IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ross v. Garvey*,
2025 BCSC 705

Date: 20250415
Docket: S248639
Registry: Victoria

Between:

Daniel Bryan Ross

Plaintiff

And

Kyle Joseph Garvey and Matthew Thomas Garvey

Defendants

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Plaintiff:	A. J. Broadley R. B. Warren
Counsel for the Defendants:	M. J. Velletta
Place and Date of Hearing:	Victoria, B.C. March 3-5, 2025
Written Submission Received from the Plaintiff:	March 12, 2025
Written Submission Received from the Defendants:	March 19, 2025
Place and Date of Judgment:	Victoria, B.C. April 15, 2025

OVERVIEW

[1] This is a summary trial application brought in the context of a breach of contract claim arising from an alleged real estate transaction.

[2] The application has been brought by the defendants, Kyle Joseph Garvey and Matthew Thomas Garvey. They are brothers, and they co-own a house in Saanich (the “Property”). For clarity, I will reference them individually by their first names, meaning no disrespect. They will also be referenced collectively as “the Owners”.

[3] The respondent to the Owners’ application is the plaintiff, Daniel Bryan Ross. Mr. Ross feels that he has a binding contract with the Owners to purchase the Property, and has sued the Owners to enforce it. The Owners disagree, primarily on the basis that they never actually signed a purchase and sale agreement with Mr. Ross.

[4] The parties do, however, agree that their dispute can be largely decided on this application. This will require a legal determination of whether a contract for conveyancing land must have a signature in order to be enforceable in British Columbia, and a factual determination of whether the Owners provided one here.

[5] I find that the answer to the first question is yes, and that the answer to the second is no. While such contracts need not be signed by hand, they must bear at least some sort of a formal inscription, made manually or electronically, that reflects the identity of the party who made it. In this case, no such inscription was made by the Owners. Accordingly, Mr. Ross’ claim to enforce the contract against the Owners must be dismissed.

[6] On the other hand, I do not agree with the Owners that the certificate of pending litigation that encumbers the Property should be immediately cancelled. It will remain in place while Mr. Ross considers whether he wishes to pursue an appeal of this judgment.

[7] My detailed reasons for reaching these conclusions are as follows.

BACKGROUND

Factual Background

[8] The Property is located at 3350 Cook Street in Saanich. It is a residential lot of approximately 8,000 square feet. A small, one-storey, two-bedroom residential house was built upon it in around 1910. The house is unoccupied and in poor condition.

[9] The Owners' interest in the Property is undivided. Kyle has a 99% share, and Matthew has a 1% share.

[10] In September 2024, the Owners listed the Property for sale. They chose to represent themselves rather than to use a realtor. Initially, Kyle was the one mainly responsible for marketing the Property. The listing price was $759,000.

[11] Mr. Ross saw the Owners' listing on September 18, 2024. He is a licensed realtor himself, as well as a real estate developer. Mr. Ross took an interest in the Property for its development potential. Mr. Ross contacted Kyle, who then arranged for a viewing of the Property in the morning of September 19, 2024.

[12] After the viewing, Mr. Ross texted Kyle to inquire what email address should be used for submitting an offer. Kyle responded that it was "cookstreetrealestate@gmail.com" (the "Owners' Gmail Address"). Mr. Ross understood from Kyle that the Owners had set up this email address for the specific purpose of handling all correspondence in relation to the sale of the Property.

[13] At 1:28 p.m. that same day, Mr. Ross sent an email to the Owners' Gmail Address with an offer to purchase the Property (the "Offer"). The subject line of the email is: "3350 Cook St – Offer". Mr. Ross used a British Columbia Real Estate Association/Canadian Bar Association standard form contract of purchase and sale ("Standard Form CPS") saved as a .pdf document titled "Cook–Offer.pdf". The terms of the Offer include:

(a) price: $750,000;

(b) deposit: $10,000;

(c) condition removal date: October 7, 2024;

(d) completion, possession, and adjustment (i.e., closing) date: January 3, 2025; and

(e) offer expiry date and time: September 19, 2024 at 9 p.m.

[14] The Offer documentation, which also included disclosure statements and fee agreements, was formally signed by Mr. Ross with his electronic signature and electronic initials.

[15] Kyle responded to the Offer by email sent from the Owners' Gmail Address at 7:18 p.m. on September 19, 2024. It indicated that the Owners were rejecting the Offer, as follows:

> Unfortunately, we will not be accepting your offer for the property this evening. I encourage you to submit further offers in the future, should you still be interested.

[16] Mr. Ross immediately replied to this email at 7:24 p.m., writing:

> I won't be submitting further offers. Typically if you saw things you wanted differently you would send me a counter offer.
>
> So may I ask what you would want changed?

[17] After this query did not result in a written response, Mr. Ross telephoned Kyle on September 20, 2024. From their conversation, Mr. Ross understood that the Owners would not be accepting any offers for the next few days while it was shown to other potential buyers. Mr. Ross told Kyle that he wanted to be kept informed of the Owners' intentions.

[18] On September 23, 2024, Mr. Ross contacted Kyle by text and by telephone to request another update. Kyle said that he would be discussing matters with Matthew, and would be in touch later that day.

[19] Kyle did indeed get back to Mr. Ross in the afternoon, texting this message at 5:00 p.m.:

> Hey Daniel
>
> So! The long and short of it is that if you're still interested, I should be able to send you a counter offer with what we're interested in changing sometime tomorrow, in the more standard way of doing things.
>
> Frustratingly, I've been having a time getting a hold of my lawyer, and that has slowed things down a good bit.
>
> I recognize this is outside of your offer's original window and if you're no longer interested, I understand and that's fine.
>
> Would you like me to send you a counter offer tomorrow?

[20] Mr. Ross then texted Kyle back at 5:20 p.m.:

> ... Yes I would be interested in seeing a counter offer. You can just change the date and time on the part that leaves it open for acceptance. Thanks for the update!

[21] On September 24, 2024, Mr. Ross received an email at 4:10 p.m. from the Owners' Gmail Address under the same subject line of "3350 Cook St – Offer". It contained a counteroffer with respect to the Property (the "Counteroffer"). The full text of the email is as follows:

> Hey Daniel,
>
> I thought I'd shoot this counter offer your way. For your ease, the following was changed:
>
> Purchase Price: $750,000,00-->$769,000.00
>
> Deposit: $10,000.00-->$25,000.00
>
> Offer expires September 19-->September 25
>
> And while the pdf was completely un-editable, and uncommentable, and in no way could I edit it, in **"Fee Agreement Seller Pays (Buyer Represented Seller Not Represented)"**, point number 3. We would like to decrease the Buyer's Brokerage fee from 2% to 1.5%
>
> We also had a single question we were curious about:
>
> On page 5/10, section 20A. is entirely struck out. We were just curious as to why exactly? We don't really have an issue with it, but we are curious as to why.
>
> Have a lovely evening!
>
> [*emphasis in original*]

[22] The body of the email does not contain a block signature or any express mention of the author's name, although Kyle effectively acknowledges in his affidavit that he was the one who wrote and sent it to Mr. Ross.

[23] Attached to this email was a .pdf document with the file name "Cook-Counteroffer.pdf". It was an amended version of the September 19, 2024 "Cook–Offer.pdf" document that had been sent by Mr. Ross. The terms in the Counteroffer include:

> (a) price: $769,000;
>
> (b) deposit: $25,000;
>
> (c) condition removal date: October 7, 2024;
>
> (d) completion, possession, and adjustment (i.e., closing) date: January 3, 2025; and
>
> (e) offer expiry date and time: September 25, 2024 at 9 p.m.

[24] However, neither of the Owners – Kyle or Matthew – signed the Counteroffer document, electronically or otherwise. Only Mr. Ross' electronic signature and initials appear on the documentation, as they were on the original Offer document.

[25] Kyle also alerted Mr. Ross by text message that the Counteroffer had been sent. They had the following exchange:

> KYLE: Hey Daniel, I just sent you a counter, have a lovely evening!
> MR. ROSS: Thank you. I'll have a look when I get home.
> KYLE: Good good!

[26] At 6:14 p.m. on September 24, 2024, Mr. Ross sent a reply email to the Owners' Gmail Address indicating that he was accepting the Counteroffer. Two .pdf documents were attached to the email. The first, named "Cook – Accepted Offer.pdf" was identical to the "Cook-Counteroffer.pdf" document except that Mr. Ross had added a notation that the contract acceptance date was September 24, 2024 and that the buyer's deadline for exercising his rescission right was September 27, 2024.

The second, named “Fee Agreement Seller Pays (Buyer Represented Seller Not Represented).pdf” was a document reflecting Mr. Ross’ agreement to reduce the Buyer’s Brokerage fee from 2% to 1.5%.

