COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Thomson v. Thomson Estate,* 2026 BCCA 142

Date: 20260407
Dockets: CA50381; CA50382

Docket: CA50381

Between:

Lisa Thomson, 550934 B.C. Ltd., and L.L.T. Holdings Inc.

Appellants (Plaintiffs)

And

James Thomson, Executor of the Estate of Allan Thomson

Respondent (Defendant)

- and -

Docket: CA50382

Between:

Lisa Thomson, L.L.T. Holdings Inc., and 550934 B.C. Ltd.

Appellants (Plaintiffs)

And

A.R. Thomson Group

Respondent (Defendant)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Horsman
The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated December 17, 2024 (*Thomson v. A.R. Thomson Group*, 2024 BCSC 2303, Vancouver Dockets S178585 and S158569).

Counsel for the Appellants in CA50381 and CA50382:	R. Morse N.M. Vaartnou
Counsel for the Respondents in CA50381 and CA50382, James Thomson, Executor of the Estate of Allan Thomson and A.R. Thomson Group:	T.W. Clifford A. Jacobs
Place and Date of Hearing:	Vancouver, British Columbia October 1, 2025
Place and Date of Judgment:	Vancouver, British Columbia April 7, 2026

Written Reasons by:
The Honourable Justice Warren

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

Summary:

The appellants appeal the dismissal of their actions for breach of contract and negligent misrepresentation on the basis that the trial judge erred in finding there was no oral contract formed between the appellant, Ms. Thomson, and her father, Allan Thomson, for her reinstatement in the family business, the A.R. Thomson Group. Held: Appeal dismissed. The trial judge properly identified the appropriate legal principles of contract formation and made no reviewable errors in assessing the evidence concerning the formation of the contract including the certainty of its essential terms and the parties' intention to contract.

Reasons for Judgment of the Honourable Justice Warren:

Overview

[1] These appeals arise out of two actions that were tried together and dismissed. The central issue is whether there was an oral contract between the parties pursuant to which the appellant, Lisa Thomson, was to be reinstated as a partner in the Thomson family business, the A.R. Thomson Group ("ARTG"), which was started decades earlier by her father, Allan Roy Thomson ("Al"). To avoid confusion, I will refer to most of the members of the Thomson family by their first names.

[2] ARTG is a partnership that operates a business involving the distribution and manufacture of products for fluid containment and control, such as gaskets and valves. A.R. Thomson Ltd. ("ART") is the managing partner of ARTG.

[3] The business was initially conducted through ART but in November 1997, Al formed ARTG. At the time of its formation, ARTG had seven corporate partners which were indirectly controlled by one or more members of the Thomson family. Lisa's primary interest was held by 550934 British Columbia Ltd. ("934"), which was owned by Lisa and her then husband Gordon Taylor ("Taylor") in equal proportion, through a holding company, L.L.T. Holdings Inc. ("LLT").

[4] Taylor was a senior employee of ART and eventually held the role of vice president of ARTG.

[5] In 2009, after Lisa and Taylor separated, Lisa learned that 934's interest in ARTG was going to be terminated as a result of Taylor's actions. During a conversation on November 20, 2009, Al and Lisa discussed Lisa's reinstatement as a partner in ARTG after Taylor's involvement had been brought to an end and matters with him were resolved (the "November 2009 Conversation"). 934's interest in ARTG was ultimately terminated. Lisa cooperated with ARTG in subsequent litigation with Taylor. However, Lisa's relationship with her family deteriorated and she was never reinstated as a partner in ARTG.

[6] In 2015, the appellants (Lisa, 934, and LLT), commenced an action against ARTG (the "Reinstatement Action") alleging the existence of an oral contract between them and ARTG (the "Alleged Reinstatement Agreement"), formed during the November 2009 Conversation between Al and Lisa, pursuant to which ARTG was obliged to restore Lisa's interest in ARTG. ARTG denied that a contract had been formed and alternatively denied Al's authority to enter into the Alleged Reinstatement Agreement on behalf of ARTG. The appellants subsequently commenced an action against Al (the "Fraud Action") alleging that if Al did not have the authority to enter into the Alleged Reinstatement Agreement, then Al negligently or fraudulently represented to the appellants that he had that authority.

[7] A trial on liability was held over 23 days between January 29 and May 31, 2024. The trial judge issued reasons for judgment dated December 17, 2024, indexed at 2024 BCSC 2303 ("RFJ"). She concluded that no contract was formed during the November 2009 Conversation—specifically, the parties did not reach agreement on all essential terms and there was no intention to create legal relations—and she dismissed the Reinstatement Action. Given this result, she concluded it was not necessary to decide the issues in the Fraud Action and dismissed it as well.

Background

[8] Al and his wife, Patricia Thomson, had five children. From oldest to youngest, they are Jim Thomson, Debra Knight, Gordon Thomson, Lisa, and Todd Thomson. Al died on July 1, 2018. Jim is the executor of Al's estate.

[9] Lisa married Taylor on April 25, 1987. As mentioned, Taylor was a senior employee of ART and eventually held the role of vice president of ARTG. Lisa and Taylor separated in April 2005.

[10] At the time of its formation in 1997, ARTG had seven corporate partners which were indirectly controlled by one or more members of the Thomson family. Lisa and each of her four siblings had a 15% interest in ARTG, through companies controlled by them. Lisa and her siblings also indirectly owned the shares in 550920 British Columbia Ltd. ("920") in equal proportion. 920 held an indirect 5% interest in ARTG, through 477481 B.C. Ltd. ART, which was owned by some members of the Thomson family but not including Lisa, had a 20% interest in ARTG. Prior to his death, Al was the principal of ART, the managing partner of ARTG.

