

SUPREME COURT OF NOVA SCOTIA

Citation: *Pick v. Ziegler*, 2025 NSSC 383

Date: 20251204

Docket: SBW No. 539406

Registry: Bridgewater

Between:

Matthias Johannes Pick

Applicant

v.

Juergen Ziegler and Ziegler Homes Ltd.

Respondents

DECISION

Judge: The Honourable Justice Peter P. Rosinski

Heard: October 14 and 15, 2025, in Bridgewater, Nova Scotia

Counsel: Kathryn Dumke, KC, for the Plaintiff
Matthew G. MacLellan, for the Defendants, Juergen Ziegler and
Ziegler Homes Ltd.

By the Court:

Introduction

[1] This case concerns a dispute about a purported contract to purchase an incorporated construction business – Ziegler Homes Ltd - and whether, “after the deal fell through”, the buyer who paid the \$50,000 “security deposit” (Mr. Matthias Pick) or the seller (Mr. Juergen Ziegler) should have the deposit?

[2] Hereinafter, for convenience I may refer to the purported contract as “the contract” and the Pre-Sale Agreement (“PSA”).

[3] This document was drafted by the parties without the assistance of legal counsel.

[4] Matthias Pick and “Juergen Ziegler (Ziegler Homes Ltd.)” are listed thereon as the Buyer and Seller respectively. It was signed by both parties on November 29, 2023. The contemplated sale/transfer did not take place.

[5] In September 2024, Mr. Pick informed Mr. Ziegler that he would not be buying Ziegler Homes.

[6] Matthias Pick is suing Ziegler Homes and its principal and owner, Juergen Ziegler, only for the return of a \$50,000 deposit paid pursuant to the provisions of the contract to purchase Ziegler Homes.

[7] In his pleadings Mr. Pick has sought as relief “the return of the deposit plus interest”, relying on Article 8 of the PSA or “pursuant to the doctrine of unjust enrichment”.

[8] Article 8 reads (as drafted using Chat GPT and then translated from German to English):

Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposit amount of CAD \$50,000.

[My underlining added]

[9] I am satisfied that the \$50,000 deposit must be returned to Matthias Pick.

[10] I am not satisfied that the evidentiary and jurisprudential basis for the payment of interest to Mr. Pick has been persuasively established.

1-Background

[11] In 1994, Juergen Ziegler immigrated from Germany to Canada.

[12] At the time he had attained a recognized expertise in Mechanical Engineering, as well as a Masters Electrician certification.

[13] In the area of Bridgewater, Nova Scotia, he has directed his expertise and talents, along with his wife Eva's assistance, to making a very successful career for themselves in real estate and construction – the latter through the vehicle of Ziegler Homes Ltd. Mrs. Eva Ziegler assisted generally with their business ventures.

[14] In 2022, Mr. Ziegler was giving serious consideration to his retirement.

[15] In Germany, Matthias Pick and his wife, Carmen Pick, had long been interested in immigrating to, and working in, Canada.

[16] In May 2022, through contact with an immigration consultant in Nova Scotia, they became aware of an opportunity to work for Mr. Ziegler in Bridgewater.

[17] Mr. Pick had qualifications as a tradesperson and carpenter and had an established home renovation business in Germany. His wife, Carmen, worked as the office administrator of the business.

[18] During one of their initial calls, Mr. Ziegler told Matthias that “he could hire me as a carpenter, but he stressed that he was actually looking for a successor for his Company as he was planning to retire... he wanted \$300,000 for the Company, with an upfront payment of \$100,000 at the time of the transfer and instalment payments for the remaining amount.”

[19] Carmen and Matthias with their children visited the Bridgewater area in June 2022 to see whether the area and opportunity were a good fit for their family.

[20] After they had all returned to Germany, Matthias told Mr. Ziegler: “we had a serious intention to purchase the Company and that we were ready to start the immigration process [to start work as employees of Ziegler Homes].”

[21] There were numerous email contacts between the parties, which culminated with the Picks selling their German business and property sometime in or around May 2023.

[22] In order to maintain and bolster their connection to Bridgewater and the Ziegler Homes opportunity, they vacationed there with their children in May 2023.

[23] On August 23, 2023, their Applications for Work and Study Permits were submitted by the Picks through their immigration lawyer. Processing time for their Immigration Applications took longer than they had expected.

[24] They arrived with their family in Bridgewater on **October 14, 2023**, while still waiting for the Permits to ensure that they could start work immediately after receiving them.

[25] On **November 7, 2023**, they received notification that their Work and Study Permits would be approved.

[26] On **November 10, 2023**, they received their Work and Study Permits.

[27] On **November 20 and 23, 2023**, respectively, they began to work as employees of Ziegler Homes.

[28] Only on **June 7, 2024**, did they receive “confirmation ... that we will receive Permanent Residence”.

[29] On **November 29, 2023**, “Matthias” and “Juergen Ziegler (Ziegler Homes)” signed a document entitled “Pre-Sale Agreement” (attached hereto as Appendix 1). That document is at the centre of the legal dispute herein.

[30] **The PSA included the following clauses:**

1-Sale Subject: The Seller agrees to sell, and the Buyer agrees to purchase, the business known as “Ziegler Homes”, **including the inventory, vehicles, logos, company name, website, email address, and the assumption of existing employees** (the ‘Sale Subject’ detailed under 12 – Attachments)

...

5-Purchase Price: The purchase price is **CAD 100,000 plus an Advisory Fee** [detailed under 7 Advisory Fee] and includes the “Sale Subject”.

6-Security Deposit: As a Security Deposit, the Seller shall receive CAD \$50,000 in instalments to an account designated by the Seller. The remaining CAD 50,000 will be latest due on the official takeover date.

7-Advisory Fee: Following the business acquisition, the Buyer commits to pay the Seller an Advisory Fee of [Amount] monthly for the subsequent three years. This payment shall be made via the company account.

8-Contingency in case of Death:

a-in the event of the **Buyer's death before** the business takeover, the full deposit of CAD \$50,000 shall be refunded to the rightful heirs.

b-in the event of the **Seller's death before** the business sale, the agreed purchase price payment shall be made to the Seller's rightful heirs.

Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposited amount of CAD \$50,000.

...

13-Attachments: The attachments to this agreement including the detailed list of inventory, office spaces, tools, machinery, vehicles, and non-material assets, form an integral part of this Agreement.

[31] I find as a fact that on or before November 29, 2023, no Attachments were available for attachment to the Agreement, and none were attached to the Agreement.

2-The litigation herein

The Process

[32] On September 27, 2024, Mr. Pick advised Mr. Ziegler that he would **not** be proceeding with the purchase of Ziegler Homes.

[33] He sought the return of the \$50,000 security deposit. Mr. Ziegler refused to return it.

[34] On November 20, 2024, Mr. Pick filed a Notice of Application in Chambers requesting “an Order for the return of the deposit in the amount of \$50,000 paid by the Applicant to the Respondents for an asset purchase of property of the Respondent.” (which had been paid in two instalments: on **December 1, 2023** - \$14,400 and on **July 3, 2024** - \$35,600, which cumulated to the first \$50,000 of the \$100,000 purchase price mentioned in the PSA.)

[35] On February 20, 2025, Mr. Pick re-formulated his pleadings by filing a Notice of Application in Court requesting: “an Order for the return of the deposit in the amount of \$50,000 paid by the Applicant to the Respondents for an asset purchase of property of the Respondent.”

[36] On April 4, 2025, the Respondents filed their Notice of Contest seeking that this Court dismiss the Application.

The substance of the Pleadings

[37] This trial was conducted pursuant to the Nova Scotia *Civil Procedure Rules* (“CPR”) specifically CPR 5.07- Application in Court, which is a “trial by affidavits” with cross-examination thereon.

[38] The Notice of Application in Court contains the pleadings of the Applicant.

[39] The Respondent(s) have filed a Notice of Contest pursuant to CPR 5.08, defending against the claims of the Applicant.

A-Applicant Matthias Pick

[40] Matthias’s Notice of Application pleads that:

Ziegler insisted on a security deposit because he advised that he had another potential buyer. To document terms and the security deposit, the parties entered into a “presale agreement” so-called, (“the Agreement to Agree”) the contents of which were provided by Ziegler, and which were put in writing by Carmen, and signed by both parties on the same day, November 29, 2023.