[27] The full wording of the email itself is as follows:

> Hi Kyle,
>
> Please find an accepted offer attached. As well as a modified fee agreement. Yes you can not edit or modify one of these documents. Purposely. But you can strike out and amend. This shows a track record of the changes made.
>
> Your question about section 20A is in regards to the assignment option I wrote in on page 2. And the assignment notice I provided you. As mentioned I will most likely move this purchase into a corporation as that’s the vehicle I intend to use to build and redevelop under. I may also bring a partner in. As a rule assignment is not allowed under the terms of the contract unless amended. Hence me striking out 20A and providing notice. But as I intend to add or assign this contract to other parties this is the process. I’m not intending to simply assign the contract away completely. I will remain involved.
>
> Just to note. When providing a counter offer to me you would typically have signed and initialled everywhere. Including the additional forms and disclosures I made. I understand you’re kinda learning as you go. I’m providing this signed and accepted offer to you as per our email and text conversations stating that you were providing me with a ‘counter offer’. I would ask you to please sign and initial everything as soon as possible.
>
> If you have a digital signature program you may use that for ease. Or print and physically sign.
>
> I’m not sure how the relationship works when you’re under a ‘mere posting’ relationship. But maybe Darya can assist here?
>
> Let me know if you have any questions.

[28] Over the next couple of hours, Kyle and Mr. Ross also exchanged the following text messages:

> MR. ROSS: I’ve sent you an accepted offer on the email thread. Let me know if there’s any questions.
>
> KYLE: [*thumbs up emoji*]
>
> MR. ROSS: Please also note Kyle, that typically your counter offer would have been fully signed and initialed. And returned with the other disclosures I made. Please send that to me tonight. If you’re struggling to accomplish that I could potentially send it to you through Docusign. Thank you!
>
> KYLE: I won’t be able to accomplish that tonight unfortunately. Given my, and my brothers schedules. But I will have my lawyer look things over and

> discuss with my brother tomorrow and get back to you. Sorry for the inconvenience.
>
> MR. ROSS: Man I wish you had a realtor.. [*grinning squinting face emoji*]
>
> > When you send me a 'counter offer' and I accept without changes that is done. And the date of acceptance is today.
> >
> > There isn't another round.
> >
> > I'm in a really tough spot as I'm not your representative and you don't have one.
> >
> > At this point you've created a binding accepted offer with me that should have all signatures attached.
> >
> > Do you have anyone you can reach out to for guidance? Did your lawyer provide any?
>
> KYLE: Well I'm sorry for all the oddities and inconveniences so far, but it is simply an impossibility to accomplish this evening. I will be speaking with my lawyer and brother tomorrow as soon as possible and should have everything squared away tomorrow.
>
> > Thank you for your understanding and patience.
>
> MR. ROSS: All good. For clarity, I understand what you're trying to do and admire the spirit. You're just making me sweat with how you're exposing yourself. I wish I could provide guidance.
>
> > Please seek your lawyers opinion tomorrow and get back to me.
>
> KYLE: Thanks so much

[29] This was the last direct communication that took place between Mr. Ross and Kyle.

[30] On September 25, 2024 at 7:49 p.m., Matthew sent an email to Mr. Ross from a different Gmail account (i.e., not from the Owners' Gmail Address). In his message, Matthew introduced himself, explained that Kyle was dealing with a medical emergency, and requested that all future communication be directed to Matthew instead. Matthew also wrote:

> Given this situation, I wanted to let [*you*] know that we'll need to put things on hold until [*Kyle's*] back on his feet. Additionally, as the second owner, I haven't had a chance to review or comment on any of the documents you two have exchanged, and I need to do so before anything is agreed upon.

[31] Mr. Ross replied by email to Matthew shortly thereafter, at 8:37 p.m. Mr. Ross expressed sympathy for and understanding of Kyle's situation, and a willingness to

extend the timelines to accommodate it. However, Mr. Ross also set out his perspective on the parties' discussions about the Property in these words:

> My understanding from [*Kyle*] was the counter-offer he sent me was something from the both of you. And he had mentioned that he would talk to your lawyer before sending it.
>
> We're in a bit of an awkward situation at the moment. To put it lightly! But I'm happy to try and find a solution that works out well for everyone. Just for your knowledge, Kyle sent me a counter-offer yesterday with a number of changes he said you guys wanted to see. I signed and accepted it without any changes creating an accepted offer. But he had missed adding signatures and initials so I asked him to do that asap. Then I haven't heard anything.
>
> So from my point of view we created an accepted offer yesterday and I should be moving forward with satisfying my conditions. But as I haven't received the contract back or heard anything today I'm in limbo.

[32] Matthew did not answer Mr. Ross until the next morning. In his reply email sent on September 26, 2024 at 9:48 a.m., Matthew effectively informed Mr. Ross that the Owners do not believe that a mutually acceptable agreement on selling the Property had been reached. Matthew noted in particular that the Owners had deliberately not signed the Counteroffer, and that their lawyer had concerns with some of the language in the document. Matthew wrote:

> We appreciate your understanding. Regarding the "counter-offer", I believe there's been a miscommunication with terminology I'm sorry to say. I was aware my brother was talking with you as we reviewed and made the decision to decline your offer from Sept. 19th. However, as I said yesterday I have yet to sign-off on anything more recent because as you mentioned we were waiting for our lawyer to review the documents which did not occur until yesterday.
>
> The comments and annotations to the PDF were sent deliberately unsigned and uninitialed to be used as a template for what a new contract would look like when it was drafted if we were to move forward. Similarly it was why my brother raised the issue with section 20A on page 5. I apologize if it was taken as anything else.

[33] Mr. Ross then replied to Matthew's email at 11:26 a.m. with a request for the name of the Owners' lawyer. Mr. Ross also emphasized that, in his view, a contract had been made which now needed to be finalized:

> I'd like to go over exactly how we get to the finish line. I totally get that you guys are learning as you go but I want to make sure we have a proper and

> formal process that if I make adjustments to an already agreed upon contract they are done properly.

[34] Matthew answered at 1:47 p.m. with an email informing Mr. Ross that the Owners' lawyer was Natalia Velletta. Mr. Ross then thanked Matthew with another email sent at 1:57 p.m., which included the following comments:

> I'm fine with continuing to work towards something that works for everyone. But Kyle sent me a specific counter offer with an acceptance date. Which I agreed to and signed. If we are to make changes now I want to make sure everyone, including the lawyer is on board.
>
> We need to nail down times that everyone can sign things. When offers are sent back and forth with deadlines but then people can't act it doesn't work. So I want to clarify that whatever is done next is done so in a time frame that everyone can adhere to.
>
> I will also likely need extensions of time to complete my due diligence. Just to reflect the delays. I want assurances from the lawyer that that is acceptable before changing anything.
>
> And lastly I want clarification around what language changes she would like to see so I can amend properly and we don't have to go another round.

[35] This September 26, 2024 email was the last substantive direct communication that took place between Mr. Ross and Matthew.

[36] Mr. Ross then made multiple attempts to contact the Owners' lawyer, Ms. Velletta, by phone and email. Ms. Velletta did not respond until October 3, 2024, when she sent an email to Mr. Ross. It informed Mr. Ross that the Owners are taking the position that they did not enter into a binding contract to sell the Property to Mr. Ross. Ms. Velletta wrote:

> As I understand it, you presented Matthew and Kyle with an offer on their Cook Street property. Kyle participated in some negotiations with you with regards to the terms of the offer to determine whether or not your offer was suitable for consideration. Upon consideration and further discussion with his brother, Matthew and Kyle have respectfully declined your offer.
>
> The presented offer was not signed, initialled, or accepted by Kyle or Matthew.

[37] The day before Ms. Velletta's email, another development took place in this matter. On October 2, 2024, the Owners accepted an offer to buy the Property from Lengai Properties Ltd. and Jackie Ngai (the "Third Parties") that had been made on

September 30, 2024. The original closing date for this sale was November 28, 2024. However, the closing date has been extended by agreement between the Third Parties and the Owners three times since, apparently as a result of the present litigation. The most recent extension pushed the closing date to April 15, 2025.

[38] As of the date this application was heard, the Owners would like to sell the Property to the Third Parties, and do not want to sell it to Mr. Ross. I was also given no indication that the Third Parties are not willing to extend their closing date with the Owners yet again if necessary.

Procedural Background

[39] Mr. Ross filed a notice of civil claim against the Owners on November 5, 2024. Mr. Ross asserts that he accepted the Owners' Counteroffer of September 24, 2024, thereby creating a binding and enforceable contract for the purchase and sale of the Property. Mr. Ross seeks an order for specific performance in respect of this alleged contract or, in the alternative, damages for breach of the contract.

