IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ralmax Properties Ltd. v. Pt. Ellice Properties Ltd.,* 2025 BCSC 814

Date: 20250501
Docket: S183402
Registry: Victoria

Between:

Ralmax Properties Ltd.

Plaintiff

And:

Pt. Ellice Properties Ltd. and Fred Berman

Defendants

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Plaintiff: R. T. Ashmead, A. Yen, A. Denhoff

Counsel for the Defendants: J. H. Goulden, K.C., E.J.F. Grant, K. E. Siddall

Place and Dates of Trial/Hearing:	Victoria, B.C. October 11-14, 2022 October 17 - 21, 2022 October 24 - 28, 2022 October 31 - November 4, 2022 November 14 - 18, 2022 November 28 - December 2, 2022 December 5 - 9, 2022 December 12, 2022 January 10 - 11, 2023 November 14 - 17, 2023 November 20 - 24, 2023 November 27 - December 1, 2023 December 4 - 8, 2023 December 11 - 12, 2023 January 26, 2024 April 8 - 12, 2024
Place and Date of Judgment:	Victoria, B.C. May 1, 2025

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INTRODUCTION

[1] This action concerns the legal status of a document titled “Term Sheet – Hybrid Sale” (the “Term Sheet”). The document is dated March 10, 2018, and was signed by Ian Maxwell, president of the plaintiff, Ralmax Properties Ltd. (“Ralmax”) on that date. The document was signed by the defendant Fred Berman, on behalf of the corporate defendant Pt. Ellice Properties Ltd. (“Pt. Ellice”) on March 11, 2018.

[2] The central issue in this action is whether the Term Sheet constitutes a binding contract of purchase and sale of approximately eight acres of industrial land in the Victoria Harbour and shares of the defendant Pt. Ellice Properties Ltd. The Term Sheet specified a total purchase price of thirty-six million dollars Canadian ($36,000,000 CAD) consisting of twelve million dollars Canadian ($12,000,000 CAD), for Beneficial Ownership Sale of Property and twenty-four million dollars Canadian ($24,000,000 CAD), for Share Purchase of Pt. Ellice Properties Ltd.

[3] The plaintiff argues that the Term Sheet is a binding and enforceable contract for the purchase and sale of the land and shares. Among its claims, the plaintiff claims specific performance of the purchase and sale contract and claims damages. In the alternative, in lieu of specific performance, the plaintiff claims general and specific damages.

[4] The defendants argue that the Term Sheet did not create any binding obligations between the parties and its purpose was to fix certain terms, including price, and to serve as a roadmap for final agreements which were never reached or signed.

[5] The plaintiff commenced this action on August 1, 2018, the day after the proposed closing date in the Term Sheet of July 31, 2018. Ralmax claims it was, and remains, ready, willing and able to complete the sale.

[6] When a facilitator and negotiator acting for Mr. Berman and Pt. Ellice learned of this lawsuit, he described feeling “Deep disappointment. Very sad. It was easy to guess then it was going to be ugly. But nobody could have guessed that it [would go] this far.”

That sentiment aptly describes the highly contentious and protracted nature of this dispute.

BACKGROUND

The Property

[7] The property in question, which I will refer to throughout this judgment as the "Pt. Ellice lands", is located in the Victoria Harbour. The Pt. Ellice lands consist of seven adjoining lots, comprising approximately eight acres. Some of the lots are adjoined by a water lot, leased by Pt. Ellice from the Federal Government (the "water lot"). Generally, when I refer to the Pt. Ellice lands in this judgment, that term will include the water lot, unless I reference the water lot separately. Aerial photographs of the lands were entered into evidence and several of the witnesses were shown the photographs.

OVERVIEW

[8] Before I discuss the evidence in more detail I will give a high-level overview of this dispute.

[9] The personal parties to this action are two successful businessmen and landowners in the Victoria Harbour. Ian Maxwell (who, although not named in the style of cause, is the controlling mind and sole shareholder of the plaintiff) had wanted to buy the Pt. Ellice lands from the personal defendant Fred Berman for many years. Mr. Maxwell made overtures in the 1980s and in 2005 made an offer for Budget Steel (a company operating on the lands which was owned by Mr. Berman) and for the Pt. Ellice lands. In 2016, one of Mr. Maxwell's consultants made an approach to Mr. Berman on behalf of Ralmax which did not result in any agreement.

[10] Sometime in 2017, Mr. Maxwell approached Mr. Berman directly and began discussions that culminated in a four-page document titled "Term Sheet – Hybrid Sale". The Term Sheet was prepared by business representatives for the parties and was not prepared by legal counsel, although legal counsel had provided some advice on an earlier draft. The Term Sheet outlined a purchase price of $12 million for Beneficial Ownership Sale of Property and $24 million for the Share Purchase of Pt. Ellice

Properties Ltd. The Term Sheet was executed by Mr. Maxwell on behalf of Ralmax Properties Ltd. on March 10, 2018, and by Mr. Berman on behalf of Pt. Ellice Properties Ltd., on March 11, 2018. At trial, the plaintiff claimed that the Term Sheet is a binding and enforceable contract.

[11] After the Term Sheet was signed, the parties spent several months discussing further agreements, in order to move forward with the sale. Lawyers for both parties were heavily involved in those discussions, as were the business representative, Gary Leibel, Chief Financial Officer for Ralmax, and initially Jason Austin, a consultant of Mr. Berman's for Pt. Ellice. Three agreements were drafted and exchanged back and forth between the parties. These agreements were titled Asset Purchase Agreement ("APA"), Share Purchase Agreement ("SPA"), and Post-Closing Obligations and Environmental Indemnity Agreement ("PCOEIA"). These agreements were never signed by Mr. Berman for Pt. Ellice.

[12] During the period between the signing of the Term Sheet and the closing date referenced in the Term Sheet, which was July 31, 2018, deposits totalling $5.5 million were paid by Ralmax. The Term Sheet references deposits, but the deposits were not paid in conformity with the Term Sheet. Ralmax removed the due diligence condition at the time it paid the second deposit. Lawyers for Pt. Ellice accepted the deposits and placed them in the firm's trust account, but then wrote to counsel for Ralmax on multiple occasions asking for clarification on the basis upon which they were holding the deposits.

[13] Although agreement in principle was reached on some aspects of the three agreements (the APA, SPA, and PCOEIA), the main points in contention related to the required security for an indemnification with respect to environmental matters. It was understood by all parties at the start of negotiations that one of Mr. Berman's conditions for even contemplating the sale of the Pt. Ellice lands was that he would be completely free of any responsibility for possible environmental liabilities related to the lands. Ultimately, after many options were discussed and considered, Pt. Ellice demanded a sum of $5 million as security for the indemnity which would be held in escrow for five

years until environmental Certificates of Compliance (“CoC”) from the Ministry of Environment were obtained on the lands.

[14] Another point of major dispute between the parties related to the meaning of “standard representations and warranties” referenced in the Term Sheet. This issue became contentious especially around tax liabilities for the share portion of the sale.

[15] The closing date in the Term Sheet was July 31, 2018, or an earlier date mutually agreeable. When the parties could not come to an agreement on the three agreements (the APA, SPA, and PCOEIA), Mr. Maxwell signed versions which were prepared by lawyers for Ralmax, and were, in the opinion of Ralmax, closest to the terms that were agreed on between the parties. In preparing the proposed closing version of the agreements, lawyers for Ralmax used as much of the wording prepared by lawyers for Pt. Ellice as they could. Eric Kerr, Ralmax’s lawyer, Gary Leibel, Ralmax’s Chief Financial Officer, and Sage Berryman, a consultant for Ralmax, then went to Vancouver on July 25, 2018, to try and resolve the outstanding issues between the parties. Ralmax advised that they were ready and wished to complete the sale. However, the lawyer for Pt. Ellice declined to meet with them. As I have said, the documents were never signed by Mr. Berman and Pt. Ellice.

[16] Ralmax filed the Notice of Civil Claim the day after the closing date in the Term Sheet, on August 1, 2018. In the Notice of Civil Claim, Ralmax seeks “specific performance of the Purchase and Sale Contract”, in other words, specific performance of the Term Sheet. Ralmax’s position is that they are and remain ready to complete the sale. Ralmax claims and argues at trial that the Term Sheet is a binding and enforceable contract. In the alternative to the remedy of specific performance, Ralmax claims general and specific damages.

[17] Ralmax argues that security for the environmental indemnity was the unlimited guarantees of Mr. Maxwell and of Ralmax Group Holdings Ltd. (“RGHL”). Mr. Maxwell testified at trial that he and RGHL will continue to provide the guarantees if the sale completes.

[18] The defendants argue that both the witness testimony and the documentary evidence make clear that the parties never intended to be contractually bound by the Term Sheet, and instead viewed it as only a starting point in negotiating a potential transaction, which negotiations continued until July 2018. The defendants argue that before and after the Term Sheet was signed, the parties were actively exchanging information and negotiating, and it was understood that the purpose of the Term Sheet was to fix certain terms, including total price, which would not be revisited. The defendants argue that there were numerous terms still to be agreed upon, and there was considerable distance to go before a binding agreement could be reached. The defendants argue that a binding agreement was never reached.

THE EVIDENCE OF THE PRINCIPALS

[19] Several witnesses gave detailed evidence about the negotiations that led up to the signing of the Term Sheet, as well as continuing negotiations and events after the Term Sheet was signed. I intend to outline some of the evidence of the principals of each corporate party, Ian Maxwell ("Mr. Maxwell"), for Ralmax Properties Ltd. ("Ralmax") and Fred Berman ("Mr. Berman") for Pt. Ellice Properties Ltd. ("Pt. Ellice") since doing so gives context to this dispute. I will also refer to the evidence of Gary Leibel ("Mr. Leibel"), Chief Financial Officer ("CFO") for Ralmax and for Ralmax Group Holdings Ltd. ("RGHL"), and Jason Austin ("Mr. Austin"), who acted as Mr. Berman's liaison during a key period in the negotiations from early January 2018 to April 25, 2018. I will then refer to other evidence at trial as necessitated by the analysis.

Ian Maxwell

[20] Mr. Maxwell is the sole shareholder, sole director and Chief Executive Officer of Ralmax and also RGHL. Both of these companies are part of a group of companies known as the Ralmax Group of Companies ("Ralmax Group"). Mr. Maxwell is the sole owner and director of the companies within the Ralmax Group, except for Salish Sea Industrial Services, and the Victoria Harbour Ferries. Mr. Maxwell is the principal and controlling mind of Ralmax. At the time of his testimony in October 2022, Mr. Maxwell was 69 years old. In his evidence, he described his personal background and the

companies within the Ralmax Group. I will not describe all of the activities of the various companies that are under the Ralmax Group – they are however generally related to each other and also generally relate to industrial activities in the Victoria Harbour.

[21] The plaintiff, Ralmax, is a company which owns the industrial real estate used by the Ralmax Group. The landholdings are leased to other Ralmax Group companies usually at market rents.

[22] Mr. Maxwell is a self-made man who described himself at heart as “an industrialist”. He admires people who work in the trades and who can do things with their hands. For example, he expressed admiration for tradespeople who stayed with their trades long enough to achieve red seal certification. He described having approximately thirty-six apprentices in various trades employed under the Ralmax Group umbrella. The Ralmax Group employs more than 400 people in Victoria. It is clear from his evidence at trial that Mr. Maxwell takes pride in his landholdings being job-creating lands.

[23] Mr. Maxwell started his business career when he was still a teenager. He married young and had a family to support. He eventually earned enough to purchase a gravel truck and became a gravel truck operator. From these humble beginnings, Mr. Maxwell has grown a group of companies that have a fair market value of somewhere around $200 million, of which Mr. Maxwell is the sole shareholder. Mr. Maxwell personally is not a plaintiff in the action nor are any other entities that are part of the Ralmax Group.

[24] After the events that give rise to this dispute (sometime after July 31, 2018), Mr. Maxwell’s ownership shares in Ralmax and all associated shares in the Ralmax Group were transferred to an alter ego trust as part of Mr. Maxwell’s estate planning. Mr. Maxwell’s personal demonstration of his wealth is modest given his success; a nice home and farmland where he raises sheep and about two million in cash and other assets. He takes a modest salary and drives a 1999 Dodge pickup truck. Mr. Maxwell pours everything he has into his companies and testified at trial he does not personally value real estate or companies.

[25] Mr. Maxwell's longstanding interest in acquiring the Pt. Ellice lands was related to his desire to improve the industrial waterfront in the Victoria Harbour and to leave an industrial legacy to the City of Victoria. He described the Pt. Ellice lands as the "last big piece of industrial lands in the City of Victoria" and that any comparable lands are already owned by the Ralmax Group. He wanted to acquire the Pt. Ellice lands to preserve them as industrial in the Victoria Harbour and because they were complementary to the work done by the Ralmax Group. As Mr. Maxwell explained, he wanted to keep the lands as industrial and as job-creating lands – to generate paycheques. Mr. Maxwell is of the view that if the City of Victoria loses too much more industrial lands, they will be lost forever. As he explained, "... no one knocks down a condominium tower to build industrial lands."

[26] Mr. Maxwell described his approach to deal making. He described doing at least 30 share/asset deals to acquire companies and lands and over 30 separate heavy industrial real estate land deals over his career. It is clear from his evidence that he is very experienced in such large-scale transactions. Mr. Maxwell testified that his approach to such transactions depends on how the deal starts. Mr. Maxwell testified he does not usually approach other landowners, usually he is approached. Either way, he testified that he does not play his cards close to his vest and that he would complete a deal on a handshake, a verbal agreement, or a term sheet. In Mr. Maxwell's words if the "... counterparties are in agreement let's get [it] done."

[27] Mr. Maxwell was interested in acquiring the Pt. Ellice lands for many years before the negotiations that gave rise to this dispute. He first met the defendant, Mr. Berman, when he was in his early to mid-thirties. At that time, Mr. Berman was running a couple of truck yards and running a company called Budget Steel. Mr. Maxwell testified that Mr. Berman was "up there" and "I was just a truck driver", when they first met. Mr. Maxwell testified that he only had short conversations with Mr. Berman a number of times over a 10 to 15-year period.

[28] Mr. Maxwell first started talking to Mr. Berman about purchasing the Pt. Ellice lands sometime in the 1980's. Mr. Maxwell testified that Mr. Berman was interested then

in coming to an arrangement to lease a portion of the lands to Mr. Maxwell, but a leasing arrangement did not suit Mr. Maxwell. Mr. Maxwell testified that at that time Mr. Berman did not express any interest in selling all or part of the lands.

[29] Mr. Maxwell testified that in 2016, Sage Berryman (who did not testify on the trial but was mentioned several times as a significant employee/consultant for the Ralmax Group) approached Mr. Berman about the Ralmax Group's interest in purchasing the Pt. Ellice lands. A non-disclosure agreement (the "2016 NDA") dated October 12, 2016, was signed. The 2016 approach to Mr. Berman from Ralmax stalled quickly and did not go anywhere.

[30] The 2016 NDA was originally prepared by or on behalf of Ralmax. Prior to it being executed, revisions were made to the 2016 NDA in response to comments from Mr. Berman and his legal counsel, Max Collett.

[31] The 2016 NDA contains a "Definitive Agreement Clause", which provides:

> **13. Definitive Agreements**
>
> This Agreement does not constitute a binding agreement to transact, but is intended to govern the disclosure and use of Confidential Information during the pre-contractual discussions, investigations and negotiations and during any subsequent period between the execution and delivery by the parties of a formal, comprehensive written agreement, if any, between Disclosing Party and Recipient with respect to the Opportunity and the implementation, if any, of such Opportunity. Until a formal, comprehensive written agreement has been executed and delivered, no party or person will be under any legal obligations of any kind with respect to the Opportunity except for the matters expressly referred to in this Agreement. For certainty, the term "formal, comprehensive written agreement" does not include a preliminary written or oral agreement such as a letter of intent, information memorandum, term sheet, bid or offer.
>
> [Emphasis added.]

[32] The 2016 NDA has a termination clause setting out that the 2016 NDA would remain in full force and effect until the earlier of:

> **12. Termination**
>
> This Agreement and all of its terms, and each of the covenants, agreements and acknowledgements set out herein, will remain in full force and effect until the earlier of:

> (a) the execution and delivery by the parties of a formal, comprehensive written agreement in relation to the Opportunity which, expressly by its terms, supersedes this Agreement, and
>
> (b) five (5) years from the date of this Agreement, after which the parties will have no further obligations hereunder and this Agreement will terminate.

[33] Mr. Maxwell "perused", but did not study the 2016 NDA in detail prior to signing it.

[34] Sometime in 2017, Mr. Maxwell tried again to purchase the Pt. Ellice lands, but this time he approached Mr. Berman personally. As a result of those discussions, Mr. Maxwell understood that Mr. Berman was doing some tax planning and estate planning and was willing to discuss a possible sale of the Pt. Ellice lands to the Ralmax Group. Mr. Maxwell came away from those discussion with a clear understanding that Mr. Berman had three essential criteria before he would consider selling the lands:

1. That Mr. Berman would receive a certain amount of money for the property, plus enough on top of that to pay any expenses of selling the property, such as the taxes, so that his income stream would remain whole when it came from a different source.

2. That Mr. Berman would not have any responsibility for the potential environmental contamination on the site.

3. That Mr. Berman would have a replacement investment available so that his income stream was not impacted.

[35] At this point, Mr. Maxwell went to his CFO, Gary Leibel, who began working up various numbers with different formulas in order to meet Mr. Berman's goals. Mr. Maxwell could not remember all the details surrounding these initial discussions, and in any event, they are unimportant to the ultimate issues I must decide. An initial value for the lands of $31,576,000 was reached by Mr. Leibel.

[36] Around the same time, in the fall of 2017, and before the Term Sheet was signed, Mr. Maxwell decided to sell two Ralmax Group properties, referred to in evidence as David Street and Henry Avenue. These sales were made to "toughen up"

the balance sheet by about $14 million. Ralmax wanted to be ready to complete the Pt. Ellice lands sale in the event that an agreement with Mr. Berman was reached. Mr. Maxwell acknowledged in his evidence that there was no agreement to purchase the Pt. Ellice lands when the David Street and Henry Avenue properties were listed and sold. These sales were not conditional on Ralmax acquiring the lands.

