

CANADA / JUDGMENT

Dutcyvich v. Monette Farms Ltd.

2025 BCSC 548

COURT

Supreme Court of British Columbia

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2025 BCSC 548 Dutcyvich v. Monette Farms Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dutcyvich v. Monette Farms Ltd.,

2025 BCSC 548

Date: 20250325

Docket: S223168

Registry: Vancouver

Between:

David Dutcyvich and 3L Developments Inc.

Plaintiffs

And

Monette Farms Ltd., Darrel Monette and

102134752 Saskatchewan Ltd.

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiffs:

R.A. Millar

Counsel for the Defendants:

M.B.J. Stainsby

Place and Date of Trial:

Vancouver, B.C.

September 23-27,

October 1-4, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 25, 2025

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I. Introduction

- [1] This dispute arises from the purchase and sale of the shares of Blue Goose Cattle Company ("BGCattle"). Blue Goose Capital ("BGCapital"), a company with substantial ranching interests in British Columbia, who owned the shares of BGCattle and sold them to the defendants in 2021. The plaintiffs claim in contract and alternatively in quantum meruit, against the defendants, for a fee for work done to assist the defendants' purchase of the BGCattle shares.
- [2] The ranching interests in this matter are extensive and consist of 16 separate ranches over approximately 21 locations in the interior of British Columbia. The lands are in excess of 45,000 acres, plus lease interests which have been accumulated by BGCattle.
- [3] The defendants ultimately paid \$63 million to BGCapital for the shares of BGCattle. 102134752 Saskatchewan Ltd. ("102"), a subsidiary of Monette Farms Ltd., acquired the shares of BGCattle through a series of assignments.
- [4] The plaintiffs' claim for fees is pursuant to two contracts that they say are partly oral and partly written. First, the plaintiffs assert a contractual claim of \$12 million for introducing the defendants to BGCattle and providing advisory services as the purchaser's agent for the defendants' purchase of the BGCattle shares. Second, the plaintiffs claim \$40,000 for services provided pursuant to a contract for logging and logging advisory services. The plaintiffs also claim out of pocket expenses of \$6,900 incurred in relation to the introductory and advisory services for the acquisition of the BGCattle shares.
- [5] Alternatively, should this court determine no enforceable contract exists, the plaintiffs claim against the defendants in quantum meruit for the work and benefit they provided to the defendants to facilitate and assist in the purchase of the BGCattle shares. The plaintiffs claim the same amounts in quantum meruit, and say since this is an equitable remedy, the court may exercise a wide discretion in awarding a monetary remedy for the value of the services provided equivalent to these amounts.
- [6] In response, the defendants maintain there was no agreement with the plaintiffs with respect to the purchase of the shares in BGCattle.
- [7] The defendants also deny they acted in a common enterprise with LBJ Capital Inc. ("LBJ") in an effort to acquire the ranching interest shares of BGCattle. Furthermore, the defendants maintain the plaintiff was not acting as the purchaser's agent, but was instead acting as the seller's agent for BG Capital. Lastly, the defendants deny the plaintiffs provided any services to the defendants in relation to the ranching interests and, and that if they did, this was pursuant to an agreement with other separate legal entities, from whom they were unable to collect.

- [8] The defendants also counterclaim against the plaintiffs, claiming that if there was a contract between the defendants and the plaintiffs, the plaintiffs breached the contractual duties of good faith and agency/fiduciary duties. However, this claim was not seriously advanced in these proceedings.

II. Issues

1. Have the plaintiffs established a contract for a fee, payable by the defendants, for providing services to the defendants, including introducing the purchaser to the vendor, and incurring expenses in acting for the defendants and providing logging services?
2. Alternatively, if the contractual entitlement is not proven, are the plaintiffs entitled to the amounts claimed in quantum meruit?
3. If the plaintiffs have a claim in quantum meruit, what is the value of that claim?

III. FACTS AND BACKGROUND

A. Mr. Dutcyvich, BGCattle, and LBJ

- [9] David Dutcyvich ("Mr. Dutcyvich") is a successful cattle rancher and logging company owner who is the sole shareholder of 3L Developments Inc. ("3L Development"). 3L Developments is the corporate entity through which Mr. Dutcyvich operates, and it is part of a group of related companies through which Mr. Dutcyvich carries out development, ranching, and agricultural activities.
- [10] The corporate structures in this matter are somewhat complicated. Some of the specifics are set out below and as part of the chronology in this matter.
- [11] BGCattle was the owner of various ranch properties and interests in British Columbia. The shares of BGCattle were owned by BGCapital. BGCapital is a subsidiary of the Dundee Corporation ("Dundee"), a public company listed on the Toronto Stock Exchange. Tochi Lewis-Asoyne ("Tochi") was the principal vendor's agent for, and representative of, Dundee and BGCapital on the sale of the shares of BGCattle. Another accounting representative of BGCapital was Perina Montesano.
- [12] Mr. Dutcyvich testified in this matter. He is an 81-year-old, self-made, successful businessman. Born on a farm in Saskatchewan, Mr. Dutcyvich finished 8th grade and then commenced working in a butcher shop and meat processor in Saskatchewan. At the age of 16, he started working as a logger in the forest industry on Vancouver Island. He later established Lemare Lake Logging, a profitable logging company on Northern Vancouver Island, which at one time had 400 employees.

- [13] Using the profits from this logging company, Mr. Dutcyvich acquired ranch and farmlands in Saskatchewan, which grew to more than 26,000 acres. He became a leader in cattle husbandry, utilizing genetics with his cattle herds which were viewed as being of superior quality as a result. In 2017, he sold his ranching and farming interests for \$26 million.
- [14] In the spring of 2020, Mr. Dutcyvich was approached by LBJ Capital Inc., whose principal is Mr. Lanny Benoit, to provide services to LBJ with respect to purchasing the shares of BGCattle.
- [15] Specifically, LBJ sought the advisory services of 3L Developments and Mr. Dutcyvich, as purchaser's agent, for the due diligence analysis of the purchase of the ranching interests, determination of an appropriate offering price, and assistance in negotiating the purchase price of the shares, ranch interests, and a term sheet for that purpose. These services were to be performed up to the closing of LBJ's purchase of BGCattle's shares.
- [16] Mr. Dutcyvich had acquired extensive knowledge and experience over the years, and was able to assess BGCattle's ranching and the logging interests upon its lands. LBJ sought to utilize and rely on these skills in determining the appropriate offering price for the BGCattle shares and ranching interests.
- [17] Mr. Dutcyvich testified he was aware of LBJ, as LBJ had tried to purchase his farm in Saskatchewan in 2016. The Saskatchewan government however, did not allow the sale to go through, as the funds for the purchase were sourced out of the country.
- [18] Initially, Mr. Dutcyvich turned down LBJ, but LBJ persisted. Ultimately, in April 2020, Mr. Dutcyvich agreed to provide the requested assistance on specific terms associated with the price of the shares.
- [19] BGCapital, the owner of the BGCattle shares, was asking for slightly over \$100 million for the shares. This amount was derived from an appraisal dated December 6, 2016, which valued BGCattle's ranching interests at \$101,060,000. LBJ and 3L Developments agreed, as per Mr. Dutcyvich's proposal, that LBJ would pay 3L Developments an amount equal to 50% of the difference between the asking price of the \$100 million and the purchase price ultimately agreed to between LBJ and BGCattle for the shares and ranch interests. For example, as Mr. Dutcyvich explained, if he was able to reduce the purchase price by \$20 million, Mr. Dutcyvich and 3L Developments would receive \$10 million.
- [20] Mr. Dutcyvich contacted BGCapital and dealt with Mr. Tochi Lewis-Asonye, the representative for BGCapital and Dundee, throughout the transaction. Mr. Dutcyvich developed a good relationship with Tochi and said the BGCapital office was easy to deal with.

- [21] To facilitate the sale, BGCapital established a substantial data room--a secure electronic storage facility of all pertinent information relating to the shares and the ranching interests. The plaintiffs entered into a nondisclosure agreement ("NDA") with BGCapital in mid-April 2020, and were granted access to the data room through 3L Cattle, an entity that is part of the 3L group of companies.
- [22] James MacIntyre is the chief financial officer ("CFO") of the 3L group of companies. He works in the office dealing with paperwork and other matters. Mr. Dutcyvich asked Mr. MacIntyre to review the information in the data room and assist him in ascertaining the nature and health of BGCattle. Once Mr. MacIntyre reviewed the paperwork concerning BGCattle, Mr. Dutcyvich travelled into the field to ascertain whether the information and identified assets did, in fact, exist. Mr. Dutcyvich said he would check and assess the identified equipment, review the land and the leases, check the herds, and importantly, do a cattle count of the 16 ranches in the interior of British Columbia. Mr. Dutcyvich said cows were a valuable part of the business, as each cow is worth approximately \$2,300-\$2,500.
- [23] Mr. Dutcyvich put in long hours in undertaking this assessment and, as he put it, making sense of the situation. His wife also worked hard on the cattle count as she was "a good cattle counter", but it was difficult to do the count properly. Mr. Dutcyvich said it appeared BGCattle was indicating it had 14,000 cows when it appeared the count was more likely 5,000 cows. Mr. Dutcyvich said BGCattle was including cows, steers, and calves in the count, when the essential question was only how many cows there were, and the consistency of their pregnancies. He said this is because if there was no cow, there would be no calf, and the money in cattle ranching is made on calves being born, as that is essentially the next year's crop.
- [24] Mr. Dutcyvich took at least two or three helicopter trips to and over the ranches as part of his assessment of BGCattle. On at least one of those trips, he assessed the BGCattle logging operation and concluded that BGCattle was not sufficiently realizing on its product, as it was being paid less than the going rate in the interior.
- [25] Mr. Dutcyvich also became concerned that equipment was being moved between ranches during his assessment, making it difficult for him to accurately assess the assets. Mr. MacIntyre and Mr. Dutcyvich also assessed the payroll, noting it was large for ranches of this size, and it appeared many employees were relatives of the ranch manager, Doug Sinclair. Mr. Dutcyvich developed a concern about Mr. Sinclair as a result.
- [26] Mr. Dutcyvich also became concerned that BGCattle would likely be unable to renew its leased land, as this land was being returned to First Nations peoples.
- [27] After Mr. Dutcyvich completed his assessment, he concluded that BGCattle's shares and ranch interests were worth \$76 million, and that he would not pay more if he was purchasing these shares. This was in part because of the condition of the equipment, the cattle count, and the problem with the leases. Mr. Dutcyvich provided this advice to LBJ.

- [28] After Mr. Dutcyvich provided this advice, LBJ and BGCapital signed a term sheet for the purchase of the BGCattle shares and ranching interests for \$76 million on June 11, 2020. Following the execution of the term sheet by LBJ, the plaintiffs remained actively involved and assisted LBJ in the finalization of various matters, including confirmation of assets, headcounts for cattle, financial review, and other analysis and advice.
- [29] Specifically, Mr. Dutcyvich continued his work to confirm the assets indicated in the term sheet existed. This included the cattle counts, which were very important as they represented a significant financial part of the operations. Mr. Dutcyvich said this was not easy and that he continued to be concerned about the cattle count. As set out above, BGCapital had indicated it had 14,000 cows, but Mr. Dutcyvich was still unable to confirm that amount. He concluded there were only 5,000 cows, and that the 14,000 number was made up of cows, calves, steers, and bulls.
- [30] On July 22, 2020, LBJ sent an unsigned solicitor's irrevocable direction to pay \$12 million to 3L Developments as part of the transaction process. If the deal between LBJ and BGCapital closed, 3L Developments would then be paid out of the sale proceeds.
- [31] As matters progressed, however, LBJ was unable to set a closing date, as it appeared unable to source funds to complete the sale. By the fall of 2020, BGCapital became frustrated and indicated they no longer wished to deal with LBJ. I will deal with this later in these reasons.