[40] Also on November 5, 2024, Mr. Ross registered a CPL on the Property.

[41] The Owners filed their response to civil claim on December 2, 2024. They deny the existence of an enforceable contract for the sale of the Property to Mr. Ross, for three reasons in particular. First, they characterize the Counteroffer as a "Further Offer" provided by Mr. Ross following non-binding "Discussion Correspondence" sent by Kyle which indicated the unacceptable terms in the earlier Offer. Second, they note that the Owners never signed the Counteroffer. Third, they argue in the alternative that if a contract had been formed, Mr. Ross did not remove the conditions precedent, and breached and repudiated the alleged contract by not providing a deposit. The Owners therefore say that Mr. Ross' request for relief from the court should be denied.

[42] The Owners then filed an application to cancel the CPL on December 5, 2024. It was made returnable in Victoria general chambers on December 17, 2024. However, the chambers judge (Justice Gaul) determined that the matter would

require over two hours to be heard and should be scheduled on the assize list instead. The Owners' CPL cancellation application was therefore adjourned generally.

[43] On January 15, 2025, the Owners filed the present application for summary trial. It is supported by affidavits made by Kyle and Matthew. The Owners seek a judgment dismissing Mr. Ross' claim in its entirety, and an order cancelling the CPL on the Property.

[44] Mr. Ross' application response opposing the relief sought was filed on February 25, 2025. He also filed his own affidavit in support. Mr. Ross does not simply ask for a dismissal of the Owners' application. Rather, Mr. Ross seeks a judgment declaring that the parties' September 24, 2024 contract for the purchase and sale of the Property made by means of the Counteroffer is valid and enforceable against the Owners.

[45] I heard the application over three days from March 3 to 5, 2025. Further written submissions were provided by counsel on March 12 and 19, 2025. Leave to file an additional affidavit made by a legal assistant employed by counsel for the Owners was also granted on consent during the hearing.

[46] The parties are agreed that their fundamental dispute surrounding whether there exists a binding and enforceable contract between them can be determined by way of summary trial. If it is resolved in the Owners' favour, they agree that Mr. Ross' claim should be dismissed. If it is resolved in Mr. Ross' favour, they agree that the matter of Mr. Ross' remedy and damages can and should be severed and determined after a further hearing.

[47] I am also in agreement with this manner of proceeding. In particular, I agree with the parties that I can find the facts necessary to decide the issues in relation to contract formation and enforceability on this summary trial application, and that it would not be unjust to do so. These facts, which relate primarily to contractual negotiations conducted almost entirely through emails and texts, are largely

undisputed and well documented in the parties' affidavits. Accordingly, I conclude that I can grant judgment on these issues pursuant to Rule 9-7 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009.

ISSUES TO BE DECIDED

[48] The following issues arise and may be decided on this application:

1. Agency: Did Kyle have the authority as Matthew's agent to contractually bind both of the Owners?

2. Contract Formation: Was a contract validly formed by means of the September 24, 2024 Counteroffer?

3. Contract Enforceability: If the answer to (2) is yes, is the September 24, 2024 contract enforceable even though it was not formally signed by all parties?

4. Contract Breach/Repudiation: If the answers to (2) and (3) are both yes, did Mr. Ross breach or repudiate the contract by failing to remove the conditions precedent and/or by failing to pay the deposit?

5. CPL Cancellation: Should the CPL on the Property be cancelled?

[49] I will consider these issues sequentially, as necessary.

ANALYSIS

Issue 1: Agency

[50] The first issue to be determined is the extent to which the two Owners - Kyle and Matthew - were acting as agents for each other, and had the authority to contract on their collective behalf. This must be determined in particular with respect to the Counteroffer that was made through the Owners' Gmail Address on September 24, 2024 and accepted by Mr. Ross on that day.

The Parties' Positions

[51] In their response to civil claim, the Owners plead that Kyle had neither actual nor ostensible authority to contract for, or to bind, Matthew. The Owners also plead that Mr. Ross knew or ought to have known that any contract to sell the Property would need to be signed by Matthew personally. Curiously, the Owners have not pled the converse; that is to say, that Matthew lacked the authority to contract on Kyle's behalf. The Owners have also not made any assertions about an alleged lack of agency in their notice of application for summary trial.

[52] Mr. Ross' notice of civil claim does not expressly address the issue of agency either. That said, all of its references to the Owners' actions are made in the plural and it is implicit that Mr. Ross pleads that the Owners were acting collectively with the requisite agency.

[53] In his application response, Mr. Ross acknowledges that the Owners have pled facts which could support a defence that Kyle did not have the authority to bind Matthew. However, Mr. Ross says that such a defence lacks the necessary evidentiary foundation. In particular, he argues that the evidence tendered shows that Matthew gave Kyle actual authority to contract on his brother's behalf in respect of the Property. In the alternative, Mr. Ross says that the doctrine of ostensible authority applies as Matthew allowed Kyle to represent to Mr. Ross that Kyle had the authority to bind Matthew.

Discussion

[54] Contracts are typically made by parties on their own behalf, or else through the intermediary of an agent who has actual or apparent authority to bind the principal. Actual authority is the authority which the principal has given the agent by means of words or writing through an agreement. Apparent authority exists when the principal, by words or conduct, represents or allows it to be represented that an agent has authority to act on the principal's behalf. A conclusion that such authority exists will be drawn, even in the absence of an explicit representation, if the principal creates a situation where such an inference is reasonable in the circumstances. The principal will be held liable for the actions of an agent where the agent acts within the

scope of their actual or apparent authority: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.,* 2009 BCSC 1303 [*Le Soleil*] at paras. 346 to 348; *Keddie v. Canada Life Assurance Co.,* 1999 BCCA 541 at paras. 23 and 29.

[55] The description of the contours of Kyle and Matthew's agency relationship set out in their affidavits is ambiguous. This is surprising given their clear pleading to the effect that Kyle did not have the authority to contractually bind Matthew. It is perhaps because of this ambiguity that there is no mention of a lack of agency defence in the Owners' notice of application. But I will consider it regardless.

[56] In his affidavit, Kyle states that the brothers collectively decided to sell the Property, arranged to list it on the Multiple Listing Service, and that they wanted to represent themselves rather than using a realtor in order to save costs. Kyle also describes in some detail his interactions with Mr. Ross and his discussions with Matthew regarding both the Offer and the Counteroffer. However, Kyle's affidavit is silent on his specific understanding of the extent to which he was entitled to negotiate on behalf of his brother Matthew as the co-owner of the Property.

[57] Turning to Matthew's affidavit, it confirms that both he and Kyle were trying to sell the Property collectively and were representing themselves in doing so. With respect to the scope of the agency Matthew provided to Kyle, Matthew deposes as follows:

> 3. My brother [*i.e., Kyle*] handled the initial interactions with [*Mr. Ross*] in this matter. I have never met [*Mr. Ross*]. At the time I was generally aware that my brother was showing the Property to interested parties, including [*Mr. Ross*]. I retained my decision making ability.
>
> ...
>
> 12. At no time did I intend to sell the Property to [*Mr. Ross*] or provide him with a counter offer capable of being accepted. At all times I believed that any contract would need to be in writing and signed by me, as was done by [*Mr. Ross*] in his initial offer.

[58] While Matthew baldly states that he "retained [his] decision making ability", he does not explain what steps he took to make it clear to Kyle and prospective purchasers that Kyle lacked the authority to contract in respect of Matthew's interest in the Property. This, too, is surprising since it is apparent that Matthew was content

to have Kyle market the property on the brothers' collective behalf until Kyle's September 25, 2024 medical emergency.

[59] On the other hand, Mr. Ross provided clear and uncontradicted evidence in his affidavit of what he was told by Kyle on September 19, 2024 with respect to the Owners' arrangement for marketing the Property:

> 11. While still at the Property with Kyle Garvey, I specifically asked him how he expected the sale process to go in terms of receiving and replying to offers. Kyle said that he and Matthew Garvey had set up a separate email address to handle all correspondence related to the Property and that he would provide that address to me. Kyle said that he would be the one handling negotiations and would be my contact going forward as Matthew was quite busy and less involved in the selling process as he had a much smaller ownership share in the property.

[60] On my review of these affidavits, I am satisfied on a balance of probabilities that Matthew allowed Kyle to represent that Kyle had the authority to act on Matthew's behalf. Mr. Ross reasonably understood this apparent authority to be in place from September 19, 2024 until September 25, 2024 when Matthew emailed Mr. Ross to say that Matthew was now taking care of the marketing of the Property because of Kyle's incapacity. In other words, I conclude that Matthew created a situation where it was reasonable for Mr. Ross to infer that Kyle had ostensible authority to sell the Property on behalf of the Owners.

