Court of King's Bench of Alberta

Citation: Reid v AMRY Family Trust, 2026 ABKB 55

Date: 20260127
Docket: 2101 00669
Registry: Calgary

Between:

Stephen Reid

Applicant

- and –

AMRY Family Trust

Respondent

Reasons for Decision
of the
Honourable Justice C.B. Thompson

Appeal from the Order of
The Honourable Applications Judge J.T. Prowse in Chambers
Dated July 31, 2023; filed September 13, 2023
(Docket: 2101 00669)

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I. Overview

[1] The Plaintiff/Appellant, Stephen Reid ("Reid"), appealed the decision of the Honourable Applications Judge Prowse (the "Judge") dated July 31, 2023, and the resulting Order (the

"Decision"). The Defendant/Respondent is AMRY Family Trust (the "Trust"). The Trust is represented by Joe Dand ("Dand"), a Trustee of the Trust.

[2] Reid and Dand were entrepreneurs and businessmen. They were also family friends and business partners.

[3] The Decision summarily dismissed Reid's Action filed January 8, 2021 (the "Claim"), against the Trust. Reid's Claim is a contractual dispute arising from the settlement of a $1 million loan that the Trust advanced to Reid pursuant to a Promissory Note dated March 24, 2017 (the "Loan").

[4] The Loan was secured by Reid's personal shares of Founders Advantage Capital Corp ("FAC shares"). Reid was unable to repay the Loan's principal and interest when it became due on November 1, 2019. The Trust was prepared to enforce the security and recover the Loan. However, the parties entered into a written contract to settle the Loan, which is the Debt Settlement Agreement made effective December 19, 2019 (the "DSA").

[5] Reid subsequently filed the Claim alleging the existence of an oral collateral agreement to the DSA and the Trust's breach of the oral collateral agreement.

[6] The Trust filed a Defence denying Reid's allegations and filed an application to summarily dismiss Reid's Claim (the "Summary Dismissal Application"), which the Judge granted.

[7] Reid argued on appeal that the Judge failed to consider the oral evidence and implicitly accepted Dand's interpretation of the written communications. Reid argued that to determine the existence of the oral collateral agreement and truthful interpretation of the written communications, a judge is required to make a credibility determination as between Reid and Dand as the only parties to the communications that form the basis of the oral agreement. Reid submitted that this credibility determination is a complete answer to the Summary Dismissal Application as it creates a genuine issue for trial.

[8] The Trust argues that the Judge is correct in summarily dismissing the Claim and there is no merit to Reid's Claim of some uncertain oral collateral agreement for the return of cash or shares to him after having settled the Loan.

[9] For the reasons that follow, I dismiss the Appeal and uphold the Decision granting the Trust's Summary Dismissal Application.

II. The Judge's Decision

[10] The central issues before the Judge were whether Reid could establish an oral collateral agreement outside the written DSA, and whether Reid's Claim could be resolved summarily.

[11] The Judge relied on the relevant caselaw, reviewed the material evidence in detail, and applied the legal principles accordingly. He found that the record allowed the Court to make necessary findings without a trial.

[12] The Judge noted Reid's evidence that acknowledged his lack of bargaining power and acceptance of the terms in the written DSA. The Judge held that it was untenable to assert a valid oral collateral agreement for a term proposed during negotiations and expressly excluded from the final written DSA. The Judge also held that Reid's alleged oral collateral agreement is

inconsistent with the fixed threshold adopted in the written DSA. Reid's hope or expectation of additional payment was insufficient to create a contractual right. The Judge concluded that summary dismissal of Reid's Claim was proportionate, expeditious, and just.

III. Issues on Appeal

[13] The central issue on appeal is whether the Judge erred in granting summary dismissal of Reid's Claim. Therefore, based on the legal framework for summary dismissal in Alberta, the issues in this Appeal are:

(a) whether the Trust met its burden to establish that there is no merit to Reid's Claim and no genuine issue requiring a trial;

(b) whether there is a genuine issue requiring a trial; and

(c) whether the merits of Reid's Claim can be fairly and justly determined on a summary basis and judicial discretion should be exercised to summarily resolve the Claim.

IV. Standard of Review

[14] An appeal from a decision of an Applications Judge is a hearing *de novo* pursuant to Rule 6.14(3) of the *Alberta Rules of Court*. However, there is no new evidence filed by the parties in this Appeal.

[15] The standard of review of a decision of an Applications Judge is correctness, and no deference is owed: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11; ***Bacheli v Yorkton Securities Inc***, 2012 ABCA 166, at paras 17 and 30; ***Jacobs v. McElhanney Land Surveys Ltd***., 2019 ABCA 220 at para 153.

V. The Record

[16] Reid filed the record of proceedings described as Appeal Compendium of Evidence and compiled in two volumes: Volume I and Volume II. I refer to them collectively as the Record, and individually as Record Vol I and Record Vol II.

[17] The Record includes the pleadings in Reid's Claim; the Trust's Summary Dismissal Application; Affidavits of Dand and Reid with significant exhibits; transcript and exhibits from cross-examination of Dand and Reid on their Affidavits; answers to undertakings of Dand and Reid with significant documentary evidence; transcripts of the Application hearing, the Decision, and the Notice of Appeal.

VI. The Legal Framework for Summary Dismissal

[18] The Trust's Summary Dismissal Application before the Judge was pursuant to r 7.3(1)(b) of the *Rules*. The Alberta Court of Appeal set out the test for summary judgment in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 para 47.

[19] The phrase "no merit" in r 7.3 should not be viewed in absolute terms, but in the context of there being "no real issue": ***Weir-Jones***, para 31.

[20] The Trust must show that there is no merit to Reid's Claim, that it is entitled to summary judgment on the merits of the case, and that there is no genuine issue requiring a trial. At a threshold level, the Trust must prove the material factual elements of its case on a balance of probabilities: ***Weir-Jones***, paras 32, 35 and 47.

[21] However, the mere establishment of the facts to the standard of balance of probabilities is insufficient to obtain summary judgment because proof of the facts does not determine whether the Trust has also proven that there is no genuine issue requiring a trial: ***Weir-Jones***, paras 33 and 47.

[22] The ultimate burden remains on the Trust to establish on a balance of probabilities that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis: ***Weir-Jones***, para 35; ***Kostic v Thom***, 2021 ABCA 406 at para 22.

[23] The presiding judge must determine, considering the state of the record and the issues in dispute, whether it is possible to fairly resolve the Claim on a summary basis, or whether uncertainties in the facts, the record, or the law, reveal a genuine issue requiring a trial: ***Weir-Jones***, para 47.

[24] The standard for fairness is not whether the process is as exhaustive as a trial, but whether it gives the presiding judge confidence that they can make the necessary fact-finding and apply the relevant law to resolve the dispute: ***Hryniak v Mauldin***, 2014 SCC 7 para 50.

[25] If the judge has sufficient confidence in the record such that they are prepared to exercise the judicial discretion to summarily resolve the dispute, and the Trust has proved the material facts on a balance of probabilities and advances the law that vindicates its position, summary disposition is appropriate: ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at para 12.

[26] The presiding judge may make contested findings of material facts and should not be reluctant to do so. However, before the presiding judge resolves a material factual dispute, the judge should ask if it constitutes a genuine issue requiring a trial. This is because a dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial: ***Hannam***, at paras 147-149 and 175; ***Weir-Jones***, at paras 35 and 38.

[27] Both parties have the obligation to put their best foot forward: ***Kostic***, paras 21-22. Therefore, the test is to be applied based on the record before the summary disposition judge: ***Weir-Jones***, at para 37.

[28] I now apply the forgoing legal principles, defined burdens and standard to the issues in this Appeal.

VII. Issue 1: Has the Trust met its burden to establish that there is no merit to Reid's Claim and no genuine issue requiring a trial?

[29] The issues on the merits of Reid's Claim are: (a) is there an oral collateral agreement to the DSA? (b) if so, did the Trust breach the oral collateral agreement?

[30] I find that there is no oral collateral agreement to the DSA and the Trust did not breach any legal contract it had with Reid. The Trust has established that there is no merit to Reid's Claim and there is no genuine issue for trial. It has met its burden for summary dismissal.

A. The Legal Framework for Oral Collateral Contract

[31] The Supreme Court of Canada approved the collateral contract principle in ***Hawrish v. Bank of Montreal***, 1969 CanLII 2 (SCC), [1969] S.C.R. 515 at 520 and applied it in ***Carman Construction Ltd v Canadian Pacific Railway Co***, [1982] 1 SCR 958 p 966-967 where it quoted that principle as pronounced in *Heilbut, Symons & Co. v. Buckleton* [[1913] A.C. 30] 47:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare.
>
> The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100£, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.
>
> [emphasis added]

[32] Thus, a collateral contract can be an oral agreement ancillary to a written contract: ***Ahone v. Holloway***, 1988 CanLII 3141 (BC CA) para 18.