[11] As mentioned, Lisa's 15% interest in ARTG was held by 934. The shares of 934 were owned by LLT. The shares of LLT were owned by Lisa and Taylor equally.

[12] The partners of ARTG entered into a partnership agreement effective as of November 1, 1997 (the "Partnership Agreement"). The Partnership Agreement was amended on several occasions, including on September 19, 2008. The terms of the September 2008 version, which was in place at the time of the November 2009 Conversation between Al and Lisa, included:

a) Article 1.1 which contains definitions, including of "Managing Partner", "Partner", "Principal", and "Special Resolution". ART was the Managing Partner, 934 was a Partner, and Lisa was a Principal. A Special Resolution was defined as requiring a 75% majority vote of the Partners.

b) Articles 7.1–7.4 which address the management of ARTG and provide that the Managing Partner (effectively, Al) is given a wide scope to manage both the affairs of the partnership and its business, with some enumerated exceptions. Article 7.2 identifies major decisions that require the approval of the Partners by Special Resolution, including the admission of a new Partner and the terms of such admission.

c) Article 7.7 which addresses the management services to be provided by the Partners and notes the roles to be carried out by each of the Principals (being the members of the Thomson family).

d) Articles 10.2, 10.4, and 10.5 which address the termination of a partnership interest in certain circumstances, including if a Partner is in default of the Partnership Agreement. Article 10.5 sets out a formula for the calculation of the amount to be paid to a terminated Partner in satisfaction of the Partner's interest.

e) Article 11.2 which is a non-competition provision.

[13] ARTG was a working partnership. Each of the principals (other than Lisa at times) was indirectly employed to provide services to ARTG for which they received an income allocation from ARTG to the company through which they held their interest. Lisa did not work for ARTG during her marriage to Taylor. Rather, Taylor was actively involved in the management of ARTG. He attended partnership meetings and made partnership decisions on behalf of 934. During Lisa and Taylor's marriage, 934's income from ARTG was based on Taylor's services.

[14] After Lisa and Taylor separated in April 2005, they were involved in an acrimonious divorce proceeding in Alberta.

[15] Taylor resigned from ARTG in August 2006 but for a period of time he continued to indirectly hold an interest in ARTG through 934 and LLT.

[16] In November 2007, Taylor acquired an interest in a company, the business of which was similar to ARTG's business. This apparently put him in breach of the non-competition provision in the Partnership Agreement. On November 9, 2009, ART (as managing partner of ARTG) issued a notice to 934 (the "Default Notice") asserting that 934 was in default of the Partnership Agreement and demanding that the default be cured within 60 days, failing which 934 would be removed from ARTG.

[17] On November 20, 2009, Lisa and Al had the November 2009 Conversation during which Lisa maintains they formed a contract for her reinstatement in ARTG.

[18] Taylor did not cure the default. On January 12, 2010, he commenced an action in the names of 934 and LLT in the Supreme Court of British Columbia challenging the Default Notice (the "Taylor Action"). ARTG, ART, 920, and some related entities were named as defendants (the "ARTG Defendants"). Lisa was also named as a defendant. She collaborated with the ARTG Defendants in the defence of the Taylor Action.

[19] Effective April 19, 2010, 934 was removed from ARTG by special resolution. Pursuant to the formula in the Partnership Agreement, 934's 15% partnership interest was eventually valued at $1,781,214 (the "Buyout Amount"). It was anticipated that Lisa and Taylor would share the Buyout Amount equally, given their equal interests in 934 through their equal ownership of LLT. In other words, it was anticipated that Lisa and Taylor would each receive 50% of the Buyout Amount for their respective 7.5% indirect interests in ARTG.

[20] In late 2010, Lisa commenced part-time work for ARTG, performing filing, event planning, and accounts payable functions for $20 per hour. In 2011, she worked about 155 hours. In January 2012, Lisa stopped working for ARTG to pursue other interests.

[21] In February 2011, Lisa commenced a proceeding in the Supreme Court of British Columbia seeking to vary the amount of spousal support she was receiving from Taylor. She swore an affidavit on February 15, 2011, in which she deposed

that once the Taylor Action was resolved she would "seek approval from [ARTG] to buy back into [her] family's business" and "[s]hould the partnership agree to [her] request, [her] entire share [of the Buyout Amount] equaling roughly $900,000 would be earmarked solely for that purpose".

[22] On March 8, 2011, the Taylor Action was stayed as Taylor did not have authority to commence the action on behalf of 934 and LLT.

[23] On July 13, 2012, there was a fire in Lisa's apartment building, rendering it uninhabitable. She went to stay at the Thomson family's vacation property in Point Roberts. This led to friction between Lisa and her siblings that ultimately triggered a breakdown in Lisa's relationship with the rest of the family.

[24] On August 30, 2012, Lisa published an article on a third-party website in which she described her family in a negative manner. This was referred to as the "99% Article".

[25] On September 10, 2012, Taylor obtained leave to continue the Taylor Action as a derivative action. The next day, Lisa sent an email to Jim in which she proposed three options in relation to her role in the Taylor Action. Under two of those options, she asked about being reinstated in ARTG. Among other things, she asked whether Al would "continue to represent the partnership agreement as a 'working partnership only'"; proposed "buy[ing] back in as a 15% owner" using her portion of the Buyout Amount; and acknowledged she would have to come up with "another $750,000 for the other 7.5% in order to receive the full 15% stake". She did not refer to the Alleged Reinstatement Agreement already having been formed during the November 2009 Conversation. She closed the email by asking Jim for his thoughts and asserting that they "[would] need a written agreement covering the details of whatever scenario given anything ever happening to [him]".

