CANADA / JUDGMENT

Kaban Resources Inc. v. Goldcorp Inc.

2020 BCSC 1307

COURT
Supreme Court of British Columbia

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20020 BCSC 1307 Kaban Resources Inc. v. Goldcorp Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaban Resources Inc. v. Goldcorp Inc.,

2020 BCSC 1307

Date: 20200904

Docket: S165822

Registry: Vancouver

Between:

Kaban Resources Inc.

Plaintiff

And

Goldcorp Inc., Goldcorp Holdings (Barbados) Ltd., and Guatemala Holdings (Barbados) Limited.

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

August 4-6, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 4, 2020

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1. Overview and Central Issues

[1] The Defendants, Goldcorp Inc., Goldcorp Holdings (Barbados) Ltd., and Guatemala Holdings (Barbados) Limited (collectively, "Goldcorp"), bring this application under Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 for judgment dismissing the claim of the Plaintiff, Kaban Resources Inc. ("Kaban").

[2] On February 3, 2016, Goldcorp and Kaban signed a letter agreement (the "Letter Agreement") providing for the transfer of Goldcorp's various Guatemala assets including its Cerro Blanco mine ("Cerro Blanco" or the "Project") and the Mita geothermal project ("Mita") on various terms and conditions.

[3] On March 14, 2016, Kaban delivered an agreement (the "Fortuna Agreement") to Goldcorp. The Fortuna Agreement purported to comply with the terms and conditions of the Letter Agreement.

[4] On March 17, 2016, Goldcorp responded to Kaban (the "March 17 Letter"). On March 21, 2016, Kaban, in turn, sent an email to Goldcorp (the "March 21 Email") asserting that the March 17 Letter constituted a repudiation of the Letter Agreement, that Kaban accepted the repudiation, and that it considered the Letter Agreement at an end.

[5] The present application raises the following distinct issues:

i. Is this application suitable for disposition under Rule 9-7?

ii. Did the Letter Agreement contain various implied terms?

iii. Was there any obligation on Goldcorp to consent to the Fortuna Agreement? and

iv. Did the March 17 Letter constitute a repudiation of the Letter Agreement?

[6] Each of issues (ii), (iii) and (iv) are independent. Goldcorp would succeed on this application if the answers to issue (ii) is yes or if the answer to either of issues (iii) or (iv) is no.

2. The Parties and other Relevant Entities or Individuals

[7] Goldcorp Inc. is a publicly-traded gold mining company based in Vancouver that was acquired by Newmont Corporation in 2019. Goldcorp Holdings (Barbados) Ltd. and Guatemala Holdings (Barbados) Limited were both subsidiaries of Goldcorp Inc.

[8] Mr. Ball was, at the time, the Executive Vice President and Chief Financial Officer of Goldcorp Inc. Ms. Wang was the Director of Corporate Development and Strategy at Goldcorp Inc.

[9] Kaban is a mining company incorporated in British Columbia in December 2015 by its founders, Messrs. Murphy, Roberts, and Downey (collectively, the "Founders"). Each of the Founders were directors of Kaban.

[10] Mr. Pejman worked for and was the Managing Director and Head of Venture Capital at Canaccord Genuity. He was an advisor to and agent for Goldcorp.

[11] Fortuna Silver Mines Inc. ("Fortuna") is a publicly traded mining company. Mr. Ridgway is the Chairman of the Board of Fortuna.

3. The History of Events Leading to the Letter Agreement

[12] The events that led to the Letter Agreement are, Goldcorp argues, relevant to (i) whether the Letter Agreement contained any implied terms and (ii) to the circumstances that surrounded these transactions, which, in turn, is relevant in determining whether the March 17 Letter constituted a repudiation of the Letter Agreement.

[13] Mr. Murphy, the Chief Executive Officer of a publicly traded junior mining company formerly called RedZone Resources Ltd. ("RedZone"), first approached Goldcorp in 2014 about acquiring Cerro Blanco. Cerro Blanco was an undeveloped gold-silver mining project in Guatemala that had been placed into "care and maintenance" -- meaning that Goldcorp was not actively investing in or planning to develop the mine. In October 2014, RedZone made an unsolicited offer to purchase Cerro Blanco. Goldcorp did not accept the offer explaining that it intended to launch a formal sale process in 2015.

[14] In June 2015, Goldcorp launched a sale process for Cerro Blanco and Mita, a nearby geothermal project. It did so for various reasons including the socio-political conditions in Guatemala and the ongoing care and maintenance costs of Cerro Blanco. Goldcorp invited RedZone and five other potential bidders to participate in the sale process.

[15] At the end of the sale process, Goldcorp selected RedZone's proposal because it was the highest offer, it included upfront cash consideration, it had a prompt timeline, and it offered a proposed management team that was both experienced and familiar to Goldcorp. On this latter point, it is relevant that Goldcorp had prior experience with Mr. Murphy on another project, and based on this experience, Goldcorp believed he had the skills, experience, and relationships necessary to assemble and lead a management and operating team. He also had relationships with institutional investors who might be interested in backing that team.

[16] Accordingly, on July 23, 2015, Goldcorp and RedZone signed an exclusivity agreement under which Goldcorp agreed, for a period of 30 days, to negotiate exclusively with RedZone with respect to the acquisition of an interest in Cerro Blanco and Mita. It was after the signing of the exclusivity agreement that Goldcorp retained Mr. Pejman to assist and monitor Mr. Murphy's efforts to obtain financing.

[17] In early August 2015, Mr. Murphy and Mr. Ball discussed the transaction and agreed to use a "Tahoe-type structure", modelled on an earlier deal between Goldcorp and Tahoe Resources Inc., a private mining company. The two men used this term as shorthand for their shared understanding that Goldcorp would transfer its rights in Cerro Blanco to a newly incorporated private company (Newco). Newco would then develop and operate the Project and, at some point, Newco would make an initial public offering on a securities exchange.

[18] In exchange, Goldcorp would receive a 40% interest in Newco. Goldcorp would then have an opportunity to sell all or part of its 40% interest when Newco went public. The parties subsequently confirmed on multiple occasions that they would adopt a "Tahoe-type structure" for the transaction. Kaban does not dispute this evidence.

[19] One or more of the Founders thereafter had several conversations and meetings in the fall of 2015 and in early 2016 with Ms. Wang, during which the parties discussed and confirmed that:

i. Goldcorp would sell Cerro Blanco to Newco, the company to be incorporated as a vehicle to effect the transaction. That vehicle was ultimately Kaban;

ii. Mr. Murphy and his team would operate and manage the Project;

iii. Goldcorp would receive 40% of the shares of Newco; and

iv. Mr. Murphy and his team would raise the necessary initial financing from a number of investors. They were primarily targeting institutional investors -- not mining companies.

Once again, Kaban does not dispute the foregoing evidence.

[20] The process did not move as quickly as the parties had hoped. Mr. Murphy requested and Goldcorp granted two extensions of the RedZone exclusivity agreement. The first extension occurred on August 19, 2015, and the second occurred on October 25, 2015.

[21] On October 19, 2015, Mr. Murphy sent Goldcorp a document outlining his proposed strategy for Newco, including the management and board of that entity. The document contemplated Mr. Murphy taking on the role of Chairman of the Board of Newco and Mr. Roberts, who had over 30 years of mining engineering, operations, and investment banking experience joining the Executive/Financial/Corporate development team. In November 2015, Mr. Downey, a mining executive with an engineering background and significant operating experience, joined the team as president and Chief Executive Officer of Newco. Mr. Murphy, at his examination for discovery, said that he had brought Mr. Downey on board because, inter alia, he had an excellent track record of running companies and building mines and

because "he was seen as a guy that could go into challenging places and was successful and had a lot of credibility with investors".

[22] In late 2015, there were two developments. First, the Founders advised Goldcorp that they could not raise the expected initial financing unless the proceeds were used to develop the Project. This meant that Goldcorp would not receive an upfront cash payment on closing. Instead, the parties agreed, and Mr. Downey at his examination for discovery accepted, that Newco was to raise $35 million in financing. That money would then be used to obtain a feasibility study and to develop the Project.

[23] Second, Mr. Murphy, at his examination for discovery, acknowledged that RedZone determined that the Project was too risky and it decided not to back the transaction.

[24] As a result, the Founders incorporated a shell company, Kaban, which was to serve as the Newco the parties had discussed and as the vehicle through which they proposed to effect the proposed transaction.

[25] In January, the Founders delivered a PowerPoint presentation to Goldcorp highlighting their individual experiences and setting out their preliminary plans for developing Cerro Blanco. The presentation and written material stated, inter alia, that:

i. "the company will be led by Michael Murphy", "the Operating Team will be led by Patrick Downey" and "Craig Roberts will be responsible for overall corporate development". Biographical information for each of the Founders was included in the presentation.

ii. "the Kaban team have extensive experience in South America including Latin America" and "Kaban has assembled a strong board and management team to move the Cerro Blanco project through feasibility studies, final approvals, engineering, and construction to production";

iii. the "terms of the acquisition agreement with Gold Corp." provided the "Kaban management team [would] retain 10% escrowed shares, to be released on accomplishment of milestone through successful commercial production"; and

iv. Kaban was "completing a financing of CDN $35 [million] from a limited number of strategic investors". The CDN $35 million was "to advance the project to 'shovel ready' open pit operation". The CDN $35 million "will go directly to project feasibility and development". The Funding was to be used "to move the project through full feasibility and amendment of the EIA for open pit mining over a two year schedule".

[26] On February 3, 2016, Goldcorp and Kaban signed the Letter Agreement. The relevant terms of the Letter Agreement provide:

Attention: Russell Ball, EVP, Corporate Development and Capital Projects

Dear Sir:

This letter agreement (the "Letter Agreement"), sets out our agreement with respect to the acquisition (the "Transaction") from Goldcorp Inc. ("Goldcorp"), Goldcorp Holdings (Barbados) Ltd. ("Goldcorp Barbados") and Guatemala Holdings (Barbados) Limited ("Guatemala Holdings" and together with Goldcorp and Goldcorp Barbados, the "Vendors") by Kaban Resources Inc., or its nominee (the "Purchaser") of: (a) all of the issued and outstanding shares ("Target Shares") of Entre Mares de Guatemala S.A. (the "Target"), a corporation incorporated and existing under the laws of Guatemala which owns all of the mining licenses (exploration, exploitation or otherwise) and similar rights in real property related to or in connection with the Cerro Blanco gold-silver project located in Jutiapa, Guatemala (the "Project" and collectively, the "Property"); (b) all of the issued and outstanding shares ("GNRG Shares") of Goldcorp NRG Limited ("GNRG"), a corporation incorporated and existing under the laws of Barbados which, together with Entre Mares, indirectly owns all of the mining licenses (exploration, exploitation or otherwise) and similar rights in real property related to or in connection with the Mita Geothermal Project in Jutiapa, Guatemala (the "Mita Geothermal Project"); and (c) all amounts due by the Target to Goldcorp (the "Target Debt").

Each of the Vendors and the Purchaser shall herein be collectively referred to as the "Parties" and, individually, as a "Party", as applicable. Closing of the Transaction is referred to as the "Closing", which shall take place on the third business day after all of the conditions precedent contained herein have been satisfied or waived by the Party that has the benefit of the relevant condition, or such other date as the Purchaser and the Vendors may agree in writing. The Parties agree to use commercially reasonable efforts to close the Transaction on or before February 29, 2016, or such other date as the Parties may otherwise agree.