[33] While the collateral contract and the main contract are distinct, they are inextricably tied and without one the other would not exist: Jason W Neyers, ed, *Fridman's The Law of Contract in Canada*, 7th ed (Toronto: Thompson Reuters, 2024) 742.

[34] If the Court determines that a contract is partly oral and partly written, both the oral and written parts must be considered together and interpreted as one inclusive contract: ***Harco Enterprises Ltd. v Knelsen Sand and Gravel Ltd.***, 2021 ABQB 263 para 150.

[35] The existence of a collateral contract is a question of fact: ***T.D. Bank v. Griffiths***, 1987 CanLII 2434 (BC CA) para 29.

[36] As a collateral contract induces and co-exists with a main contract and operates according to standard contractual principles, its existence depends on proof of the same elements that give rise to other contracts. To determine the existence or formation of a collateral contract, the following elements must be satisfied:

(a) both parties had an intention to create a legal relationship. That intention is to be determined objectively from the words used and the conduct of the parties;

(b) consideration must exist on both sides of the agreement;

(c) the terms of the collateral agreement are sufficiently clear and certain in the minds of both parties at the time the agreement was made;

(d) the collateral agreement must have all the essential elements of a contract separate and distinct from the main contract; and

(e) the collateral agreement must not contradict the main contract:

B & R Development Corporation Ltd. v. Trail South Developments Inc., 2012 ABCA 351 paras 45; ***Total Petroleum (N.A.) Ltd. v. AMF Tuboscope Inc***., 1987 CanLII 3172 (AB KB) paras 40 and 45; *Fridman's* p 749.

1. The Parties must have Intention to Create a Legal Relationship

[37] The existence of a contract collateral to the primary agreement must be established by proof of an intention to contract, just as in the case of any other contract: ***Carman***, p 966.

[38] The evidence must demonstrate, on an objective basis, that the parties clearly intended to enter into a separate and legally binding distinct contract containing a promise that induced one party to enter into a main contract containing the essence of the negotiated bargain: *Fridman's* p 749; ***Harco***, para 151.

[39] Courts have adopted an objective standard in determining the intention of the parties to create legal relations. The Court in ***MacMillan v. Kaiser Equipment Ltd***., 2004 BCCA 270 at para 44 quoting G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) 17 stated:

> The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. The common law embraced this attitude of objectivity in the determination of contractual relations...

[40] A party's subjective intentions are not a relevant consideration: ***Talwandi Video Lab Inc v 1441419 Alberta Ltd***, 2024 ABCA 140 para 11 citing ***P & C Lawfirm Management Inc v Sabourin***, 2020 ABCA 449 at para 54.

[41] Therefore, the question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound; "what intention is objectively manifest in the parties' conduct". In answering this question, courts are not limited to the four corners of the purported agreement but may consider the surrounding circumstances: ***Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga***, 2021 SCC 22 at paras 37-38.

[42] The relevant consideration includes the factual matrix in existence at the relevant time and the genesis and aim of the transaction. In determining the existence of a contract, the judge's fact-finding role is expanded beyond the mere words and context plays a greater role: ***Ziola v Petrie***, 2021 SKCA 97 paras 41 and 43.

[43] The nature of the relationship between the parties and the interests at stake are relevant factors to determine the existence of an intention to create legal relations. The Supreme Court of Canada has held that courts will often assume that such an intention is absent from an informal agreement among spouses or friends: ***Ethiopian***, para 38.

[44] In ***Strother v. Darc***, 2016 BCCA 297, the Court held that evidence of generous and interest-free loans over a number of years, a lack of rigour on repayment dates, and no resort to formal demands or litigation, was nothing more than a pattern of dealing to be expected between close friends and long-standing business partners. It demonstrated a history of mutual generosity and forbearance which may have given rise to an "understanding or expectation" but did not amount to a binding contractual obligation. The fruits of a long and mutually beneficial friendship and business partnership were voluntary acts that did not bind the parties to continue in the same way: paras 31-32.

[45] In ***866565 Alberta Ltd v Molsberry***, 2020 ABQB 191 para 18, it was held that the nature of the promise Mr. Molsberry described was insufficiently certain to constitute a definite contractual undertaking that engages the collateral agreement exception to the parole evidence rule. The Court found a pattern of dealing between the parties that may have created expectations but held that expectation "is not sufficient to create a contractual obligation": para 21.

2. Consideration must Exist on Both Sides of the Agreement

[46] Consideration involves exchange of promises, acts, or acts and promises, resulting in each party receiving something of value from the other. The promises are reciprocal undertakings regarding the future conduct of the promising parties. A promise based solely on a past action or obligation is merely gratuitous and not binding: ***Balfour v. Tarasenko***, 2016 BCCA 438 para 44 citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Carswell, 2011), at 3-5, 82-85, 108.

[47] The consideration that supports a collateral contract may be the offeree entering into a separate main contract with the offeror, or with another person, at the request of the offeror: *Fridman's* pp 742 and 751; ***Traders Finance Corporation Ltd. v. Haley Haley v. Ford Motor Co. of Canada Ltd***., 1966 CanLII 451 (AB CA) affirmed ***Ford Motor Co. of Canada Ltd. v. Haley*** , 1967 CanLII 72 (SCC), [1967] SCR 437; ***S & B General Contracting Ltd. v. V.I.P. Clothing and Sound Ltd***., 1982 CanLII 2570 (SK QB).

[48] Thus, a collateral contract may be made for the purpose of inducing a party to enter into a separate main contract. The offeror requests the offeree to enter into a main contract: "I will undertake an obligation if you enter into a main contract." The consideration for the offeror's promise is found in the offeree's agreement to enter into the main contract on the strength of that promise. Therefore, the collateral contract must precede or arise at the same time with the main contract. Otherwise, if it arises after the main contract, the entry into the main contract would be past consideration that does not constitute a consideration: *Fridman's* p 751; ***Degoesbriand v. Radford*** 1986 CarswellSask 753, 1 A.C.W.S. (3d) 264 (SKCA) para 4; ***Total Petroleum***, para 40.

[49] The collateral contract principle is applicable in bilateral and multilateral contractual contexts: *Fridman's* pp 742 and 751. Where the offeror is a party to the main contract, the

parties just supplement the terms of their main contract. *Fridman's* pp 751-752 citing ***Byers v. McMillan***, 1887 CanLII 58 (SCC), 15 SCR 194 pp 204, 200 and 212.

3. The Terms must be Sufficiently Clear and Certain in the Minds of Both Parties at the time of the Agreement

[50] The terms purporting to be the contractual promise in a collateral agreement must be more than a broad, general inducement to enter into the main contract, or a representation. The statement must constitute a definite, contractual undertaking, a binding promise meant to be taken seriously by the party receiving the statement, and intended to have such effect by the party who made it. An understanding or expectation is not sufficient to create a contractual obligation: ***Talwandi***, para 14; ***Strother***, para 29 citing G H L Fridman in *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) p 513-514.

[51] Therefore, a collateral contract demands both certainty as to the identities of the contracting parties and an intention to contract: ***B & R Development***, paras 46-47. The terms of the agreement must not be vague and must be capable of both performance and enforcement: ***Strother***, para 28.

[52] The Alberta Court of Appeal held in ***Ko v Hillview Homes Ltd***, 2012 ABCA 245 leave to appeal dismissed 2013 CanLII 1188 (SCC) that "[a] putative contract of unpredictable validity is almost useless. Almost as bad is a contract of unpredictable contents": para 2.

[53] The Alberta Court of Appeal in ***Ko*** reviewed Canadian jurisprudence on certainty of terms and cautioned against generalizing any suggestion that courts are reluctant to find a contract void for uncertainty: ***Ko***, para 118.

[54] Certainty of contractual terms is part of formation of contract. Uncertainty is a question of law: ***Ko***, paras 73-74, 80, 89, 115 and 121.

[55] Further, "the test for interpretation and for certainty of terms is objective; one party's subjective views about the agreement, or how it would later work, not agreed to by the other side, are irrelevant": ***Ko***, para 27.

[56] A purported contract with an uncertain material term is usually impossible to perform or enforce and is neither a contract nor even an agreement. Which terms are essential depends on the type of contract: ***Ko***, paras 81 and 91.

[57] The Court of Appeal in ***Ko*** set out the basic principles on uncertainty of contractual terms, including some of the ways that uncertainty of terms can be saved: ***Ko***, paras 83-121.