[37] On December 5, 2017, Mr. Maxwell emailed Mr. Berman inquiring whether he could purchase the Pt. Ellice lands. Mr. Berman responded by asking whether Ralmax had any interest in a long-term lease. Mr. Maxwell's interest was in purchasing the lands, and discussions continued on that basis.

[38] At around the same time, in December 2017, Mr. Maxwell purchased a ready-mix concrete plant through one of the Ralmax Group companies, Trio Ready-Mix Ltd. ("Trio"). In his evidence, Mr. Maxwell confirmed that the general manager of Trio entered into an agreement to purchase the concrete plant with his approval. Mr. Maxwell also confirmed that there was no agreement to purchase the Pt. Ellice lands at the time the concrete plant was purchased.

[39] Mr. Maxwell testified that by Christmas 2017 he had many friendly emails and telephone conversations with Mr. Berman. Mr. Maxwell testified that the Pt. Ellice lands' deal was taking a lot longer than anything he had ever done and that Mr. Berman as a counterparty was very "thorough, careful, and cautious."

[40] With respect to the environmental condition of the Pt. Ellice lands, Mr. Maxwell testified that he expected there would be hydrocarbons and oils, and that he did not expect "... that there would be anything there that we hadn't dealt with, like, Ralmax hadn't dealt with, a number of times before." In that regard, all of Mr. Maxwell's evidence suggested that he was not personally worried about the environmental condition of the Pt. Ellice lands, and he did not share Mr. Berman's concern about the cost of remediating the lands.

[41] Mr. Maxwell testified that in early 2018, Mr. Berman stepped out of the negotiations and appointed Jason Austin to conduct the negotiations for him.

Mr. Maxwell testified that Mr. Austin was able to discuss any topic with Ralmax, but that Mr. Austin would need to go back to Mr. Berman for approval on any recommendations. Mr. Maxwell understood that Mr. Berman had all final decision making with respect to any discussions. Mr. Maxwell testified that Mr. Austin was clear that no one should discuss the proposed sale with Mr. Berman directly.

[42] In January and February 2018, discussions continued between Ralmax (represented by Mr. Maxwell and Mr. Leibel), and Jason Austin on behalf of Mr. Berman for Pt. Ellice. On January 8, Mr. Maxwell and Mr. Leibel met with Mr. Austin and described how Ralmax intended to use the lands if it purchased them.

[43] On February 1, 2018, Mr. Maxwell signed a second non-disclosure agreement (the "2018 NDA") on behalf of Ralmax. Again, Mr. Maxwell testified that he perused the 2018 NDA, but did not spend a lot of time reading it since he relied on his lawyer and his CFO. Mr. Maxwell did not remember who prepared the 2018 NDA. The 2018 NDA has a "Definitive Agreements" clause (12) that is identical to the 2016 NDA. The Termination Clause (11) in the 2018 NDA is slightly different than that of the 2016 NDA and only operated for two years.

[44] In his testimony, Mr. Maxwell described how his thinking evolved around the purchase price of the Pt. Ellice lands. Mr. Maxwell described meeting with Mr. Austin and coming to an understanding that he would have to pay a premium for the Pt. Ellice lands. On January 28, 2018, an offer of $35 million was made by Ralmax, plus an indemnity for remediation of the lands and subject to a review of the leases. On February 9, 2018, Ralmax offered to increase that offer to $35.5 million in order to preserve the ability for Ralmax to deal with one of the tenants, Schnitzer Steel. At the time those offers were made, Mr. Maxwell testified that the assessed value of the Pt. Ellice lands as determined by B.C. Assessment was in the range of $22 to $24 million.

[45] On February 21, 2018, Mr. Austin met with Mr. Leibel and Mr. Maxwell in order to discuss a draft term sheet, which had been prepared by Mr. Austin. At that meeting, Mr. Maxwell raised the possibility of a hybrid sale in order to save a portion of the

property purchase tax, and to prevent a possible increase by B.C. Assessment to assessed values of neighbouring properties. Many of these neighbouring properties were owned by the Ralmax Group, and therefore a hybrid sale would benefit the Ralmax Group. Mr. Maxwell testified that he assumed that Ralmax and the defendants would share the benefits of a share sale, and the resultant savings of the property purchase tax. A hybrid sale would also allow Ralmax to utilize the replacement property rules under the *Income Tax Act*, since the purchase could allow Ralmax to claim the Pt. Ellice lands as replacement for the David Street and Henry Avenue sales.

[46] Negotiations continued, but by March 7, 2018, Mr. Maxwell called a halt to the negotiations. Mr. Maxwell testified that he got very frustrated with the unfairness of it all and he "pulled the pin" because the negotiations were too one-sided in favour of the defendants. He testified that he felt he had "dealt honestly" and that he had been treated "really bad".

[47] Mr. Maxwell testified that Gary Leibel and another of his employees, Adam Quesnel, told him to come back to work. After considering the matter further, Mr. Maxwell ended up giving detailed instructions to Mr. Leibel to prepare two term sheet options: an asset purchase agreement or a hybrid sale. The first option was titled: "Term Sheet – Option 1 – Asset Purchase". In that version, the property description was the seven lots, and the vendor was to use best efforts to obtain the consent of Transport Canada to assignment of the water lot lease. Option one had a price of $35,500,000. The second option was titled: "Term Sheet – Option 2 – Hybrid Sale". In this version, the purchase price was $35,770,000. Mr. Maxwell signed both versions of the term sheets. Mr. Maxwell made it clear to Gary Leibel that he should communicate that the back and forth had to stop and that Mr. Maxwell "was done".

[48] The two versions of the term sheets were presented on March 9, 2018 by Gary Leibel to Mr. Austin. Both versions were dated March 9, 2018.

[49] Mr. Maxwell testified that sometime between March 9 and 10, 2018 he spoke to Mr. Austin, who explained to him that he believed Gary Leibel had previously agreed to a purchase price of $36 million for a hybrid sale. As a result, Mr. Maxwell agreed to

raise the purchase price on the hybrid sale version of the term sheet to $36,000,000. On March 10, 2018 Mr. Maxwell signed the final version of the hybrid sale version of the term sheet. As I have stated, that document was titled “Term Sheet – Hybrid Sale”.

[50] On March 11, 2018, Mr. Berman signed the hybrid sale version of the term sheet on behalf of Pt. Ellice.

[51] Since the alleged contract is titled “Term Sheet – Hybrid Sale”, Mr. Maxwell in cross-examination seemed to concede that the title “Term Sheet” should have been taken off or another title given to the document. According to Mr. Maxwell, it was “unfortunate” that the Term Sheet was titled “Term Sheet”. Mr. Maxwell testified that all four of us – Jason Austin, Fred Berman, Ian Maxwell and Gary Leibel – understood what we were doing, which was creating a binding contract of purchase and sale.

[52] After the Term Sheet was signed, the parties continued to negotiate various aspects of the anticipated sale. Lawyers for both parties became more heavily involved: Eric Kerr for Ralmax and initially Max Collett for the defendants. Mr. Collett had a sabbatical scheduled for the summer of 2018, so Christopher Horte, who was providing background advice on the share purchase aspect of the transaction, was brought in to complete the transaction on behalf of Pt. Ellice.

[53] Mr. Maxwell was not directly involved in the continuing negotiations once the Term Sheet was signed. As he explained, the deal in his mind was “done”, and Mr. Leibel and Mr. Kerr would deal with the details and the “minutiae”. Mr. Maxwell explained that his forte was not dealing with such matters, and he left those details to Mr. Leibel and Mr. Kerr for Ralmax.

[54] On April 5, 2018, Mr. Maxwell executed an amendment to the 2018 NDA, so that representatives of Ralmax could go and look at certain other properties owned by Pt. Ellice, which were located in Nanaimo and Campbell River. It is clear from the tenor of his testimony that Mr. Maxwell did not expect to have any interest in purchasing the up-island properties. However, the discussion about them was necessary because the properties were contained within Pt. Ellice Properties Ltd. Since the Term Sheet

contemplated a hybrid sale, the up-island properties would have to be removed from the company in order for a share sale to complete.

[55] Mr. Maxwell testified that by April 2018 he came to the view that Mr. Austin was becoming “paranoid” about the environmental condition of the Pt. Ellice lands because he did not understand the environmental issues. As result, Mr. Maxwell instructed Mr. Leibel to try to educate and accommodate the defendants. In Mr. Maxwell’s words, “I didn’t think there was any risk to Mr. Berman, but I fully believed that … Jason Austin and Fred Berman thought there was a risk, so it was up to us to educate them, make them happy, if we could.”

[56] As I have already stated, after Mr. Maxwell signed the Term Sheet he was less involved with the continuing discussions around the deal. He did not go to Vancouver for the July 25, 2018 meeting, but he remained in touch with Mr. Leibel, Ms. Berryman, and Mr. Kerr.

Fred Berman

[57] Mr. Berman is the personal defendant and is the sole registered and beneficial owner of all of the issued and outstanding shares in the corporate defendant Pt. Ellice Properties Ltd. Pt. Ellice is the owner of the properties, the Pt. Ellice lands, and the holder of a water lot lease, all of which are at issue in this dispute. Mr. Berman was 78 years old at the time of his testimony.

[58] In terms of his personal and business background, Mr. Berman graduated from the University of British Columbia with a Bachelors Degree in Commerce. He worked for a family company in steel and metals as a “weigh master” for about seven years after his graduation. It was in that capacity he learned about the scrap metal business. In and around 1975 he formed his own company, Clean Steel Products Ltd. with a partner. That company eventually went into receivership around 1979/80. Ultimately, after another attempt to form a small company, Mr. Berman formed a company called Budget Steel with two other partners. That company operated on a portion of the Pt. Ellice lands, which were leased from B.C. Forest Products at the time.

[59] Mr. Berman described how Budget Steel went on to purchase six of the seven lots that comprise the current Pt. Ellice lands. The seventh lot was eventually purchased by Pt. Ellice from B.C. Hydro. Mr. Berman testified that he bought out his other two partners in Budget Steel and became the sole owner. In 2005, Budget Steel was sold to a company doing business as Pacific Steel. Schnitzer Steel became a current tenant on the property around 2010, when they bought out Pacific Steel.

[60] Mr. Berman testified that over the years he was somewhat familiar with Mr. Maxwell and the Ralmax Group. He testified that Ralmax had previously been a customer of Budget Steel, and he found Mr. Maxwell businesslike, professional and courteous. Mr. Maxwell had expressed interest in purchasing the Pt. Ellice lands over the years, in casual conversation. Mr. Berman testified that he had very little interest in selling, and he was never an interested seller.

[61] Mr. Berman testified about the 2016 approach by Sage Berryman of the Ralmax Group. Again, Mr. Berman testified that he had “very little” interest in selling, but that he thought it would be worthwhile to listen. He signed an NDA in 2016, which originated from Ralmax, but was annoyed to find that it had an exclusivity clause which was ultimately removed.

[62] Mr. Berman testified that the 2016 discussions did not last long. After that he continued to hear from Mr. Maxwell from time to time.

[63] Sometime in late 2017, Mr. Berman testified that he recalled meeting once in person with Mr. Maxwell. There may have been other communications which may have been by phone or email.

[64] In the meeting that he had with Mr. Maxwell, Mr. Berman laid out his conditions if he was to entertain a sale:

1. He needed a “pool of cash” that would be net of all tax implications and associated costs and would be enough for him to purchase another investment so that his net worth would be at least as good after the transaction as before.

2. He wanted to be risk-free from any environmental claims or liability related to the lands.

3. He had to have an investment vehicle for his "pool of cash" where he could place those funds.

[65] Mr. Berman testified that he believed he was quite clear about his conditions and that he believed Mr. Maxwell understood them.

[66] With respect to the issue of environmental claims or liability, Mr. Berman described his knowledge and concern about environmental issues relating to the property. He testified that the rules and regulations respecting the environment are continuing to change and are becoming more onerous. He wanted to make sure that he was covered for that risk. Mr. Berman stated that he believed he had told Mr. Maxwell very clearly during the in-person meeting that the environmental issues were important to him.

[67] Mr. Berman testified that he knew of a real "horror story" with respect to one of Schnitzer Steel's yards in Portland, Oregon where a clean up hit a billion dollars.[1] He was also aware that B.C. Hydro had spent 100 million dollars on remediation with respect to a property in Rock Bay. Mr. Berman was also aware of a property near Laurel Point in Victoria that had environmental clean up costs of $25,000. All of these examples were in Mr. Berman's mind as he considered the issue of ongoing environmental liability if he was to sell the property.

[68] In January 2018, Mr. Berman brought Jason Austin into the ongoing discussions with Ralmax. Mr. Austin was a retired Certified General Accountant who had at one time acted as a general manager for Budget Steel, Mr. Berman's former company. Mr. Berman asked Mr. Austin to take the lead on discussions with Mr. Maxwell and Mr. Leibel. Mr. Berman was going to be travelling and would not be available in person in any event. Mr. Austin was authorized to discuss any subject relative to the proposed

[1] The transcript says one million dollars, but my bench notes indicate that Mr. Berman said "billion", not "million". In addition, the log notes on December 5, 2022 at 3:45:30 indicate "one billion dollar clean up".

purchase of the Pt. Ellice lands, but he was not able to bind the company or Mr. Berman to any contract. Mr. Berman made it clear that he would make the final decisions on all matters.

[69] In my opinion, it is clear from all of the evidence at trial that both Mr. Maxwell and Mr. Leibel knew that when they were discussing matters with Mr. Austin, Mr. Berman retained all final decision-making authority. In Mr. Austin's words – there were no misunderstandings with Ian and Gary, "I did not make decisions". As I have already said, Mr. Maxwell appeared to concede that in his evidence.

[70] I do not intend to outline all of Mr. Berman's evidence leading up to the signing of the Term Sheet. As I have said, Mr. Austin was taking the lead for Pt. Ellice and was keeping Mr. Berman apprised of the discussions, mostly by email. With respect to the discussions around environmental matters, Mr. Berman understood that there were discussions taking place that included mortgage security for a possible vendor take back mortgage and also discussions about mortgage security for environmental matters.

[71] Mr. Berman confirmed that Mr. Austin initially raised the issue of security for an environmental indemnity and that Mr. Collett agreed that it was an idea worth pursuing. Mr. Berman understood that one of the possibilities first discussed was a type of insurance which could be a form of security. Mr. Collett also raised the idea of a collateral mortgage. Although these options were discussed, no agreement was ever reached with respect to the form or amount of security.

[72] Mr. Berman testified that when he signed the Term Sheet on March 11, 2018 he signed on behalf of Pt. Ellice Properties Ltd. In his mind, the terms contained were agreed to and would not be changed unless the parties agreed. These terms that were agreed to would be imbedded in the final documents. The matters left to be determined and agreed to included the form and amount of the security referenced under the environmental term. Mr. Berman testified that it had been made very clear to Ralmax from the very beginning of the discussions that this was a very important term. In Mr. Berman's mind, there was no agreement on the form or amount of that security

when he signed the Term Sheet. Mr. Berman believed that the Term Sheet confirmed that Ralmax would have to provide security for the environmental terms, but it did not indicate the specific type or amount of security, which would have to be agreed to between the parties.

[73] The other matters left to be determined included the final sales documents including an asset purchase agreement, which is referenced in the Term Sheet. Mr. Berman understood that the reference to "Guarantors" in the Term Sheet he signed, would ultimately be placed in the Asset Purchase Agreement and in a share purchase agreement (although the Term Sheet does not explicitly reference a share purchase agreement).

[74] After the Term Sheet was signed, there were continuing discussions between lawyers for both parties, and Mr. Leibel and Mr. Austin. Mr. Berman was very concerned when he saw the first version of the Asset Purchase Agreement, as there was no reference to the security term which Mr. Berman said was "conspicuous by its absence". In terms of various options for potential security, Mr. Berman was generally in favour of a collateral mortgage security proposal which would provide a collateral mortgage over four of the seven lots. However, the collateral mortgage proposal put forward by Ralmax ultimately fell through because their bank would not approve it.

[75] In late April of 2018, Mr. Berman wanted to put a pause on the transaction because he felt that his team had been placed under pressure from the Ralmax side. He testified that emails were flying around and "we didn't seem to be closing in on it." In his opinion, mistakes were being made, and obvious omissions were made in the draft closing documents. In Mr. Berman's view, he had paid a lot of money to lawyers and the status at that time was that there was no final agreement on the APA, no final agreement on the SPA, and no agreement on the form and amount of security for the environmental issues. Mr. Berman wanted to take a time out, because he was of the view that his side was under too much pressure and mistakes were being made.

[76] Around that time, after a meeting between Mr. Austin and Mr. Maxwell, Mr. Maxwell provided an additional check for $20,000 which Mr. Berman understood to be a good faith advance for legal fees in light of the continuing discussions.

[77] In late April of 2018, Mr. Austin resigned his role as a facilitator/negotiator for Mr. Berman and Pt. Ellice. Although discussions continued between the lawyers and options continued to be discussed, ultimately no formal agreements were signed by Mr. Berman or Pt. Ellice.

[78] It is clear from Mr. Berman's evidence at trial that when Mr. Berman signed the Term Sheet he thought he was signing what is conventionally thought of as a Term Sheet as opposed to a binding and enforceable contract. Mr. Berman testified that although some terms were fixed, such as price, there was still work to be done by the parties to get to a binding and enforceable contract.

TERM SHEET

[79] As I have said, whether or not the Term Sheet is a binding and enforceable contract is one of the central issues in this case. I turn now to the analysis of the legal issues raised at trial in order to determine that issue.