1. The Transaction

On Closing, as consideration for the transfer of the Target Debt by Goldcorp to the Purchaser, the Purchaser shall pay Goldcorp the purchase price for the Target Debt, which shall be comprised of a cash payment of US$1.00, the issue by the Purchaser and delivery to Goldcorp, or as Goldcorp may direct, that number of common shares of the Purchaser ("Purchaser Shares") equal to 40% of the issued and outstanding Purchaser Shares immediately following Closing on a fully diluted basis, and any subsequent payment made pursuant to Section 6.

On Closing, as consideration for the transfer of all of the issued and outstanding Target Shares by Guatemala Holdings and Goldcorp Barbados to the Purchaser, the Purchaser shall pay aggregate cash consideration of US$140 to Guatemala Holdings and Goldcorp Barbados.

On Closing, as consideration for the transfer by Guatemala Holdings to the Purchaser of all of the issued and outstanding GNRG Shares, the Purchaser shall pay aggregate cash consideration of US$98 to Guatemala Holdings.

2. Definitive Agreement

The Parties agree to negotiate in good faith and use their commercially reasonable efforts to enter into one or more definitive agreements providing for the Transaction consistent with the terms hereof (the "Definitive Agreements") as soon as practicable, to replace and supersede in its entirety this Letter Agreement. In the event that the Definitive Agreements are not executed, this Letter Agreement shall continue in full force and effect unamended. The Definitive Agreements shall be in form and substance satisfactory to each of the Parties, acting reasonably, and shall include customary terms and conditions consistent with industry practice, including representations and warranties, covenants, conditions and completion mechanics (including, without limitation, the representations and warranties, covenants, conditions and completion mechanics contained in this Letter Agreement to the extent still applicable), for a transaction of the nature of the Transaction. In the event that the Purchaser and the Vendors determine that for tax purposes it is necessary or desirable to proceed with the Transaction in another form to directly or indirectly acquire the Property and the Mita Geothermal Project, the Parties shall use commercially reasonable efforts to implement and completed the Transaction in its revised form. The first draft of the Definitive Agreements shall be prepared by counsel to the Vendors.

3. Conditions

a) Completion of the Transaction shall be subject to the following mutual conditions (or such other conditions as the Parties may otherwise agree to in the Definitive Agreements) in favour of the Purchaser and the Vendors:

i. completion by the Purchaser of one or more financings to raise gross proceeds of at least CDN$35 million (the "Financing");

ii. all required government, regulatory and other third-party approvals and consents that are necessary or advisable to complete the Transaction shall have been obtained, each on terms and conditions satisfactory to the Purchaser and the Vendors, each acting reasonably; and

b) Completion of the Transaction shall be subject to the following conditions (or such other conditions as the Parties may otherwise agree to in the Definitive Agreements) in favour of the Purchaser:

iv. the Vendors shall have provided the Purchaser with their covenant and agreement to (i) vote with management recommendations at shareholder meetings of the Purchaser, except in the case of any transactions that are put to a shareholder vote and change of control transactions; and (ii) provide the Purchaser with a five business day right of first refusal to find a purchaser should the Vendors wish to sell Purchaser Shares held by them, in each case for a period of two years from Closing;

v. there being no finder's or advisory fees paid or payable by the Target, GNRG or Geotermia, or payable by the Purchaser on behalf of the Vendors, in connection with the Transaction;

c) Completion of the Transaction shall be subject to the following conditions (or such other conditions as the Parties may otherwise agree to in the Definitive Agreements) in favour of the Vendors:

i. no material adverse change in respect of the business, properties, assets, liabilities (including, without limitation, any contingent liabilities that may arise through outstanding or pending litigation), capitalization, financial condition or results of operations of the Purchaser shall have occurred or arisen, except as contemplated in this Letter Agreement in order to close the Transaction, or shall have been disclosed to the Vendors if not previously disclosed in writing to the Vendors prior to the date hereof; except for changes relating to: (i) the global mining industry in general, (ii) the market price of precious metals or changes in currency exchanges rates, interest rates, monetary policy or inflation, and (iii) any generally applicable change in applicable laws or regulations (other than orders, judgments or decrees against the Purchaser) or generally applicable change in International Financial Reporting Standards, or the interpretation thereof, provided that such change referred to in clauses (i), (ii), or (iii) above does not primarily relate only to (or have the effect of primarily relating one to) the Purchaser, or disproportionately adversely affect the Purchaser, compared to other companies of similar size operating in the industry in which the Purchaser operates;

ii. the Parties shall have entered in an agreement to: (i) provide the Vendors with registration and piggy back rights on an initial public offering of the Purchaser or any other subsequent equity financing; and (ii) allow the Vendors to maintain their current ownership interest in any equity financing completed by the Purchaser following Closing, in each case for a period of two years from Closing;

iv. there being no finder's or advisory fees payable by the Vendors on behalf of the Purchaser in connection with the Transaction.

4. Deliveries on Closing

a) On Closing, the Purchaser shall deliver the following to the Vendors (or such other deliverables as the Purchaser and the Vendors may otherwise agree to in the Definitive Agreements):

i. a cash payment to Goldcorp in the amount of US$1.00 as partial consideration for the Target Debt;

ii. a cash payment to Goldcorp Barbados and Guatemala Holdings in the amount of US$140 as consideration for the Target Shares;

iii. a cash payment to Guatemala Holdings in the amount of US$98 as consideration for the GNRG Shares;

iv. as partial consideration for the Target Debt, that number of Purchaser Shares that is equal to 40% of the issued and outstanding Purchaser Shares immediately following Closing (including taking into account the shares and convertible securities issued upon a Financing, stock options issued to management and board of directors of the Purchaser as at Closing and any agreements existing as at Closing pursuant to which shares of the Purchaser may be issued in the future) registered in the names of Goldcorp or as Goldcorp may otherwise advise;

vi. a resolution of the board of directors of the Purchaser approving this Letter Agreement, the Transaction and the issue and delivery of the Purchaser Shares contemplated in Section 4(a)(iv) above; and

b) On Closing, the Vendors shall deliver the following to the Purchaser (or such other deliverables as the Purchaser and the Vendors may otherwise agree to in the Definitive Agreements):

i. share certificates representing all of the issued and outstanding Target Shares duly endorsed for transfer to the Purchaser or its nominee and free and clear of all liens, claims and encumbrances whatsoever and the Vendors shall cause the Target to enter the Purchaser or its nominee on the share register as the holder of the Target Shares and to issue one or more share certificates representing the Target Shares to the Purchaser or its nominee;

ii. an assignment of the Target Debt to the Purchaser or its nominee;

6. Payment on Commercial Production

The Purchaser covenants that the Vendors to made an additional cash payment in respect of increase in the purchase price for the Target Debt in the amount of US$25 million to Goldcorp, or as Goldcorp may direct, within 12 months following the commencement of commercial production from a mine developed on the Property by the Target or its affiliate. For the purposes of this Section 6, "commencement of commercial production" means the first day of the calendar month following which a mine developed on the Property by the Target or its affiliate has operated for a period of 60 consecutive days at an average of 66 2/3% or more of the designed production capacity for such mine, The Parties acknowledge and agree that the covenant set forth in this Section 6 is unsecured and that upon Closing, the Vendors shall have no liens or other residual interest whatsoever in the Target Shares or Property.

8. Disposition of Mita Geothermal Project

The Purchaser agrees to pay, or cause to be paid, to Guatemala Holdings a percentage of the net profit interest received by the Purchaser, or an affiliate thereof, from the proceeds of any sale, directly or indirectly, of GNRG, Geotermia or the Mita Geothermal Project equal to the Vendors' percentage holdings of the Purchaser (to a maximum of 40%) as at the date the Purchaser, or an affiliate thereof, receives the proceeds of such sale.

9. No Alternative Transactions

The Vendors each agree not to participate in any discussions or negotiations or enter into any agreement regarding, or furnish to any person any information with respect to the Property or the Mita Geothermal Project, or otherwise cooperate with, facilitate or encourage any effort or attempt by any person to do or seek an Alternative Transaction (as defined below) prior to the termination of this Letter Agreement. The Vendors shall promptly (and in any event, within 72 hours) notify the Purchaser, at first orally and thereafter in writing, of any written proposal, inquiry, offer or request relating to or constituting an Alternative Transaction, and shall keep the Purchaser fully informed as to the status of such proposal, inquiry, offer or request.

The Vendors shall cause their respective subsidiaries and its and their respective officers, directors, employees, advisors, agents or representatives to, cease and terminate: (1) any existing activity, discussion or negotiation with any other person in respect of an Alternative Transaction; and (2) any other person's existing access to any electronic data room or any information contained therein, with respect to the Property or the Mita Geothermal Project,

For the purposes hereof "Alternative Transaction" shall mean (a) any acquisition by a third party, directly or indirectly, of all or any part of the Property, the Target Debt or the Mita Geothermal Project; or (b) any joint venture, reorganization, or other transaction granting to any third party any right or interest in any part of the Property or the Mita Geothermal Project, or any agreement, option, right or privilege (whether pre-emptive or contractual) being or capable of becoming an agreement, option or right for the purchase or other acquisition of any right or interest in any part of the Property, the Target Debt or the Mita Geothermal Project,

10. Due Diligence

During the term of this Letter Agreement, the Vendors shall give the Purchaser and its representatives full access to the Vendors' personnel and all of the properties, documents, contracts, books, records and operations to the extent relevant to the Transaction and shall cause its directors, employees, accountants, counsel and other representatives to provide reasonable cooperation with the Purchaser in connection with due diligence investigations carried out by the Purchaser. To the extent relevant to the Transaction, the Vendors shall use reasonable best efforts to furnish the Purchaser with copies of documents and with such other information as the Purchaser may request.

12. Non-Disclosure

The Parties acknowledge that this Letter Agreement and the Transaction is subject to the confidentiality agreement dated January 15, 2016 between Goldcorp and the Purchaser. Subject to the following paragraphs, this Letter Agreement and any discussion in connection therewith shall be treated by the Parties as strictly confidential and shall not be disclosed by any Party. In the event of a conflict between the provisions of this Letter Agreement and the provisions of the Confidentiality Agreement, the provisions of the Letter Agreement shall prevail.

No Party will, without the prior written consent of the other Parties, except as required by law or regulation or in connection with marketing of the Financing by the Purchaser and/or its advisors to potential investors, disclose the existence or terms of this Letter Agreement or the existence or status of any negotiations between the Parties.

No Party shall make or authorize any disclosure or announcement relating to the subject matter hereof without the prior written consent of the other Parties, except as required by law or regulation or in connection with marketing of the Financing by the Purchaser and/or its advisors to potential investors, subject to providing the Vendors with an opportunity to review and provide comment on any public disclosure or announcement prior to its public dissemination.

The Parties and Goldcorp acknowledge and agree that the obligations under this Section 12 shall terminate on the earlier of Closing and the termination of this Letter Agreement pursuant to Section 14 hereof.