[58] The Court in ***Hunt River Camps / Air Northland Ltd. v. Canamera Geological Ltd***., 1998 CanLII 18009 (NL CA), 168 Nfld. & P.E.I.R. 207 para 25 discussed the subtle distinction between uncertainty and incompleteness in contract law as follows:

> The notions of uncertainty and incompleteness in contract law are conceptually distinct, but in practice the arguments as to their application often shade into one another. Incompleteness refers to the notion of putative contractual parties failing to express or otherwise indicate adequately by their words or actions, objectively determined, that they have completed an agreement. Uncertainty, on the other hand, presupposes that the parties have in principle reached an agreement but it is impossible for the court, within the rules of evidence, to give any clear or

> substantial meaning to the agreement which is sought to be enforced, with the result that the court has no choice but to declare the agreement or a particular clause void and unenforceable. In practical terms, however, whether the use of vague language is indicative of uncertainty as to what is meant by the agreement or is indicative of a failure to be complete enough to convince the court that a meeting of the minds on the essentials of the agreement has occurred, really does not matter to the end result. In either case, it is the infelicitous use or non-use of language which creates the problem for enforceability, leading the court to conclude that it cannot make a contract for the parties where they have not sufficiently indicated what their intentions and expectations are.

4. The Collateral Agreement must have all the Essential Elements of a Contract Distinct from the Main Contract

[59] A contract is formed when there is an offer made by one party, accepted by the other party, with the intention to create a legal relationship, and supported by consideration: ***Ethiopian***, para 35; ***Gateway Industries v. Macmillan Bathurst Inc***., 1990 CanLII 11244 (MB QB), 66 Man. R. (2d) 210 paras 25-26.

[60] To be legally enforceable, it must be shown that the parties to a collateral agreement intend to be legally bound by the essential terms offered and accepted, with an exchange of something of value. Whether the parties have agreed to be bound is assessed on an objective basis using the "reasonable bystander" standard. The Court may therefore rely on the parties' statements, oral agreements, and actions in determining an intention to be bound. The parties' subjective intentions are irrelevant. The same principles apply whether the contract is oral, written or a combination of the two: ***Harco***, paras 143-145.

5. The Collateral Agreement must not Contradict the Main Contract

[61] A collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement. This is a ground for denying the existence of a collateral contract: ***Carman***, p 969; ***Hawrish***; and ***Bauer v. The Bank of Montreal***, 1980 CanLII 12 (SCC), [1980] 2 S.C.R. 102. See also ***P & C Lawfirm Management Inc v Sabourin***, 2020 ABCA 449 para 57 and ***River Wind Ventures Ltd. v. British Columbia***, 2011 BCCA 79.

[62] I now apply these legal principles to determine whether there is an oral collateral agreement between the Reid and the Trust and whether the Trust breached the Loan settlement agreement.

B. Application of the Law to the Facts

[63] Based on my analysis of the Record, my inferences therefrom, and the written and oral submissions of the parties I make the following key findings.

[64] At paragraph 6 of his Statement of Claim, Reid pleaded that the parties' agreement governing their settlement of the Loan included the following oral terms:

> If the value of the FAC Shares increased in 2020 such that the total consideration received by Amry Trust under the Repayment Agreement exceeded $1,355,056.19 (resulting in Amry Trust receiving $150,000 more than balance owing under the Loan), then Amry Trust would pay the excess amount to Reid (the **Excess Amount**); and The Excess Amount would be paid by Amry Trust to

> Reid in cash or by way of transfer-back of that portion of the FAC Shares having a value equal to the Excess Amount.

[65] At paragraph 23 of his Affidavit, Reid described the terms of the alleged collateral agreement as follows:

> 23. ... Dand and I agreed that I would transfer my 750,000 FAC shares to the Trust under the Debt Settlement Agreement and if the value of those shares for any reason came to exceed the amount owing on the Loan plus a "reasonable premium or fee" in 2020, then the excess amount would be returned to me in either cash or FAC shares in kind (the **Primary Agreement**).

[66] Reid also submitted that evidence of the terms of the alleged collateral agreement is found in the text messages between Reid and Dand dated December 19, 2019, 4:40 PM, Record Vol I Tab 9 page 209 as follows:

> [R] Is it your intention to refund money or shares over the $100k threshold if the windfall happens in 2020?
>
> [D] We talked 150
>
> [R] Yes and we agree!

[67] Reid variously defined the terms of his alleged oral collateral agreement as Excess Amount, Primary Agreement, Handshake deal, and Share Price Adjustment. In these Reasons, I refer to all of Reid's various descriptions of the terms collectively as the "Alleged Collateral Agreement".

[68] Reid and Dand are successful entrepreneurs and businessmen.

[69] Reid and Dand became good friends through their teenage sons who were friends and played competitive soccer together. Their families frequently socialized and even holidayed together once.

[70] Dand's Trust advanced Reid the $1million Loan under the Promissory Note in March 2017 at the interest rate of 20% per annum. Reid pledged as security for the Loan 300,000 FAC shares he personally owned. FAC is a publicly traded yield fund.

[71] When the Loan became due for repayment in 2018, Reid sought an extension, as the FAC shares that secured it "were in a stage of depressed value" and Reid wanted to "continue to hold the assets until their value recovered".

[72] On March 1, 2019, Reid and Dand extended the date for repayment of the Loan to November 1, 2019, with another 300,000 FAC shares as additional security.

[73] By October 2019, Reid informed Dand that Reid would not be able to meet the November 1 repayment deadline. In the fall of 2019, Dand began exerting significant pressure on Reid to repay the Loan. During their discussions Dand said to Reid things like "If you don't clean up the Loan, I have a nasty lawyer", "it will get nasty", "we will sue", and "we will embarrass you with your co-workers, family and business partners".

[74] On October 21, 2019, the Trust's lawyers wrote a letter to Reid advising him that if the Loan was not repaid in full by its due date, the Trust would pursue all legal remedies. The Trust

intended to realize on its security for the Loan (the 600,000 FAC Shares) and to pursue Reid for the balance.

[75] Throughout November and December 2019, Reid and Dand discussed and negotiated business terms regarding the Loan, initially regarding extension of the Loan repayment date, and subsequently regarding full settlement of the Loan. The terms that Reid and Dand were discussing were then communicated to their respective lawyers who were "papering" each agreement that Reid and Dand were working towards.

[76] Initially, Reid's lawyer and Dand's lawyer were working on the Amending Agreement to extend the Loan repayment date. I find that no extension agreement was reached between Reid and the Trust. There is no Amending Agreement to the Loan signed by both parties.

[77] I find that Reid did not agree to Dand's terms for extension of the Loan to Jan 2, 2020. (Record Vol II Tab 48) Reid determined that the circumstances would not change during such relatively short period of time. Reid decided, instead, to release to the Trust $60,000 and additional 150,000 FAC shares to the existing pledge without requiring a signed Amending Agreement on the extension of the Loan, as a show of good faith, and based on his discussions with Dand that Dand would not enforce the security and its potential value increase to collect more than Reid owed on the Loan. (Record Vol II Tabs 55, 56)

[78] Reid's lawyer cautioned Reid that his understanding is uncertain, the Trust can proceed with enforcement of the Loan security at any time, and any subsequent increase in value of those shares would not count towards the Loan balance. (Record Vol II Tabs 55, 56, 57, 58, and 59). Reid's lawyer also cautioned Reid that his unconfirmed note to Dand's lawyer would not increase the enforceability of Reid's discussions with Dand.

[79] I find that the context of the parties' discussions, regarding the Trust not enforcing the FAC shares to take advantage of its potential value increase occurred during the Loan extension negotiations. At this time the FAC shares were still pledged as securities.

[80] Between December 12 and 13, 2019, Reid and Dand abandoned the extension of the Loan and focused their discussions on full settlement of the Loan. The parties and their respective lawyers confirmed that an amending agreement for extension would not be needed. (Record Vol II Tabs 65, 66, and 69) Accordingly, Reid's lawyer and Dand's lawyer started working on the Debt Settlement Agreement (DSA).

[81] Reid did not want to sell any of his other assets to repay the Loan. Reid decided to use 750,000 of his FAC shares as consideration for the full settlement of the Loan (the "Consideration Shares").

[82] Reid and Dand were both familiar with the value of FAC stock. Reid co-founded FAC and was the President and CEO from February 2016 to January 2019 and resigned to complete a transaction. Dand had purchased shares as part of FAC's initial public offering in 2016.

[83] On October 8, 2019, Reid had informed Dand of a possible privatization of FAC that Reid was leading with his group of investors either as a share sale or an asset sale, and if by asset sale the proceeds would be distributed by dividend (the "FAC Privatization"). The FAC Privatization would equal about $2.10 - $2.25 a FAC share by December 2019 (Record Vol I Tab 14 Exhibits 2 and 3).

[84] The value of the 750,000 FAC shares at that time was less than the unpaid Loan balance. However, Reid and Dand as part of the settlement discussed the potential for an increase in the FAC share price in 2020 as a result of the FAC Privatization.

[85] Dand agreed to enter into the DSA and settle the Loan in contemplation that if the FAC Privatization occurred in 2020, it would lead to a quick recovery and profit for the Trust.

[86] Reid wanted to include in the DSA a cap on the profit the Trust can make from the FAC shares and a refund of the profit balance to Reid in cash or shares if the value of the FAC shares increased significantly in 2020 (the "adjustment concept").