[26] Jim responded to Lisa's email telling Lisa not to worry about reinstatement as she would "always have an opportunity to be a partner". He noted "[t]erms and funding to be determined" but that the other partners had "funded [their] ownership in the past through earnings of the business".

[27] On September 24, 2012, the lawyer who had been representing Lisa in the Taylor Action, Richard Attisha, wrote the lawyer acting for the ARTG Defendants, Barry Fraser, putting forward options similar to those advanced by Lisa in her email to Jim. Mr. Attisha's letter sought a guarantee that Lisa would be reinstated as a 15% partner for which she would reinvest her half of the Buyout Amount. His letter did not mention the Alleged Reinstatement Agreement.

[28] Between October 2010 and October 2012, Lisa attended ARTG's partnership meetings despite 934's removal from ARTG. She prepared the minutes for those meetings. The minutes show that Lisa's reinstatement to the partnership was discussed at some of the meetings. At a meeting on October 30, 2012, family members also expressed their disapproval of Lisa's decision to publish the 99% Article.

[29] On November 9, 2012, Lisa sent a letter to her family by email, outlining her concerns about the discussion of her reinstatement at the October 30, 2012 meeting. Among other things, she wrote she "would like to know immediately whether [she would] be reinstated … and if so on what terms so [she could] respond accordingly".

[30] The Taylor Action was settled on May 31, 2013. Lisa became the sole shareholder of LLT but it no longer held an interest in ARTG through 934, or at all.

[31] Between late 2012 and early 2015, Lisa and her family continued to communicate about Lisa's reinstatement to the partnership. At least some of the exchanges were heated. At times, Lisa indicated that she had decided against reinstatement, while at other times she indicated the opposite. At one point, Jim wrote to her saying that her reinstatement was "conditional on acceptance by

Partner Principals of [her] desire to work in harmony" and that this was not likely "until relationships are mended and [they could] all agree …".

[32] On October 16, 2015, the appellants commenced the Reinstatement Action against ARTG. ARTG filed a response denying the existence of the Alleged Reinstatement Agreement. Subsequently, ARTG filed an amended response in which it pleaded, in the alternative, that Al did not have the authority to bind ARTG. The appellants then commenced the Fraud Action.

Trial Judge's Reasons

[33] The RFJ are detailed and lengthy. Based largely on her assessment of the facts, the trial judge concluded that no contract was formed during the November 2009 Conversation. This was dispositive of the issues in both the Reinstatement Action and the Fraud Action.

[34] The judge noted that the case turned on whether the parties had entered into an enforceable contract for Lisa's reinstatement to ARTG, or merely an "agreement to agree": RFJ at para. 299. She summarized the legal principles of contract formation, emphasizing that the parties must have indicated an objective intention to create legal relations, they must have reached agreement on all essential terms, and those terms must be sufficiently certain: RFJ at paras. 300–313. She discussed the legal principles applicable to the identification of the essential terms of a contract: RFJ at paras. 309–311. The appellants do not take issue with the judge's articulation of the law.

[35] The judge proceeded to make credibility findings. She started by observing that Lisa was the only living witness to the conversation in which the Alleged Reinstatement Agreement was made, making her credibility particularly important. She ultimately concluded that Lisa's credibility had been entirely undermined.

[36] The judge found that "in many responses … Lisa's evidence did not make sense or was inconsistent with the documents and with other witnesses' evidence which [she did] accept": RFJ at para. 325. She cited a "pattern of equivocation and

obfuscation [Lisa] often used when asked a question to which the answer would harm her case": RFJ at para. 327. She characterized Lisa as "so convinced of the correctness of her re-creation of the past 15 years of the family history that she follows her belief without reference to common sense or any other plain meaning of words or events": RFJ at para. 330. In particular, the judge found the affidavit Lisa swore in February 2011 in support of her application to vary the spousal support she was receiving from Taylor to be a "striking contradiction to her testimony at trial": RFJ at para. 407.

[37] The judge's conclusions about Lisa's credibility were key to her analysis. In particular, the judge considered documents generated after the November 2009 Conversation to be inconsistent with a contract having been formed during that conversation, and she found Lisa's attempts to "explain away" those documents to be unpersuasive: RFJ at para. 330.

[38] The appellants have not challenged the judge's credibility findings.

[39] The judge observed that the burden of proving that a contract had been formed rested on the appellants and she made findings that she ultimately concluded established that the burden had not been discharged. Those findings include:

- It was more likely than not that Lisa and Al had a conversation on or about November 20, 2009 but the substance of what was said is unclear.

- It made sense that Al would reassure his daughter that the family would take care of her no matter the result of the Default Notice that had been issued to 934 on November 9, 2009: RFJ at para. 347.

- Lisa's evidence was that during the November 2009 Conversation Al said that Lisa would be reinstated as a partner of ARTG; this would occur when matters with Taylor were finalized; Lisa would have the same 15% interest as had previously been held by 934; and Lisa would use her share of the Buyout Amount to buy back in. However, if that evidence was accepted, the meaning

of what Lisa claimed Al said about “price, percentage or property, as well as the corresponding funding of Lisa’s future interest” was not clear: RFJ at paras. 351–352.

