IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cissell et al v. Fern et al,*
2023 BCSC 193

Date: 20230208
Docket: S222765
Registry: Victoria

Between:

Jason Robert Cissell and Cynthia Grace Jakab

Plaintiffs

And

Donald James Fern, Sharon Elaine Fern and North Shore Recreation Ltd.

Defendants

And

Jason Robert Cissell and Cynthia Grace Jakab

Defendants by Counterclaim

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiffs and Defendants by Counterclaim:	J.Y.S. To
Counsel for the Defendants:	J. Horton
Place and Date of Summary Trial:	Victoria, B.C. January 31, 2023 February 1–2, 2023
Place and Date of Judgment:	Victoria, B.C. February 8, 2023

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INTRODUCTION

[1] In August 2022, the plaintiffs filed a notice of civil claim seeking, *inter alia*, specific performance requiring the defendants to "honour the oral agreement" for transfer of property, once the purchase price is paid. In response, the defendants filed a counterclaim seeking occupational rent.

[2] The property at the heart of this dispute is seven acres of waterfront on Cowichan Lake owned by defendant, Donald James Fern ("the property").

[3] In 2018, Mr. Fern engaged in negotiations with the plaintiffs to sell them the property. The plaintiffs, Jason Robert Cissell and his wife Cynthia Grace Jakab take the position that the parties reached an oral agreement in late 2018. The defendants, Mr. Fern and his wife Sharon Elaine Fern ("the Ferns") counter that there was never a meeting of the minds. No written agreement was ever entered into.

[4] The defendants bring this summary trial application seeking dismissal of plaintiff's action and judgment against the plaintiffs/ defendants by counterclaim.

[5] The plaintiffs take the position that the matter is unsuitable for summary trial.

[6] Accordingly, the preliminary issue is whether this matter is suitable for summary trial. If not, that ends this application. If so, I will continue to consider the application.

IS THIS MATTER IS SUITABLE FOR SUMMARY TRIAL?

[7] Rule 9-7 of the *Supreme Court Civil Rules (SCR)*, B.C. Reg. 168/2009 applies to applications for summary trial. Rule 9-7(2) permits a party to an action to apply to the court for judgment under the *Rule* either on an issue or generally. Evidence may be tendered in a variety of forms including affidavits: R. 9-7(5).

[8] The scope of the summary trial application is set out in R. 9-7(15):

Judgment

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

[9] Under this *Rule*, the court "tries the issues raised by the pleadings on affidavits", a "triable issue or arguable defence will not always defeat a summary trial application" and "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law," provided the court does not find "it unjust to do so": *Gichuru v. Pallai*, 2013 BCCA 60 at para. 30 citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. (1989), 36 B.C.L.R. (2d) 202 (C.A.).

[10] In determining whether it would be unjust to decide the issues on a summary trial application, the court is to consider a number of non-exhaustive factors including:

1) the amount involved;

2) the complexity of the matter;

3) the urgency of the matter;

4) any prejudice likely to arise by reason of delay;

5) the cost of taking the case forward to a conventional trial in relation to the amount involved;

6) the course of the proceedings;

7) costs of the litigation and time of the summary trial;

8) whether credibility is a critical factor in determination of the dispute;

9) whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and

10) whether the application will result in litigation in slices.

See *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 215, and *Dahl v. Royal Bank of Canada et. al.*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369.

[11] The plaintiffs take the position that this is precisely the kind of matter that is meant for summary trial:

- it involves a relatively small amount of money;
- there is urgency to having the matter decided;
- none of the parties can afford to litigate;
- the facts are simple and straight forward; and
- if there are credibility issues they can be determined on the documentation filed.

[12] The defendants argue that this matter is not suitable for summary trial. They point to the speed at which the plaintiffs have brought this application. The action was filed on August 23, 2022. Disclosure is not complete. Examinations for discovery have not taken place. Further, the plaintiffs contend that there are conflicts in the affidavit evidence that raise issues of credibility: whether there was an

agreement; whether Mr. Cissell asked Mr. Fern not to show the property to others and regarding the work done on the property.

[13] I do not find the plaintiff's arguments persuasive. The plaintiffs could not point to any material disclosure that is missing. I note that the defendants' summary trial application was filed November 22, 2022. The plaintiffs made no request for further disclosure or to examine the Ferns for discovery prior to this hearing.

[14] With respect to credibility, the mere fact of conflicting affidavits is not an automatic bar to a summary trial: *Charest v. Poch*, 2011 BCSC 1165 [*Charest*] at para. 56. I am satisfied that I can find facts necessary to decide the matter summarily on the material filed. The facts in the main are not in dispute. The issues of credibility raised are either on immaterial matters or can be decided on the evidence filed. The numerous emails filed as exhibits provide a clear (and contemporaneous) window into the dealings between Mr. Cissell and Mr. Fern over the relevant period and require no explanation.