[61] Accordingly, I find that on the date of the Counteroffer (September 24, 2024), Kyle had apparent authority to act on Matthew's behalf in relation to the sale of the Property, and to bind Matthew contractually with respect to the latter's 1% share of the Property.

Issue 2: Contract Formation

[62] The second issue to be determined is whether a contract was validly formed on September 24, 2024 when Mr. Ross accepted the Counteroffer that was sent by Kyle from the Owners' Gmail Address.

The Parties' Positions

[63] Mr. Ross submits that a valid contract was formed between the parties on September 24, 2024, as evidenced by their communications on that day. They show objectively that there was a meeting of the minds that occurred when Mr. Ross accepted the contractual terms regarding the purchase and sale of the Property set out in the Counteroffer sent by the Owners. Having reached an agreement on those terms, which were not ambiguous or unclear, the Owners became obliged to formalize it by executing the necessary documentation.

[64] The Owners disagree. They submit that an objective bystander would not conclude that, on September 24, 2024, all parties intended to make a contract and had consented to identical terms that are sufficiently clear to be enforceable. In particular, the Owners say it was understood that there would be no binding contract until all parties had signed the contract, which did not occur. As for the Counteroffer – which the Owners characterize as "Discussion Correspondence" – this was simply an outline of what terms were generally acceptable to the Owners which could then be formalized into a further offer that Mr. Ross could send to the Owners for acceptance. The Owners also submit that further discussions were contemplated after the Counteroffer had been sent. These discussions were to cover such topics as the assignment term Mr. Ross had struck from the Offer, Mr. Ross' desire to extend the time for him to complete his due diligence, and the need for clarification of the specific language in the Standard Form CPA that the Owners' lawyer would like to see.

Discussion

[65] The necessary conditions for establishing a binding legal contract are well known. They were restated by the Supreme Court of Canada in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral* v. *Aga*, 2021 SCC 22 [*Aga*], at para. 35 as follows:

> A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Scotsburn Co operative Services Ltd. v. W. T. Goodwin Ltd.*, 1985 CanLII 57 (SCC), [1985] 1 S.C.R. 54, at p. 63. The common law holds

> to an objective theory of contract formation. This means that, in determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party*": Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp*., 2020 SCC 29, at para. 33.

[66] Because the test for determining whether the parties intended to create legal relations is objective, evidence of the actual state of mind or subjective intention of the parties is irrelevant to the existence of a valid contract and its terms: *Aga*, at para. 38; *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144, at para. 35.

[67] The latter point is important. While all three of the affiants – Mr. Ross, Kyle, and Matthew - depose to their subjective understandings and intentions, contract formation must ultimately be determined from the perspective of the reasonable person in the position of the other party.

[68] Viewed from such an objective perspective, I find that a contract for the purchase and sale of the Property was formed on September 24, 2024 when Mr. Ross accepted the Owners' Counteroffer.

[69] In particular, there is no dispute that the Owners were actively seeking to sell the Property. They had listed it for $759,000. Kyle showed the Property to Mr. Ross, who was invited to send any offer Mr. Ross wished to make to the Owners' Gmail Address. Mr. Ross did so on September 19, 2024, using a Standard Form CPS. The Offer proposed that Mr. Ross would buy the Property for $750,000, with a $10,000 deposit, and on the basis that he would receive a 2% buyer's brokerage fee. The Owners rejected the Offer. However, on September 24, 2024, Kyle sent the Owners' Counteroffer to Mr. Ross from the Owners' Gmail Address. The Counteroffer was made using the same Standard Form CPS prepared by Mr. Ross for the Offer, with just a few revisions. Most significantly, the proposed price was increased to $769,000, the deposit was increased to $25,000, and the buyer's brokerage fee was reduced to 1.5%. Just two hours after the Counteroffer was sent from the Owners' Gmail Address, Mr. Ross accepted it without proposing any further substantive changes by return email.

[70] I am satisfied on a balance of probabilities that these circumstances demonstrate contract formation objectively. A reasonable person in Mr. Ross' position would consider the email sent from the Owners' Gmail Address on September 24, 2024 at 4:10 p.m. (i.e., the Counteroffer) as an offer capable of acceptance. A reasonable person in the Owners' position would consider Mr. Ross' reply email sent to the Owners' Gmail Address on September 24, 2024 at 6:14 p.m. as an acceptance of the Owners' offer (i.e., the Counteroffer). This assessment by a reasonable person would be reinforced by the contemporaneous exchange of text messages between Mr. Ross and Kyle. This is especially the case when Mr. Ross sent a text at 6:22 p.m. confirming his acceptance of the Counteroffer, and Kyle responded two minutes later by texting a thumbs up emoji. There is also no suggestion that there was any ambiguity surrounding the essential terms of the contract, including its subject (the Property), the price ($769,000), the deposit ($25,000), the buyer's brokerage fee (1.5%), and the closing date (January 3, 2025).

[71] In reaching this conclusion, I have considered the Owners' submissions to the contrary. However, I do not find any of them persuasive.

[72] First, when viewed objectively, it is wholly disingenuous for the Owners to characterize the Counteroffer as simply "Discussion Correspondence" intended to encourage Mr. Ross to prepare a new "Further Offer" on terms which the Owners would then be free to accept or reject subsequently. Such an assertion cannot be accepted when Kyle used the terms "counter offer" and "counter" to describe the contents of the electronic document he named "Cook-Counteroffer.pdf" that was sent to Mr. Ross from the Owners' Gmail Address. This is especially the case when the Cook-Counteroffer.pdf was a straightforward modification of the Standard Form CPS prepared by Mr. Ross for the original Offer, with the Owners' revised terms clearly indicated therein. Also of significance is the fact that the Owners' Counteroffer included a change to the offer expiry date, from September 19, 2024 to September 25, 2024. Viewed objectively, this change is consistent with an intention to make a binding offer, as opposed to a signal that the Owners simply wanted to "discuss" the parameters of a hypothetical contract that might be agreed to in the future.

[73] Second, the fact that the Owners asked for an explanation of why Mr. Ross had crossed out the assignment term in the original Offer cannot objectively be used to impugn the nature of the Counteroffer when Kyle explained that "we" (i.e., the Owners) were "just curious as to why" this had been done, and that they "don't really have an issue with it". Furthermore, Mr. Ross provided a full and reasonable answer to this query in his Counteroffer acceptance email.

[74] Third, I do not accept that Mr. Ross' post-acceptance comments about his willingness to potentially consider further changes to the language of the Standard Form CPS after review by the Owners' lawyer shows that contract formation did not take place on September 24, 2024. This is particularly the case when Mr. Ross was emphatic that a "binding accepted offer" had been created further to the Owners' Counteroffer.

[75] Finally, I also reject the Owners' argument that the parties could not objectively be seen to have formed a contract in the absence of signatures from all parties. This position is based largely on the introductory page of the Standard Form CPS, which includes the following sentence in its first paragraph:

> 1. ... This document, when signed by both parties, is a legally binding contract. ...

[76] However, this argument cannot be accepted when the Standard Form CPS also contains a clear disclaimer found directly above the first paragraph just quoted:

> THIS INFORMATION IS INCLUDED FOR THE ASSISTANCE OF THE PARTIES ONLY. IT DOES NOT FORM PART OF THE CONTRACT AND SHOULD NOT AFFECT THE PROPER INTERPRETATION OF ANY OF ITS TERMS.

[77] Furthermore, I am of the view that the presence or absence of party signatures goes to the issue of contract enforceability, which will be discussed below. It is not strictly relevant to the question of contract formation, given that contracts may be made orally and by conduct, as well as in writing: *Le Soleil* at para. 323.

[78] In sum, I find that a contract for the purchase and sale of the Property was formed between the parties on September 24, 2024 when Mr. Ross accepted the Owners' Counteroffer by communicating his acceptance by email sent to the Owners' Gmail Address at 6:14 p.m. Going forward in these reasons, this agreement to convey the Property will be referenced as the "Contract".

Issue 3: Contract Enforceability

[79] The third issue to be determined is whether the Contract is enforceable given that the only signature on the Standard Form CPS used to set out the accepted Counteroffer is that of Mr. Ross. The Contract does not contain the Owners' signatures, and they are resisting enforcement.

[80] The question in issue can also be formulated as follows: Is the Contract enforceable against the Owners even though they did not sign it?

The Parties' Positions

[81] The issue of contract enforceability arises because the Owners plead and rely on s. 59(3)(a) of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 [*LEA*] as a defence to Mr. Ross' claim. This provision imposes a statutory requirement that, in order to be enforceable, contracts respecting land or the disposition of land must be in writing and signed by the party to be charged or by that party's agent. The Owners say that neither of them signed the September 24, 2024 Counteroffer, thus rendering the Contract unenforceable even if contract formation can be said to have occurred on that date.