13. Costs

Each Party will be liable for its own costs, including legal, investment banking, accounting and financial advisory fees and expenses.

14. Termination

This Letter Agreement may be terminated:

a) by the Vendors or the Purchaser if the Transaction is not completed on or before March 31, 2016 provided that the Letter Agreement may not be terminated by a Party in default of this Letter Agreement or who is the cause of the delay of Closing;

b) by written notice from the Vendors to the Purchaser if any of the conditions set forth in Section 3 in favour of the Vendors is not satisfied at the Closing;

c) by written notice from the Purchaser to the Vendors if any of the conditions set forth in Section 3 in favour of the Purchaser is not satisfied at the Closing; or

at any time by mutual written agreement between Parties.

15. Miscellaneous

d) Assignment: The Purchaser has the right to assign this Letter Agreement and any rights of ownership in respect of the Target Shares and/or the GNRG Shares to a non-Guatemalan affiliate provided the that the Purchaser continues to be a party to, and bound by, this Letter Agreement. Otherwise, neither Party may assign its rights or obligation under this Letter Agreement without the prior written consent of the other Parties hereto.

f) Entire Agreement: This Letter Agreement contains the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings with respect thereto.

g) Binding Effect: This Letter Agreement shall be binding upon and shall enure to the benefit of the Parties hereto and their respective successors and permitted assigns.

[27] Following the signing of the Letter Agreement, Kaban continued to encounter difficulty in obtaining the financing contemplated in the Letter Agreement. The parties agreed to extend the closing date from February 29, 2016 to March 31, 2016. This appears to have been done orally.

[28] Between February 28, 2016 and March 2, 2016, representatives of Goldcorp, Kaban, and Fortuna attended the BMO Global Metals and Mining Conference in Hollywood, Florida. Representatives of these three entities met on different occasions. I will return to the relevance of those meetings when I address the specific legal issues that I outlined at the outset.

[29] On March 11, 2016, Mr. Murphy sent Mr. Ball an email which attached the Fortuna Agreement. That email is relevant and it states:

Russel and Tina,

Please find attached the executed agreement between Kaban and Fortuna.

I very much have appreciated your patience and assistance through this somewhat challenging process.

While the outcome is certainly not as I planned, I believe that this is the best solution for the success of the project.

Executives from Fortuna;

Discovered the deposit

Have all the land surrounding the property

Have family living in country

The newly appointed vice - minister of mines, as I understand was the best man at the CEO's wedding.

So while it may not be the structure I had hoped for, I no longer have a job, I must admit that this is a strong group.

The teams are currently in Guatemala returning Sunday.

Russel, congratulations on the new responsibilities, exciting times indeed.

Kind regards,

Michael

Michael D. Murphy

[30] The relevant terms of the Fortuna Agreement, which were on the letterhead of Fortuna, state:

March 9, 2016

Kaban Resources Inc.

Attention: Michael Murphy Chairman

Dear Mr. Murphy.

Re: Cerro Blanco Project

I am writing to confirm our agreement regarding the participation by Fortuna Silver Mines Inc. ("Fortuna") in the Transaction agreed between Kaban Resources Inc. ("Kaban") and Goldcorp Inc., Goldcorp Holdings (Barbados) Ltd. and Guatemala Holdings (Barbados) Limited (collectively "Goldcorp") pursuant to the Letter Agreement between Kaban and Goldcorp dated February 3, 2016 (the "Letter Agreement") in respect of the Cerro Blanco Project in Guatemala. Terms with an initial capital letter not otherwise defined in this letter will have the meanings given to them in the Letter Agreement.

Fortuna and Kaban agree as follows:

1. Fortuna will provide at Closing the Financing required by section 3(a)(i) of the Letter Agreement.
2. As consideration for Fortuna providing the Financing, Kaban will issue to Fortuna at Closing that number of common shares of Kaban equal to 50.1% of the issued and outstanding shares of Kaban immediately following Closing on a fully diluted basis.
3. At Closing Fortuna will appoint a majority of the board of directors and all of the management team of Kaban.
4. The reasonable expenses of Kaban, estimated to be approximately $300,000, together with the C$500,000 payable by Kaban to Redzone Resources Ltd. ("Redzone") (which represents the total amount owed by Kaban to Redzone on the date hereof), shall be paid by Kaban subsequent to Closing.
5. Completion of the foregoing and in particular the provision of the Financing by Fortuna at Closing, is subject to the following conditions in favour of Fortuna:

a. Completion of due diligence, with the results satisfactory to Fortuna in its discretion, with respect to Kaban and with respect to the assets and mining licenses comprising the Project and the Property, and the corporations to be acquired and the liabilities and obligations to be assumed by Kaban at Closing.

b. The consent of Goldcorp to Fortuna's participation in the Transaction and the development of the Project.

c. Kaban, Fortuna, the shareholders of Kaban Immediately prior to Closing (the "Founders") and Goldcorp. entering into a shareholders' agreement (the "Shareholders' Agreement") at Closing on terms reasonably satisfactory to Fortuna, Goldcorp and the Founders, and Including, without limitation, the terms' set forth in sections 6 and 7 below; and

d. Kaban obtaining a waiver from BMO Nesbitt Bums Inc. ("BMO") with respect to section 8 of the engagement letter dated February 12, 2016 between Kaban and BMO for the advance of funds to occur.

6. The Shareholders' Agreement will provide that Kaban will cause to be completed either a pre-feasibility study or a feasibility study (the "Study") on the Property as soon as possible following Closing. In addition, the Shareholders' Agreement will provide that, subject to force majeure, In the event the Study is not completed:

a. on or before the date which is 30 months following the Closing, Fortuna will pay an aggregate amount of C$500,000 to the Founders within five business days;

b. on or before the date which is 36 months following the Closing, Fortuna will pay an additional aggregate amount of C$500,000 to the Founders within five business days; and

c. on or before the date which is 42 months following the Closing, Fortuna will thereafter, or the Founders will have the right to require Fortuna thereafter, to use commercially reasonable efforts to cause Kaban to become a reporting issue in at least one jurisdiction of Canada by way of an initial public offering, reverse take-over, or otherwise and for the common shares of the resulting public company to be listed on the Toronto Stock Exchange, the TSX Venture Exchange or another recognized stock exchange in Canada (a "Going Public Transaction").

Fortuna will have an unrestricted right to determine all aspects of the preferred development option for the Project, including the mining methods, processing options, financial and operational factors and the type of technical study to be completed. The Study shall be prepared in accordance with Canadian National Instrument 43-101 and CIM Definition Standard referred to therein.

7. The Shareholders' Agreement will also provide that:

a. on the earlier to occur of: (i) completion of the Study; and (ii) the dissemination by Kaban and/or Fortuna of a press release announcing the results of the Study (the "Valuation Date"), Fortuna will grant the Founders a right to convert (the "Conversion Right") the Founders Shares held by them into common shares of Fortuna (the "Consideration Shares"), with the value of the Founders' common shares of Kaban subject to the Conversion Right being equal to the product obtained by multiplying 0.5 of the net present value ("NPV") of the Property as disclosed in the Study by 9.9% (the "Valuation Formula"). The Consideration Shares shall have an issue price equal to the 20 day volume weighted average trading price of the common shares of Fortuna on the principal exchange in Canada on which the common shares of Fortuna are listed at the time ending on the business day immediately prior to the

Valuation Date;

b. upon exercise of the Conversion Right, the Consideration Shares will be issued into escrow and released from escrow to the Founders as follows:

i. one-third of the Consideration Shares shall be released upon the permitting of the construction and operation of a mine on the Project as contemplated in the Study;

ii. one-third of the Consideration Shares shall be released upon dissemination of a press release by Kaban and/or Fortuna announcing a positive decision to proceed with construction of a mine on the Project (the "Construction Decision Date"); and

iii. one-third of the Consideration Shares shall be released upon the first pouring of gold from the mine on the Project,

c. if following the Valuation Date and prior to the Construction Decision Date, Kaban and/or Fortuna announce a new prefeasibility study or feasibility study which in results in a material Increase in the NPV of the Project, Fortuna will issue additional shares (the "Additional Consideration Shares") based on the value obtained from the Valuation Formula using the new NPV (the "Updated Value"). The issue price of the Additional Consideration Shares shall be equal to the 20 day volume weighted average trading price of the common shares of Fortuna on the principal exchange in Canada on which the common shares of Fortuna are listed at the time ending-on the business day immediately prior to the announcement of the new study or the Intention to develop a mine on the Project, as applicable (the "Updated Issue Price"). The number of Additional Consideration Shares to be issued shall be equal to (x) the Updated Value divided by the Updated Issue Price (y) minus the number of Consideration Shares previously issued. The Additional Consideration Shares shall be Issued into escrow or to the Founders based on the schedule set out in clause (b) above.

d. until (i) the later of (A) the Valuation Date; or (B) the expenditure by Kaban of C$35 million on the Project; or (11) the data Kaban closes a Going Public Transaction, the Founders will have a free carried interest in the Project; and

e. the Founders will collectively own 9.9% of the common shares of Kaban immediately following Closing and such shares shall include any common shares of Kaban issuable to Redzone or any other third parties Immediately prior to completion of: (i) the transactions described herein with Fortuna; and (II) the transactions described in the Letter Agreement.

The Founders agree to appoint one representative, who shall initially be Craig Roberts, to represent the Founders for purposes of negotiating the terms of this Letter Agreement and closing the Transaction.

We expect to be able to complete our due diligence and for Closing to occur on or before [March 30, 2016]. assuming we have been granted access as soon as possible after the date hereof to all material relating to the Transaction, the Property and the Project, including a site visit.

Please sign below to acknowledge your agreement with the foregoing. Thank you.

[31] Goldcorp responded to Kaban and to the Fortuna Agreement in the March 17 Letter, which stated:

Strictly Confidential

March 17, 2016

Kaban Resources Inc. ("Kaban")

Attention: Michael Murphy, Chairman (via email to [email address redacted])

Dear Michael:

Re: Cerro Blanco Project

Notwithstanding the hard work by your group and ourselves over the last nine months, the transaction contemplated in your January 2016 presentation has not come to pass despite our numerous accommodations.

While I recognize you presented us with a "solution" to your inability to raise the funding necessary to pursue the business plan outlined in your January 2016 presentation through the introduction of Fortuna Silver Mines Inc. ("Fortuna"), I would be remiss not to remind you that Goldcorp entered into the binding letter agreement with an investor/management group led by you. At no time during the process did we request you find us an alternative transaction to the one contemplated in our agreement dated February 3, 2016.

In simplistic terms, you optioned our current arrangement (intended to be exclusive to you) to Fortuna, who are now responsible for funding, permitting and managing the Cerro Blanco project. This is not the transaction we contemplated when we initially discussed a "Tahoe-type transaction" and has restricted our ability to negotiate terms as appropriate in the proposal.

After due consideration, we are prepared to continue to work with Kaban, but not under the terms of your current agreement with Fortuna which reflects that as consideration for a contribution of C$35 million and reimbursement of certain fees and expenses incurred, Fortuna will own 50.1% of Kaban, we will own 40% and 9.9% will accrue to the "Founders". This is not an equitable arrangement from our perspective as the Founders will have no management involvement going forward.