The Agreement to Agree set out some bare terms of the parties, the assets intended to be purchased and the purchase price of \$100,000, and a closing date. However, all parties agreed verbally that the purchase of Ziegler Homes would cost \$300,000.

The Agreement to Agree further called for a “security deposit” in the amount of \$50,000, and a final payment of another \$50,000 on closing of the transaction.

The Agreement to Agree further provided for a return of the deposit if “a legal purchase of the business became impossible due to insufficient contractual terms...”

The deposit was paid to Ziegler by the Picks.

...

The Agreement to Agree lacked essential terms such as a contemplated Advisor Fee which was payable for three years but was never quantified.

Further, **Ziegler’s restructuring of the Company during the entire period starting in June 2022**, including but not limited to the firing of support staff, the non-replacement of originally existing employees/positions who quit, and the shift of focus away from customer order homebuilding toward speculative construction projects, **meant that what was being offered to the Picks for purchase was no longer that which had been discussed when the Agreement to Agree was signed.**

On September 27, 2024, after months of negotiations, the Picks concluded that a purchase of the business of Ziegler Homes was impossible as a result of the parties’ inability to agree to the full terms between them.

The Picks demanded the return of their deposit.

...

The Picks seek an Order for the return of the deposit plus interest and disbursement(s) and seek costs on this Application.

In the alternative, the Picks seek an Order declaring that the Agreement to Agree was merely a non-binding and unenforceable Agreement to Agree, and the deposit plus interest is to be returned pursuant to the doctrine of unjust enrichment.

The Agreement to Agree further provided for a return of the deposit if ‘a legal purchase of the business become impossible due to insufficient contractual terms...

[My bolding and underlining added]

B-Respondent(s) Juergen Ziegler (Ziegler Homes Ltd.)

[41] In response, the **Notice of Contest includes:**

Though there was no written agreement, **by or around late summer 2022, [Mr. Ziegler and Matthias] had agreed to essential terms orally including the purchase price for Ziegler Homes and that a non-refundable \$50,000 security deposit [the “Deposit”] would be paid to [Mr. Ziegler] – such that both parties understood [Mr. Ziegler] was contractually obligated to sell the business to [Matthias].**

...

[Matthias and Mr. Ziegler] entered into a **written agreement [the “Agreement”] on November 29, 2023 [the “Signing Date”].** The Agreement provided and reiterated that [Mr. Ziegler] would sell Ziegler Homes to [Matthias].

...

The Agreement included that [Matthias] would provide the Deposit to [Mr. Ziegler] and that [Mr. Ziegler] would return the Deposit to [Matthias] (or his estate) only if [Matthias] died prior to taking ownership of Ziegler Homes or if the purchase became impossible.

...

As to Gound 9: The terms of the Agreement went beyond bare terms and were sufficient to bind the parties.

The parties agreed at all material times – and certainly prior to and on the Signing Date – that the total cost of purchasing Ziegler Homes was \$300,000.

Prior to and on the Signing Date, the parties agreed that the \$300,000 would be comprised of the Deposit, an additional \$50,000 due upon closing, and that the remaining \$200,000 would be payable within three years.

...

As to Ground 16: The ‘Advisor Fee’ as is referenced in the Agreement, **was the \$200,000 agreed to be payable within three years of closing. That this amount was not quantified in the Agreement was an inadvertent omission.**

As to Ground 18: [Ziegler Homes] states that **the purchase was at all material times possible.**

...

[Ziegler Homes] state that **the written Agreement was binding and enforceable and that the Agreement did not lack essential terms.**

...

At all material times prior to [Matthias] stating that he would not purchase Ziegler Homes, [his] **words and conduct indicated an intention to be bound by the Agreement**, and [Mr. Ziegler] **relied upon such words and conduct to his detriment**. The Respondents state that [Matthias] **is estopped from now claiming that the Agreement was non-binding and unenforceable.... If the Agreement as written lacked essential terms**, and where the parties had agreed upon all essential terms and that the Agreement would be binding and enforceable, that **the Agreement may be rectified as to include all essential terms.**

In the further alternative, if the Agreement is not enforceable, the Respondents state that the parties entered into a binding oral agreement, which included that the Deposit was non-refundable unless [Matthias] died before taking ownership of Ziegler Homes or if the purchase became impossible.

[Ziegler Homes] **deny that they have been unjustly enriched** to the detriment of [Matthias] or at all.

[My underlining and bolding added]

3-The issues for consideration and resolution

A-Credibility and fact-finding

[42] As in any trial, the Court must make “credibility” findings. The assessment of the credibility of a witness focuses on the perceived truthfulness/honesty of the witness, as well as the reliability of their testimony.¹

[43] After carefully scrutinizing each of the witness’ testimony, including the affidavit evidence and documentation presented, with a view to assessing their credibility, although I found Mr. and Mrs. Ziegler to be generally credible, where their evidence materially differs from that of Mr. and Mrs. Pick, I accept the evidence of Mr. and Mrs. Pick, unless otherwise stated by me.²

[44] One example where I prefer the evidence of Mr. and Mrs. Pick is the matter of the provenance of the PSA, which was signed on November 29, 2023.

[45] Mrs. Pick testified that Mrs. Ziegler had provided her with a hard copy raw document with basic terms in German, and this guided Mrs. Pick in creating as a computer document what is Exhibit 12 (the PSA). Mrs. Pick characterized the PSA as “a letter of intention to purchase”.

¹ At the request of the Court, counsel for the Picks provided a letter dated September 18, 2025, to register in writing objections they had to the affidavit of Mr. Ziegler, and which I had earlier indicated could be dealt with during submissions at the conclusion of the Application hearing. Mr. Ziegler outlined his position in his October 1, 2025, brief under Issue 1. These objections were not canvassed directly with counsel at the end of a very late day on October 15, 2025. Let me briefly put my conclusions here. The Applicants disputed the admissibility of paragraphs 17, 22, 32 and 33 as hearsay and had concerns as well regarding paragraphs 83 and 88 of Mr. Ziegler’s affidavit. I have examined those paragraphs and conclude that paragraphs 17 and 22 are admissible for the mere fact that the statements were made directly to Mr. Ziegler, and he was available for cross-examination thereon, albeit they deal with immaterial matters. The factual assertions in paragraphs 32 and 33 are hearsay as they are tendered for the truth of their contents and therefore inadmissible as well as irrelevant; and paragraphs 83 – 88 are similarly irrelevant. I find immaterial or irrelevant the content of paragraphs 31 – 39 of Mr. Ziegler’s affidavit.

² I keep in mind that Mrs. Eva Ziegler was not cross-examined. The evidence of Mr. and Mrs. Pick was at times given in their native High German language, and an interpreter, Friedemann Brauer, only for short intervals and on request, provided a commendable service for the Court. I conclude that the Picks’ command of the spoken and written English language in October and November 2023 shortly after immigrating to Canada was limited much more so than for Mr. and Mrs. Ziegler who had been here for decades. At times, Mr. and Mrs. Pick also referenced materials written in German. In my assessment of the witnesses’ credibility, and to better understand the contextual background here, I considered what they said in their *viva voce* testimony, and what was written in the documentation presented in German including where a translation was not provided, when my attention was drawn to such relevant matters, as I am fluent in speaking and reading German.

[46] She went on to say that she had scanned Mrs. Ziegler's materials onto her computer and asked Chat GPT to create a letter of intention to purchase and then to translate it from German to English.³

[47] I bear in mind that Mr. Ziegler signed the PSA, and I infer he was content with its wording.

[48] There is no evidence that he asked that any material amendments be made to the draft PSA which Mrs. Pick had provided to the Zieglers.

[49] I infer there were none.

B-The legal positions of the Parties

[50] **The Picks' position** is set out in their Notice of Application, as supplemented by their written and oral arguments. They disagree with the arguments put forward by the Zieglers.

[51] They say that **the PSA is not a valid and binding contract and it was not supplemented by any oral agreement that made it valid and binding**, nor could any oral utterances of themselves have created or modified a valid and binding contract.