- The appellants’ pleadings described the Alleged Reinstatement Agreement as providing for Lisa to buy back into ARTG with the funds she received for her 7.5% interest and to obtain the entire 15% interest that 934 had lost. The judge noted this was a “mismatch” and found that Al did not represent that Lisa could buy 15% of ARTG for one half of the Buyout Amount; RFJ at para. 359.

- It was more than likely that the price for a 15% interest was intended to be equal to the Buyout Amount and that amount was not yet known: RFJ at para. 353. Even if the price for a 15% interest was sufficiently clear, the funding and thus the corresponding property was not clear because Lisa would receive only 50% of the Buyout Amount or “funds equivalent to a 7.5% interest”: RFJ at paras. 354, 362. There was no discussion about how the remaining 7.5% would be funded and Lisa and Al never came to a consensus on how the discrepancy between Lisa’s previously held 7.5% interest and her alleged future 15% interest would be resolved: RFJ at paras. 356, 361.

- There was no discussion between Al and Lisa regarding Lisa’s provision of services to ARTG, whether she would have the right to vote when reinstated, or how she would obtain approval of the other partners for her reinstatement: RFJ at para. 363.

- The requirement for partners to provide services had always been the business practice of ARTG and was reflected in the Partnership Agreement. This accorded with Al’s vision for ARTG: there was no wavering on core principles without serious discussion and consideration and working partners was one of, if not the most important, of those principles: RFJ at para. 374.

- The Partnership Agreement provided that major decisions, including the admission of a new partner, required the approval of the partners by special resolution (a 75% vote). With one possible exception, there was no evidence that this requirement was not followed: RFJ at para. 374.

- Following the November 2009 Conversation, Lisa never wrote to her father or to anyone else to confirm the making of, or the terms of, the Alleged Reinstatement Agreement.

- Lisa attended partnership meetings between the fall of 2010 and the fall of 2012. While Lisa's position was that there were discussions about an existing reinstatement agreement at those meetings, "it is more accurate to read the minutes as discussions about the family's shared expectation and intention for Lisa to one day be reinstated": RFJ at para. 393. There was no recognition in the minutes that Al and Lisa had entered into a binding agreement in November 2009 and there was no consensus on terms of an agreement for Lisa's reinstatement.

- In September 2012, in the context of Taylor obtaining leave to continue the Taylor Action as a derivative action, both Lisa and her lawyer, Mr. Attisha, wrote to the respondents seeking a guarantee of Lisa's reinstatement to ARTG. They did not refer to a binding agreement for Lisa's reinstatement, and "[i]t makes sense that if there was a binding agreement, it would have been asserted": RFJ at para. 422.

- The Taylor Action was settled on May 31, 2013, which triggered the timing for Lisa's reinstatement as discussed during the November 2009 Conversation. By then, Lisa's relationship with her family had deteriorated. Efforts were made to repair the relationship. Lisa exchanged emails with family members that discussed her reinstatement but she never asserted that she had reached a binding agreement with her father in November 2009 and "[t]his is in striking contrast with Lisa being very bold and direct with her family about other matters": RFJ at para. 432.

[40] The judge concluded that "the financing of the other 7.5% required to fund Lisa's reinstatement was an essential term of any possible agreement through which Lisa would come to have a 15% interest in ARTG" and correspondingly, the interest to be acquired depended on the financing. She considered subsequent discussions regarding the percentage interest Lisa would acquire, and the financing for the second 7.5%, to be indicative of the necessity of this term. She cited *Boyd v. McDermott*, 2007 BCSC 1793, as "consistent with" this conclusion: RFJ at para. 361.

[41] The judge found that how Lisa's reinstatement would be approved by the other partners and what services she would provide upon her reinstatement were also essential terms upon which no agreement was reached.

[42] The judge concluded there was no objective intention to create legal relations between Al and Lisa, in part due to the lack of agreement on essential terms, finding that an "objective bystander would view Al's expectation and intention of Lisa's future reinstatement as those of a concerned father" (RFJ at para. 365) and the November 2009 Conversation did not "rise to the level of a binding, enforceable contract" (RFJ at para. 369). The judge found the lack of reference to the Alleged Reinstatement Agreement in subsequent documents to be consistent with this conclusion. She also found that Lisa's conduct in the period after November 2009 "leads to the inexorable conclusion that Lisa understood [the November 2009 Conversation] in the same way as Al; it was reassurance by a concerned parent that his daughter would be taken care of": RFJ at para. 433. While all parties "hoped" that Lisa's reinstatement would "come to fruition … [n]one of the parties made a contract that it would": RFJ at para. 433.

Issues on Appeal

[43] The appellants raise two broad grounds of appeal.

[44] First, they contend the trial judge erred in finding that there was no agreement on the essential terms of the contract when, on their theory, there was agreement on parties, property and price. Specifically, the appellants submit:

a) In concluding that financing was an essential term, the judge:

   i. erred in law by relying on *Boyd* for the proposition that financing is, universally, an essential term of a purchase and sale agreement; and

   ii. committed a palpable and overriding error by overlooking the purpose of the Alleged Reinstatement Agreement which was to facilitate Lisa's reinstatement once Taylor had been removed, and which renders immaterial the manner in which Lisa would finance the reinstatement.

b) In concluding that the services Lisa would provide was an essential term, the judge:

   i. erred in law by conflating the requirements of the Partnership Agreement and the requirements of the Alleged Reinstatement Agreement, and in doing so, ignored the purpose of the latter; and

   ii. committed a palpable and overriding error because the conclusion is unsupported by the evidence.

c) In concluding that partner approval was an essential term, the judge:

   i. erred in law by failing to address Al's authority to bind ARTG to the Alleged Reinstatement Agreement and instead "folded that analysis into her assessment of the essential terms of the agreement"; and

   ii. committed a palpable and overriding error because the conclusion is inconsistent with the judge's finding that there was no discussion about partner approval during the November 2009 Conversation and it cannot be reconciled with the purpose of the Alleged Reinstatement Agreement.