[15] Regarding other factors:

1) There is a moderate amount of money at issue: the plaintiffs claim that it is approximately $300,000; the defendants say it is $100,000;

2) The issues are not complex: whether there was an oral agreement and if not, whether the defendants were unjustly enriched;

3) Neither party can afford to engage in litigation and the plaintiffs are unlikely able to pay costs, should this matter proceed to trial and they are unsuccessful; and

4) the summary trial application would bring the entire action to an end.

[16] There is an additional factor that is crucial: urgency. Mr. Fern's mortgage comes due in March. With this action challenging his ownership of the property extant, he fears that the bank will not renew his mortgage. I accept that that is a realistic concern even if the Certificate of Pending Litigation ("CPL") placed on title

by the plaintiffs is temporarily removed. Without a mortgage the Ferns would fast be facing foreclosure of their property.

[17] Considering the factors above and being mindful of the object of the *SCR* "to secure the just, speedy, and inexpensive determination of every proceeding on its merits", I am satisfied that this matter is suitable for summary trial.

ISSUES

[18] The issues to be decided on this application are:

1) Was there was an agreement between the parties regarding the sale of the property;

2) Alternatively, if there was no agreement, do the plaintiffs have a claim for unjust enrichment;

3) Alternatively, do the plaintiffs have a claim in passing-off; and

4) Are the defendants are entitled to occupational rent from the plaintiffs?

[19] I will consider the issues in turn but first I will outline the evidence.

THE EVIDENCE

[20] As stated at the outset, defendant Donald Fern, who turns 74 years of age this month, is the registered owner of seven acres on Lake Cowichan that is the subject of this litigation. The property is zoned for one single family dwelling, in which he and his wife Mrs. Fern reside, and six waterfront lots on the lakefront for short term recreational vehicle ("RV") rentals. Both Mr. and Mrs. Fern are retired. Mr. Fern incorporated the defendant company, North Shore Recreation Ltd. with the intention of developing a business on his six lakefront RV sites. The company never did operate such a business.

[21] The plaintiffs Mr. Cissell and his wife Ms. Jakab are information technology consultants who live in Victoria. Mr. Cissell lived on the property in the 1980's when

he was aged 11 to 17. When Mr. Fern purchased the property in late 1986, Mr. Cissell's family moved onto a nearby property. Mr. Cissell has known the Ferns since he was a child. In fact, when he was growing up he did odd jobs for them to make money.

[22] In 2018, Mr. Fern had the property for sale. Mr. Cissell was interested in buying the property for a couple of reasons – it was his childhood home and he had a sentimental attachment to it and he wanted to start a short-term RV rental business on it. In around October 2018, Mr. Fern and Mr. Cissell began talking about the possibility of Mr. Cissell buying it.

[23] Mr. Cissell claims that he and Mr. Fern reached an oral agreement in around November or December 2018 on the following terms:

1) Mr. Cissell and Ms. Jakab would purchase the property for $2.2 million;

2) They would pay for the property by assuming Mr. Fern's mortgage payments and lease payments on a vehicle for Mr. Fern's use, which totalled approximately $4,000 per month, and a portion of the income from the RV business when it was up and running;

3) When Mr. Cissell and Ms. Jakab had paid off the full purchase price, title would be transferred to them; and

4) Mr. Cissell and Ms. Jakab would move some RVs onto the property and operate a short-term RV rental business to fund the property purchase.

[24] Mr. Cissell paid Mr. Fern $3,699 on or about November 20, 2018, as his first payment on the Fern mortgage.

[25] According to Mr. Fern, Mr. Cissell also gave him $10,000 as a deposit to hold the property as he needed time to arrange financing. Mr. Cissell denies asking Mr. Fern to hold the property. He claims that the $10,000 was a deposit on the oral agreement to purchase the property. I will return to this $10,000 payment as Mr. Cissell argues that it is significant.

[26] Mr. Fern denies that he and Mr. Cissell had reached an agreement at the end of 2018.

[27] To determine whether there was an agreement, it is necessary to detail the history of dealings between the parties. For the most part, the evidence is not in dispute and is supported by emails and documents:

1) On October 16, 2018, Mr. Fern sends Mr. Cissell contact information for his lawyer and says that he will let the lawyer know that Mr. Cissell will be in contact;

2) On October 28, 2018, Mr. Fern proposes a “sort of partnership” with Mr. Cissell making a small down payment then servicing the mortgage while paying off the purchase price using the income from the RV rental business;

3) On October 31, 2018, Mr. Fern follows up asking Mr. Cissell if he had sent an offer and “small” deposit to the lawyer yet. He then states: “At $2.2mil I would go for the $250k down that you preferred, you take over the $676K mortgage and I will give you one free year before the first payment on the balance owing spread over the fifteen years you felt was the term you could make reasonable payments on”;

4) On November 5, 2018, Mr. Fern sends a proposal with a selling price of $2.2 million, $300,000 down and monthly payments on an estimated profit from the RV rentals of $175,00 per year. Mr. Cissell responds that it looks “really good’ to him;