[52] **If the PSA was *prima facie* valid, then Article 8** properly interpreted (if "a legal purchase of the business became impossible due to insufficient contractual terms...") **caused it to be not binding**, and the deposit must be returned.

[53] Alternatively, **if the PSA is not valid and binding, the deposit must be returned** pursuant to the doctrine of **unjust enrichment**.

[54] **Mr. Ziegler's position** is that:

- (i) **the PSA, signed November 29, 2023, is valid and binding**, and the security deposit is not refundable **unless**, as Article 8 thereof states:

³ The Zieglers' counsel cross-examined Mrs. Pick about what had happened to the original hard copy document. Although Zieglers' counsel intimated disbelief that the hard copy document was presently unavailable, and wished the Court to draw an adverse inference against her, I accept Mrs. Pick's answer that she distinctly recalled Eva Ziegler handing it to her in her office as a hard copy document and she specifically remembered the non-compete clause, and that the hard copy was simply lost. I note that the Zieglers' position was that Mrs. Ziegler provided a digitized version of her writings to Mrs. Pick. If that were the case, then the Zieglers' would still have a copy presumably in their own computer records.

Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposit amount of CAD \$50,000.

and Mr. Pick has failed to establish that the purchase had become “impossible due to insufficient contractual terms”.

(My underlining added)

- (ii) Mr. Ziegler also relies on the following arguments:
- there was a **stand-alone oral binding and enforceable agreement** that predated the PSA, or otherwise associated with and which modified the PSA;
 - (**promissory estoppel**) that Mr. Pick’s words and conduct indicated an intention to be bound by the PSA and that Mr. Ziegler relied upon such to his detriment, and therefore Mr. Pick should be estopped from claiming the PSA is not valid and binding;
 - it is appropriate to rely upon the **doctrine of rectification** to correct errors that the parties made in the drafting of the PSA which frustrated their true intentions – *Performance Industries Inc. v. Sylvan Lake Golf and Tennis Club Ltd.*, 2002 SCC 19; and more recently *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56; *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26.

4-An examination of the positions of the parties

A-No oral agreement(s)

[55] Firstly, let me briefly address whether there was any binding and enforceable oral agreement(s) that pre-dated or was otherwise associated with the PSA.

[56] There were not.

[57] In its pleadings, Ziegler Homes states that in the Summer/Fall of 2022 Mr. Pick and Mr. Ziegler “had agreed to essential terms orally including the purchase price for Ziegler Homes and that a non-refundable security deposit would be paid to Mr. Ziegler... both understood that [Mr. Ziegler] was contractually obligated to sell the business to Matthias Pick”.

[58] The evidence presented by the Zieglers, and otherwise, was not sufficiently reliable and persuasive in establishing that a valid and binding oral agreement(s) of any kind had been concluded.

[59] Moreover, the Picks' testimony (including Mrs. Pick's cross-examination) and their affidavits, persuasively suggest that there was no oral agreement in part or in whole form.

[60] All parties understood that:

1. Until Ziegler Homes received a Nova Scotia Immigration Program [NSIP] designation, [which was granted on September 5, 2022 – Pick affidavit paragraph 62] Mr. Ziegler/Ziegler Homes could not invite them to become employees;
2. Until Mr. and Mrs. Pick received Work Permits for themselves [which are based on specific job descriptions which themselves must be approved [paras. 77-78 and 82 Matthias Pick affidavit], and Study Permits for their 3 children, Mr. Ziegler/Ziegler Homes could not employ them [received November 10, 2023]; and ultimately,
3. Mr. Ziegler/Ziegler Homes could not guarantee:
 - a. if, and when, the Picks would be permitted to immigrate to Canada
 - b. that they would obtain Permanent Resident status and be permitted to stay here indefinitely-which was only confirmed on June 7, 2024.

[61] I am satisfied that it is very unlikely that the Picks intended commit themselves to be bound as expressed by the Ziegler Homes' claim, that "essential terms ... including the purchase price for Ziegler Homes and that a non-refundable security deposit would be paid to Mr. Ziegler ... [such that] both understood that [Mr. Ziegler] was contractually obligated to sell the business to Matthias Pick", in the Summer/Fall of 2022, or on or before November 29, 2023.⁴

⁴ In having so concluded, I did keep in mind that in Mr. Pick's affidavit at Tab 9 [p. 111] one finds an email thread between Carmen Pick and Eva Ziegler on **June 28, 2022**, wherein Carmen states: ["Ebenso ist es uns wichtig, Euch moeglichst zeitnah eine erste kleine "Anzahlung" als Sicherheit zukommen zu lassen (1. Dass wir es wirklich ernst meinen und 2. Ihr Gewissheit habt)" ... to which Eva responds in part: "Also bitte keine uebereilten Verkauefe."] These can be reasonably translated as: "In any event, it is important to us, in the near future to send you a first small

[62] I bear in mind as well that it was much later when Mrs. Ziegler sent written instructions to the Picks about what should be included in the PSA, which I infer was not long before it was signed November 29, 2023; I accept Matthias' evidence from his affidavit at paragraph 80(e) that:

...one or two days after our arrival [October 14, 2023] [Mr. Ziegler] unexpectedly demanded that we pay a security deposit of \$50,000. **Since the issue of the security deposit had already been set aside by Eva Ziegler in June 2022, we had never discussed the matter again**, and it was also known that it was not yet certain whether we would receive the [Permanent Residency] at all, we were very surprised that he now insisted on a deposit and then in such an amount. Nevertheless, **we were willing to provide the security deposit, as this is a common practice for prospective buyers to demonstrate their serious interest.**

[63] I am satisfied more likely than not, that there was no valid and binding oral contract, or oral modification to the PSA at any time.

B-No promissory estoppel

[64] Secondly, let me deal with Ziegler Homes' promissory estoppel argument.

[65] Ziegler Homes states in its pleadings that Mr. Pick's "words and conduct indicated an intention to be bound by the [PSA] and [Mr. Ziegler] relied upon such words and conduct to his detriment ... [therefore Mr. Pick] is estopped from now claiming that the Agreement was non-binding and unenforceable" through the doctrine of promissory estoppel.

[66] I find useful Justice Gerald Moir's reasons in *Jones v. Laurie*, 2004 NSSC 87, wherein he cited the reasons in *Ford v. Kennie*, [2002] NSJ. No. 477 (CA), regarding the doctrine of "promissory estoppel", which stated:

The doctrine expanded in equity, so as to include, not only representations of fact, but also representations of intention; or promises... Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by doing so the representee would be prejudiced.

payment for your security (1. that we are serious and 2. you have certainty)"; to which Eva responds in part: "Please, let's not get ahead of ourselves". I am satisfied that the Picks were very interested in exploring with the Zieglers whether their hoped for ultimate immigration to Canada might be effected by a sponsorship through Ziegler Homes, firstly as employees, which could possibly later lead to the Picks buying the Ziegler Homes operations.

[67] In the circumstances of this case, I am satisfied more likely than not that Mr. Pick did not make unambiguous representations of fact, intention or promise regarding his future conduct, nor did he intend that any words or conduct he made should be relied upon by Ziegler Homes, as claimed by them.

[68] I am similarly not satisfied that Mr. Ziegler/Ziegler Homes materially relied on the argued words or conduct of Mr. Pick to their detriment.

[69] Bearing in mind that Ziegler Homes' position is that the November 29, 2023 PSA as drafted by the parties without the benefit of legal counsel is a valid and binding agreement, it is odd that on September 16, 2024, Ziegler Homes unilaterally presented a further Agreement to Purchase Assets ("APA") drafted by its own legal counsel, to be signed by the Picks - especially since the APA did not make any reference to the PSA, and did not include important clauses that were in the PSA such as a non-competition clause which would have been very much consistent with Mr. Ziegler receiving an "Advisory Fee" over a period of three years after the transfer of Ziegler Homes to Mr. Pick.

[70] Moreover, the unsigned APA refers to the \$50,000 paid already, as a "Down Payment" whereas in the PSA it is referred to as a "Security Deposit".⁵

[71] Let me go on to explain why I find the November 29, 2023, written PSA is not a valid and binding contract.