[45] Second, the appellants submit the judge's conclusion that the parties did not intend to create legal relations reflected an error of law. Specifically, they say the judge allowed her finding that essential terms were unresolved to dictate her conclusion that the parties did not intend to contract.

Legal Principles

[46] As I have already noted, the appellants take no issue with the trial judge's summary of the legal principles of contract formation. Nevertheless, it is useful to summarize these principles as they provide the foundation for the judge's analysis.

[47] In addition to offer, acceptance, and consideration, for communications between parties to constitute a binding agreement the parties must intend to be legally bound. The test for determining that intention is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23.

[48] This inquiry is an objective one, such that the actual state of mind and personal knowledge of the parties is not relevant: *Voitchovsky v. Gibson*, 2022 BCCA 428 at para. 33. 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: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 37 [*Ethiopian Orthodox*].

[49] The trial judge referred to a passage from *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97, 1991 CanLII 2734 (Ont. C.A.) [*Bawitko*], frequently cited to explain the difference between an enforceable contract and a preliminary agreement in which the parties' legal obligations are to be deferred until a formal contract has been approved and executed:

> [20] 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.
>
> [21] 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 by trial judge.]

[50] Determining the objective intentions of parties is inherently fact specific: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 55. In determining intention to contract, a court is not confined to the four corners of the agreement, but may look at "all the circumstances" or "all the material facts", such as "evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties": *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at para. 21; *Leemhuis v. Kardash Plumbing Ltd*., 2020 BCCA 99 at para. 17.

[51] As noted in *Bawitko,* an enforceable contract requires consensus between the parties on all essential terms, and these terms must be sufficiently certain: see also *Oswald v. Start Up SRL*, 2021 BCCA 352 at paras. 34, 39; and *Berthin v. Berthin*, 2016 BCCA 104 at para. 47.

[52] What terms are essential is also a fact specific inquiry that depends on the type of contract and the nature and purpose of the transaction: *Ko v. Hillview Homes Ltd.,* 2012 ABCA 245 at para. 91; *Concord Pacific Acquisitions Inc. v. Oei,* 2022 BCCA 16 at paras. 38–41 [*Concord*].

[53] Courts are reluctant to find a contract void for uncertainty but it is not open to a court to create a contract where agreement has not been reached on all essential terms: *Concord* at para. 38.

Standard of Review

[54] Questions concerning the requirements for the formation of a contract are questions of law, reviewable on a standard of correctness: *Sattva Capital Corp.* at para. 53.

[55] A question regarding whether the requirements for the formation of a contract are met involves applying a legal standard to a set of facts and is therefore a question of mixed fact and law, reviewable for palpable and overriding error, unless the trial judge commits an extricable error of law: *Angus v. CDRW Holdings Ltd.,* 2023 BCCA 330 at para. 31.

[56] In *Housen v. Nikolaisen,* 2002 SCC 33 at para. 36, the Supreme Court of Canada directed appellate courts to be cautious in determining that an extricable error of law can be extracted from a question of mixed fact and law, “as it is often difficult to extricate the legal questions from the factual”. This cautionary principle expressly applies to the determination of contract formation: *Oswald* at para. 32.

[57] Where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error: *Housen* at para. 36. The fact that other interpretations of the evidence are available does not constitute palpable and overriding error.

Discussion

[58] The task before the trial judge was to determine whether Al and Lisa objectively intended to form an enforceable contract for Lisa's reinstatement to ARTG during the November 2009 Conversation and reached a consensus on all essential terms of such a contract. This was an inherently fact-specific inquiry.

[59] While the appellants assert that the judge committed several errors of law, with the exception of the argument based on the judge's reliance on *Boyd*, I have been unable to extract genuine legal issues from the appellants' submissions. Rather, most of the appellants' submissions focus on the judge's assessment of the evidence. As such, the standard of review is particularly significant in this case.

[60] I am not persuaded that the judge erred in law or made any reviewable error in her assessment of the evidence. For the following reasons, I would dismiss the appeal.

The first ground of appeal: certainty of essential terms

[61] As I have already noted, the appellants do not take issue with the judge's articulation of the legal principles applicable to the identification of the essential terms of a contract.

Parties, property, and price

[62] The appellants contend that parties, property, and price were the only essential terms needed to form a contract for Lisa's reinstatement into ARTG. They argue the judge erred in finding that financing, Lisa's provision of services to ARTG, and partner approval were also essential terms.

[63] This aspect of the appellants' argument is based on the premise that the judge found that Al and Lisa agreed to the following terms:

a. Parties—Lisa, through a corporate entity to be owned by her, and ARTG;

b. Price—the Buyout Amount;

c. Property—a 15% partnership interest in ARTG; and

d. Completion date—once matters with Taylor were resolved.

[64] It is not clear that the judge found that Al and Lisa agreed on the admittedly essential terms of price and property. She found that even if she accepted Lisa's evidence about what Al said during the November 2009 Conversation (she would acquire a 15% interest and would use her share of the Buyout Amount to buy back in), the meaning of what he said "about price and percentage or property" was unclear: RFJ at para. 352. She emphasized that Lisa's evidence about what Al told her left a discrepancy between the amount of money Lisa would have available to her and the acquisition of a 15% interest, and this left the funding for the acquisition and the "corresponding property" uncertain: see e.g., paras. 354, 357, 361, 362.