5) On November 6, 2018, Mr. Fern writes that he wants to make it as easy as possible for Mr. Cissell but “We just need enough by the end of 5 years to purchase a smaller house. Or we could just stay there forever.” He adds that he wants to keep things moving “sooner rather than later”;

6) On November 12, 2018, Mr. Cissell says that he is still working on “private money” and mentions a couple of possibilities. He then goes on to outline what he “can do right now”:

    i. Cash out gold for $40k cash;

    ii. Start paying the mortgage of $3,700 per month;

    iii. He has put a deposit on two RVs and is working on getting a third. The RVs will be completely financed; and

    iv. “we make a deal where you take most of the money the two or three trailers make. The idea is to get as much money as I can in your pockets to help you get to your retirement as soon as possible”.

7) On November 13, 2018, Mr. Fern writes to Mr. Cissell saying that he wants to enter into an agreement with him but there has to be “some” fixed dates and “some” fixed amounts so they are not entering into “the never never land or whatever and whenever”. Mr. Cissell agrees with having fixed dates but states that he needs flexibility in case he cannot meet them adding that this project is “a tough one” as he does not have the down payment or easy access to the funds he needs. Both Mr. Fern and Mr. Cissell indicate that they have been consulting lawyers throughout the negotiations;

8) On the afternoon of November 14, 2018, Mr. Fern emails Mr. Cissell stating that he is concerned about the smaller down payment as he and Mrs. Fern need money for various things, noting that he will be 70 years old in February 2019 and can not wait five years to do things;

9) That evening Mr. Cissell emails Mr. Fern summarizing “where we are” stating in part as follows:

i. Selling price $2.2 million with a loan, 15 years at 0% starting third year, unless second and third year down payments are not met;

ii. [Cissell] to put $40k down then $60k down as soon as possible in the first year;

iii. In the first year [Cissell] makes monthly payments for the mortgage of $3,700;

iv. “Will [Cissell] be able to make the second and third yearly downpayments of $100k each year? If [Cissell] is unable to make the deferred downpayments amount [Fern] must begin receiving a payment on the remaining purchase price at beginning of the second year based on a percentage of Rental income. [Fern] needs income to offset the absence of deposit payments. If [Cissell] wishes to do away with the second and third downpayments then there must be a fixed monthly payment “minimum amount’ with any additional amount as a permitted prepayment on the purchase of the property”;

v. [Fern]’s lawyer will hold the property in trust until it is fully paid for;

vi. The Ferns can stay in the house for a maximum of 10 years, but [Cissell] would prefer that it be just five years and longer if a certain percentage has not been paid as Ms. Jakab wants to live in the house; and

vii. [Cissell] cannot come up with much more than a small deposit but is working on getting private investors/ lenders.

Mr. Cissell closes this email by saying that he thinks they are “really close”. He can start the process of cashing in some gold tomorrow and will start making loan payments right away. He will have his lawyer to deal with the fine details.

10) On November 15, 2018, Mr. Fern responds to Mr. Cissell's summary saying that it looks good but that they will have to think on each point as the agreement will be for 15 years. Mr. Cissell replies that he thinks that he can pay $200 more per month and that he feels that private funds will come;

11) On November 18, 2018, Mr. Fern writes conveying the "loans guy's" concern regarding the small down payment. He also wonders if there is a way he and Mrs. Fern can live on the property in a converted carport after the five years they spend in the house stating "this is just a possible contingency plan that could be considered as time goes on and we get a handle on what income the trailers will generate." He mentions that he "wants to move this thing along";

12) On November 18, 2018, Mr. Cissell notes that in the next six months he needs to spend money on getting his RV rental business going. He is meeting with investors;

13) On December 3, 2018, both parties acknowledge that they need a written agreement;

14) On December 5, 2018, Mr. Fern emails a "Final draft" agreement for Mr. Cissell to purchase the property by buying the shares of the defendant company. The draft states that it is "Contingent upon the Lawyers and Accountants perusal". The draft agreement stipulates the following: purchase price of $2.2 million, Mr. Cissell is to make the monthly mortgage and line of credit payments of approximately $3,600 and the monthly lease payments of approximately $600 on a vehicle for Mr. Fern, and "once the RV rental does start to flow, [Mr. Fern] should receive all Rent Income over a yearly threshold that threshold to be decided between [Mr. Cissell] and [Mr. Fern]." Finally, the draft agreement states that the remaining purchase price will be "self financed" by Mr. Fern for a term of

15 years and must be paid by the end of the fifteenth year. Mr. Cissell did not agree to this agreement;

15) On December 16, 2018, Mr. Fern sends Mr. Cissell a copy of the email he sent to his lawyer which states in part as follows:

> Hi Todd. I was just thinking. [Cissell] has already paid me everything that he owes me over the next two years.
>
> I understand why he, [Cissell], wants the paperwork finalized as quickly as possible, and the deal closed, but it really doesn't make any difference to me how long it takes.
>
> Next year if [Cissell] wants to keep the deal alive, he will make the next payments that he and I have already agreed to. I am a man of my word, and so it seems is [Cissell].
>
> We have a two million dollar deal going on a handshake.