B. Mr. MacIntyre

- [32] James MacIntyre, CFO of the 3L group of companies, also testified in this matter. He has been with 3L in a number of different capacities for 13 years and became the CFO in October of 2017.
- [33] Mr. MacIntyre briefly described the nature of 3L's businesses. 3L Developments deals with property development, property acquisition, and business consulting. 3L Cattle undertakes farming operations, including an alfalfa farm. Essentially, 3L Developments holds the land, while 3L Cattle focuses on actual ranching and farming.
- [34] In March 2020, Mr. Dutcyvich advised Mr. MacIntyre he was helping a purchaser with the possible purchase of BGCattle's shares and its cattle ranches. Mr. Dutcyvich asked Mr. MacIntyre to review extensive documentary information with respect to BGCattle's ranches and business. Mr. MacIntyre contacted BGCattle for information on its holdings and dealt with two individuals, Tochi and Perina Montesano. Ms. Montesano provided 3L a nondisclosure agreement (NDA) in order to access the aforementioned data room, which included 620 files and over 85 folders of digital documents, located on the server of the parent company, Dundee.

- [35] 3L Cattle signed the NDA on April 14, 2020, because, as Mr. MacIntyre said, "we were talking about ranches", and he didn't know much more than that. Mr. MacIntyre said that, as part of his assessment, he estimated he reviewed between 6,000 to 6,500 pieces of paper. Mr. MacIntyre assessed four main areas as part of his due diligence: the assets and equipment; the land; the inventory (including cows and steers); and human resources, which included the payroll.
- [36] Mr. MacIntyre reviewed the December 2016 appraisal of BGCattle, which valued BGCattle's ranching interests at \$101,060,000. He said this was a massive project, as the assessment involved 45,000 acres; a \$101 million company; 268 freehold titles; 13 ranches, the Lambert Meats abattoir; and the North Vancouver head office. Mr. MacIntyre is a forensic accountant by experience. During his assessment of the appraisal, he utilized the accounting principles of completeness and existence, and assessed for accuracy and relevance. As part of his review, he determined whether something was relevant to the task, whether it existed, and the accuracy of items such as the declared worth of a vehicle or equipment.
- [37] As an example, when reviewing a list of equipment that included a vehicle, he would ascertain whether the vehicle existed, review the provided worth of the vehicle in the 2016 appraisal, and determine whether that worth was in fact consistent with the worth of the vehicle set out in available internet databases. With respect to land assessments, Mr. MacIntyre reviewed land reports to ensure the land was there and reviewed land leases, including the duration and expiration of the leases, since Mr. Dutcyvich had identified a particular concern with respect to the likelihood of the renewal of those leases. Mr. MacIntyre also tallied the leased land in order to remove it from the overall land value, and researched the land value assigned by the BC Assessment Branch. He reviewed 268 titles as part of this extensive task.
- [38] Ultimately, Mr. MacIntyre concluded that while BGCattle was presently operating at a \$25 million loss, future operation could make a difference, as its assets were important and could be valuable.
- [39] Mr. MacIntyre noted the consistent and substantial problem of obtaining an accurate cow count, as Mr. Dutcyvich had also encountered. This included the number and health of the cows, which were the most important part of BGCattle's inventory. With respect to the human resources/payroll assessment, Mr. MacIntyre noted numerous individuals with the same last name on the payroll and many with the title of "manager".
- [40] Overall, Mr. MacIntyre said he worked long hours with the data and attended numerous conference calls and discussions on this matter. He estimated that he worked 10-hour work days for a total of 450 hours from the date of signing the NDA (April 14, 2020) to the date on which the term sheet between LBJ and BGCattle was created (June 12, 2020). He also continued working on this after June 12, 2020, as it was necessary to further substantiate the \$76 million offer price. While he had done most of the work regarding the equipment and the land, concerns with respect to the payroll still needed to be addressed, and it was

important to ascertain the accuracy of his findings and information. He noted that a term sheet is only a promise, and the parties were looking for a final document--a purchase agreement and funds to close the deal.

- [41] On July 22, 2020, LBJ sent a signed solicitor's direction to pay \$12 million dollars to 3L Developments as part of the closing of the transaction. Mr. MacIntyre indicated that while 3L Cattle had signed the NDA, 3L Developments was to receive the monies, as this would be better utilized from a tax point of view. Mr. MacIntyre said an assignment of the contract was unnecessary, as the 3L group of companies had one CEO, one shareholder, and one CFO.
- [42] During the summer and fall of 2020, Mr. MacIntyre and Mr. Dutcyvich spent time on conference calls with all the parties--including LBJ and Dundee--as they tried to get the deal closed. Ultimately, as LBJ was unable to come up with the funds, Dundee and 3L Developments became frustrated. On January 4, 2021, Tochi sent both Mr. Dutcyvich and Mr. MacIntyre an email indicating he did not wish to engage with LBJ or Mr. Benoit of LBJ anymore, as they had proven to be "untrustworthy" and not credible. Tochi referred to them as a "dodgy/discordant group" and suggested to 3L Developments that they discuss the next phase.
- [43] Mr. MacIntyre responded on January 12, 2021, indicating that 3L Developments was equally disappointed with the LBJ group and its lack of performance. He said 3L Developments would continue to remain actively involved with an alternate purchaser, as "we feel that David's expertise and knowledge is paramount for the success of the transition. We also hope to speed up the due diligence process as David's recent involvement will be relied upon in the second proponent".
- [44] Mr. Dutcyvich had two alternate purchaser possibilities in mind--Mr. Levitt and Mr. Nielsen--who he thought may be interested in such a transaction and be able to complete it. Mr. Levitt was, however, not interested, and Mr. Nielsen ultimately made a lowball offer which was rejected. 3L Developments was not involved with this latter offer.

C. Monette Farms

- [45] At this time, unknown to Mr. Dutcyvich and 3L Developments, it appears that the defendants, Darrel Monette and Monette Farms, were making arrangements to have some measure of involvement with LBJ. Mr. Monette disputes this. However, I find that the evidence supports this involvement, and I therefore conclude that it did occur and was underway at this pertinent time. I will address this later in the reasons.
- [46] Monette Farms is a large ranching and agricultural corporation with operations and land holdings in Saskatchewan and the USA. Mr. Monette is the CEO and principal of Monette Farms. He dealt with Mr. Dutcyvich in relation to Monette Farms' ultimate acquisition of the shares of BGCattle.

- [47] Mr. Dutcyvich testified he had various conference calls in late 2020 with LBJ, and that these calls included Mr. Monette. Specifically, Mr. Dutcyvich testified that Mr. Monette was on two or three conference calls he had with Mr. Thomas Bunker and Mr. Benoit, two members of LBJ. Mr. Dutcyvich says that during these calls, Mr. Monette expressed substantial interest in matters relating to Mr. Dutcyvich's prior cattle ranching experience and herd quality. Specifically, Mr. Monette was very interested in Mr. Dutcyvich's previous ranch, which had been ranked highly in North America. Mr. Monette wanted to know what Mr. Dutcyvich had done differently to achieve these results.
- [48] As a result of these calls, Mr. Dutcyvich testified that he was under the impression that Mr. Monette was in partnership with LBJ, Mr. Bunker, and Mr. Benoit at the time, and that Mr. Monette was to be part of the LBJ transaction that was delayed continuously in late 2020.
- [49] Mr. Dutcyvich first met Mr. Monette in person in March 2021. Mr. Dutcyvich testified that Mr. Monette contacted him in early March 2021 after BGC Capital told LBJ they were no longer interested in dealing with LBJ, due to lengthy delay in sourcing funds to close the deal. According to Mr. Dutcyvich, Mr. Monette said that he was "going to leave those three buggers and do the deal on his own" and that he would like Mr. Dutcyvich's help. As part of this conversation, Mr. Dutcyvich said to Mr. Monette: "you know the deal, my fee is \$12 million are you going to pay me?". Mr. Dutcyvich testified that Mr. Monette replied "yes", he would pay the fee. As a result, Mr. Dutcyvich agreed to help and said, "I'll get my accountant to send you a letter for you to sign". Mr. Monette agreed he would sign the letter.
- [50] Mr. MacIntyre testified that Tochi emailed him saying that, "David had found an alternate purchaser named Darrel Monette who is going to access the data room". Mr. MacIntyre did not know how Mr. Dutcyvich had found Mr. Monette, but he knew Mr. Monette would need to sign an NDA in order to obtain access to the data room.
- [51] Mr. MacIntyre said he was very concerned, however, that the next person he works with be financially sound and able to complete the deal. He therefore asked Mr. Dutcyvich to ask Mr. Monette to "show him the money". As part of his CFO responsibilities, Mr. MacIntyre said he did not want 3L Developments to spend any more time on this matter while not being paid for it. At this point, 3L Developments had spent nine months working on this matter without being paid, and Mr. MacIntyre did not want that to happen again.
- [52] At 3L Developments request, Monette Farms sent a combined financial statement to Mr. MacIntyre for his review. Mr. MacIntyre concluded that while there was no equity-based ability for Monette Farms to purchase BGCattle, a Scotiabank letter confirmed Monette Farms' significant credit ability of \$395 million. This letter persuaded Mr. MacIntyre that there was sufficient liquidity for 3L Developments to work for Monette Farms to purchase the shares of BGCattle. As a result, 3L Developments could move ahead and assist Mr. Monette and Monette Farms, which they did.

- [53] On March 8, 2021, Monette Farms signed an NDA with BGCapital in order to access the data room.
- [54] Matters moved relatively quickly after this. On March 14, 2021, Monette Farms signed a term sheet for the purchase of the shares of BGCattle, including the purchase of the shares of Lambert Creek Organic Meats Ltd., which was a processing facility of BGCattle in North Vancouver.
1. The March 2021 Emails
- [55] On March 16, 2021, Mr. MacIntyre sent an email to Monette Farms, with an attached direction to pay \$12 million, saying, "as per your discussions with David, please see the attached and return via email once signed". Mr. MacIntyre said he sent a direction to pay instead of an invoice, as, similar to the previous process, 3L Developments would be paid out of the transaction funds, meaning Mr. MacIntyre would not have to pursue collection of the funds.
- [56] Mr. Monette forwarded this email to Mr. Bunker of LBJ on that same day copying, 3L Developments. In the email, Mr. Monette asked, "is this what you are paying David? Not sure why I got it".
- [57] Mr. Bunker replied by email and copied 3L Developments, saying "this email you received from 3L Developments has nothing to do with you or Monette Farms Ltd. and should not have been sent to you. LBJ Capital Inc. will pay the fees to 3L Developments, not you. Please disregard this email".
- [58] These series of emails about the \$12 million fee, dated March 16, 2021, were put to Mr. Dutcyvich in cross-examination. While the emails were copied to 3L Developments, Mr. Dutcyvich said he paid no attention to them, as they meant nothing. From his perspective, LBJ had no money, and he had a face-to-face agreement with Mr. Monette to be paid \$12 million.
- [59] Mr. Dutcyvich also said if Mr. Monette did not understand that he was to pay \$12 million to 3L Developments, he had many opportunities to tell Mr. Dutcyvich over the time that Mr. Dutcyvich was working for him. Mr. Dutcyvich said he spoke to Mr. Monette after this email, saying "you know the deal", and said that Mr. Monette was happy for Mr. Dutcyvich to continue his work. Mr. Dutcyvich said Mr. Monette had no problem with his work until the closing of the share purchase, when Mr. Monette decided he didn't need Mr. Dutcyvich anymore.
- [60] When cross-examined on why he took no more steps to confirm the payment owed by Monette Farms, Mr. Dutcyvich said that he took Mr. Monette at his word when he said he would pay Mr. Dutcyvich for the work. He liked and trusted Mr. Monette, and so he didn't feel the need to pursue him. Mr. Monette, however, never signed the direction to pay \$12 million, as attached to Mr. MacIntyre's original email.