[65] On the other hand, some aspects of the judge's analysis assume a settled intention that Lisa would acquire a 15% interest. For example, when analyzing the need for certainty with respect to financing, she referred to the property to be financed as "the other 7.5%" (RFJ at paras. 361,438), the "second 7.5%" (RFJ at para. 362), and "the additional 7.5%" (RFJ at para 362, 364).

[66] In the end, whether the judge was satisfied there was certainty about price and property is of no consequence because she concluded that there was uncertainty about other essential terms and that the parties did not intend to create legal relations, and no reviewable error has been demonstrated in relation to those findings.

Financing

[67] The appellants say the judge erred in law by relying on *Boyd* for the proposition that financing is, universally, an essential term of a purchase and sale agreement. I disagree. Nowhere did the judge say or imply that financing was universally, or even generally, viewed as an essential term of a contract of purchase and sale.

[68] As she was required to do, the judge engaged in a fact-specific analysis of the importance of financing to the Alleged Reinstatement Agreement.

[69] As I have already discussed, the judge noted the "mismatch", on Lisa's evidence and the pleadings, between the size of the interest in ARTG that Al said she could acquire and the amount of the funding that he proposed she use to finance the acquisition. Again, Lisa testified that Al said she would acquire a 15% interest and use her share of the Buyout Amount to do so, but as the judge emphasized Lisa's share of the Buyout Amount represented only a 7.5% interest. Lisa's evidence was that she understood that her half of the Buyout Amount was to be used to "begin the buy-back" but there was no certainty as to when and on what terms she would buy back the remaining 7.5%. The judge found that Al and Lisa never came to a consensus on how the discrepancy between Lisa's previously held 7.5% interest and her alleged future 15% interest would be resolved. In other words, the percentage interest Lisa was to acquire depended on certainty with respect to financing.

[70] The judge also considered subsequent discussions between the parties regarding the percentage interest Lisa would acquire and the financing for the second 7.5% (which included the possibility of Lisa using partnership draws) to be indicative of the necessity of this term. In these circumstances, the judge concluded that certainty with respect to the financing was an essential term of any possible agreement through which Lisa would come to have a 15% interest in ARTG. At para. 361, she cited *Boyd* as "consistent" with this conclusion. This does not suggest that the judge relied on *Boyd* for the principle that financing is, universally, an essential term of a contract of purchase and sale.

[71] In *Boyd*, the plaintiff claimed the defendant breached an oral agreement pursuant to which the defendant was to purchase the plaintiff's physiotherapy clinic. The defendant's position was that an enforceable contract was never formed and, while discussions were had, she decided not to proceed with the purchase because she was unable to make satisfactory financing arrangements. The defendant's need

for financing was raised early in the discussions between the parties and the plaintiff was involved in attempting to facilitate financing and even offered to finance the purchase herself, but the defendant was not comfortable with the proposed interest rate and repayment terms. The trial judge concluded that no enforceable contract had been formed. It was in this context that she stated that that "[t]here can hardly be a more material term to a contract of purchase and sale of a business than an unambiguous agreement or clear understanding as to the terms of the financing arrangements": *Boyd* at para. 70.

[72] The appellants attempt to distinguish *Boyd* on the basis that financing was not discussed between Al and Lisa during the November 2009 Conversation and discussions about how Lisa would finance the acquisition did not start until almost a year later in the fall of 2010. They say that ultimately it was of no import to ARTG how the purchase price was paid, so long as it was paid.

[73] In my view, the appellants have not identified any meaningful distinction. First, on Lisa's evidence, financing was discussed between her and Al during the November 2009 Conversation in the sense that, according to her, he said that she would "buy back in with [her] buyout funds": RFJ at para. 349. The problem was the "mismatch" between the amount of those funds and the value of a 15% interest, as I have already discussed. Second, as in *Boyd,* it cannot be said that financing was of no import to ARTG. It was contemplated that ARTG would be involved in one way or another in the financing arrangements, in the sense that Lisa's share of the Buyout Amount would be used, and when financing was discussed later, it was contemplated that Lisa might use partnership draws from ARTG to fund the balance.

[74] The appellants also argue the judge committed a palpable and overriding error in concluding that financing was an essential term by overlooking the purpose of the Alleged Reinstatement Agreement.

[75] I disagree. The asserted purpose of the Alleged Reinstatement Agreement was to facilitate Lisa's reinstatement as a partner in ARTG. In the circumstances of this case, the judge found that certainty with respect to how Lisa was going to

finance her reinstatement was essential. In other words, given the purpose of the Alleged Reinstatement Agreement, the judge found that the percentage interest Lisa was to acquire depended on certainty with respect to financing As I have already said, the judge engaged in a fact-specific analysis of the importance of financing to the Alleged Reinstatement Agreement. Its purpose was the central focus of that analysis. I can discern no reversible error in her analysis in this respect.

The provision of services to ARTG

[76] The appellants submit that in concluding that the services Lisa would provide was an essential term, the judge erred in law by conflating the requirements of the Partnership Agreement and the requirements of the Alleged Reinstatement Agreement, and in doing so, ignored the purpose of the Alleged Reinstatement Agreement. They also submit that this conclusion was not supported by the evidence, emphasizing that no one provided services to ARTG on behalf of 934 between 2006, when Taylor stopped working for ARTG, and 2010, when Lisa resumed providing some modest services.