[82] The Owners also say that Mr. Ross cannot invoke s. 59(3)(b) or (c) of the *LEA* as alternative bases for rendering the Contract enforceable. These are the part performance and reliance exceptions to the requirement that land conveyance contracts be in writing and signed (as discussed in *0827857 B.C. LTD v DNR Towing Inc.,* 2020 BCSC 717 at paras. 75-77). This is because the Owners did not commit an act or acquiesce so as to indicate that an enforceable contract was made, nor has Mr. Ross done anything in reasonable reliance on the Contract that would require enforcement of the Contract under principles of equity.

[83] Mr. Ross acknowledges that s. 59(3) of the *LEA* is applicable to the question of enforceability of the Contract since its subject relates to land. However, Mr. Ross submits that there has been compliance with s. 59(3)(a) since the Contract is in writing and was effectively signed. On the other hand, Mr. Ross does not argue in the alternative that s. 59(3)(b) and/or (c) might apply to render the contract enforceable if compliance with s. 59(3)(a) is found to be lacking.

[84] Mr. Ross also acknowledges that the Owners did not affix traditional signatures to the Contract. However, Mr. Ross nevertheless urges the Court to broadly and purposively interpret s. 59(3)(a) of the *LEA*, and to find that the Owners signed the Contract by communicating the Counteroffer electronically to Mr. Ross in the manner they did.

[85] Mr. Ross relies in particular on the fact that the Counteroffer was sent to Mr. Ross by email from the Owners' Gmail Address, which Kyle represented to be the email account that the Owners would use to deal with offers regarding the Property. Attached to that email was the Standard Form CPS containing the terms of the Counteroffer, with the email itself outlining which terms differed from Mr. Ross' original Offer. Kyle also sent a thumbs up emoji in response to Mr. Ross' text, confirming that the Counteroffer had been accepted. Mr. Ross argues that these facts support a finding that the Owners' conduct amounts to a signing of the Contract that satisfies s. 59(3)(a) of the *LEA*. Mr. Ross also relies on s. 15 of the *Electronic Transactions Act,* SBC 2001, c. 10 [*ETA*] in support of his position, as it is statutory authority for the proposition that electronically formed contracts are generally enforceable.

Discussion - Legislation

[86] There are three legislative provisions that are directly relevant to the analysis of the issue of the Contract's enforceability.

[87] The first is s. 59(3)(a) of the *LEA.* It provides that, in order to be enforceable, contracts in relation to land must be: (1) in writing; and (2) signed by the party to be

charged or their agent, unless either of the exceptions set out at s. 59(3)(b) or (c) apply (which is not the case here). The wording of s. 59(3) in its entirety is:

> *Enforceability of contracts*
>
> ...
>
> 59(3) A contract respecting land or a disposition of land is not enforceable unless
>
> (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
>
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> [*emphasis added, not in original*]

[88] The second is s. 15 of the *ETA.* It provides that contractual offer and acceptance may be done electronically. It also provides that contracts are not invalid or unenforceable solely because the contract was formed electronically. The relevant portions of s. 15 read this way:

> *Formation and operation of contracts*
>
> 15(1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed
>
> (a) by means of information or a record in electronic form, or
>
> (b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.
>
> 15(2) A contract is not invalid or unenforceable solely by reason that information or a record in electronic form was used in its formation.
>
> ...

[89] The third s. s. 11(1) of the *ETA*, which must be read along with the definition of “electronic signature” in s. 1 of the *ETA.* Together, they provide that if there is a legal requirement for a signature, it can be satisfied electronically:

> *Definitions*
>
> 1 In this Act:
>
> ...
>
> "**electronic signature**" means information in electronic form that a person has created or adopted in order to sign a record and that is in, attached to or associated with the record.
>
> ...
>
> *Signatures*
>
> 11(1) If there is a requirement under law for the signature of a person, that requirement is satisfied by an electronic signature.

[90] By operation of s. 15 of the *ETA,* there can be no doubt that the Contract satisfies the requirement that it be "in a writing" for the purposes of s. 59(3)(a) of the *LEA.* This is because the Contract is described in the electronic documents that were exchanged between Mr. Ross and the Owners on September 24, 2024 when the Counteroffer was accepted. In light of my conclusions set out in the previous section of these reasons, it is also beyond dispute that these documents demonstrate "both an indication that [a contract respecting land] has been made" and that there is "a reasonable indication of the subject matter" of the Contract.

[91] At this point, I note parenthetically that I did raise a question during the hearing about whether the *ETA* is applicable in this case given s. 2(4)(d) of that legislation. It states that the *ETA* does not apply to "documents that create or transfer interests in land and that require registration to be effective against third parties".

[92] Counsel were directed to prepare written submissions on this question, which they helpfully did. They both submit that the question should be answered in the affirmative and that the *ETA* does apply. This is because while a Standard Form CPS, such as the Counteroffer, deals contractually with land, it does not in and of itself transfer or create an interest in land, and is not subject to registration requirements. Rather, the terms of a binding and enforceable Standard Form CPS effectively create an obligation to make registerable transfer documents in the future – documents that would be subject to s. 2(4)(d) of the *ETA.* I agree with the parties'

submissions and conclude that the exception set out at s. 2(4)(d) does not render the *ETA* inapplicable to Mr. Ross' claim.

[93] Therefore, the only real question in dispute is whether the Contract was "signed by the party to be charged or by that party's agent", thereby satisfying that remaining aspect of s. 59(3)(a) of the *LEA.*

Discussion - Authorities

[94] While counsel for the parties have identified a number of jurisprudential authorities that touch upon this question, none of them are binding by operation of *stare decisis*. I nevertheless found a few of these authorities to be of assistance to my analysis. Counsel also directed me to the Law Reform Commission of British Columbia's 1977 Report on the Statute of Frauds, which was helpful too. I will summarize the cases and the relevant extracts from the Commission's report here.

British Columbia Jurisprudence

[95] I begin with the British Columbia authorities that were brought to my attention, of which there are three.

[96] The first is *Jeyartnam v. Cheng*, 2015 BCSC 538. The main issue in this case was whether an enforceable contract for the purchase and sale of land was formed further to the sending of a "counter-counteroffer" by fax machine. The parties had been initialling changes to their various proposals. The counter-counteroffer included a particular change that the prospective purchaser added, along with his initials and an empty circle intended for the landowner to initial as well. However, the landowner did not initial or sign the counter-counteroffer. In these circumstances, Justice Leask found that the s. 59(3)(a) *LEA* requirement had not been met, and that the purported contract could not be enforced by virtue of s. 59(3)(b) or s. 59(3)(c) either:

> [16] Clearly neither the defendants nor their agents signed the counter-counteroffer so that s. 59(3)(a) does not apply. Section 59(3)(b) requires the party to be charged to have done an act or acquiesced in the plaintiff's act consistent with the alleged contract. In this case the defendants did no act consistent with the alleged contract. Indeed their refusal to sign when the counter-counteroffer was presented to them is an act inconsistent with the

> alleged contract. As to the alleged (and denied) act of their agent, the affidavit evidence, even if accepted, is ambiguous and I find as a fact would not establish on the balance of probabilities the "act of acquiescence" necessary to give effect to s. 59(3)(b). As to s. 59(3)(c) there is no evidence that the plaintiff changed his position in reliance on the alleged contract. The actions of his sister do not provide a basis for invoking s. 59(3)(c) for the plaintiff's benefit.
>
> [17] The plaintiff's failure to bring himself within the terms of any of the subsections of s. 59(3) of the *Law and Equity Act* combined with the fact that there is no written contract of sale for the relevant property mean that his claim must be dismissed.
>
> [*emphasis added, not in original*]

[97] The second is *Johal v. Nordio,* 2017 BCSC 1129 [*Johal*], a summary trial application brought in respect of an unpaid loan agreement in which a limitation defence had been raised. At issue was whether the limitation period had been extended by operation of s. 24 of the *Limitation Act,* SBC 2012 c. 13 because there had been an acknowledgement of liability in an email. The case did not directly concern a land conveyance contract, and there is no mention of s. 59(3)(a) *LEA.* However, there is a discussion of s. 24(6)(b) of the *Limitation Act*, whose wording is similar but not identical to s. 59(3)(a) of the *LEA.* It provides that an acknowledgement of liability must be "signed, by hand or by electronic signature within the meaning of the *Electronic Transactions Act*" in order to effect an extension of a limitation period. The author of the email acknowledgement in question had included his name, position, and contact information at the end of his message in an email signature block format. Justice Russell concluded that this constituted an "electronic signature" that satisfies s. 24(6)(b) of the *Limitation Act*.