[80] Before I do so, I will reproduce the alleged contract in its entirety so that the rest of this judgment can refer where necessary to the details of the document itself:

March 10, 2018

Term Sheet – Hybrid Sale

Vendor:	Pt Ellice Properties Ltd. and Fred Berman or successor or assign
Purchaser:	Ralmax Properties Ltd. or related party assignee
Guarantors:	Ian Maxwell Ralmax Group Holdings Ltd.
Assignment:	Assignment by Purchaser to related parties only. Not assignable by the Purchaser without the prior written consent of the Vendor which cannot be unreasonably withheld.
Property Description:	7 parcels on the Victoria Harbour having P.I.D.: 025-906-887, 025-906-895, 025-906-879 023-978-384, 003-082-989, 003-083-063 003-082-938
Beneficial Ownership Sale of Property	$12,000,000 CAD
Share Purchase of Pt Ellice Properties Ltd.	$24,000,000 CAD
Deposit on signing:	$3,500,000 CAD payable within 2 days of signing APA to Vendors solicitors in trust, to become non-refundable upon the Purchaser completing its due diligence to their satisfaction and removing the due diligence condition.
Second deposit:	$2,000,000 CAD non-refundable, payable upon the Purchaser completing its due diligence to their satisfaction and removing the due diligence condition.
Payment on closing & Vendor Financing:	Minimum of $6,500,000 CAD. The Vendor has the option to exercise Take Back Financing as per Schedule 1 – Vendor Take Back Financing – Hybrid Sale
Closing Date:	Subject to the Purchaser completing its due diligence to their satisfaction and removing the due diligence condition, July 31, 2018 or an earlier date mutually agreeable by the Purchaser and Vendor
Purchasers due diligence period:	(1) Minimum period is the first Friday after 21 calendar days after signed agreement of this term sheet by the Vendor and Purchaser. (2) due diligence period must include (unless waived by the purchaser) sufficient time for a face to face meeting with Mark Mossey, or similar level executive of Schnitzer Steel, plus 6 business days for response. The minimum due diligence period can be extended in the event the Schnitzer Steel meeting and response period ends after the minimum due diligence period. (3) The due diligence period must include a site inspection for the Ralmax representatives during business hours Monday to Saturday lead by a

knowledgeable representative of the Vendor and the site inspection date can be set by the Vendor. The due diligence end date can be extended if the site inspection date falls after the due diligence end date(s) noted above.

(4) Any days lost between March 12, 2018 to March 18, 2018 due to a prior commitment for Ian Maxwell will be added to the due diligence period if required by the Purchaser

(5) Notwithstanding the foregoing, the due diligence period will not exceed 45 days from the date of signing of this term sheet.

Vendor's warranties	The Properties will be sold "as is". Pt Ellice Properties Ltd. will be sold with the Vendor providing standard representations and warranties related to a share sale excluding the environmental indemnity noted below.
Environmental	Purchaser will: 1) provide environmental indemnity to the Vendor, Fred Benman and its affiliates, subsidiaries and associated companies including Budget Steel Limited and their respective directors, officers, shareholders and advisors from any claims made related to environmental condition, or damage or remediation arising from, the Property or the water lot lease. 2) Require Schnitzer to do an environmental study and complete any needed remediation of: a. the water lot in 2018, either under the terms of the existing sub water lot lease, or under a new sub water lot lease b. all the Schnitzer leased Victoria lands pursuant to the terms of the lease, or as a condition of Schnitzer being allowed to surrender or sublease part of those lands 3) enforce the environmental provisions in the H&L lease prior to termination of their lease 4) ensure the inspection of the storm drain system on the Victoria lands is completed by Kerr, Wood & Leidal and any needed repairs are completed in 2018 5) provide baseline environmental studies following completion of each of the works above 6) obtain a pollution liability policy with the indemnified parties as named insured 7) provide security for the performance of the above 8) Detailed wording to be refined by Max Collet and Eric Kerr.
Vendor's dealings with Schnitzer and Other Tenants	Upon signing this term sheet the Vendor will consult with the Purchaser before dealing with Schnitzer and the other tenants and will not enter into any changes to the leases with any of the Tenants without the consent of the Purchaser which will not be unreasonably withheld. The Vendor, if the Purchaser completes its due diligence to their satisfaction, and removes the due diligence condition and pays the additional deposit, will not make any changes to the leases without the consent of the Purchaser. If the Purchaser does not remove its conditions or does not complete the purchase the Vendor is no longer obligated to comply with these limitations.

Other Terms: The Purchaser is responsible for its own costs and the Purchaser will pay for the Vendor's legal costs to a maximum of $15,000.00.

On behalf of Ralmax Properties Ltd, I agree to the terms and conditions outlined in this term sheet.

Ralmax Properties Ltd.

Ian Maxwell, President — Date: 10 March 2018

On behalf of Pt Ellice Properties Ltd., I agree to the terms and conditions outlined in this term sheet.

Pt Ellice Properties Ltd.

Fred Berman, — Date: MARCH 11, 2018

Schedule 1 – Vendor Take Back Financing Hybrid Sale

Vendor Take Back Financing

The Vendor will have the option, exercisable by written notice to the Purchaser not less than 60 days prior to the Closing Date, to finance a portion (the "**VTB Amount**") of the Purchase Price on the following terms and conditions:

(a) the VTB Amount will not be more than $24,000,000 TWENTY FOUR MILLION DOLLARS and not be less than $5,000,000 FIVE MILLION DOLLARS on closing;

(b) the interest rate applicable to the VTB Amount will be FIVE (5%) PERCENT per annum with interest only payments payable monthly.

(c) the VTB Amount will be repayable over a term of not more than 5 years from the closing date., The Vendor has the option to request installment payments of not less than $1,000,000 with the Vendor providing the Purchaser a minimum of 30 days-notice for any installment payment equal to or less than $10,000,000 (TEN MILLION DOLLARS) and a minimum of 90 days-notice for any installment payment over $10,000,000 (TEN MILLION DOLLARS) with the balance of the VTB Amount, if any, due and payable in full at the end of the term of 5 years from the closing date.

CHRONOLOGY

[81] The plaintiff and the defendants each provided a detailed chronology as part of their closing submissions. In order to give further context to this decision, excerpted below are some key dates and events:

2010

November 26, 2010 – TerraWest Environmental Inc. samples and reports upon the soil and groundwater on the lands. They prepare a report which also includes the up-island properties. This report provides a comparison to a report prepared in 2005/2006 when Budget Steel was sold by Mr. Berman and Pt. Ellice.

2015

November 25, 2015 – Stantec Consulting Ltd. conducts soil and groundwater investigation of the Pt. Ellice lands leased to Schnitzer Steel. They compare the soil samples to the baseline report prepared in 2005/2006.

2016

October 12, 2016 – Pt. Ellice Properties Ltd. and Ralmax sign a mutual confidentiality and non-disclosure agreement.

2017

November 29, 2017 – Ralmax enters into a binding agreement to sell the David Street and Henry Avenue properties in order to “toughen up” the balance sheet of Ralmax.

December 5, 2017 – Mr. Maxwell emails Mr. Berman and asks if he can “buy your property”.

December 22, 2017 – Ralmax subsidiary Trio Ready-Mix confirms intention to purchase a concrete plant from Pacific Site Contractors.

2018

January 8, 2018 – Meeting between Mr. Austin, Mr. Maxwell and Mr. Leibel. Discussions occur regarding Ralmax's interest in purchasing the Pt. Ellice lands. Mr. Maxwell explains Ralmax's intended use of the lands. Mr. Austin makes detailed notes which he has Ralmax review before he forwards them to Mr. Berman.

January 28, 2018 – Ralmax offers to buy the Pt. Ellice lands for $35,000,000 plus an indemnity for the remediation of the lands, subject to a review of the leases and title.

February 1, 2018 – A confidentiality and non-disclosure agreement are executed by Pt. Ellice Properties Ltd. and Ralmax.

February 9, 2018 – Ralmax offers to increase the purchase price of the Pt. Ellice lands from $35,000,000 to $35,500,000.

February 21, 2018 – Mr. Austin meets with Mr. Maxwell and Mr. Leibel and presents Ralmax with a draft term sheet prepared by Mr. Austin with input from Mr. Berman and lawyer, Max Collett.

February 28, 2018 – Mr. Austin and Mr. Leibel agree on a purchase price of $36,000,000 for a share sale.

March 2018

March 7, 2018 – Mr. Maxwell tells Mr. Leibel and Mr. Austin to stop negotiating.

March 9, 2018 – Mr. Leibel presents Mr. Austin with two options from Mr. Maxwell: 1) a term sheet reflecting an asset sale; or 2) a term sheet for a hybrid sale.

March 10, 2018 – Mr. Maxwell signs the final version of the term sheet for a hybrid sale, titled "Term Sheet – Hybrid Sale".

March 11, 2018 - Mr. Berman signs the "Term Sheet – Hybrid Sale" on behalf of Pt. Ellice Properties Ltd.

April 2018

April 5, 2018 – Pt. Ellice Properties Ltd. and Ralmax execute an amendment to the 2018 confidentiality and non-disclosure agreement.

April 11, 2018 – Mr. Leibel emails Mr. Austin and Mr. Berman to acknowledge the parties shared intent was to have the deposit paid after signing of the Term Sheet rather than the APA. Mr. Austin forwards this email to Mr. Berman, who responds noting the reference to the APA in the Term Sheet was “clearly a legal deficiency”.

April 12, 2018 – Mr. Austin reviews the first draft of the APA circulated by Mr. Leibel. Mr. Austin responds that the APA is lacking security for the environmental indemnity.

April 13, 2018 – Ralmax deposits $3,500,000 to Pt. Ellice solicitors’ trust account on undertakings.

April 16, 2018 – Mr. Leibel advises Mr. Austin that Mr. Maxwell believes the guarantees provided for the indemnity are significant and that Mr. Maxwell is open to showing their financial position.

April 20, 2018 – Mr. Kerr emails Mr. Collett and sets out proposal for collateral mortgages.

April 21, 2018 – Mr. Leibel proposes to Mr. Austin a collateral mortgage as the security. It would be a mortgage over the four small lots of the Pt. Ellice lands.

April 24, 2018 – Mr. Leibel informs Mr. Austin that Ralmax will no longer discuss providing a collateral mortgage as security and Ralmax’s bank does not agree to Ralmax providing a collateral mortgage. He asks Mr. Berman to select one of the following to discuss: a collateral mortgage over Mr. Maxwell’s farm, or $5 million in cash in an escrow account.

April 24, 2018 – Mr. Austin advises Mr. Maxwell that Mr. Berman wishes to pause negotiations and that the environmental security is important to Mr. Berman but that he is open to the form of security.

April 24, 2018 – Mr. Maxwell sends Mr. Berman an additional $20,000 as a good faith payment towards Mr. Berman's legal fees.

April 25, 2018 – Mr. Austin withdraws from further involvement.

April 25, 2018 – Ralmax gives notice that it has removed the due diligence condition and pays the second deposit of $2 million into the trust account of Pt. Ellice's solicitors.

May 1, 2018 – Mr. Kerr provides Mr. Collett with a copy of two remediation cost estimates: a report prepared by Alana Duncan of SNC-Lavalin dated April 24, 2018, and a report prepared by Hemmera Envirochem Inc. dated April 25, 2018.

May 7, 2018 – Mr. Kerr writes to Mr. Collett and Mr. Horte to confirm they are released from Mr. Kerr's undertaking regarding the first deposit paid (of $3.5 million) and that the deposits are governed by the Term Sheet.

May 9, 2018 – Mr. Kerr emails a revised draft Post-Closing Obligations and Environmental Indemnity Agreement ("PCOEIA") providing for security of cash in escrow of $855,000.

May 10, 2018 – Mr. Collett advises Mr. Kerr that the security proposal is insufficient and recommends Mr. Kerr withdraw the draft PCOEIA.

May 28, 2018 – Mr. Berman instructs his professional team to "press for maximum advantage".

May 29, 2018 – Mr. Collett sends Mr. Kerr a revised draft PCOEIA. In Schedule C, the security is changed to $5 million cash either to be released after five years of the closing date or to be released after a Certificate of Compliance is obtained, which ever event occurs sooner.

June – August 2018

June 8, 2018 – Mr. Collett departs on sabbatical. Mr. Horte takes over as primary counsel for the defendants.

June 25, 2018 – Mr. Horte advises Mr. Kerr that Mr. Berman is struggling to reconcile the value of previous security proposals with the lesser value of the current security proposal.

July 5, 2018 – Mr. Kerr writes to Mr. Horte offering to increase the amount of cash security to 175% of Hemmera Envirochem Inc.'s estimate to obtain a Certificate of Compliance.

July 5, 2018 – Mr. Horte advises Mr. Kerr that the parties remain far apart on the issue of security and that the value of the security offered by Ralmax has decreased substantially since late April of 2018.

July 17, 2018 – Mr. Horte emails Mr. Kerr to state the views of Mr. Berman as follows: The NDA means the parties did not intend the Term Sheet to be binding; and the defendants will complete the sale only if terms of the APA, SPA and PCOEIA are substantially consistent with Mr. Horte's July 13th drafts and the deposits are forfeit if Ralmax does not close on that basis.

July 25, 2018 – Mr. Horte emails Mr. Kerr that "the term sheet is not binding and our clients are not under any legal obligation with respect to any of the terms described in it, or otherwise proceed with any such transaction". Mr. Horte advises that Mr. Berman is open to discussions on the possibility of closing on the basis of the July 13th draft agreements and to reviewing new proposals for a performance bond and insurance policy option for security once available in a fully developed state.

July 31, 2018 – Mr. Kerr sends an email and letter confirming funds are held in their trust account, and Ralmax is ready, willing and able to complete the sale.

August 1, 2018 – Ralmax files and serves the notice of civil claim initiating this action.

COURT HISTORY

March 4, 2020 – Order made after application by the plaintiff seeking 11 orders concerning the production of privileged documents. I ordered that the defendants

provide an updated list of documents that lists and describes the privileged documents to allow the plaintiff to assess the claim of privilege.

July 21, 2020 – Application by the plaintiff for adjournment of the trial set for October 5, 2020 for reasons related to Covid-19. Order granted by Associate Judge, formerly Master, Bouck.

January 7, 2021 – Application by the plaintiff seeking to have Mr. Berman found in contempt for not attending in person examinations for discovery in November 2020 during the Covid-19 pandemic, to have defendants' response to civil claim struck, and for extended examination of Mr. Berman. Justice Thompson dismissed the applications with respect to contempt and to striking pleading, and granted the application for four days of examination for discovery of Mr. Berman.

March 1 and 2, 2021 – Application by the plaintiff seeking orders concerning production of privileged documents. Justice Saunders granted two orders by consent of the defendants and dismissed the remaining orders sought.

December 17, 2021 – Application by the plaintiff seeking six orders concerning the production of privileged documents. Order granted by Justice Saunders (2021 BCSC 2454) requiring the defendants to disclose all emails to or from the defendants' accountants by moving them from Part 4 to Part 1 of their list of documents.

February 15, 2022 – Application by the plaintiff seeking access to defendants' properties for the plaintiff's environmental consultants to conduct a physical inspection of the properties and water lot. Order granted by Mayer J. (as he then was) (2022 BCSC 240).

January 10, 2023 – Application by the plaintiff mid-trial seeking to have the defendants' response to civil claim struck and to have the defendants found in contempt for late disclosure and failing to disclose certain documents. This application necessitated an adjournment of the trial and resulted in the decision at 2023 BCSC 1684 on September 26, 2023. In that decision, I declined to order a strike to the defendants' pleadings, although I did find that some late disclosure did occur.

SOME GENERAL ISSUES OF LAW AND FACT

Credibility and Reliability

[82] Ralmax argues at trial that credibility and reliability of the two principals, Mr. Maxwell and Mr. Berman is a critical issue in the case. Ralmax argues that Mr. Maxwell's evidence is beyond reproach, whereas Mr. Berman's evidence is replete with inconsistencies and dishonesty.

[83] The defendants do not accept that credibility and reliability of witnesses is a central issue in this case. The defendants accept that the parties have different views of the events but do not allege that Mr. Maxwell's or any other witnesses' account of the events is fabricated. Instead, the defendants argue that the evidence demonstrates that the parties did not intend for the Term Sheet to be a binding contract and that it does not contain the essential terms of a contract.

[84] It is my task to determine the issues raised by the pleadings after an assessment of all of the evidence and by including an assessment of credibility and reliability of the witnesses' testimony. In my September 2023 mid-trial ruling, I declined to make any conclusions on credibility mid-trial.

[85] In *Concord Pacific Acquisitions v. Oei*, 2019 BCSC 1190 [*Concord Pacific*], Voith J. (as he then was) provided a helpful summary of the concepts of reliability and credibility commencing at para. 79:

> [79] The distinction between reliability and credibility, each of which is relevant to the assessment of a witness's evidence, was explained in *R. v. H.C.*, 2009 ONCA 56, where Justice Watt, for the Court, said:
>
> > 41. Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
> >
> > i. observe;
> >
> > ii. recall; and
> >
> > iii. recount
> >
> > events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

> [80] Further guidance in relation to the assessment of credibility was provided in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, where the Court said:
>
> > Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
>
> [81] I am mindful that assessments of credibility are based on a consideration of the evidence as a whole rather than on weighing pieces of evidence individually: *McCabe v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 77 at paras. 5–6. Having said this, the evidence at trial occupied more than 40 days. The parties relied on discovery and deposition evidence that covered a further 25 days of evidence. They relied on hundreds of text and WeChat communications, on a significant volume of material from other proceedings and on a relatively significant number of documents. In such circumstances it is simply not realistic to describe all of the evidence that may be relevant to a particular finding of credibility or to any other finding of fact. Nor is it possible to address all of the issues of credibility, or conflicts in the evidence of the parties, that were raised by the parties. Concord's written submission correctly observes that the evidentiary record is “rife with contradictions and inconsistencies that are ultimately of little moment”.

[86] Credibility and reliability of the witnesses’ evidence and particularly the two principal witnesses, is an aspect of the evidence that I must consider. However, I have concluded that the credibility assessment is not determinative of whether the Term Sheet is an enforceable contract. One of the reasons for this is that after considering the totality of the evidence in this case, I have come to the opinion that the evidence of Mr. Maxwell and Mr. Berman with respect to many of the issues foundational to the preparation and signing of the Term Sheet is similar and is not in dispute.

[87] Both Mr. Maxwell and Mr. Berman testified over several days and were cross-examined. They were each taken to a significant number of documents and emails. In the case of Mr. Berman, he was taken to transcripts of his examination for discovery several times in an attempt to challenge his credibility.

