IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Masztalar Holdings Ltd. v. Krafte Holdings Ltd.,* 2025 BCSC 2361

Date: 20251128
Docket: S243207
Registry: Vancouver

Between:

Masztalar Holdings Ltd., Kenneth Blaire Masztalar, and Allan Dean Masztalar

Plaintiffs

And

Krafte Holdings Ltd., Brian Krafte, and Scott Krafte

Defendants

Before: The Honourable Justice Dion

Reasons for Judgment

Counsel for the Plaintiffs:	S.A. Turner B.S. Khatra
Counsel for the Defendants:	J.V. Payne M. Robson, Articled Student
Place and Dates of Trial:	Port Coquitlam, B.C. June 23-27 and 30 July 3-4 and 10, 2025
Place and Date of Judgment:	Vancouver, B.C. November 28, 2025

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Introduction

[1] This action arises from the sale of a longstanding, well-known and respected family business in Aldergrove, British Columbia. The four individual parties are second cousins who have been unable to agree about whether there is an enforceable agreement for the plaintiffs to purchase the defendants' one-half share of Fraser Valley Holdings Limited ("FVHL"), a company owned equally by the parties.

[2] The plaintiffs, Kenneth Blaire Masztalar ("Blaire") and Allan Dean Masztalar ("Dean") are brothers. Their father, Pete Masztalar ("Pete") started Fraser Valley Refrigeration Ltd. ("FVRL" or "FVR") in 1969. Pete was joined by his cousin, Ross Krafte ("Ross") in about 1973. Ross, now deceased, was the father of Scott Krafte ("Scott") and Brian Krafte ("Brian"). Scott and Brian are equal owners of their holding company, defendant Krafte Holdings Ltd. ("Krafte Holdings Ltd." or "Krafte Holdco."). Blaire and Dean are equal owners of their holding company, plaintiff Masztalar Holdings Ltd ("Masztalar Holdings Ltd." or Masztalar Holdco.").

[3] Masztalar Holdco. owns half of the shares of FVHL. Krafte Holdco. owns the other half.

[4] The plaintiffs argue that the defendants simply refuse to complete the transaction as set out in the parties' one-page agreement dated May 5, 2023 (the "May 5 Agreement"). The plaintiffs seek specific performance of the May 5 Agreement.

[5] The defendants say that the May 5 Agreement is unenforceable and is simply an "agreement to agree". Alternatively, if the May 5 Agreement is enforceable, the issue of whether the parties breached the contract – and any consequences of that breach – arises and will have to be determined by this court.

[6] At times, I use only the first names of the parties in these reasons, which is how they were referred to at trial and in the parties' respective written submissions. I mean no disrespect in doing so.

Background

[7] Since commencing operations, FVRL grew into one of British Columbia's largest refrigeration, heating and air-conditioning companies. It had annual sales (including related companies) of more than $60,000,000 and employed more than 80 full-time and part-time employees. There were two main locations, one in Aldergrove and one in Victoria, B.C.

[8] At one point, three of Pete's sons worked for FVRL, Blaire, Dean and their brother Ross, as did three of Ross's sons, Scott, Brian and their brother Steve. Pete still goes to work every day, though he no longer receives a pay cheque. Ross Krafte passed away in 2020.

[9] In August 2020, Steve Krafte and Ross Masztalar were bought out of FVRL and they have not participated in the business since.

[10] As of 2022, the directors of FVRL were Blaire and Dean, and Scott and Brian. Through various holding companies and family trusts, each of the four hold a twenty-five percent interest in FVRL and FVHL.

Land

[11] For many years FVRL has operated and continues to operate out of commercial premises located at 26121 Fraser Highway in Aldergrove (the "Aldergrove Property"). The Aldergrove Property is owned by FVHL. In 2007, FVHL incorporated 0778158 BC Ltd., as a wholly owned subsidiary company ("778"). 778 then acquired, and still holds, land on Lefeuvre Road in Abbotsford (the "Lefeuvre Road Property") (together, the "Two Properties").

[12] FVRL uses the Lefeuvre Road Property for various business purposes including truck parking. A portion of the property is leased out to an arms-length tenant, Champs Fresh Farms, who is in the business of growing mushrooms.

[13] FVRL also had a subsidiary company called Accutemp Refrigeration, Air-Conditioning and Heating Ltd. ("Accutemp"), located on Vancouver Island. Accutemp

was sold as part of the sale of FVRL to Arcticom Group Canada Limited, a subsidiary of The Arcticom Group ("TAG") in September 2023, discussed more fully below.

Management of FVRL

[14] Pete Masztalar and Ross Krafte were the directors of FVRL until approximately 2017. From 2017, the second generation, that is, the three sons of each of Pete and Ross, had primary responsibility for the management of FVRL, until Ross Masztalar and Steve Krafte were bought out. Thereafter, the directors of all the companies (FVRL, FVHL, 778 and Accutemp) were Blaire and Dean Masztalar and Scott and Brian Krafte.

[15] At the time the issues giving rise to this litigation arose, all four individual parties had different responsibilities within the businesses. For the most part, they all started working for the family business as young men, some in their teens. Blaire has worked in the family business since 1984; over time he has trained in various trades, assuming more responsibility. Among other things, he trained and worked as a fire apprentice, a gas fitter, an estimator and in office management. He is certified in gas, electrical and refrigeration.

[16] In 2022–2023, Blaire oversaw the refrigeration side of the FVRL including contracts for ice rinks, industrial coolers and restaurants.

[17] Dean joined the family business right out of high school. He is trained as a mechanical engineer. In 2022–2023, he oversaw the commercial design and inspection of the heating, air conditioning and ventilation (HVAC) side of FVRL.

[18] Starting in 1993, Scott began working in the family business; he also attended trade school. He is qualified in gas and refrigeration. In 2004, he began helping his father and in 2005 or 2006 he assumed a management role, and shortly afterward, he took over for his father. Scott was the "numbers guy"; he dealt with the lawyers and accountants with his uncle Pete and he "took care of the lawsuits". Scott was

also in charge of Accutemp, regularly travelling to Vancouver Island until it was sold in September 2023.

[19] Brian was not as involved as the other three directors. He apprenticed in gas and refrigeration, though there is no evidence he obtained qualification in either. He helped where help was needed; he collected bills, talked to employees who were not doing well and helped the "service guys" by picking up parts. According to Dean, Brian worked fewer hours than he did. Blaire's evidence was that in 2022, while Brian ran errands for the service department for Scott and ran some small projects, the time he expended did not generate enough revenue to cover the salary he was paid. Blaire's evidence was that after Scott was divorced in 2021, he was less engaged in the family business.

Sale of FVRL and Accutemp to Arcticom

[20] In 2022, the plaintiffs and defendants were approached unsolicited by TAG about the possibility of them acquiring FVRL. TAG is a large commercial and industrial refrigeration and mechanical services provider based in the United States.

[21] In June 2022, Blaire, Dean, Scott and Brian met with representatives of TAG; meetings continued into 2023. On January 27, 2023, a formal offer was presented by TAG by way of a Letter of Intent to purchase the FVRL business. The parties entered negotiations, which led to the execution of a share purchase agreement dated September 3, 2023 (the "Arcticom SPA"). FVHL and the individual parties sold their interests in Fraser Valley Refrigeration to Arcticom, for consideration of approximately $28,000,000 USD. The consideration has all been paid to the individual parties, their holding companies and family trusts pursuant to the Arcticom SPA.

[22] As part of the Arcticom transaction, Blaire and Dean agreed to remain with FVRL in managerial roles, positions they continue to occupy. Scott and Brian left the business in September 2023, on the expiry of six-month consulting contracts they had with Arcticom. Neither Scott nor Brian have played any role, including in the management of FVRL, since. The positions they held were not replaced.

[23] Blaire was the lead on the negotiation of the Arcticom SPA, which meant that he had the most contact with the professionals, lawyers and accountants, assisting. He sought agreement from Dean, Scott and Brian when it was needed.

[24] Dean, Scott and Brian acknowledge that Blaire negotiated the sale of FVRL. According to Dean, Blaire was able to negotiate a higher price for all of them.

[25] Prior to closing, on September 1, 2023, certain "excess cash" in FVRL, totalling approximately $8.413 million, was transferred to FVHL's bank account. The money transferred by FVRL to FVHL prior to closing comprised most of the "cash" the parties agreed to distribute pursuant to the terms of the May 5 Agreement. There were other additional business-related transfers or payments out of FVRL to FVHL. After September 2023, and since, FVHL continues to receive lease revenue from FVRL and Champs Mushrooms, and to pay regular business expenses including insurance and taxes.

Life Insurance

[26] The May 5 Agreement provides that the "cash" to be distributed amongst the parties "shall include life insurance policies or their cash value".

[27] FVHL holds an insurance policy on the life of Pete Masztalar. As of September 7, 2023, the policy had a cash surrender value of approximately $197,455. As of the date of trial, the value was approximately $225,000.

[28] As with any life insurance policy, the death benefit is typically far in excess the cash surrender value. Upon Pete Masztalar's passing, the payout will be approximately $850,000. As already noted, Pete is alive.

[29] The parties agreed to include life insurance policies in their agreement. There is no dispute that there is only one policy, Pete's. When the parties – Blaire for the plaintiffs and Scott for the defendants – were getting down to the final iterations of what was to be included in their agreement, the agreed-to language in respect of the life insurance policies or their cash value contained no reference to death benefits.

Events giving rise to May 5 Agreement

[30] Prior to May 2023, Blaire, Dean and Scott were each receiving salaries of approximately $160,000.00 per annum. Brian was receiving a salary of approximately $130,000.00 per annum.

[31] The plaintiffs say one of the first issues that gave rise to the May 5, 2023, agreement was Brian's claim he was entitled to equal remuneration from FVRL. Brian's legal counsel wrote Blaire, Dean and Scott on January 30, 2023, to advise that Brian sought equal compensation and an "immediate" lump sum payment, to equalize his remuneration from FVRL since 2017 when they all became equal owners in the company. Brian threatened to commence legal proceedings in the nature of an oppression action if his demands were not met.

[32] In the same letter, Brian alleged that Dean had been deriving additional value from FVRL by "diverting" some jobs that were rightly FVRL opportunities to his own personal corporation, Eng. Co., in breach of his fiduciary duty.

[33] At trial, Dean firmly denied Brian's allegations. In a letter dated March 23, 2023, Dean's then legal counsel confirmed that any work Dean did through Eng. Co. was with the approval of FVRL's then owners, his father and uncle. Brian claimed the value of the work done between 2016 and 2022 was over $250,000. The unaudited financial statements show the actual amount was $23,220.

[34] At trial Brian said the basis for his allegations was that he had photocopies of two bills. He admitted he did not ask Dean about them before authorizing his counsel to send the January 30, 2023, letter.

[35] The plaintiffs say that Brian's actions were indicative of the acrimony and mistrust between the parties in early 2023.

[36] While the parties were in discussions with TAG, Blaire told Scott that if Scott was going to stay, Blaire was not interested in the deal because in his view, by January 2023, their partnership was very stressed. Scott's evidence was that while

he thought he could still work with Blaire, he could not work with Dean, whom he considered to be a liability.