C-The PSA is not a valid and enforceable contract

[72] I approach this issue by considering, "from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty" (paragraph 82 of the reasons in *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71 per Cromwell JA, as he then was); and while doing so, I appreciate that "where possible, words should be understood so as to give effect to the agreement rather than to destroy it" per the reasons of

⁵ I have considered that Clause 9.04 of the unexecuted APA is an "Entire Agreement" clause intended to preclude any reliance on previous oral or written bases that might be used to add to the provisions of the APA or inform the meaning of the APA provisions. See, also Justice Duncan Beveridge's reasons (as he then was) in *Executive Rental Agency v. Quaintance*, 2009 NSSC 161 at paras. 25-28. I appreciate that the parties to the APA are different, insofar as Mr. Pick is not a party, but rather 4641011 Nova Scotia Ltd is whereas only Ziegler Homes Ltd. is a party, not Mr. Ziegler. In contrast, in the PSA, the parties are listed as: "Juergen Ziegler (Ziegler Homes)" and Matthias Pick in his personal capacity.

Cromwell JA, as he then was, in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2000 NSCA 95.

[73] I am satisfied that the PSA was no more than an “agreement to agree”, and the “security deposit” was mutually intended to temporarily acknowledge the interests of both Ziegler Homes/Mr. Ziegler and the Picks, and consequently the deposit was not intended to be non-refundable, as claimed by Mr. Ziegler.

[74] Let me briefly outline the situations of both families.

[75] The Picks had sold their business in Germany and liquidated their assets, before they immigrated to Canada on **October 14, 2023**, with their 3 children.

[76] They had taken on a significant risk by immigrating to Canada.

[77] Their family only received confirmation of their Work and Study Permits on November 10, 2023, which allowed them both to work for Ziegler Homes.

[78] On **November 20 and 23, 2023**, Mr. and Mrs. Pick began their employment with Ziegler Homes.

[79] They were aware, beforehand, that Mr. and Mrs. Ziegler had planned a trip overseas between December 31, 2023, and April 1, 2024.

[80] On **November 29, 2023**, when the PSA was signed by Mr. Pick, he had already agreed to be employed as the Project Manager for Ziegler Homes, and his wife had agreed to become the Office Administrator.

[81] They were very much on their own running Ziegler Homes, particularly while the Zieglers were on their trip.

[82] At the time Mr. Pick signed the PSA, I am very satisfied that he had no reliable bases upon which to decide whether to buy the company, *inter alia* for the following reasons:

- they had only just begun working for the company as employees, and had no experience with, or real insights into, running of the company, or the market in which it operated;

- they had not seen any financial statements for the company, thus making it impossible for them to make an informed decision, about what price they would be prepared to pay for the company;
- without having seen audited financial statements, they had no reliable basis to know what assets, existing and contingent liabilities Ziegler Homes had;
- they did want to have an exclusive opportunity to purchase the company, if they decided that is what they wanted to do in future, however I am satisfied that, on or before November 29, 2023, they did not intend to commit themselves to purchasing the company.

[83] I accept Mr. and Mrs. Pick's evidence that, effectively, they paid the \$50,000 security deposit in order to temporarily buy themselves exclusivity, that is to say, to demonstrate their seriousness of interest and to ensure that only they would be entitled to have an opportunity buy the company in the foreseeable future.⁶

[84] The PSA was generated by Eva Ziegler providing basic information to Mrs. Pick, and then she formatted the information and requested Chat GPT to prepare a draft "intention to purchase" document.

[85] Neither of them has any legal training in Europe or otherwise, and they did not have legal advice before they created, and then Mr. Pick signed, the PSA.

[86] On the other hand, Mr. Ziegler is a sophisticated businessman, having prolonged business experience in Nova Scotia, and being particularly knowledgeable about Ziegler Homes.

[87] Moreover, he had the opportunity to have explored selling the company to other persons including:

- in relation to Dale Sutherland who had been the Project Manager from November 2020 until July 2022, Mr. Ziegler stated:

⁶ Notably Mrs. Pick's Work Permit, (Exh. "C" Ziegler affidavit) unlike that of her husband, was restricted. The conditions included: "Not authorized to work in any occupation other than stated [administrative assistant]; Not authorized to work for any employer other than stated [Ziegler Homes Ltd.]. Not authorized to work in any location other than stated [Bridgewater Nova Scotia]".

Eva and I initially planned for Dale to take over Ziegler Homes in or around November 2022 ... In or around **May 2022**, Dale informed Eva and I that ... he no longer wished to take over Ziegler Homes.

For this reason, I was very happy to hear that the Picks were interested in purchasing Ziegler Homes, as I was nearing retirement and wanted to find a successor to take over the company.

During the Picks' visit in June 2022, we discussed the fact that Dale was leaving, and it was agreed that Matthias would fill Dale's position as Project Manager."- paras. 15-24 Affidavit.

[88] Mr. Ziegler also had other potential buyers for Ziegler Homes:

- Mr. Loeffler in **July 2022** – see paragraph 15 of Mr. Ziegler's affidavit;
- Steve MacIsaac in the **Fall of 2023** – see paragraph 17 of Mr. Ziegler's affidavit.

[89] In and around November 2023, Mr. Ziegler was hoping to retire, as would his wife. They needed someone like the Picks to carry the business forward in the shorter term, especially if they wanted to take their trip between December 31, 2023 and April 1, 2024, and so he and his wife benefited in any event by them being employees of Ziegler Homes.

[90] Moreover, regarding the longer term, the Picks, who started working as employees of Ziegler Homes in November 2023, showed serious interest in wanting to purchase Ziegler Homes, and they seemed to be a good fit for taking over the business, and keeping it running profitably.

[91] Let me then next examine the terms of the PSA, which I say amount to no more than "an agreement to agree".

[92] In his text, *Canadian Contractual Interpretation Law*, 2nd Ed., LEXIS-NEXIS Canada 2012 (with a Forward by the Hon. Ian Binnie, Former Justice of the Supreme Court of Canada), Geoff Hall states in Chapter 5 – Agreements to Agree (p. 159):

It is almost trite law that an agreement to agree is not an enforceable contract.

[Footnote 1 thereto, reads: "A classic expression of the basic concept was provided by Lord Denning MR in *Courtney and Fairburn Ltd. v. Tolaini Brothers (Hotels) Ltd.*, [1975] 1 WLR 297 at 301 (CA): 'a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law'. ... I think we must apply the general principle that when there is a fundamental matter left undecided and to

be the subject of negotiation, there is no contract”. *Courtney* was followed by the House of Lords in *Walford v. Miles*, [1992] H.L.J. No. 5. ... Both decisions have been widely cited in Canada.”]

While the basic concept is an easy one to state, there are several layers of complexity to the point. *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* is a leading Canadian decision on agreements to agree and aptly sets out the various sub issues raised by the proposition that an agreement to agree cannot be enforced.

In *Bawitko*, the paragraph cited is as follows:

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. See, generally, *Von Hatzfeld Wildenburq v. Alexander*, [1912] 1 Ch. 284; *Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al.* (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), *affd.*, (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); *Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd.* (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), *rev'd.*, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); *Chitty on Contracts*, 26th ed. (1990), at pp.79-91; *Corbin on Contracts*, (1963), Vol. 1, § 29-30; and *Treitel, Law of Contract*, 7th ed. (1987), at pp.42-47.

In this case, **the parties clearly contemplated the signing of a formal written contract.** Given this fact, **can the oral contract they were found to have reached constitute in law a completed contract which took effect immediately after it was agreed to on April 18?** In determining this question, it is plainly necessary to examine what transpired at that time. In doing so, it must be borne in mind that the franchise agreement which formed the subject-matter of the negotiations was intended to govern a lengthy franchisor-franchisee relationship. The precise terms under which a business relationship of this nature is to be governed are manifestly essential to the formation of a binding contract. **If no agreement in respect to essential terms has been reached or the terms have not been agreed to with reasonable certainty, it can only be concluded that such terms were to be agreed upon at a later date and until that time there would be no completed agreement.**

[My bolding added]

[93] Albeit in different circumstances, the above-noted reasons are cogent bases why the PSA is not a valid and binding contract.