16) On December 17, 2018, Mr. Fern is hopeful that they can get the agreement sorted out by Christmas stating: "We could get the deposit and sign an agreement to sell the Company and the property for $2.2 with details on payment as per the letter I signed and sent to you, details to be written up and signed in the New Year". Mr. Cissell states that he is consulting his accountant. He also mentions budgeting for lawyers;

17) On December 20, 2018, Mr. Cissell tells Mr. Fern that he is picking up his first trailer on Saturday, (which would be December 22) and that it would arrive at the property that evening;

18) On February 4, 2019, Mr. Fern advises Mr. Cissell that he was contacting his lawyer to see if "this week is possible for signing". He then adds "The only thing I am concerned with, and it is nothing I haven't been requesting all along, and that is a guaranty income minimum for next year, year two. I do not think that this is unreasonable, especially considering what you are purchasing, the method of purchase and the financing I have provided for you." Mr. Fern suggests meeting the next day to "do the transaction";

19) On March 5, 2019, Mr. Fern receives an email from a third party asking him what was going on with the property. Mr. Fern responds that “all five lots were sold to the same person” and that he has two trailers on site;

20) On March 23, 2019, the Ferns, and Mr. Cissell and Ms. Jakab sign a document “signifying” the receipt of $40,000 “for the purchase of the property” and stating that that amount plus the original $10,000 deposit will be discounted from the purchase price of $2,200,000;

21) On July 4, 2019, Mr. Fern emails the property tax notice to Mr. Cissell asking when he can pay him for them;

22) On July 18, 2019, Mrs. Fern emails Mr. Cissell regarding a possible guest for his RV rentals. Mr. Cissell thanks her for all she does for him and Ms. Jakab. Mrs. Fern responds that they are like her kids and that she wants to help them so they succeed;

23) On September 16, 2019, Mr. Fern apologises for his upset over the lack of privacy with the RV business stating in part: “I realize you are working long hours to make this interesting Deal between us work, and work for both of us … This is a truly unusual agreement, but one I am quite proud to accomplish and see to its fulfillment.”

24) In or about September 2019, Mr. Cissell presents Mr. Fern with a draft Option to Purchase, the key terms of which are that:

    i. Mr. Cissell and Ms. Jakab would pay for the property by making ongoing installments until the earlier of:

        a) the $2.2 million purchase price was paid, or

        b) the expiry date, December 21, 2049 (a period of 30 years);

ii. If the purchase price is not paid in full by the expiry date, the agreement is null and void and the option fee of $10,000 is the Fern's sole remedy.

Mr. Fern refuses to sign the agreement, taking issue with the 30-year term;

25) In an October 23, 2019 email exchange, Mr. Fern says that he and his lawyer will be discussing the sales agreement that day. He then states that "the full amount of the [car payments] are to be credited to the purchase price but that only the interest on the two mortgage payments is credited to the purchase price". Mr. Cissell replies that he thinks that the principal of the mortgage payments goes toward the purchase price but the interest does not. He adds that the accountants can figure that out hopefully by the end of the year. He closes by saying that he is glad they are moving ahead finally;

26) On November 6, 2019, Mr. Fern says that his lawyer said that he would have a draft contract ready by the end of the week;

27) The parties pause contract discussions during the COVID-19 pandemic which begins in late February/ early March 2020. During that time Mr. Cissell focusses on building and operating his RV rental business as well as his computer repair business;

28) On April 23, 2020, Mr. Fern advises Mr. Cissell that one of his mortgages has been deferred for a few months (presumably due to the pandemic) and that the other mortgage may have to be deferred as well. He attaches "an updated version of the letter of intent" he sent Mr. Cissell in 2019 that he needs signed for the Credit Union;

29) On July 30, 2020, Mr. Cissell accepts Mr. Fern's thanks for his gift of an iPad by saying "You and Sharon feel like my parents so I feel like I need to

be there for you and really appreciate having you around and of course really appreciate all you have done with the house deal";

30) On July 5, 2021, Mr. Fern emails Mr. Cissell as follows:

> Hi [Cissell]. My intentions of discussing the start of transferring funds got waylaid when everyone else starting talking at us.
>
> As I said yesterday, I have held off as long as I could in order to give you as good a startup period as I could.
>
> So, could you give me some indication as to the date you can start the deposits, and the amount you have in mind. It will have to be an amount that works for both of us.
>
> Bearing in mind the startup time I have allowed and the thought that we have a long way to go to the "paid out" date, maybe we should try and find more imaginative methods of a more rapid pay-down of the purchase price.
>
> Also have you given any thought as to how we finish off the paperwork still needing to be done?
>
> …
>
> I would like to get on with the payments right away, and we can discuss the paperwork as time permits.