[37] By March 1, 2023, TAG and FVRL shareholders had reached agreement on the essential terms of the share purchase agreement, and TAG presented a revised LOI to the FVRL shareholders for execution. Also on March 1, 2023, Brian advised Blaire that he would not agree to the final terms of any transaction with TAG until his "lawsuit" had first been dealt with.

[38] Over the course of March and April 2023, counsel, taking instructions from Blaire (with input primarily from Scott, but also from Dean), on behalf of FVRL, and Brian, on his own behalf, exchanged proposals about how to deal with Brian's claims. Blaire and Dean proposed the establishment of an escrow fund in the amount of $83,000, that figure being the differential in salary. However, Brian wanted escrow funds in the amount of $500,000 to cover his claims and costs from the proceeds of the proposed sale to TAG. These funds were to serve as security for those claims pending their resolution. Brian and Scott were, in principle, amenable to the establishment of the escrow fund; however, the parties could not agree on the amount to be held.

[39] By mid-April 2023, the issue of Brian's compensation claim had become an obstacle to the proposed TAG acquisition. Email correspondence indicates that Blaire and Dean were clear in their position that they were not prepared to proceed with the TAG acquisition unless Brian's compensation claim was finally resolved.

Parties begin to discuss buy-out

[40] Within the framework of attempting to resolve Brian's compensation claims, the parties began to discuss the terms of a buy-out by Blaire and Dean of Scott and Brian's interests in FVHL.

[41] The parties did not want to work together any longer and the proposed agreement was intended to bring an end to their working relationship.

[42] Into April 2023, Blaire, Dean and Scott continued to grapple over terms of possible payments to Brian. They also discussed land values of the Two Properties. Brian was copied on some emails where his compensation was being discussed but he generally did not participate in those discussions.

[43] When tensions again crept into the discussions, Blaire proposed to Scott that he and Dean buy Blaire and Dean out, which Scott declined. Scott wanted $250,000 for Brian, and $28,000,000 for the Two Properties. Although Blaire did not agree that Brian ought to be paid out $250,000, he and Dean would agree to dissolve the parties' working relationship.

[44] After further communications, on April 17, 2023, the parties asked Clint Harcourt, FVRL's longtime corporate lawyer, to prepare a document reflecting the agreements reached by email. When Mr. Harcourt provided the four parties a draft form of release only of Brian's claims, Blaire replied to everyone that the draft was not what he was expecting; according to his understanding all the terms were "intertwined". Blaire also added that, "Dean and I have agreed to settle with Brian, based on FVR sale going through and Scott and Brian selling their shares in FVR holdings for the properties per below, thus ending all business ties between us."

[45] Mr. Harcourt began to prepare a further draft "dealing with all of the issues". Blaire and Scott exchanged further email correspondence on April 24, 2023, clarifying their positions. Scott maintained that the matters to be included in an agreement were separate and not contingent on a sale of FVRL.

[46] Dean told Scott that the only reason he and Blaire were not contesting Brian's claims was to allow the TAG LOI to go forward. He also confirmed that he and Blaire were entertaining the TAG LOI to facilitate the end of the partnership between him and Blaire and Scott and Dean.

[47] In an effort to lower tensions, Blaire wrote to only Scott, stating in part, that:

> Only reason I agreed to below was based on a sale and tying up all the items at once to provide closure.

> If we are not selling I would prefer to take Brian's claims to task.
>
> What happened prior to 2015 is between each of us and our fathers, they signed the cheques, not us.
>
> If we can't get an agreement to tie in Brian's settlement, completion of sale to TAG and purchasing the partnership, then I guess we do one step at a time and deal with Brian's legal issue first.

[48] Blaire and Scott continued to correspond by email, discussing terms of an agreement.

[49] Also on April 24, 2023, Blaire advised Scott he would speak to Dean about Brian's payout. He asked Scott if he could get Brian to "sign the agreement for sale of holdings if he gets the money". Scott responded to Blaire the next day, on April 25, 2023:

> This is what I said from the start,
>
> Brian is paid $250,000.00, his wage is brought to equal the other 3 owners ongoing. Then it is settled
>
> Land value agreed at a combined $28,000,000.00. Transaction takes place if FVR is bought by Tag.
>
> No realtor fees added etc.
>
> The agreements can be signed at the same time.

[50] On April 28, 2023, Blaire sent Clint Harcourt an email, copied to Scott, as follows:

> Clint:
>
> Can you draw up a very simple agreement?
>
> Dean and Blaire agreed to FVR paying Brian $250,000 to close legal battle.
>
> Scott and Brian agree to sell FVR Holdings and 889 Lefeuvre for ½ of the combined total value of $28 million upon the sale of FVR operations.
>
> Any cash in FV Holdings will be distributed equally before sale completion.
>
> We all sign this agreement and the LOI at the same time.

[51] Clint Harcourt produced a further draft of the agreement on May 2, 2023, which Blaire, copying Dean, Scott and Brian, advised was too complicated:

> Just Blaire, Dean, Brian and Scott, please. Just want the agreement simple. The accountants will figure out most cost-effective method of shares, etc.

[52] On May 3, 2023, Mr. Harcourt provided a further draft of an agreement. Blaire and Scott continued working on various iterations reflecting their negotiations.

The May 5 Agreement

[53] On May 5, 2023, the parties signed the agreement, which provides that:

> NOW THEREFORE BE IT RESOLVED THAT in consideration of the premises and the convents and agreements contained this Agreement, the parties agree with each other as follows:
>
> 1. Upon signing of this Agreement, Dean, Blaire and Scott agree to FVRL paying Brian the sum of $250,000 with respect to the dispute he has. The parties agree that Brian's salary shall immediately be increased to be equal to Blaire, Dean and Scott.
> 2. Upon the sale of FVRL, Scott and Brian agree to sell their one-half interest and Blaire and Dean agree to buy their one-half interests [sic] Fraser Valley Holdings (including 0778158 BC). The combined value is agreed upon at $28,000,000 so the purchase price shall be $14,000,000. Such agreement shall be executed and paid as soon as possible no longer than thirty (30) days after the sale of FVRL and transfer of funds has completed.
> 3. Parties agree that any cash held in any related companies shall be distributed prior to any sale and that each of Blaire, Dean, Scott and Brian shall be entitled to one-quarter of such cash, this shall include life insurance polices or their cash value.
> 4. The parties agree that the final structure of any sale shall be agreed upon after discussions with accountants, lawyers and other advisors but that the intent of this agreement shall be binding on the parties and any related companies they control.
> 5. Sale of FV Holdings will be after completion of sale of FV Refrigeration and preferred shares of FV Refrigeration have been paid out to the shareholders.

Events post-May 5 Agreement

TAG LOI signed

[54] The parties signed the TAG LOI at the same time as they signed the May 5 Agreement. TAG returned the executed LOI on May 8, 2023, and the parties proceeded to negotiate the final terms of the sale over the summer.

Brian paid out

[55] On May 8, 2023, Brian received $250,000 from FVRL. Thereafter, he was paid the same wages as Blaire, Dean and Scott until the Arcticom sale closed on September 6, 2023. Thus fully satisfying his compensation claims.

Leases

[56] When the TAG LOI was signed in May 2023, FVRL and FVHL had a written lease on the Aldergrove Property. There was no written lease for the Lefeuvre Road Property; FVRL paid rent to 778 monthly.

[57] In anticipation of the execution of the Arcticom SPA, lawyers for FVRL and TAG prepared leases for the Two Properties, which were also executed on September 6, 2023.

[58] Scott was copied on the emails exchanged over the summer of 2023 regarding the leases, but his evidence was that he did not pay attention to them because, to him, this was Blaire and Dean's issue since he and Brian were selling their interests in FVHL.

[59] According to the plaintiffs, the parties' common expectation, as expressed in a later email by Dean of March 27, 2024, was that he and Blaire would continue to own the Two Properties as the sole owners of FVHL.

[60] The lease signed by FVRL for the use of the Aldergrove Property is for a five-year term, with a right of renewal in their favour. The lease for the Lefeuvre Road Property is for a three-year term.

Efforts to complete May 5 Agreement

[61] On September 14, 2023, Laurel Thornton, an accountant with KPMG, prepared a draft illustration of a buyout of the defendants' shares of FVHL. Scott's evidence was that he understood that this draft was shared with the FVRL's accountant Paul Sangha.

[62] The next day, Blaire gave Dean, Scott and Brian the "heads up" that he spoke with Ms. Thornton who was going to reach out to Mr. Sangha to explain the two options they had for the FVHL purchase. Then Mr. Sangha could go over the options with them.

[63] Ms. Thornton reached out to Mr. Sangha on September 14, 2023; she shared Mr. Sangha's response with Blaire:

> "September is our second biggest bottleneck of the year as have a large concentration of March year ends. Is this something that we can discuss in early October? I know Scott is away for a month now and he will not be reviewing anything until his return."

[64] On September 15, 2023, Blaire sent an email to Scott, copied to Brian, passing along Mr. Sangha's message, and he asked Scott if he wanted to "push Paul or extend the closing?" That same day, Scott advised Blaire, with copy to Brian, that he had not seen anything from Paul, adding "If he is busy, we can extend the closing".

[65] The plaintiffs say Blaire reasonably took Scott's reply as his agreement to extend the closing. In that regard, also on September 15, 2023, Blaire wrote to Ms. Thornton, copying Dean, to advise her that:

> "Answer from Scott below he is okay to extend closing. Have not heard from Brian."

[66] To that, Ms. Thornton wrote back to Blaire,

> "Thanks Blaire – if you all agree to extend the closing, we would suggest having it line up with the FVH's normal October 31 yearend so that the regular financial statements and tax return can be prepared with the same effective date. So the transactions would have effective dates in late October, with the share purchase occurring November 1 at 12 am.
>
> Let us know what Brian says.

[67] On September 15, 2023, Blaire forwarded Ms. Thornton's email to Scott, Dean and Brian asking if they were all in agreement with extending until October 31 pursuant to Ms. Thornton's email. Dean said he did not respond in writing, but his

evidence was that he was agreeable with extending. He confirmed that as of September 2023, he was financially able to meet his obligation of closing on the May 5 Agreement had it been settled.

[68] Scott did not respond to Blaire's email. In his *viva voce* evidence, he explained what he meant in his email was that if Paul was too busy, they could extend in that moment. Brian said he saw Blaire's email, but he did not respond to it.

[69] No progress was made on completing the May 5 Agreement between September 15 and October 16, 2023, including the distribution of cash and the transfer of Scott's and Brian's shares of FVHL.

[70] On October 16, 2023, Blaire wrote to Scott asking him to "touch base" with Mr. Sangha that day on "FV Holdings". Blaire reminded Scott that Mr. Sangha was too busy while Scott was on holidays. On cross-examination, Scott could not recall if he spoke to Mr. Sangha after this.

[71] On October 18, 2023, Brian sent Blaire, Dean and Scott an email advising them as follows:

> Gentlemen,
>
> With the events that have happened over the last month, I have decided that I will keep my properties, therefore, they are not for sale…In the next couple of weeks I would be willing to sit down and discuss this matter.