[94] As Geoff Hall further elaborates at page 160, *Canadian Contractual Interpretation Law*, under the heading “There is no enforceable contract where there is no agreement on essential terms”:

... This proposition is neither controversial nor unclear. The difficult point is to determine what terms are essential.

The difficulty arises because a binding contract can arise even if there are gaps in what has been agreed, as long as the missing provisions are not essential or fundamental. As a result, the difference between an “essential” or “fundamental” term and one which is neither can be the difference between a binding contract and an unenforceable agreement to agree. **Unfortunately, the difference between essential and non-essential provisions is also rather difficult to define, and like most things in contractual interpretation in many cases can only be discerned by a close examination of the entire contractual context...** Moreover, ‘**the nature of the transaction is key for determining what terms are essential**’. [Citing *United Gulf Developments Ltd. v. Iskandar*, [2008] N.S.J. No. 317 (CA) at para. 15 per Cromwell JA as he then was.] ... **Parties may fully intend to have an incomplete agreement, and proceeding in that fashion may be perfectly efficacious from a business perspective, yet the law will not enforce such an agreement.**

[My bolding added]

[95] Let me also cite the reasons of Justice Cromwell (as he then was) in *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71:

[5] Applying these principles to the appellants’ submissions, I conclude as follows:

1. Contractual interpretation is a question of law and therefore the judge’s construction of the November 12th document should be reviewed for correctness: *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, 2004 SCC 23 (CanLII), [2004] 1 S.C.R. 609 at para. 29.

2. **In interpreting a contract, the judge is entitled to consider, where appropriate, the surrounding circumstances.** These are matters of fact and the judge’s findings in relation to them should be reviewed for palpable and overriding error: see, e.g. *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129 at para. 54; *MacDougall v. MacDougall* (2005), 2005 CanLII 44676 (ON CA), 262 D.L.R. (4th) 120, 205 O.A.C. 216 (C.A.) at paras. 23 - 34.

3. Determining whether, in a particular situation, certain terms are essential requires the application of legal principles to the facts. Whether a term is essential

is, therefore, a mixed question of law and fact. Absent some extractable error of legal principle, the judge's conclusions should be reviewed for palpable and overriding error.

...

2. Legal Principles:

[14] **To have an enforceable contract, there must be agreement between the parties as to all essential terms. To use the language of a leading case, a contract "... settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties":** *May and Butcher, Ltd. v. The King*, [1934] 2 K.B. 17 (H.L.) at p.21. **Determining what terms are "essential" in a particular case is, however, more difficult than stating the principle. The sort of terms that are considered essential varies with the nature of the transaction and the context in which the agreement is made:** *Mitsui & Co. v. Jones Power Co.*, 2000 NSCA 95, 189 N.S.R. (2d) 1 (C.A.) at para. 64.

[15] **It follows that the nature of the transaction is key for determining what terms are essential.** This brings me to an outline of the terms of the November 12th document before I turn to the judge's assessment of the nature of the transaction and to an examination of some of the critical terms he found were missing.

...

[75] **Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented.** Professor Waddams, in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) puts the question well:

Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? ... **[T]he test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the latter there is none.**" (section 51 page 36,)

[76] **This is a matter of the proper construction of the agreement, viewed as a whole and in light of its origins and purposes:** *Calvan Consolidated Oil & Gas Co. Ltd. v. Manning*, 1959 CanLII 56 (SCC), [1959] S.C.R. 253 at 260-61;

Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 1991 CanLII 2734 (ON CA), 53 O.A.C. 314, 79 D.L.R. (4th) 97(C.A.) at 103-04; Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co., supra at para. 67.

[My bolding added]

[96] The nature of the transaction and context underlying the PSA, is the potential purchase by Mr. Pick (a very recent immigrant to Canada, who had only 6 weeks earlier started as an employee of Ziegler Homes) of an ongoing residential home construction business, which had been overseen and operated by Mr. Ziegler for decades.

[97] I conclude, *inter alia*, that there are missing or uncertain terms which are essential to the PSA being a valid and binding contract, including the following.⁷

1. There is **no specific closing date** [variously referred to as: “the official takeover date”; “the business sale”; “the company acquisition”; “the final takeover date”] referred to in the PSA, and the language thereof is too loose to provide any ascertainable degree of certainty. The importance of a fixed closing date to there being a valid and binding Agreement, is evident from the nature and the language of the PSA.

[98] The composition and value of the assets/liabilities, the reputation and profitability of Ziegler Homes are each not static, but rather dynamic factors which impact whether a reasonable observer would conclude that Mr. Pick had intended at that time to be bound by the PSA, as he could have been legally bound to pay a fixed amount for Ziegler Homes over a large range of indefinite points in time.

[99] Compounding that uncertainty on November 29, 2023, was the fact that neither Mr. Pick nor any of the members of his family had Permanent Resident status at that time. They had Work and Study Permits. His wife was entitled thereunder to work only for Ziegler Homes.

⁷ Mr. Pick stated at paragraph 111 of his affidavit: “The [July 3, 2024] deposit having now been paid, marking the start of the negotiation period, we requested financial documents such as invoices from subcontractors, jobsite allocation lists, etc., which were received on July 23, 2024. Attached hereto as Exhibit “18” are the financial documented [sic] received.” To my recollection, in cross-examination Mr. Ziegler conceded that for an asset purchase you need a list of the assets including the serial numbers thereon if applicable, personal property registry and other checks so that the buyer can ensure the property will become theirs in an unencumbered manner. He further agreed that the Picks did not receive such information until at least September 4, 2024. Ms. Dumke put to Mr. Ziegler that “the actual and real negotiations about all of this started to take place after July 2024”? [once the second instalment, July 3, 2024, deposit, had been paid], Mr. Ziegler replied: “this was an ongoing process”.

[100] Without the guarantee of Permanent Resident status (notification having ultimately been received **June 7, 2024**), they did not have certainty that, at the time of closing, whenever that might be, they would still be entitled to remain in Canada.

[101] The following references appear in the November 29, 2023, executed PSA:

- (a) **“The sale of Ziegler Homes approximately should be completed no later than December 2024. An earlier transfer of the business can occur if the Buyer holds Permanent Residency status for 2-3 months.”**
- (b) “Until the final takeover of the business Juergen Ziegler and Eva Ziegler will be actively involved in the ongoing operations of the business. They will work closely with [Mr. and Mrs. Pick] during the training period to facilitate a smooth transition.”

[Mr. and Mrs. Pick were going to be working as employees for Ziegler Homes in any event, so the “training” would have happened regardless, whether they were intending to buy the Company.

Moreover, within one month of November 20, 2023, when Mr. Pick started working for Ziegler homes as Project Manager, the Zieglers were on an overseas vacation from December 31, 2023, until April 1, 2024. This “training period” was intended to continue “until the final takeover of the business” – namely the closing date – which date was never set, as it was not agreed to by the parties.

Starting on the closing date, per Article 7, if the PSA was a valid and binding agreement, Mr. Ziegler would have been obligated for a further 3 years to provide such services as intended by the parties to justify his monthly “Advisory Fee”.]

- (c) “As a Security Deposit, the Seller shall receive CAD \$50,000 in installments to an account designated by the Seller. The remaining CAD \$50,000 will be latest due on the official takeover date.”

[102] That the security deposit was not payable immediately on or about November 29, 2023, and that the date for payment was left unmentioned in the PSA, suggests its terms were not sufficiently certain, or that the PSA was not meant to be a binding agreement for the sale of the Company.

2-The PSA contemplates a total “purchase price” split between: two \$50,000 instalment payments on or before the closing date, and \$200,000 “Advisory Fee” split into 36 monthly payments after the closing date.

[103] For doing what, and for how much effort, is Mr. Ziegler to be paid \$200,000? Are there circumstances where the Buyer could refuse to pay, or delay, the payments?

[104] What if Mr. Ziegler had died not long after November 29, 2023?⁸ What if he died after “the business takeover”? The Advisory Fee, which was premised on his experience and expertise over decades, and his remaining alive to provide this service, could hardly be said to have been earned in the ensuing three years after “the business acquisition” if Ziegler had died, within three years of the closing date.