31) On July 27, 2021, Mr. Cissell starts making payments additional to the mortgage and car payments. He claims that Mr. Fern "gave him" three years with no extra payments. Mr. Fern denies that;

32) In March 2022, the Ferns' mortgage is up for renewal. At that point they realize that Mr. Cissell is never going to be able to purchase the property;

33) Mr. Cissell attests that in April 2022 he requests from Mr. Fern "a written agreement for an option to purchase as [he] had been paying the mortgages and vehicle lease in accordance with the oral agreement". Mr. Cissell further attests that in May 2022 he had people willing to invest but they require a written agreement to be in place. According to Mr. Cissell he kept following up with the Ferns, primarily Mrs. Fern (who is not the owner of the property) through to August 2022 to get a written agreement with no success;

34) Mr. Fern attests that in June 2022, he tells Mr. Cissell that he has had enough and that he can no longer subsidise Mr. Cissell's business. He allows Mr. Cissell to continue his business over the summer as he knows it was his peak months. After this discussion, Mr. Cissell transfers to Mr. Fern $4,000 without explanation as to what it was for;

35) On or about August 19, 2022, Mr. Fern delivers to Mr. Cissell a letter demanding that he vacate the premises. It states in part:

> The time period requested by Mr. Cissell, with bond of $50,000, to arrange funding for the downpayment and to purchase [the property] has expired, as has the extended time period requested and granted with Mr. Cissell paying the property expenses, mortgage payments, property insurance, taxes, etc. to give Mr. Cissell the first option to purchase the property. Our accountant has shown concern with Mr. Cissell's position with Canada Revenue Agency as well as his seemingly (sic) inability to raise the required funds to complete a purchase of the property.
>
> We have been forced to realize that granting more time past this date of August 18, 2022, will not help to facilitate a sale of this property…

36) On August 27, 2022, Mr. Cissell serves the Ferns with the notice of civil claim in this action seeking specific performance of "the agreement' and registers a CPL on the property.

[28] I turn now to consider the issues.

ISSUE 1: WAS THERE WAS AN AGREEMENT BETWEEN THE PARTIES REGARDING THE SALE OF THE PROPERTY?

[29] As above, Mr. Cissell claims that he and Mr. Fern entered into an oral agreement in late 2018, and all of the payments were made pursuant to it. Although Mr. Cissell says that he told Mr. Fern that he required a written agreement, he paid the first payment on the mortgage on or about November 20, 2018, on the understanding that a written agreement would be obtained. A written agreement was never entered into.

[30] Mr. Cissell further argues that under the *Law and Equity Act*, R.S.B.C. 1996 c. 253 [*LEA*], there is no requirement that a contract for land be in writing. By

accepting the $10,000 deposit and other payments from Mr. Cissell, acquiesced in an act that indicates that there was an oral agreement between them: s. 59(3)(b) of the *LEA*. Additionally, Mr. Cissell argues that he has reasonably relied on the oral contract and built a successful business on the property incurring considerable cost and expending significant hard work. As such pursuant to s. 59(3)(c) of the *LEA*, it would be inequitable for the court to decline to enforce the oral contract.

[31] Mr. Fern counters that the parties never actually reached an agreement. He maintains that the payments made by Mr. Cissell were to cover the Ferns' expenses and to hold the property until Mr. Cissell got financing together and was able to provide a formal offer of purchase and sale. Mr. Fern takes the position that Mr. Cissell strung him along for four years, tying up his property and not paying fair market rent when he never had the ability to purchase it.

The Law

[32] In order to have a binding contract there must be a clear offer, a clear acceptance, certainty as to essential terms, consideration and a meeting of the minds. See G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed (Toronto: Thomson Canada Limited, 2006) at pp. 13, 26, 45, and 81.

[33] Our Court of Appeal in *Berthin v. Berthin*, 2016 BCCA 104, dealt with the issue of whether an agreement reached between the parties pending a lawyer drafting a formal contract, was enforceable. The court's discussion of the law of valid agreements is applicable here:

> *Validity of the Agreement*
>
> [45] As we have seen, although there was considerable evidence that the wife at least had regarded the Agreement merely as a statement of guiding principles that was to be taken to a lawyer with instructions to draft a contract, that argument was not pursued at trial by either party or addressed by the Court.
>
> [46] The test, of course, is not what the parties subjectively intended but "whether 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": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

> The test for determining consensus ad idem at the time of contract formation is objective: it 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"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": *Fridman, supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Witzke (Guardian ad litem of) v. Dalgliesh*, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises. [At para. 27.]

[47] Of course, the terms in question must be enforceable -- i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick, supra*:

> An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.
>
> If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In

> those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.
>
> Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at P4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves." [At paras. 30-32; emphasis added.]