Tensions

[72] Beyond the tensions referred to above, in September 2023, Brian was unhappy about not being able to get a copy of a human resources report of a past FVR employee who had been critical of Dean. While Brian denied in cross examination that he wanted the report to "stir up" trouble for Dean, the plaintiffs say there was no other reason for him to want to see the report since he was no longer employed or associated with FVR.

[73] Also, after September 6, 2023, Brian went to the FVR offices and accused Dean of spreading rumours about Brian's wife. Dean acknowledged FVR employees

were talking about Brian's wife and that Dean shared this with his father and his wife, who was also an employee at FVR. According to Dean, Brian threatened him, which made him uncomfortable. Brian denied threatening Dean.

[74] Brian's *viva voce* evidence was that he went to FVR because another staff person asked him to help with something. The plaintiffs say Brian had no work-related reason to be FVR since his 6-month contract had ended. Brian's evidence in cross-examination was that he went to the FVR offices to confront Dean because he knew Dean would be there.

Events after Brian's October 18, 2023, email

[75] Almost immediately after receiving Brian's October 18, 2023, email Blaire asked Brian, Scott and Dean to meet. Brian responded to all of them that he was busy for the "next little while" and that he would let Blaire know when he was available.

[76] Having thought about it over the weekend and spoken with Dean, on October 23, 2023, Blaire suggested to Scott and Brian that they buy out Blaire and Dean. Brian replied, "[n]o. I think I am good just holding onto them for now. I don't want to make any sudden decisions".

[77] Blaire emailed Scott on October 24, 2023, asking if he was back from vacation; he was, but he was in Victoria. Blaire asked Scott, "So next steps with sale?"

[78] That same day, Scott replied to Blaire and said:

> Brian said he did not want to sell. He was complaining about some stuff he heard that Dean was saying. I have not had a chance to talk to him in depth or in person about his thoughts. I have to get him by myself sometime when I get back later this week.

[79] Blaire suggested that Scott may want to have Brian talk with Clint Harcourt, adding, "I asked Clint about the agreement that was signed and he said it's

enforceable. You need to talk to Paul and Clint about your shares too, you signed as well".

[80] Through counsel, Blaire and Dean wrote to Scott and Brian on October 30, 2023, asking them to confirm if they agreed that the May 5 Agreement was binding on the parties. There was no direct response to this correspondence.

[81] On January 3, 2024, again through counsel, Blaire and Dean sent a 5-page letter to Scott and Brian which included a detailed proposal to complete the transactions contemplated in the May 5 Agreement. In this correspondence, counsel advised:

> The [May 5 Agreement] contemplates that the parties will work together, in good faith, to come to terms on an appropriate "structure" for the proposed acquisition of your respective interests in FVHL. The foregoing is our client's good faith proposed to this effect. They would be amenable to any reasonable suggestions that you may have to modify the above-mentioned sequence of events, or otherwise give effect to the [May 5 Agreement].

[82] Notwithstanding Scott and Brian did not respond specifically to the January 3, 2024, letter, on February 1, 2024, Scott and Brian wrote to Blaire, Dean and their legal counsel, and said:

> After conversations with accountants and Brian, we believe the first step is to distribute all monetary assets in both FVHL and the numbered farm company to leave only the properties and the insurance policy.

[83] Blaire responded to Scott and Brian on February 1, 2024, stating:

> Scott: we agree that the first step is to distribute cash. That is what we have been trying to communicate for some time. There is no cash in the farm company (0778158 BC Ltd) at the present time. The money is all in FVHL.
>
> Very Simply put, what we want to do is distribute the FVHL cash in a manner that is fair and tax efficient for all of us. To do that, we need to pass some corporate resolutions, declaring various capital of taxable dividends, as set out in Scott Turner's letter of January 3, 2024. However, Dean and I are reluctant to authorize those distributions, unless we have your and Brian's commitment to complete the share purchase agreement that we all agreed on last May. It seems to me that the two things go hand in hand and should be done at the same time.

[84] In the meantime, it appears that Scott had engaged his realtor as to valuations on the Two Properties and information was provided to both him and

Blaire. In response to those valuations, Blaire wrote Scott on March 17, 2024, and said:

> Got this from your real estate agent.
>
> This is pretty close to the same info I sent you last year when we settled on 28M total value.
>
> You were copied by email on the leases as they were negotiated with Arcticom before they were signed.
>
> As per last years correspondence the offer is way over value based on Cap Rate, at very close to top market value.
>
> So do we just stand across the river looking at each other in a Mexican standoff.
>
> Dean and I are not agreeing to distributing funds in FVH until agreement to sign off for sale of FVH shares.
>
> Our lawyer has been going back and forth with Clint on setting up a directors meeting so we can move forward.

[85] So, by March 17, 2024, both parties were engaging with respect to steps to advance transactions contemplated by the May 5 Agreement.

[86] Unfortunately, tensions again began to rise. On March 26, 2024, Scott told Blaire and Dean that he had not been consulted about the leases nor had he even been asked. Beyond also saying that the Two Properties had increased in value, he said:

> Holding money hostage and costing all 4 of us seems idiotic but that has been the MO of both of you before, to get what you want.

[87] On March 27, 2023, Blaire responded to Scott only, stating:

> WTF. You have got to be kidding!!
>
> You are holding us hostage, follow thru on your word, finish the agreement and all the money will flow out.
>
> We paid Brian out, and have kept up on our end of the agreement this is all in your court!
>
> I have the emails that you were cc'd on for the lease negotiations.

[88] In reply, Scott said:

> That's the point. You have paid Brian out of a completely separate issue threatening to hold the sale of FVR.

> Brian only settled the wage payout for me because I was so worried about the thought of being partners with Dean any longer.
>
> Just look at the pattern. It is all you guys trying to get what you want holding other completely separate things hostage. Why did all of that need to happen?

[89] Blaire forwarded the March 27 email exchange with Scott to Dean, who sent his own email. While Dean's email (also sent on March 27) was not received by Scott, his evidence was that it was his view at the time:

> We all signed an agreement. The intent was to dissolve the partnership fairly.
>
> We have consulted with our lawyer. We have not heard from your team (I am told it is three now)
>
> The agreement you signed is fair even according to your realtor.
>
> Your intent appears to be evicting TAG. You should note that this is causing FVRL harm, and you should have your lawyer review your contract.
>
> Please Scott look at your e-mail chain. You have been in agreement and have signed the contract.
>
> As directors, we are at a deadlock. Myself and Blair will not sell FVR holdings and intend to honor our agreement with TAG, by not causing them any harm and by not devaluating the product they purchased.

[90] There continued to be conflict between the parties. Only Baire and Dean signed Christmas cards enclosing FVR staff bonusses, which angered Brian. He emailed Blaire and Dean on December 21, 2023, name-calling and using expletives.

[91] On January 25, 2024, Chris Dembski, Chief Strategy Officer for Arcticom, wrote to Scott and Brian advising that he had become aware of incidents that occurred that were not in keeping with their respective obligations under, among other things, the Arcticom SPA. Mr. Dembski gave Scott and Brian formal notice that "incidents were being assessed and investigated." Mr. Dembski asked Scott and Brian to take "appropriate corrective measures to refrain from any further non-compliance. Mr. Dembski also reminded them that pursuant to the terms of agreements, their "access and presence at any FVR or Accutemp location must be pre-approved and arranged in advance with Blaire."

Incentive to close May 5 Agreement

[92] On April 16, 2024, Laurel Thornton wrote to Blaire advising that the federal government announced it was increasing the capital gains inclusion rate from 50% to 66.67% for transactions after June 25, 2024. She thought that may be some motivation for Scott and Brian to close on the buyout. She recommended it would be wise to complete the transaction in the next two months.

[93] On April 18, 2023, Dean forwarded Ms. Thornton's email to Brian, commenting how the increase would affect their taxes. He was also of the view that he and Blaire were overpaying and that he would not pay more than had been agreed to in the May 5 Agreement.

[94] Scott replied that same day to Dean, that he had been requesting the cash in FVRL be paid out more than three months ago and not having done so, "you guys" cost him and them financially.

[95] Blaire responded to Scott,

> No, Scott, you have cost us. It was only extended from September because you and then you both failed to follow through in October. This should have all been complete in October and all of us on our separate ways.

[96] Scott responded to Blaire that the first step was paying out the funds. Among other things, he also said that he did not agree with how "your" accountants wanted to structure the deal, and he did not agree with the shortfall of the life insurance.

[97] On April 30, 2024, Blaire and Dean sent a share purchase agreement to Scott and Brian. However, according to the plaintiffs the defendants have refused their proposals to close on the May 5 Agreement.

[98] On May 3, 2024, Brian sent Blaire an email saying:

> "…I am tired of hearing about this agreement that expired 30 days after the sale of the company. I have taken care of my mortgage and I don't really give a shit about this capital gains tax. … I don't want to sign any agreement that you guys are proposing I won't. Capital gains in 20 years will make it all so much better for me. So drop saying agreement agreement agreement…."

[99] The plaintiffs filed their notice of civil claim on May 15, 2024.

Removal of Funds from FVHL

[100] In October 2024, the parties asked KMPG and Mr. Sangha to recommend the most appropriate manner and timing of distribution of any non-essential surplus cash then held by FVHL. By way of a director's resolution, the parties agreed to meet again after receipt of the accountant's recommendations to resolve to distribute the cash.

[101] The plaintiffs say that the resolution was only entered into after threats of oppression by the defendants, and involvement of their respective legal counsel, after the within action was commenced.

[102] The parties were to obtain recommendations from their respective accountants as to how to distribute FVHL's excess cash. They agreed thereafter to meet again to implement the recommendations. By early December 2024, there was a further breakdown between what Scott thought had been reached with Blaire on the amount for distribution. Dean and Blaire both objected to Scott's view, which the plaintiffs say Scott ignored.

[103] On January 10, 2025, while the parties were still discussing the amount of a holdback FVHL would retain – and whether a further holdback should be placed in trust pending the outcome of the action – without authorization from Blaire, Dean or Brian, Scott unilaterally removed $9,320 million from FVHL's account, by having the bank issue drafts to Masztalar Holdco. and Krafte Holdco., in the amount of $4,660 million each.

[104] The plaintiffs say that Scott's unilateral removal of funds is yet another basis upon which the parties are unable to work together in the future. They also say that Scott's actions put the parties at tax risk. The parties have not taken any steps since to alleviate the tax consequences or issued any dividends.

[105] The plaintiffs also say that the defendants have now received the monetary benefits agreed to in the May 5 Agreement, other than the purchase price for the shares of Krafte Holdco.

Parties' Positions

Plaintiffs

[106] The plaintiffs submit that the May 5 Agreement is binding and enforceable.

[107] The plaintiffs submit that the parties clearly intended to contract. The May 5 Agreement is headed with the word "Agreement" and starts with the words "This Agreement dated for reference May 5, 2023". As such, the onus is on the defendants to satisfy the court that the May 5 Agreement was not intended to be contractual: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 134 [*Oswald BCSC*], aff'd 2021 BCCA 352 [*Oswald BCCA*], citing *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 [*Langley*] and *R. v. CAE Industries Ltd.*, 1985 CanLII 5525, [1986] 1 F.C. 129 (C.A.).