[88] Having heard Mr. Maxwell's and Mr. Berman's evidence for several days each, I believe that I understand their very different approaches to business and to the potential formation of a significant contract. As Mr. Maxwell acknowledged in his evidence, Mr. Berman, as a counterparty, was very thorough, careful, and cautious. I agree with that characterization. In contrast, I would describe Mr. Maxwell as casual and freewheeling in his approach – willing to complete a contract of tens of millions of dollars on a handshake. In my opinion, many of the difficulties that arose in this case may have arisen because of the fact that Mr. Maxwell and Mr. Berman took a very different approach to their business dealings. With these fundamental differences in their approach to business, it was always going to be difficult for the parties to reach a "meeting of the minds" and a binding and enforceable contract.

[89] In my opinion, this case cannot be resolved by simply counting how many times Mr. Berman was impeached, or impeachment of Mr. Berman was attempted, and then concluding that Mr. Berman was not credible or reliable. Conversely, I cannot conclude that there was an enforceable contract simply because Mr. Maxwell was not impeached, or was generally considered credible and reliable even by the defendants. It is trite law that I can accept all, some or none of a witnesses' evidence.

[90] There are some aspects of the evidence of Mr. Berman that cause me concern. In particular, it is unclear to me what knowledge Mr. Berman had of some pre-existing environmental reports on the lands and to what extent those reports factored into his position on the environmental condition of the lands. I touched on this issue in my mid-trial decision on the disclosure application. It is my opinion however, Mr. Berman was consistent throughout all of the background to this dispute and in his evidence at trial that if he was to sell the Pt. Ellice lands to Ralmax, he wanted to be protected against any claims or liabilities that would arise – "... for me, for my estate, for my

beneficiaries, for my alter ego trust, for past employees, anybody that might be connected to the damages, to the environmental condition I wanted protected." The issue of security for the environmental issues, is not hindsight reasoning by the defendants. This was an issue that was identified by Mr. Berman from the outset.

[91] I found Mr. Berman's evidence on security for the environmental indemnity convincing. For example, Mr. Berman was questioned about the instructions he gave to his lawyers on May 28, 2018, and in particular "forfeiture of the cash security to be added in the event that the clean up is not accomplished in 5 years".

[92] When asked in cross-examination: "So, if Ralmax submits the CFC application in the fourth year and the government takes two years to approve it, which is outside of five years, you get $5 million in cash?". Mr. Berman replied: "Mr. Maxwell told us that he could have this job completed in two years. He told us that he had an environmental company. He's familiar with the industry. He was very comfortable with the condition of the property, and he said that he could have the work completed in two years. So, five years seemed to be a generous amount of an extension. And if he would, if he would do the work that he said he was familiar with and could do, then there was no risk." In my opinion, that particular exchange was not only convincing, it also accurately conveyed the sense of confidence that Mr. Maxwell had conveyed about Ralmax's ability to remediate the lands, both to Mr. Berman during the negotiations and in his evidence at trial.

[93] By way of a general observation with respect to other witnesses called for both sides, I found all of the witnesses in this trial to be making every effort to give honest and reliable evidence. It is clear to me, that the conflict between Mr. Maxwell and Mr. Berman has had significant emotional impacts on some of the other witnesses. In particular, this case has been very difficult for Mr. Leibel and Mr. Austin, who were both heavily involved in the initial discussions before the signing of the Term Sheet and afterwards as the matter was attempted to be brought to conclusion. I found both Mr. Leibel and Mr. Austin to be credible and I believe each of them brought their high personal integrity to their task.

[94] Similarly, I found the legal witnesses, Mr. Kerr for Ralmax, and Mr. Collett and Mr. Horte for the defendants to be credible and reliable. I am satisfied they brought their duty as Barristers and Solicitors, and officers of the court to their task as witnesses. Mr. Kerr and Mr. Collett had worked closely together at earlier points in their legal careers and had personal respect for each other. When differences arose as the documents were being drafted and issues were being discussed, it was because, in my opinion, each lawyer was attempting to represent and protect their clients' best interests.

[95] Mr. Maxwell testified that when he signed the Term Sheet, he thought that Mr. Collett and Mr. Kerr would be able to work out the details and finalize the wording for the underlying agreement or, as it turned out, agreements. The Term Sheet does say under the "Environmental" heading at number 8 "Detailed wording to be refined by Max Collet [sic] and Eric Kerr". However, in my opinion, Mr. Maxwell did not seem to consider that the lawyers would always be obliged to represent their sides' best interests. He also did not appear to factor in the difference between his own personal view of the environmental risk on the property compared to Mr. Berman's clearly stated concerns. Therefore, in my opinion, Mr. Maxwell's view at the time the Term Sheet was signed was overly optimistic and perhaps even naïve, especially since he knew that the ongoing protection from environmental liability for the lands was critically important to Mr. Berman. In saying this, I do not mean to be critical of Mr. Maxwell, and again, this view may have emanated from Mr. Maxwell's way of doing business compared to that of Mr. Berman.

[96] After hearing the totality of the evidence at trial, I have concluded that I do not agree with the plaintiff's submission that credibility is a key issue in this trial. In addition, on the matters material to my analysis, I am of the view that the background evidence is similar and a serious credibility conflict does not arise on the evidence.

The Resignation of Mr. Austin

[97] In late April of 2018, after being heavily involved in the negotiation and drafting of a draft term sheet in February 2018, the signed Term Sheet at issue in this case, and

the follow up agreements, Mr. Austin withdrew from involvement in the potential sale. Although negotiations continued until July 2018, they did so without Mr. Austin's involvement. Lawyers for Mr. Berman and Pt. Ellice took the lead for the defendants.

[98] On April 25, 2018, Mr. Austin wrote an email to Gordon Chan, accountant and financial advisor for Mr. Berman and Pt. Ellice, outlining his reasons for withdrawing. In the email, Mr. Austin explained that in his view Mr. Berman had decided on a course of action that he was not prepared to be a part of. He wrote that it was immoral and that Mr. Berman was risking a major lawsuit.

[99] Mr. Austin acknowledged in his direct evidence at trial that with the passage of time, he has come to realize that Mr. Berman's concerns in April 2018 were well founded. Mr. Austin explained what had preceded that email. He explained that he had worked for four months trying to put a deal through and in the three to four days preceding his resignation, he had been through a "roller coaster" of emotions. He testified that he had lost focus that he was there to work for Mr. Berman's interests and that he had become obsessed with getting the deal through. He testified that he took Mr. Berman's call for a pause on negotiations too personally. He also confirmed that Mr. Berman was not walking away from the deal, but that he simply wanted a pause in negotiations.

[100] Having heard the evidence including the emails that were being exchanged between the parties at the time, I agree with Mr. Austin's testimony that at the time he resigned, Mr. Austin had lost focus and was too close to the Ralmax side. It is easy to see how that could happen since the evidence reveals that the Ralmax approach to business was engaging and Mr. Leibel and Mr. Maxwell were pleasant and convivial counterparties. In Mr. Austin's words, Mr. Leibel was "a pleasure, professional and a gentleman". Mr. Austin described Mr. Maxwell as very charming and very smart, and he liked his vision. From the outset, Mr. Austin was persuaded by the visionary and community minded long-term vision for the Pt. Ellice lands by the Ralmax side. All of these factors likely influenced Mr. Austin's interest in completing the deal on behalf of Mr. Berman.

[101] Although the sale did not complete, Mr. Austin was paid $100,000 for his efforts by Mr. Berman. After Mr. Austin withdrew and he learned that Ralmax had removed its due diligence condition and paid the second deposit, Mr. Austin was “flabbergasted”. In his view, there was no need for Ralmax to take such a big risk and that to do so was like “pushing a square peg into a round hole”.

[102] As I have already said, I found Mr. Austin to be a credible witness and I accept his evidence without reservation. I accept his reasons for his resignation and his view of that decision now. Mr. Austin was a careful and cautious witness who made every effort to provide accurate evidence. Mr. Austin opined in his evidence to the effect that if the break that Mr. Berman wanted to take from discussions in late April, had in fact been taken, the sale might have been able to complete. He may well be right. Instead, positions hardened, the parties became stubborn and by early June 2018, the parties were clearly on a litigation track.

[103] In my opinion, the resignation of Mr. Austin has no impact on the ultimate resolution of this case. Mr. Austin felt that Mr. Berman had a moral obligation to complete on the Term Sheet and that he should not take a break in negotiations. That opinion does not assist in determining whether or not the Term Sheet is a binding contract of purchase and sale. Mr. Austin’s resignation is simply one of the background facts that I must consider when I am assessing the evidence.

[104] Finally, there are many emails between Mr. Berman and Mr. Austin that were disclosed pre-trial as a result of the ruling of Justice Saunders (2021 BCSC 2454). Those emails may ordinarily have been privileged. As a result, there are numerous examples in the emails that the concerns of Mr. Berman relating to security for the environmental indemnity were present long before the sale ultimately collapsed in July 2018. In my opinion, those emails support Mr. Berman’s position at trial and show that Mr. Berman’s concern with respect to security was longstanding. As I have outlined, Mr. Berman made his concerns about the environmental issues known to Mr. Maxwell when he first talked to him in 2017. Mr. Maxwell knew about Mr. Berman’s three conditions, and referred to them in his own evidence.

THE EXPERT EVIDENCE

[105] There were a number of witnesses qualified as experts during the trial including in the areas of commercial real estate transactions, accounting, and environmental remediation.

[106] With respect to commercial real estate transactions, the late Ralston Alexander, K.C., a lawyer with expertise in real estate and commercial transactions testified for Ralmax and filed an expert report. Jeffrey Merrick provided an expert report and testified for the defendants. Mr. Merrick is also a lawyer, specializing in major commercial real estate transactions amongst other areas.

[107] Ralmax also called a commercial real estate broker, Ty Whittaker.

[108] The law is clear that expert witnesses and evidence are provided to help a trier of fact decide an issue; they are not there to decide the issue for a trier of fact.

[109] Rule 11-2(1) of the *Supreme Court Civil Rules* states that "[i]n giving an opinion to the court, an expert ... has a duty to assist the court and is not to be an advocate for any party." Further, as stated by Justice Moldaver in *R. v. Sekhon*, 2014 SCC 15, "this Court has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact. The trier of fact, whether a judge or a jury, is responsible for deciding the questions in issue at trial": at para. 75. Finally, in *Royce Holdings Inc. v. Jupe*, 2018 BCSC 2025, Justice Skolrood (as he then was) stated that "the role of an expert witness is to assist the Court by providing an impartial and objective opinion on matters outside the experience and knowledge of a judge or jury: at para. 81.

[110] Traditionally, the law was clear that an expert should not opine upon the ultimate issue, in this case whether or not the Term Sheet was a binding contract of purchase and sale. However, this rule on opining upon the ultimate issue has been somewhat relaxed in the case law. As Justice Smith explained in *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 232, leave to appeal to SCC ref'd, 37817 (8 March 2018):

> … Historically, opinion evidence was inadmissible when it touched on one of the ultimate issues before the court. The rule is no longer one of general application. Even so, opinion evidence that approaches the ultimate issue has the potential to distort the fact-finding process by cloaking the witness with an aura of specialized knowledge on critical issues. As a consequence, the admissibility criteria must be applied more strictly as the proposed evidence approaches the ultimate issue the court has to decide: *Mohan* at 24−25.

[111] Further, as explained by Justice McLachlin (as she then was) in *R. v. Burns*, [1994] 1 S.C.R. 656 at 666, 1994 CanLII 127:

> ... While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: [citations omitted].

[112] Ultimately, it is my role as the trier of fact of this case to determine the ultimate issue of whether or not the Term Sheet is a binding contract of purchase and sale. I may use all, some or none of the expert witnesses' evidence and testimony to assist me in making such a determination.

[113] One aspect of Ralmax's expert reports is deserving of comment. Many of Ralmax's experts were provided with copies of examination for discovery transcripts for review prior to preparing their reports. As found by Justice Ker in *Friebel v. Omelchenko*, 2013 BCSC 948, there is no rule prohibiting experts from reviewing examination for discovery transcripts, but an expert who does so must clearly set out the facts from those transcripts upon which their opinion is based. I agree with the defendants' submission that many of Ralmax's experts have failed to set out those facts upon which their opinions are based.

[114] I have considered the expert evidence provided, particularly by the legal experts, for the purpose for which it was proffered – to provide guidance in the area of practice and procedure in large commercial real estate transactions. However, in my opinion, the expert evidence does not and should not determine the ultimate issue. The case law is clear that I, the trier of fact, must determine the ultimate issue. Overall, I agree with the defendants that this was an atypical transaction, with a very motivated purchaser and a

reluctant seller. Mr. Merrick highlights some of the atypical aspects of this transaction in his report.

[115] Throughout the trial, Ralmax disputed the defendants' characterization of Mr. Berman as a reluctant seller. However, in my opinion, the evidence abundantly supports that characterization. By way of example, as Mr. Maxwell acknowledged, Mr. Berman was a thorough, careful and cautious counterparty. Mr. Berman responded to Mr. Maxwell's initial approach about a possible sale in the 1980s and in 2017, with a query about whether Ralmax would be interested in leasing the lands. Mr. Berman wanted to put a pause on negotiations when Ralmax could not provide a collateral mortgage as security in April 2018. Although Ralmax pointed to the fact that Mr. Berman listed the lands for sale at around the time of Mr. Berman's divorce in 2005, ultimately Mr. Berman did not sell the lands and did not accept the Ralmax offer at that time. In my opinion, all of these examples support the fact that Mr. Berman was a reluctant seller.

THE PROPOSED USE OF THE PROPERTY BY RALMAX

[116] In submissions, the defendants argued that the proposed use of the property by Ralmax is irrelevant to the issues that must be decided on the trial. I agree with that submission.

[117] Mr. Maxwell's proposed use of the industrial lands was outlined at the start of the serious negotiations. In a January 8, 2018 email, the Ralmax plan for the property was summarized "... to invest in industrial infrastructure that will service the Victoria market for generations. An example is silo storage for aggregates to service a concrete redi-mix plant they wish to build on their adjoining property on the east. The long term plan is that aggregate would be brought in by barge; loaded into the silos by conveyor belt; then fed to the redi-mix plant by underground tunnel. In the short term they would stockpile that aggregate on the ground."

[118] In my opinion, the proposed use of the lands was only relevant as an argument to persuade Mr. Berman, the long-term landowner, to sell to Ralmax. While the proposed use of the Pt. Ellice lands is admirable, visionary and arguably in the

long-term interests of the City of Victoria, it is not a basis upon which I can decide whether the Term Sheet is a binding and enforceable contract.

IS THE TERM SHEET A BINDING CONTRACT?

[119] In *Concord Pacific* at para. 311, the Court stated that in order to establish the existence of a contract, a plaintiff must establish two requirements. Justice Voith stated that:

> [311] In order to establish the existence of a contract, a plaintiff must establish two things. These two requirements were summarized by Gillese J.A. in *UBS Securities Canada, Inc. v. Sands Brothers Canada. Ltd.*, 2009 ONCA 328 at para. 47:
>
> > As has been mentioned, the trial judge gave thorough, thoughtful reasons for decision. After setting out the facts in detail, she reviewed certain basic principles of contract formation. Those principles can be summarized as follows. For a contract to exist, there must be a meeting of minds, commonly referred to as consensus ad idem. The test as to whether there has been a meeting of the minds is an objective one -- would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract? As intention alone is insufficient to create an enforceable agreement, it is necessary that the essential terms of the agreement are also sufficiently certain. However, an agreement is not incomplete simply because it calls for the execution of further documents.

[120] Similarly, in *Angus v. CDRW Holdings Ltd.*, 2022 BCSC 1001 [*Angus* BCSC], aff'd 2023 BCCA 330 [*Angus* BCCA], Mayer J. (as he then was) set out the legal framework to establish a contract as follows:

> [7] Parties must intend to be legally bound by their agreement for it to bind them. As well, the essential terms of the agreement must be settled. Finally, the terms agreed upon must be sufficiently certain. Whether these three requirements have been met must be determined from the standpoint of the objective reasonable bystander and not the subjective intentions of the parties. The determination is contextual and must take into account all material facts including communications between the parties and conduct before and after the agreement is made: *Oswald v. Start Up SRL*, 2021 BCCA 352, at para. 34.
>
> [8] This Court will not enforce an agreement to agree or a set of guiding principles to be negotiated into specific rights and obligations or a preliminary agreement where the understanding or intention of the parties is that their legal obligations are to be deferred until a formal contract has been approved and executed: *Berthin v. Berthin*, 2016 BCCA 104, at para. 48.

[121] Accordingly, in order to find the Term Sheet is an enforceable contract I must first determine whether there was a meeting of minds, that is whether both parties intended to be bound by the Term Sheet, which must be determined on an objective basis. Secondly, even if I am satisfied that there is objectively an intention to contract, I must be satisfied that the essential terms of the agreement are settled and sufficiently certain.

[122] With respect to the second part of the test, in *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416 [*Ai Kang*], aff'd 2024 BCCA 299, Justice Marzari was considering the legal status of a document signed by both parties. One of the parties resiled from the document arguing that it lacked essential terms and therefore was not a binding contract. Justice Marzari found the document was a valid contract and ordered specific performance.

[123] As Justice Marzari noted in *Ai Kang* where there is an intention to contract, the court must strive to give meaning to that agreement. However, a court cannot create an agreement on essential terms where none exists: *Ai Kang* at para. 260.

Subjective intention to contract

[124] Since the test is an objective one, the subjective belief or intention of the parties is less relevant: *Concord Pacific* at para. 316. However, since on all of the evidence, it was the principals Mr. Maxwell and Mr. Berman who were driving this transaction, and they have very different opinions on the effect of the Term Sheet, I will briefly discuss their subjective views.

Mr. Maxwell

[125] As I have already stated, it is clear from his evidence at trial that Mr. Maxwell viewed the Term Sheet as a binding contract of purchase and sale. In his evidence Mr. Maxwell identified the Term Sheet as a contract to purchase the Pt. Ellice lands. In Mr. Maxwell's words "... we have agreed to – to all the essential terms, and with the exception of one mistake that was corrected on this document it is the document." Mr. Maxwell went on to explain that the "mistake" was that on signing he would put up three and a half million dollars of faith money. He explained how the "mistake" occurred:

> And it had to be one of the lawyers because it wasn't—it was not one of the four of us because Mr. Leibel mentioned it to me, and all four of us agreed there had been a mistake made. That it had been changed from three and a half million dollars on signing to three and a half million dollars within two days of the asset purchase agreement being – being signed. And we all knew that was a mistake. We just didn't pick it up. One of the lawyers had to have changed it. Don't know which one.