[48] It is also trite law, however, that a court will not attempt to enforce what is effectively an 'agreement to agree' or a list of guiding principles to be negotiated into specific rights and obligations. One of the leading Canadian cases is *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991) 79 D.L.R. (4th) 97 (Ont. C.A.), where Mr. Justice Robins summarized the law:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.
>
> However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself. [At 103-4; emphasis added.]

In *Bawitko*, the Court concluded that the case was not one in which the missing terms were "mere formalities or routine language"; nor was the purported contract one that required merely the "completion of minor details which the parties can impliedly be taken to have agreed upon." (At para. 106.) The "original contract" was found not to "satisfy the standards of certainty which the law requires as a prerequisite to incurring binding and enforceable contractual relations." [citations omitted].

[49] Reference may also be made on this point to *Salminen*, where the Court reasoned:

> Where the alleged agreement contemplates the execution of a further formal contract or where, as here, further negotiations take place after the conclusion of the alleged agreement, the court must determine whether the parties intended to create a binding contract or simply reached a basis for future agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 329, [2009] B.C.J. No. 1900 (QL) [*Le Soleil*]. It is trite law that "an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all": *May & Butcher Ltd. v. The King*, [1929] All E.R. Rep. 679, [1934] 2 K.B. 17 (H.L.), at 20.
>
> The question for the court is whether the parties reached an agreement on all matters that are vital to that agreement or merely intended to defer legal obligation until a final agreement has been reached: see, for example, *Boult Enterprises Ltd. v. Bissett* (1985), 67 B.C.L.R. 273, [1985] B.C.J. No. 1872 (QL) at para. 13. In *Le Soleil* at para. 333, Dickson J. said this:
>
> > In some cases where execution of a formal contract is contemplated, a draft contract containing additional or different contractual terms may be produced and delivered. In such circumstances, if the court is satisfied, on an objective analysis, that all essential terms were agreed and the new terms do not amount to a repudiation or admission that no agreement was reached earlier, the agreement will be binding: *Perry v. Suffields Ltd.*, [1916] 2 Ch. 187 (C.A.); *Horsnail v. Shute* (1919), 27 B.C.R. 474 (C.A.); *Klemke Mining Corporation... [v. Shell Canada Ltd.*, 2007 ABQB 176, aff'd 2008 ABCA 257 (CanLII)]; *Lake Ontario Cement Co. v. Golden Eagle Oil Co. Ltd.*, (1974), 46 D.L.R. (3d) 659. On the other hand, if the Court concludes that key terms remained open for negotiation an intention to create legal relations will not be found: *"Bay Ridge" (The*), [1999] 2 Ll.L. Rep 277; *Pitt Air Ltd. v. Pitt Meadows Airport Society*, [2006] B.C.J. No. 1870, 2006

> CarwellBC 2031 (S.C.), affirmed [2007] B.C.J. No. 36, 2007 CarswellBC 34 (C.A.); *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 79 D.L.R. (4th) 97 (Ont. C.A.). [At paras. 32-33; emphasis added.]

[Emphasis added.]

Analysis

[34] The emails between Mr. Fern and Mr. Cissell demonstrate that they were trying to figure out a way to make the transaction work for both of them. The only element that was firm was the purchase price. How Mr. Cissell and Ms. Jakab could pay it was uncertain. According to the affidavits, Mr. Fern and Mr. Cissell were communicating continually. Emails show that Mr. Cissell needed financing to buy the property. He constantly spoke of “friends” and investors. Emails also show that Mr. Fern was eager to sell and was trying to come up with creative financing alternatives for Mr. Cissell.

[35] What complicated this deal somewhat was the close relationship between the parties. As was evident throughout the emails, both parties cared about each other (the Ferns considered Mr. Cissell and Ms. Jakab to be like their children and Mr. Cissell and Ms. Jakab thought of the Ferns as parents) and wanted the other to succeed. Mr. Cissell knew that the Ferns needed money. The Ferns wanted to help Mr. Cissell and Ms. Jakab succeed in their business. It was because of this close relationship that the Ferns permitted Mr. Cissell to move RVs onto the property and start his business before they had an agreement in place. In addition, Mr. Fern continually granted Mr. Cissell extensions on payments to be made or accepted reduced payments.

[36] From the evidence I find the following:

1) Mr. Fern desperately wanted to sell his property to Mr. Cissell as the Ferns wanted to retire and needed money;

2) Mr. Cissell wanted to buy the property to operate a short-term RV rental business on but did not have the financial ability to do so;

3) Other than the sales price and the minimum monthly payments to be made by Mr. Cissell, the parties were continuously negotiating terms for payment throughout the four-year period;

4) Both parties wanted to make it work. Ideas were exchanged frequently over the years;

5) Both parties consulted lawyers sporadically over the years;

6) Both parties wanted a written agreement;

7) No written agreement was ever entered into because the parties wanted different things with different terms: Mr. Fern wanted to sell his property with final payment to be made in 15 years at the latest; Mr. Cissell wanted an option to purchase with a 30-year term and no financial ramifications to him if the purchase price was not paid at the end of that term.