[108] The plaintiffs argue that the parties clearly intended that the May 5 Agreement would be binding on their related companies as Clause 4 of the Agreement explicitly states that "This agreement shall be binding on the parties and any related companies they control". Accordingly, the fact that the actual shareholders of FVHL are not parties to the Agreement is not an impediment to its enforceability. An objective bystander would conclude that the parties intended to bind Krafte Holdings Ltd. and Masztalar Holdings Ltd.: *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416 [*Ai Kang BCSC #1*] at paras. 271–290, aff'd 2024 BCCA 299 [*Ai Kang BCCA*].

[109] The plaintiffs submit that there is no significant ambiguity in the May 5 Agreement. More specifically, they submit:

a) Clause 1 clearly provides for Brian to be paid $250,000 and for his salary to be increased to be equal to Blaire, Dean and Scott. Both of these terms have been performed.

b) Clause 2 provides that "upon the sale of FVRL, Scott and Brian agree to sell their one-half interest and Blaire and Dean agree to buy their one-half interests [sic] Fraser Valley Holdings including 0778158 BC". There is no ambiguity as to what Scott and Brian's interests in FVHL were. They held shares of FVHL through their holding company, Krafte Holdings Ltd., and at the time the May 5 Agreement was being negotiated and drafted, the parties' lawyer Clint Harcourt clearly stated that "When we do the transfer it will definitely be a transfer of shares".

c) Clause 2 provides that "[t]he combined value is agreed upon at $28,000,000 so the purchase price shall be $14,000,000". There is no ambiguity or difficulty of meaning. While the parties may have derived the purchase price from the value of the properties owned by FVHL, the expression of their agreement is clear: Blaire and Dean agreed to purchase Scott and Brian's interests for $14,000,000.

d) Clause 2 further provides that "such agreement", which can only be a reference to the sale of Scott and Brian's interests, "shall be executed and paid as soon as possible no longer than thirty (30) days after the sale of FVRL and transfer of funds has completed". The parties by their subsequent conduct showed that they thought they had a contract and that it was supposed to close by October 6, 2023 – 30 days after the execution of the share purchase agreement with Arcticom. Indeed, Brian relied on this clause to argue that the May 5 Agreement "expired" when the October 6, 2023, deadline passed.

e) Clause 3 provides that "any cash held in any related companies shall be distributed prior to any sale and that each of Blaire, Dean, Scott and Brian shall be entitled to one-quarter of such cash", and that "this shall include life insurance polices or their cash value". This must be read with Clause 4, which provides that "the final structure of any sale shall be agreed upon after discussions with accountants, lawyers and other advisors". All parties

gave evidence that the intention of the May 5 Agreement was to provide for a "fair" distribution of the cash in FVRL, having regard to tax consequences. That being said, the prospect of less favourable tax treatment should not be an impediment to the enforcement of the May 5 Agreement – if the parties cannot agree on appropriate tax treatment, then they should simply exchange shares for money and "let the tax chips fall where they may".

f) Clause 3 specifically provides that "cash" includes "life insurance policies or their cash value". This is not an impediment to the enforceability of the May 5 Agreement. In using the words "life insurance policies" the parties were clearly referring to the Pete Masztalar policy. The term "cash value" has a recognized meaning in both family and tax cases, and is almost universally understood to mean the cash surrender value of the policy: *S.A.T. v. D.I.T*, 2022 BCSC 1176 at para. 210. The defendants have not put forward any evidence to suggest that the policy, if it could be sold at all, could be sold for more than its cash surrender value. Rather, the interpretation provided by the defendants asks the court to add in new terms such as "death benefit" or "fair market value" and lacks an air of commercial reality: *Qi v. Qin*, 2024 BCSC 1830 at para. 149.

[110] The plaintiffs argue that the May 5 Agreement did not expire on October 6, 2023. They concede that the Agreement contemplated that elements of the agreement, including the distribution of excess cash and the purchase of the defendants' interests in FVHL, would be completed within 30 days of the sale to Arcticom (September 6, 2023), and that those steps did not occur by October 6, 2023. They contend, however, that they reasonably understood the defendants to have agreed to an extension of the time for completing the May 5 Agreement. Scott said that if the parties' longtime accountant, Paul Sangha, was busy the parties could extend – Mr. Sangha was busy and it was thus reasonable to infer that Scott was content to extend. Brian simply did not respond and, while that was not unusual as he had very little involvement in any of the parties' negotiations, it was not open

to him to “lie in the weeds” until he thought the contract had expired. A party cannot “stay silent, do nothing, and then argue that the time of the essence was an essential clause”: *Lal v. Grewal*, 2024 BCCA 149 at paras. 20, 24, citing *King v. Urban & Country Transport Ltd*. (1974), 1 O.R. (2d) 449 at 455, 1973 CanLII 740 (C.A.); see also *Shaw and Shaw v. Holmes and Holmes*, [1952] 2 D.L.R. 330 at 334, 1952 CanLII 285 (Ont. C.A.); *Bowlen v. Digger Excavating (1983) Ltd.*, 2001 ABCA 214 at para. 19.

[111] The plaintiffs submit that Brian must be taken by his silence to have agreed or consented to the extension, or is at least estopped from relying on any “expiration date”. Brian’s evidence was that he went into “hibernation” when he received Blaire’s email about extending the May 5 Agreement. Neither he nor Scott took any steps to complete the transfer of their shares in FVHL to the plaintiffs, for example, by tendering their shares for transfer or demanding payment of $14,000,000. Further, the evidence shows that, after October 6, 2023, both Scott and Brian proceeded on the basis that at least some aspects of the May 5 Agreement remained “alive”. In particular, there were negotiations and positions exchanged and, as Brian said in his evidence, he was prepared to come to terms that “followed the contract”. It was only after Brian sent his text in May 2024 stating his view that the Agreement had expired that the plaintiffs commenced this action, thereby giving notice that the plaintiffs wished to complete and were affirming the Agreement: *Lal* at para. 28.

[112] Finally, the plaintiffs submit that the May 5 Agreement is not merely an “agreement to agree”. The Agreement is not overly complicated and, stripped to its basics, calls for a distribution of cash and transfer of shares. They argue that the essence of their January 3, 2024, proposal, to which the defendants never properly responded, was for the parties to meet with accountants and lawyers and come up with the most tax-efficient way to effect those two things. Nevertheless, the plaintiffs argue that the court may still order the transfer of shares without more; while that may result in more or less favourable tax treatment, taxes are taxes, and it is not for the court to impose additional, non-essential terms which the parties could not work out themselves.

[113] As for remedy, the plaintiffs submit that specific performance is the only appropriate remedy in this case. They explain that the availability of specific performance depends on whether damages would be an adequate remedy and note that specific performance is often awarded to enforce contracts for the purchase and sale of shares: *Oswald BCSC* at para. 304, citing Sharpe J.A., *Injunctions and Specific Performance*, 3rd ed. (Aurora, Ont: Canada Law Book Inc., 2000) at 8–28; see also *UBS Securities Canada Inc. v. Sands Brothers Canada. Ltd.*, 2008 CanLII 19507 at paras. 64–65, [2008] O.J. No. 1676 (S.C.J.) [*UBS ONSC #1*], aff'd 2009 ONCA 328 at para. 96 [*UBS ONCA*].

[114] The plaintiffs submit that, in this case, it is clear that damages would not be an adequate remedy. The May 5 Agreement contemplates the sale of shares in a private corporation not otherwise available in the marketplace. The plaintiffs did not enter the agreement to earn a profit but rather as a means to end the parties' partnership, which the evidence shows has broken down. It would make no practical sense to require these parties to remain partners by awarding damages as opposed to specific performance. Further, there is no difficulty with timing as a new completion date may be set by the court: *Bollhorn v. Lakehouse Custom Homes Ltd.*, 2022 BCSC 2120 at para. 71. In sum, the plaintiffs argue that the May 5 Agreement can and should be enforced so that the parties can move on.

Defendants

[115] The defendants took issue with the credibility and reliability of Blaire and Dean's testimony, relying on the oft-cited authorities of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356–357, 1951 CanLII 252 (B.C.C.A), and *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185–188, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013). The defendants submit that Blaire and Dean showed an inclination to agree with anything they thought would assist them and disagree with or avoid admitting anything they thought might be harmful to their case. They argue that Dean, in direct examination, minimized or glossed over his inappropriate conduct towards Brian and, in cross-examination, was defensive, argumentative and either exaggerated or was untruthful. The defendants submit that Scott and Brian's

testimony, on the other hand, was blunt and forthright. They testified in a candid manner, freely admitted reasonable positions put to them in cross-examination and were neither argumentative nor evasive in their answers. The defendants therefore argue that where findings of fact must be made on the basis of the parties' testimony, Scott and Brian's evidence ought to be preferred over Blaire and Dean's where it conflicts.

[116] I do not agree with those submissions. I did not find Brian to be a reliable or a credible witness. His evidence was, at times, self-serving and inconsistent with the evidence I do accept. For instance, he claimed he went to the FVRL offices because he had some work-related business to do and that he spoke to Dean at the same time about rumours regarding his wife. In cross-examination, Dean admitted he had no work-related reason to be at FVRL offices and that he went there because he knew Dean would be there. Scott was more reliable and credible, though I do not accept that he only agreed to extend the May 5 Agreement in his September 15, 2023, email in *that moment*, because the evidence I do accept does not support that claim.

[117] I agree that at times, Dean was defensive and argumentative in cross-examination, but that was primarily related to two issues he was heavily cross-examined on. The first was the rumours about Brian's wife, and the second was the work Dean put through Eng. Co. Both were matters put in issue by the defendants. The modest work Dean put through his company was authorized by Pete and Ross. I found Blaire to be a credible and reliable witness. Both he and Dean testified in a straight-forward and forthright manner, in the context of an extensive documentary record.

[118] Turning to the merits, the defendants concede that the parties intended to contract but submit that the May 5 Agreement is not an enforceable agreement as it is an "agreement to agree". More specifically, the defendants argue that the Agreement is unenforceable because: (a) it does not contain all essential terms; and (b) the terms it does contain are not sufficiently certain: Geoff R. Hall, *Canadian*

Contractual Interpretation Law, 4th ed. (Toronto: LexisNexis Canada Inc, 2020) at ch. 7.1; *Ball v. Eckhart*, 2025 BCCA 70 at paras. 51–54; *Berthin v. Berthin*, 2016 BCCA 104 at paras. 46–49.

[119] With respect to essential terms, the defendants submit that one of the most glaring omissions of the May 5 Agreement is the absence of any language specifying which parties are responsible for taking certain steps under the contract. For example, Clause 2 refers to the execution of a further agreement without stating who is responsible for creating the first draft. Clause 4 requires the parties to engage in discussions but does not specify who is responsible for setting up those meetings or when they must be held. As a result, the defendants say, neither the Masztalars nor the Kraftes took sufficient steps to execute the agreement because they did not know what anyone was required to do. This, they submit, is powerful evidence that there was no enforceable contract: *Canadian Contractual Interpretation Law* at ch. 7.5.