- [61] These emails were also put to Mr. MacIntyre. Mr. MacIntyre said when he saw this email, it made no sense from his perspective.
- [62] When cross-examined as to why, given his confusion and role as CFO, he did not pursue this further, Mr. MacIntyre said that the email had not been sent to him, that LBJ had no involvement at this stage, and that he had spoken to Mr. Dutcyvich, who said he would make a few phone calls and handle it. Mr. Dutcyvich also told Mr. MacIntyre that Mr. Monette had been clear he would pay 3L Developments bill, and that he had asked Mr. Dutcyvich to send an invoice.
- [63] Mr. Dutcyvich gave Mr. MacIntyre no further instructions. Sometime after this exchange, Mr. Dutcyvich told Mr. MacIntyre that the "the deal was still in place for \$12 million". Mr. MacIntyre also said that no one at Monette Farms ever contacted them to say there was no deal or to change the name on the direction to pay.
- [64] Both Mr. Dutcyvich and Mr. MacIntyre indicated that at no time did Mr. Monette ever dispute or say to them that he did not owe \$12 million.
- [65] Very late in these proceedings, after the plaintiff had closed its case and the defendant was on its last witness, the defendants disclosed an email from Mr. MacIntyre related to this exchange of emails concerning the direction to pay the \$12 million fee in this matter. The defendants had failed to properly list this document. I note that the defendants' disclosure has been minimal in this case, up until a case management conference shortly before this trial. However, despite significant reservations, the Court reluctantly allowed the document into the proceeding, as it referred to a central issue in this case. The plaintiff witnesses were not, however, able to address it. I have taken this late disclosure into account in assessing this matter.
- [66] This document indicated Mr. MacIntyre sent an email to Mr. Monette, following receipt of Mr. Bunker's email, that said the following:

Good afternoon Darrel:

I just spoke to David and he wanted me to send you a note to disregard the draft agreement that was sent earlier today. LBJ Capital has indicated that they will honour the previously signed agreement between 3L and themselves.

- [67] As the plaintiffs' case was closed, neither Mr. Dutcyvich nor Mr. MacIntyre were in a position to explain this email. Submissions on its impact were instead made in closing.
- [68] The defendants say this email essentially confirms that if there was an alleged contract between 3L Developments and Monette Farms, it was, by this objective measure, at an end. Furthermore, there could not have been an agreement, because Mr. MacIntyre included "draft" in his email. I will deal with this apparent conflict as part of my analysis.

2. The LBJ-Monette Purchase

- [69] In the meantime, on March 10, 2021, unbeknownst to 3L Developments and prior to Monette Farms signing a term sheet to purchase the shares of BGCattle from BGCapital, Monette Farms and LBJ signed a term sheet in which LBJ agreed to purchase 75% of the shares of Monette Farms. Mr. MacIntyre was not aware of this. At the time, Mr. MacIntyre was of the view that LBJ had nothing to do with the offer from Monette Farms. If he had been told of LBJ's involvement, Mr. MacIntyre said this would have put him in an impossible position. Dundee, which owned BGCapital, had clearly expressed the position that LBJ was not welcomed, and they would not deal with them. As a result, Mr. MacIntyre indicated that LBJ had no business being part of this transaction.
- [70] After the March 16, 2021 term sheet between LBJ and Monette Farms was signed, Mr. MacIntyre who was unaware of this term sheet, said 3L Developments continued to work for Monette Farms to ensure that \$76 million was the right price for BGCattle. While they had done a significant amount of work already with respect to the land, the equipment inventory and the cattle count, continued to be a problem. In addition, Mr. Dutcyvich examined issues concerning the logging part of the business.
- [71] Mr. Dutcyvich and Mr. MacIntyre worked on these matters until May 2021. They say this involved weekly conference calls to review issues such as identification of assets, cattle counts, inventory, and human resource issues. Throughout this process, Mr. Monette never made reference to LBJ, and no representatives were ever included on the conference calls. Mr. Dutcyvich and Mr. MacIntyre also say that, throughout this time (from March to May 2021), Mr. Monette never dissuaded 3L from performing tasks for him at his request.
3. The May 2021 Helicopter Ride
- [72] Mr. Dutcyvich was cross examined extensively on the date of his final conversation with Mr. Monette, which he said was May 6, 2021. He described meeting at the Kamloops Coast Hotel on May 5, and then arriving the next day for a very early helicopter flight with Mr. Monette, his counsel Tyler McCuaig, and Mr. Sinclair to tour the ranches which were part of the deal. Other witnesses, however, indicated this helicopter tour took place on May 11, 2021. I will deal with this discrepancy later in my analysis.
- [73] Mr. Dutcyvich said he had a brief early morning conversation with Mr. Monette just prior to the helicopter tour, during which he advised Mr. Monette that his work was essentially done and he expected his \$12 million when the deal closed.
- [74] Mr. Monette says this conversation did not occur. During his testimony, he also sought to minimize Mr. Dutcyvich's role in the share purchase to the point where one has to ask why Mr. Dutcyvich was even part of this helicopter tour of the ranch lands. Indeed, when Mr. Monette was questioned about other helicopter tours that Mr. Dutcyvich took over the ranch lands, Mr. Monette said that he did not ask Mr. Dutcyvich to do so. Essentially, he said the other rides were Mr. Dutcyvich's choice and apparently unrelated to any assistance Monette Farms may have had as a result. I note that while at least one helicopter tour of the ranches was Mr. Dutcyvich's choice, it was part of his work to assist Monette Farms in purchasing the

BGCattle shares, as Mr. Dutcyvich said.

4. Closing of BGCattle Share Purchase

- [75] In an August 30, 2021 press release, Dundee indicated a share purchase agreement had been reached between BGCapital and Monette Farms. On October 21, 2021, Dundee issued a further press release indicating it had closed the sale of BGCattle. Mr. MacIntyre testified that he was happy upon seeing this news, as 3L Developments had done its job and Mr. Monette was able to complete the sale.
- [76] Mr. MacIntyre expected the \$12 million to be paid to 3L Developments once the deal closed. By November 1, 2021, however, this had not occurred, so Mr. MacIntyre sent an email seeking payment of the fee, attaching an invoice for the \$12 million fee. In this email, he indicated that he had already sent "multiple emails, and messages, regarding the above, but you failed to respond". On December 8, 2021, he sent a further email to Mr. Monette concerning the unpaid invoices. To date, the \$12 million has not been paid to 3L Developments.
- [77] When cross-examined about the parties to the \$12 million dollar contract, Mr. MacIntyre indicated the parties were 3L Developments, Mr. Monette, and Monette Farms. When cross-examined on who Mr. Dutcyvich said the agreement was between, Mr. MacIntyre said Mr. Dutcyvich did not provide the name of a legal entity, but rather referred to the new purchaser as Darrel or Monette. Mr. MacIntyre said Mr. Dutcyvich did not differentiate between Darrell or Monette Farms as "that is not how he speaks". Mr. Dutcyvich spoke of a deal between himself and Monette. Mr. MacIntyre said he did not know who the legal entity was until he received the term sheet, where the name Monette Farms was listed as the purchaser.

D. Mr. Monette

- [78] Mr. Monette commenced his land acquisition business in 2004, with the purchase of his first quarter of land. In 2009, he incorporated Monette Farms and is the sole owner and shareholder. By 2013, his business was sufficiently successful, so he commenced working full-time at Monette Farms. He diversified in 2016, purchasing lands in different locations including various parts of Western Canada and branching ultimately into the US.
- [79] By the fall of 2020, Monette Farms had up to 450 people working for it operationally and 55,000 seeded acres. Mr. Monette said his focus was on growth and land acquisition deals as part of his business.

- [80] In November 2020, Darren Sander, a real estate agent who Mr. Monette had previously worked with, advised Mr. Monette that he had someone who was interested in purchasing Mr. Monette's whole operation. Mr. Sander then introduced LBJ and Silver Stone Industries ("Silver Stone") to Mr. Monette. Silver Stone was a consultant to LBJ. The group met on November 27, 2020, to discuss a large transaction involving Monette Farms' lands, BGCattle, and another ranch in Saskatchewan.
- [81] Mr. Monette signed an NDA and Mr. Sanders apprised him of the price the group was willing to pay for Monette Farms: \$4,000 an acre, making for an essentially \$580 million deal. Mr. Monette testified that while he was not interested in selling at the time, he explored this option as he had been purchasing lands for \$3,000 an acre, and this proposal was for \$1,000 more an acre.
- [82] Mr. Sanders advised Mr. Monette that because LBJ "had a lot of money", the commission on the sale of Monette Farms should be increased to 5%. In addition, he added a value amount that raised the price to \$600 million. Combined with the 5% commission, this increased the deal value to \$630 million.
- [83] On December 2, 2020, Mr. Monette signed a brokerage contract with Mr. Sanders which set an asking price for the shares of Monette Farms at \$630 million. Mr. Monette said that because he was not really interested in selling and had never paid a commission as the buyer, he wished the price to, in effect, include the commission. Mr. Sanders then discussed this with the "LBJ people", Mike Lessing and Thomas Bunker.
- [84] On January 5, 2021, LBJ sent a structured proposal for the purchase of Monette Farms, along with a PowerPoint, to Mr. Monette. He reviewed it to assess whether they should do the deal or not. Mr. Monette noted that while LBJ may have had the money, they did not have the operational expertise, so Mr. Monette saw the deal as a way to further grow his company.
- [85] Mr. Monette met with Mr. Bunker and Mr. Lessing from LBJ, but he cannot recall this in detail. Mr. Monette asked his lawyer, Tyler McCuaig, and his tax accountant to accompany him to the meeting in February 2021. The group met, but due to unsatisfactory answers to questions about LBJ's funding for such a large purchase, Monette Farms did not sign a deal with LBJ in January or February 2021.
- [86] Mr. Monette said that, during the course of his discussions with LBJ, LBJ indicated that it had a number of other opportunities, reflected in letters of intent. Specifically, LBJ told Mr. Monette that they had a land acquisition opportunity with BGCattle, and were working with Mr. Dutcyvich on this. LBJ indicated that Mr. Dutcyvich was a cattle expert, and Mr. Bunker told Mr. Monette that he should speak with Mr. Dutcyvich about BGCattle. As Mr. Monette has family in Kelowna, he was very interested in the BGCattle opportunity as a legacy opportunity for his family.
- [87] Mr. Monette said Mr. Bunker introduced him to Mr. Dutcyvich at the end of February 2021.

- [88] When asked whether he had a discussion with Mr. Dutcyvich about being introduced to Dundee, Mr. Monette said, "I don't remember how that all went down". He did, however, say that they did not discuss any compensation or payment to Mr. Dutcyvich for acting as the purchaser's agent. Mr. Monette said that when LBJ introduced him to Mr. Dutcyvich, LBJ said that Mr. Dutcyvich worked for them and was a trusted consultant.
- [89] There is no dispute, that Mr. Dutcyvich set up the call to introduce Mr. Monette to BGCattle and Mr. Tochi Lewis-Asoyne of Dundee. This occurred in early March. Mr. Monette said he was interested in BGCattle, but before he "flew it", he needed an idea of where he was going. As a result, a few days before March 10 or 11, he had a phone call with Mr. Lewis-Asoyne. Mr. Lewis-Asoyne then sent an email to Mr. Monette and Mr. Dutcyvich, attaching an NDA for Mr. Monette to sign and thanking Mr. Dutcyvich for introducing Mr. Monette to BGCattle. I will discuss this email later in my reasons.
- [90] After Mr. Monette did a flyover of the lands involved in the potential BGCattle purchase on March 12, 2021, Mr. Monette signed a term sheet provided by BGCapital for \$76 million. Mr. Monette said this was always the price for BGCattle. Mr. Monette said he also signed an NDA to get access to the BGCattle data room. This was his first experience with a data room, as his previous purchases involved land only and no data room was necessary.
- [91] As I have set out, by this time, Monette Farms had also signed a term sheet on March 10, 2021, for LBJ to purchase 75% of Monette Farms' shares for \$630 million. Mr. Monette noted that despite there being red flags throughout their meeting, he was willing to see if the sale would happen, as a term sheet was only a promise and not a legally binding agreement. Mr. Monette said if he could get the appreciation of his farmland from \$3,000 per acre to \$4,000, he would take it.
- [92] After the term sheet between BGCattle and Monette Farms was signed in March 2021, Mr. Monette had access to the data room. He said that while Mr. Dutcyvich was on the weekly conference calls with Dundee, and there were a few texts and emails about lumber or cattle, that was the extent of Mr. Dutcyvich's work.
- [93] In mid-March, 2021, 3L Developments sent a direction to pay \$12 million to Mr. Monette. As I have set out, Mr. Monette then sent the email to Mr. Bunker of LBJ, asking what this was for. Mr. Monette said Mr. Bunker emailed him saying that the direction to pay should not have come to him, as LBJ would take care of it. As a result, Mr. Monette said he just left it. He did not raise it with Mr. Dutcyvich or 3L Developments. He said he was surprised, as he had never heard of this before. Also, in his view, there was no value to the \$12 million-dollar compensation, as the price had been set at \$76 million by Tochi for some time.
- [94] With respect to 3L Developments and Mr. Dutcyvich's assistance in this matter, Mr. Monette said that he would talk about the lumber with Mr. Dutcyvich quite a bit, but indicated that would be something they could do by contract once the deal closed.