However, we are willing to proceed on the basis that the Founders retain no more than a 1% interest in Kaban, which I believe is more reflective of a "finder's fee" arrangement and takes into account the long working relationship between Goldcorp and yourself. The balance of the equity in Kaban would be owned 50.1% by Fortuna and 48.9% by Goldcorp.

I look forward to your prompt response and then working expeditiously with Fortuna and yourselves to close the transaction.

Sincerely,

[32] Kaban, in turn responded to the March 17 Letter in the March 21 Email which stated:

Russell,

Your letter of March 17, 2016 is a repudiation of our contract. We accept that repudiation and the contract is at an end.

We reserve our rights.

Kind regards,

Michael D. Murphy.

Executive Chairman Kaban

4. Issue 1: Suitability for Determination

[33] The parties agree that this application is suitable for determination under Rule 9-7(15). I am mindful, however, that such agreement is not determinative of the issue of suitability. Instead, that determination continues to reside with the hearing judge.

[34] The relevant factors that arise under Rule 9-7(15) are well-established and have been described in each of Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.); Gichuru v. Pallai, 2013 BCCA 60; and Dahl v. Royal Bank of Canada, 2005 BCSC 1263, aff'd 2006 BCCA 369.

[35] These factors overwhelmingly support the appropriateness of a determination under Rule 9-7 in the present circumstances. The amounts involved are likely relatively significant. Nevertheless, the parties have exchanged documents and they have completed their respective examinations for discovery. Importantly, the parties agree, and I am satisfied, that there are no real conflicts in the evidence or disputes on the central facts that are relevant to the legal issues I have identified and that are raised in the pleadings.

[36] Each party did seek, at times, to rely on evidence that created a picture or added a complexion to the case that was not truly pertinent. For example, each party sought, in its own way, to suggest that the other was not transparent in its conduct or its motivations. These matters do not, however, find any expression in the pleadings that the parties filed and they are not germane, on a principled basis, to the issues I have identified. Furthermore, when such matters were raised during the hearing, and I indicated that they had the prospect of interfering with the determination the parties sought, counsel resiled from pressing the issue.

[37] It is also pertinent that the matter has been set to be heard, before a jury, for six weeks commencing in October 2020. On account of COVID-19, it is obvious that the matter cannot proceed before a jury on the scheduled date. However, counsel indicated that if I determined that I could not decide this application the parties would go to trial as

scheduled, though likely for less than the present six-week trial estimate. Hence, proportionality, economic considerations and efficiency also militate in favour of a determination under Rule 9-7.

[38] Accordingly, I am satisfied both that I am able, on the whole of the evidence, to find the facts necessary to decide the relevant issues of law and fact that have been raised and that it would not be unjust to do so.

5. Two Preliminary Matters

a. An Overview of the Positions of the Parties

[39] Counsel for the parties had various discrete positions in relation to each of the legal issues I have described. There is, however, an overarching difference in the perspective and position of the parties.

[40] It is Goldcorp's position that there are various implied terms in the Letter Agreement. For example, it argues that it entered into the Letter Agreement because it knew and had confidence in the principals of Kaban, because the Founders had consistently emphasized their personal management, development, and other related skills and because the parties had, at all times, contemplated that Kaban, through its principals, would manage Cerro Blanco. Goldcorp similarly argues that the parties both intended that the $35 million that Kaban was to raise by way of "financing" would be invested into Cerro Blanco.

[41] Kaban does not dispute these and other similar facts. It accepts that the Fortuna Agreement is fundamentally different from what the parties had discussed or from their earlier shared expectations. It does not deny that Kaban and Fortuna worked to fit the Fortuna Agreement, and its language, into the Letter Agreement. It simply says, however, that the implied terms Goldcorp relies on were never made express contractual terms or contractual requirements of the Letter Agreement. It further emphasizes that the Letter Agreement was carefully prepared by sophisticated commercial parties who had the benefit of legal advice.

b. The Relevance of the BMO Meetings

[42] Different representatives of each of Goldcorp, Kaban and Fortuna met at different times at the BMO Global Metals and Mining Conference in Florida. These meetings occurred between February 28, 2016 and March 2, 2016. Both counsel spent significant time on the evidence of the various individuals who participated in these meetings. These individuals filed affidavits and/or were examined for discovery in relation to their meetings and exchanges. Ultimately, however, I do not consider that these meetings, and what took place at them, are relevant to the specific issues before me. I understood counsel to agree with this.

[43] At these meetings, representatives of Fortuna were introduced to Goldcorp and there was some discussion of Fortuna's potential involvement with Kaban and with the Project. It is clear that Kaban and Fortuna had not yet come to any agreement but they appear to have discussed certain elements of a proposed transaction -- at least at a high level.

[44] Counsel for Goldcorp endeavoured to establish that Goldcorp never agreed to or accepted any such potential proposed terms or the involvement of Fortuna in any transaction. This issue appears to be academic in that Kaban does not argue that Goldcorp formally agreed to or accepted Fortuna's involvement in the Project on any specific terms or at all. At most, Kaban argues that Goldcorp was apprised of some elements of a potential transaction, that Goldcorp appeared receptive and that it did not express any opposition. Mr. Ridgway, for example, deposed that he believed Mr. Ball appeared "keen". Goldcorp's representatives, in turn, have deposed that they understood Kaban's discussions with Fortuna were preliminary and Mr. Ball, for example, has deposed that he had "more questions than answers" about what was being discussed.

[45] Kaban, on the other hand, accepted, in response to a question from me, that it relied on this series of meetings and various ensuing communications to establish that Goldcorp was acting in "bad faith", or that it was using "bully like tactics" or that it was only endeavouring to deprive the Founders of their ongoing shareholdings in Kaban and that it had no real concern in relation to the Fortuna Agreement. Aspects of these allegations were pursued with Mr. Ball at his examination for discovery and were denied by him. When I communicated to counsel for Kaban that such issues, and such factual determinations, could not be addressed in the context of this application I understood counsel to accept this and to abandon these specific and limited submissions.

6. Issue 2: Did the Letter Agreement Contain Additional Implied Terms?

[46] Paragraph 16 of Goldcorp's Response to Civil Claim asserts:

16. It was an express and/or implied term of the Letter Agreement that (a) Murphy and the other Founders would remain actively involved in the development and management of the Project as members of Kaban's board and/or management after Closing, and (b) the Initial Financing would be structured to ensure Goldcorp held the largest single shareholder interest in Kaban.

[47] Kaban, in turn, both in its Notice of Civil Claim, at para. 21, and its Reply, at para. 9, denied that either of the implied terms that were pleaded by Goldcorp were incorporated into the Letter Agreement.

[48] Two questions arise. The first is whether Goldcorp can establish, as a matter of evidence and at law, the implied terms that it advances. The second is what, if any, relevance does the "entire agreement clause" (clause 15(f)) in the Letter Agreement have?

[49] Kaban accepts that if Goldcorp is able to establish the existence of any one of the implied terms it relies on, notwithstanding the entire agreement clause, it would succeed on its application for judgment.

a. Can Goldcorp Establish the Existence of an Implied Term?

[50] To succeed on this first issue Goldcorp must establish several things. It must establish that the parties shared the same presumed intentions that Goldcorp alleges prior to the parties executing the Letter Agreement. This is because Kaban, in its Reply, at para. 7, denies these matters. Implying a term on the basis of business efficacy or the officious bystander test, which Goldcorp relies on in this case, is based on the presumed intention of the parties. This requires "a factual determination based on the evidence adduced in the particular case. Indeed, the evidence is crucial and will be examined closely to ensure that the court is imposing the parties' (presumed) will rather than its own": G.R. Hall, Canadian Contractual Interpretation Law, 3rd ed. (Canada: LexisNexis, 2016) at 176; Venture Capital USA Inc. v. Yorkton Securities Inc. (2005), No. 75 O.R. (3d) 325 (C.A.) at para. 31, leave to appeal refused, [2005] S.C.C.A. No. 334.

[51] Next, it must establish that these presumed shared intentions satisfy the various legal requirements that are necessary, and that I will identify, to establish an implied term.

i. The Evidentiary Foundation

[52] Goldcorp, in its pleadings, relies on two specific implied terms. One such implied term, as I have said, is "that Murphy and the other Founders would remain actively involved in the development and management of the Project as members of Kaban's board and/or management after Closing".

[53] In its written argument and submissions, Goldcorp relied on other implied terms. One of those implied terms was that the $35 million that was to be raised by Kaban, "in one or more financings" would be used for studies and to develop the Project. For present purposes Goldcorp need only establish a single such alleged implied term in order to succeed.

[54] It is generally necessary to plead an implied term. In this case, however, the additional implied terms that Goldcorp relied on, and in particular the additional implied term I have identified and that I intend to address, appears to have been pursued, without objection, at the examinations for discovery of Kaban's representatives. This further alleged implied term was also identified in Goldcorp's Notice of Application, in its written submissions and it was responded to, in full, in Kaban's written submissions.

[55] In such circumstances, I do not consider that Kaban would be prejudiced by Goldcorp's reliance on an additional implied term that it had not previously expressly identified or advanced in its Response to Civil Claim: Canadian Bedding Company Ltd. v. Western Sleep Products Ltd., 2009 BCSC 1499 at paras. 76-78; Chandler v. Rasmussen, 2012 BCSC 1010 at paras. 145-147.

[56] I have addressed these two alleged implied terms -- that being (i) that the Founders would lead and remain actively involved in the management of Kaban and in the development of Cerro Blanco and (ii) the $35 million that Kaban was to raise by way of financing was to be invested in the Project, including in relevant feasibility studies, because they are, in some senses, quite straightforward.

[57] I say they are straightforward, in part, because there is no denial from any one of the Founders, in the affidavits that they filed, of the facts that are deposed to by each of Mr. Ball and Ms. Wang in relation to these two matters. Indeed, even though each of the Founders filed affidavits, none of them chose to contest any aspect of the history or facts that are deposed to by Mr. Ball and Ms. Wang.

[58] This is to be contrasted with the consistent, affirmative and unequivocal evidence of each of Mr. Ball and Ms. Wang. In particular, each of Mr. Ball and Ms. Wang have deposed that in their various respective and collective interactions with one or more of the Founders the unwavering shared intention and expectation was that these individuals would operate and manage Cerro Blanco and that the $35 million they raised from "investors" would be "invested" in the development of the Project. These interactions took place orally, by way of email and they included the different presentation materials that were sent to Goldcorp. This includes the January PowerPoint presentation that preceded the signing of the Letter Agreement on February 3, 2016.

[59] The evidence of Messrs. Murphy and Downey, at their examinations for discovery in relation to these two implied terms, is also generally consistent with the evidence of Mr. Ball and Ms. Wang.

[60] It is also relevant that Mr. Murphy, at his examination for discovery, admitted that Fortuna wanted 51% or more of Kaban from the outset. The Founders were not, however, prepared to agree to this initially because "We weren't prepared to give 51 percent because we intended to remain in control, and if we gave the 51 percent we wouldn't be in control". In this vein it is also relevant that the expiry date of the Letter Agreement was looming when the Fortuna Agreement was executed.