[120] The defendants add that Clauses 2 and 4 also lack essential terms because they do not specify the type of further agreement to be drafted or set out what the parties agree will be included in the further agreement. They argue that even though the further agreement could be relatively simple, there are still many issues that can arise in drafting a contract that the parties would need to discuss and agree on.

[121] As for uncertainty of terms, the defendants submit that the most compelling argument for why the May 5 Agreement cannot be an enforceable agreement is the provision in Clause 3 that the cash held in FVHL to be distributed among the parties "shall include life insurance policies or their cash value".

[122] The defendants do not dispute that the only life insurance policy held by FVHL at the time of the May 5 Agreement that needed to be divided between the parties was the policy on the life of Pete Masztalar. They argue, however, that it is impossible or unfair for the court to decipher the meaning of Clause 3 and, in particular, what it means to distribute that life insurance policy between four different parties in a way that is distinct from splitting its cash value. More specifically, the

defendants submit that, excluding evidence of negotiations or subjective intentions of the parties, there are several equally likely interpretations of that clause, including that the four parties to the May 5 Agreement: (a) would each become beneficiaries of the life insurance policy; (b) would each get a share of the value of the death benefit or its tax-free equivalent; (c) would split the current cash surrender value of the policy; or (d) merely agreed to agree in the future on how to split the policy.

[123] The defendants argue that there is nothing in the admissible factual matrix or the words of the May 5 Agreement that could allow the court to determine which of those options the parties objectively intended. This ambiguity cannot be resolved by simply determining what "cash value" means as that does not resolve the question of what the first part of the couplet ("life insurance policies") means or why there is a disjunctive "or" used to join the couplet. To find that the phrase only requires the cash surrender value to be split between the parties would be no different than deleting words chosen by the parties at the time they signed the document, which is impermissible under well-established rules of contractual interpretation. The defendants submit Clause 3 most likely reflects that the parties chose not to resolve the issue of how to value and split the life insurance policy on Pete Masztalar's life and, in doing so, left the May 5 Agreement incomplete, unenforceable and as an agreement to agree. The court is prohibited from constructing and substituting its own agreement for that reached by the parties.

[124] The defendants add that Clause 3 is also too uncertain to be enforceable as the phrase "shall be distributed prior to sale" is inherently uncertain – is the actual distribution under this clause required before the parties execute the sale transaction under Clauses 2 and 4? Must the distribution occur before the closing of that transaction? Must the distribution occur before the meetings and further agreement on the structure of the sale are completed under Clause 4?

[125] The defendants submit that Clause 4 also represents an incomplete agreement to agree. For one thing, it is *expressly* drafted as an agreement to agree as it provides that the parties will agree on a final structure after discussions with

advisors, but does not mention any of the terms or issues to be discussed nor the nature or content of those discussions. Further, Clause 4 does not contain any terms specifying what the parties would discuss or decide on with “accountants, lawyers and other advisors”. While “final structure” could simply mean that the parties needed to agree on whether the sale would be a share purchase agreement or some other form of asset purchase agreement, there are potentially limitless structures the lawyers, accountants and other advisors could have come up with to help the parties effect a sale in a tax-efficient manner. The term “final structure” does not have a defined meaning in the contract, common law, custom of the parties or general commercial custom or usage. It is impossible for the court to determine what the parties meant by this term without impermissibly considering evidence of negotiations or the parties’ subjective intention. The parties’ post-contract conduct does not assist in this regard as they did nothing to have discussions or reach agreement about what the final structure of any sale would be.

[126] The defendants submit that the court need not conclude that all or even a majority of these terms or their specific phrases are uncertain. Rather, if any one part of Clauses 2–4 of the May 5 Agreement is too uncertain to be enforceable, all of those sections are unenforceable because they are intertwined and together form the core purpose of the Agreement.

[127] The defendants submit that the parties’ post-contract conduct is inconsistent with the existence of a binding agreement. In particular:

a) After Brian sent his October 18 email indicating that he did not wish to sell his interest, Dean responded and offered to have the Kraftes buy out the Masztalars.

b) After Brian’s October 18 email and the alleged new deadline of October 31, the Masztalars took no steps to advance performance of the May 5 Agreement.

c) The Masztalars did not commence this action for approximately seven months after Brian's October 18 email and the alleged October 31 deadline passed.

d) The October 2024 resolution for the disbursement of excess cash was agreed to even though it was inconsistent with the May 5 Agreement. It was agreed to after the defendants filed their response to civil claim denying the existence of any obligations under the May 5 Agreement.

[128] The defendants submit that the May 5 Agreement, if enforceable, was never extended as alleged by the plaintiffs and thus expired 30 days after the sale to Arcticom. The alleged extension of the deadline in Clause 2 would have required an amendment to the May 5 Agreement; however, none of the parties responded to Blaire's request for an extension in a manner that communicated their express agreement to modify the contract. Scott suggested a conditional willingness to extend if Mr. Sangha was busy. Neither Dean nor Brian even responded to Blaire's request.

[129] The defendants further submit that even if the court finds the May 5 Agreement to be binding and enforceable, the plaintiffs have failed to establish that Scott or Brian breached the Agreement or that the plaintiffs did not themselves breach the Agreement. For one thing, the plaintiffs did not specify whether it was Scott or Brian, who are separate parties to the contract, that breached the Agreement. Thus, even if the court were to find that the parties agreed to extend the deadline for the execution of the sale (which the defendants say is not legally possible), and that Brian's October 18 email amounted to a repudiation of the agreement, this does not address Scott's liability under the Agreement.

[130] More concerning, the defendants say, is the plaintiffs' failure to clearly set out which parts of the Agreement were breached and who breached them. The plaintiffs seem to take as a given that the fact there is no completed share purchase agreement is proof the Kraftes breached the agreement. The failure to complete a share purchase agreement could not constitute a breach of the May 5 Agreement,

however, as the share purchase agreement could only be completed after all excess cash was paid out and the parties agreed upon the final structure of any sale. Each of those steps required participation by the Masztalars and there was no evidence that they did anything apart from Blaire's texts and emails seeking an extension of the deadline and asking Scott if he had spoken to Mr. Sangha. Being "ready, willing and able" was not sufficient performance on the Masztalars' part.

[131] With respect to remedy, the defendants argue that while specific performance could be available considering the nature of the agreement and unsuitability of damages, to grant the remedy of specific performance there must be a clear contractual obligation to perform. The defendants argue that the plaintiffs have failed to establish that specific performance is available for a contract that requires the parties to have a series of poorly defined discussions and to reach a series of agreements on additional issues. Policy considerations suggest that a court may be reluctant to grant an order for specific performance where there are not clear obligations to enforce and where the court might need to supervise performance: *Westwood Plateau Partnership v. WSP Construction Ltd.*, [1997] B.C.J. No. 1294 at paras. 160–161, 37 B.C.L.R. (3d) 82 (S.C.); *Munro v. James*, 2020 BCSC 1348 at paras. 192–202. Here, an order for specific performance could put the parties at risk of breaching the order or being held in contempt as the required performance is simply not clear enough under the contract.

Plaintiffs' Reply

[132] The plaintiffs say that the provision in Clause 3 that "cash" shall include "life insurance policies or their cash value" is capable of sensible interpretation. Clause 3, as a whole, deals with the fair "distribution" of "cash". "Cash" may be defined as "money or its equivalent": *Black's Law Dictionary*, 12th ed. (Eagan, MN: Thomson Reuters, 2024). The distribution of "cash or its equivalent" is clearly what the parties had in mind when they signed the May 5 Agreement.

[133] The plaintiffs note that an insurance policy cannot simply be "distributed" like cash. Rather, it is an asset of a corporation which can be turned into cash by

surrendering it to the insurer, in which case it has a “cash surrender value”, or sold, which triggers tax consequences under s. 148(7) of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.). Because Pete Masztalar has not died, FVHL (the holder of the policy) cannot force a payout of a death benefit. It is thus simply not possible to equate the words “cash value” with the words “death benefit”.

[134] The plaintiffs suggest that a reasonable objective interpretation of the provision that the “cash” to be distributed includes “life insurance policies or their cash value” is that the amount to be distributed is either the cash surrender value or the fair market value of the life insurance policy, either of which can be readily ascertained at any given time. The plaintiffs reiterate that the court should be reluctant to find a contract void for uncertainty and argue that, while the cash surrender value interpretation ought to be preferred, where the parties have provided two possible interpretations the court should have regard to commercial reasonableness and efficacy: *Qi* at paras. 117, 130–138.

[135] The plaintiffs disagree that the parties themselves did not know what the May 5 Agreement meant or what they had to do to effect it. Such a suggestion, the plaintiffs argue, is contrary to the evidence, including: (a) the proposal Blaire obtained from KPMG setting out two methods for Masztalars to purchase the Kraftes’ shares; (b) the plaintiffs’ January 3, 2024, proposal; and (c) the plaintiff’s April 24, 2024, proposal including a draft share purchase agreement.

[136] The plaintiffs disagree that the May 5 Agreement is not capable of specific performance. They submit that a court granting a remedy of specific performance is entitled, in appropriate cases, to depart from the literal terms of the contract, impose terms or conditions which alter the letter but not the spirit of the agreement where the situation makes it inappropriate to grant a straightforward and unqualified order or order specific performance *cy-près* where the plaintiff is unable to comply literally with particular details: *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd*., 2008 CanLII 28064 at para. 6, [2008] O.J. No. 2309 (S.C.J.) [*UBS ONSC #2*], aff’d *UBS ONCA*; *AK (007) GP Management Ltd. v. Wang Dong,* 2023 BCSC 363 at

para. 43 [*Ai Kang BCSC #2*]; *Ai Kang BCCA* at paras. 74–78. The defendants submit that, in this case, specific performance can be ordered in a manner that is just and equitable and gives effect to an agreement that has already been partially performed.

[137] The plaintiffs propose terms for such an order. They submit that the parties ought to be able to easily identify the amount of cash held by FVHL on October 31, 2023, or May 12, 2024, as well as the cash surrender or fair market value of the life insurance policy on either of those dates. They say any disagreement between the parties as to the amounts to be distributed by FVHL may be resolved through a reference to the Registrar pursuant to R. 18-1 of the *Supreme Court Civil Rules*: *Sangha v. Reliance Investment Group Inc.*, 2012 BCSC 355 at paras. 53, 56, 67; *Eckhart v. Ball*, 2019 BCSC 1530 at para. 67; *Moon v. Golden Bear Mining Ltd.*, 2013 BCSC 364.

Legal Principles

[138] The legal principles applicable to determining whether an enforceable contract has been formed are not disputed by the parties and were succinctly summarized by our Court of Appeal at para. 34 of *Oswald BCCA*, as follows:

a) there must be an intention to contract;

b) the essential terms must be agreed to by the parties;

c) the essential terms must be sufficiently certain;

d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and

e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement was made.