[126] In his evidence, Mr. Maxwell noted that when he signed the Term Sheet on March 10, 2018, there were several differences from a previous document dated February 21, 2018. As he testified on October 14, 2022:

> The previous document had "Draft" on it. The previous document had – had blanks on it. The previous document was subject to the lawyers approving it. The previous document did not have anything in the way of signature on it. The previous document to me and in my mind was a term sheet.

[127] As I have already stated, Mr. Maxwell went on to acknowledge that the March 10 Term Sheet, which was titled "Term Sheet – Hybrid Sale", should not have had that title and that was a mistake:

> ... we should have taken that off there. It should have had no title or it should have had a different title, but it – it's a minor mistake as far as I'm concerned. It's unfortunate.

[128] Mr. Maxwell explained "All the four of us – Jason Austin, Fred Berman, myself and Gary Leibel – understood what we were doing". By this testimony I understood that Mr. Maxwell strongly believed that all four, each principal and their designated representative or second in command, were of the view that the March 10 Term Sheet represented a binding contract of purchase and sale.

[129] In my opinion, Mr. Maxwell's confident statements about the binding nature of the Term Sheet and what was in the minds of his counterparty guided his own actions after the Term Sheet was signed. However, there are obvious difficulties with Mr. Maxwell determining what was in Mr. Berman's mind. These difficulties are amplified when, as was the case here, the principals were speaking to each other through their intermediaries, Mr. Austin and Mr. Leibel.

[130] The version of the Term Sheet that was signed by both parties was prepared by Mr. Leibel under a tight timeline guided by Mr. Maxwell's directions. Mr. Austin had advised Mr. Berman that Ralmax was "perilously close to walking" prior to the document being received by the Pt. Ellice side.

[131] While Mr. Maxwell viewed the Term Sheet as binding, it is not clear on the evidence that all of Mr. Maxwell's advisors shared his view on the binding nature of the Term Sheet. For example, in mid-April 2018 Gary Leibel expressed uncertainty about the impact of Ralmax being unable to provide Mr. Berman a collateral mortgage over four lots as security under the environmental section of the Term Sheet. In an email dated April 16, 2018, Mr. Austin wrote to Fred Berman cc'd Max Collett:

> [Ralmax's] bank is giving them grief on mortgage security for us for the environmental security. Gary and I realize that this could be a deal breaker and we are exploring ways to resolve it. I'll get back to you later today on this.

[132] I accept that email as confirmation of Mr. Austin's and Mr. Leibel's view of the possible impact of the plaintiff's inability to provide a collateral mortgage.

[133] On July 26, 2018, Sage Berryman a consultant to Mr. Maxwell, was so concerned about Mr. Maxwell's actions that she wrote him an email expressing all of her concerns about the possible transaction. In particular she wrote:

> ... You have never allowed someone else so much involvement or ongoing tie-in to your business and last night whenever Gary and I would push back on a clause in the agreement the answer was "well, I think we could sue Fred for that" as our answer.

[134] As I have already explained, Ms. Berryman was not called on the trial. Her email was put to Mr. Maxwell in cross-examination, and he stated that the answer "well, I think we could sue Fred for that" was a statement that could be attributed to Mr. Kerr, and not to Mr. Maxwell. This could be considered hearsay since Ms. Berryman did not testify and I do not believe the email was put to Mr. Kerr. Nevertheless, I am of the opinion that the fact this statement was made at all does illustrate a lack of certainty of terms that is recognized by the Ralmax side.

Mr. Berman

[135] Ralmax argues that Mr. Berman intended to enter a binding contract. At trial, Mr. Berman testified that he viewed the Term Sheet as an agreement on a number of terms, such as price, with other terms yet to be agreed on. Most importantly to Mr. Berman, the form and amount of security for the environmental indemnity provided by Ralmax was yet to be agreed on.

[136] Ralmax points to many answers provided by Mr. Berman during his evidence which they say proves that Mr. Berman by signing the document, intended to enter a binding contract for the sale of the property. In particular, Ralmax highlights the following passage from Mr. Berman's evidence:

> Q And we can say that you agreed to all the terms in the term sheet?
>
> A Yes.
>
> Q So all these terms are settled, right, Mr. Berman?
>
> A All the terms are set out in the term sheet.
>
> Q And they're not further to any negotiation – not subject to any further negotiation, right?
>
> A Not unless the parties agree.
>
> Q So, what we have then is an agreement on its terms, so we have an agreement on the parties, the properties to be sold, the purchase price and a closing date, correct?
>
> A Correct.

[137] Ralmax argues that this evidence establishes that the Term Sheet was a binding and enforceable contract even in Mr. Berman's mind.

[138] However, the difficulty with this line of questions and answers is that it demonstrates what the Court in *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, referred to as the "serious semantical difficulty" in calling the parties' discussions and communications an "agreement" or "contract" because the use of such words usually denotes a completed bargain. The Court drew a distinction between such words and a legally enforceable agreement or contract: at para. 6. At no point in the above passage, or indeed at any point in his evidence, did Mr. Berman agree that the Term Sheet was a legally enforceable and completed contract.

[139] In my opinion, all of Mr. Berman's actions after he signed the Term Sheet demonstrate his strong belief that the Term Sheet was fulfilling the customary purpose referred to in Ralston Alexander, K.C.'s report at page 2, "... as a roadmap to conclude an agreement between or among the parties and in my experience, never constitutes a final agreement." As the defendants' legal expert Mr. Merrick noted in his report at page 3, "... it is not uncommon for a Term Sheet to lack any statement describing it as non-binding simply because, as noted above, parties generally understand they are not entering into a binding agreement in respect of the transaction at the Term Sheet stage."

[140] Mr. Berman was a very experienced businessperson, and it is clear he was very familiar with the purpose of a term sheet. In my opinion, Mr. Berman's instructions to his advisors on more than one occasion after the Term Sheet was signed to "press for maximum advantage" reflected his view that the Term Sheet was not a binding contract of purchase and sale. For example, in an email to his lawyer Mr. Collett on May 28, 2018, when discussing the PCOEIA and under the heading "Collateral Security", Mr. Berman wrote:

> As recently suggested, this part of the agreement will be the most contentious and I believe a deal breaker. So be it if it comes to that. I wish we would have resolved this part at the beginning as it would have saved hours of prior discussion and debate.

[141] This passage also demonstrates Mr. Berman's unwavering view about the importance of the environmental security term. In addition, Mr. Berman's comments in the emails to his advisors to press for maximum advantage, were not made until he started to become impatient with what Mr. Collett characterized, in a May 4, 2018 email to Mr. Kerr, in the following way:

> ... Fred has been buffeted by the twists and turns, offers and retractions, that have characterized the negotiations thus far. He is very concerned that Ralmax advanced negotiations without first confirming its CIBC or other third party financing. That has resulted in the financing driving the transaction (and most importantly, the security available to the vendor). Fred seeks confirmation that Ralmax will reimburse him for third party expenses he incurrs [sic] from and after May 1, 2018 in excess of $20,000, in connection with completing this transaction. In other words, Fred will commit up $20,000 toward third party costs, but does not want an open-ended commitment. He also wants time certainty. He wants us

> to establish an outside date for the parties to settle the terms of the Share Purchase Agreement, Asset Purchase Agreement, and Post-Closing Obligations and Environmental Indemnity Agreement (PCOEIA), and an outside date for execution of the Share Purchase Agreement and Asset Purchase Agreement.

[142] Another example of Mr. Berman's strongly held view that there was no binding and enforceable contract, after the Term Sheet was signed, occurred during cross-examination surrounding terms in the Share Purchase Agreement ("SPA"). For this purpose, I will only include Mr. Berman's answers since they give insight into his views:

> A What I'm saying is that my net worth had to be protected. And if those taxes came into play, it wouldn't satisfy my pre-conditions for the sale.
>
> ...
>
> A There was no gun put to Mr. Maxwell's head on this transaction. If he wanted the transaction, that term had to be included that way.
>
> ...
>
> A I don't agree with you. Not in a transaction of this kind. This is – this was not a typical transaction. This was a – a hot in pursuit purchaser that had to have this asset, and an indifferent – indifferent seller. If he wanted the property, it had to be under those terms or there wasn't going to be a transaction.
>
> ...
>
> A I wasn't sticking anybody with anything. It was up – it was up to Mr. Maxwell to make up his mind whether he wanted to agree to those terms or not.

[143] Prior to signing the Term Sheet, Mr. Berman was reminded by Mr. Austin in an email dated March 6, 2018 that "Max's advice was not to sign something you do not intend following". Mr. Berman's evidence at trial was that he intended to follow the terms of the Term Sheet, and those terms could not be changed unless the parties agreed. However, in Mr. Berman's view there were important issues yet to be decided, most significantly, the security for the environment indemnity.

[144] In summary, while Mr. Maxwell was firmly of the opinion that the Term Sheet represented a binding contract of purchase and sale, Mr. Berman was just as firmly of the view that it was not.

THE ONUS OF PROOF

[145] Generally, the onus of proving that the requirements for a contract have been met and that a binding contract exists is on the party who pleads and seeks to rely on its existence: *Ai Kang* at para. 216.

[146] An exception to the general rule arises where a document is "clearly contractual". In those circumstances a reverse onus applies: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 134 [*Oswald*], aff'd 2021 BCCA 352.

[147] In *Oswald*, Justice Giaschi found that the memorandum of understanding ("MOU") at issue was a clearly contractual document so that a reverse onus applied, although he found that the case did not hinge on the onus. However, there were differences between the MOU at issue in *Oswald* and the Term Sheet at issue here. In particular, the MOU stated it was "[t]o provide comfort and a binding obligation ... the parties agree under this MOU to be bound": *Oswald* at para. 139. There is no similar language in the Term Sheet at issue in this case. In contrast, as part of the background here, there were two non-disclosure agreements (a 2016 NDA and a 2018 NDA) signed by the parties which expressly stated that a term sheet was not a binding contract.

[148] In my opinion, the fact that the Term Sheet itself is titled "Term Sheet – Hybrid Sale"; is composed of bullet points with incomplete sentences; and is only four pages in length, is enough to conclude that the Term Sheet is not "clearly contractual". In addition, among other things, the Term Sheet contemplates more formal agreements, specifically an APA. I conclude that there is no reverse onus here, since the Term Sheet is not clearly contractual.

[149] Therefore, the onus of proof is on Ralmax to prove that the Term Sheet is a binding and enforceable contract, on a balance of probabilities. In *McIver v. Power*, 1998 CanLII 4858 (P.E.I. S.C.T.D.), 77 A.C.W.S. (3d) 175, the Court described the standard of "balance of probabilities" as follows:

> [5] In any civil case the plaintiff must prove their case on a balance of probabilities if they are to succeed. This means that the plaintiff must prove that his facts tip the scale in his favor even if it is only a 51% probability that he is correct.

DOES THE EVIDENCE ESTABLISH AN INTENTION TO CONTRACT?

The Objective Test

[150] As I have already discussed, whether the parties intended to be bound by a contract is determined from the perspective of an objective reasonable bystander, and not based on the subjective intentions of the parties: *Angus* BCSC at para. 7. As noted in *Angus* BCSC, in considering whether the parties intended to be bound, the court may consider all of the circumstances or all of the material facts including evidence of past agreements between the parties, the circumstances in which the alleged agreement was made and future actions of and representations by both parties: at para. 13. Intent is also derived from the words of the agreement itself: *Concord Pacific* at para. 317.

[151] As explained by Justice Butler in *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23 [*Rudyak*]:

> ... The test for finding 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"; i.e. "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": [citations omitted].

The Term Sheet

[152] As I have already stated, the Term Sheet is not clearly contractual. The fact that it is titled "Term Sheet – Hybrid Sale" is not, in my opinion, a minor error as Mr. Maxwell testified, particularly since term sheets have a customary purpose as a roadmap to complete more formal agreements. The Term Sheet also contemplates the signing of more formal definitive agreements, specifically the APA (although as I have said, as a result of discussions after the Term Sheet was signed, the parties were also working on other definitive agreements (i.e. the SPA and the PCOEIA)). While the need for more formal agreements is not in itself determinative, that fact is important here where, as I will discuss, the essential terms for the contract were not sufficiently certain and the parties were not consensus *ad idem* on what they had agreed to. As explained by Justice Butler in *Rudyak* at para. 24:

> Madam Justice D. Smith (as she then was) summarizes the requirement for consensus *ad idem* in *Frolick v. Frolick*, 2007 BCSC 84. To be enforceable, the parties must have reached consensus on all of the essential terms of their agreement. If they fail to reach a meeting of the minds on the essential terms or the terms cannot be divined by the court, the agreement will fail for lack of certainty: at paras. 30-32.

[153] Ralmax has also pointed to celebratory language between Mr. Austin and Mr. Berman when the Term Sheet was signed to support their argument that the parties objectively intended to contract. In their closing submissions, Ralmax states:

> Mr. Berman and Mr. Austin celebrated the signing of the Term Sheet.
>
> These celebrations were without caveats too. Neither of them cautioned the other that the Term Sheet was something less than an agreement or that the parties still had to reach further agreements—this notwithstanding that they are both very experienced with contracts.

[154] However, as noted by the Court in *Angus* BCCA,

> [46] Finally, the fact that Mr. Williams subjectively believed that he had negotiated a price and that it was "all done" is not determinative of the objective question before the Court. In *Bawitko*, after signing the document in question, one of the parties said to the other, "You've got a deal". That statement did not prevent the Ontario Court of Appeal from concluding, after considering all the circumstances including the subsequent conduct of the parties, that the agreement was subject to a formal written contract.

[155] In my opinion, the facts here are similar and celebratory language between Mr. Berman and Mr. Austin cannot be determinative. In addition, Mr. Berman made it clear in all of his communications that the details were important to him so that any celebration by him was always a cautious one.

[156] In addition, the 2016 NDA and 2018 NDA had also been signed by the parties which included a definitive agreements clause, which expressly provided that a term sheet was not a binding agreement.

Does the payment of Deposits provide evidence of contract formation?

[157] The Term Sheet provides for the payment of deposits as follows:

> Deposit on signing: $3,500,000 CAD payable within 2 days of signing APA to Vendors solicitors in trust, to become non-refundable upon the Purchaser

> completing its due diligence to their satisfaction and removing the due diligence condition.
>
> Second deposit: $2,000,000 CAD non-refundable, payable upon the Purchaser completing its due diligence to their satisfaction and removing the due diligence condition.

[158] As I have already said, the Asset Purchase Agreement ("APA") was never signed by Mr. Berman for Pt. Ellice. Nevertheless, the deposits were paid by Ralmax totalling $5.5 million. Those funds were held by lawyers for the defendants until a consent order dated June 13, 2023 was made after a mid-trial adjournment in early 2023.

[159] The first deposit of $3,500,000 was paid on April 13, 2018, on an undertaking which Mr. Collett accepted "... not to release or make use of same, and to hold same to our order and return it on demand, until such time as we otherwise agree in writing." The email from Mr. Kerr also stated that "... the expectation is that once the APA is signed we will agree that these funds are held as the initial deposit pursuant to the APA".

[160] The second deposit of $2,000,000 was sent by Ralmax on April 25, 2018, without undertakings. On May 4, 2018 Mr. Collett wrote an email to Mr. Kerr seeking clarification about the basis on which the deposits were held as follows:

> We also need to clarify the terms on which our firm holds in trust the "Deposit on signing" and the "Second Deposit" described in the Term Sheet. You sent the "Deposit on signing" to our firm on our undertaking that they are returnable "on demand" (see attached). We need to align those undertakings with the terms of the Term Sheet, which suggest that the deposit was only payable within 2 days of signing the Asset Purchase Agreement. Since that agreement has not been signed, should we return those funds to you pending the parties settling the terms of, and signing, the APA? You also sent the "Second deposit" to us on April 25, without undertakings. Are those funds governed by the earlier undertakings or rather, governed by the Term Sheet? If the latter, the Term Sheet characterizes the "Second deposit" as non-refundable. Is it Ralmax's understanding that the "Second deposit" is non-refundable? Again, I want to bring some structure and clarity to this transaction.

[161] Ralmax argued at trial that the payment of deposits and retention of the deposits by the defendants is clear evidence that the Term Sheet is a binding contract. Ralmax argued that every day the deposits continued to be held, the defendants affirmed that the Term Sheet is a contract.

[162] Ralmax argued that Mr. Collett's attempts for clarification on the deposits, as outlined above, is a "red herring". Ralmax also points to Mr. Berman's evidence about the deposits. Mr. Berman gave evidence about the payment of the deposits at his examination for discovery which was read in at trial. At one point in his examination for discovery, when asked "... How were the deposits involved in the transaction? Please explain", Mr. Berman answered "You'd have to look at [the] term sheet. That's what would govern the deposits."

[163] Ralmax points to various case law establishing that the payment or acceptance of a deposit is seen as a factor affirming a contract. These include: *Phoenix Homes Limited v. Takhar*, 2023 BCSC 184 [*Phoenix Homes*]; *Muslim Green Cemeteries Corporation v. Toronto Muslim Cemetery Corporation*, 2015 ONSC 5031 [*Muslim Green*]; *Cheema v. Chan et al*, 2004 BCSC 1342; and *Toor v. Dhillon*, 2020 BCCA 137. In my opinion, these cases provide limited assistance since each case must be determined on its own facts. For this purpose, I will only discuss *Phoenix Homes* and *Muslim Green*.