[105] Two-thirds of the purchase price was apparently allocated based on Ziegler Homes having the continued benefit of the advice of Mr. Ziegler over a period of three years, hence he was to be paid an “Advisory Fee”.

[106] That amount only became payable “following the business acquisition”, and Mr. Ziegler testified that in fact it would be Ziegler Homes not Mr. Pick who would commit to pay him that amount for 36 consecutive months (\$5,555.55 monthly).

[107] If there was a dispute between the parties, what provisions of the PSA could be relied upon to provide guidance to them?

[108] There is no general description, or evidence, as to what obligations Mr. Ziegler would have had to the Corporation/Mr. Pick, insofar as, for example, the required monthly minimum amount of time to be committed by him, and what pattern of availability could be expected of him, as well as the nature and extent of his advisory role and what constituted the giving of “advice” to the new owner of Ziegler Homes., etc.

[109] Given the significant proportion of the total purchase price associated with this “service”, and lengthy period of time for which Mr. Ziegler was to be paid therefor, that it was not referenced in greater detail, makes that important wording especially uncertain.

⁸ Article 8 presumably would have applied if Mr. Ziegler died, before the Closing date, yet it still requires that “the agreed purchase price payment shall be made to the Seller’s rightful heirs”.

3- “The Buyer does not assume any obligations of the Seller arising from the period before the official takeover of the company.”

[110] What “obligations” are being referred to here? Are these references to what in accounting are characterized as “liabilities” or is a broader interpretation intended? And in this situation is the “Seller” Mr. Ziegler, Ziegler Homes, or both?

[111] The “Seller” is characterized in the PSA as “Juergen Ziegler (Ziegler Homes)”.

4-What is being bought by Mr. Pick and sold by Mr. Ziegler, and other uncertainties.

[112] There is no listing of what specifically was being sold - no list of assets; and no “attachments” to the PSA - although its wording suggests they would be attached.

[113] The wording in the PSA is:

13 – Attachments: the attachments to this Agreement including the detailed list of inventory, office spaces, tools, machinery, vehicles and nonmaterial assets, **form an integral part of this Agreement.**

[114] Moreover, on November 29, 2023, Mr. Pick had no basic list of what were the “Items not and included in Sale” – which was ultimately sent to him by Ziegler Homes on September 4, 2024 - see p. 68 Tab 6 to his affidavit.

[115] I accept Mr. Pick’s evidence from paragraphs 104 and 118 of his affidavit that: “This list was to have been provided on August 12, 2024, according to the jointly developed summary [see Exhibit 19 page 277 and Exhibit 6]”.

[116] I also accept Mr. Pick’s evidence that on June 7, 2024, they “received confirmation from IRCC that we will receive Permanent Residence.”

[117] He went on to say that (para. 111):

The deposit now having been paid [in full, after the second installment \$35,600 was paid on July 3, 2024] marking the start of the negotiation, **we requested financial documents such as invoices from subcontractors, job site allocation lists etc. which were received on July 23, 2024.** Attached hereto as Exhibit 18 are the financial documents received. **I also retained legal counsel at this time to advise us on the purchase of the Company.**

[My bolding and underlining added]

[118] Mr. Pick had no reliable bases to assess the profitability of the business and what its assets were worth (and whether they were encumbered, and if so, to what extent).

[119] He did not see relevant financial statements until the most recently available ones were received in May 2024 (for fiscal year September 1, 2022 - August 31, 2023) (para. 43/103 Pick affidavit).

[120] Very simply, although the PSA's provisions stated that the attachments "**form an integral part of this Agreement**", none were attached, and there is no evidence that Mr. Pick had received from Mr. Ziegler any other precise and reliable description of what he was buying.

[121] I have identified a number of essential terms that were either missing or sufficiently imprecise in the PSA, so as to make the PSA not valid and/or binding.⁹

[122] However, I also rely on the following bases for finding the PSA to be not valid or binding.

[123] As Geoff Hall noted in his textbook, *Canadian Contractual Interpretation Law*, 2nd ed., at p. 159 and following, the validity of a purported contract may be undermined not only by its being incomplete because essential terms are not agreed upon, but also where it is "too general or uncertain" or "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".

D- It is not appropriate to rely on the doctrine of rectification in these circumstances.

[124] In Mr. Ziegler's Notice of Contest, he stated at paragraph 30:

... If the Agreement as written lacked essential terms, and where the Parties had agreed upon all essential terms and that the Agreement would be binding and enforceable, that the Agreement may be rectified as to include all essential terms.

⁹ I also keep in mind Mr. Pick's evidence that by before and shortly after the signing of the PSA in November 2023, there had been material changes in circumstances at Ziegler Homes since 2022 when they visited, including: that most of Ziegler Homes employees had left – project manager Dale Sutherland in July 2023; office administrator Paula Davidson in August 2022; drafting technician Sébastien Emino-Sayvory in January 2024.

[125] If the argument here is made only in support of the “inadvertent omission” to fill in a monthly amount for the \$200,000 to be made in 36 monthly payments, it is unnecessary, since mathematically the answer must be \$5,555.55.

[126] However, I reject any argument for a larger role of the doctrine of rectification in these circumstances.

[127] Although in dissent, Justice Côté set out a helpful statement regarding the ambit of the doctrine of rectification in *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26 at paragraphs 39 – 42:

[39] Thus, neither *Fairmont* nor *Jean Coutu* generally precludes the availability of equitable remedies in a tax context. **Both of those decisions clarified the test for rectification.** In *Fairmont*, the majority emphasized that “**rectification is limited solely to cases where a written instrument has incorrectly recorded the parties’ antecedent agreement**” (para. 13) and that, on the facts of that case, the party seeking rectification “could not show having reached a prior agreement with definite and ascertainable terms” (para. 39). Similarly, in *Jean Coutu*, which was rendered in the civil law context, the majority held that, under art. 1425 C.C.Q., a general intention of tax neutrality that is not related to obligations whose objects are determinate or determinable cannot on its own give rise to a common intention that would form part of the original contract and permit the requested modifications.

[40] Moreover, while both *Fairmont* and *Jean Coutu* clarified the circumstances in which the remedy of rectification is available, neither addressed specifically the availability of rescission. This is the consensus in the academic literature as well. For example, T. Fitzsimmons and E. S. Roth explain that

[t]he majority of the Supreme Court of Canada in *Fairmont* made no reference to rescission and did not determine (or even comment on) the circumstances in which the remedy of rescission can or should be granted. **Although rectification and rescission share a doctrinal overlap and common evidentiary foundation, they are separate and distinct equitable remedies**, and on the basis of the court’s reasons for judgment, it appears that the availability of the equitable remedy of rescission should therefore have been unaffected by the decision in *Fairmont*.

(“Rectification, Rescission, and Other Equitable Remedies After *Fairmont* Hotels Inc.”, in Canadian Tax Foundation, *Report of Proceedings of the Sixty-Ninth Tax Conference* (2018), 30:1, at p. 30:34; see also T. J. Agioritis, “Is Rectification Still a Remedy? A Practical Overview”, in Canadian Tax Foundation, *2017 Prairie Provinces Tax Conference & Live Webcast* (2017); R. Pandher and B. Graversen, “Does *Fairmont* Hotels

Eliminate *All Equitable Remedies in the Tax Context?*” (2018), 66 *Can. Tax J.* 931, at p. 940.)

[41] Rescission and rectification ought not to be confused. As Pandher and Graversen write, “[t]he same brush cannot be used to paint all equitable remedies in the tax context” (p. 940). Rescission and rectification are two different remedies with different objectives. They “are not simply two roads leading to the same place” (R.F., at para. 40). Hence, depending on the nature of the case, one may justify a relief where the other cannot.