[61] Still further, other exchanges or communications that were contemporaneous with the delivery of the Fortuna Agreement are consistent with the position of Goldcorp. The email of Mr. Murphy, which attached the Fortuna Agreement, stated:

While the outcome is certainly not as I planned, I believe that this is the best solution for the success of the project.

So while it may not be the structure I had hoped for, I no longer have a job, I must admit that this is a strong group."

[Emphasis added.]

[62] Upon receiving a copy of the Fortuna Agreement, Mr. Pejman wrote to Mr. Murphy and said:

We confirm receipt. Goldcorp will respond next week as to its desired position under this new circumstance.

[Emphasis Added]

[63] That same day Mr. Murphy communicated with Kaban's financial advisor at BMO Financial about the Fortuna transaction and said:

"Goldcorp is trying to renegotiate the terms of the transaction, as it is with a corporate and not the way we described." [Emphasis added].

[64] In the March 17 Letter Mr. Ball said:

I would be remiss not to remind you that Goldcorp entered into the binding letter agreement with an investor/management group led by you. At no time during the process did we request you find us an alternative transaction to the one contemplated in our agreement dated February 3, 2016.

[65] This is a case then where it is quite clear that the parties had a shared intention or expectation that the Founders would have an ongoing management and development role in the Project after the closing that was provided for in the Letter Agreement.

[66] The same is true for the parties' shared intention that the $35 million that Kaban was to raise, by way of one more financings prior to closing, would be invested in the Project. The affidavit and examination for discovery evidence in relation to this issue is entirely consistent. So too is other evidence that I will come to.

[67] It is also clear, as Kaban emphasizes, that neither of these shared expectations or intentions is expressly contained in the Letter Agreement.

ii. Understanding the Commercial Transaction that is Reflected in the Letter Agreement

[68] Various elements of the Letter Agreement, and of the commercial transaction between the parties, can also inform the shared intention of the parties. The Purchaser, Kaban, was a shell company that was incorporated for this transaction and that was to acquire all of the mining licenses and rights in Cerro Blanco and in Mita. The "Closing" was, however, subject to "completion by the Purchaser of one or more financings to raise gross proceeds of at least (CDN) $35 million". This obligation is defined as the "Financing"; (clause 3(a)(i)).

[69] It is further relevant that the express consideration Goldcorp was to receive consisted of different components:

i) various modest or token payments (clause 4(a)(i)(ii) and (iii));

ii) 40% of the shares of the Purchaser/Kaban - again a shell company (clause 1);

iii) USD $25 million within 12 months following the "Commencement of Commercial Production" (clause 6); and

iv) Kaban was to enter into an agreement with Goldcorp to (i) provide Goldcorp " with registration and piggy back rights on an initial public offering of [Kaban] or any other subsequent equity financing" and (ii) to allow Goldcorp "to maintain their current ownership in any equity financing completed by the Purchaser following Closing, in each case for a period of two years from Closing" (clause 3(c)(ii)).

[70] Thus, the Letter Agreement provided for, among other things, the acquisition of Cerro Blanco and Mita by a shell company with no upfront payment being required from that company. Goldcorp would receive 40% of the shares of that shell company. Goldcorp's further payment was to be received if and when the mine became commercially productive and when Kaban completed a going public transaction or equity financing within two years following the Closing.

[71] Still further, Goldcorp agreed to have no board representation in Kaban and it agreed to "vote with management recommendations at shareholders meetings of the Purchaser" (clause 3(b)(iv)).

[72] Goldcorp also agreed not to participate in any other discussions or negotiations, relating to any direct or indirect acquisition by a third party of Cerro Blanco or Mita, prior to the termination of the Letter Agreement (clause 9).

[73] Furthermore, neither Party was permitted, without the prior written consent of the other, "except in connection with marketing of the Financing by the Purchaser to potential investors, to disclose the existence or terms of this Letter Agreement " (clause 12).

[74] These various express obligations, individually and cumulatively, are consistent with Goldcorp having significant confidence in the "management recommendations" of Kaban and with the ability of management to perform these various obligations. Kaban, when it signed the Letter Agreement, had nothing to offer other than the expertise and reputation of its board and management team. Absent the ongoing involvement of the principals of Kaban, Goldcorp would have transferred its interest in Cerro Blanco to an unknown entity or to unknown individuals. It would have done so without any upfront consideration and it would have relinquished all future board and management decision making in relation to Cerro Blanco to such unknown entities or individuals.

[75] It is also important that the Letter Agreement required "one or more financings to raise gross proceeds of at least CDN $35 million" prior to the Closing. The Merriam-Webster Dictionary (online) defines "financing" as "the act or process or an instance of raising or providing funds". The Court considered the definition of "financing" in Octagon Capital Corporation v. Niko Resources Ltd., 2016 ONSC 3946 citing several dictionary definitions, at para. 15, before concluding "the ordinary and grammatical meaning of 'financing' is the supplying of funds": para. 16.

[76] The Fortuna Agreement was not in the nature of a "financing". It was not, in real terms, about "raising or supplying funds" to Kaban for the development of the Project. The "Non-Disclosure" provision (clause 12) prevented Kaban from disclosing the existence of the Letter Agreement to any third party except in connection with marketing the "Financing" or to "investors".

[77] At the same time, Goldcorp was not permitted (clause 9) to engage in any discussions with other potential purchasers of Cerro Blanco during the term of the Letter Agreement. That is, while Kaban endeavoured to raise "financing" from one or more "investors".

[78] Instead, the Fortuna Agreement represented an acquisition of Kaban by another mining company. Under the Fortuna Agreement, Fortuna would, on closing, acquire 50.1% of the shares of Kaban. It would appoint a majority of the Board of Directors and all of the management team of Kaban (clauses 2 and 3 of the Fortuna Agreement). The Founders would have no further involvement in the transaction other than, for the limited purpose, of the closing (the penultimate paragraph of the Fortuna Agreement). Furthermore, the Fortuna Agreement provided that "Fortuna will have an unrestricted right to determine all aspects of the preferred development option for the Project, including the mining method, processing options, financial and operational factors and the type of technical study to be completed ..." (clause 6).

[79] The foregoing transaction was, as Mr. Murphy said in his March 11, 2016 email, not the outcome he had planned. He "no longer [had] a job". The following description provided by Mr. Ball in the March 17 Letter appears to be accurate:

In simplistic terms, you optioned our current arrangement (intended to be exclusive to you) to Fortuna, who are now responsible for funding, permitting and managing the Cerro Blanco project. This is not the transaction we contemplated when we initially discussed a "Tahoe-type transaction" and has restricted our ability to negotiate terms as appropriate in the proposal.

iii. Other Relevant Express Terms of the Letter Agreement

[80] Additional express terms of the Letter Agreement are relevant to the question of whether the Letter Agreement contained either of the two implied terms I have referred to. This is so because an implied term cannot be inconsistent with the express terms of a written agreement. For example, Goldcorp, in its submissions, also relied on an implied term that Kaban was to obtain financing from a number of investors rather than from a single party. That implied term would, arguably, be inconsistent with the language "completion by the Purchaser of one or more financings" (clause 3(a)(i)).

[81] The Letter Agreement, as I have said, contains an entire agreement clause (clause 15(f)). Kaban argues that this clause, without more, precludes the introduction or addition of any implied terms into the Letter Agreement. For reasons that I will return to, I do not agree that this is so.

[82] There are no express terms in the Letter Agreement that are overtly inconsistent with an implied term that (i) the Founders were to have an ongoing obligation to, inter alia, develop and manage Cerro Blanco or (ii) that the $35 million Kaban raised by way of one or more financings was to be invested into the study and development of the Project.

[83] Instead, there are number of express terms that are consistent with these obligations. This includes:

i) Clause 3(b)(iv) provides that Goldcorp is to provide Kaban with its agreement to "vote with management recommendations at shareholder meetings except in the case of any transactions that are put to a shareholder vote and change of control transactions". [Emphasis added.]

It is clear that in the event of a "change of control transaction", Goldcorp sought to maintain the ability to vote its shares. The Fortuna Agreement is, in effect, a change of control transaction in which Kaban says that Goldcorp has no say.

ii) Clause 3(c)(iv) provides that "there being no finder's or advisory fees payable by the Vendors on behalf of the Purchaser in connection with the Transaction".

This provision is consistent with an expectation that what Kaban and the Founders were to do under the Letter Agreement would not warrant a finder's or advisory fee. Instead its obligations were to be of a different nature. Ultimately, what Kaban did, in connection with the Fortuna Agreement, was exactly what a person or an entity would receive a finder's fee for. It found or secured a prospective purchaser for the intended transaction. It then, for all practical purposes, exited the transaction. Once again, this is exactly what Mr. Ball said in the March 17 Letter: "However, we are willing to proceed on the basis that the Founders retain no more than a 1% interest in Kaban, which I believe is more reflective of a "finder's fee" type arrangement and takes into account the long working relationship between Goldcorp and yourself "

iii) Clause 15(d) addresses the issue of "Assignment" and provides: "the Purchaser has the right to assign this Letter Agreement to a non-Guatemalan affiliate provided that the Purchaser continues to be a party to, and bound by, this Letter Agreement. Otherwise, neither Party may assign its rights or obligations under this Letter Agreement without the prior written consent of the other Parties hereto".

Under the Fortuna Agreement, Kaban remains a party to the Letter Agreement. Nevertheless, the practical reality is that Kaban's various obligations under the Letter Agreement have been transferred or assigned to and assumed by Fortuna. This is made explicit in clause 6 of the Fortuna Agreement which contemplates that "Fortuna will have an unrestricted right to determine all aspects" of the Project's development and in the penultimate paragraph of clause 7 which recognizes that the ongoing role of the Founders is to be limited to closing the transaction.

iv. The Legal Framework

[84] The principles governing the implication of a term into a contract are well established and are developed at length in Canadian Pacific Hotels Ltd. v. Bank of Montréal, [1987] 1 S.C.R. 711 and M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619. These cases establish that there are three means or analytical routes by which a term can be implied into a contract. The third of these routes, relied on in this case, was described in M.J.B. at para. 29 in the following terms:

As mentioned, Le Dain J. stated in Canadian Pacific Hotels Ltd., supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in The Law of Contract in Canada (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[Emphasis in original.]

[85] There are additional principles that are relevant. The onus lies on the party seeking to imply a term into a contract to establish that term: Olympic Industries Inc. v. McNeill (1994), 38 B.C.A.C. 254 (C.A.) at para. 31. It is the actual shared intention of the parties, and not what reasonable parties would intend, that is relevant: Moulton Contracting Ltd. v. British Columbia, 2015 BCCA 89 at para. 58. The device of implying a term into a contract is to be used sparingly and with caution: High Tower Homes Corp. v. Stevens, 2014 ONCA 911 at para. 39. Thus, courts must be cautious not to rewrite contracts for the contracting parties: Zeitler v. Zeitler (Estate), 2010 BCCA 216 at para. 25. This latter point is important and it was developed further in Zeitler:

[27] Many other decisions explore the law of implied contractual terms. Perhaps the most succinct summary of the law is to be found in Luxor (Eastbourne) Ltd. v. Cooper, [1941] A.C. 108, [1941] 1 All E.R. 33 (H.L.), where at pp. 52-53 Lord Wright said this:

There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed,

but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts.