[87] The commercial terms of the DSA for fully settling the Loan were primarily negotiated between Reid and Dand. The discussions between Reid and Dand included Reid's proposal for the adjustment concept.

[88] Dand declined including the adjustment concept in the DSA. Dand did not have the intention to enter into a binding contractual relationship regarding the adjustment concept. No legal or contractual agreement was reached between Reid and Dand on the adjustment concept at this stage.

[89] Reid's lawyer prepared the first draft of the DSA ("**Draft DSA#1**") with a date of December 16, 2019 attached to an email dated December 17, 2019 at 10:52AM from Reid's lawyer to Reid (Record Vol II Tabs 73). Reid's Draft DSA#1 did not contain any terms in respect of the Alleged Collateral Agreement at all. Reid's lawyer specifically stated that "no adjustment is contemplated for increase in value of the shares".

[90] Reid continued "ongoing negotiation" with Dand. Reid also continued ongoing discussions with Reid's lawyer regarding the drafting. Reid's lawyer produced a revised draft of the DSA ("**Draft DSA#2**") with a date of December 18, 2019, attached to an email of December 18, 2019 at 2:31PM from Reid's lawyer to Reid (Record Vol II Tabs 74), which included Reid's proposal for the for the adjustment concept.

[91] However, Reid's lawyer also stated two material issues as of December 18, 2019:

(a) Dand's lawyer advised that Dand wants the draft documents quickly otherwise they will be filing the notice of intent to enforce; and

(b) Dand was "<u>not agreeable to the adjustment mechanism we have now included in the draft</u>." [emphasis added]

[92] Reid's revised Draft DSA#2 contained the adjustment concept with a $100,000 profit cap for the Trust and three adjustment triggers for Reid:

5. The Parties hereto agree that if:

(a) a sale/disposition by the Trust of the Consideration Shares occurs on or before December 31, 2020 whereby the Trust realizes a profit in excess of $100,000 of the Remaining Amount; [the "sale trigger"]

(b) a dividend or other payment is issued to the shareholders of Founders on or before December 31, 2020 such that the Trust receives a dividend or other payment in respect of the Consideration Shares in excess of $100,000 of the Remaining Amount; or [the "dividend trigger"]

> (c) the value of the Consideration Shares remaining to be held by the Trust as of December 31, 2020 exceeds the Remaining Amount by greater than $100,000, such value to be calculated on December 31, 2020 based on the previous 90 day trading average of the Consideration Shares on the TSXV; [the "December 31, 2020 trigger"]
>
> then, within 30 days, the Trust will pay to Stephen an amount equal to the amount received by the Trust (or deemed value in the case of section 5(c)) as a result of any of the above conditions being satisfied, greater than the Remaining Amount plus $100,000. Such payment shall be made in cash or an equivalent value in shares in Founders (based on the previous 90 day trading average of the Consideration Shares on the TSXV at the time). Notwithstanding anything to the contrary, and for greater certainty, in the event more than one of Sections 5(a), (b), and (c) apply, and/or there are sales/dispositions of less than all of the Consideration Shares, and/or more than one dividend or payment is issued during the subject period, the determination of value in excess of $100,000 of the Remaining Amount shall be determined in the aggregate, considering all such events. [emphasis added]

[93] By email dated December 19, 2019 at 9.04 AM (Record Vol II Tab 76), Reid's lawyer inquired whether Reid has had a chance to discuss the revised draft DSA with Dand, and whether Reid's lawyer could send the revised draft to Dand's lawyer.

[94] By an email of the same day, December 19, 2019 at 9:27AM (Record Vol I Tab 14 Exhibit 8), Reid directly shared with Dand the final and mutually signed FAC company offer to be presented on January 6, 2020 through a 100% share purchase at $2.10 per share, and stated "we expect it will be accepted and approved by the board."

[95] I infer from the Record that Dand and Reid discussed various profit caps such as $100,000 and $150,000, and the three adjustment triggers proposed by Reid. Some evidence of their negotiation of these terms is in their respective lawyers' emails indicating same, and in the text messages between Reid and Dand discussed below.

[96] However, I do not find that Reid and Dand reached legal or contractual agreement on the adjustment concept or any profit cap or any adjustment trigger at this stage of their negotiations.

[97] The Record shows that Reid signed the revised Draft DSA#2 even before it was sent to Dand's lawyer for comments, and his lawyer advised him that it was an incomplete draft (Record Vol II Tabs 77, 78, 79, 75 and 80). I find that Draft DSA#2 signed by Reid does not constitute a collateral contract and does not bind the Trust.

[98] By email dated December 19, 2019 1:32 PM (Record Vol II Tab 75), Dand's lawyer responded to Reid's lawyer, attaching a revised **Draft DSA#3** clean and blackline that he was going to review with Dand.

[99] Dand's Draft DSA#3 deleted Clause 5 in its entirety, among other revisions. Dand's lawyer conveyed the following information from Dand:

> (a) Dand was "NOT willing to adjust upside because: 1. Too complicated; 2. Wording doesn't work; 3. He has significant losses on the Scopa and Lina's investments etc."

(b) "He [Dand] has trusted Stephen and Stephen will have to trust him [Dand]".

(c) Dand has asked to trust that if he [Dand] receives upside that he [Dand] would deal appropriately with you [Reid] on that, but is not willing to formalize that in an agreement.

(d) He's also advised that if you are not willing to accept the revised settlement, that he will proceed with realizing the shares, potentially selling at today's values and repurchasing, as well as pursuing you for the remaining amount, and that there would be no adjustment for upside in that event. [emphasis added]

[100] I find that at this stage of the parties' negotiations, Dand had no intention to enter into legal relations in respect of the adjustment concept, profit cap, and adjustment triggers.

[101] Dand's Draft DSA#3 was sent to Reid by his lawyer's email dated December 19, 2019 at 2:31PM (Record Vol II Tab 75).

[102] By text messages between Reid and Dand (Record Vol I Tab 9 page 209), Dand and Reid had further discussions on the deleted Clause 5 containing Reid's proposals of the adjustment concept, and the profit caps. The text messages began with Dand's text message informing Reid:

> [D] Stephen as bob [Dand's lawyer] has explained there is a number of complications with your proposal that makes it unfeasible from my side. For the last two years I had been patient and acted in good faith. Now I believe it is your turn.
>
> [R] **Dec 19, 2019, 4:40 PM** Is it your intention to refund money or shares over the $100k threshold if the windfall happens in 2020?
>
> [D] We talked 150
>
> [R] Yes and we agree!
>
> [emphasis added]

[103] When the entire four-paragraph conversation is objectively construed together in context, I do not find that Dand and Reid reached a legal or contractual agreement on Reid's adjustment concept in these text messages. I find only ongoing negotiations of Reid's adjustment concept at this stage.

[104] As discussed further below, an acceptance of an offer must be clear, unambiguous and absolute. The offeree must unconditionally assent to the exact terms proposed by the offeror: ***Ziola***, paras 45 and 51. That is not what happened here. Dand's answer did not clearly and absolutely assent to Reid's question: "Is it your intention to refund money or shares over the $100k threshold if the windfall happens in 2020?"

[105] While I did not find a legal or contractual agreement in these text messages, I find that Dand subsequently developed the intention to enter into a legal relationship with Reid in respect of the adjustment concept. However, Dand did not accept the terms Reid proposed. Instead, Dand instructed his lawyer to further revise the draft DSA to add back a modified Clause 5 drafted by Dand's lawyer.

[106] By email dated December 19, 2019 at 9:00 PM (Record Vol I Tab 7 Exhibit H), Dand's lawyer sent a further revised DSA, **Draft DSA#4**, to Reid's lawyer. Dand's lawyer conveyed

that he met with Dand and Dand has agreed to partial amendments from Draft DSA#3 with the following explanations:

(a) The Draft DSA#4 includes a refund to Reid if the amount of net proceeds on a sale is above $1.5 million (the "net value threshold"). The reason given for adopting a net value threshold was to keep it simple and avoid calculations.

(b) The $1.5 million net value threshold was calculated using the Loan balance at that time of approximately $1.2million, "the $150,000 that Stephen had initially proposed" (Reid's proposed $150,000 profit cap for the Trust), interest through Dec 31, 2020 being $130,000, and costs [emphasis added].

(c) Dand did not add back dividends [the dividend trigger] or the hypothetical calculations if there is not a sale [the December 31, 2020 trigger] because:

(i) First, if dividends are paid the value of shares usually is reduced and it is too complex to calculate.

(ii) Second, and more significant, the shares don't trade much volume and if 750,000 were sold it would significantly drop the price.