[139] As that makes clear, three requirements must be established for there to be a binding contract: there must be an intention to contract; the essential terms must be agreed; and the terms must be sufficiently certain: see *Oswald BCSC* at para. 121, citing *Matic v. Waldner*, 2016 MBCA 60 at para. 57. As Mr. Justice Giaschi explained in *Oswald BCSC*:

> [122] *Matic* also sets out that the determination of whether there is an enforceable contract involves a contextual analysis of all the material facts and circumstances, but excluding the subjective intentions of the parties:
>
> > [63] The determination of whether the requirements for an enforceable contract have been met involves a contextual analysis, taking into account all the material facts. Such facts can include the subsequent conduct of the parties, including subsequent negotiations. Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham: LexisNexis, 2012) states (at p 164):
> >
> > > Whether the parties acted as if they had a binding agreement after entering into an understanding is given great weight by the courts in determining whether there is an unenforceable agreement or a binding contract. The parties' subsequent conduct transcends all three of the categories of unenforceable agreements to agree, such that conduct indicating a belief that one is bound will reinforce a conclusion that essential terms have been agreed or that the agreed terms are sufficiently certain or that there was no intention to delay the creation of binding obligations until execution of a formal contract document.
> >
> > [Emphasis in original.]
> >
> > [64] The facts and circumstances that should be considered will depend upon the context of each case but could include written or oral communications between the parties; communications to third parties; the conduct of the parties; the nature of subsequent negotiations, including when and how they came to an end. The subjective intention of the parties is not relevant in this analysis. SM Waddams, *The Law of Contracts*, 6th ed (Toronto: Canada Law Book, 2010) states (at para 145):
> >
> > > The phrase "consensus ad idem" though frequently appearing in the cases, must be used with caution, lest it should imply that the court should concern itself with the actual subjective state of mind of the parties. The objective principle of contract formation is not a mysterious or arbitrary rule but an inevitable result of the law's attempt to protect reasonable expectations.

[140] It is trite that an "agreement to agree" is not an enforceable contract and neither is a list of guiding principles: *Oswald BCSC* at para. 124, citing *Berthin* at

para. 48. However, if the parties have agreed on all essential terms and merely intend to incorporate those terms into a future formal document, there is an enforceable contract. As the Ontario Court of Appeal explained in the oft-cited decision of *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 at 12–13, 26 A.C.W.S. (3d) 350 (Ont. C.A.):

> 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.
>
> [Emphasis added; citations omitted.]

[141] As the Court in *Berthin* noted at para. 49, reference may also be made on this point to *Salminen v. Garvie*, 2011 BCSC 339, where Mr. Justice Williams stated:

> [32] Where the alleged agreement contemplates the execution of a further formal contract or where, as here, further negotiations take place after the conclusion of the alleged agreement, the court must determine whether the parties intended to create a binding contract or simply reached a basis for future agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 329, [2009] B.C.J. No. 1900 (QL) [*Le Soleil*]. It is trite law that “an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no

> contract at all": *May & Butcher Ltd. v. The King*, [1929] All E.R. Rep. 679, [1934] 2 K.B. 17 (H.L.), at 20.
>
> [33] The question for the court is whether the parties reached an agreement on all matters that are vital to that agreement or merely intended to defer legal obligation until a final agreement has been reached: see, for example, *Boult Enterprises Ltd. v. Bissett* (1985), 67 B.C.L.R. 273, [1985] B.C.J. No. 1872 (QL) at para. 13…
>
> [Emphasis added.]

[142] What constitutes a "vital" or "essential" term in an agreement will depend on both the nature of the agreement and the circumstances of the case: *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 at para. 341 [*Concord Pacific BCSC*], aff'd 2022 BCCA 16 [*Concord Pacific BCCA*], leave to appeal to SCC ref'd, 40089 (18 August 2022). As the above makes clear, the parties must have agreed on the essential terms and those essential terms must be sufficiently certain. Courts will be reluctant, however, to find a contract void for uncertainty. In *Berthin*, Madam Justice Newbury addressed that balance as follows:

> [47] Of course, the terms in question must be enforceable – i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:
>
> > An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.
> >
> > If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so

> rigidly so that the intentions of the parties to create a binding agreement are thwarted.
>
> Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."
>
> [Emphasis added.]

[143] Courts, and particularly Courts in British Columbia, will therefore strive to give effect to agreements reached through negotiation and discussion: *Concord Pacific BCSC* at para. 333, citing *Langley* at para. 38; *Miller v. Jellybean Park International Inc.*, 2013 BCSC 1237 at para. 67; *Brule v. Rutledge*, 2015 BCCA 25 at para. 45. However, as Mr. Justice Voith explained in *Concord Pacific BCSC* at para. 334, no amount of believing that a contract exists will cause that to be so if the initial agreement made by the parties lacks one or more essential terms or if that initial agreement, properly construed, contemplates that the agreement of the parties is not effective until some further formal agreement is signed.

Analysis

Is the May 5 Agreement Enforceable?

[144] The parties agree that there was an intention to contract in this case. The enforceability of the May 5 Agreement therefore depends on: (a) whether the essential terms of that Agreement were agreed to by the parties; and (b) whether those essential terms are sufficiently certain.

[145] The onus of proving both the existence of an agreement and the terms of that agreement lies with the plaintiff: see *Concord Pacific BCSC* at para. 82.

Agreement on Essential Terms

[146] I am satisfied that the essential terms were agreed to by the parties.

[147] I note at the outset that in addressing the existence or absence of essential terms I am not addressing issues of uncertainty or ambiguity, to which I turn in the next section. Rather, what I am addressing here is those fundamental terms of a

contract that the parties must agree to before a binding contract can be created: see *Concord Pacific BCSC* at paras. 340–341.

[148] As above, what constitutes an essential term in an agreement depends on both the nature of the agreement and the circumstances of the case: *Concord Pacific BCSC* at para. 341. Here, the May 5 Agreement contains three components: (1) Clause 1 – settlement of Brian's dispute and an immediate increase in Brian's salary; (2) Clause 3 – the distribution of any cash, including life insurance policies or their cash value, in any related companies to Blaire, Dean, Scott and Brian; and (3) Clauses 2 and 4 – the sale of Scott and Brian's one-half interest in FVHL to Blaire and Dean.

[149] The defendants raised no specific concerns with the existence of, or the parties' agreement to, the essential terms of components (1) and (2), for good reason. I am satisfied that the essential terms of those components of the Agreement were agreed to by the parties. More specifically, component (1) contains all essential terms as it specifies the amount Brian was to be paid ($250,000) and the amount to which his salary was to be immediately increased (an amount equal to the salaries of Blaire, Dean and Scott). That the parties agreed to these essential elements is evidenced by the fact that component (1) has been performed. Component (2) also contains all essential terms as it specifies the subject matter to be distributed (any cash, including life insurance policies or their cash value), from where (any related companies), to whom (Blaire, Dean, Scott and Brian) and in what proportions (one quarter each). Any difficulty with the essential terms of component (2) relates not to whether said terms exist and were agreed to by the parties but whether those terms are sufficiently certain, which I will address below.

[150] That leaves component (3) – the sale of Scott and Brian's one-half interest in FVHL to Blaire and Dean. Neither of the parties set out what they viewed as the essential terms of that component of the agreement.

[151] I find that the essential terms of the sale of Scott and Brian's one-half interest in FVHL to Blaire and Dean, whether achieved through a share purchase or

otherwise, are the parties, the subject matter and the purchase price: see *Qi* at paras. 119–123; *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at para. 50; *Concord Pacific BCSC* at paras. 354–355. All such terms were agreed to by the parties in this case: the parties are Blaire, Dean, Scott and Brian; the subject matter of the agreement is Scott and Brian's one-half interest in FVHL; and the purchase price is $14,000,000.

[152] In some cases involving share purchase agreements, the completion or closing date – the date on which payment is to be made and the shares transferred – has also been found to be an essential term: *Concord Pacific BCSC* at para. 355. Whether a specific closing date is an essential term in a share purchase agreement depends on the circumstances: *Hoban Construction* at para. 51. Here, I conclude that it was not necessary to include a specific closing date in order to have an enforceable agreement. There is nothing in the parties' conduct or other circumstances which evince an intention to make a specific completion date an essential term. Rather, the parties agreed that execution was to be "as soon as possible no longer than thirty (30) days after the sale of FVRL to Arcticom and transfer of funds has completed". As in *Langley*, at the time the May 5 Agreement was signed, a completion date could not be predicted with certainty as it depended on the sale of FVRL to Arcticom. As a result, rather than set a specific closing date, the parties agreed that the terms of the May 5 Agreement would be binding, and would be dependent on the timing of the sale to Arcticom and the preparation of the transfer documentation: see *Ai Kang BCSC #1* at para. 306. Timing was, in other words, a detail to be resolved later and could be resolved when the funds were paid: see *Hoban Construction* at para. 52, citing *Langley* at paras. 63–65.

[153] The defendants submit that one of the most glaring omissions of the May 5 Agreement is language specifying which parties were responsible for taking certain steps under the contract. In particular, the defendants note that Clause 2 refers to the execution of a further agreement but fails to state who is responsible for creating the first draft and that Clause 4 requires the parties to engage in discussions but fails

to specify who is responsible for setting up those meetings or when they must be held.

[154] I disagree that such terms are essential or that their absence renders component (3) of the May 5 Agreement an "agreement to agree". As the Court explained in *UBS ONSC #1*, an agreement is not incomplete simply because it calls for some further agreement between the parties or because it provides for the execution of a further formal contract. Rather, the question is whether the further agreement or documentation is a condition of the bargain or whether it is simply an indication or expression of a desire as to the manner in which the contract already made will be implemented: *UBS ONSC #1* at para. 56, citing *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 176, aff'd 2008 ABCA 257; see also *Bawitko* at 12–13.

[155] Here, the omissions raised by the defendants – terms specifying the author of the first draft of the further agreement and the organizer of the subsequent meetings or discussions – are not essential terms or conditions of the bargain reached in the May 5 Agreement, but rather matters relating to the manner in which the contract already made was to be implemented. They are, in other words, matters which are in my view "objectively ancillary" to an agreement for the sale of an interest in a corporation and not in any way essential to the basic transaction, which was for Scott and Brian to sell their one-half interest in FVHL to Blaire and Dean: *Matic* at para. 86; see also *Canadian Contractual Interpretation Law* at ch. 7.2. Thus, while Clauses 2 and 4 undoubtedly required further documentation to formally effect the transfer of Scott and Brian's one-half interest in FVHL, that does not render those clauses an agreement to agree: see *Oswald BCSC* at para. 171.

