needs to be formalized in writing, which, I would submit, is an admission that the So in this letter, Ms. Eckhart is effectively noting that they need to figure out past expenses and figure out financial responsibilities and their division. Given the subject matter of the letter, the division or how they will be divided, I would submit, most likely refers to the refinement of the 80/20 split, which is referenced in the letter. So there's a clear indication in this letter on behalf of the petitioner herself that there are key issues which haven't been figured out and need to be dealt with. The second paragraph suggests that the agreement needs to be formalized in writing, which, I would submit, is an admission that the document which was produced on October 30th, 2004, is not the final agreement between the parties. It's some type of draft agreement which anticipates a further meeting which would result in a formalized contract. And this is also supported by her statement that this should avoid any future misunderstandings and construct a clear business arrangement. Well, the only reason Ms. Eckhart would want to construct a clear business arrangement in respect of this agreement is if one didn't already exist. There would be no reason for her to write -- to pose this if she thought that the agreement was final and binding on the parties and that a second meeting was not necessary. The following –

THE COURT: But I guess -- I guess equally the reference to agreements suggests something's going to happen in the future.

CNSL D. GRIFFITH: I would respectfully submit, yes, that effectively this is the -- the -- the thrust of my argument, Mr. Justice, is –

THE COURT: So she's not talking about the existing agreement at all.

[60] The following exchange, after Ms. Ball's counsel recited the statements he wished to highlight from the second letter, is another example:

CNSL D. GRIFFITH: ... Now, there's a few key issues about the October 2004 document that are brought in here. First of all, Ms. Eckhart is writing, as of 2006, that she's seeking legal advice about the agreement, which is her right, but also that she thinks the parties need to take a further step of entering into a formal mortgage agreement. She also indicates that the meeting, which hasn't happened yet,

needs to finalize the amount and also the interest rate that would apply. So here is yet another issue which is not discussed in the October 2004 document. There's no mention of interest rates. Not only is the amount not finalized, but there's no interest rate provision, and there's -- unclear to the parties was that provision would be, which again indicates that, as of 2006, Ms. Eckhart seemed to have some awareness that this document, which she thinks -- she says is a binding agreement, might not actually be binding. And I will submit later on that that has relevance to limitation period arguments. Yes, Mr. Justice?

THE COURT: I'm not seeing anything about her believing it's not binding.

CNSL D. GRIFFITH: Well, what I'm -- I'm inferring that, and I'll -- I'll show the court where I'm inferring that from. She -- the -- and this will go to my argument which I'll be canvassing about agreements to agree versus binding contracts. But she does say that she believes that Sheila and herself should develop a mortgage -- so now we're talking about creating a mortgage document, which is not part of the 2004 document -- and that that agreement would need to finalize the amount which is owing as well as an interest rate, and this will be discussed at the follow-up meeting -- is effectively what's being said here.

THE COURT: Yeah. And two years have gone by.

CNSL D. GRIFFITH: Two years have gone by, yes, Mr. Justice. But even after the passage of two years, my point is that the petitioner seems to be aware that the document that was executed in October of 2004 doesn't address key issues, such as the finalized amount and whether or not an interest rate would apply and that we still need a meeting --

THE COURT: But --

CNSL D. GRIFFITH: -- to resolve these --

THE COURT: But --

CNSL D. GRIFFITH: -- issues.

THE COURT: -- in 2004 she didn't appreciate she'd be waiting for years.

[61] The remarks of the chambers judge indicate that he did not accept Ms. Ball's submissions about the import of these statements. Rather, his comments support a conclusion that he considered Ms. Eckhart's statements in the first letter to relate to other agreements between the parties, and thus irrelevant to his determination about whether, objectively, the parties had entered into a binding and enforceable contract in the 2004 Agreement. In light of the evidence of surrounding circumstances pertaining to the vast array of other historical and ongoing contribution claim

controversies between the parties at the time, this conclusion was clearly open to the chambers judge.

[62] The judge's comments also suggest that he considered Ms. Eckhart's statements in the second letter irrelevant to his determination, as well. In light of the length of time that had passed since the 2004 Agreement without any repayment, the judge considered Ms. Eckhart's statements to refer to a practical solution for enforcing Ms. Ball's obligation to repay Ms. Eckhart under the 2004 Agreement — by registering a mortgage with applicable interest — rather than an objective indication of uncertainty of terms. This was certainly open to him.

[63] With the benefit of the record, I am satisfied the reasons are factually and legally sufficient to explain why the judge found that the parties had indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and that the terms of such contract had been settled and agreed upon. The reasons are sufficient to permit meaningful appellate review.

[64] I also see no principled basis upon which to interfere with this decision.

[65] There was no dispute the 2004 Agreement was executed in the manner of a formal document, that the Payment Amount was advanced by Ms. Eckhart in 2004, and that there was an agreement for a proportionate repayment upon the happening of the first of two contingencies. Unlike the factual matrix alleged by Ms. Ball in analogy to *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991) 1991 CanLII 2734 (ON CA), 79 D.L.R. (4th) 97 (Ont. C.A.), it was open to the chambers judge to conclude as he did that no essential provision from the contract was missing, nor that the parties intended for their legal obligations to be deferred until the execution of some further document. Both on construction of the document and in light of surrounding circumstances, it was also open to him to conclude that the clause referring to the further meeting did not create any uncertainty as to the terms, and that the evidence of subsequent conduct relied upon by Ms. Ball was irrelevant to this determination.

[66] As I interpret the judge’s reasons, in the context of the record, he concluded that although the 2004 Agreement contemplated the possibility of a “further meeting” that could “refine” the agreed-upon “80/20%” breakdown or “other repayment agreements”, a core agreement had been reached between the parties on the fact of repayment by Ms. Ball once the Property sold, and that agreement was binding.

[67] As a determination of mixed fact and law, I can distill no palpable and overriding error in the judge’s determination that the requirements for contract formation and enforceability were met here.

Disposition

[68] I would dismiss the appeal.

“The Honourable Justice Donegan”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Winteringham”