[37] In *Berthin*, *supra*., the parties entered into a written “separation agreement” without legal advice. Under this agreement, Mr. Berthin was to retain the family home and the parties were to “work collaboratively” toward purchasing a new residence for Ms. Berthin. To that end Mr. Berthin was to make installment payments to Ms. Berthin, which were to be “financed in the best way possible” and “paid off as soon as practical”, but within six years. In the agreement six years was referred to as “the target date”; no firm deadline was specified. Within six months, Ms. Berthin sought reapportionment of the assets. Then when she learned that Mr. Berthin’s business was not as profitable as the parties had believed, Ms. Berthin sought to enforce the agreement. Mr. Berthin argued that it was unfair and unenforceable. The trial judge found that it was an enforceable contract. Mr. Berthin appealed.

[38] Our Court of Appeal allowed the appeal and found that the terms of the agreement were vague and unenforceable, stating:

> [59] As I have already indicated, it is clear there was not a "firm agreement", at least on the essential points of a date by which the residence was to be purchased by Mr. Berthin, or the date by which Ms. Berthin was to be removed as a co-signer on the mortgage. It is difficult to imagine how firm

> dates could have been specified given that Mr. Berthin's ability to buy the residence depended on obtaining financing that was "practical" for him. (He told the Court below that he required flexibility and the Agreement as drafted provided it.) …
>
> [Emphasis added.]

[39] This is strikingly similar to the present case. Here there was never a firm agreement on the date by which the property was to be paid off by the plaintiffs. Further as in *Berthin*, no date could be specified as it depended on the plaintiffs obtaining financing through an investor or private lender.

[40] The present case has more uncertainties than *Berthin*. Most significantly, as is clear from the detailed rendition of the facts, the parties did not even agree on what kind of agreement they were entering into. Mr. Fern wanted, and in fact needed, to sell his property. Mr. Cissell just wanted an option to purchase with a 30-year term (at which point Mr. Fern would be 100 years of age).

[41] There is a reason that the parties were unable to enter into a written agreement—they did not agree on central elements. Quite simply, all they had was an agreement to agree, which is not a contract.

[42] I am satisfied that the parties never had a valid agreement. The terms were too vague to be enforceable.

[43] I reject Mr. Cissell's arguments under ss. 59(3)(b) and (c) as they require that a valid contract be found on the facts: *Charest*, *supra*, at para. 79.

ISSUE 2: DO THE PLAINTIFFS HAVE A CLAIM FOR UNJUST ENRICHMENT?

[44] Mr. Cissell and Ms. Jakab's alternate argument is that they have a claim in unjust enrichment and should be granted a declaration of constructive trust on the property.

The Law

[45] An unjust enrichment may arise where a person makes a substantial contribution to the property of another without compensation: *Peter v. Beblow*, [1993] 1 S.C.R. 980 [*Peter*] at 987. To succeed in an unjust enrichment claim, the petitioner must establish three elements:

1) an enrichment to the respondent;

2) a corresponding deprivation to the petitioner; and

3) the absence of any juristic reason for the enrichment.

See *Kerr v. Baranow*, 2011 SCC 10 [*Kerr*] at para. 32.

[46] Regarding the first element, an enrichment, the court has taken an economic approach. There must be a tangible benefit which has enriched the respondent and which can be restored to the petitioner in kind or with money: *Kerr* at paras. 37–38.

[47] The second element, a corresponding deprivation, bears relation to the respondent's gain. Put another way, the respondent's gain has led to or caused the petitioner's loss: *Kerr* at para. 39.

[48] The third element, the absence of juristic reason, means that there is no reason in law or justice for the respondent's gain: *Kerr* at paras. 40–41. It contemplates the autonomy of the parties, including their legitimate expectations and their right to order their affairs by contract. Juristic reasons may include, for example, the petitioner's intention to give a gift or a contract, but juristic reasons are not limited to a closed list.

[49] In determining whether there is a juristic reason for the enrichment, the petitioner must first show that no juristic reason from an established category exists to deny recovery (*Kerr* at para. 43, citing *Garland v.Consumers' Gas Co.*, 2004 SCC 25 at paras. 44–46). If he is successful, the petitioner has made out a *prima facie* case under the juristic reason analysis which may be rebutted by the respondent if

she can show why the enrichment should be retained, bearing in mind the parties' reasonable expectations and public policy considerations.

[50] The remedy for a claim of unjust enrichment may be monetary or proprietary through a constructive trust.

[51] A constructive trust may be imposed as a remedy where:

1) monetary damages are inadequate;

2) there is a "direct" or "special" link to the contribution that founds the action and the property in which the constructive trust is claimed; and

3) the contribution to the property was substantial.

See *Peter* at 987–988; *Harraway v. Harraway*, 2009 BCCA 561 at para. 52.