[156] The defendants add that Clauses 2 and 4 also lack essential terms insofar as they fail to specify the type of further agreement to be drafted or what would be included in that further agreement. I have concluded above that the essential terms to be included in the further agreement to effect the sale of Scott and Brian's one-half interest in FVHL – parties, subject matter and price – were agreed to by the

parties. Any other matters to be included are again, in my view, objectively ancillary to those essential terms and thus not essential to the basic transaction: *Matic* at para. 86. I take the alleged failure to specify the "type" of further agreement to refer to the means or structure of transfer, for example, by way of share or asset transfer. In my view, however, the means of transfer was not essential to the bargain between the parties: see *Ai Kang BCSC #1* at paras. 298–300. For one thing, Clause 4 of the May 5 Agreement explicitly states that "[t]he parties agree that the final structure of any sale shall be agreed upon after discussions with accountants, lawyers and other advisors *but that the intent of this agreement shall be binding*" (emphasis added). Further, as in *Ai Kang BCSC #1*, while the issue featured briefly in the parties' submissions, neither party presented evidence as to the implications for either party with respect to one transfer mechanism over the other. There is therefore nothing in the words of the agreement or the evidence before me to suggest an objective intention on behalf of the parties that the means or structure of the transfer was an essential term to the May 5 Agreement, as opposed to the manner in which the contract already made was to be implemented.

[157] Finally, the defendants argue that even though the further agreement could be relatively simple, there are still many issues that can arise in drafting a contract that the parties would need to discuss and agree on. Our Court of Appeal has made clear, however, that anticipated difficulties which may never arise are not enough to destroy the agreement: *Langley* at para. 74; see also *UBS ONSC #1* at para. 55.

[158] In sum, I conclude that the parties reached an agreement on all matters that are vital to the May 5 Agreement: see *Salminen* at para. 33.

Certainty of Essential Terms

[159] It is not enough that a contract contain all essential terms. The terms of a contract must also be sufficiently certain. The question of whether terms are certain asks whether the court can give a reasonably definite meaning to what the parties have said: *Canadian Contractual Interpretation Law* at ch. 7.3, citing *Mitsui & Co.*

(Point Aconi) Ltd. v. Jones Power Co. Ltd. et al., 2000 NSCA 95 at para. 74, leave to appeal to SCC ref'd, 28205 (20 October 2000).

[160] It is the responsibility of the parties, not the court, to clearly express the essential terms. However, as long as the agreement is not to be constructed by the court to the surprise of the parties, or one of them, the court will try to retain and give effect to the agreement that the parties have created for themselves: *Berthin* at para. 47.

[161] I am satisfied that the essential terms of the May 5 Agreement are sufficiently certain to be given reasonably definite meaning.

[162] With respect to component (1) of the May 5 Agreement, set out in Clause 1, there is nothing uncertain about the essential terms of the parties' agreement to settle Brian's dispute and effect an immediate increase in Brian's salary, as evidenced by the fact that that component of the Agreement was performed without issue.

[163] As for component (2) of the May 5 Agreement, the defendants submit that the essential terms of the parties' agreement are too uncertain to be enforceable in two respects. First, the provision in Clause 3 that the cash held in FVHL to be distributed among the parties "shall include life insurance policies or their cash value" cannot be enforceable as it is impossible or unfair for the court to decipher the meaning of that phrase and, in particular, what it means to distribute the life insurance policy on Pete Masztalar's life between four different parties in a way that is distinct from splitting its cash value. Second, the provision in Clause 3 that the cash "shall be distributed prior to any sale" does not specify with sufficient certainty the timing of the distribution as it relates to the steps required for the sale contemplated under Clauses 2 and 4.

[164] I conclude that neither term of Clause 3 is uncertain such that I cannot give reasonably definite meaning to what the parties have said.

[165] With respect to the term providing that the cash "shall include life insurance policies or their cash value", the parties agree that such can only refer to the policy

on the life of Pete Masztalar. The defendants nevertheless submit that there are several equally likely interpretations of that clause, and that there is nothing in the admissible factual matrix or the words of the May 5 Agreement that could allow the court to determine what the parties objectively intended. They argue that because the term references both "life insurance policies" and "cash value", to resolve the ambiguity by simply determining what "cash value" means would be no different than impermissibly deleting words chosen by the parties at the time they signed the document.

[166] I disagree. Clause 3 explicitly provides for the distribution of cash. It provides that such cash includes "life insurance policies *or* their cash value" (emphasis added). It is thus permissive in the sense that the parties agreed the life insurance policies held by FVHL at the relevant time could be distributed either as a life insurance policy or as its cash value, but not both. As a result, to interpret that term as requiring the distribution of "cash value" is not to delete words chosen by the parties but to find enforceable one of the means of distribution to which the parties explicitly agreed. Put differently, any ambiguity arising from the question of how to distribute the life insurance policy in a way that is distinct from splitting its cash value is *avoided* by the fact that the parties agreed to split the policy in that manner.

[167] Further, with respect to the defendants' "equally likely interpretations", there is nothing in the words used in the May 5 Agreement nor the surrounding context which evinces an objective intention on behalf of the parties that they would become beneficiaries of the life insurance policy or would get a share of the value of the death benefit or its tax-free equivalent. Again, the plain wording of Clause 3 indicates that it provides for the distribution of "cash", not a beneficial interest in a life insurance policy. Further, Pete Masztalar has not died, and there is nothing before me to suggest that FVHL (as holder of the policy) could force a pay out of the death benefit by the insurer to FVHL so as to allow FVHL to distribute that benefit to Scott, Brian, Blaire and Dean. Scott and Blaire negotiated various iterations of the terms to be contained in the May 5 Agreement. Scott was long accustomed to working with

details and with lawyers and accountants; he knew the importance of words and their meanings.

[168] Finally, I cannot agree that Clause 3 reflects that the parties chose not to resolve the issue of how to value and split the life insurance policy and thereby left this aspect of the May 5 Agreement incomplete and merely an agreement to agree. As above, the May 5 Agreement specifically provides that any life insurance policies held by FVHL at the relevant time may be distributed by way of their "cash value". I agree with the plaintiff that "cash value" can be reasonably interpreted as cash surrender value: see *S.A.T.* at para. 210; *Zhu v. Zhang*, 2021 BCSC 2524 at para. 48. While "cash value" could also theoretically refer to the fair market value of the life insurance policy (i.e. the price it would fetch on the open market), nothing in the words of the May 5 Agreement nor the surrounding context contemplates the sale of any life insurance policies such that the fair market value could in fact be obtained by FVHL, nor is there anything to suggest that, absent the designation of a new beneficiary, the life insurance policy could be sold on the open market for any more than its cash surrender value.

[169] As above, because the parties agree that there was an intention to contract, I am obliged to strive to give effect to agreement they reached through negotiation and discussion: see *Concord Pacific BCSC* at para. 333; *Berthin* at para. 47. While the term "cash value" of the life insurance policy discloses some ambiguity, I am of the view that it may be given the reasonably definite meaning of cash surrender value.

[170] As for the provision in Clause 3 that the cash "shall be distributed prior to any sale", I see no real ambiguity. It is clear on a plain reading of the May 5 Agreement that the "sale" before which the cash is to be distributed is the sale of Brian and Scott's one-half interest in FVHL provided for in Clauses 2 and 4. The words of the Agreement and the surrounding context demonstrate that the purpose of Clause 3 is to effect the distribution of any cash held in related companies (i.e. FVHL) to Blaire, Dean, Scott and Brian before Scott and Brian sell their interest in FVHL to Blaire and

Dean. It is also clear that the parties objectively intended this distribution to occur before the closing of the sale of Brian and Scott's one-half interest. The sale before which the distribution was to occur is effected at closing i.e., the date on which the payment is to be made and the one-half interest transferred. As to the defendants' suggestion that it is unclear whether the distribution must occur before the meetings and further agreement on the structure of the sale are completed under Clause 4, I see no such ambiguity. Clause 3 provides that the distribution must be made "prior to any sale", not prior to the completion of any discussions with accountants, lawyers or other advisors contemplated in Clause 4.

[171] Turning then to component (3) of the May 5 Agreement, I have concluded above that the essential terms requiring sufficient certainty are the parties, the subject matter and the price.

[172] I am satisfied that the parties to the May 5 Agreement are sufficiently certain. Blaire, Dean, Scott and Brian are named as parties to the Agreement. The parties' holding companies, Krafte Holdings Ltd. and Masztalar Holdings Ltd., are named as parties. I am satisfied on the evidence that the parties understood and objectively intended that the May 5 Agreement, as Clause 4 explicitly provides, would be "binding on the parties and any related companies they control": see *Ai Kang BCSC #1* at paras. 278–282.

[173] I conclude that Scott and Brian's "one-half interest" in FVHL is sufficiently certain subject matter: see *Qi* at paras. 119–123. As the plaintiffs submit, there is no ambiguity as to what Scott and Brian's "one-half interest" in FVHL is: it is 50% of the shares in FVHL, held by Krafte Holdings Ltd. Further, as I have concluded above, the means by which that subject matter was to be transferred (i.e. the structure of the transaction) was not an essential term but rather a matter that the parties objectively intended would be "agreed upon after discussions with accountants, lawyers and other advisors". Thus, any uncertainty as to the structure of the transaction is not uncertainty of an essential term and does not render the May 5 Agreement an unenforceable agreement to agree: see *Qi* at para. 300.

[174] Finally, there is no uncertainty in the price to be paid for Scott and Brian's one-half interest in FVHL as the May 5 Agreement explicitly provides for a purchase price of $14,000,000.

[175] In sum, I find that the essential terms of the May 5 Agreement are sufficiently certain. I therefore conclude that the May 5 Agreement is an enforceable contract.

Was the May 5 Agreement Breached?

[176] Having found that the May 5 Agreement is an enforceable contract, I must now determine whether the Agreement was breached. Relevant to that determination is whether the May 5 Agreement was breached or expired pursuant to the time limit in Clause 2, which provided that the sale of Scott and Brian's one-half interest in FVHL was to be executed "no longer than thirty (30) days after the sale of FVRL and transfer of funds has completed".

[177] The parties signed the final TAG LOI on May 5, 2023, the same time as they signed the May 5 Agreement. TAG returned the executed LOI to the parties on May 8, 2023.

[178] Also on May 8, 2023, Brian was paid $250,000 from FVRL as contemplated by Clause 1 of the May 5 Agreement. Brian was also paid the same wages as Blaire, Dean and Scott until the sale to Arcticom on September 6, 2023.

[179] The plaintiffs say that the defendants agreed to extend the 30-day deadline to October 31, 2023, to accommodate their long-standing accountant's schedule. The defendant's position is that they did not agree to an extension. More specifically, they submit that the plaintiffs have not shown that they met the 30-day deadline nor have they shown that all four parties to the May 5 Agreement agreed expressly to modify the contract. I do not agree.

[180] In contemplation of Clause 4 of the May 5 Agreement, the parties were to speak to their accountants and lawyers to come up with a "final structure" which was to be fair to both sides.

[181] As he had in the negotiation of the Arcticom sale, after the Arcticom SPA was signed, Blaire took the lead on advancing the May 5 Agreement, including in respect of Clause 4. Scott thought the plaintiffs would "push the agreement", including engaging lawyers and accountants, and "start to make it complete" while he was on vacation from September 14 to October 12, 2023. Scott's understanding that Blaire would do so in his absence was not unusual, given Scott "left it to" Blaire to negotiate the Arcticom SPA. When FVRL's accountant, Mr. Sangha, was not available in September 2023, Scott agreed to extend the 30-day deadline. It was reasonable for the plaintiffs to act on that extension, and they did so.