[86] Still further, as I have said, an implied term cannot be inconsistent with the express terms of a contract: Zeitler at para. 25; G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd. (1983), 43 O.R. (2d) 401 (C.A.) at 403.

[87] I have also considered the relevance of the parol evidence rule. That rule, though "riddled with exceptions", Canadian Contractual Interpretation Law at 320, does establish that the evidence of a parties' subjective intention is never admissible as an aid to contractual interpretation: Eli Lilly & Co. v. Novapharm Ltd., [1998] 2 S.C.R. 129 at para 54. (S.C.C.).

[88] Two points are, however, relevant. First, the introduction of an implied term, on the basis of the officious bystander test, relies on the shared intentions of both parties rather than on the subjective intentions of one or the other of the parties. Thus, in this case it is not the subjective intentions of Goldcorp or Kaban that I have looked to but rather the shared intentions of both parties. Second, the process of implying a term into a contract goes beyond the "interpretation" of that contract. In Canadian Contractual Interpretation Law the author, at 175, states: "While the principles governing the implication of terms into a contract are rooted in the law of contractual interpretation, implying a term into a contract is a separate process from simple interpretation of the contract. Interpretation gives meaning to the words used by the parties'; implication fills gaps in those words".

[89] Even if, however, the parol evidence rule were to prevent me from considering the interactions and discussions of the parties prior to their signing the Letter Agreement, I would come to the same conclusions as I have. I say this on the basis of the nature of the transaction the parties entered into and the language and terms of the Letter Agreement.

[90] Finally, Goldcorp argued that the Letter Agreement was in the nature of a "term sheet" and that it was expressly contemplated the parties would use commercially reasonable efforts to enter into one or more definitive agreements that would be consistent with the terms of the Letter Agreement (clause 2 of the Letter Agreement). It did so in aid of the submission that the parties knew the Letter Agreement did not fully reflect their agreement. I do not consider this persuasive. The Letter Agreement was a reasonably detailed 12-page document that was binding on its terms (clause 15 (g)). Furthermore, Goldcorp accepts that the Letter Agreement contained the various essential terms necessary to create a binding contract.

v. The Entire Agreement Clause

[91] Kaban, as I have said, placed significant emphasis on the entire agreement clause found in the Letter Agreement and argued that that clause prevented the inclusion of any implied terms into the Letter Agreement. Clause 15(f) of the Letter Agreement provides:

f) Entire Agreement: This Letter Agreement contains the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings with respect thereto.

[92] Kaban correctly emphasizes that entire agreement clauses are given more weight or significance in circumstances where the parties are sophisticated and have access to legal advice: Canadian Contractual Interpretation Law at 319 and 323-324; MacMillan v. Kaiser Equipment Ltd., 2004 BCCA 270 at para. 45. Courts will often enforce an entire agreement clause, see Balfour v. Tarasenko, 2016 BCCA 438 at para. 53. I am also mindful that there are cases where courts have refused to imply a term into a contract on the basis of an entire agreement clause, see for example; 921250 Alberta Ltd. v. 762910 Alberta Inc., 2003 ABQB 81 at para. 20; and Kovacevic Consult Inc. v. Coastal Contacts Inc., 2017 BCSC 321 at para. 117, aff'd 2018 BCCA 203.

[93] Nevertheless, in Canadian Contractual Interpretation Law, at 318, the author observes:

Entire agreement clauses--provisions that specify that the written text agreed by the parties constitutes the whole contract and that excludes all representations made outside the document--are one of the most confusing areas of the law of contractual interpretation in Canada. There appears to be no overarching theory of how the court should or do approach such provisions, so it is difficult to predict in any particular case whether an entire agreement clause will be enforced or not.

[94] In the pages that follow, Canadian Contractual Interpretation Law explains the basis for this confusion and identifies a number of circumstances which can influence whether a court enforces an entire agreement clause or not. One of those circumstances, again, is the sophistication of the parties: at 323-324. Canadian Contractual Interpretation Law does not, however, expressly address the interrelationship between alleged implied terms and entire agreement clauses.

[95] In K. Lewison, The Interpretation of Contracts, 4th ed. (UK: Thomson, Sweet & Maxwell, 2007), the author, at 6.10 states:

Terms may also be implied or incorporated by conduct. But a term which would otherwise be implied as a result of custom or usage may be excluded by an "entire agreement" clause.

[96] This quote, by way of a footnote, references the decision of Exxonmobil Sales and Supply Corp. v. Texaco Ltd., [2004] 1 All E.R. (Comm) 435. In that case the Court dealt with an entire agreement clause that, among other things, confirmed that "there is no other promise, representation, warranty, usage or course of dealing affecting it". In such circumstances the Court considered that it was not open to argue that a term, based on custom and usage, should be implied into the contract.

[97] The Court in Exxonmobil also considered whether a term could be implied into the contract on the basis of business efficacy and concluded, on the basis of general principles, that it could not. The Court went on, however, to consider whether the entire agreement clause in the agreement would, in any event, have prevented a term from being implied on the basis of business efficacy. In relation to that latter issue the Court said:

The entire agreement clause was also relied upon by Exxonmobil in seeking to defeat the argument that a term should be implied based upon business efficacy. I have not, on that account, rejected Texaco's argument that a term should be implied on the grounds of business efficacy. It seems to me arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by the entire agreement clause because it could not be said that such a term is to be found in the document or documents forming part of the contract. The same cannot be said of an implied term based upon usage or custom.

[98] Deepak v. ICI, [1998] 2 Lloyd's Rep. 139 (Q.B.) is another case where the Court carefully analyzed the language of the entire agreement clause that was being relied on. The clause confirmed that there were not " any agreements, understandings, promises or conditions, oral or written, express or implied " in the contract. The Court, at 168, confirmed that this language would not extend to "representations". It did, however, extend to "warranties collateral to the main agreement", at 168.

[99] The point is that the language of an entire agreement clause will not necessarily be effective in preventing one of the parties from relying on a representation, or a collateral agreement, or an implied term or some other legal theory. Different entire agreement clauses use different language. In each case it is necessary to consider the language of the particular entire agreement clause and consider whether it properly addresses or captures the legal theory or legal position being relied on by one of the parties.

[100] Thus, in this case the question is whether the language of clause 15(f) in the Letter Agreement and, in particular, the words "supersedes all prior agreements or understandings" in that provision, which Kaban emphasizes, extend to the implied terms that Goldcorp seeks to rely on. I do not consider that it does.

[101] In The Interpretation of Contracts, at 193-195, the author explains that an implied term is not, as a matter of legal concept, based on the agreement or understanding of the parties. Instead it is based on their shared intentions. There may be cases, as in this case, where the parties did discuss an issue or term that did not make its way into a contract. But that is not

necessary. Indeed, in most cases that deal with implied terms the parties never turned their minds to the term that one of them subsequently seeks to imply into the contract. There is no "understanding" or "agreement" between them. The term is implied into the written agreement on account of business efficacy or because it is obvious what the parties would have said if they had been asked about the term when they entered into their agreement.

[102] This point is developed in The Interpretation of Contracts, at 194, where the author refers to the following explanation in Codelda Construction Pty Ltd. v. State Rail Authority of New South Wales, (1982) 149 C.L.R. 337 at 346:

The implication of a term is to be compared, and at the same time contrasted, with rectification of a contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which the parties would have agreed had they turned their minds to it - it is not a term actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provisions for it. Rectification ensures that the contract gives effect to the parties' actual intentions; the implication of a term is designed to give effect to the parties presumed intention.

[103] Thus, I do not consider that the words "agreements" or "understandings" in the entire agreement clause in the Letter Agreement prevent Goldcorp from relying on the implied terms it advances.

[104] Kaban also argued that because, Mr. Ball, in his affidavit, used the word "agreement", when referring to the implied terms Goldcorp relies on, this supported Kaban's submission in relation to the use of that word in clause 15(f). Again, I do not agree. Mr. Ball is a businessman. It is not his understanding of what properly supports an implied term that is relevant. Rather that question turns on a proper understanding of the legal basis on which a court may imply a term into a contract.

[105] Apart from looking at the specific language of a specific entire agreement clause, and there are many cases that do not, there is no broad principle that entire agreement clauses necessarily serve to prevent a party from relying on an implied term. Thus, there are instances where courts have implied a term into an agreement without any detailed consideration of the language of the entire agreement clause in the agreement. In Agfaphoto Canada Inc. v. Overwaitea Food Group Ltd., 2008 BCSC 1287, Justice Holmes, as she then was, determined that, notwithstanding the existence of an entire agreement clause, "the parties' business relationship and history" left "little doubt" that the parties' written agreement contained an implied term that was "necessary to give the Agreement business efficacy": para. 17. See also Cordova Housing Holdings Inc. v. Wheeldon, 2015 BCSC 2301 at paras. 30-32.

[106] In Packall Packaging Inc. v. Ciszewski, 2016 ONCA 6, the Ontario Court of Appeal considered a separation agreement that contained three different terms that were in the nature of entire agreement clauses. The Court said:

[20] The appellants submit that three terms of the Separation Agreement prevented the motion judge from implying a term restricting Anita from selling her shares in Anita Co. without Henry's consent. Section 1.6 states: "This Agreement replaces all oral or written agreements made between the parties." Section 5.2 states:

Anita and Henry do not want any court to order a change which deviates from or overrides the terms of this agreement, and more particularly this release. Anita and Henry want the court to uphold this agreement in its entirety inasmuch as they are basing their future lives upon this release.

Finally, s. 9.1 states: "There are no representations, collateral agreements, warranties or conditions affecting this Agreement."

[21] The motion judge referred only to s. 9.1, holding that it does not deal with implied terms: at para. 46.

[22] I do not accept the appellants' submission on this issue. I agree with the motion judge that the language of s. 9.1 does not preclude the implication of a term. Nor does the language of ss. 1.6 and 5.2. In any event, as this court stated in CivicLife.com Inc. v. Canada (Attorney General) (2006), 215 O.A.C. 43, at para. 52, the presence of an entire agreement clause will not preclude the implication of a term of the contract because the term is already part of the existing agreement: finding an implied term does not add a term to the agreement that was not part of the parties' bargain, but enforces the parties' reasonable expectations.

[107] Packall addresses several points. It deals with the language of the entire agreement clauses in issue and concludes that that language does not extend to any implied terms. Next it referred to CivicLife.com Inc. v. Canada (Attorney General) (2006), 215 O.A.C. 43. CivicLife.com was addressed in Moulton, where the Court of Appeal, at para. 68, adopted the comments that were made earlier in High Tower. Specifically, the Ontario Court of Appeal in High Tower, at para. 37, had observed that in light of the decision of Bhasin v. Hrynew, 2014 SCC 71:

CivicLife is about the importance of acting in good faith in contractual dealings, and not about the general ability to imply terms - whatever their nature - notwithstanding an entire agreement clause.

[108] Notwithstanding this observation, neither Agfaphoto nor Packall have anything to do with good faith obligations. Furthermore, a review of High Tower, at para. 39, makes clear that the Court of Appeal ultimately declined to include an implied term into the agreement in question not because of the existence of an entire agreement clause, but rather because such a term would have been inconsistent with the express provisions of the agreement, because an implied term was not necessary to give business efficacy to the parties'

agreement and because the proposed implied term did not reflect the presumed intentions of the parties.