[164] In *Phoenix Homes*, one of the issues before the Court was whether a contract between the parties was valid and enforceable. One of the factors that the Court looked at to determine this issue was the payment and acceptance of deposits between the parties. Justice Kent at para. 423 explained:

> Furthermore, and perhaps more importantly, View Side paid and Phoenix Homes received (and continues to retain) deposit payments, part performance of the contract which fulfils the requirements of s. 59(3)(b) and (c) of the *Law and Equity Act* and one which, in my opinion, estops Phoenix Homes from raising lack of certainty or other flaws in the formal contract as a defence to the claim. Our Court of Appeal has held that the court should particularly strive to uphold agreements where partial performance has occurred: *Hanif v. TJM Management Consultants Ltd.*, 2012 BCCA 485 at para. 38.

[165] In *Muslim Green*, the Court considered "the payment and acceptance of the deposit" as a factor in determining whether there was a formal and final agreement between the parties: at para. 23.

[166] As Ralmax has asserted at para. 416 in their closing submissions, "[t]he acceptance or payment of a deposit is seen as a factor affirming a contract" [emphasis added]. I find this assertion accurate. In my opinion, the payment and acceptance of a deposit, on its own, does not prove contract formation. Instead, it is just *one* of the many factors I must consider in determining whether a contract was formed or not. This is also evident from the cases that Ralmax relies on. In both *Phoenix Homes* and *Muslim Green*, the payment and acceptance of deposits was simply *one* of the many factors the Court considered in determining whether a contract was valid and enforceable.

[167] Specifically, in *Phoenix Homes*, the Court considered the payment and acceptance of deposits under the heading of "Certainty of terms and statutory requirements": at paras. 413–424 (see specifically para. 423 for consideration of payment and acceptance of deposits). Justice Kent at para. 424 stated "[f]or all these reasons, I reject Phoenix Homes' challenge to the validity of the View Side Contract based on uncertainty of terms or noncompliance with statutory requirements" (emphasis added). Therefore, the payment and acceptance of deposits was just *one* of the many factors the Court considered in determining whether there was a valid contract or not; it was not the *sole* factor.

[168] Further, in *Muslim Green*, it was clear that the payment and acceptance of deposits was *one* of the many factors that the Court considered in determining whether there was a valid contract. Justice Lederer at para. 23 explained:

> In summary, the payment and acceptance of the deposit, the due diligence along with the identification and retaining of consultants, the advertising by the applicant in company with the request for its membership list and the making of the planning application paid for by the applicant and signed on behalf of the respondent establish that the parties were acting under, and in compliance with, the agreement signed on May 13, 2014. They both acted as if it was the formal and final agreement between them.

[169] In this case, the fact that the defendants accepted the deposit paid by Ralmax, does not on its own, prove that the Term Sheet was a contract. It is just *one* of the many factors I consider in making my determination.

[170] In my opinion, the payment and acceptance of the deposits in this case cannot support Ralmax's position that the Term Sheet was a valid and enforceable contract. My finding is based on the circumstances upon which the deposits were paid here, including that:

- The initial deposit was paid by Ralmax on undertakings not to make use of it until the "definitive agreements" were signed, or until the parties "otherwise agreed in writing".

- The Term Sheet provided that the initial transfer would be made within two days of the signing of the APA which had not been negotiated or signed when the initial deposit was made. I share the view of the defendants' expert Mr. Merrick who opines that the Term Sheet does not require the payment of non-refundable monies but rather it clearly provides for non-refundable deposits only after signing the APA and upon the removal of the purchaser's conditions.

- Ralmax argues that the Term Sheet was supposed to require payment on the signing of the Term Sheet, and that the change to payment within two days of signing the APA was a "mistake". In his evidence Mr. Collett indicated that he made the change to align that term with his expectation that the deposit would only be payable upon signing the definitive APA.

- However, even though Ralmax argues that everyone understood that it was their obligation to pay the first deposit on the signing of the Term Sheet, they did not actually do so until more than a month had passed.

- An email from Mr. Horte, stating that it was the defendants' position that the deposits were paid on a non-refundable basis occurred when negotiations between the parties were clearly turning so that the parties were on an inevitable litigation track. As a result of that, I give less weight to that email from Mr. Horte.

[171] Although the provision of terms in the Term Sheet relating to deposits can, in certain circumstances, evince intention to create binding contractual relations, in my

opinion, the terms around the payment of deposits are too uncertain to provide any objective evidence of contract formation. In my opinion, it is not open to Ralmax to ignore attempts by the defendants to put some structure on the transaction, and to elect not to have the deposits returned as suggested in Mr. Collett's email, and then argue that the failure of the defendants to return them is evidence in favour of a binding contract.

[172] The defendants concede that since they argue at trial the deposits were not paid pursuant to a binding and enforceable contract, this Court should order, as the Court did in *Miller v. Jellybean Park International Inc.*, 2013 BCSC 1237 [*Jellybean Park*], that the deposits are refundable to Ralmax.

[173] Before I leave the issue of the deposits, I wish to note that in the plaintiff's cross-examination of Mr. Berman, there was a proposition that was, in my opinion, not fully developed. The suggestion that was hinted at in the questioning was that Mr. Berman entered the proposed transaction in order to obtain non-refundable deposits with no intention of completing a contract. Although that proposition was not clearly put to Mr. Berman, and he did not get a clear opportunity to address it, I wish to comment on it for the sake of completeness.

[174] In my opinion, the evidence amply demonstrates that Mr. Berman entered the proposed transaction with an intention to complete it if his three preconditions were met. In that regard, he drove a hard bargain on price, and was content with the price represented in the Term Sheet, if all the other details could be resolved. Mr. Berman was prepared to pause the transaction in late April 2018, when the only deposit paid at that point was the $3,500,000 sent by Mr. Kerr on April 13, 2018. As I have said, that deposit had an undertaking attached to it, which made it returnable on demand. Accordingly, in my opinion, there is no merit to any suggestion that Mr. Berman only signed the Term Sheet to obtain non-refundable deposits.

[175] For all of these reasons, I am of the view that the plaintiff's argument on the issue of deposits is not determinative of an objective intention to contract. Given all the

confusion around the deposits, I have concluded that the issue of the deposits should be given little weight under the objective test.

Conclusion on objective intention to contract

[176] Although Mr. Maxwell subjectively viewed the Term Sheet as a binding and enforceable contract of purchase and sale, viewed objectively and as a whole, many of Ralmax's actions after the Term Sheet was signed suggest to me that the Term Sheet was not an enforceable contract of purchase and sale for the Pt. Ellice lands. In my opinion, Ralmax's position that the Term Sheet was binding only began to be asserted when they could not satisfy Mr. Berman by providing security for the environmental indemnity to his satisfaction. In this case, the subsequent conduct of the parties objectively supports the view that the Term Sheet was not binding.

[177] Ralmax's actions include:

- continuing to negotiate the three agreements (APA, SPA, and PCOEIA);
- offering additional funds to Mr. Berman for legal fees as a good faith gesture as a result of the length of time it was taking to finalize the definitive agreements;
- changing many aspects of the Term Sheet such as the division between the share and asset portion of the sale; and
- paying the deposits not in conformity with the Term Sheet.

[178] In my view, the following email from Mr. Austin to Mr. Leibel supports the conclusion that there was no objective intention to contract. On April 16, 2018, Mr. Austin wrote to Mr. Leibel an email with the subject "Security for the environmental endemnity [sic]", and stated the following:

> Hi Gary,
>
> This is the difficulty I face now – on **March 1st** I sent you the email below from Max to Eric that made it clear we were looking for mortgage security for environmental indemnity.

> *I also will provide you with language to describe the collateral mortgage our client wishes to receive as security for Ralmax' covenant that Pt. Ellice will indemnify the vendor for environmental matters*

And in my email to you of **March 27th** with the subject "Checklist" I told you:

> *4. As you know, the security for the environmental indemnity is very important to Fred*

I have not heard from Fred yet and do not know what his position will be, but I fear it will not be positive that at this late stage we are being told there will be no security.

I have suggested you offer Fred mortgage security over the farms until the water lot lease is remediated, and the Schnitzer Victoria lands are examined and any required remediation is done. I don't know if this will be sufficient for Fred, but I urge you to try.

Jason

[Emphasis in original.]

[179] Having considered the totality of the evidence surrounding the formation of the alleged contract, I have concluded that I am not satisfied on an objective basis that there was a meeting of the minds so that I can conclude that the Term Sheet is a binding and enforceable contract.

HAVE THE PARTIES REACHED AGREEMENT ON ESSENTIAL TERMS?

[180] As I have said, I am not satisfied that Ralmax has established the first branch of the test for contract formation, that on an objective basis, both parties believed that by signing the Term Sheet, they had entered into a binding and enforceable contract and they intended to be bound by it. Although this aspect of the decision could effectively end the matter, out of the abundance of caution and for completeness, I will consider the second aspect of the contract test.

[181] As I have said, even if the parties objectively did intend to be bound by the Term Sheet, that in itself is not sufficient. As Justice Voith stated in *Concord Pacific*:

> [336] In *Le Soleil*, Justice Pitfield, after identifying that a clause in the agreement in question stipulated that the agreement was "binding", went on to say: "If the parties express an intention to be bound by the LOI, the court must nonetheless consider whether its terms are sufficiently precise to constitute an agreement": para. 11.
>
> [337] I have earlier referred to *UBS* where the Ontario Court of Appeal, at para. 47, said: "An intention alone is insufficient to create an enforceable agreement, it

is necessary that the essential terms of the agreement are also sufficiently certain" *Ward*, at para. 54, makes the same point. In *Ward*, at para. 55, the Court confirmed that the parties reached agreement on all essential terms.

[338] One of the most commonly relied on statements of the applicable principles is found in *Bawitko*. *Bawitko* has likely been referred to several hundred times by various courts in this country and some dozens of times by the courts of this province. It is also a case that, in some respects, resembles the circumstances of this case. The parties negotiated an agreement. They shook hands saying they had "a deal". The respondent made payments by way of a deposit towards a franchise fee and he took steps to arrange for financing. The agreement was intended to be a long-term contract. The parties anticipated that a formal agreement would have to be signed. The party seeking to uphold the agreement expected that most of the terms in that additional contract would be in the nature of "boilerplate". Justice Robins, for the Court, said at 103–104:

> 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. [Authorities omitted.]

[339] I have focused on the first component of this framework. Absent agreement on the essential terms of a contract, no contract can exist. Though a court will make "every effort" to find meaning in a contract, it is not open to a court to create a contract for the parties. This has been so for a long time: *Kelly v. Watson*, [1921] 61 S.C.R. 482 at 490; *Murphy v. McSorley*, [1929] S.C.R. 542 at 546. It remains true today: *Langley* at para. 40.

> [340] In addressing the absence of an essential term in an agreement, I am not speaking of the "informality" of a written document, *UBS* at para. 73, or of "inelegant drafting": *Hoban* at para. 47. Nor am I addressing issues of uncertainty or ambiguity. In such circumstances the courts will, as I have said, strive to give meaning to the agreement the parties have made: see *CCIL* at 66–71.
>
> [341] Instead, I am addressing those "fundamental" terms of a contract that the parties must agree to before a binding contract can be created. What constitutes an "essential" term in an agreement will depend on both the nature of the agreement and the circumstances of the case. In *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, Cromwell J.A., as he then was, said: "Determining what terms are "essential" in a particular case is ... more difficult than stating the principal. The sort of terms that are considered essential varies with the nature of the transaction and the context in which the agreement was made" (para. 71): see also *Nordlund Family Retreat Inc. v. Plominski*, 2014 ONCA 444 at paras. 57–58 and *Ko v. Hillview Homes Ltd.*, 2012 ABCA 245 at para. 91.

[182] Ralmax argues that the parties to the sale, the properties to be sold, and the purchase price are described in the Term Sheet. Ralmax says that altogether, they are the terms for the plaintiff to purchase the lands and shares of Pt. Ellice Properties Ltd.

[183] However, as pointed out by the defendants, such necessary terms are merely the minimum requirements in a contract for purchase and sale of lands: *Tut v. Evershine Land Group Inc.*, 2022 BCCA 63 at para. 52. What constitutes essential terms is derived from the context of the agreement being negotiated and the parties' intentions.

[184] As pointed out by the defendants, there is a persuasive argument that the "Three P's" – Parties, Price and Property – are not sufficiently certain in the Term Sheet.

Parties

[185] With respect to parties, when the Term Sheet was signed, the proposed transaction had shifted from a sale of land to a hybrid agreement involving both the sale of land and the sale of the Pt. Ellice shares. As I have said, Mr. Maxwell proposed the hybrid sale when he realized that such an approach could reduce the amount of property purchase tax payable on closing, and could also protect neighbouring properties (many of which were owned by Ralmax) from an increase in assessed value by B.C. Assessment. The Term Sheet was signed by Mr. Berman in his capacity as the directing mind of Pt. Ellice. Further, although Mr. Maxwell and RGHL are mentioned as guarantors, neither Mr. Maxwell nor RGHL is a signatory to the Term Sheet. Signatures

of all parties in their respective capacities would have gone a long way to resolve any dispute about the parties. In his testimony, Mr. Kerr confirmed that the parties to the Term Sheet as written are Ralmax and Pt. Ellice only.

[186] At examination for discovery, Mr. Berman accepted that he signed the Term Sheet on behalf of himself as the seller of the shares, however he denied that at trial. I am concerned that Mr. Berman was tailoring his evidence at trial to conform with what he thought was most advantageous for him in the litigation. It makes sense to me that when he signed the Term Sheet he did so as representative for Pt. Ellice and in his personal capacity as he initially testified at his examination for discovery.

[187] However, even if I can find that the parties to the transaction include Mr. Berman personally, I am not satisfied the role of Mr. Maxwell and RGHL is clear. For example, this action is brought in Ralmax Properties Ltd.'s name solely. Therefore, in my opinion, the parties to the Term Sheet are uncertain.

Price

[188] The Term Sheet allocated the price of $36,000,000 between the beneficial ownership of land ($12,000,000) and the shares of Pt. Ellice ($24,000,000). The actual allocation changed as the parties continued to negotiate after the Term Sheet was signed. The allocation was renegotiated to $17.5 million and $18.5 million respectively. The amount allocated to the beneficial ownership was not assigned to any particular portion of the lots.

[189] In addition, and more importantly, the Term Sheet fails to provide any detail regarding the security for the environmental indemnity. As Mr. Collett testified, the parties had merely "parked" that aspect of the discussions when they signed the Term Sheet, and left the issue of security to the lawyers to finalize. The parties had not had any meaningful discussion about the form or amount of the security at the time the Term Sheet was signed beyond Mr. Berman and Mr. Austin, for Pt. Ellice, making clear the nature of their concerns regarding security for environmental issues.

[190] As I have already said, the issue of security for the environmental indemnity was an essential part of the overall value of the transaction from Mr. Berman's perspective. Mr. Berman made it extremely clear to Ralmax, both personally and through Mr. Austin, that he wanted himself and his estate protected from any environmental claims. The failure of the transaction to do so, could result in financial loss to Mr. Berman or his estate in the future and would be a deal breaker for Mr. Berman. Mr. Berman expressed that at the time that the collateral mortgage option was being withdrawn by Ralmax in mid-April.

[191] In *Concord Pacific*, Justice Voith accepted that agreement on terms which would have directly or significantly impacted the total value of the transaction, including future costs to a vendor, were essential and went to whether the parties had reached agreement on price, or the essential terms of the transaction more broadly: at para. 351.

Property

[192] The Term Sheet does not specify which portion of the property was the subject of the asset sale versus the share sale. The Term Sheet also does not address the treatment of the up-island properties, which were contained within Pt. Ellice. Prior to the Term Sheet being signed, there was discussion between Mr. Leibel and Mr. Austin about transferring out the up-island properties although the mechanism for that to occur had not been agreed to. I am satisfied on a balance of probabilities, that the property Mr. Maxwell was interested in and was contracting for was clear: that is the seven lots and water lot mentioned in the Term Sheet, and the shares in Pt. Ellice. However, the mechanism for transferring out the up-island properties was not sufficiently certain.

Security for environmental indemnity

[193] Ralmax submits that security was not an essential term of the transaction or the Term Sheet. As I have already said, I have concluded that security was considered essential by Mr. Berman, and Ralmax understood that at the time the Term Sheet was signed. Mr. Berman made his three requirements known to Mr. Maxwell at their first meeting, and Mr. Maxwell testified that he was aware of the importance of security to Mr. Berman both personally, and for his estate.

[194] The emails between Mr. Austin, Mr. Leibel, Mr. Collett, and Mr. Kerr also emphasized the importance of security. In my opinion, the emails both before and after the Term Sheet was signed, along with the conduct of the parties indicated that the parties were working on the definitive agreements on the understanding that security was essential. There are emails as early as February 2018 speaking directly to the importance of security.

[195] In *Ai Kang*, Justice Marzari cautioned that considerations of the parties' subsequent conduct raises an inherent risk of hindsight reasoning:

> [265] The document itself, its factual context including the prior and subsequent conduct of the parties, can assist the court to understand what terms were essential: *Langley* at para. 21. Frequently, good faith agreements that the parties intended to be binding but for which "details" needed to be ironed out, are brought down by those "details" when they prove more consequential than initially believed. Considerations of subsequent conduct therefore raise an inherent risk of hindsight reasoning: *Holm v. Holm*, 2013 ABCA 345 at para 8. While courts will consider surrounding circumstances in interpreting the terms of a contract, those circumstances must not be allowed to overwhelm the words of the agreement: *Sattva* at para. 57.
>
> [Emphasis added.]

[196] I find that the circumstances here are distinguishable from the caution expressed in *Ai Kang* about the risk of hindsight reasoning and in my opinion hindsight reasoning by the defendants does not apply here.

[197] Although I have previously set out the Term Sheet in its entirety, it is helpful at this point, to excerpt the "Environmental" section of the Term Sheet again since in my opinion this transaction ultimately failed on this section:

> Purchaser will:
>
> 1) provide environmental indemnity to the Vendor, Fred Berman and its affiliates, subsidiaries and associated companies including Budget Steel Limited and their respective directors, officers, shareholders and advisors from any claims made related to environmental condition, or damage or remediation arising from, the Property or the water lot lease.
>
> 2) Require Schnitzer to do an environmental study and complete any needed remediation of:
>
> a. the water lot in 2018, either under the terms of the existing sub water lot lease, or under a new sub water lot lease

b. all the Schnitzer leased Victoria lands pursuant to the terms of the lease, or as a condition of Schnitzer being allowed to surrender or sublease part of those lands

3) enforce the environmental provisions in the H&L lease prior to termination of their lease

4) ensure the inspection of the storm drain system on the Victoria lands is completed by Kerr, Wood & Leidal and any needed repairs are completed in 2018

5) provide baseline environmental studies following completion of each of the works above

6) obtain a pollution liability policy with the indemnified parties as named insured

7) provide security for the performance of the above

8) Detailed wording to be refined by Max Collet [sic] and Eric Kerr.