- [95] Mr. Monette said he did not discuss Mr. Dutcyvich doing an investigation into the land. Rather, since Mr. Dutcyvich told Mr. Monette he was driving by the ranch properties on his way to Calgary, Mr. Monette simply asked him to keep him informed with respect to cattle counts. Mr. Monette said he had retained Ritchie Brothers to undertake that task, as per his financial institution's requirement that a third party undertake a cattle count.
- [96] Mr. Monette testified that Mr. Dutcyvich was always in contact with Dundee and that he was the liaison for both sides. Mr. Monette said Mr. Dutcyvich provided some value, but felt he was working as much for "Tochi and them as for myself". Mr. Monette quickly corrected himself and said "not for myself".
- [97] Overall, Mr. Monette is of the view that 3L Developments and Mr. Dutcyvich did not provide any services with respect to the purchase of the shares of BGCattle. While he conceded Mr. Dutcyvich may have provided a small service with respect to possible lumber operations, this was not a significant amount.

IV. ISSUE 1: EXISTENCE OF CONTRACT

- [98] The Court must first determine whether the plaintiffs have established a contract for the \$12 million fee, payable by the defendants, for providing services to the defendants, including introducing the purchaser to the vendor, and incurring expenses in the acquisition of BGCattle's ranching interests, along with some logging services.

A. Legal Principles

- [99] The plaintiffs essentially seek to establish the existence of an oral contract. As argued, the test for doing so is set out in a number of cases, including, *Du v. Ji*, 2016 BCSC 1319, *Clifford v. Flores*, 2004 BCSC 358, and *Le Soleil Hotel and Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303. The parties do not differ on the applicable principles, and both cite *Le Soleil*.
- [100] The test for whether the essential requirements of an oral contract came into place and were agreed to is objective. As noted in *Le Soleil*, the court must assess what the parties said and did and consider whether those words and actions establish an intent to be bound. Credibility of the witnesses plays a critical role.
- [101] In *Le Soleil*, Justice Dickson provides guidance on how to interpret oral contracts:
- [328] The interpretation of oral contracts turns on the same essential principles: *Lawson Graphics Pacific Ltd. v. Simpson* (1987), 12 B.C.L.R. (2d) 126. If the alleged agreement has not been reduced to writing, the Court must consider what the parties said and did and assess objectively whether, in context, their words and actions establish an intention to be bound: *Periscan Financial Services Inc.*, *supra*; *Leong & Associates*, *supra*. The genesis and aim of the transaction is an aspect of the relevant context for consideration: *Canada Square Corporation*, *supra*. The credibility of witnesses will be particularly important and differing

versions of events will increase the difficulty of establishing that an enforceable bargain was made: *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 CarswellBC 2947 (C.A.).

- [102] In *Hucul v. GN Ventures*, 2022 BCSC 144, Justice Marzari cited Justice Dickson and provided further helpful guidance on the enforceability and interpretation of oral contracts:
- [133] A contract does not need to be written or signed to be binding, even in complicated commercial contexts: *Crosse Estate (Re)*, 2012 BCSC 26.
- [136] The existence of an enforceable contract requires an objective intention to contract. The test is not what the parties subjectively intended but rather whether a reasonable person in that party's situation would believe that the party was assenting to the terms proposed by the other party. The actual state of mind and personal knowledge or understanding of the other party are not relevant. In assessing intention to contract, a court is not confined to the four corners of the alleged contract, but may look to all the circumstances, including evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties: *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at paras. 15-17.
- [139] The issue of whether the parties intended to form an enforceable contract and what is evidenced by their conduct is often entangled with the issue of whether there is certainty in the essential terms of an alleged contract. Courts cannot enforce an alleged contract if its terms are unclear. Where the terms are vague, ambiguous, or incomplete, it cannot be said that the parties came to a meeting of the minds: *Le Soleil* at para. 339. While it is not necessary for every conceivable matter to be resolved to create an enforceable contract, the law does not recognize a contractual "agreement to agree": *Le Soleil* at para. 330.

B. Position of the Parties

- [103] The plaintiffs allege that they were providing services to Mr. Monette, Monette Farms and 102 in purchasing the shares of BGCattle. The plaintiffs claim they are owed \$12 million and \$40,000 in fees for this service, pursuant to two alleged contracts, respectively. The alleged contracts are partly oral and partly written. One contract relates to the introduction, brokerage, and advising provided in relation to the purchase of BGCattle's shares. The second contract relates to advisory services provided in relation to logging activities to be carried out.
- [104] With respect to the first contract, Mr. Dutcyvich testified that he, on behalf of 3L Developments, made an oral agreement with the defendants to provide assistance and enable them to purchase the shares of BGCattle. Mr. Dutcyvich says the plaintiff had three essential obligations under this agreement: 1) to make the introduction to BGCapital; 2) to promote the defendants as a viable purchaser to BGCapital; and 3) to provide assistance, information, and/or analysis, as requested by the defendants, to settle the terms of the ultimate purchase. In return, the defendants were to pay the same fee as had been agreed

to by LBJ: \$12 million, plus out of pocket expenses incurred by the plaintiffs.

- [105] The plaintiffs allege that, as time progressed during their assessment of BGCattle's operations, the defendants cut the plaintiffs out of the process, prior to and up until the closing of the share purchase. The plaintiffs allege that the defendants then denied any obligation to the plaintiffs to provide them payment for their efforts.
- [106] The defendants maintain that the plaintiff's claims are ill conceived. Specifically, the defendants maintain that the plaintiffs had an agreement with a different legal entity, LBJ, and either failed to recover from that entity or did not attempt to do so, instead seeking to recovery from one or all of Darrel Monette (in his personal capacity), Monette Farms, or 102. The defendants say there was no contract between these parties, as there was never a meeting of the minds with respect to any contractual terms or entitlement. Accordingly, the only basis upon which the plaintiffs could seek compensation is through quantum meruit or unjust enrichment. The defendants argue, however, that this claim is also bound to fail, as there was no juristic reason for Mr. Dutcyvich to have completed this work, since the contract he had was with LBJ.
- [107] In response to the plaintiff's claim that they were acting as purchaser's agent for the defendants, the defendants say that, in January 2021, the plaintiffs instead began acting on behalf of the seller of the BGCattle shares and its ranching interests, helping them to find a purchaser. Alternatively, the defendants say the plaintiffs simply began acting in order to get a deal completed, likely in the hopes that one or more of the parties may help ease the sting of losing the \$12 million that LBJ was unable or refused to pay.
- [108] Further, the defendants submit that if the plaintiffs were the "purchaser's agent" for Monette Farms, as they claim to have been, they would have been duty bound to assist the purchaser in getting the best possible price, rather than a fair price for all sides. If they were the purchaser's agent, this means they were acting in a clear conflict of interest, as they also assisted the seller on issues such as the cattle count and human resources--two concerns Monette Farms raised.
- [109] The defendants also say that the plaintiffs' version of events does not make business sense and is simply not believable, as its witnesses are not credible or reliable.
- [110] Specifically, regarding the claim for breach of contract, the defendants submit that none of the five key elements required for establishing a contract are in place: offer, acceptance, consideration, intention to be bound, and certainty of terms. The defendants point to the fact that, despite extensive questioning during direct and cross examination, Mr. Dutcyvich did not provide any evidence of what the terms of the alleged contract were at the time of his discussion with Mr. Monette. Specifically, he provided no evidence that the terms of the contract included an introduction to BGCattle, the promotion of the defendant as a viable purchaser, and the provision of assistance, information, and analysis to settle the terms of the ultimate purchase.

[111] Furthermore, the defendants say that the plaintiffs cannot provide evidence of who the parties were, and that there is thus no certainty as to who the parties were to the alleged contract.

C. Application of the Legal Principles

[112] Starting first with the certainty of terms, I note that Mr. Dutcyvich did testify that during their first conversation in March 2021, Mr. Monette asked for his assistance both with respect to the introduction to BGCattle and more generally to assist with purchasing BGCattle in exchange for a fee of \$12 million, which would be paid by Mr. Monette and Monette Farms to Mr. Dutcyvich and his company, 3L Developments. I conclude that the term to promote the defendants as viable purchasers to BGCattle was implicit in this request.

[113] With respect to this latter term, there was specific evidence on this point in the form of a request by Mr. MacIntyre for financial information from Mr. Monette to ultimately support Mr. Monette and Monette Farms' financial capability with respect to this transaction. Monette Farms' financial viability was indeed relayed to BGCapital by the plaintiffs. This directly resulted in the ability of Monette Farms to be taken seriously as a purchaser by BGCapital. This was especially important because of BGCapital and 3L Developments most recent experience with LBJ, whose reputation with BGCapital had been seriously adversely impacted by financing issues.

[114] I also note these discussions were referenced in a March 16, 2021 email from Mr. MacIntyre to Mr. Monette which noted "As per your discussion with David ". I will deal with the details of this shortly.

[115] Mr. Monette denies that any such agreement had been discussed, let alone reached, involving the very specific fee of \$12 million. While Mr. Monette admitted he did not recall any details from his discussion with Mr. Dutcyvich, he was adamant that he did not agree to pay \$12 million to the plaintiffs. In his testimony, Mr. Monette said that this is a very large, specific number that he would have remembered.

[116] Furthermore, the defendants point out that the plaintiffs relied on a single document to support its version of events: the direction to pay that Mr. MacIntyre sent to Mr. Monette in March 2021, that Mr. Monette did not sign.

[117] I have already set out the relevant email correspondence that followed with respect to the direction to pay. For clarity, I have repeated this correspondence below:

· On March 16, 2021, Mr. MacIntyre sent an email to Mr. Monette with the subject line "Agreement". Attached to the email was a direction to pay, which referenced a brokerage fee of \$12 million to be paid on the closing of the "Share purchase of Blue Goose Cattle Company from Dundee Corporation by Monette Farms". Specifically, the email said: "As per your discussions with David, please see the attached and return via email once signed."

- On the same day, Mr. Monette, who was confused by this email, forwarded it to Mr. Bunker of LBJ, saying, "Is this what you are paying David? Not sure why I got it."
- Mr. Bunker replied to Mr. Monette by email, copying Mr. MacIntyre, saying, "This email you received from 3L Developments has nothing to do with you or Monette Farms Ltd. and should not have been sent to you. LBJ Capital Inc. will pay the fees to 3L Developments not you. Please disregard the email." Mr. Monette presumed this was an error and continued to investigate the purchase of BGCattle shares.
- Mr. MacIntyre at some point, sent an email to Mr. Monette and said: "Good afternoon Darrel. I just spoke to David and he wanted me to send you a note to disregard the draft agreement that was sent earlier today. LBJ Capital has indicated that they will honour the previously signed agreement between 3L and themselves."

[118] The defendants say this confirms that if there was an alleged contract, it was objectively at an end. Furthermore, the defendants say there could not have been an agreement because Mr. MacIntyre included "draft" in his email.

[119] This series of documents is troubling and impacts the issues in a number of ways. First, its existence illustrates that the parties did indeed discuss the terms of a deal and a fee in the amount of \$12 million. That amount is set out in the emails, and while Mr. Monette says he was confused by the email and forwarded it to LBJ, the email establishes the existence and reference to the specific amount in issue. This casts doubt on Mr. Monette's testimony, in which he said that no amount was discussed because he would have remembered an amount of \$12 million. In reality, that amount was set out in a document that he read and forwarded on to LBJ.

[120] Second, the documents establish that Mr. Monette was not truthful in saying to Mr. Dutcyvich that he essentially wanted to pursue this transaction himself or "go it alone", and not as part of LBJ. This adversely impacts Mr. Monette's credibility. Mr. Monette immediately forwarded the email to Mr. Bunker, who was part of LBJ. Mr. Monette clearly continued to be part of a transaction that included LBJ, which has been suggested to be "a front", as he knew BGCattle would not deal with LBJ.