[98] The third is *Ross v. Parihar,* 2021 BCPC 96 [*Ross*], a decision of the Provincial Court of British Columbia. This was another limitation period extension case involving s. 24(6)(b) of the *Limitation Act*. Judge Chettiar accepted that texts and emails whose authenticity and authorship were not disputed met the signature requirement for acknowledgments of liability set out in that legislation.

Ontario Jurisprudence

[99] One authority from the Ontario Superior Court was brought to my attention: *Lev v. Serebrenikov,* 2016 ONSC 2093 [*Lev*]. Similar to *Johal* and *Ross,* the issue was whether an acknowledgement of liability could extend a limitation period pursuant to s. 13 of the Ontario *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (Ontario's equivalent of s. 24 of the British Columbia *Limitation Act*). That provision also requires the acknowledgment to be in writing and signed. In *Lev*, the acknowledgement was contained in an email that was not signed by means of an electronic signature, but which did contain the author's name.

[100] After noting that previous Ontario cases dealing with the issue "go both ways", Justice Pattillo found that an email can satisfy the statutory requirements concerning acknowledgment, with the issue in every case being one of fact concerning authenticity: *Lev,* at paragraphs 20-24. On the facts before him, Justice Pattillo accepted that the email in question did comply with these requirements: *Lev,* at para. 25.

Alberta Jurisprudence

[101] A case from the Alberta Court of Queen's Bench,*1353131 Alberta Ltd. v. Roswell Group Inc.,* 2019 ABQB 559 [*Roswell*], was brought to my attention as well. Here, a dispute had arisen over the enforceability of a contract to transfer land that was concluded by means of an email sent by the solicitor of a party. Resolution of the dispute required an answer to the question of whether the solicitor's block electronic signature satisfies s. 4 of the English *Statute of Frauds,* 1677 (29 Cha 2) c 3 (Alberta's functional equivalent of s. 59(3)(a) of British Columbia's *LEA*). Justice Bokenfohr answered the question in the affirmative. However, she was careful to note that her reasons should not be read to hold that a block signature will always be sufficient to satisfy the *Statute of Frauds*. Instead, Justice Bokenfohr said that whether the signature requirement has been met will need to be determined on the circumstances of each case: *Roswell,* at paras. 219-220.

New Brunswick Jurisprudence

[102] The parties also raised an interesting authority from the New Brunswick Court of Appeal ("N.B.C.A."): *Druet v. Girouard,* 2012 NBCA 40 [*Druet*]. Similar to the case at bar, it involved a purported contract for the conveyance of land concluded through an exchange of emails which lacked electronic signatures. The N.B.C.A. discussed in some detail the applicable legislative framework, which included New Brunswick's then equivalents to the British Columbia *LEA* and *ETA* (s. 1(d) of the *Statute of Frauds,* R.S.N.B., 1973, c. S-14, and ss. 7 and 10 of the *Electronic Transactions Act,* S.N.B. 2001, c. E-5.5). However, the N.B.C.A. ultimately concluded that there had been no contract formation, and therefore no need to determine whether the signing requirement had been met for the purposes of contract enforceability.

[103] That said, the N.B.C.A.'s reasons for judgment contain some helpful observations on the latter issue. They are reproduced here:

> VI. The Non-Issue – The Signing Requirement & Electronic Signatures
>
> [24] As much as the signature issue is certain to attract the intellectual curiosity of the lawyer and non-lawyer alike, this is not the case to venture into uncharted waters unsupported by lifejackets infused with cogent submissions. ...
>
> ...
>
> [27] ... the following analysis provides an outline of issues upon which we express no opinion.
>
> [28] As a matter of statutory interpretation, one must seek out the legislative purposes underscoring the *Electronic Transactions Act* and, in particular, the provisions relating to electronic signatures. This leads one to ask whether the legislative objectives underscoring the signature requirement under the *Statute of Frauds* are relevant to the application of the *Electronic Transactions Act*. It is generally accepted that signatures serve two purposes. One is to identify the person who is signing; that is to say, to identify the source and authenticity of the document. The other purpose is to establish the signatory's approval of the document's contents. Admittedly, these purposes are well-documented in the jurisprudence and by commentators. We also know the signature requirement under the *Statute of Frauds* has long been a topic of discussion in the law. As a general proposition, the concept of signature under that legislation has been interpreted loosely: ...
>
> [29] There is one recent English decision dealing with electronic signatures, outside the context of the statutory equivalent of the *Electronic Transactions Act*, which warrants brief consideration. It shows there are limits as to what the common law will accept as an electronic signature. In *Mehta v. J. Pereira Fernandes S.A*., [2006] EWHC 813 (Ch.), the Court was asked whether the automatic insertion of a person's email address in the header, after the document has been transmitted by either the sending and/or receiving ISP,

> constituted a signature for the purpose of s. 4 of the English *Statute of Frauds* [our s. 1(d)]. Mr. Mehta's name or initials did not appear at the end of the email or indeed, anywhere else in the body of the email. The appeal judge answered "no" to the question. His analysis, found at paragraph 26 of his reasons, is of interest, as is the case law cited throughout the decision. Apparently there are American decisions that take a contrary view: see, e.g., *JSO Associates, Inc. v. Price*, 2008 N.Y. Slip Op 30862 (U). Indeed, there does not appear to be consistency in the treatment of email signatures.
>
> [30] As an aside, one has to wonder whether legal determinations regarding satisfaction of the signature requirement are strongly influenced by the merits or so-called "equities" of a particular case. This leads us to pose another question: Will satisfaction of the signing requirement in electronic form be dependent on the circumstances of each case? For example, would it make a difference that the parties downloaded from the internet a standard form agreement of purchase and sale and used that document to circumscribe their negotiations, as opposed to an exchange of quick-fire emails? In the case of the electronic standard form agreement, would the law accept as a valid signature the person's first or last name only? By contrast, would the law reach the same conclusion if the facts involved a series of email exchanges? The questions posed lead one to ask whether the form of the writing is as important, or more important, than the form of the signature. In turn, we cannot help but ask whether there is an overlap between the intention to authenticate a document and its contents and the intention to create legal relations. The present case poses another legal conundrum. There was an exchange of seven emails. In order to cobble together a binding contract, the plaintiff, Mr. Girouard, had to invoke the principle of "joinder", which is explained below. Are we to assume the signing requirement applies only to the email in which Ms. Druet conveyed her willingness to accept Mr. Girouard's offer of $155,000, or does the requirement apply to the other emails or, alternatively, only those which set out the essential terms? These are the types of questions we leave for another day.

Saskatchewan Jurisprudence

[104] The most recent case that was brought to my attention that I wish to mention is the decision of the Saskatchewan Court of Appeal ("Sask. C.A.") in *Achter Land & Cattle Ltd. v. South West Terminal Ltd.,* 2024 SKCA 115 [*Achter Land*].

[105] It involved a dispute over the enforceability of a contract for the sale of flax seed. As the value of the contract was over $50, s. 6(1) of the Saskatchewan *Sale of Goods Act,* RSS 1978, c. S-1 [*SGA*] applied. That legislation sets out a number of ways in which such a contract may become enforceable. One is that the contract be in writing and signed by the party to be charged or their agent, a requirement whose legislative wording is very similar to that of s. 59(3)(a) of British Columbia's *LEA.*

[106] The principal issue in *Achter Land* was whether the signature requirement of s. 6(1) of the *SGA* was satisfied by a text message containing a thumbs up emoji. The trial judge found that it was, and enforced the contract in question. The defendant appealed to the Sask. C.A. The appeal was dismissed, with a majority of two appellate judges agreeing with the trial judge's disposition of the case. The other appellate judge dissented, finding that the text messages exchanged by the parties did not comply with the legislative requirement for a signature.

[107] The majority judgment was written by Chief Justice Leurer, with Justice Caldwell concurring. Paragraphs 102-151 of the reasons deal with the signature issue. The majority began by noting that the fundamental issue was one of statutory interpretation of s. 6(1) of the *SGA*, particularly in relation to the meaning of the word "signed". Interpreted purposively, the provision requires that there be a mark or proxy that can constitute a signature that fulfills the purpose of identifying its maker and signifying an intention to contract, as well as authenticating the document as being binding. The majority then proceeded to consider the specific question of whether the thumbs up emoji text in this case constitutes a signature under both the common law and the Saskatchewan *Electronic Information and Documents Act, 2000*, SS 2000, c. E-7.22 (the equivalent of British Columbia's *ETA*). The majority found that the answer to this question is yes. Finally, the majority rejected arguments to the effect that its judgment is likely to create commercial uncertainty for parties who communicate by way of emojis or text messages. The majority felt that the greater mischief would be to allow contracting parties to walk away from their bargains in circumstances where a deal had otherwise been struck, and there exists retrievable communications authenticating the contract and evidencing its terms.