[77] I am unable to extract any legal issue from the appellants' submissions on this point. Again, the judge expressly recognized that what terms are essential is a fact specific inquiry that depends on the type of contract and the nature and purpose of the transaction. The purpose of the Alleged Reinstatement Agreement was central to her analysis.

[78] Section 7.7 of the Partnership Agreement expressly provides that "[e]ach of the Partners, other than 477481, agrees to provide the management services to the Partnership which are set forth below in this section or such other services as the Managing Partner may determine from time to time, acting reasonably". There was evidence before the judge to the effect that the concept of ARTG as a working partnership was fundamental. She found:

> [374] … there was a strong philosophical and business presence embodied in the Partnership Agreement representing Al's operation of and his vision for ARTG. There was no wavering from those principles without serious discussion and consideration. "Working partners" was one of, if not the most important of, those principles.

[79] The asserted purpose of the Alleged Reinstatement Agreement was to facilitate Lisa's reinstatement as a partner in ARTG following Taylor's removal. The appellants argue that any difficulties she may have faced complying with the Partnership Agreement after reinstatement could not form the basis of an essential term of her reinstatement. They invoke a real estate purchaser's requirement to comply with the terms of their mortgage as analogous, asserting that a requirement to comply with a subsequent mortgage would not be an essential term of the purchase and sale agreement.

[80] In my view, this is not an apt comparison. A seller of real estate would rarely have any ongoing interest in a purchaser's subsequent mortgage. In contrast, ARTG was a closely held family business operated by family members pursuant to the Partnership Agreement. It certainly had an ongoing interest in compliance with the Partnership Agreement.

[81] At the time of the November 2009 Conversation, Lisa had not worked for ARTG since before her marriage in 1987. The judge found that the working partner principle was one of, if not the most important of, the principles on which ARTG operated. The judge did not find that there was never any wavering from those principles. She found there was no wavering <u>without serious discussion and consideration</u>.

[82] The judge found that such serious discussion and consideration was later afforded to whether Lisa could be a non-working partner, and to the possible amendment of the Partnership Agreement to exempt her from the working partner principle (i.e., in 2013). In these circumstances, the judge concluded that agreement on the question of the services to be provided by Lisa upon reinstatement was an essential term. In other words, given the purpose of the Alleged Reinstatement

Agreement was to reinstate Lisa into the partnership, and given the importance attached to the working partner principle, the judge concluded that agreement on the services she was to provide was essential. This conclusion was open to her on the evidence. No reviewable error has been identified.

Partner approval

[83] The appellants submit that in concluding that partner approval was an essential term, the judge erred in law by failing to address Al's authority to bind ARTG to the Alleged Reinstatement Agreement and instead "folded that analysis into her assessment of the essential terms of the agreement". They also submit that she committed a palpable and overriding error because the conclusion is inconsistent with the judge's finding that there was no discussion about partner approval during the November 2009 Conversation, and it cannot be reconciled with the purpose of the Alleged Reinstatement Agreement.

[84] The appellants' arguments on this point are similar to those advanced with respect to the provision of services issue. Again, I am unable to extract any legal issue from the appellants' submissions. As I have said several times, the judge expressly recognized that what terms are essential is a fact-specific inquiry that depends on the type of contract and the nature and purpose of the transaction and the purpose of the Alleged Reinstatement Agreement was central to her analysis.

[85] The appellants emphasize that pursuant to s. 7.1 of the Partnership Agreement, Al had the authority to manage and control the business and affairs of ARTG. However, s. 7.1 provides that this authority does not extend to "decisions in respect of matters referred to in section 7.2 which will be dealt with in accordance with section 7.2". Section 7.2 of the Partnership Agreement provides that, except in certain circumstances that would not apply to Lisa's reinstatement, "the admission to the Partnership of a new Partner and the terms of such admission" requires the approval of the Partners by special resolution (a 75% vote).

[86] I fail to see how the judge's finding that there was no discussion between Al and Lisa about the requirement for partner approval of her reinstatement to the partnership is inconsistent with the conclusion that partner approval was an essential term of Lisa's reinstatement or how, in light of s. 7.2 of the Partnership Agreement, that conclusion could be said to be irreconcilable with the purpose of an agreement to reinstate her to the partnership.

[87] It was open to the judge to conclude on the evidence that agreement about how Lisa's reinstatement would be approved was essential to the Alleged Reinstatement Agreement. No reviewable error has been identified.

The second ground of appeal: intention to create legal relations

[88] Citing *Ethiopian Orthodox* at para. 37, the trial judge, at para. 301 of the RFJ, correctly identified the test for determining whether the parties intended to create legal relations as an objective one that asks "whether their conduct was such that a reasonable person would conclude that they intended to be bound".

[89] The judge then noted, at para. 302 of the RFJ, that in determining whether this test has been met, a court is not confined to the four corners of the alleged contract but may also consider surrounding circumstances including the underlying business context, the parties' conduct leading up to and following the alleged contract formation, and the presence of subsequent discussions and negotiations: citing *Leemhuis* at para. 17; *Ethiopian Orthodox* at para. 38; *Hucul v. GN Ventures Ltd.*, 2022 BCSC 144 at para. 138; *Oswald* at para. 33; *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.,* 2009 BCSC 1303 at para. 334; and *Salminen v. Garvie*, 2011 BCSC 339 at para. 28. With reference to *Hucul*, she observed, at para. 305 of the RFJ, that the assessment of parties' intention to contract is closely related to the assessment of the essential terms of the contract.