[121] Mr. Monette's enmeshment with LBJ is reflected in a detailed email from Mr. Bunker to him on January 5, 2021. This email outlined "the general terms of agreement between LBJ Capital and Monette Farms". That email listed and outlined a number of matters, including:

LBJ Capital is currently under contract with Dundee Capital of Toronto to purchase all the outstanding share in Blue Goose. LBJ Capital will roll these shares into Monette Farms at cost and upon merger of all companies the fair market value for Blue Goose is estimated to be at CDN \$185, 000.00.

[122] It noted further:

It is understood and agreed that you will be the managing partner of Monette Farms and LBJ Capital will be the financial partner. Decisions to expand or do further acquisitions will be made jointly.

[123] On January 5, 2021, Mr. Monette then directed his legal team to draft up a letter of intent with respect to the share purchase agreement.

[124] A term sheet between Monette Farms and LBJ was in existence by March 2, 2021, and signed on March 10, 2021. That term sheet included general conditions that:

LBJ Capital Inc will cause to be incorporated all of its other farming operations and other farm holdings located in Saskatchewan, Manitoba and British Columbia into Monette Farms Ltd and will further cause a consolidation of all companies, to allow for a re-evaluation of the assets to current market value.

[125] In the meantime, Mr. Monette knew that BGCattle would no longer deal with LBJ, as it had not closed the previous deal. Mr. Monette contacted Mr. Dutcyvich in late February/early March to be introduced to BGCattle so Monette Farms could pursue purchase of BGCattle's shares. While the defendants say LBJ introduced Mr. Dutcyvich to Mr. Monette, I prefer Mr. Dutcyvich's evidence that Mr. Monette contacted him and asked him to assist Monette Farms by investigating the acquisition of BGCattle shares and introducing him to BGCattle/Dundee for that purpose.

[126] Mr. Dutcyvich was very specific and not shaken on cross-examination about his evidence that Mr. Monette said he no longer wanted to deal with those "three buggers" (meaning representatives of LBJ and Silver Stone) and instead wanted to pursue the purchase of BGCattle alone. Indeed, he said this more than once. Mr. Dutcyvich told Mr. Monette he would help him, but Mr. Monette had to demonstrate that Monette Farms had sufficient financial capability to buy the shares. As Mr. Dutcyvich and Mr. MacIntyre testified, neither wanted to waste their or 3L Developments time.

[127] Mr. Dutcyvich testified that, as part of this conversation, he told Mr. Monette that he wanted 3L Development to be paid a fee. He said, "you know the deal" to which Mr. Monette said yes. Mr. Dutcyvich said the fee was \$12 million, to which Mr. Monette said yes, he would pay that amount.

[128] On March 5, 2021, Mr. Monette provided Mr. MacIntyre with information as to the financial health of Monette Farms, as per 3L Developments request. This adds credence to the testimony of both Mr. Dutcyvich and Mr. MacIntyre, as Mr. Monette provides no other reason as to why he would do so.

[129] By March 8, 2021, Mr. Dutcyvich introduced Mr. Monette to Mr. Tochi Lewis-Asonye of BGCattle. This is evidenced in an email from Mr. Tochi Lewis-Asonye to Mr. Monette, attaching an NDA to be signed and says, "Pleasure connecting with you and thanks again David [Dutcyvich] for the introduction."

[130] By March 14, 2021, Mr. Monette signed a term sheet for acquisition of all the shares of BGCattle and Lambert Creek Organic Meats.

1. Credibility

[131] In view of this tangled history, it is disingenuous of Mr. Monette to indicate this deal was his initiative and a deal of Monette Farms alone. It also detracts from his testimony that he was "confused" when he received the direction to pay from Mr. MacIntyre. LBJ remained involved in seeking to acquire the shares of BGCattle with Mr. Monette, and Mr. Monette deliberately did not disclose this, as he knew that BGCattle refused to engage with LBJ since they considered LBJ "dodgy". While Mr. Monette asserted he had no duty to disclose this information, this behaviour is pertinent to an assessment of credibility, and in turn the issue of the existence of an oral contract.

[132] Further to the issue of credibility, I note Mr. Dutcyvich gave his evidence in a direct forthright manner. While he occasionally was not the best with dates and documents, this did not detract from his overall testimony. As he said, and as is evident in his testimony, he conducts business by phone and verbal discussions and considers his word as his bond.

[133] While much was made of a difference in the date of a final fly-over helicopter meeting in May, I do not find this adversely affects Mr. Dutcyvich's credibility or testimony. The date in and of itself is not important, and Mr. Dutcyvich was consistent with what occurred that day when pressed in cross-examination. I conclude that Mr. Dutcyvich did reference the \$12 million fee to Mr. Monette just prior to the fly-over. While Mr. Monette denies this conversation took place, he simply has no answer as to why Mr. Dutcyvich was on this fly-over. His denial seems to be aimed at minimizing and denigrating Mr. Dutcyvich's efforts in the sale and purchase of BGCattle.

[134] I do not find the testimony of Mr. Sinclair or Mr. McCuaig helpful in this context. Overall, Mr. Sinclair's evidence did not relate to the contentious issues in question, but rather set out background with respect to BGCattle that was not integral to matters at issue. Mr. Sinclair's references concerning the helicopter ride were not pertinent to the disputed issues and simply demonstrated an inexplicable antipathy to Mr. Dutcyvich. Mr. McCuaig similarly provided little evidence determinative of critical matters in dispute. While he agreed it would be material to not disclose to a counterparty that a party with whom the counterparty refused to deal was involved in a transaction, his comment that he did not observe a conversation between Mr. Monette and Mr. Dutcyvich at the commencement of the May helicopter ride does not assist one way or the other.

[135] Mr. MacIntyre was concise, direct, and precise in his testimony. He was clear in the description of the work he carried out with respect to the financial analysis of the data room and in his description of the role of the plaintiffs in their efforts as purchaser's agent. He did not embellish and admitted facts potentially adverse to the case where necessary.

[136] As between Mr. Dutcyvich and Mr. Monette, I conclude Mr. Dutcyvich is the more credible witness. In addition to the above, Mr. Monette admitted that he knew, before he was introduced to 3L Developments and BGCattle, that BGCattle and BGCapital would not deal with LBJ, and that he was in effect a "front" for LBJ in its dealing with BGCattle to buy the shares. To purport to deal with BGCapital and the plaintiffs in the name of Monette Farms, without disclosing the nature of the transaction whereby LBJ, the people that BGCapital thought were untrustworthy and with whom BGCapital refused to deal, was a material non-disclosure. I agree that the failure to disclose that fact constituted deceit by half truth. As noted at para. 16 of *C.R.F. Holdings Ltd. v. Fundy Chemical International Limited*, 21 B.C.L.R., 1980 CanLII 586 (B.C.S.C.), when quoting Spencer Bower on Actionable Misrepresentation, 3rd (Turner) ed. (1974) at p. 94:

"To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a lie, and one of the most dangerous and insidiously forms of lie".

[137] The duplicitous behaviour and statements of Mr. Monette are not actionable in this case, but they did induce the plaintiffs to deal with the defendants. The plaintiffs claim that the contract was entered into on the understanding that Monette Farms or its nominee would buy the shares of BGCattle alone, without influence from LBJ. This did not happen. The plaintiffs argue that this reflects directly and adversely on Mr. Monette's credibility, and I agree. This also leads me to prefer the testimony of Mr. Dutcyvich and Mr. MacIntyre where it differs from that of Mr. Monette.

[138] As set out, credibility is an essential factor in the determination of the existence of an oral agreement: Du at paras. 60-64; *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-187; *Le Soleil* at para. 328. For the foregoing reasons, Mr. Monette's evidence denying the existence of an oral contract lacks credibility. I accept Mr. Dutcyvich's evidence on the existence of the oral agreement for services as part of the purchase of BGCattle.

2. Enforceability of Contract

[139] The jurisprudence is clear that an enforceable contract can be established on the basis of oral terms. The terms of such an oral contract must, however, be clear, established, and certain, which can sometimes be challenging. As noted in *Le Soleil*, "[i]f the alleged agreement has not been reduced to writing, the Court must consider what the parties said and did and assess objectively whether, in context, their words and actions establish an intention to be bound": at para. 328.

[140] As asserted by the plaintiffs, their three essential obligations under the contract were first, to introduce the defendants BGCapital, second, to promote the defendants as viable purchasers to BGCapital, and third, to provide whatever assistance, information, and analysis requested by the defendants in settling the terms of their ultimate purchase of BGCattle's shares. In return, the defendants were to pay the same amount as had been agreed to by LBJ as a fee: \$12 million, plus out of pocket expenses incurred by the plaintiffs,

upon closing of the share purchase.

- [141] As noted above, Mr. Dutcyvich agreed to introduce Mr. Monette to BGCapital, but Mr. Monette had to first demonstrate he had sufficient financial capability to buy the shares. Once Mr. Monette provided this financial information to 3L Developments, on March 5, which was then vetted by Mr. MacIntyre, Mr. Dutcyvich introduced Mr. Monette to BGCapital, on the basis that he was a realistic financially vetted buyer. The history of LBJ and BGCapital over the past year, as indicated in emails from January, demonstrate the importance of this term and introduction, whether or not Mr. Monette acknowledged that in his testimony.
- [142] 3L Developments then assisted Monette Farms in their drive to purchase the shares by providing information gathered previously, continuing efforts to assess and ensure the value of the company, and providing unique perspectives with respect to the cattle, equipment, and logging operations, based on Mr. Dutcyvich's extensive experience in these areas.
- [143] The March 2021 email exchange set out above arguably creates some uncertainty about who was to pay the plaintiff this \$12 million fee, which is a fundamental term of the contract. However, I conclude that these emails do not fundamentally undermine the existence of the term that the plaintiffs were to be paid a \$12 million fee upon the closing of the sale of BGCattle's shares.
- [144] With regard to who was to pay the fee, the plaintiff argues this email exchange does not create uncertainty. They allege that the defendants were always to pay the \$12 million fee, and the direction to pay did not need to be signed and returned by Mr. Monette. The plaintiffs say that, for whatever reason, LBJ said they were going to pay, but it was unclear what LBJ was going to pay for. The plaintiffs also say they were unaware of the March 10 term sheet with respect to the purchase of Monette Farms' shares by LBJ for \$425 million (reduced from the original asking price of \$630 million). As the plaintiffs argued, LBJ was an interloper making another vacant promise about paying some kind of fee they were contractually bound to.
- [145] I conclude that LBJ could not affect the contract the plaintiffs made with the defendants by virtue of this email exchange. If the \$12 million was ultimately not paid, the plaintiffs would seek recompense from the defendants as the party to the contract. The March 16 email does not alter the verbal contract which I have found to be in place based in the original conversation between Mr. Dutcyvich and Mr. Monette in early March. As a result of this contract, the remedy for non-payment would be against the defendants, Mr. Monette and Monette Farms.
- [146] After the email exchange, both parties appeared to ignore the issue of who would pay the \$12 million, assuming it had been taken care. Both parties continued their respective work.

[147] Essentially, the plaintiffs say that the evidence demonstrates that Mr. Monette agreed to the \$12 million fee, as it was his expectation the fee would be paid from the money acquired through LBJ's purchase of Monette Farms, pursuant to the March 10, 2021 term sheet. Put differently, Mr. Monette's expectation was that LBJ would buy Monette Farms. Monette Farms would then be capitalized to buy BGCattle's shares and pay the \$12 million fee to 3L Developments. As a result, the plaintiffs say that Mr. Monette did not care that he was binding Monette Farms to the same fee obligations that LBJ had incurred, as ultimately it would be LBJ who would pay by virtue of the deal between Monette and LBJ, in which Mr. Monette would be receiving \$300 million.

[148] I accept the truth of this proposition, which further confirms my finding that Mr. Monette knew of and intended to enter the contract for a \$12 million fee with Mr. Dutcyvich and 3L Developments. In addition, I note as per the exchange of texts between Mr. Dutcyvich and Mr. Monette on April 28, 2021, it appeared LBJ had promised to provide funds to Mr. Monette and Monette Farms as part of the dealings between LBJ and Mr. Monette. This however does not affect the existence of a contract already in place between 3L Developments and Mr. Monette and Monette Farms.