(iii) Third, Reid told Dand "it is a buy out that might happen" and so Dand has agreed to add back the sale trigger until Dec 31, 2020 "but nothing else." [emphasis added]

(d) Dand's signature was sent in trust, that Reid "signs the agreement and provides the original signed stock power of attorney and have them delivered to our office before 2 on Friday." [emphasis added]

(e) "If we don't receive it then we will issue the demand and Notice of Intent to Enforce. This has gone on too long and we need it finalized tomorrow." [emphasis added]

[107] Dand's Draft DSA#4 contained clause 5 that provides:

> 5. The parties hereto agree that if a sale or disposition by the Trust of the Consideration Shares occurs on or before December 31, 2020 whereby the Trust realizes net proceeds above $1,500,000.00 then, within 60 days, the Trust will pay to Stephen the amount of net proceeds in excess of $1,500,000.00. Stephen shall be responsible for any tax relating to such payment and shall indemnify the Trust should Canada Revenue Agency assess the Trust tax on the amount of the net proceeds that are paid to Stephen. [emphasis added]

[108] I find that Dand's terms for the adjustment concept used a different calculation model of a net value threshold, which was calculated using Reid's proposed profit cap of $150,000 among other commercial considerations. Further, Dand only accepted the sale trigger due to Reid's FAC Privatization contemplated by the parties, and extended the timeline for its occurrence to December 31, 2020.

[109] By text messages between Reid and Dand **Dec 19, 2019, 10:28 PM** (Record Vol I Tab 9 page 209):

> [R] Joe, you one of the most amazing human beings I have ever met. I formed that opinion watching you award [...] "most improved" or pushed [...] to his fullest and

> not putting up with shit! I am comfortable with your returning above $150k gain by cash or shares. I appreciate all of it!
>
> [D] Thank you. Bob's agreement and email explain everything quite well. Now we need to get FCF sold. Please sign tomorrow and get to Bob

[110] I find that at the time of these text messages at 10:28 PM, Reid had not seen the email from Dand's lawyer at 9:00PM and its attached further revised Draft DSA#4 that added back a modified Clause 5. On the other hand, Dand was referring to his own lawyer's revised Draft DSA#4 and email of 9:00PM attaching it and explaining the revisions and the rationale.

[111] I find that Reid and Dand were referring to very different things in these text messages and there was no *consensus ad idem* between these parties in these text messages.

[112] Dand's lawyer's email with the attached Draft DSA#4 was forwarded to Reid by Reid's lawyer the next morning by email dated Dec 20, 2019 9:53AM (Record Vol II Tab 81). Further, Reid's lawyer expressed his concern that the dividend trigger was not included, given that "the upcoming transaction may result in the value being paid to shareholders through a dividend rather than a sale/disposition as contemplated."

[113] Reid's lawyer highlighted to Reid that Dand imposed "a deadline of 2 pm today for us to provide signed agreements (in original copy)." [emphasis added]

[114] The Record indicates, and I find, that Reid's remaining options to resolve his overdue outstanding Loan debt at this stage were very limited:

(a) accept Dand's terms for the adjustment concept as revised in Draft DSA#4 and settle the Loan fully;

(b) expect enforcement proceeding before the end of 2019 (within 10 days) on the FAC Shares and outstanding amount on the total Loan balance of $1,205,056.19.

[115] By email dated December 20, 2019 1:13 PM (Record Vol I Tab 7 Exhibit I), Reid's lawyer conveyed Reid's instructions to Dand's lawyer:

> I've discussed with Stephen [Reid] and he's [Reid] asked to advise that he [Reid] is highly cooperative, and agreeable to a simplified concept for the adjustment, but is asking that I revise so as to include a dividend in the triggering events (as his understanding is that is the most likely method should the potential transaction proceed), as well as to adjust the threshold to a $150k profit as discussed between he [Reid] and Joe [Dand].
>
> [emphasis added]

[116] By email dated December 20, 2019 2:03 PM (Record Vol I Tab 7 Exhibit I), Reid's lawyer sent to Dand's lawyer a further revised draft DSA, **Draft DSA#5** for review, and given they were at Dand's deadline, confirmed that he was arranging to meet with Reid shortly to sign the DSA and the stock transfer.

[117] I find that Reid attempted again to have his own terms with $150k profit cap for the adjustment concept added into Clause 5 of the draft of the DSA before the 2:00PM deadline given to him to resolve his Loan debt. However, he was not successful. Draft DSA#5 only added a dividend trigger that aligned with Dand's net value threshold concept in Clause 5.

[118] By email dated December 20, 2019 2:09 PM (Record Vol II Tab 83), Reid's lawyer sent Draft DSA#5 to Reid seeking confirmation of Reid's approval of Draft DSA#5.

[119] Upon seeing Draft DSA#5, Reid returned to Dand for further negotiation by text messages (Dec 20, 2019, 2:27 PM Record Vol I Tab 9 page 211):

> [R] Bobs [Dand's lawyer] numbers are moving around. Are we singing on this understanding?
>
> [D] Bob has explained to Devin [Reid's lawyer]. Have faith and get signed. My timeline is today. Or plan B needs to get going to be done this year [enforcement].
>
> [R] Ok will sign today I faith and shake hands on $150 cap if we succeed in 2020.
>
> [D] Bob has all the evaluations and has gone through the rational with Devin
>
> [emphasis added]

[120] I find that, Reid's reference to "this understanding" was referring to his own previous text messages to Dand "Is it your intention to refund money or shares over the $100k threshold if the windfall happens in 2020" and Reid's subsequent confirmation of his proposal "I am comfortable with your returning above $150k gain by cash or shares".

[121] Dand's references to Bob explaining to Devin all the evaluations and the rationale, was referring to his own lawyer's email of December 19, 2019 at 9:00 PM sending Draft DSA#4 with explanations to Reid's lawyer (Record Vol I Tab 7 Exhibit H).

[122] It is clear that these parties were not on the same page. I find that Reid and Dand were referring to very different things in these text messages. The parties were not of one mind in these text messages. The required degree of mutuality of agreement mandates that the parties must reach a *consensus ad idem* on essential terms: ***Ron Ghitter Property Consultants Ltd v Beaver Lumber Co***, 2003 ABCA 221 para 8. That was not present between Dand and Reid in their discussions on the adjustment concept.

[123] Further, the Alberta Court of Appeal has held that if an offeree rejects one term of an offer, there is no bargain at all, and therefore no contract. Similarly, if the offer and acceptance do not correspond completely, there is equally no bargain at all and no contract: ***Ko***, para 75.

[124] Besides their lack of *consensus ad idem*, I find that in response to each of Reid's assertion of "Understanding" and "shake hands on $150 cap", Dand each time counteroffered with Bob's explanation and Bob's evaluations. The legal test is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. The test was not met. Objectively, Dand was not consenting to Reid's terms or previous understanding.

[125] Reid ultimately accepted Dand's counteroffer of the adjustment concept in the DSA by signing the DSA containing the terms that were the subject of Bob's explanation and evaluations.

[126] Draft DSA#5 became the final version of the DSA. The same afternoon of the deadline, Reid's lawyer met with Reid and Reid executed the final DSA and the stock transfer document. By an email of the same day, December 20, 2019, 3:42 PM (Record Vol II Tab 84), Reid's lawyer sent to Reid the fully executed copy of the DSA. Reid's lawyer also sent the fully executed copy of the DSA to Dand's lawyer (email dated December 20, 2019 3:44 PM Record Vol I Tab 7 Exhibit I).

[127] Clause 5 of the DSA executed by the parties provides:

> 5. The parties hereto agree that if: (i) a sale or disposition by the Trust of the Consideration Shares occurs on or before December 31, 2020 whereby the Trust realizes net proceeds above $1,500,000.00; or (ii) a dividend is issued to the Trust in respect of the Consideration Shares on or before December 31, 2020 whereby the net after tax receipt by the trust is greater than $1,500,000.00; then, within 60 days, the Trust will pay to Stephen the amount of net proceeds in excess of $1,500,000.00. Stephen shall be responsible for any tax relating to such payment and shall indemnify the Trust should Canada Revenue Agency assess the Trust tax on the amount of the net proceeds that are paid to Stephen.

[128] I find that the DSA ultimately contains the adjustment concept but with different terms than those proposed by Reid. The DSA based it calculation on a net value threshold of $1.5 million as opposed to a simple profit cap of $150,000 proposed by Reid. Although the $1.5 million was derived with the profit cap of $150,000 and other commercial inputs. Further, the DSA has only two types of adjustment triggers: the sale trigger and the dividend trigger.

[129] I now consider these facts specifically within the elements of a collateral contract.

1. The Trust had no Intention to Create Legal Relations on the subject of the Alleged Collateral Agreement

[130] Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations: ***Ethiopian***, para 34.

[131] The Supreme Court of Canada has acknowledged that many of the informal agreements people undertake do not result in a contract. Such mutual undertakings between friends are left as that because one or more of the parties do not intend to be subject to adjudication as to the performance of their commitments or to the imposition of remedies such as damages or specific performance: ***Ethiopian***, paras 21-22.