[198] In its argument, Ralmax points to many excerpts from Mr. Berman's evidence and suggests that security was just a detail to Mr. Berman, and that it was not an essential term. In particular, Mr. Berman, when asked the question "The security was just a detail?" answered "It was important, but it was a – an important detail but it was one of many, yes". In my opinion, those questions and answers demonstrate Mr. Berman's belief which I have already discussed, that the Term Sheet was fulfilling the traditional role of a term sheet as a roadmap for a binding contract and was not itself a binding contract of purchase and sale.

[199] Pt. Ellice argues that security was always essential and points to Mr. Maxwell's creation of an alter ego trust after the Term Sheet was signed as demonstrating the necessity of security. As Mr. Austin explained in his evidence the need for security was to address the unknowns going forward.

[200] Ralmax also suggests that the term requiring security did not in fact apply to all of the items listed above it and only applied to items two through five. It is not clear on what basis Ralmax makes that argument, and in my opinion that submission is more akin to the hindsight reasoning by Ralmax that the Court cautioned about in *Ai Kang*. In my opinion, a plain reading of the "Environmental" section of the Term Sheet suggests that "security for the above" means security for all of the items listed above that term which would then include security for the environmental indemnity.

[201] Further, the suggestion that was made by Mr. Kerr in an email dated June 8, 2018, that the guarantees referenced on the first page of the Term Sheet would provide the sufficient security is unsupported by the evidence, and in my opinion would make the reference to security unnecessary and redundant. In my opinion, Ralmax only began to make such arguments, when it became clear that they would likely not be able to come up with security to Mr. Berman's satisfaction – either by way of a collateral mortgage over some of the lots, as was being pursued in April of 2018, or in the amount of $5 million, as proposed by Mr. Collett for the defendants on June 4, 2018. I am cautious in saying that Ralmax could not come up with the $5 million because it is not entirely clear to me whether Ralmax could not come up with an additional $5 million as security, or whether they simply refused to. It is also unclear to me why Ralmax initially suggested the $5 million as security and then resiled from it.

[202] In *Alberta Opportunity Company v. Moulton*, 1990 ABCA 359, the Alberta Court of Appeal accepted the following definition of the word "security":

> [13] In Child & Gower Piano Company Limited v. Gambrel, 1933 CanLII 265 (SK CA), [1933] 2 W.W.R. 273 (Sask. C.A.), Mr. Justice Martin dealt at length with the meaning of the word security. He said at pp. 281 and 282:
>
> > "Security for a debt, in the ordinary meaning of the term, carries with it the idea of something or somebody to which, or to whom, the creditor can resort in order to aid him in realizing or recovering the debt, in case the debtor fails to pay; the word implies something in addition to the mere obligation of the debtor."
>
> There is nothing in the guarantees in question to indicate that the word security should be given anything other than its ordinary meaning.
>
> [Emphasis in original.]

[203] I find that the words of the Alberta Court of Appeal are equally applicable here.

[204] In *Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd.*, 2001 BCCA 600, Justice Newbury, in dissent, described an indemnity as "an independent undertaking to make good a loss": at para. 17. I agree with the defendants' submissions that an indemnity is not a security.

[205] Similarly, guarantees are not security. In *Wang v. Chen*, 2013 BCSC 1138, Justice Smith stated the following:

> [24] In *Gabbs v. Bouwhuis*, 2005 BCSC 1782, this court said at para. 28:
>
> > The definition of "guarantee" is a legal definition. Many principle debtors "guarantee" repayment. This does not then legally define the debtor as a "guarantor". Indeed, a guarantor can, in some circumstances, become a principal debtor ...
>
> [25] The essence of a contract of guarantee is that the guarantor agrees to pay what is owed by the principal debtor if the principal debtor defaults on its obligations to the creditor: [citation omitted].

[206] As I have outlined, Mr. Berman testified about his knowledge of the historic uses of the property and his concern for potential contamination of the lands. Mr. Berman's concerns were consistent throughout all of the negotiations and his evidence at trial relating to those concerns was compelling. The issues of the environmental matters were so central to the proposed sale that they merited a separate section in the Term Sheet and ultimately a proposed stand-alone definitive agreement, the PCOEIA.

[207] Ralmax argues that because Mr. Berman has not taken steps himself either before or after the Term Sheet was signed to conduct environmental investigations on the property, the risk of environmental liability must not be important to him. However, as argued by the defendants, as long as Mr. Berman owns the shares and his company Pt. Ellice owns the properties, Mr. Berman has some control over what happens on the lands. If Mr. Berman sells the company and no longer has control over the lands, investigation or development by the new owner could lead to the discovery of contamination, which could lead to a remediation that Mr. Berman could be responsible for. As Mr. Austin pointed out in his evidence, the costs of such remediation in that scenario would be paid by after tax dollars by Mr. Berman. The purpose of the environmental terms, and the indemnity backed by security for it, was to protect Mr. Berman from liability.

[208] Further, I am not persuaded by Ralmax's argument that finding security for an environmental indemnity an essential term would be a novel advancement of the law in this area. The law is well established that essential terms will vary depending on the case and the facts in the particular case. Here, the environmental issues achieved outsize importance, because of the significant concerns Mr. Berman articulated from his first meeting with Mr. Maxwell in 2017, that he and his estate be protected in the future.

Mr. Berman's requirement was foundational to all of the discussions between the parties. This is one of the areas in which this transaction could be considered atypical as argued by the defendants. As I have said, I am satisfied that, in Mr. Berman's words, Ralmax was "a hot in pursuit purchaser that had to have this asset, and [he was] an indifferent – indifferent seller."

Conclusion on essential terms

[209] As set out above, there is uncertainty with respect to essential terms in the Term Sheet, particularly the form and amount of security for the above in the "Environmental" section of the Term Sheet.

[210] I have concluded that the parties objectively did not intend to enter a binding and enforceable contract, and that instead the Term Sheet represented an agreement to agree, serving as a roadmap for continuing discussions.

[211] My conclusion is amplified when one considers the outstanding issues between the parties on July 31, 2018, when the proposed transaction was to close according to the Term Sheet. While some of these issues are more important than others they included:

a) As discussed above, the form and amount of security for the environmental terms, including the indemnity. At the time the Term Sheet was signed, the form and amount of the security was not agreed to. Although Mr. Berman was unfamiliar with the Certificate of Compliance approach to environmental issues, he was open to and seemed to be prepared to accept the proposed approach by Ralmax providing that he had adequate security. It seems that the collateral mortgage over four of the lots as security would have been acceptable to Mr. Berman. The proposed transaction started to drift towards failure when Ralmax withdrew the proposal for the collateral mortgage since their bank would not agree to it. After that, Ralmax did not accept the defendants' proposal of $5,000,000 cash in escrow (which they had initially offered) and instead insisted on proceeding with security of considerably lesser value.

b) The lesser value of security included progressive release terms in favour of Ralmax which were not agreed to by the defendants, and which could leave unresolved environmental liability exposure.

c) The process for transferring the up-island properties out of Pt. Ellice.

d) The scope of the indemnity to be provided by Ralmax to Mr. Berman.

e) The inability of the parties to agree on what constituted standard representations and warranties. It is clear that at the time the Term Sheet was signed, the parties had not considered in any detail the tax consequences to Mr. Berman (which could affect his net worth precondition), or the future tax consequences for Ralmax of acquiring the company in the event of reassessment. This led to further disagreement on what constituted appropriate holdback.

f) The Term Sheet imposed a limit on compensation of legal fees of $15,000. Mr. Berman had been clear that the transaction would have to leave him “whole” net of taxes and fees. Ralmax provided another $20,000 as a good faith gesture towards legal fees.

[212] As I have said, I am of the view that the Term Sheet cannot objectively be considered a contract as opposed to an agreement to agree. Even if that were not the case, I also conclude that the essential terms of the contract are not sufficiently certain so as to make the Term Sheet an enforceable contract of purchase and sale of the lands.

[213] I cannot leave this conclusion without stating that in my opinion, to find otherwise would leave this Court in the position of trying to write a contract for the parties when it is obvious on the evidence that many of the issues that arose between the parties had not even been considered at the time the Term Sheet was signed. For example, if I were to find that the Term Sheet is an enforceable and binding contract, this Court would have to determine the price of the purchase and sale of the Pt. Ellice lands, which is an essential term. This would leave this Court with two options: 1) applying the

original price of $12 million for the ownership of the lands and $24 million for the shares of Pt. Ellice; or 2) applying the renegotiated price of $17.5 million for the ownership of the lands and $18.5 million for the shares of Pt. Ellice. Such an approach and decision would be contrary to the principles expressed in *Ai Kang* and *Concord Pacific*.

[214] In *Ai Kang*, Justice Marzari stated that:

> [260] Where there is an intention to contract, the court will make a significant effort to give meaning to that agreement. However, there are limits to how far a court can go; a court cannot create an agreement on essential terms where none exists: [citations omitted].

[215] Further, in *Concord Pacific*, Justice Voith explained that:

> [339] ... Absent agreement on the essential terms of a contract, no contract can exist. Though a court will make "every effort" to find meaning in a contract, it is not open to a court to create a contract for the parties.

[216] While it is unclear who on the Ralmax side said "well, I think we could sue Fred for that" as referenced in Sage Berryman's email on July 26, 2018, it is not an approach to contract that should be countenanced by this Court. Such a result would encourage lengthy cases such as this one. In a nutshell, there are simply too many "mistakes" that were made on the Term Sheet that lead me to conclude that the Term Sheet is not objectively a contract and that essential terms cannot be distilled.

[217] The issues left to be resolved at the time the Term Sheet was signed were not minutiae but were matters of significance to both parties. I conclude that there was no objective intention to contract and that the essential terms cannot be distilled. Therefore, the Term Sheet is not a binding and enforceable contract.

DUTY OF GOOD FAITH IN NEGOTIATIONS

[218] Underlying all of Ralmax's arguments is an assertion that the defendants failed to negotiate in good faith.

[219] Ralmax argues that where a contract is found to exist, the parties are obligated to negotiate the terms and performance of the contract in good faith. Ralmax claims that

the defendants acted in bad faith and breached their duty to perform the Term Sheet in good faith. In their reply written submissions at para. 136, Ralmax states that:

> Instead, the plaintiff says that, in the course of settling the terms of the APA, SSA, PCOEIA during the closing process, the defendants were obligated to negotiate in good faith. The plaintiff offered fair terms on matters of security, representations and warranties, holdbacks, and other terms in these documents. Similarly, the defendants were obligated to counter with reasonable terms that aligned with this duty of good faith. The defendants did not do this.

[220] The defendants argue that there is no obligation to negotiate in good faith absent a contract.

[221] In my view, the law is clear that the duty of good faith in contractual relations only applies when a contract is found to exist. Specifically, *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*] provides that the duty of good faith in contractual relations applies to the performance of a contract. In *Bhasin*, Justice Cromwell stated that:

> [63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
>
> …
>
> [65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.
>
> …
>
> [73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The

> requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.
>
> [Emphasis added.]

[222] As the defendants assert, "while the law imposes a duty of good faith and honest contractual performance subsequent to contract formation, a duty to negotiate in good faith has not been recognized in Canadian law absent an underlying contractual obligation." This proposition is clearly and overwhelmingly supported by the case law.

[223] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, Justices Iacobucci and Major stated at para. 73:

> As a final note, we recognize that Martel's claim resembles the assertion of a duty to bargain in good faith. The breach of such a duty was alleged in the Federal Court, but not before this Court. <u>As noted by the courts below, a duty to bargain in good faith has not been recognized to date in Canadian law</u>. These reasons are restricted to whether or not the tort of negligence should be extended to include negotiation. Whether or not negotiations are to be governed by a duty of good faith is a question for another time.
>
> [Emphasis added.]

[224] In *Jellybean Park*, Justice Arnold-Bailey explained:

> [69] Further, I note that in *Kosaka v. Chan*, 2008 BCSC 1231, a judge of this Court considered the duty to negotiate in good faith in the context of a failed contract negotiation between the manager and the owner of a greenhouse. Despite negotiations suggesting shared equity, the owner eventually sold the greenhouse and terminated the management agreement with the plaintiff. The initial stages of negotiation never amounted to a contract. The manager brought an action for breach of duty to negotiate in good faith. The action was dismissed. Gropper J. stated:
>
> > [40] Mr. Kosaka considered that the defendants did not put forward any reasonable proposal. However, the court is not in the position to assess the reasonableness of each proposal made in negotiations. <u>Even if they were unreasonable to Mr. Kosaka, that does not necessarily mean that the defendants were not negotiating in good faith. Hard bargaining does not denote a lack of good faith</u>. It would be impossible for a court to supervise negotiations in normal commercial transactions; this is the

> problem which the court would confront if a duty to negotiate in good faith was implied.
>
> [70] After reviewing the relevant authorities, Gropper J. concluded:
>
> > [43] There is no duty at common law to negotiate in good faith. While a special relationship may imply such in duty in certain circumstances, those circumstance do not exist here. Mr. Kosaka's claim that the defendants did not negotiate in good faith is dismissed.
>
> [71] This is not a case where the court should impose a duty to negotiate absent a binding contract. The duty to negotiate in good faith prior to a contract being established has not been readily accepted in law.
>
> [Emphasis added.]

[225] I have provided some emphasis to Justice Arnold-Bailey's statement that hard bargaining does not denote a lack of good faith because Mr. Berman's position throughout was that of a hard bargainer. He was only going to sell if all of his conditions were met.

[226] Further, in *Concord Pacific*, Justice Voith stated at para. 373:

> *Bhasin v. Hrynew*, 2014 SCC 71, to which I will return, dealt with the obligation of good faith performance in existing contracts and not with the process of negotiation that leads to such contracts: see paras. 63, 65–66, 69 and 73. *Bhasin* did leave the door open to future developments in the law of good faith: para. 66. To date, that has not occurred as courts have applied the principle of good faith performance in a restrained manner. In *Bank of Montréal v. Javed*, 2016 ONCA 49, for example, the court rejected the appellant's argument that the good faith principle in *Bhasin* modified the test for unconscionability: paras. 11–12. The British Columbia Court of Appeal similarly declined to modify the doctrine of implied terms on the basis of *Bhasin*: *Moulton Contracting* at paras. 67–68. In *Power Limited Partnership v. Ontario Electrifying Financial Corp.*, 2016 ONSC 4415, the court expressly confirmed that "the duty of honesty under *Bhasin* does not extend to a negotiation": para. 71. In *Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1, leave to appeal dismissed [2017] S.C.C.A. No. 76, the court confirmed at para. 51 that "the *Bhasin* principle relates to performance of the contract. It does not relate to the negotiation or terms of the contract". In *CCIL* the author states: "Aside from attaching the label of 'organizing principle', *Bhasin* does nothing to modify the pre-existing law in which a duty of good faith has been recognized": at 45, see also *CCIL* at 38.

[227] Finally, after arguments were concluded in the case before me, the British Columbia Court of Appeal has confirmed that the duty of good faith in contractual relations does not apply to contract negotiations; in other words, that there is not a

contractual duty to negotiate in good faith. In *Oceans Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57 [*Oceans Pacific Hotels*], Justice Butler explained:

> [63] I note other decisions have also accepted that the duty of honest performance recognized in *Bhasin* does not apply to pre-contractual negotiations. For instance, the New Brunswick Court of Appeal has stated "the law does not recognize a pre-contractual duty to bargain in good faith": *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44 at para. 35; *Algo Enterprises Ltd. v. Repap New Brunswick Inc.*, 2016 NBCA 35 at para. 13. Similarly, in *Okanagan Equestrian Society v. North Okanagan (Regional District)*, 2018 BCSC 800 [*Okanagan*], the court referred to *Bhasin* and *OEFC* and observed that a duty to negotiate in good faith is incompatible with the adversarial nature of negotiations between parties. The Court concluded "the duty to act in good faith referred to in *Bhasin* ... does not apply to contract negotiations, as distinct from performance of one's obligations under an existing contract": *Okanagan* at para. 248.
>
> [64] I appreciate the SCC has not conclusively rejected the existence of a duty of good faith which could apply to pre-contractual negotiations. Recently, in *Rovi Guides, Inc. v. Videotron Ltd.*, 2024 FCA 125 at para. 119 [*Rovi*], the Court observed that while a duty of good faith applicable to pre-contractual negotiations appears to arise under the *Civil Code of Québec*, "the issue has not been firmly settled in the common law". It noted that in *Martel Building Ltd. v. Canada*, 2000 SCC 60, the SCC specifically left the question of whether such a duty of good faith exists for another time.
>
> [65] Despite the fact the SCC has not explicitly found there is no manifestation of good faith which could apply to pre-contractual negotiations, there is still a developing consensus, with which I agree, that a claim for breach of the duty of honest performance cannot be based on dishonest conduct connected to contract negotiations. It is my view that in recognizing the contractual duty of honest performance in *Bhasin*, the Court did not intend to establish a contractual duty to negotiate in good faith.

[228] I have found that the Term Sheet is not a valid and enforceable contract. Therefore, the duty of good faith in contractual relations does not apply to the defendants. To impose on the defendants a duty to negotiate in good faith is clearly contrary to the established case law.

[229] In *Concord Pacific*, Justice Voith explained that there are some exceptions to the "usual rule that no duty or obligation of good faith exists as between arm's-length parties who negotiate a commercial agreement": at para. 374. One exception, which Ralmax relies on, is "circumstances where the parties have agreed on the essential terms of a contract but have not yet worked out the details of their agreement" and "in circumstances where the parties have again agreed on the essential terms of a contract

but one party unreasonably or arbitrarily fails to agree on a further term that is necessary for the contract to be effective": *Concord Pacific* at paras. 374–375.