[108] The dissenting judgment was written by Justice Barrington-Foote. He addressed the signature issue at paras. 188-219. Like the majority, the dissenting judge conducted a statutory interpretation exercise in respect of the signature requirement imposed by s. 6(1) of the *SGA*. However, he found that, in addition to the three purposes identified by the majority, this requirement must also be interpreted to include an element of solemnity or attentiveness to the act of

contracting. In the dissenting judge's view, this element cannot be satisfied by a text message that only contains a thumbs up emoji, any more than one just containing the word "yes". By effectively finding that the metadata that identifies the source of a text message equates to a signature, the majority had, in Justice Barrington-Foote's opinion, stretched the s. 6(1) *SGA* signature requirement beyond recognition in a fashion that would be tantamount to repealing it.

Law Reform Commission of British Columbia Report

[109] Lastly, the parties alerted me to the Law Reform Commission of British Columbia's 1977 *Report on the Statute of Frauds,* 1977 CanLIIDocs 8. It contains a helpful discussion of the purposes underlying the legislative requirement that land conveyancing contracts be signed in order to be enforceable. At the time of the report's writing, that requirement was found in the British Columbia *Statute of Frauds,* RSBC 1960, c. 369, in terms similar to those prescribed today by s. 59(3)(a) of the *LEA.*

[110] Of particular note is the section within the report titled "Benefits of the Statute of Frauds". It explains that the original policy rationales for requiring that significant transactions – such as land conveyances – be effected through contracts that are written and signed are threefold: (1) evidentiary; (2) cautionary; and (3) "channelling" (i.e., ensuring certainty of contractual intention).

[111] The first rationale is the evidentiary function, which is self-explanatory. It constituted the primary impetus for the English *Statute of Frauds* in 1677 when there was great concern surrounding fraud and the difficulties of proving oral contracts for the sale of land. The authors of the report noted that while this concern has abated, it has not disappeared entirely:

> The evidentiary difficulties of 1677 are no longer with us, but that does not detract from the value of having written evidence of the terms and existence of an alleged agreement.

[112] The second rationale is the cautionary function. It refers to the importance of ensuring that both parties to a significant transaction are aware of its substance, and intend to enter into a binding legal relationship. The report's authors observed:

> The value of a device that promotes an awareness of entering into a binding legal relationship, and that prevents unconsidered action is not lightly to be discounted. The requirement of writing in the *Statute of Frauds,* although perhaps imperfect, is a device to this end.

[113] The third rationale is the channelling function of ensuring certainty of contractual intention. This rationale provides a specific justification for requiring that significant contracts be signed as well as set down in writing. In the words of the Law Commissioners:

> There can be no doubt that whatever its original purpose the *Statute of Frauds* serves to delineate which relations are legally enforceable, and which are not.
>
> ...
>
> The value of a technique which reinforces certainty during contractual negotiations is unquestionable...
>
> The requirement "that a party must sign written evidence of an agreement in order to be legally bound" does, in many cases, focus his attention on the legal implications of his acts. This advantage is not often perceived, and is never spoken of in litigation which involves a *signed* agreement. Yet there can be no doubt that in thousands of cases, the requirement of a signature does in fact raise an awareness of the importance of the transaction to countless numbers of individuals.
>
> [*emphasis added, not in original*]

Discussion – Analysis and Conclusion

[114] While Mr. Ross is the respondent to this summary trial application, he is the plaintiff in the underlying proceeding. He is also asking the court on this application to declare that the Contract is enforceable against the Owners. As such, it is Mr. Ross who bears the burden of proof to establish its enforceability.

[115] There is no dispute that the Owners did not affix an actual signature to the Contract, either electronically or by hand. Indeed, the empty signature and initial boxes designated for the sellers on the Standard Form CPS stand in stark contrast to the buyer's signature and initial boxes that were duly filled out electronically by Mr.

Ross. Furthermore, neither the accompanying emails sent by Kyle from the Owners' Gmail Address, nor his contemporaneous texts, contain electronic signature blocks or the names of either of the Owners. These facts strongly militate against a conclusion that the Owners signed the Contract for the purposes of s. 59(3)(a) of the *LEA,* even accepting – as I do – that this requirement could have been met with an electronic signature as per ss. 11 and 15 of the *ETA*. While not determinative, it is also significant that Mr. Ross expressed his concern to Kyle that the Contract had not been signed by the Owners, and insisted that this be rectified as soon as possible.

[116] Mr. Ross nevertheless urges the Court to find, as a matter of fact and law, that the Contract was "signed", on two bases. The first is that the Counteroffer that Mr. Ross accepted was sent from the Owners' Gmail Address. The second is that Kyle subsequently texted a thumbs up emoji in response to Mr. Ross' text, stating that "an accepted offer" had been sent by email to the Owners' Gmail Address.

[117] While I am prepared to make factual findings to this effect, in my view, neither demonstrates that the Contract was legally "signed" for the purposes of s. 59(3)(a) of the *LEA*. This is because, properly interpreted, this legislation cannot be extended so as to treat the mere act of having sent an email or a text that does not contain a formal mark reflecting the identity of its author as being the equivalent of having signed a contractual writing.

[118] In so concluding, I agree with and adopt the analysis set out by Justice Barrington-Foote of the Sask. C.A. writing in dissent in *Achter Land,* in which he considered whether the s. 6(1) signature requirement of the *SGA* was met by the sending of a text message with a thumbs up emoji, as described above. While this analysis is obviously not binding upon me, I find it to be cogent and persuasive, and have adapted it as necessary for my consideration of whether the signature requirement for contract enforceability imposed by the analogous British Columbia legislation in issue here (i.e., s. 59(3)(a) of the *LEA*) is satisfied in this case.

[119] In particular, I begin by acknowledging that the accepted method for conducting statutory interpretation is that set out by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, where it formally confirmed that Elmer Driedger's "modern approach" is to be used. That approach is to read the words of legislation in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislator. Furthermore, s. 8 of the British Columbia *Interpretation Act*, RSBC 1996, c. 238 provides that: "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[120] However, I am also cognizant that purposive interpretation must be consistent with the words chosen by the legislator (*Re: Sound v. Motion Picture Theatre Associations of Canada,* 2012 SCC 38 at para. 33). In addition, while a strained interpretation may be adopted to avoid defeating legislative intention, the meaning adopted must be one the words of the legislative text can reasonably bear (Ruth Sullivan, *The Construction of Statutes,* 7th ed. (Toronto: LexisNexis, 2022) at §7.03).

[121] I turn now to the legislation in issue. For convenience, I reiterate the wording of s. 59(3)(a) of the *LEA* here:

> 59(3) A contract respecting land or a disposition of land is not enforceable unless
>
> (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter...
>
> [*emphasis added, not in original*]

[122] The word "signed" is the past participle of the verb "to sign". In the context of s. 59(3)(a) of the *LEA,* it is clearly used in the sense of writing or affixing one's "signature". Dictionary and jurisprudential definitions of these words and concepts were discussed at length by Justice Barrington-Foote in *Achter Land* at paras. 199-213. While I will not quote them directly, I summarize their essential content as follows:

(a) the *Oxford English Dictionary* definitions of “signature” and “sign” confirm that “to sign” in this context means to write your name – the words that identify you – or to affix a cross or other distinguishing mark that serves the same purpose, in order to authenticate or authorize the document at issue;

(b) a number of legal dictionaries (including *Jowitt’s Dictionary of English Law* and *Stroud’s Judicial Dictionary of Words and Phrases*) confirm that a signature, whether it be in the form of a person’s name or their mark, must be written or placed on the document with the intention of being bound or authenticating it;

(c) however, none of these definitions suggest that every word (such as “yes”) or symbol (such as a thumbs up emoji) expressing the affirmative is enough to constitute a signature; rather, for a document to have been signed, there must be a writing or placing of words or a mark representing a signature, made with the requisite intention;

(d) as has been held by a number of judicial authorities (e.g. *Goodman v J. Eban Ltd*., [1954] 1 QB 550 (CA) and *R. v. Kapoor,* [1989] O.J. No. 1887, 1989 CanLII 7250 (ONSC)), a signature need not necessarily be a handwritten inscription of one’s full name, it can also be effected by typing or writing all or a portion of one’s name, or by placing another mark one uses to represent oneself, such as a rubber stamp or a letterhead;

(e) as noted by the Law Reform Commissions of British Columbia (in 1977) and Manitoba (in 1980), as well as by Stephen Mason, author of *The Signature in Law: From the Thirteenth Century to the Facsimile* (London: University of London Press, 2022), the primary purposes of requiring a signature on a document are threefold:

1. to provide tangible evidence that the signatory approves and adopts the contents of the document;

> 2. in so doing, the signatory is agreeing that the content of the document is binding upon them and will have legal effect;
>
> 3. the signatory is reminded of the significance of the act and the need to act within the provisions of the document; and
>
> (f) the signature requirement remains relevant in the technological age as demonstrated by the fact that it is possible to sign digital documents by means that include typing one's name in appropriate places on a computer record, using apps to insert digital signatures, signing physical documents that are scanned into .pdf files, and including signature blocks in electronic messages.