[149] In arguing that no contract exists, the defendants also maintain that Mr. Dutcyvich was not the purchaser's agent, but was instead the seller's agent. They point to a number of factors in support of this argument, including that Mr. Dutcyvich said he was trying to achieve a fair price for both the parties. I note first that there is no real dispute that 3L Developments was initially acting for LBJ in the purchase of BGCattle. By December 2020, however, BGCattle was frustrated with the pace of closing and no longer wished to deal with LBJ. In the new year, on January 4, 2021, Tochi wrote an email to Mr. Dutcyvich and Mr. MacIntyre, saying:

I get the sense that 3L was still keen on working with Dundee to close the Blue Goose transaction...we can chart out concrete sets based on your engagement with the new financiers all we [BGCapital] need is for you to provide documentary evidence that the new/entity group is willing and able to finance the acquisition.

[Emphasis added.]

[150] I do not accept that 3L Developments was not working for Monette Farms as purchaser's agent because it sought a fair price for both parties. A fair price for both parties incentivizes a deal, which is what both parties wanted. The email set out above supports the view that 3L Developments was working for the purchasers. As BGCapital was a willing seller, it needed a purchaser and identified the problem with the previous deal, which did not complete. In reply to the email from BGCapital that it would not deal with LBJ, both Mr. MacIntyre and Mr. Dutcyvich said and indicated that they were now actively searching for a purchaser in order to recoup some of their losses on the previous arrangement. As above, BGCapital references Mr. Dutcyvich and 3L Developments remaining "actively involved" with the new purchasers and providing them his expertise.

- [151] As noted by the defendants, the Supreme Court of Canada recently articulated the law of contractual formation in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, stating at para. 35 that for a binding contract to be formed, there must be "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration". The Court further stated that when focusing on the intention requirement, the test is "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": para. 36, citing G. H. L. Fridman in *The Law of Contract in Canada* (6th ed. 2011), at p. 15. The defendants say that, in this case, there was no intention to create a legal relationship, and no certainty of parties or subject matter.
- [152] I do not agree. In this case, there is certainty of parties and subject matter. As I have set out, I find that it was sufficiently certain that the parties to the contract were the plaintiffs and defendants, as reflected in the initial conversation between Mr. Dutcyvich and Mr. Monette. The parties were Mr. Dutcyvich and his selected corporate entities and Mr. Monette and his selected corporate entities. The subject matter was the introduction and assistance of Mr. Monette and Monette Farms to BGCapital for the purchase of the shares of BGCattle.
- [153] The subject matter included the services that 3L Developments promised to provide: to introduce the defendants to BGCapital, to promote the defendants as viable purchasers to BGCapital, and to provide whatever assistance, information, and analysis requested by the defendants in settling the terms of their ultimate purchase of BGCapital shares.
- [154] I also find that there was consideration, being the agreement to pay a fee of \$12 million and the promise to provide the above work. Mr. Monette sought out Mr. Dutcyvich, as he wished to purchase the shares of BGCattle and needed an introduction to the seller of the shares. In addition, he sought to utilize Mr. Dutcyvich's knowledge and expertise. Mr. Dutcyvich required Mr. Monette to establish he had the money to fund this expensive purchase, and if he did, then Mr. Dutcyvich would assist him. Mr. Monette agreed to pay the \$12 million if the deal closed. Monette Farms then used Mr. Dutcyvich to make the important introduction.
- [155] Matters proceed from there, including the work done by Mr. Dutcyvich. While Mr. Monette seems to have sought to minimize and denigrate Mr. Dutcyvich's work and contribution in this matter, he noted in his testimony that this was his first deal involving ranching operations. It is consistent with that reality that he would need the experience of someone like Mr. Dutcyvich, who had years of experience in this area. It is once again disingenuous and contradictory of Mr. Monette to indicate otherwise.
- [156] I agree as set out in the jurisprudence, including the recent SCC case of *Ethiopia Orthodox Church*, that the test for an intention to create legal relations is objective. In this matter, I conclude overall that the objective evidence supports the plaintiff's claim in contract and the intention of both parties to create legal relations. This includes the objective reality of Mr. Dutcyvich's introduction of Mr. Monette to BGCapital. There is no quarrel that

occurred.

[157] The history of financial delay by LBJ with the resulting requirement of 3L Developments that Monette Farms demonstrate its financial ability to close such a large deal, is reflected in the request and receipt of Monette Farms' financial documents by 3L Developments as set out in the documentary evidence. This also provides objective evidence of the contract formed between them.

[158] In addition, the exchange of emails that referenced a fee of \$12 million, along with the continued work of Mr. Dutcyvich as reflected his emails of April and May 2021 from Mr. Lewis-Asoyne to David Dutcyvich and James MacIntyre of 3L Developments, along with David Monette, highlight due diligence and closing tasks with respect to the sale of BGCattle. This included the last helicopter ride in May 2021 and an exchange of texts between Mr. Dutcyvich and Mr. Monette in April 2021. This all confirms the objective reality that Mr. Dutcyvich was working for Monette Farms to assist it in purchasing the shares of BGCattle.

[159] I am persuaded that there was an intention to create a legally enforceable contract as the objective reality confirmed these services were to be done for a fee, which was agreed to orally and which fee was also referenced in an email exchange. The services were performed and the sale of the shares ultimately closed.

[160] All this evidence establishes that the parties indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of the contract.

[161] I am however ultimately not persuaded of the certainty of the terms with respect to the second contract concerning logging services. While the parties are clear and the provision of advice is evident concerning as a term, the terms of payment for the logging services, which I conclude is a fundamental term is not clear. I will deal with this as part of the alternative claim in quantum meruit.

D. Summary on Contract Enforceability

[162] For ease of reference, I will now summarize my conclusions on the existence and enforceability of the contract in this instance.

[163] As I have set out above, the parties agree with respect to the key principles of contract law to be applied in the case at hand. A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration": *Ethiopian Orthodox Tewahedo Church of St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 35. The contract does not need to be written or signed to be binding, even in complicated commercial contexts: *Crosse Estate (Re)*, 2012 BCSC 26 at para. 29. Additionally, the essential terms of the contract must be sufficiently certain and agreed to by the parties: *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34.

- [164] The test for determining the intention to create legal relations is objective. If the alleged agreement has not been reduced to writing, the court must consider what the parties said and did, and assess objectively whether, in context, their words and actions establish an intention to be bound: *Le Soleil* at paras. 324, 328. In doing so, the court may be required to determine whether the parties intended to create a binding contract or simply reached an "agreement to agree" in the future. Justice Dickson helpfully elaborates on this in *Le Soleil*, as follows:
- [330] It is not necessary for every conceivable matter to be resolved between the parties before an enforceable contract is created. The law does not, however, recognize an "agreement to agree". The question for determination is whether the parties have reached agreement on all matters that are vital or fundamental to the arrangement or whether they intended to defer legal obligation until a final agreement has been reached: *Boult Enterprises Ltd. v. Bissett* (1985), 1985 CanLII 260 (BC CA), 21 D.L.R. (4th) 730.
- [332] If agreement on all essential terms is established, on occasion the law will permit certain terms to be implied to give business efficacy to the bargain
- [334] In order to determine whether a binding contract was created the Court may consider both the parties' conduct leading up to and following conclusion of the alleged agreement. For example, if the parties have acted on their understanding of agreement and incurred expenses the Court may be reluctant to find there was only a non-binding agreement to agree: *Leong & Associates*, supra. On the other hand, if further negotiations took place after the alleged agreement was concluded it may suggest that definitive agreement was never achieved. Subsequent negotiations are not, however, necessarily inconsistent with a fully formed contract: *Ridgeway-Pacific Construction Ltd. v. United Contractors Ltd.*, [1978] BCJ. No. 478 (SC).
- [Emphasis added.]
- [165] In *Hucul*, Justice Marzari discussed the degree to which terms must be certain to find an intention to create legal relations exists, noting that these two requirements are often intertwined:
- [139] The issue of whether the parties intended to form an enforceable contract and what is evidenced by their conduct is often entangled with the issue of whether there is certainty in the essential terms of an alleged contract. Courts cannot enforce an alleged contract if its terms are unclear. Where the terms are vague, ambiguous, or incomplete, it cannot be said that the parties came to a meeting of the minds: *Le Soleil* at para. 339. While it is not necessary for every conceivable matter to be resolved to create an enforceable contract, the law does not recognize a contractual "agreement to agree": *Le Soleil* at para. 330.

[140] The overarching question in the certainty of terms analysis is whether the parties have agreed on all matters that are "vital or fundamental" to the arrangement or whether they intended to defer legal obligations until a final agreement has been reached: *Le Soleil* at para. 330. What constitutes an "essential term" is fact specific and is not readily addressed in the authorities: *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2013 BCSC 866 at para. 188.

[141] If agreement on all essential terms is established, courts may imply some terms to give business efficacy to the bargain. However, courts should not imply a term unless it is necessary, and the courts should not imply terms which would effectively rewrite the contract or contradict its other terms: *Zeitler v. Zeitler (Estate)*, 2010 BCCA 216 at paras. 25-26.

[Emphasis added.]

[166] In the case at hand, I am satisfied on the evidence that Mr. Dutcyvich and Mr. Monette entered into an oral contract during their initial conversation in early March 2021. I am satisfied that the vital or fundamental terms of the contract were agreed to and sufficiently certain--essentially, that Mr. Dutcyvich would assist Mr. Monette in purchasing the shares of BGCattle in exchange for a fee of \$12 million, so long as Mr. Monette demonstrated that Monette Farms had sufficient financial capability. These promises operated as the consideration supporting the agreement.

[167] I am also satisfied that the specific obligations flowing from this assistance, which Mr. Dutcyvich testified to, were agreed to as part of the contract between the parties: to introduce Mr. Monette to BGCapital, to promote him and Monette Farms as viable purchasers to BGCapital, and to provide whatever assistance, information, and analysis requested by the defendants in settling the terms of the ultimate share purchase. This is supported by the evidence--specifically, Mr. Dutcyvich's testimony, Mr. MacIntyre's request for Mr. Monette's financial information (which Mr. Monette complied with), and the subsequent conduct of Mr. Dutcyvich and Mr. MacIntyre indeed providing assistance and support to Mr. Monette by assessing BGCattle's assets.

[168] The parties to this contract were Mr. Dutcyvich and Mr. Monette and included their respective chosen corporate entities. In this case, Mr. Dutcyvich chosen corporate entity for tax reasons was 3L Developments. Mr. Monette's chosen entity was Monette Farms which ultimately assigned the purchase of the BGCattle shares to 102134752 Saskatchewan Ltd for business reasons. None of this is unusual in a complex corporate transaction. I find that LBJ was not party to the contract at the time of its formation. Mr. Monette made an agreement with Mr. Dutcyvich and his chosen corporate entity and Mr. Monette specifically told Mr. Dutcyvich that he no longer wanted to deal with LBJ and wanted to pursue the purchase of BGCattle shares on his own.

- [169] Further, I do not find that the email exchange later in March 2021 demonstrates that there was a contract between LBJ and Mr. Dutcyvich/3L, rather than between Mr. Monette and Mr. Dutcyvich/3L. A third party providing the funds to a contracting party, in order to help the contracting party to fulfill a contractual obligation, does not make that third party part of the contract. Put differently, the source of the \$12 million that Mr. Monette agreed to pay does not change the fact that he was the contracting party that entered into the oral agreement with Mr. Dutcyvich. Mr. Dutcyvich reached a meeting of the minds on the essential terms of an agreement with Mr. Monette and Monette Farms as I have indicated above.
- [170] Finally, and as I have said, I find that there was an objective intention by the parties to create a legally enforceable contract. This is evidenced by the oral agreement made in March 2021, the subsequent conduct of the parties according to the terms of that agreement (including the introduction, promotion, work, and other services undertaken by 3L), and the reference to the \$12 million figure in the March 2021 emails. While Mr. Monette sought to minimize the efforts of Mr. Dutcyvich and 3L Developments, the evidence establishes that the introduction by itself was critical to BGCapital entertaining any dealings at all with Mr. Monette and Monette Farms in view of recent history, and Mr. Dutcyvich continued to provide advice and information to Mr. Monette at its request. All of this facilitated Mr. Monette's ultimate purchase of the BGCattle shares - his specific goal at the time, which he achieved.