Analysis

[52] Mr. Cissell and Ms. Jakab argue that the Ferns have been enriched by the funds they have paid them and the work they have done on the property. They argue that they paid these funds and made the improvements with the expectation that they would own the property. Without ownership passing to them, the Ferns have been unjustly enriched. Mr. Cissell and Ms. Jakab submit that the improvements have greatly increased the value of the property. They rebuilt the five RV pads so they could support RVs and they built a sixth pad. They landscaped, did work around the property, and repaired the dock. In addition, their business proved that a profitable short-term rental business could be operated on the property, a fact which will possibly increase the value of the property.

[53] With respect to a corresponding deprivation, Mr. Cissell and Ms. Jakab submit that they are out of pocket for the improvements and the payments made to the Ferns. In addition, if they have to leave the property they will lose their business. There is not a comparable property available on the lake on which they could run such a business.

[54] Finally, Mr. Cissell and Ms. Jakab argue that there is no juristic reason for the Ferns to keep the funds paid or to not have to reimburse them for the improvements made to the property.

[55] The Ferns respond that they have not been enriched in any way. Their property has been tied up by Mr. Cissell and Ms. Jakab for four years. They were unable to sell their property. The funds they received were less than what would have paid in rent. In fact, the Ferns say that they subsidised the RV business because the payments were so low. The improvements were made to benefit the RV rental business, not the property, Mr. Cissell can take the RVs and the wood from the structures he built around them. He can take his hot tubs. The sixth RV pad that was built by Mr. Cissell is located in a riparian area where it is not permitted and a number of trees were killed in the process.

[56] The Ferns argue that Mr. Cissell has not suffered a deprivation, in fact he has profited. He was able to run an Airbnb business for four years on a property he could not afford to purchase or rent.

[57] I agree with the Ferns. I do not find that the Ferns have been enriched. The work the plaintiffs did on the property was in furtherance of their business. When Mr. Cissell moves his business off the property it is likely that the property will have to be repaired. The funds paid to the Ferns did not enrich them; it was the cost of Mr. Cissell using the property to run his business. And it tied up the property for four years.

[58] Likewise, I do not find that Mr. Cissell and Ms. Jakab have suffered a deprivation. They were able to run their business for four years on a property they could not afford to be on. They are able to take the RVs and other materials with them.

[59] I reject Mr. Cissell’s claim that he helped fix the Fern’s house on the property as an enrichment or deprivation. He helped them because they were like family. Just like they helped him.

[60] Having found no enrichment or corresponding deprivation it is not necessary to consider juristic reason.

[61] Mr. Cissell and Ms. Jakab's claim for unjust enrichment is dismissed.

ISSUE 3: DO THE PLAINTIFFS HAVE A CLAIM IN PASSING-OFF?

[62] The plaintiffs make a claim for damages for loss of business, reputation goodwill or trade based on the action of passing-off.

[63] There are three necessary components of a passing-off action: the existence of goodwill, deception to the public due to a misrepresentation and actual or potential damage to the plaintiff: *Ciba-Geigy Canada Ltd. v. Apotex Inc*., [1992] 3 S.C.R. 120 at para. 33.

[64] The plaintiffs' claim is based on their unsubstantiated allegation that the Ferns want them off the property so they can run a short-term RV rental business like the one they proved could be successful.

[65] It is a stretch to conclude from the evidence before the court that the Ferns plan on running a short-term RV rental on their property, but even if they do there is no evidence to satisfy any of the components of a passing-off action.

[66] There is no merit to this claim.

ISSUE 4: ARE THE DEFENDANTS ARE ENTITLED TO OCCUPATIONAL RENT FROM THE PLAINTIFFS?

[67] In their counterclaim the Ferns contend that they are entitled to occupational rent as they could have rented out the RV pads themselves and earned revenue.

[68] I reject this claim. There is no evidence that the Ferns were inclined to run an RV rental business themselves. In fact, Mr. Fern told Mr. Cissell when asked, that they were too old and not interested in doing so. The fact that Mrs. Fern's son in the last few months has rented out two of the RV pads does not impact this decision.

[69] The Ferns' counterclaim is dismissed.

CONCLUSION

[70] I make the following orders:

1) The plaintiff's action is dismissed as against all of the defendants;

2) The plaintiffs by counterclaim claim for occupational rent against the defendants by counterclaim, is dismissed;

3) The certificate of pending litigation filed against the property located at 8580 North Shore Road, Shawnigan Lake, British Columbia, and legally described as:

   PID: 001-033-611
   District Lot 54, Cowichan Lake District, Plan 37714

   be cancelled;

4) The plaintiffs are to vacate the property no later than 5 p.m., February 28, 2023; and

5) Parties are to submit written submissions regarding costs. The defendants shall file their written submissions within 14 days of this judgment. Plaintiffs will file a reply seven days after receipt of the defendants' submission. Written submissions may be no more than 10 pages in length, double-spaced.

"The Honourable Madam Justice Murray"