[90] Again, the appellants do not take issue with the judge's articulation of the legal principles applicable to determining the parties' intention to create legal relations. However, they submit that the judge's conclusion that the parties did not intend to create legal relations reflects an error of law. Specifically, they say

the judge allowed her finding that essential terms were unresolved to dictate her conclusion that the parties did not intend to contract, referring to the judge's statement that "Al did not intend to enter into a binding agreement with Lisa during their conversation … as the essential terms of the alleged agreement were incomplete and unclear" (RFJ at para. 360) and her statement "that there was no objective intention to create legal relations between Al and Lisa, in part due to the lack of certain terms" (RFJ at para. 365).

[91] The appellants submit that rather than assessing the factual matrix leading up to the November 2009 Conversation and the parties' actions immediately thereafter, the judge relied upon her erroneous conclusion that the essential terms of the Alleged Reinstatement Agreement were unresolved to determine that Lisa and Al did not intend to contract.

[92] With respect to the period leading up to the November 2009 Conversation, the appellants say that the purpose of Al initiating the conversation was to elicit Lisa's cooperation with his goal of removing Taylor from ARTG through the expulsion of 934.

[93] With respect to the period immediately following the November 2009 Conversation, the appellants refer to evidence of the following actions taken by the parties that they say are consistent with the parties intending to contract:

- In January 2010, Lisa was asked to sign documents on behalf of 934 guaranteeing a loan for ARTG. She did not do so, but the appellants say the fact she was asked indicates an intention for 934 to be reinstated upon Taylor's removal.

- In the summer of 2010, Al asked Lisa to sign two promissory notes to replace a note that Lisa had given to ARTG in the prior year. Lisa did not have the money to repay the notes but was told by Al that she could repay them through future distributions from ARTG upon being reinstated.

- Lisa began attending ARTG partnership meetings in 2010, despite 934 having been removed from the partnership.

- Lisa attended seminars regarding the operation of family businesses in 2010 and 2011.

- Lisa returned to work at ARTG's office in the fall of 2010 on a part-time basis.

- Al and Jim contacted ARTG's accountants to obtain tax advice regarding Lisa's reinstatement.

[94] In my view, the appellants have not identified any reviewable error in the judge's analysis. It is clear, from the RFJ read as a whole, that the judge assessed the parties' intention to create legal relations in the context of all the circumstances, including the factual matrix leading up to the November 2009 Conversation, the conversation itself, and the parties' actions immediately thereafter. It was not an error for her to give considerable weight to the parties' failure to reach agreement on all essential terms in concluding that the parties did not intend to create legal relations.

[95] The judge found that the substance of the conversation was as Al described in his examination for discovery—"a communication about his expectation and intention that Lisa would be reinstated into ARTG as a partner in the future": RFJ at para. 365. She found that this was "not equivalent to an intention to create a binding contract, particularly when essential terms remain outstanding": RFJ at para. 365.

[96] The judge went on to discuss the evidence at some length. She expressly referred to the period prior to the November 2009 Conversation: RFJ at paras. 377–390. Contrary to the appellants' assertion that Al's purpose in initiating the conversation was to elicit Lisa's cooperation with his goal of removing Taylor from ARTG, the judge found it was unlikely that Lisa could have done anything to cure Taylor's breach of the Partnership Agreement, and that Al had said as much in an email he wrote to Lisa in January 2015 in response to her assertion that he had asked her "not to compel Taylor into rectifying the breach": RFJ at para. 387.

[97] The judge also expressly mentioned much of the evidence the appellants emphasize from the period immediately following the November 2009 Conversation but found it was not persuasive in the context of the totality of the evidence:

> [344] I have also been mindful of events and circumstances after 2009 that could be consistent with there having been a contract reached between Al and Lisa for Lisa's reinstatement in addition to their consistency with an expectation of her future reinstatement. For example, on June 29, 2010, Lisa signed two promissory notes in favour of her parents, with the intention of repayment from ARTG earnings. Lisa was involved in the ARTG partners' attendance at the Sauder School of Business course on family businesses in 2010 and 2011. Lisa also attended partnership meetings between 2010 and 2012 and took the minutes, as well as worked in the ARTG office for short periods. Jim described her as having "future wealth" at ARTG. While these examples demonstrate that Lisa had some degree of involvement in ARTG after 2009, they are not persuasive in the context of the totality of the evidence, which I find clearly indicates that the parties did not reach a binding agreement for Lisa's reinstatement—Al and Lisa did not have an intention to contract, nor did they reach agreement on all the essential terms.

[98] This Court approaches a trial judge's findings of fact and the inferences drawn from the evidence with a high degree of deference. We do not second-guess findings of fact or credibility or the weight the trial judge assigned to particular pieces of evidence. This is because of the judge's privileged position in assessing and weighing the evidence. Absent an error of law, we may only interfere where the judge has made a palpable and overriding error in reaching their conclusions, that is, if they are obviously wrong, unreasonable or unsupported by the evidence, and can be shown to have affected the result. The fact that other interpretations of the evidence are available does not constitute palpable and overriding error.

[99] Again, I have been unable to extract any error of law in the judge's determination that the parties did not intend to contract. In my view, the appellants have failed to meet the heavy burden of persuading this Court that the judge committed any palpable and overriding error in reaching that conclusion. The judge's interpretation of the evidence was open to her and is owed deference.

Conclusion

[100] For these reasons, I would dismiss the appeals.

"The Honourable Justice Warren"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice Horsman"