[42] **Rectification requires a valid antecedent decision to carry out a particular transaction that was incorrectly transcribed on paper. The premise underlying this remedy is that it would be unfair to hold a person to be bound by a transaction they never agreed to (Swan, Adamski and Na, at §8.406).** As for rescission, it relieves against a mistake. It presupposes that the transaction was transcribed correctly but was entered into under a mistaken assumption about the facts or the law. If granted, rescission “puts the parties in status quo ante and restores things, as between them, to the position in which they stood before the contract was entered into” (*Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at para. 39 (emphasis added), quoting *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.), at p. 781; see also *Snell’s Equity* (34th ed. 2020), by J. McGhee and S. Elliott, at para. 15 001). In other words, the purpose of rectification is to ensure that a written instrument accurately reflects the parties’ antecedent agreement, whereas rescission enables a court to retroactively cancel a transaction that was entered into by mistake, thereby restoring the parties to their original position.

[My bolding added]

[128] The doctrine of rectification should not breathe the life of a contract into the corpse of the PSA, which is an agreement to agree.¹⁰

E-What meaning/effect is to be attributed to Article 8 of the PSA?

[129] As I understand it, the Picks’ position is as follows:

The PSA was an agreement to agree, not a contract; and even if it were cloaked in language that made it appear to be valid and binding, it is not

¹⁰ Mr. Ziegler argued that Carmen “drafted” the PSA and therefore the *contra proferentum* rule applies. That rule does not materially apply to drafting by non-legally trained persons generally, and moreover here, Carmen Pick used ChatGPT to “draft” the PSA based on Mrs. Ziegler’s drafting. Mr. Ziegler says that the “Asset Purchase Agreement” (“APA”) prepared by his legal counsel, found at Tab 21/para. 119 of Mr. Pick’s affidavit, was presented to the Picks for signature on September 16, 2024. That unsigned document is of little, if any, evidentiary value but does permit an inference, which I draw, that Mr. Ziegler believed that the PSA was an insufficiently binding document.

because under Article 8 of the PSA, the purchase had become “impossible due to insufficient contractual terms”.

[130] What meaning, objectively, did the parties intend for that choice of words?

[131] It must be borne in mind that the parties conducted their business discussions leading up to the crafting of the PSA in German.

[132] Their collective thoughts were reduced to writing in German by Mrs. Pick and then presented to Chat GPT to create an “intention to purchase” document.

[133] Then she requested the result in German be translated into English.

[134] The PSA in English was signed November 29, 2023.

[135] Article 8 [Contingency in case of Death] reads:

- (a) in the event of the Buyer’s [Mr. Pick] death before the business takeover, the full deposit of CAD \$50,000 shall be refunded to the rightful heirs.

[Thus, “the deal is off”.]

- (b) in the event of the Seller’s [Mr. Ziegler] death before the business sale, the agreed purchase price payment shall be made to the Seller’s rightful heirs.

[Thus, such payment, the remaining \$50,000 payable, concludes the payment of the \$100,000 purchase price - “the deal is proceeding”.]

Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposit amount of CAD \$50,000.

[Thus, “the deal is off”.]

[136] I am satisfied that what they intended to convey by that latter wording in Article 8 must be seen in light of the circumstances at the time.

[137] Only 3 weeks earlier (November 10, 2023) had Mr. and Mrs. Pick received their Work Permits which allowed them to work as employees at Ziegler Homes.

[138] On December 1, 2023, Mr. Pick paid \$14,400 CAD of the \$50,000 “security deposit”.

[139] Mr. Ziegler stated in his affidavit at paragraph 44: “As the Picks now had their work permits, I requested the initial deposit of \$50,000.”

[140] The remainder was not paid until July 3, 2024 “following a verbal request from Mr. Ziegler for the remainder of the deposit ...”- paragraph 110 Mr. Pick’s affidavit.

[141] I am satisfied more likely than not, as a factual finding, that both Mr. Pick and Mr. Ziegler understood the PSA was creating a basis for preserving Mr. Pick’s exclusive opportunity to purchase Ziegler Homes in future, but the PSA was not created/intended to impose an obligation on Mr. Pick to purchase Ziegler Homes.

[142] Mr. Ziegler said at paragraph 54 of his affidavit, and I accept his evidence that:

The Picks were the ones who suggested that we enter into the Pre-Sale Agreement. The Picks advised, and I verily believed, that **they wanted to have an agreement in writing in case anything happened while Eva and I were on our planned vacation** [December 31, 2023 – April 1, 2024].

[143] At paragraphs 83 - 85, Mr. Pick stated, and I accept his evidence that:

My wife and I and the Zieglers decided that it was in everyone's best interests to create a Pre Sale Agreement to confirm the intention of both sides for us to purchase the Company to protect everyone's interests.... The Zieglers advised, and we verily believed, that they had booked a three-month trip overseas after Carmen received her endorsement [to work in Canada]. **The Pre Sale Agreement was intended to be a safeguard in the event of any unforeseen emergencies during their trip. For us, the Pre Sale Agreement was only intended to serve as proof of the security deposit paid and to make it clear that the takeover of the company was even under discussion, as we had no certainty whatsoever at that point that this deal with Mr. Ziegler was even being discussed.** At that time, **we also assumed that the actual purchase price would still be negotiated.** This was primarily because **we did not yet have any financial documents** regarding the actual value of the company, but also because the negative effects of the restructuring measures implemented by Mr. Ziegler were not yet apparent to us and still had to be determined. **For this reason, Carmen did not enter any amount for the Advisory Fee in the Pre Sale Agreement.** This would depend on the actual final purchase price negotiated.

[My bolding added]

[144] Neither party specifically identified what concerns, and on whose behalf, they were so identified, which led to the Article 8 wording being included (although we must recall that Chat GPT was employed to “draft” the PSA, as well as translate from the German into the English language):

Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposited amount of CAD 50,000.

[145] I keep in mind, as Justice Duncan Beveridge stated (as he then was), in *Executive Rental Agency v. Quaintance*, 2009 NSSC 16:

[26] With all due respect to the appellant, **what is or is not a contractual term is in essence a finding of fact and a Court is not limited by the words used in a written contract.** Even where there are “entire agreement” clauses specifying that the written contract constitutes the “entire agreement” between the parties does not in and of itself exclude any finding of a side agreement or collateral contract, let alone the potential for legal consequences from misrepresentations (see Cartwright, *Misrepresentation Mistake and Non-Disclosure*, 2nd (Sweet and Maxwell, London 2007 para 9.12)

[27] In **Fridman, The Law of Contract in Canada**, 5th ed. (Thomson Carswell, Toronto 2006) the author reviews the law with respect to statements made by a party to a contract at or prior to the finalization of the agreement. He **notes the distinction between statements that are intended to be and are regarded as being terms of the contract and statements which are not terms, but are merely inducements to the making of the contract and the different approach at common law and equity to these kinds of statements. He notes that at common law if the statement was made to get consent to enter into a contract it will usually be considered a term of the contract (see p. 296).**

[28] If representations amount to a term of the contract, then the innocent party can sue for breach of contract and damages. If the representation was not a term of the contract, then the innocent party can sue for non-contractual remedies such as avoidance or rescission of the contract, not to mention the potential for the innocent party to advance a claim in tort for negligent misrepresentation. Representations can also amount to a collateral contract.

[29] **Although the appellant asserts that the adjudicator erred in law in finding that a representation was made to the respondent or relied upon by the respondent in entering a contract, this issue is a factual one (Fridman at p. 439). ...**

[My bolding added]

[146] I interpret the intended meaning of Article 8 wording of the PSA – “Should a legal purchase of the business become impossible due to insufficient contractual terms, the Buyer is entitled to a full refund of the deposit amount of CAD \$50,000” - as the parties agreeing that it was intended to account for the \$50,000 “security deposit” once paid by Mr. Pick, and consistent with my conclusion that the parties intended the PSA to be an “agreement to agree”, recognized that there was not yet

full agreement on all essential terms, it particularized that Mr. Pick was to have returned to him the \$50,000, in a situation where it was not possible ultimately for Mr. Pick and Mr. Ziegler to agree on all essential terms required, or otherwise as required, for a valid and binding contract.

[147] I am satisfied that effectively what they meant to record was:

Should a legal purchase of the business become impossible due to insufficient [agreement on] contractual terms, the Buyer is entitled to a full refund of the deposit amount of CAD \$50,000.

[148] Neither Mr. Ziegler nor Mr. Pick asked to revisit the terms of the PSA at any time before September 2024.