[182] Brian's direct evidence was that he never made Scott his "legal agent" (with respect to closing the May 5 Agreement), though no explanation was given for what he meant by that term nor how it was any different from what his practice had been at FVRL.

[183] When a decision had to be made, Brian was "okay" with Scott discussing the matter with Blaire, and in turn, Scott would let Brian know how it affected him. Brian relied on Scott to tell him what the documents were about and Scott made sure Brian understood them. Then Brian would agree or disagree with proposals Scott put to him. If Scott discussed business with Brian which required a document to be signed, Brian signed it if he believed it was fair.

[184] While Brian says he never told Scott he could extend the Agreement for him, I find it was not uncommon for Brian to be passive within FVRL business decision-making. Brian was typically involved in emails with the three other directors, yet he mostly did not respond. Brian recalled Arcticom approaching the parties on the proposed buyout by TAG. He saw the letter Arcticom sent on January 27, 2023, about the TAG LOI, which he "skimmed" but did "not review", because Scott helped him out with FVRL "stuff".

[185] Brian recalled receiving Blaire's email asking about an extension, but he did not respond to it. Instead, he "closed off his ears" and went into "hibernation". The plaintiffs say that it was reasonable to infer that Brian's silence was deliberate and

that he was “lying in the weeds” to gain leverage over the plaintiffs, or, at least, keeping his options open. While Brian’s evidence was that he could not recall if his non-response was intentional, he did agree that an extension did not cross his mind. He did nothing.

[186] On October 16, 2023, Blaire asked Scott to contact FVRL’s accountant, reminding him that the accountant was too busy to deal with FVRL while Scott had been away on holidays.

[187] When Brian purported to repudiate the May 5 Agreement with his October 18 email, he also said he would be prepared to meet in the future to discuss. Blaire responded to Brian’s email the same day asking for the parties to meet, leaving it open future discussions. Brian took no steps to arrange a meeting, but he said Scott attempted to do so. Brian’s evidence was that he had already been paid the compensation referred to in Clause 1 of the May 5 Agreement, which was his primary focus. He was also upset over events involving Dean in September 2023.

[188] Approximately a week later, on October 24, 2023, Blaire asked Scott about the next steps on the sale. Scott told Blaire that Brian was upset about some things he heard Dean was saying. Scott said he would speak to Brian alone.

[189] Blaire suggested that Scott may want to have Brian talk with Clint Harcourt, adding that Mr. Harcourt said the Agreement was enforceable. Scott did not dispute this, nor did he say he had not agreed to an extension.

[190] Through counsel, Blaire and Dean wrote to Scott and Brian on October 30, 2023, asking them to confirm if they agreed that the May 5 Agreement was binding on the parties. There was no direct response to this correspondence. Again, neither Scott nor Brian said the Agreement had expired.

[191] On January 3, 2024, again through counsel, Blaire and Dean sent a letter to Scott and Brian with a detailed proposal to complete the transactions contemplated in the May 5 Agreement. They also said they were open to any reasonable suggestions the defendants might have in the suggested sequence of events.

[192] Though Scott and Brian did not respond specifically to the January 3, 2024, letter, on February 1, 2024, they wrote to the plaintiffs and their legal counsel advising that the first step was to distribute all the monetary assets in FVHL and 778, leaving only the Two Properties and the insurance policy.

[193] In my view, notwithstanding Brian's prior declaration that he would not sell his land, Scott did speak to him on or after October 24, 2023, and thereafter Scott, on both his and Brian's behalf, continued to discuss matters in connection with the May 5 Agreement, including the February 1, 2024, letter.

[194] Blaire replied to Scott and Brian on February 1, 2024, reminding them that they had agreed the first step was to distribute cash; all the money was in FVHL, not in 778. Blaire reiterated the plaintiffs' desire to distribute the FVHL cash in a manner that was fair and tax efficient for all of them, which required corporate resolutions. The plaintiffs were reluctant to authorize those distributions without the defendant's commitment to complete the share purchase agreement the parties had agreed to.

[195] When Scott forwarded the valuations on the Two Properties to Biaire on March 17, 2024, Blaire also reminded Scott that he and Dean would not agree to distributing funds in FVHL until there was agreement to sign off for sale of FVHL shares. Scott did not dispute this.

[196] So, by March 17, 2024, the parties continued to engage on steps to close the May 5 Agreement. On March 26–27, 2024, Scott, Blaire and Dean continued to correspond. Scott told Blaire that he had not been consulted about the leases on the Two Properties nor had he even been asked. He also said the Two Properties had increased in value.

[197] Blaire reminded Scott he had been copied on the lease negotiations, and that he and Dean had held up their end of the bargain; now that Brian had been paid out, the defendants needed to follow through and complete the Agreement.

[198] Scott's view, in part, was that Brian only settled the wage payout for him because Scott was so worried about the thought of being partners with Dean any longer.

[199] Dean's view on March 27, 2024, was that the four parties signed an agreement with the intent to dissolve the partnership fairly.

[200] On April 2024, after the federal government's proposed capital gains inclusion rates and the recommendation the plaintiffs received that the May 5 Agreement ought to close prior to the effective date of the increased rates, the plaintiffs forwarded a simple form of share purchase agreement to the defendants.

[201] The plaintiffs submit that the defendants' position (and Brian's in particular) was captured in his May 3, 2024, email to Blaire. Brian refused to sell his interests because his mortgage was paid off; he did not care about capital gains at that time because in 20 years capital gains would make it so much better for him, thus finally ending the parties' efforts to close the May 5 Agreement.

[202] In sum, I find that the plaintiffs were at all material times, ready, willing and able to complete the closing. They made repeated efforts to do so, which Scott, on behalf of the defendants, reciprocated, until Brian's May 3, 2024, email breached the Agreement.

What is the Appropriate Remedy?

[203] At this stage, the question is whether the plaintiffs are entitled to specific performance of the May 5 Agreement for the distribution of cash and the transfer of Scott and Brian's one-half interest in FVHL, or whether they are constrained to recovering damages.

[204] The primary award for breach of contract is generally monetary damages. Specific performance is a discretionary remedy, supplementary to the common law remedy of damages: see *Munro* at para. 193. In order to grant an order for specific performance, I must be satisfied that damages would be an insufficient remedy: *Ai*

Kang BCSC #1 at para. 350, citing *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 14, 1996 CanLII 209.

[205] As Giaschi J. explained in *Oswald BCSC*:

> [304] Specific performance is often awarded to enforce contracts for the purchase and sale of shares (see for example: Sharpe J.A., *Injunctions and Specific Performance*, 3rd ed. (Aurora, Ont: Canada Law Book Inc., 2000) at p. 8-28). The availability of specific performance depends on whether damages would be an adequate remedy: *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328, at para. 96.

[206] The question of whether damages will be an appropriate remedy in any given case is a largely factual inquiry: see *Qi* at para. 17, citing *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 44.

[207] I am satisfied that specific performance is the appropriate remedy in this case.

[208] The May 5 Agreement provides for the distribution of cash from and sale of Scott and Brian's one-half interest in FVHL. Scott and Brian's one-half interest in FVHL, a private corporation, is made up of shares held by Krafte Holdings Ltd. which are not otherwise available on the public market. The purpose of the distribution of cash and sale of Scott and Brian's interest was, in essence, to facilitate a buy-out and the end of the parties' partnership. In such circumstances, an award of damages would not only be inadequate, but would frustrate the objective intentions of the parties by requiring them to remain joint owners of FVHL.

[209] The defendants argue that while specific performance could be available considering the nature of the agreement and unsuitability of damages, specific performance is not an appropriate remedy in this case as the May 5 Agreement lacks certainty such that there are no clear obligations to enforce and the court might need to supervise performance. For the reasons I have given above, I am satisfied that the May 5 Agreement is sufficiently certain to support a claim for specific performance: see *Oswald BCSC* at para. 303.

[210] Further, in making an order for specific performance, the court is exercising its powers in equity. In doing so, the court can impose terms as it sees fit to do justice between the parties. More specifically, in ordering specific relief, the courts will often impose terms or conditions which alter the letter but not the spirit of the agreement, where the situation makes it inappropriate to grant a straightforward and unqualified order: *Ai Kang BCSC #2* at paras. 31–32; citing Sharpe J.A., *Injunctions and Specific Performance* (Toronto: Thomson Reuters) (loose-leaf update 2021, release 1), at 11.7; see also *UBS ONSC #2* at para. 6.

[211] In their written and oral submissions, the plaintiffs submitted that it was preferable for this court to find the appropriate date for an order of specific performance be the date they commenced their action for specific performance; namely, May 12, 2024. While I agree it would be most fair to order specific performance on the date the plaintiffs commenced their action, that action was commenced on May 15, 2024.

Orders

[212] On that basis, and in light of my conclusions above, I am satisfied that the following orders will give effect to the substance and spirit of the May 5 Agreement:

a) With respect to Clause 2 of the May 5 Agreement, the defendants are ordered to transfer all of the issued and outstanding shares of FVHL now held by Krafte Holdings (the “Krafte Shares”) to the plaintiffs within 30 days of the date of this order, and the plaintiffs are ordered to pay $14,000,000.00 to the defendants at the time of transfer.

b) The parties are directed to discuss the transfer of the Krafte Shares with accountants and lawyers and to attempt to agree on a mutually acceptable, tax-efficient manner of transfer; however, if the parties are unable to agree within 30 days on a tax-efficient structure for the share transfer, then the transfer of the Krafte Shares to the plaintiff ought to be a simple transfer of the common shares of FVHL now held by Krafte Holdings.

c) The parties are directed to determine:

i. the amount of cash in FVHL as of May 15, 2024; and

ii. the cash surrender value of the insurance policy on the life of Pete Masztalar held by FVHL (the "Policy") as of May 15, 2024.

d) If, within 30 days of the date of this order, the parties are not able to determine and agree on the amounts and values set out in sub-paragraph c), then there will be a reference to the Registrar to determine the amount of cash in FVHL and the cash surrender value of the Policy.

e) To the extent the defendants received more than the total of the amounts referred to in subparagraph c) (i) and c) (ii) when they withdrew $4.662 million (less 50% of the holdback payment of $1.4 million) on January 10, 2025, the defendants are ordered to repay the difference to FVHL within 60 days of the date of this order.

f) To the extent the defendants received less than the total of the amounts referred to in subparagraph c) (i) and c) (ii) when they withdrew $4.662 million (less 50% of the holdback payment of $1.4 million) on January 10, 2025, the defendants shall cause FVHL to pay them the difference within 60 days of the date of this order.

[213] The plaintiffs are entitled to their costs. If the parties cannot agree on costs and wish to make submissions on them, they may do so in writing, on the following schedule:

a) the plaintiffs' submissions of no more than 15 pages within 30 days of this judgment;

b) the defendants' response of no more than 15 pages within 30 days of receipt of the plaintiff's submission; and

c) the plaintiffs' reply of no more than 5 pages within 15 days of receipt of the defendants' response.

"Dion J."