[109] Finally, Packall makes the point, albeit with reference to CivicLife.com, that was made in Codelda. That is, that it is important to understand the conceptual basis for implying a term into an agreement. An implied term is not based on an actual agreement between the parties. Indeed, it does not add a new term to an agreement that was not part of the parties' bargain. It is a term that is based on the Court's conclusion that the term reflects what both parties intended when the contract was made.

vi. Analysis

[110] In considering whether to imply a term into a contract, in order to give that agreement business efficacy or under the officious bystander test, it is important for the Court to bear in mind the cautions, limitations and considerations that I have identified and that are expressed in the relevant authorities. These cautions and limitations are restrictive and exacting. The object of the Court's exercise, however, subject to such limitations, is to give effect to the presumed intentions of the parties. In Zeitler, the Court of Appeal developed this further and said:

[26] The courts have adopted a business efficacy or business necessity test for determining whether a particular term is implied by a contract. The following passage written by Bowen L.J. in The "Moorcock" (1889), 14 P.D. 64 at 68 (C.A.), is often cited as the starting point for discussing this area of contract law:

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

[111] The present intention of the parties is a question of fact that is based on the circumstances of each case: Olympic Industries at para. 31; Zeitler at para. 32. The analysis requires a consideration of the transaction as a whole: Zeitler at para. 18. It further requires that the Court determine the mutual intention of the parties at the time of contract formation: Illidge v. Sona Resources Corporation, 2019 BCCA 89 at paras. 22 and 23.

[112] The positions of the parties and the question of whether the Letter Agreement contained implied terms that the Founders would oversee the management of Kaban and the development of Cerro Blanco, and use the $35 million that was to be raised from investors for the Project, give rise to two very different agreements.

[113] The first agreement is one where Kaban was required to first complete one or more "financings", defined as the "Financing", before it acquired the assets, including Cerro Blanco, that are described in the Letter Agreement. The Founders would then direct the affairs of Kaban and oversee the development of the mine. The $35 million would be used for necessary studies and development. That development was important, at least in part, so that Goldcorp might receive USD $25 million, provided for in the Letter Agreement, if the mine became commercially productive.

[114] The second agreement, represented by the Fortuna Agreement, reflects the effective "purchase" of Kaban by Fortuna and the removal of the Founders from any ongoing involvement in Kaban. They would have no place on the board of Kaban or any role in the management of the Project. The obligation of ongoing development and management of the Project lie with, and are in the sole discretion of, Fortuna (Clauses 3 and 6 of the Fortuna Agreement). The $35 million in "financing" that was a precondition to the "Closing" in the Letter Agreement did not in fact, have to be used for studies or for the development of Cerro Blanco.

[115] I am satisfied, and find as a fact, that the first of these agreements, and specifically the implied terms within it, reflects the presumed intentions of Goldcorp and Kaban when the Letter Agreement was executed.

[116] This intention is reflected in the uncontradicted evidence of Goldcorp and in the other objective documents and communications that I have referred to. It is consistent with the dealings of the parties and with the "transaction as a whole". It is consistent with various express terms of the Letter Agreement and with the structure and nature of the parties' intended transaction. Indeed, there is no evidence, of any kind, that a structure where an unknown third party purchaser would acquire Kaban and then take on the development and management of the Project, was ever intended by Goldcorp or Kaban or any of the Founders. There is no term in the Letter Agreement that foreshadows this. There was, similarly, never any apparent intention that the $35 million in financing that Kaban had to raise prior to Closing would be used for any purpose other than the Project.

[117] Absent the inclusion of the implied terms that Goldcorp seeks, the Letter Agreement, as reflected in the Fortuna Agreement, is not commercially efficacious. It allows Kaban to find a purchaser for Cerro Blanco and to unilaterally determine the suitability of that purchaser. Goldcorp would have no input into that decision. It is to be recalled that when RedZone had earlier sought to acquire Cerro Blanco, Goldcorp was not interested. Instead, it sought to oversee a formal purchase process where it would choose the purchaser of the mine.

[118] This unknown purchaser would control both the board of Kaban and the management of the Project. The unknown purchaser would be able to vote Goldcorp's 40% interest in Kaban. The unknown purchaser would not be required to make any upfront payment to Goldcorp. Indeed, the unknown purchaser would not be required to invest the $35 million, which had to be raised prior to the closing, into the Project. Instead, the unknown purchaser would have paid $35 million to Kaban and, because it now controlled the board and management of Kaban, it would be in a position to decide where or how to use that $35 million. This is, in fact, what Kaban expressly argues and what the Fortuna Agreement allows.

[119] Such circumstances do not reflect the shared intentions of Goldcorp and Kaban. They would create "a failure of consideration as cannot have been within the contemplation of either side": Zeitler at para. 26. They would "impose on one side all of the perils of the transaction" and they would "emancipate one side from all of the chances of failure". They give rise to a result they can fairly be described as "absurd".

[120] I consider it "obvious" that both parties would accept that this is not the transaction they had intended. Mr. Murphy's March 11 email acknowledges this. It is equally "obvious" that both parties would agree that the Founders were not intended to find a purchaser for Cerro Blanco or for Mita. They were endeavouring to secure financing and to find "investors". It is "obvious" that the shared intention of both parties was to have the Founders involved with Kaban and that they would continue to oversee the management and development of Cerro Blanco. Again, Mr. Murphy's March 11 email says this and the Founders admit it. It could not be more "obvious" that the shared intention of both parties was that the $35 million would be used for the Project. Why else would the parties have required that this money be raised, from investors, before the transaction could close? It is also noteworthy that Mr. Murphy, at his examination for discovery, said he believed that this requirement was expressly contained in the Letter Agreement.

[121] Accordingly, I consider that the Letter Agreement contained an implied term that Messrs. Murphy, Roberts, and Downey would, after they obtained "financing", continue to be involved in the board of Kaban, that they would use the $35 million they had raised for studies and for the development of Cerro Blanco, and that they would oversee the ongoing development and management of the Project. These implied terms "arise inevitably to give effect to the intention of the parties" and they are necessary to give business efficacy to the Letter Agreement: Zeitler at para. 27.

[122] The Fortuna Agreement is inconsistent with these implied terms of the Letter Agreement. Accordingly, there was no requirement for, or obligation on, Goldcorp to accept the terms of the Fortuna Agreement.

7. Issue 3: Was there an obligation on Goldcorp to provide its consent to the Fortuna Agreement?

[123] The Fortuna Agreement purports, in its opening paragraph, to confirm the agreement of Fortuna and Kaban "pursuant to the Letter Agreement". The Fortuna Agreement also requires, as I have said, "the consent of Goldcorp to Fortuna's participation in the Transaction and the development of the Project" (clause 5(b)).

[124] Before me the parties focused on the obligation of Goldcorp, if any, to act reasonably and to consent to the Fortuna Agreement. That issue is informed, if not determined, by the consistency of the Fortuna Agreement with the Letter Agreement. Thus, it is first necessary to determine whether the material terms of the Fortuna Agreement were different from the express terms of the Letter Agreement. If, in fact, the Fortuna Agreement did impose additional obligations on Goldcorp or did vary the express terms of the Letter Agreement the next question is whether there was, nevertheless, an obligation on Goldcorp to provide its consent to the Fortuna Agreement. It is important that I am now dealing with the express terms of the Letter Agreement and not the implied terms that I dealt with earlier.

a. Was the Fortuna Agreement Consistent with the Letter Agreement?

[125] I consider that the Fortuna Agreement was materially different from the Letter Agreement in several respects. First, the Fortuna Agreement required that Goldcorp enter into a shareholders agreement with Kaban, Fortuna, and the shareholders of Kaban on terms "reasonably satisfactory to Fortuna, Goldcorp and the Founders". That shareholders agreement was to include, without limitation, the terms contained in clauses 6 and 7 of the Fortuna Agreement.

[126] The record before me does not disclose all of the shareholders of Kaban. This would, however, include each of the Founders. Clause 7(e) of the Fortuna Agreement suggests that this might also include RedZone and other third parties.

[127] The Letter Agreement, on the other hand, does not contemplate or require that Goldcorp enter into a shareholders agreement with Fortuna or with any other third party. Instead the Letter Agreement contemplates that the "Parties", defined as Goldcorp and Kaban, would enter into further "Definitive Agreements" that would give effect to the "Transaction" provided for in the Letter Agreement.

[128] To be clear, and putting it on its best foot for Kaban, there is nothing in the Letter Agreement that contemplates or requires Goldcorp to enter into contractual relations with any third party who provided "financing" to Kaban under clause 3(a)(i). In the March 17 Letter, Mr. Ball identified this concern and he commented that the Fortuna Agreement "has restricted our ability to negotiate terms".

[129] Apart from this overarching issue there are additional specific concerns with some of the terms or requirements of Clauses 6 and 7 of the Fortuna Agreement. The opening words of clause 6 state that the shareholders agreement will provide "that Kaban will cause to be completed either a pre-feasibility or a feasibility study (the "Study") on the Property as soon as possible following Closing". The next sentence, however, contemplates that the study may not, in fact, be completed and the balance of the provision addresses the consequences of there being no completed study.

[130] It is to be remembered that clause 3 of the Fortuna Agreement establishes that Fortuna will appoint the management team of Kaban and that clause 6 of the Fortuna Agreement states that "Fortuna will have an unrestricted right to determine all aspects of the preferred development option for the Project, including the mining methods, processing options, financial and operational factors and the type of technical study to be completed".

[131] Thus, Goldcorp is being asked to sign a shareholders agreement that would confirm not only that Fortuna is to have the "unrestricted right" to determine what kind of study to be completed for the Project but to accept that Fortuna may decide that there may, in fact, not be any such completed study.

[132] In this context, it is again worth remembering that under the Letter Agreement Goldcorp was to receive USD $25 million if the Project entered commercial production. Absent the completion of a study no such commercial production could commence.

[133] The balance of clause 6 of the Fortuna Agreement seeks to safeguard the interests of the Founders without any such safeguards for Goldcorp. To be specific, clause 6(a) and (b) provides that if no study is completed by Fortuna, the Founders are to be paid certain amounts within certain time frames. There is no similar provision or protection or payment for Goldcorp. Instead clause 6(c) provides:

On or before the date which is 42 months following the Closing, Fortuna will thereafter, or the Founders will have the right to require Fortuna thereafter, to use commercially reasonable efforts to cause Kaban to become a reporting issuer in at least one jurisdiction of Canada by way of an initial public offering, reverse take-over, or otherwise and for the common shares of the resulting public company to be listed on the Toronto Stock Exchange, the TSX Venture Exchange or other recognized stock exchange in Canada (a "Going Public Transaction").

[134] Clause 3(c) of the Letter Agreement, however, had provided that the "Transaction" was subject to a number of conditions in favour of Goldcorp, including:

(ii) the Parties shall have entered into an agreement to: (i) provide the Vendors with registration and piggyback rights on an initial public offering of the Purchaser or any other subsequent equity financing; and (ii) allow the Vendors to maintain their current ownership interest in any equity financing completed by the Purchaser following Closing, in each case for a period of two years from Closing;

[135] Thus, if Fortuna, in its sole discretion, chose not to complete the Study, the "going public" aspect of the Transaction, and the express requirement of the Letter Agreement, would be further delayed or would not happen at all.