V. ISSUE 2: Quantum Meruit Claim

- [171] With respect to the quantum meruit claim, the plaintiffs rely upon *Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd.*, 2010 BCSC 1186 for a number of propositions, including the elements and calculation of quantum meruit claim when a court finds a contract is no longer binding. The plaintiffs submit that should the court conclude a contract is not in effect in this case, it has a wide discretion under the equitable principle of quantum meruit to award amounts equivalent to the amounts claimed in contract above. Although I have found a valid contract, I will deal with this alternate claim.
- [172] The defendants argue the plaintiffs are not entitled to compensation pursuant to quantum meruit or unjust enrichment. The defendants say the plaintiffs fail the three-part test for quantum meruit that must be made out: first, an enrichment; second, a corresponding deprivation; and third, no juristic reason for the enrichment. The defendants say there was a juristic reason for the enrichment, but this enrichment was derived by LBJ. The defendants say that the plaintiffs had a contractual relationship with LBJ to perform certain services which would have entitled them to a substantial sum. The defendants say that all of the work was done pursuant to an agreement with LBJ, and there was no assignment of that agreement to Monette Farms.

[173] In addition, the defendants say the plaintiffs had a relationship with Dundee, wherein they attempted to find a buyer for the shares of BGCattle and continued to work in this relationship. The defendants say this is the opposite of acting as a purchaser's agent, for which a fee or compensation would be earned.

[174] The defendants also say Mr. Dutcyvich did not substantially reduce the price of BGCattle's shares, as the price became \$76 million for LBJ pursuant to a contract. Therefore, to the extent the plaintiff completed any services, this was pursuant to an agreement with other separate legal entities.

[175] Alternatively, the defendants say 3L Developments and Mr. Dutcyvich would be entitled to payment only for the small amount of work completed--being to review some cattle counts and timber. Any amounts for an introduction to BGCattle are not due and owing from Monette Farms via contract or unjust enrichment. Instead, the defendants maintain that Mr. Dutcyvich can attempt to collect from LBJ or Dundee.

[176] In pursuing their argument, the defendants say the SCC has adopted a "straightforward economic approach" in assessing enrichment and deprivation, leaving moral and policy question for the third stage of the analysis: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 31.

[177] The BCSC recently summarized the law in *Hucul*. As part of that case, the Court noted, at para. 243:

where there is controversy in the evidence as to whether Mr. Hucul was contributing to GN or Mr. Colvin or both, it is important to clearly identify the nature of the enrichment being claimed the most useful analytical device for distinguishing cases where recovery is appropriate or not, ask whether the defendant had been genuinely or "incontrovertibly benefited by the conferral in question

[178] In this case, the defendant argues that they did not receive any genuine benefit, as there was no price reduction achieved by the plaintiffs.

[179] I disagree. The facts show the fundamental benefit to the defendants was Mr. Dutcyvich's introduction of Mr. Monette to BGCattle and his knowledge of the entity. This was particularly beneficial in the circumstances at the time, wherein BGCattle was seemingly skittish about buyers given its experience with LBJ. Mr. Monette relied upon the good will and trust that 3L Developments and Mr. Dutcyvich built up with BGCattle, and leveraged that to get an introduction and move forward with a purchase deal. This introduction was instrumental in the deal moving forward. Without that, given his ties with LBJ (albeit hidden at the time), there is no doubt Mr. Monette would have faced obstacles in securing a deal with BGCattle and may not have been successful in the purchase of its shares.

- [180] The defendants do not seriously contest the plaintiff's corresponding deprivation and move to the third element: absence of a juristic reason. The defendant points out that the plaintiff must establish there is no juristic reason to deny recovery, such as the existence of a contract or other obligation. In this case, the existence of a contract with LBJ is a juristic reason to deny recovery for unjust enrichment. Benefits conferred under contract cannot be extracted from a stranger who may have benefited from such performance.
- [181] The plaintiff points out that in *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215, the Court of Appeal considered the distinction between contractual quantum meruit and restitutionary quantum meruit. The former is a consequence where a contract existed but an essential term, such as price, is omitted. The latter arises when no enforceable contract came into existence. The plaintiff notes that while the basis of recovery is said to be different between these two claims, the distinction may well be without a difference, as per para. 12 of *Infinity*.
- [182] The plaintiff says it is content to proceed on the basis of that they are entitled to restitutionary quantum meruit. The oral contract the plaintiffs assert does not lack primary or essential terms, as the price was fixed and the service terms were simple.
- [183] The plaintiff says the leading case in BC on the issue of an agent's fee in relation to the sale of shares is the *Craigdarloch* case. In that case, the plaintiff had contractual arrangements with the personal owner and another corporation in a complex web of companies. Following the sale of operating company's shares, the plaintiff was unable to recover a fee, as it was denied payment by the vendor corporation and the ultimate principal of the group. The plaintiff sued on the asserted contract and alternatively in quantum meruit. The Court denied recovery in contract, as it found the contract to be voluntarily terminated. However, the plaintiff was awarded 10% of the value of the share transaction (being the amount payable to the owner) as determined by the court. The Court concluded the plaintiff's activities were effective and material to the success of the sale, and that the plaintiff had not only introduced the buyer, but provided merchant banking services that induced the buyer to complete.
- [184] The plaintiff also notes that the court in *Craigdarloch* referred to the BC Court of Appeal judgement in *Malik (Estate of) v. Stat Petroleum Corporation*, 2009 BCCA 505, which noted that a finder's fee may be payable not just in real estate transactions, but also in investment transactions and mergers and acquisitions--as is the situation in this case.
- [185] The plaintiff points out that the role played by 3L Developments and Mr. Dutcyvich is along the lines of the role that the plaintiff played in *Craigdarloch*, as 3L Developments went beyond the introduction to BGCattle, conducting considerable analysis and taking steps in drawing the parties together to a final conclusion.

- [186] The defendant points out, however, that awards in restitutionary quantum meruit require some evidence on which the court can value the services provided: *Hucul* at para. 247. Since quantum meruit is often difficult to quantify, the courts have broad discretion in the valuation of a fair fee: *Hucul* at para. 248.
- [187] The defendants point to *Infinity* as providing guidance on calculating damages in quantum meruit. In that case, the BCCA said:
- [19] If it was not well-settled when the trial judge rendered his decision in July 2009, it is now firmly established that a claim alleging unjust retention of a benefit conferred in an ineffective transaction is a discrete category of the doctrine of unjust enrichment, which may attract a personal monetary remedy (*Kerr v. Baranow*, 2011 SCC 10 at para. 31) and that remedy must match, as best it can, the extent of the enrichment unjustly retained by the defendant (at para. 73).
- [20] However, as Cromwell J. explained in *Kerr*, at paras. 58 and 70 to 72, equitable remedies are flexible. They must respond to various situations in various ways, so as to "deal with different circumstances according to principles rooted in fairness and good conscience" as Binnie J. stated in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para. 13. As the original quantum meruit award of the common law expanded over time and developed as a restitutionary remedy for an unjust enrichment claim, so its measure became more flexible. From a fee-for-services award at common law, a quantum meruit award came to be assessed in various ways, including the cost to the claimant of providing the service, the market value of the benefit, or even the value placed on the benefit by the recipient. (*Kerr*, at para. 74.)
- [21] From this recent judgment, I derive the lesson that a trial judge's first task after rejecting a contractual remedy and finding unjust enrichment is to determine what measure is appropriate to remedy the unjust enrichment in all the circumstances of the case. Judges have described the appropriate measure in many ways: "the amount [the claimant] deserves" or "what the job is worth" (*Ketza Construction Corp. v. Mickey*, 2000 YTCA 4 at para. 13); "the value of the benefit obtained by the defendant" or "the reasonable market value of the services" (*Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248 at paras. 22 and 37); the "fair value of the services rendered" (*Degelman v. Brunet Estate*, [1954] S.C.R. 725 at 735; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324 at para. 105); "the value of his services to the defendants" (*Palethorpe v. Bogner*, [1995] B.C.J. No. 2311 at para. 23). Recently, in *Aerovac Systems Ltd. v. Darwon Construction (Western) Ltd.*, 2010 BCSC 654, Savage J. came to this conclusion at para. 49:

- [49] In my view these authorities support the view that the court has a broad discretion in determining the appropriate method to apply in calculating a quantum meruit claim. Estimates, reasonable costs and expenses, quoted rates, abortive negotiations on price, and expert opinions are all methods which a court can utilize in determining a fair value for the services rendered. This is not a closed list. The appropriate method or methods to use in any individual case will depend on the evidence before the court.
- [22] I respectfully agree. As I understand the authorities cited to this Court, in the light of Kerr, the appropriate measure for restitutionary quantum meruit is to be selected to meet the circumstances of the particular case. Important factors will include but not be limited to, the course of dealings between the parties, any estimates obtained, the costs incurred, the scope of work, the actual work done, the market value of the services provided.
- [23] As Lowry J.A. noted in *Malik (Estate of) v. State Petroleum Corporation*, 2009 BCCA 505, at para. 42 about the measure in an unjust enrichment case involving a finder's fee:

It is for the court to do the best it can to determine a reasonable fee for the service provided, by assessing what the service was worth having regard for the relevant circumstances in any given instance.

- [188] While the approach in *Malik* is not the only way to assess a claim in quantum meruit, I consider that it is the appropriate approach to determine the plaintiff's claim in this case. The defendants also rely upon *Malik* to argue "the amount of such a fee must be consistent with its purpose - compensation for the service rendered. It is to be no more and no less than what the service is worth": at para. 71. The defendants say there is little value in the work performed in this case. The defendants say that the work referenced by the plaintiffs with respect to the hours of review of the data room and other services is unrelated to any alleged enrichment of the defendants, as it was done for LBJ.
- [189] The defendants also dispute the plaintiff's reliance on *Craigdarloch*--specifically, the plaintiff's submission that *Craigdarloch* has established an "industry standard fee" and that the case is on "all fours" with this case. The defendants say the facts in *Craigdarloch* are so dissimilar to the case at hand that it is of no assistance to the court, and that it is the opposite of the case commenced by the plaintiffs. The defendants say the case would be similar if the plaintiffs in this case had brought their claim against Dundee. Instead, they sued a purchaser that they made an introduction for and assisted with cattle counts and some timber issues. The defendants say they didn't find a deal for Monette Farms, nor did they negotiate a price for Monette Farms.
- [190] On this latter point, I disagree. The plaintiffs did find a deal for Monette, ultimately with a price acceptable to both parties.
- [191] Indeed, as argued by the plaintiffs, this case is akin *Malik* and *Craigdarloch*. In *Malik*, Lowry J.A. for the court said:

[36] The concept of an intermediary who brings parties together for the purpose of furthering a business arrangement is, however, recognized in Canadian law. The Supreme Court of Canada recognized this as a valuable function as early as 1911, in *Stratton v. Flanagan Estate*, 1911 CanLII 50 (SCC), 44 S.C.R. 395, where Davies J. (at 401) cited *Burchell v. Gowrie and Blockhouse Collieries, Limited*, [1910] A.C. 614 (P.C.), in which Lord Atkinson identified bringing "a person into relation with his principal as an intending purchaser" as "the most effective, and, possibly, the most laborious and expensive, part" of the work of an agent (at 625). The idea of compensation on a commission or percentage basis for having introduced two parties who ultimately enter into a transaction is common in a real estate context: *Lindholm Land & Investment Corp. v. Danzo*, 2002 BCCA 506, 5 B.C.L.R. (4th) 266 at paras. 6-7.

[37] An early expression of what entitles an intermediary to a fee for bringing together the parties to a transaction is found in *Bow's Emporium, Ltd. v. A.R. Brett & Co.* (1927), 44 T.L.R. 194 (H.L.). There, the plaintiffs were agents in the sale and purchase of businesses. They acted for the purchaser, Bow, who wished to buy a particular business. The plaintiffs put the purchaser and the vendor in touch, and laid the groundwork for the transaction. Viscount Haldane identified the key question as "whether the services of the agent were really instrumental in bringing about this transaction" (at 197). Lord Shaw of Dunfermline identified the correct test of causation as "material contribution". He set out the basis of entitlement as follows at 199:

When it is proved - and it must, of course, be proved - that parties to a transaction are brought together, not necessarily personally but in the relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent.