[123] Paraphrasing paras. 214-217 of *Achter Land,* all of these aspects point the way to the correct interpretation of s. 59(3)(a) of the *LEA*, in a manner that is consistent with the ordinary meaning of its words, and interpreted in the contextual and purposive manner mandated by the modern principle. That interpretation is that, in order for the contract to be enforceable, the party charged must have inserted a signature in the writing for the purpose of authenticating the document. While it need not be a traditional handwritten signature, the contract must bear at least some sort of a formal inscription, made manually or electronically, that reflects the identity of the party who made it. In so doing, there is some assurance that the signatory not only wishes to be bound, but also appreciates the significance of the act they have agreed to and the importance of performing it in accordance with the terms set out in the document.

[124] As such, I cannot conclude that simply sending a contractual document from a particular email address means that the document can then be considered "signed" by the persons responsible for the email account for the purposes of s. 59(3)(a) of the *LEA*. Sending an email is not the same as signing an email, any more than mailing or faxing a letter amounts to signing a letter. Furthermore, unlike affixing an electronic signature of some sort, sending an email does not serve a "cautionary" or "channelling" function in the sense of impressing upon the party the

significance of agreeing to the contract. This is especially the case for land conveyancing contracts, given their importance to both the individuals concerned and to the economy in general.

[125] I also cannot conclude that the sending of a separate text with a thumbs up emoji constitutes a signature on a contract for the purposes of s. 59(3)(a) of the *LEA.* Accepting that a contract can be "signed" by simply sending a thumbs up emoji in a text disconnected from the contractual document itself is no different than accepting that a text containing just the word "yes" constitutes a valid signature. To do so would require treating s. 59(3)(a) of the *LEA* as if the word "signed" does not appear at all in the legislation.

[126] In sum, I find that the Contract was not signed by the Owners. Therefore, by operation of s. 59(3)(a) of the *LEA,* the Contract cannot be enforced by Mr. Ross against the Owners. It follows that Mr. Ross' claim will be dismissed.

Issue 4: Contract Breach/Repudiation

[127] In light of my conclusion that the Contract is not enforceable, there is no need to consider the Owners' alternative position that Mr. Ross' claim should be dismissed on the basis that Mr. Ross breached and/or repudiated the Contract by not removing his conditions precedent and by failing to provide a deposit. This issue is moot and will not be decided here.

Issue 5: CPL Cancellation

[128] Since Mr. Ross' claim will be dismissed, the CPL he registered on the Property is now subject to s. 254 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*]. As was explained by our Court of Appeal in *Berthin v. Berthin,* 2018 BCCA 57 at paras. 40-44, this means that the CPL will presumptively remain on title until Mr. Ross exhausts his avenues of appeal, after which the CPL is subject to cancellation.

[129] That said, there is an exception to this rule. The Owners may request the court to cancel the CPL immediately on the grounds of hardship or inconvenience pursuant to ss. 256 and 257 of the *LTA.* The Owners have done so in this case.

[130] A concise summary of the test to be applied for such applications is found in *Save-A-Lot Holdings Corp. v. Christensen*, 2023 BCCA 35 at para. 30:

> As a threshold requirement for obtaining an order under s. 257(1), a person applying to cancel a CPL under s. 256(1) must show hardship and inconvenience that is causally connected solely to the registration of the CPL. The evidence of hardship must include particulars that demonstrate real hardship; general allegations of inconvenience are not sufficient: *Liquor Barn* at para. 37. The degree of hardship must be more than "trifling" or "insignificant" but a court is not required to be exacting in its analysis: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 28.

[131] Another helpful distillation of what must be demonstrated by an applicant to meet the test of hardship and inconvenience is contained in Justice Fitzpatrick's decision in *Kaur v. Chandler*, 2018 BCSC 1283 at paras. 43-48:

> [43] The threshold question is whether 096 and Newmark Sagebrush have proven hardship and inconvenience arising from the registration of the CPLs, pursuant to s. 256(1)(b) of the LTA.
>
> [44] It is not enough to show "insignificant" or "trifling" hardship or inconvenience; on the other hand, the court is not to be "exacting" in its analysis: *Youyi Group* at para. 28.
>
> [45] Examples of hardship and inconvenience will vary from case to case and require an analysis of the particular circumstances before the Court. Examples of hardship and inconvenience caused by CPLs can generally include: impeding the ability to close a sale (*Marrello* and *Enigma*); impeding a sale process where the CPL is dissuading persons from making an offer (*Watson Island Development Corp. v. Prince Rupert (City)*, 2015 BCSC 1474 at paras. 37-41); and impeding the ability to obtain financing for the continued development of the lands: *Syed v. Randhawa*, [1993] B.C.W.L.D. 1899 at paras. 15-19 and 23 (S.C.) (WL).
>
> [46] Much of the submissions on this issue concerned whether 096 and Newmark Sagebrush had adduced sufficient evidence to meet the onus upon them. Any person seeking to cancel a CPL registered against their title must include affidavit evidence that sets out the "particulars" of the hardship and inconvenience experienced or likely to be experienced by the registration of the CPL: *Liquor Barn* at para. 26.
>
> [47] Generalizations, unsupported by specific proof of hardship and inconvenience, are not sufficient to meet the requirements of s. 256(1)(b):

> *Kwan v. Kwan* (1992), 33 A.C.W.S. (3d) 101 at paras. 27–28 (S.C.) (WL); *0771252 B.C. Ltd. v. 0764735 B.C. Ltd*., 2012 BCSC 2039 at paras. 42-48.
>
> [48] In addition, speculation about potential business opportunities or sales are not sufficient: *Saunders v. Jaremco*, 2015 BCSC 2019 at paras. 23-28; *Aviawest Resorts Inc. v. Memory Lane Developments Inc*., 2004 BCSC 999 at paras. 26-31.

[132] If an applicant establishes that a CPL should be removed because of hardship or inconvenience, then the court considers whether or not security terms ought to be imposed in accordance with s. 257(1)(a) of the *LTA*. In setting the amount of security to be given, the court may take into consideration the probability of the party's success in the action: s. 257(3) of the *LTA*: *Instafund Mortgage Management Corp. v. Garrow*, 2020 BCSC 1017 at para. 65.

[133] The Owners submit that the CPL on the Property causes them hardship and inconvenience because it is preventing them from selling the Property to the Third Parties in accordance with their October 2, 2024 contract. The only evidence of the extent of this alleged hardship and inconvenience is provided by Kyle in the final paragraph of his affidavit, as follows:

> 28. If [Mr. Ross'] certificate of pending litigation is not removed, I am afraid that we will be unable to complete the sale of the Property to the [Third Parties], resulting in us breaching that purchase contract, and causing us significant hardship and risk.

[134] In my view, this vague and speculative assertion falls short of what is required to establish sufficient hardship and inconvenience. While exacting proof is not the standard, an applicant who seeks relief from an otherwise validly imposed CPL under ss. 256 and 257 of the *LTA* must provide sufficient particulars to show actual hardship or inconvenience that is causally connected solely to the CPL.

[135] In this case, the Owners have provided no indication of the extent of the prejudice that they may face if they breach their contract with the Third Parties in terms of a potential damages award against them. Furthermore, there is no evidence that the Third Parties are contemplating a breach of contract proceeding against the Owners. To the contrary, the Third Parties have already agreed to extend the closing date for the sale of the Property multiple times, even though they are apparently

aware of these proceedings. There is no evidence in the record that the Third Parties will not be willing to do so again while Mr. Ross considers whether to appeal this judgment.

[136] Accordingly, I will not be ordering the immediate cancellation of the CPL on the Property. Of course, the Owners will be free to renew their request should Mr. Ross choose to appeal, and there is a material change in circumstances that gives rise to further and better evidence of actual hardship and inconvenience.

DISPOSITION

[137] The Owners' summary trial application is granted, and Mr. Ross' claim is dismissed.

[138] The Owners' application for an order cancelling the CPL on the Property immediately pursuant to ss. 256 and 257 of the *LTA* is denied.

[139] The Owners have been substantially successful. In these circumstances, the Owners should have their costs of the application and the underlying action in accordance with Scale B. That said, if there are matters of which I am unaware, the parties are at liberty to contact the Registry to schedule a hearing to address costs provided they do so within 30 days of this judgment.

"Brongers J."