[136] I had earlier said (at para. 69 of these Reasons for Judgment) that the consideration Goldcorp was to receive under the Letter Agreement consisted of various components. One such component was the benefit it would receive when Kaban was taken public or it undertook a further equity financing. Counsel for Kaban agreed with this.

[137] The consideration a vendor receives on a purchase transaction, or the "price" that is to be paid for the asset it sells, is an essential term of such an agreement. In G. Fridman, The Law of Contract, 5th ed. (Canada: Thomson Carswell, 2006) at 14 the author states: " In the case of a contract for the sale of land at the minimum there must be consensus ad idem on the parties, the land description and the price".

[138] There is no ability for one party to a contract to unilaterally vary an essential term of an agreement. What the Fortuna Agreement proposed is no different from the purchaser of a home unilaterally announcing to the vendor of that home that the vendor might get paid in six months rather than in the three months they had earlier agreed to.

[139] Accordingly, I find that the Fortuna Agreement sought to both impose additional obligations on Goldcorp that were not contemplated by the Letter Agreement, and to vary aspects of the central terms of the Letter Agreement.

b. Was There any Obligation on Goldcorp to Provide its Consent to the Fortuna Agreement?

[140] In its Reply, Kaban raised two issues in answer to Goldcorp's reliance on the consent provision contained within the Fortuna Agreement. At paras. 17 and 18 of its Reply, Kaban asserted (i) that Goldcorp was not a party to the Fortuna Agreement and that it could not therefore rely on that provision; and (ii) that to the extent Goldcorp took issue with the Fortuna Agreement it was under an obligation to negotiate in good faith with Kaban to resolve those differences. At the hearing before me Kaban only relied on the second of these positions.

[141] An obligation of good faith performance can arise either under the express terms of an agreement between two parties or by operation of the common law.

i. Good Faith Performance under the Letter Agreement

[142] The Letter Agreement contains various express provisions that use different language but that require the parties to act in a commercially reasonable manner in different circumstances. The following provisions are potentially relevant:

i) In the opening paragraphs of the Letter Agreement "the Parties agree to use commercially reasonable efforts to close the Transaction on or before February 29, 2016, or such other date as the Parties may otherwise agree";

ii) Clause 2 provides: "The Parties agree to negotiate in good faith and use their commercially reasonable efforts to enter into one or more definitive agreements providing for the Transaction consistent with the terms hereof to replace and supersede in its entirety this Letter Agreement"

iii) Clause 2 also contains a provision that the Parties are to use their "commercially reasonable efforts to implement and complete the Transaction" in some revised form if that becomes necessary for tax reasons.

iv) Clause 3(a)(ii) under the heading "Conditions" provides: "all required government, regulatory and other third-party approvals and consents that are necessary or advisable to complete the Transaction shall have been obtained, each on terms and conditions satisfactory to the Purchaser and the Vendors, each acting reasonably".

v) Clause 7 contains a provision that Goldcorp and Kaban are to use "commercially reasonable efforts", in given circumstances, to transition employees from a particular facility to the Project; and

vi) Clause 10 contains a provision that Goldcorp "shall use reasonable best efforts" to furnish Kaban with documents and information that Kaban may request.

[143] Kaban, in its written submissions, relied on the provisions that I have identified in the preceding paragraph at subparagraphs (i), (ii) and (iv). In argument, it emphasized Clause 3(a)(ii) found in subparagraph (iv).

[144] The fact that the parties to the Letter Agreement relied on a number of specific provisions to address their respective obligations to use "commercially reasonable efforts" suggests that each of those provisions was intended to address a particular set of circumstances. An analysis of the language of these various provisions supports this conclusion and calls into questions their relevance in the circumstances of this case.

[145] The opening paragraph of the Letter Agreement appears to be focused on issues of timing. It would not be open to either party to act in a manner that delayed the closing of the Transaction and to thereby allow the Letter Agreement to be terminated under clause 14.

[146] Clause 2, in turn, requires the "Parties" to use their commercially reasonable efforts to enter into one or more definitive agreements "providing for the Transaction consistent with the terms hereof". The underlying requirement of Clause 2 is that these definitive agreements were to be consistent with the terms of the Letter Agreement. I have concluded that material aspects of the Fortuna Agreement were not consistent with the Letter

Agreement. In addition, the Fortuna Agreement contemplated a further agreement, a shareholders agreement, between parties who were not the defined "Parties" under the Letter Agreement. Nevertheless, and I will return to this, the March 17 Letter confirmed that Goldcorp was prepared to continue to work with Kaban. It is clear from Kaban's internal communications that it understood this when it received the March 17 Letter. It was Kaban that chose to bring relations between the parties to an end in the March 21 Email. It is not open to Kaban to now argue that Goldcorp would not negotiate with it.

[147] Clause 3(a)(ii) requires that the parties act reasonably to obtain "all required government, regulatory and other third-party approvals and consents". Such provisions are common in commercial agreements. The parties to a transaction may require some sort of approval or permit and they are required to use their commercially reasonable efforts to secure that approval or permit. The consent required in the Fortuna Agreement is not, however, the consent of a government or regulatory body or other third party. Instead, it is Fortuna that seeks Goldcorp's consent to the Fortuna Agreement.

[148] Accordingly, I do not consider that any of these specific provisions is directly relevant in the present circumstances. Even if I am mistaken in this conclusion I would determine that Goldcorp acted in a commercially reasonable manner. It identified its concerns in the March 17 Letter. It left the door open for Kaban to respond. For the reasons that follow in the next segment of these Reasons for Judgment I do not consider that it was required to do more.

ii. A Common Law Obligation of Good Faith Performance

[149] In Bhasin v. Hrynew, 2014 SCC 71, the Supreme Court of Canada addressed the duty of honest performance and "the organizing principle of good faith" that exist in contract. The decision also addressed the various potential sources and kinds of good faith obligations that exist in contract. In doing so the Court addressed a number of earlier decisions and the writings of various scholars: see paras. 46-48. It also addressed developments in other common law jurisdictions: see paras. 57 and 58.

[150] I do not understand either party to be asserting that those portions of Bhasin that address an obligation of honest performance are engaged in this case. Certainly this issue is not raised in the pleadings.

[151] The Court made the following comments, in relation to good faith obligations, that are relevant and that do pertain to this case:

[63] The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

[69] The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at s. 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts - a relational recipe" (2005), 33 A.B.L.R. 87.

[70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another - even intentionally - in the legitimate pursuit of economic self-interest: A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: Bank of America Canada v. Mutual Trust Co., 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[152] These comments, in the context of the Letter Agreement, gives rise to various relevant considerations. The Letter Agreement and the further agreements that were to follow it, were to govern a long term relationship between Kaban and Goldcorp. The relevant context also includes the fact that the Founders knew and acknowledged that the Fortuna Agreement did not reflect the parties' earlier intentions or expectations. Still further the relevant context includes the fact that the Fortuna Agreement and the Letter Agreement were not consistent in several respects. Each of these considerations is relevant to the "legitimate intentions" of Goldcorp and Kaban. Each is relevant to demonstrate that Goldcorp did not act "capriciously or arbitrarily".

[153] Kaban referred to a number of other decisions which deal with the obligation of parties to cooperate in order to achieve the objects of a contract or to exercise, in a reasonable manner, a discretionary power that is granted to them under a contract. None of these cases impose any obligation on a party to subordinate its own commercial interests in a material way or to agree to new or additional terms and conditions that are unilaterally being imposed upon it.

[154] For example, in Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072, which was referred to in Bhasin at para. 49, the parties to a real estate transaction had failed to specify in their agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. At law the vendor was the only party capable of obtaining such permission. As such, the Court determined that the vendor was under an obligation to use reasonable efforts to secure that permission.

[155] Similarly, in Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada, [1995] 2 S.C.R. 187, referred to in Bhasin at para. 50, the lessee of a helicopter had an option to purchase the helicopter at the "reasonable fair market value of the helicopter as established by the Lessor". The Supreme Court of Canada held this clause did not permit the lessor to choose any amount it felt appropriate. Instead, the lessor was bound to act in good faith to determine a reasonable fair value for the helicopter.

[156] It is important that the reasonable expectations of parties are defined by their agreement and must be "consistent with the express terms" of their contract. Thus, in Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd. (1994), 149 A.R. 187 (Alta. C.A.), Kerans J.A., at para. 19 said:

In my view, as a matter of fact, this contract created certain expectations between the parties about its meaning and about performance standards. If those expectations are reasonable, they should be enforced because that is what the parties had in mind. They are reasonable if they were shared. Of course, those expectations must also, to be reasonable, be consistent with the express terms agreed upon. This contract should be performed in accordance with the reasonable expectations created by it.

[157] Mesa was cited and relied upon by the British Columbia Court of Appeal in Mannpar Enterprises Ltd. v. Canada, 1999 BCCA 239 at paras. 25, 50 and 51. and in Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd., 2019 BCCA 66 at para. 10.

[158] A similar point was made by the Ontario Court of Appeal in Barclays Bank PLC v. Devonshire Trust (Trustee of), 2013 ONCA 494 at para. 134: "[A] duty of good faith arises when necessary to ensure that the parties do not act in a way that defeats the objects of the very contract the parties have entered".

[159] Goldcorp's refusal to provide its consent to the Fortuna Agreement did not "defeat the objects of" the Letter Agreement. Its refusal was not inconsistent with the reasonable or "shared" expectations of the parties. Goldcorp's March 17 Letter expressly stated that it was

prepared "continue to work with Kaban" but not under the Fortuna Agreement. Goldcorp refused to agree or "consent" to an agreement that sought to vary the Letter Agreement. In such circumstances I do not consider that there was any good faith or other obligation on Goldcorp to provide its consent to the Fortuna Agreement.

[160] Two final issues arise. First, Kaban argued that it was not open to Goldcorp to rely on the consent provisions of the Fortuna Agreement as that issue is not raised by Goldcorp's pleadings. Respectfully, paragraph 30 of Goldcorp's Response to Civil Claim does exactly that. Paragraph 30 asserts both that the Fortuna Letter was "materially inconsistent with the terms of the Letter Agreement" and that the Fortuna Agreement "expressly required--and therefore invited--Goldcorp to provide its consent".

[161] Second, Kaban argued, based on an email dated March 18, 2016 between a Mr. Durant of Fortuna and Mr. Roberts, that Fortuna might have accommodated some of Goldcorp's concerns. It is not clear to me that this email suggests any such accommodation. More importantly, no such potential accommodation was ever communicated to Goldcorp. Instead, it was Goldcorp, in the March 17 Letter, that left the door open to further potential discussions. This is again relevant because the Founders, when they received the March 17 Letter, believed it was an "an opening salvo" and they initially considered reaching out to Mr. Ball and meeting. They chose instead to treat the Letter Agreement at an end.

8. Conclusion and Ruling

[162] Because each of the second and third issues I have addressed is independently dispositive of the present application, I do not consider that I need to turn to the fourth issue that I identified at the outset.

[163] Goldcorp's application is granted. The claim of Kaban is dismissed. Goldcorp is also to have its costs of this action.

"Voith, J."

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