[132] As stated above, courts will often assume that such an intention is absent from an informal agreement among spouses or friends: ***Ethiopian***, para 38. Conversely, for enforceable collateral contracts, the intention to create legal relations must be clear in the minds of both parties.

[133] Reid vigorously argued the themes of "trust", "faith" and "friendship" in support of the existence of the Alleged Collateral Agreement. He stated that he trusted Dand because their families had become friends and Dand repeatedly told him that the Trust would be repaid a fair amount and not more.

[134] Reid also argued that he wanted the Alleged Collateral Agreement in writing, but he was unable to get it; so, he got it from his "friend" by the side. Reid submitted that, as a term taker, he could only take it from the side by oral agreement with Dand as he was told to "trust".

[135] The statement that forms the collateral contract must constitute a definite, contractual undertaking, a binding promise meant to be taken seriously by the party receiving the statement, and intended to have such effect by the party who made it.

[136] It is not disputed that initially in the parties' negotiations, Dand expressly asked Reid to trust that if Dand received upside from the Loan repayment, he would deal appropriately with Reid on that, but he was not willing to formalize that in an agreement. Other than this informal

request, I find no recorded expression of the terms of the Alleged Collateral Agreement by Dand to Reid. All other documented expressions of the Alleged Collateral Agreement came from Reid.

[137] I find that Dand was straightforward in communicating his lack of intention to enter into a legal relationship with Reid on the adjustment concept. While he was willing to deal with his "friend", Reid, appropriately if the share value increases as they hoped, Dand did not have any intention at that time to enter into legal relations about refunding any FAC share value to Reid.

[138] Dand referred to his own trust of Reid for over 2 years, indicating a pattern of mutual generosity and forbearance. Dand's expressions of "trust" and "faith", and Reid's belief in them, were nothing more than mutual friendly understanding or expectation to be expected between close friends and business partners that are not sufficient to create a contractual obligation: ***B & R Development***, para 46; ***Talwandi***, para 14; ***Strother***, paras 29, 31-32; ***Molsberry***, para 21; ***Ethiopian***, para 38.

[139] Besides, Dand loaned Reid the $1million with 20% interest. Dand's objective for advancing the Loan was profit. Dand agreed to accept the less valuable FAC shares as full settlement for the debt, with the expectation of profit if the share value increases in the near term as the parties hoped. Dand's objective for agreeing to settle the Loan remained profit. I find that an oral collateral agreement to cap that profit before it materialized, and without factoring in expenses among other business considerations, is contrary to Dand's profit objective in advancing and settling the Loan: ***Skylink Express Inc. v Innotech Aviation***, 2018 NSCA 32.

[140] I find that towards the end of the parties' negotiations, after Reid shared the FAC Privatization offer with Dand the morning of December 19, 2019, Dand subsequently developed an intention to enter into a legal relationship in respect of the adjustment concept. The first objective evidence of that changed intention is the email from Dand's lawyer dated December 19, 2019 at 9:00PM attaching their revised Draft DSA#4 which added back a modified Clause 5 (Record Vol I Tab 7 Exhibit H).

[141] Other than the dividend trigger, which the parties negotiated and added to the DSA through their lawyers a few minutes to the deadline, Dand never moved from his position in Draft DSA#4 once the intention to create a legal relationship became present on his part.

[142] On balance, I find that the terms of the adjustment concept in the executed DSA are the terms which objectively indicate the intention to create legal relations clearly in the minds of both parties and on which both parties were at idem.

[143] I find nothing on the Record to support any argument that Dand had the intention to create a legal relationship for a side oral agreement for the adjustment concept different from what he agreed to in the DSA. The Record is clear that while Reid was talking about shaking hands on $150 cap, Dand was adamant in his response that his lawyer has explained the legal contractual terms to Reid's lawyer and the rationale for those contractual terms.

[144] Besides, Reid's the Alleged Collateral Agreement is based on a theme of friendship, trust, faith, expectation and understanding. Binding legal authority is consistent that understanding or expectation is insufficient to create a binding contractual obligation. Similarly, mutual generosity and forbearance expected between close friends and business partners and the fruits of mutually beneficial friendship are voluntary acts that are not legally binding: ***Molsberry*** and ***Strother***.

[145] I find that the Trust did not have the intention (objective or subjective) to create a legal relationship in respect of the Alleged Collateral Agreement at the time of the DSA. The Alleged Collateral Agreement does not meet this element of the test.

2. The Alleged Collateral Agreement lacks Consideration

[146] Based on the collateral contract principle, entering into a main contract may be the consideration for an oral collateral agreement. However, the facts of this case as I find do not support Reid's argument that his entry into the DSA was his consideration for the Alleged Collateral Agreement to refund him the subsequent increase in the share value he claims.

[147] Reid's Affidavit stated, "I only agreed to the transfer of those shares because of the Primary Agreement that Dand and I had reached separate from what our lawyers had drafted in the Debt Settlement Agreement."

[148] First, objective evidence on the Record does not support Reid's allegation of a "Primary Agreement" separate from the DSA and I do not find any.

[149] Reid had an outstanding debt obligation to the Trust. On this Record, the DSA was one of the 3 choices Reid had to resolve his debt obligation (extension, enforcement, or settlement). He could not afford the terms of further extension. He could not afford to lose more assets than the FAC shares through enforcement. Reid chose settlement through the DSA to resolve his outstanding debt obligation to the Trust. Reid's entry into the written settlement agreement cannot be a consideration for anything else.

[150] Reid received personal forgiveness of approximately $1.2 million and a full release from the Loan debt under the DSA in exchange for his FAC shares valued at the time for $845,000 and $60,000 for administrative matters. The FAC shares were the "Consideration Shares" for the settlement.

[151] Reid acknowledged in his Affidavit that he was not in a position to sell his other assets to repay the Loan in cash and that was why he used his FAC shares. He admitted in cross-examination that it would have been a difficult and expensive circumstances requiring him to sell his other assets at a depressed value, including refinance him family home "and everything else, was on the table." He acknowledged that selling any combination of his aggregate assets to raise approximately $1.2 million that was due and payable on the Loan on November 1, 2019 would have been painful and expensive.

[152] Reid's Affidavit also stated that Dand was exerting significant pressure on him, saying this like "If you don't clean up the Loan, I have a nasty lawyer", "it will get nasty", "we will sue", and "we will embarrass you with your co-workers, family and business partners."

[153] Yet, Reid argued subsequently that if the Trust had only the right to enforce against the FAC shares as security for the indebtedness, it would not have been possible for the Trust to recover far more than the balance of the Loan. This is not what the Record objectively indicates.

[154] Dand made it clear to Reid, through Dand's counsel (email of Dec 19, 2019 2:31PM Record Vol II Tab 75), that if Reid was not willing to accept the revised settlement (Draft DSA#3 which deleted entirely clause 5 containing the adjustment concept), Dand would proceed with enforcing and realizing on the FAC shares, potentially selling and them at the December 19, 2019 values, "repurchasing" them, as well as pursuing Reid for the remaining Loan balance, in which case, there would be no adjustment for upside at all.

[155] Neither Reid nor Reid's lawyer stated at that material time in December 2019 that Dand's threat was not realistic, or that it was not possible for the Trust to repurchase the FAC shares upon enforcing them as security. Instead, Reid's lawyer cautioned Reid about Reid's inability to prevent the enforcement and its consequences if the Loan was not extended by a formal written agreement. The Record shows that Reid's lawyer highlighted to Reid, Dand's deadline for the DSA each time the deadline was communicated by Dand's lawyer.

[156] Further, Reid took no action towards challenging the value of the FAC shares used in the DSA if he truly believed that they were undervalued at the material time of the contract. Instead, he signed the DSA containing that value, received its full benefits, and obtained full release from his debt even if the value of the FAC shares crashed in the short or long term. There is no evidence before the Court that the value of the FAC shares was guaranteed to increase or not to decrease.

[157] The Alleged Collateral Contract failed to meet this element of the test.

3. The terms of the Alleged Collateral Agreement are not sufficiently clear and certain in the minds of both parties, and it does not have all the essential elements of a contract distinct from the DSA

[158] The terms of the collateral contract must be certain and clear in the minds of both parties. One party's subjective views about the agreement, or how it would later work, are irrelevant: ***Ko***, para 27. As Alberta Court of Appeal also stated, a putative contract of unpredictable validity is almost useless and a contract of unpredictable contents is as bad: ***Ko***, para 2.

[159] In determining whether the parties have reached agreement for legal purposes, the test is whether a reasonable observer would infer from the words or conduct of the parties that a contract had been concluded: ***Ron Ghitter***, para 8.

[160] The parties will be found to have reached a meeting of the minds or be *ad idem* where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty: ***Ron Ghitter***, para 9.

[161] The terms of the understanding Reid alleged is insufficiently certain to constitute a definite contractual undertaking that engages the collateral contract principle.