F- Ziegler Holmes argues that, if the November 29, 2023, PSA is not valid and binding, the burden of persuasion is upon the Picks to establish a legal and evidentiary basis for the return of the \$50,000 deposit to them, and they have failed to do so.

Unjust Enrichment

[149] Mr. Pick also relies upon the equitable doctrine of unjust enrichment, as canvassed by Justice Ann Smith in *Clark v. Ewing*, 2023 NSSC 174:

[149] Unjust enrichment is an equitable doctrine. In *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, the majority, per Brown, J., discussed the most fundamental premise of equity:

[9] I turn first to a limiting principle of equity -- indeed, the most fundamental premise of that domain, found in its origins. Equity developed to alleviate results under "an unyielding common law" that called for the relief as a matter of "conscience" and "greater fairness" (J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at p. 2). Equitable principles "have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct" (I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th ed. 2014), at p. 1).

[10] This broad scope for courts of equity to give relief also defines its own limits (hence a "limiting" principle): transactions that do not call for relief as a matter of conscience or fairness are properly outside equity's domain. This is reflected in some of equity's maxims, including that a person who comes to equity must come with "clean hands" and "he who seeks equity

must do equity" (Spry, at pp. 5-6; Berryman, at pp. 16 and 18; *Snell's Equity* (34th ed. 2020), by J. McGhee and S. Elliott, at paras. 5-009 to 5-010).

[Emphasis added]

...

The Test for Unjust Enrichment

[154] The parties agree on the law of unjust enrichment. The test was set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25:

[30] As a general matter, the test for unjust enrichment is well established in Canada. **The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment ...**

[155] In *Moore v. Sweet*, 2018 SCC 52, the majority, per Côté, J., summarized the first two elements as follows:

[41] The first two elements of the cause of action in unjust enrichment require an enrichment of the defendant and a corresponding deprivation of the plaintiff. These two elements are closely related; a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis ... To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value — a “tangible benefit” — passed from the latter to the former ... This Court has described the enrichment and detriment elements as being “the same thing from different perspectives” (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660 (“*PIPSC*”), at para. 151) and thus as being “essentially two sides of the same coin” (*Peter*, at p. 1012).

...

[43] In addition to an enrichment of the defendant, a plaintiff asserting an unjust enrichment claim must also establish that he or she suffered a corresponding deprivation. According to Professor McInnes, **this element serves the purpose of identifying the plaintiff as the person with standing to seek restitution against an unjustly enriched defendant** (M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014), at p. 149; see also *Peel*, at pp. 789-90, and *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (C.A.), at pp. 393 and 400). Even if a defendant’s retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant’s gain. Instead, the plaintiff must demonstrate that the loss he or she incurred corresponds to the defendant’s gain, in the sense that there is some causal connection between the two (*Pettkus*, at p. 852). Put simply, the transaction

that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched at the plaintiff's expense (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24). While the nature of the correspondence between such gain and loss may vary from case to case, this correspondence is what grounds the plaintiff's entitlement to restitution as against an unjustly enriched defendant. Professor McInnes explains that "the Canadian conception of a 'corresponding deprivation' rightly emphasizes the crucial connection between the defendant's gain and the plaintiff's loss" (The Canadian Law of Unjust Enrichment and Restitution, at p. 149).

[44] The authorities on this point make clear that the measure of the plaintiff's deprivation is not limited to the plaintiff's out-of-pocket expenditures or to the benefit taken directly from him or her. Rather, the concept of "loss" also captures a benefit that was never in the plaintiff's possession but that the court finds would have accrued for his or her benefit had it not been received by the defendant instead (*Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CanLII 334 (SCC), [1997] 3 S.C.R. 805, at para. 30). This makes sense because in either case, the result is the same: the defendant becomes richer in circumstances where the plaintiff becomes poorer.

[Emphasis added]

[156] **Justice Côté explained the third element – an absence of juristic reason – as follows:**

[55] This understanding of juristic reason is crucial for the purposes of the present appeal. **The third element of the cause of action in unjust enrichment is essentially concerned with the justification for the defendant's retention of the benefit conferred on him or her at the plaintiff's expense - or, to put it differently, with whether there is a juristic reason for the transaction that resulted in both the defendant's enrichment and the plaintiff's corresponding deprivation.** If there is, then the defendant will be justified in keeping or retaining the benefit received at the plaintiff's expense, and the plaintiff's claim will fail accordingly. At its core, the doctrine of unjust enrichment is fundamentally concerned with reversing transfers of benefits that occur without any legal or equitable basis. As McLachlin J. stated in *Peter* (at p. 990), "It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'."

[56] In *Garland*, this Court shed light on exactly what must be shown under the juristic reason element of the unjust enrichment analysis - and in particular, on **whether this third element requires that cases be decided by "finding a 'juristic reason' for a defendant's enrichment" or instead by "asking whether the plaintiff has a positive reason for demanding**

restitution" (para. 41, citing *Garland v. Consumers' Gas Co.* (2001), 2001 CanLII 8619 (ON CA), 57 O.R. (3d) 127 (C.A.), at para. 105). In an effort to eliminate the uncertainty between these competing approaches, Iacobucci J. formulated a juristic reason analysis that proceeds in two stages.

[57] **The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations** (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).

[58] **If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery** (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).

[59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.

[Emphasis added]

[157] **Justice Côté emphasized that the inquiry at the juristic reason stage is not whether there is a juristic reason for the defendant's enrichment, but rather whether the enrichment of the defendant and the corresponding deprivation of the plaintiff occurred without a juristic reason: para. 61.** She noted that each of the recognized categories of juristic reason "points to a relationship between the plaintiff and the defendant that justifies the fact that a benefit passed from the former to the latter": para. 61.

[My bolding added]

[150] I am satisfied that the payment of the \$50,000 was not agreed to be non-refundable. There is no valid and binding agreement that governs who should receive it in the present circumstances. The \$50,000 was paid to Mr. Ziegler by Mr. Pick. Mr. Pick has demonstrated that there is no justification for Mr. Ziegler to retain the \$50,000 on the basis of any of the established categories of juristic reasons. Mr. Ziegler has not demonstrated that there is some residual reason to deny recovery of it by Mr. Pick. I have borne in mind that the parties' expectations and conclude that the \$50,000 was not intended to be non-refundable. I find no compelling public policy bases for allowing Mr. Ziegler to retain the \$50,000. It is "just" that Mr. Ziegler must return the \$50,000 to Mr. Pick.

[151] Mr. Ziegler is required to return the \$50,000 to Mr. Pick.

Conclusion

[152] On June 7, 2024, the Picks' Permanent Residence status was confirmed.

[153] I am satisfied all parties understood that only at this point were the Picks in a position of security regarding their remaining in Canada.

[154] Mr. Pick paid only an initial \$14,400 on December 1, 2023, and the remainder amount of the Deposit on July 3, 2024, after Mr. Ziegler insisted upon it.

[155] I bear in mind that Mrs. Pick resigned her position between August 15, 2024, and September 2, 2024 (paras. 12 Eva Ziegler and 117 Matthias Pick affidavits).

[156] Mr. Pick did not communicate his ultimate answer until later in September 2024, when he confirmed to Mr. Ziegler that he was not prepared to enter into a valid and binding agreement to purchase Ziegler Homes, and was resigning as an employee.

[157] The evidence that I accept, seen in the full context of the circumstances, leads me to conclude more likely than not, at the time of its signing on November 29, 2023, the parties understood that the PSA was an agreement to agree.

[158] Ultimately, they were not able to agree to terms of a valid and binding contract.

[159] Furthermore, I am satisfied more likely than not, as a matter of fact, that the parties to the PSA did not intend the \$50,000 deposit to be non-refundable in the present circumstances, and therefore it is refundable.

[160] I am satisfied that Mr. Pick has also satisfied the evidentiary and persuasive burdens to allow him to rely on the doctrine of unjust enrichment to have the \$50,000 deposit returned to him.

[161] If the parties are unable to agree on costs, I will receive the submissions of Mr. Pick 15 days after the release of this decision, and the submissions of Mr. Ziegler 15 days thereafter.

Rosinski, J.