[230] This exception is premised on the notion that the essential terms of a contract have been agreed upon by the parties. As Justice Voith explained:

> [378] It is clear, based on the findings of fact I have made, that the state of negotiations between Concord and the Defendants never reached such certainty on essential terms. Accordingly I do not consider this first category of case law is relevant.

[231] Similarly, I have previously explained that in this case, Ralmax and the defendants did not reach agreement on the essential terms of the contract. Therefore, just as Justice Voith declined to apply this exception in *Concord Pacific* on the basis that the parties did not reach agreement on essential terms, I too decline to apply this exception to this case for the same reason.

[232] There are many similarities between *Concord Pacific* and the case before me. In finding that there was no duty of good faith to negotiate, Justice Voith concluded by stating the following:

> [396] Having said this, the present case is one in which:
>
> i. one or more essential terms had not been agreed to by the parties;
>
> ii. there was no existing agreement between the parties;
>
> iii. there was no express obligation to negotiate in good faith in the Heads;
>
> iv. Mr. Hui admitted that, on May 14, the parties did not discuss dealing with each other in good faith though he said the parties talked about trusting each other; and
>
> v. there was no objective standard in the Heads by which additional essential terms might be determined. There was also no arbitration clause or similar dispute resolution mechanism in the Heads by which disagreement between the parties might be resolved. In relation to this last consideration, see *Molson* at para. 102, *EdperBrascan* at para. 39 and *Foley v. Classique Coaches, Limited*, [1934] 2 K.B. 1 (Eng. C.A.).
>
> [397] In such circumstances, I do not consider that the Heads gave rise to a "binding obligation to negotiate" or to do so in "good faith". None of the authorities that I was provided with or that I am aware of has determined that two parties

> have an "obligation to negotiate in good faith" where the foregoing considerations, in combination, are present.

[233] In the case before me, the essential terms were not agreed to by Ralmax and the defendants; there was no existing agreement between Ralmax and the defendants, as I have found that the Term Sheet is not a valid and enforceable contract; and there was no express obligation to negotiate in good faith on the Term Sheet. Therefore, I am not persuaded that the Term Sheet gives rise to a "binding obligation to negotiate" or to do so in "good faith". There was no duty on the defendants to negotiate in good faith.

[234] During the trial, much time was spent on the issue of the costs of environmental remediation for the Pt. Ellice lands. Ralmax seems to rely on these environmental remediation reports to show that Mr. Berman acted in bad faith. Specifically, in their closing written submissions, one of Ralmax's arguments is that the defendants breached the Term Sheet because "Mr. Berman acted in bad faith by making arbitrary and unreasonable requirements to seek maximum advantage for himself in the sale." Ralmax states that Mr. Berman's requirement for extraordinary security was unreasonable and arbitrary, and that the environmental liability associated with the Pt. Ellice lands were consistent with the PCOEIA tendered by Ralmax.

[235] There are multiple environmental reports in evidence relating to both the baseline condition and cost of remediation of the Pt. Ellice lands. Specifically, there are:

1) The 2010 TerraWest Environmental Inc. report;

2) The 2015 Stantec Consulting Ltd. report; and

3) The 2018 SNC-Lavalin and Hemmera Envirochem Inc. reports.

[236] The 2010 TerraWest Environmental Inc. report was prepared for Steel Pacific Recycling on November 26, 2010. That report estimates that the total site remediation costs for the Pt. Ellice lands in Victoria was approximately $600,000. On February 1, 2018, Mr. Austin emailed a copy of this report to Mr. Maxwell, Mr. Leibel, Mr. Kerr and Mr. Collett.

[237] The 2015 Stantec Consulting Ltd. report was prepared for Schnitzer Steel on November 25, 2015. The report found that there had been no change in environmental conditions for the Pt. Ellice lands in Victoria since the 2010 TerraWest Environmental Inc. report was conducted. Therefore, the estimated remediation costs associated with the Pt. Ellice lands in Victoria remained the same from 2010, which was approximately $600,000. In their closing written submissions, Ralmax states that this report was available to the parties in 2018 when they were attempting to settle the issue of environmental liability.

[238] The 2018 SNC-Lavalin and Hemmera Envirochem Inc. reports provided estimates for the costs associated with obtaining a Certificate of Compliance for the Pt. Ellice lands (i.e. environmental remediation costs and liability associated with the Pt. Ellice lands). The 2018 SNC-Lavalin report was prepared for and obtained by Ralmax on April 24, 2018, and it estimated the remediation cost to be $805,000. The 2018 Hemmera Envirochem Inc. report was prepared for and obtained by Ralmax on April 25, 2018, and it estimated the remediation cost to be between $725,000-$855,000.

[239] Ralmax placed great emphasis on the environmental remediation reports during the trial, presumably in an attempt to enhance their arguments that Mr. Berman was not actually concerned about the environmental condition of the lands to the extent that he was claiming. As I have said, Ralmax claims that emphasis on the environmental term was hindsight reasoning by the defendants.

[240] Each party called experts to opine on the issue of environmental remediation costs: Peter Reid and Reidar Zapf-Gilje for Ralmax; and Ingo Lambrecht for the defendants. The experts disagreed on the costs of remediation of the Pt. Ellice lands. Mr. Reid opined that the estimated remediation costs for the Pt. Ellice lands would be between $725,000 to $855,000. Mr. Zapf-Gilje opined that “In my experience with sites similar to the Lands, I conclude that it is <u>likely</u> that the new owners would have been able to complete the remediation plan and obtain a CofC for all of the Lands within the costs provided the [2018 Hemmera Envirochem Inc. report]. But, in my opinion, it is <u>highly likely</u> it would be within 150% of the estimated cost” (emphasis in original).

Mr. Lambrecht provided three estimates for the costs of remediation of the Pt. Ellice lands: 1) $12,847,000 for a physical remediation approach, or dig and dump; 2) $3,625,000 for a risk assessment approach; and 3) $8,300,000 for a combined approach of physical remediation and risk assessment.

[241] There are additional reports in evidence, some of which were disclosed mid-trial by the defendants. These additional reports that were disclosed mid-trial are identified in my 2023 BCSC 1684 mid-trial decision.

[242] I wish to emphasize again that a significant amount of trial time was spent on these environmental remediation reports. In my opinion, the evidence relating to the environmental condition of the Pt. Ellice lands becomes more relevant if the Term Sheet is a binding contract of purchase and sale. As I have already said, I have concluded that the Term Sheet is not objectively a contract, and its terms are not sufficiently certain. Therefore, the significance and importance of these environmental remediation reports is reduced.

[243] However, even if that were not the case, all of the evidence makes it clear that the estimates are estimates only and the actual cost of remediation could vary. In that regard, Mr. Berman's evidence around the "horror story" and remediation costs in other projects is relevant. With that in mind, in my opinion, the request by the defendants for $5 million, although on the higher end, was not so high that it could be considered unreasonable. That is particularly so when Ralmax had initially offered $5 million in cash in an escrow account on April 24, 2018.

[244] Prior to contract formation, Mr. Berman is allowed to negotiate any terms, price, or conditions he sees fit. Mr. Maxwell recognized that he was going to have to pay a premium if he was going to persuade Mr. Berman to sell the Pt. Ellice lands to him. Therefore, the $36 million price negotiated was an above market price. Similarly, it was open to the defendants to require security beyond the estimated costs of remediation. It is important to remember that Mr. Berman had not agreed to a Certificate of Compliance approach to the environmental remediation on the lands at the time the Term Sheet was signed. It was open to him to require a "dig and dump" approach.

[245] As noted by Justice Butler in *Oceans Pacific Hotels* “a duty to negotiate in good faith is incompatible with the adversarial nature of negotiations between parties”: at para. 63. If a party is unsatisfied with another party’s negotiation position, they have the right to walk away from the deal. Indeed, as Mr. Berman said in his evidence “There was no gun put to Mr. Maxwell’s head on this transaction” and “I wasn’t sticking anybody with anything. It was up – it was up to Mr. Maxwell to make up his mind whether he wanted to agree to those terms or not.”

[246] In my opinion, this is exactly what the defendants did. The defendants were not satisfied with Ralmax’s position and terms regarding security for environmental liability, and so, they chose to walk away from the purchase and sale of the Pt. Ellice lands. Ralmax was entitled to do the same, but chose not to. Instead, Ralmax tried to do everything they could to satisfy the defendants’ requests, but in the end fell short.

[247] Thus, Ralmax’s arguments in relation to a breach of contract because Mr. Berman acted in bad faith by asking for extraordinary, unreasonable and arbitrary environmental security cannot succeed.

COUNTERCLAIM BY THE DEFENDANTS

[248] On September 26, 2018, the defendants filed a counterclaim against Ralmax. The basis for the counterclaim is that the defendants assert that Ralmax breached the terms of the 2016 and 2018 NDAs. Although they have now modified their position, the defendants were initially seeking the following relief:

(a) An Order discharging the Certificate of Pending Litigation;

(b) With respect to the Term Sheet:

  (i) the Defendants be awarded indemnification of its legal fees on a solicitor and own client basis to defend the claim against it, and prosecute the counterclaim, along with any other claims, expenses and damages that the Defendants have or must incur as a result of the Plaintiff’s conduct and law suit;

  (ii) the Deposits, or a portion thereof, be ordered forfeited by the Plaintiff and paid to the Defendant Pt. Ellice; and

  (iii) further, or in the alternative, general damages for breach of contract;

(c) indemnification pursuant to the 2016 Agreement and the 2018 Agreement;

(d) general and special damages, including for breach of the 2016 Agreement and the 2018 Agreement, as well as for intentional interference with economic interests;

(e) interest pursuant to the *Court Order Interest Act*, R.S.B.C., 1996, c. 79;

(f) costs; and

(g) such further and other relief as this Honourable Court deems just.

[249] In their final closing written submissions, however, the defendants appear to only be seeking a declaration that Ralmax breached the 2016 and 2018 NDAs and an award of nominal damages.

[250] Ralmax seeks that the counterclaim be dismissed and opposes the granting of the relief sought by the defendants in their counterclaim. However, Ralmax's submissions presume that the Term Sheet is a contract.

[251] Clause 2 of the 2016 NDA, which is similar to Clause 2 of the 2018 NDA, states:

> **2. CONFIDENTIALITY OBLIGATIONS**
>
> Recipient will, and will cause Recipient Representatives to, treat the Confidential Information received by Recipient and any Recipient Representative as secret and confidential and Recipient will, and will cause Recipient Representatives to:
>
> …
>
> (e) not disclose the Confidential Information to any person except:
>
> (i) to Recipient Representatives strictly on a "need to know" basis and only to the extent as is necessary in connection with their contribution to evaluating or implementing the Opportunity; and
>
> (ii) to a potential lender(s) and/or investor(s).
>
> provided that in either case the Recipient will first advise such Recipient Representatives, lender(s) and/or investor(s) of the requirements of this Agreement and obtain their written commitment to abide by these requirements; or
>
> (i) as required by law; or
>
> (ii) with the express prior written consent of Disclosing Party;
>
> …
>
> (g) not, without Disclosing Party's prior written consent, disclose, in any manner whatsoever, to any other person that the Confidential Information has been made available to Recipient or any

> Recipient Representative, that this Agreement has been entered into, or that discussions, investigations or negotiations are taking place concerning the Opportunity;

[252] Clause 1 of the 2016 NDA, which is similar to Clause 1 of the 2018 NDA, defines "Confidential Information" as follows:

> **"Confidential Information"** as used in this Agreement means information concerning the existence, nature, status and content of negotiations concerning the Opportunity with respect to Disclosing Party, and extends to all confidential, proprietary and non-publicly available information, whether in oral, written, graphic, schematic or electronic form, which may include, without limitation, certain information regarding Disclosing Party's past, present or future business and affairs, data, materials, analysis, studies, reports, marketing plans and strategies, market research, business plans, strategic long and short term plans, finances, financial information, methods of operation and competition, pricing, acquisition opportunities, distribution channels, information concerning personnel, customers and suppliers, business activities, business practices, research and development, know-how relating to products, equipment, processes or methods, and trade secrets, personal information, and other information, whether disclosed orally, in writing or by any other manner, part or all of which is confidential and proprietary to Disclosing Party; however, that Confidential Information will not include information which:
>
> (i) is or becomes generally available to the public other than as a result of disclosure by Recipient or any Recipient Representative in breach of this Agreement;
>
> (ii) can be established by suitable documentation or other sufficient evidence was in Disclosing Party's possession prior to disclosure by Disclosing Party or any Disclosing Party Representative from a source not known to be bound by a confidentiality agreement or other obligation of secrecy;
>
> (iii) becomes available to Recipient or any Recipient Representative from a source other than Disclosing Party or a Disclosing Party Representative, if such source is not known by Recipient or any Recipient Representative to be bound by a confidentiality agreement or other obligation of secrecy; or
>
> (iv) is independently acquired or developed by Recipient or any Recipient Representative other than in breach of this Agreement.

[253] In the 2016 NDA, the "Opportunity" relates to discussions about the exploration and evaluation of potential business opportunities involving the purchase and sale of the business of Pt. Ellice.

[254] In the 2018 NDA, the "Opportunity" relates to discussions about the exploration and evaluation of a potential property purchase opportunity of the seven parcels

described as the Pt. Ellice lands at Pleasant Street and Turner Street, Victoria, BC. There was an amendment to the 2018 NDA to include the up-island properties.

[255] The defendants argue that Ralmax breached the 2016 and 2018 NDAs by disclosing to Transport Canada negotiations that were occurring between Ralmax and the defendants regarding the sale and purchase of the Pt. Ellice lands.

[256] In cross-examination on November 16, 2022, Mario von Riedemann, a representative of Transport Canada, when asked “You were not in fact aware at the time of receiving this email that Ralmax intended to purchase Pt. Ellice Properties; is that right?”, responded that “At the time -- I became aware in and around the date of May 29th that the intent -- or that there were negotiations between Ralmax and Pt. Ellice.”

[257] In two emails dated May 29, 2018 from Doug Crowder to Mario von Riedemann, with Mr. Leibel cc’d, Mr. Crowder wrote: “Hi Mario, Follow up to my telephone voicemail to you yesterday ... I understand that you are aware that Ralmax intends to purchase Pt. Ellice Properties which includes the waterlot lease ...”; and “Hi again Mario, Although I am sure that I don’t need to remind you, please treat the planned Pt. Ellice Properties acquisition as highly confidential at this time.”

[258] In his cross-examination on October 20, 2022, Mr. Maxwell testified that in May 2018 Mr. Crowder was: possibly a consultant for Ralmax; did various things for Ralmax; and understood that the transaction between Ralmax and Pt. Ellice was supposed to be kept confidential.

[259] Clause 1 of the 2016 and 2018 NDAs is broadly worded. As previously noted, “Confidential Information” is defined as information “concerning the existence, nature, status and content of negotiations concerning the Opportunity” (emphasis added). The “Opportunity” is defined as discussions involving the purchase and sale of the business of Pt. Ellice and the potential property purchase of Pt. Ellice lands. Therefore, mentioning to a third party, in this case Transport Canada, that there exists a potential purchase and sale of property and business between Ralmax and the defendants is a

breach of the NDAs. However, since the disclosure occurred through the actions of Mr. Crowder, who had not been heavily involved in the proposed transaction, the breach of the NDAs could be characterized as inadvertent.

[260] Ralmax argues that there cannot be a breach of the 2016 and 2018 NDAs because the Term Sheet is a contract, and therefore, both NDAs are no longer in effect once there is a formal, comprehensive written agreement. However, since I have found that the Term Sheet is not a valid and enforceable contract, Ralmax's argument cannot succeed. Therefore, I find that there was a breach of the 2016 and 2018 NDAs.

[261] I turn now to consider the relief I should grant due to this breach.

[262] The defendants admit in their closing written submissions that "it is agreed that no significant damage was caused" by the breach of the NDAs. In their closing written submissions, the defendants are seeking a declaration and an award of nominal damages.

[263] Although declaratory relief was not pleaded by the defendants, Rule 20-4 of the *Supreme Court Civil Rules* gives this Court a broad discretionary ability to make declarations. Rule 20-4 reads:

> **Declaratory order**
>
> (1) A proceeding is not open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[264] Further, in relation to declaratory relief, Justice Karakatsanis, dissenting in part, stated that "a court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed, and whether or not a declaration was pleaded as relief sought": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 104 [*Babstock*].

[265] One of the key considerations in determining whether to grant declaratory relief is that the granting of the declaration must have "practical utility". As explained by the

British Columbia Court of Appeal in *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 at para. 382:

> To that end, before granting a declaration, a court must generally satisfy itself that the sought-after order has practical utility or would serve a "useful purpose" in the context of the facts of the case and the parties' interests (*West Moberly 2020* at paras. 310–312; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11). "Detached facts and general pronouncements of law have little utility" (*West Moberly 2020* at para. 312).

[266] I am not persuaded by the defendants that the granting of a declaration that Ralmax breached the 2016 and 2018 NDAs would have practical utility in this case. As I have said, although there was a breach of the NDAs, it was inadvertent. The main practical utility that the declaration would have in this case is it would confirm that the NDAs were binding on the parties, and governed the relationship between the parties in relation to the sale and purchase of Pt. Ellice lands. I have previously noted that one of the reasons why the Term Sheet is not clearly contractual is because the 2016 and 2018 NDAs include a definitive agreements clause, which expressly provides that a term sheet is not a binding agreement. I find as a fact that the NDAs were binding on the parties.

[267] In the result, I find that Ralmax breached the NDAs. However, they did so inadvertently. I am not persuaded that a declaration and a nominal award of damages would have any practical utility and I decline to make a declaration.

CONCLUSION

[268] I find that the document titled "Term Sheet – Hybrid Sale" is not objectively a contractual document, and even if I am wrong, its terms are not sufficiently certain to create a contract. Accordingly, Ralmax's claim fails and it is unnecessary to consider the issue of specific performance or damages. The two deposits totaling $5.5 million that were paid by Ralmax are to be returned to Ralmax, which has already occurred under the consent order.

[269] The parties are at liberty to contact Supreme Court Scheduling to schedule a hearing on the issue of costs.

"J. A. Power, J."
The Honourable Madam Justice J. A. Power