[162] Reid alleged two versions of the Alleged Collateral Agreement:

(a) the "Primary Agreement" described at paragraph 23 of Reid's Affidavit, and

(b) the handshake deal said to be in the parties' text messages of December 19 and 20, 2019.

[163] The timing and the terms of these two versions of Reid's claim are different.

[164] The Primary Agreement described in the Affidavit is as follows:

> 23. ... Dand and I agreed that I would transfer my 750,000 FAC shares to the Trust under the Debt Settlement Agreement and if the value of those shares <u>for any reason</u> came to exceed the amount owing on the Loan plus a "<u>reasonable premium or fee</u>" <u>in 2020</u>, then the excess amount would be returned to me in either cash or FAC shares in kind (the **Primary Agreement**). [underline added]

[165] Reid's Affidavit stated that he and Dand reached the Primary Agreement through direct discussions that did not involve their lawyers. He advised his lawyer of it, who then incorporated his Primary Agreement into a draft of the DSA, but Dand's lawyer advised that Dand was not willing to incorporate it in the DSA. In support of his assertions, Reid referenced the lawyers' correspondence of December 19, 2019 (Record Vol I Tab 7 Exhibit G) with their respective attachments being Draft DSA#2 prepared by Reid's lawyer, and Draft DSA#3 revised by Dand's lawyer.

[166] Reid's Affidavit stated that it was the night of December 18, 2019, that he and Dand then discussed that the "reasonable premium or fee" for the Primary Agreement "would be in the range of $100,000." I find that $100,000 was the number Reid's lawyer included in Draft DSA#2 sent to Reid in the afternoon of December 18, 2019. As stated above, I infer that Reid and Dand discussed Reid's proposed terms in Draft DSA#2.

[167] Reid's Affidavit further stated that it was by text message in the late afternoon on December 19, 2019, that Dand confirmed his agreement to the "reasonable premium or fee" being $150,000, which he accepted and thanked Dand.

[168] Based on Reid's own account of events, his Primary Agreement was prior to the DSA drafting began, but no agreement was reached on the "reasonable premium or fee" until late afternoon on December 19, 2019 by text message. The Record indicates that Draft DSA#1 was dated December 16, 2019 without any adjustment concept at all. Draft DSA#2 dated December 18, 2019 was the first draft to incorporate the adjustment concept.

[169] I find that Reid's Primary Agreement, with "reasonable premium or fee" an essential term still being negotiated, was incomplete and therefore did not amount to an agreement at all. Agreement to agree is unenforceable; it is no contract at all: ***Ko***, para 109.

[170] Reid's Primary Agreement is also uncertain, as "reasonable premium or fee" is indeterminate and unenforceable. The court cannot make a bargain for the parties: ***Ko***, para 96. For a court to order a litigant to guess what to do and then do it, would be unjust and futile: ***Ko***, para 82.

[171] Before the time of the parties' text messages on December 19, 2019, Dand had already rejected Reid's Draft DSA#2 that incorporated Reid's Primary Agreement with a profit cap proposal of $100,000. Dand's lawyer emailed Reid's lawyer the revised Draft DSA#3 that deleted the entirety of Clause 5.

[172] Therefore, by the time of the text message discussions on December 19, 2019 between Dand and Reid, there was no legal or contractual agreement in existence between Reid and Dand in respect of refunding Reid any increase in the value of the FAC shares. If Reid believed he had a Primary Agreement prior to the parties' 150 text message discussions, such Primary Agreement failed for incompleteness and uncertainty. It lacked a critical term: an agreed amount for the "reasonable premium or fee".

[173] I next consider whether the text message discussions between Reid and Dand constitute an agreement.

[174] The law is clear that an acceptance of an offer must be clear, unambiguous and absolute: ***Ziola v Petrie***, 2021 SKCA 97 at para 45 citing ***Harvey v Perry*** [1953] 1 SCR 233 at 237. In ***Harvey***, the Supreme Court of Canada held that the actions of the parties in continuing to

negotiate the terms of the contract indicated, at least from the point of view of one of the parties, that there had never been a completed agreement.

[175] I find that to be the same in this case. Reid's conduct in continuing to propose his own terms for the adjustment concept, through his lawyer and through text messages up to the afternoon of December 20, 2019, corroborates that there was never a legal contractual agreement on Reid's proposed terms (as opposed to his informal friendship trust and faith expectations).

[176] The handshake deal said to be in the parties' text messages of December 19 and 20, 2019 are set out and analyzed above. I adopt my earlier analysis on the text messages here and add the following findings.

[177] In the text messages, Reid was the party making the proposal and confirming his own proposal. As I discussed above, I do not find a clear, unambiguous and absolute acceptance by Dand in the text messages between Reid and Dand on December 19, 2019 and December 20, 2019. As I also discussed above, I do not find *consensus ad idem* or a meeting of the minds between the parties in those text messages.

[178] I find that Dand's statement "We talked 150" was acknowledgement of one input Dand and his lawyer later used in calculating the net value threshold of $1.5 million for Draft DSA#4, which was "Bob's agreement" Dand consistently referred Reid to in the rest of their text messages on December 19 and 20, 2019. Read in context, and objectively, I find that Dand's statement does not constitute an acceptance of, or even a counteroffer to, the terms Reid was proposing in that text message, as they were referring to different things. There was simply no meeting of the minds between the parties on the terms Reid was proposing in those text messages.

[179] Further, the terms in Reid's text message proposal at various times between the two days, December 19 and 20, 2019, are uncertain, especially: "**if the windfall happens in 2020**" and "**if we succeed in 2020**".

[180] In cross-examination, Reid was asked if his reference to "windfall" was a reference to the increase in share price upon the occurrence of one of the FAC privatization transactions the parties contemplated, and Reid responded as follows:

> Q. And your 4:40 p.m. text to Mr. Dand, your reference to
>
> the windfall
>
> A. Yes.
>
> Q. -- is a reference to the share price going up if one of
>
> these transactions you've told Mr. Dand about succeeds,
>
> right?
>
> A. No. We've already covered that off in this agreement.
>
> Now we're discussing our primary agreement, which is
>
> what happens if the share price goes up, because at
>
> this point the privatization is such a long shot it's
>
> not worth discussing. We've already been turned down

on the asset purchase. Now we are going through the motions as hard as we can because we owe it to everybody to execute fully on a share purchase. Historically, they're long shots. You don't go into a battle in a long shot -- you go with everything you've got. And we were being encouraged to bring it forward. This discussion is about that -- none of that working, and that Joe would pay us the difference because of constant reminders that we don't want to collect more than we're owed. It's a loan. We want our money back. We want our interest. We want these premiums, and other than that we don't want to harm your family. We're not trying to inconvenience you. We just want our money back.

[pages 108-109]

A. I don't remember paying Joe any interest after that.

Q. Because you didn't owe Amry any interest after that, right?

A. I don't believe I owed him any interest, no.

Q. And that's because the debt in its entirety was resolved, right?

A. Resolved except for the primary agreement that discussed that he would pay back if we had a share price windfall.

[page 110]

[181] Reid's cross-examination explanation of "windfall" is at odds with Dand's text message response on December 19, 2019 saying: "Bob's agreement and email explain everything quite well. **Now we need to get FCF sold**."

[182] Dand could not have been referring to the sale trigger in his lawyer's draft DSA and to "get FCF sold" if he understood that the FAC Privatization was not worth discussing on December 19, 2019. Contrary to Reid's answer, he had shared an email that morning directly with Dand December 19, 2019 at 9:27AM (Record Vol I Tab 14 Exhibit 8) attaching the final and mutually signed FAC company offer to be presented on January 6, 2020 through a 100% share purchase at $2.10 per share and stated "we expect it will be accepted and approved by the board."

[183] Based on objective assessment of the Record, Reid's terms "**if the windfall happens in 2020**" and "**if we succeed in 2020**" are both vague, uncertain, indeterminate, and unenforceable. The parties were not *ad idem* on essential terms. The terms of the collateral agreement must not be vague and must be capable of both performance and enforcement: ***Strother***, para 28.

[184] I find no agreement from the parties' text message discussions on December 19 or 20, 2019. The parties were referring to different things. The essential terms proposed by Reid were vague and indeterminate. There was no meeting of the minds on any of the essential terms to constitute an agreement.

[185] Reid argued that the Alleged Collateral Agreement had nothing to do with the Loan. That argument lacks merit. Without the Loan debt there would be no debt settlement with the FAC shares.

[186] Reid submitted that the parties had two separate negotiations going on: one between the parties as trustworthy friends and business partners making a handshake deal, and another that was papered by their lawyers. I disagree. The parties negotiating, and their respective lawyers "papering" their discussions, does not amount to two separate negotiation streams.

[187] The Record shows correspondence from either lawyer requesting or confirming instructions from their respective clients, and relaying information from the other party to their respective clients. There is nothing on the Record indicating that the lawyers were negotiating their own terms not conveyed to them by their respective clients.