This authority is often cited for the basis on which a real estate agent is entitled to a commission.

[38] The concept of a finder's fee is, however, not limited to the real estate context. It was recognized in the context of the introduction of a prospective investment in *Blyth Canada Ltd. v. Capozzi Enterprises Ltd.*, [1974] B.C.J. No. 9 (C.A.), and as the usual means by which intermediaries to a business transaction are compensated in *Robert Hunkin & Associés Inc. c. Crédit-Bail Banque Laurentienne Inc.*, [1997] J.Q. no 1006 at para. 30 (C.A.). The entitlement to a commission payable for facilitating mergers and acquisitions was discussed by the Manitoba Court of Appeal in *Rillford Investments Ltd. v. Gravure International Capital Corp.*, 1997 CanLII 3908 (MB CA), [1997] 7 W.W.R. 534, 118 Man. R. (2nd) 11.

[192] I agree with the plaintiff's submission that the plaintiffs provided services to and were agents in the sale and purchase of BGCattle's shares and acted for the purchaser, Monette Farms. The plaintiffs "put the purchaser and the vendor in touch, and laid the groundwork for the transaction": Malik at para. 37. The key question is whether the services of the agent were instrumental in bringing about this transaction. As set out above, if the parties are brought together in the relation of buyer and seller through the agency of an intermediary

employed for that purpose, and if a transaction then ensues, the intermediary is entitled to his or her reward as such agent. There is no doubt that occurred as has been reflected throughout the analysis in the case. Simply put, without Mr. Dutcyvich and 3L Developments, Mr. Monette would not have been viewed as a viable purchaser at a critical time in the sale and purchase process.

- [193] In addition, as noted, the concept of a finder's fee is not limited to the real estate context. It is also recognized in the context of the introduction of a prospective investment and as the usual means by which intermediaries to a business transaction are compensated: Malik at para. 38. While Mr. Monette says he had never paid a fee, there is no doubt that the sale of a business recognizes a fee in the business transaction context, as set out in Malik.
- [194] The defendants submit that in Craigdarloch, the parties also argued that the plaintiff failed to fulfill its duties to them. The defendants say the same with respect to the plaintiffs in this case, and submit that the plaintiffs are disentitled to any fee in quantum meruit, since it is an equitable remedy.
- [195] I conclude this argument has no merit. It rests on the proposition that seeking a price "fair to both parties" is a breach of an agent's fiduciary duty. As I have said, I take the comment by Mr. Dutcyvich to that effect to be a comment related to finalizing an agreement between the parties, and not that he was seeking to be fair to BGCattle at the expense of the defendants. Indeed, he sought to communicate all information to the defendants as part of his assistance to them in purchasing the shares of BGCattle.
- [196] In applying the principles to this case, I find the plaintiff is entitled to a quantum meruit fee based upon the principles in Malik, as set out above, as well as the cases set out therein. To find otherwise would be to permit the defendants to enjoy an unjust enrichment where there would be a corresponding detriment to the plaintiff with the absence of any juristic reason for the enrichment and detriment: Garland.
- [197] There is also no doubt Mr. Monette chose to facilitate the sale through various corporate vehicles, which therefore entitles the plaintiffs to a fee jointly and severally from each of the defendants.
- [198] I agree that the value of the asset realized by the defendants as purchasers was substantial--\$63 million. As Mr. Monette said, it was not a cash flow investment, it was a legacy investment for his family. I also agree that but for the suppression of the involvement of LBJ, it would have been more than likely that the defendants would not have been able to realize upon the purchase of BGCapital. BGCapital had made clear they would no longer deal with LBJ, and Monette Farms would have very likely been rejected as buyers had BGCapital known the true facts. While the defendants say there is no proof of this, the documentary evidence, including emails, establishes the antipathy of Dundee and BGCapital to LBJ because of its established inability to complete a transaction of this nature.

- [199] As I have concluded that the plaintiff is entitled to a fee, I must now determine the value of the fee in quantum meruit. As set out above, the plaintiffs rendered a valuable service to the defendants, at the defendants request, and the defendants were aware the plaintiff expected to be paid for those services. As noted in Malik, the court must ultimately focus on the value of the service to the benefitting party, rather than the cost to the other party of providing the service. Malik also identified a number of factors that can be considered in assessing the value of the fee.
- [200] The plaintiff says the \$12 million is a specific fee amount, but if the Court moves off this specific amount to a percentage calculation of the value of the service based on the transaction price, it becomes difficult. \$12 million is 15% of the transaction value of \$76 million--the original price set for the purchase of BGCattle's shares. 15% of \$63 million--the actual price paid for BGCattle's shares--is \$9,947,368.42. The fee awarded in Craigdarloch was 10%. 10% of \$76 million is \$7,600,000, and 10% of the \$63 million is \$6,300,000. If the Court is to revert to a percentage calculation, the plaintiffs argue for a range of 8-10%, based on para. 192 of Craigdarloch.
- [201] I agree that the benefit of the value provided by the plaintiffs to the defendants accrued directly to Mr. Monette as sole shareholder of the purchaser and the purchaser itself. As noted by the plaintiff, a remedy in quantum meruit is not dependent upon privity of contract, but rather is dependant upon whom received the benefit. In this case, that was Mr. Monette and the purchaser, 102. Mr. Monette, Monette Farms and 102 should therefore be jointly liable for the obligation to pay the quantum meruit award to the plaintiffs or 3L Developments alone.
- [202] In considering unjust enrichment, I agree that the defendants obtained substantial benefits from the work and efforts of the plaintiffs and the important introduction to BGCapital. This introduction was not done in a vacuum--it was in the context of BGCapital being extremely frustrated with LBJ, to the point they referred to them as "dodgy" and clearly would no longer deal with LBJ. BGCapital sought a financially sound alternative purchaser. The plaintiffs introduced Monette Farms in this very specific context. As the plaintiffs say, the defendants leveraged the good will and trust established between the plaintiffs and BGCapital, and that was indeed the reason LBJ told Mr. Monette to contact Mr. Dutcyvich. I agree that this introduction and the continued contribution of the plaintiffs were a substantial and effective cause in the sale process.
- [203] In addition, as set out in Craigdarloch, the history of the parties' dealings and negotiations as to fees can be considered in assessing the fee based on quantum meruit. Throughout the dealings between the plaintiff and the defendant, the fee of \$12 million was referenced and discussed. It existed both in conversation and documents between the parties. I have concluded that Mr. Monette's comment that \$12 million was never discussed as a fee is not credible, particularly in view of the email exchanges of March 16, 2021. While Mr. Monette questioned why a direction to pay for \$12 million was sent to him, the existence of this paper trail, sent directly to Mr. Monette, calls his credibility into question when he says

that would be a number he would remember if it was mentioned to him. I conclude it was the number discussed between Mr. Dutcyvich and Mr. Monette.

- [204] There is therefore no doubt the figure of \$12 million dollars loomed large in the plaintiff's negotiations with Mr. Monette. This was the number ultimately reached between the plaintiff and LBJ based on the price reduction that the plaintiff achieved on behalf of LBJ. As a result, this can be said to be the nature of the fee the parties anticipated, as the same price for BGCattle's shares was used for the purchase by Monette Farms. As a result, \$12 million dollars was the plaintiff's fee for facilitating the purchase of the shares of BGCapital to the defendants, in particular, Mr. Monette.
- [205] This is in conjunction with the value of the opportunity realized, especially to Mr. Monette, who saw BGCattle as a legacy for his family. In assessing what was required to realize the business opportunity and the market value of the services provided--essentially evaluating a company appraised at \$100 million--\$12 million dollars is a fair and reasonable fee in the circumstances.
- [206] As noted in Malik, *supra*:
- [42] It is for the court to do the best it can to determine a reasonable fee for the service provided, by assessing what the service was worth having regard for the relevant circumstances in any given instance. The court must determine the nature of the fee the parties could be said to have anticipated. No fee will be payable where nothing has been realized, i.e., found. The amount of a fee payable will depend in large measure on the value of the opportunity realized.
- [43] It is necessary to consider the nature, extent, and, most significantly, the effect of the service rendered and whether it was made possible by the expertise, reputation, or connections of the party providing the service. The service for which the fee is sought must be assessed with regard for the same or similar contributing services performed by others, as well as the whole of what was required for the business opportunity to be realized.
- [44] The court may consider any applicable custom with respect to the value of the service. In the absence of such, the court may have regard for the bargaining between the parties, not to complete the bargain for them but as some indication of the value each placed on the service.
- [45] There may, in any given instance, be other factors to be taken into account.
- [46] The court must ultimately focus on the value of the service to the benefitting party rather than on the cost to the other party of providing the service. It is the value to the benefitting party at the time the fee is earned that is to be considered; later profits enjoyed or losses experienced are generally of no consequence.
- [47] With these considerations in mind, I turn to the assessment of Mr. Malik's finder's fee.

[207] The court in Craigdarloch helpfully said at para 176:

In Malik, the plaintiff identified nine factors that it argued should be considered in assessing the value its fee based upon quantum meruit:

- i. prior dealings of the parties and negotiations as to fees;
- ii. the expectations of the vendor and the value perceived by the vendor for the service;
- iii. the nature of the fee the parties could be said to have anticipated;
- iv. the value of the opportunity realized;
- v. what was required to realize the business opportunity;
- vi. the market value of the service provided;
- vii. what amount the job "deserves";
- viii. applicable "custom in the industry"; and
- ix. that the "value" must be assessed at the time the service was performed.

[208] These first six factors are clearly established and helpful in coming to the conclusions set out above. I find "what the job deserves" to overlap with the 5th and 6th factors above. There was not sufficient evidence however about the applicable custom in the industry to assist in determining an applicable fee. The "value" at the time of the service is evident as it resulted in the sale and purchase of an entity that Monette Farms significantly valued at the time the service was performed.

[209] With respect to the defendants' argument that there is a juristic reason to deny recovery, being the agreement with LBJ, I conclude the existence of an unfulfilled contract with a third party is not a juristic reason to deny recovery to the plaintiffs. The plaintiffs dealt with the defendants, and the benefits and deprivation were as between the plaintiffs and the defendants. The March 16 email of Mr. MacIntyre to Mr. Monette said Mr. Monette did not have to return the signed direction to pay.

[210] The categories of juristic reason to deny recovery are very narrow, and none apply in this case. As noted by the plaintiffs, unjust enrichment is an equitable remedy. The defendants were not truthful when they told Mr. Dutcyvich they were "going it alone". They were not truthful when they said it was Monette Farms' intention to purchase, not including LBJ. Documentation established the ongoing nature of the relationship between Monette Farms and LBJ, which referenced the purchase of BGCattle. Equity will not intervene to assist such conduct by denying the recovery of a fee for the work undertaken by the plaintiffs in this matter.

- [211] The evidence established the plaintiffs acted in good faith, undertaking this job for the defendants, who obtained the benefit of those efforts. The defendants' duplicity throughout sought to minimize and deny the work undertaken by the plaintiffs, and I do not accept those claims. As argued, Mr. Monette appears to be reluctant to pay for those who assist him on his path to accumulate his very significant wealth, and the Court will not assist him in those endeavours.
- [212] I conclude that a fee-based approach to the assessment of a quantum meruit award is appropriate in these circumstances. In view of all the above, and on an alternative basis, I conclude the plaintiffs are entitled to a fee of \$12 million.
- [213] Mr. Monette does not dispute he received some benefit from the provision of the logging services. This unfortunately is difficult to quantify. In view of that and in the unique circumstances of this case, I consider the services to be adequately compensated by the \$12 million fee.
- [214] For the sake of completeness, the counterclaim is dismissed. It was not seriously pursued or argued, and my factual findings concerning 3L Developments and Mr. Dutcyvich preclude its advancement in any event. The defendant was focussed on the remark that 3L Developments and Mr. Dutcyvich were pursuing a fair price for both parties as evidence of a breach of fiduciary duty, but as noted, doing so was necessary to achieve the ultimate goal of offer and acceptance in relation to the sale of the shares of BGCattle.
- [215] Costs are awarded to the plaintiffs as in the normal course, unless an application seeking otherwise, is filed within 30 days of this judgment.

"Burke J."

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