[188] Reid argued that in all the post transaction correspondences, Dand did not deny any of Reid's statements about the Alleged Collateral Agreement but instead made sale inquiries.

[189] I find that the Trust had a payment obligation to Reid under the executed DSA Clause 5. Therefore, I find Dand's conduct of obtaining information on the share value, and his cost to date, to be consistent with Clause 5 of the DSA. Dand's reference to "As per the agreement" was referring to the DSA.

[190] I disagree with Reid that Dand's silence to Reid's expression of anger, frustration, and disappointment, supports or validates Reid's assertions of the Alleged Collateral Agreement. The Court of Appeal in ***Ko***, para 121, stated that "if there was initially no valid contract, how the parties later conducted themselves (short of a new contract) is irrelevant."

[191] Unenforceability or uncertainty is a question of law, and even an admission that there is a contract is therefore not binding: ***Ko***, para 121 citing ***Rana v Nagra***, 2011 BCCA 392 para 16.

[192] The Alleged Collateral Agreement failed to meet these elements of the test.

4. The Alleged Collateral Agreement Contradicts the DSA

[193] Reid submitted that the Alleged Collateral Agreement is not in conflict with the terms of the written DSA, rather it is harmonious with the adjustment concept in the DSA. He argued that Clause 5 of the DSA did not suggest that no other caps existed or could exist. I disagree.

[194] As I stated above, the DSA based it calculation on a net value threshold of $1,500,000 that factored in other commercial terms such as expenses among other things. Reid's Alleged Collateral Agreement used a simple profit cap of $150,000 and equals to a threshold of $1,355,056.19 without other valid business considerations such as expenses.

[195] Further, the DSA specifies only two types of adjustment triggers: the sale trigger and the dividend trigger. Reid's Alleged Collateral Agreement has no trigger or timeline and appears to be anytime in 2020, which gives Reid the capacity to avoid the value depressed periods and makes no business sense for the Trust.

[196] The Alleged Collateral Agreement contradicts the DSA. It failed to meet this element of the test.

5. Conclusion

[197] I find no oral collateral agreement between the Trust and Reid in respect of the Loan settlement with the FAC shares. The Alleged Collateral Agreement does not exist.

[198] Having considered the Record and my inferences therefrom, submissions, and the law, on balance, I find that there is no merit to Reid's Claim to the existence of an oral collateral contract.

[199] Reid did not allege that the Trust breached the DSA. In any event, I find that the Trust did not breach the DSA. Given my finding that there is no oral collateral contract in existence, the Trust did not breach any legal contractual agreement with Reid.

[200] I am satisfied that the Trust has met its burden to demonstrate that there is no merit to Reid's Claim and there is no genuine issue requiring a trial.

VIII. Issue 2: Is there is a genuine issue requiring a trial?

[201] Reid argued that credibility assessment is a complete answer to the Trust's Summary Dismissal Application as it creates a genuine issue for trial.

[202] I disagree. Reid has not discharged his onus to establish there is a genuine issue requiring trial.

A. Applicable Law

[203] Under the ***Weir-Jones*** analysis, if the Trust meets its burden, then it shifts to Reid to show that there is a genuine issue requiring a trial.

[204] Summary adjudication may be inappropriate or potentially unfair in circumstances where the record is unsuitable, the issues are not amenable to summary disposition, summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[205] Reid may meet his evidentiary burden by highlighting the gaps or uncertainties in the facts, the record, the law, by highlighting a dispute on the material facts or a dispute depending on issues of credibility that can leave genuine issues requiring a trial; or by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition: ***Weir-Jones***, paras 35 and 37.

[206] However, Reid's resistance to summary dismissal must be grounded in the Record, not mere speculation about evidence in the future. Reid must put its best foot forward and demonstrate from the Record that there is a genuine issue requiring a trial: ***Weir-Jones***, paras 35 and 47. Therefore, the test is to be applied based on the Record before the summary disposition judge: ***Weir-Jones***, at para 37.

B. Application of the Law to the Facts

[207] Reid argued that, as Reid and Dand were the only parties to the communications that formed the basis of the oral collateral agreement, a judge will be required to make a credibility assessment between Reid and Dand to determine the existence of the oral collateral agreement and the truthful interpretation of the written communications. I disagree.

[208] Reid argued that there are three material areas not canvassed by the Judge in his assessment of the evidence, which raise a genuine issue for trial because *viva voce* evidence from Reid and Dand is required to resolve the issues raised therein. Those alleged areas are: the parties' oral discussions particularly those leading up to the written exchanges on December 19-20, 2019; the written communications consistent with an oral collateral agreement; and the common theme throughout the written communications that Reid would have to have "faith" and "trust" in Dand. Reid also submitted that the parties' credibility is the key to resolving the issue of one or two negotiations. I disagree with all those assertions.

[209] I have addressed all of Reid's arguments in my findings above. I adopt my analyses and findings in issue #1 here under issue #2. Based on my analysis of the Record, my inferences therefrom, and the written and oral submissions of the parties I set out the following additional key findings.

[210] On this Record I am able to make the necessary findings of material facts I need to fairly resolve the key issues in dispute. I do not require any *viva voce* evidence or a trial. The parties' subjective meanings attributed to documents, and the parties' subjective intentions and understandings, are irrelevant: ***Zaccardelli v Kraus***, 2003 ABQB 319, paras 27-30.

[211] The parties' subjective views about the agreement, or how it would later work, are irrelevant": ***Ko***, para 27. I reject Reid's argument that credibility assessment is required to determine the existence of a collateral contract in this case. I do not need to see Dand's or Reid's demeanor in these circumstances: ***Harco***, para 31.

[212] There is significant objective evidence on the Record that assisted with resolution of the identified conflicting evidence. The legal test is an objective one. Besides, much of the identified conflicting evidence are the subjective interpretations and intents of the parties, which are irrelevant in any event.

[213] Further, Dand and Reid were cross-examined on their Affidavits, and they answered their undertakings from their respective cross-examinations. The parties filed their transcripts of cross-examinations and their significant undertaking responses on this Record.

[214] Based on all my objective analysis of the Record, inferences, and findings, I find no genuine issue requiring a trial. Reid has not met his burden to establish that there is.

IX. Issue 3: Can the merits of Reid's Claim be fairly and justly determined on a summary basis and should judicial discretion be exercised to summarily resolve the Claim?

[215] Reid submitted that it is neither fair nor just on this Record, and in the face of conflicting material evidence, to determine the merits of Reid's Claim.

[216] I disagree. I exercise my discretion to summarily resolve Reid's Claim. I agree with the Judge's Decision to summarily dismiss Reid's Claim.

A. Applicable Law

[217] In any event, the presiding judge must have sufficient confidence in the state of the record such that the Judge is prepared to exercise the judicial discretion to summarily resolve the Claim: ***Weir-Jones***, at para 46; ***Hannam*** at para 12.

B. Application of the Law to the Facts

[218] I disagree that there is conflicting material evidence that did not permit required findings of facts to resolve the dispute in this case. I adopt my analyses and findings in issues #1 and #2 here under issue #3.

[219] The Trust has proved the material facts on a balance of probabilities and advanced the law that vindicates its position, and I have determined that there is no genuine issue requiring a trial, therefore, summary disposition is appropriate: ***Hannam***, para 12.

[220] Further, I find that the process adopted in resolving this case is procedurally and substantively fair. The parties have had the opportunity to exchange their records. Dand and Reid, the material witnesses, swore affidavits on the core issues in dispute, tested their respective evidence on the core issues in cross-examination, and answered undertakings arising therefrom, which all form part of the Record before the Court.

[221] The parties filed an extensive Record that includes the parties' transcripts of *viva voce* evidence. Documentary evidence from the parties' lawyers during the transaction is on the Record and are amenable to objective interpretation by the presiding judge. The parties have had fulsome written and oral arguments before the Court. There is nothing much a trial will add to significantly improve the facts before the Court. I am confident that the necessary fact-finding has been made on this Record and the relevant law has been applied to resolve the dispute in this case.

[222] I am satisfied that it was, and continues to be, possible to fairly resolve Reid's Claim summarily. I am confident that the Record and the process are fair, just, and appropriate to resolve the merits of Reid's Claim.

X. Disposition

[223] The Appeal is dismissed, the Decision and Order of Judge Prowse are confirmed, the Summary Dismissal Application of the Trust is granted.

[224] If the parties cannot agree on costs, they may make written submissions of no more than 5 pages (excluding authorities), the Trust within 30 days, and Reid within 60 days, of the date of these Reasons.

Heard on the 1st day of May, 2025 and the 19th day of June, 2025.
Dated at the City of Calgary, Alberta this 27th day of January, 2026.

C.B. Thompson
J.C.K.B.A.

Appearances:

J. Kelly Hannan
for the Applicant

Marc T. J. Matras
for the Respondent