

CANADA / JUDGMENT

Sequoia Mergers & Acquisitions Corp v. Camacc Systems Inc

2021 BCSC 1740

COURT

Supreme Court of British Columbia

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2021 BCSC 1740 Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc. ,

2021 BCSC 1740

Date: 20210902

Docket: S158001

Registry: Vancouver

Between:

Sequoia Mergers & Acquisitions Corp.

Plaintiff

And

Camacc Systems Inc.

Defendant

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

September 2, 2021

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INTRODUCTION

- [1] The Plaintiff, Sequoia Mergers and Acquisitions Corp. ("Sequoia"), seeks payment of their fee from the Defendant, Camacc Systems Inc. ("Camacc") related to the sale of that business pursuant to a commission fee agreement, despite the fact that the sale did not proceed. The claim is brought in breach of contract by Sequoia against Camacc.
- [2] The essential background is as follows: Sequoia and Camacc entered into a brokerage agreement in November 2014, which provided for relatively low initial retainer amounts to be paid up to the date of the signing of a letter of intent for the sale of Camacc, and a much more substantial "success fee" based on a percentage of the sale price upon completion of the sale. That agreement also included a "Seller's Failure to Complete" clause that required Camacc to pay the success fee to Sequoia even if a sale did not complete, but where a letter of intent had been mutually accepted, and the buyer's breach was not the reason for the sale not proceeding.
- [3] Yehochai Schneider, the president of both Camacc and Camacc's parent company, 3xLogic Holdings Inc., signed a letter of intent for the sale of Camacc in June of 2015 for \$21.6 million (the "LOI") to a US security system company with ambitions to expand into the Canadian market, Protection One Alarm Monitoring Inc. ("Protection One"). It is uncontentionous that this offer was a result of Sequoia's marketing efforts, and exceeded both the value expectations set by Sequoia, and the target sale price desired by Camacc and its ownership group.
- [4] However, in August 2015, just days just prior to the anticipated closing of the sale, Mr. Schneider terminated the negotiations towards a final sale agreement, and the sale did not complete. One of the key issues in this trial was the reason that sale did not complete, and whether it was a result of actions of the would-be purchaser breaching or resiling from the LOI terms, or for reasons unrelated to the purchaser's actions.

- [5] Other issues revolve around the validity and enforceability of the "Seller's Failure to Complete" clause, and whether Sequoia has established that it met all of the preconditions under the brokerage agreement so as to be entitled to rely on that clause, including whether Sequoia can rely on the actions of Camacc's parent company, 3XLogic Holdings, as fulfilling some of those preconditions.
- [6] Camacc also advances a counterclaim in the event that Sequoia is successful in establishing its claim to the success fee, on much the same basis that it advances its defence to Sequoia's claim. Camacc concedes that in the event that I find that Sequoia does establish this entitlement, it will also likely mean that the foundation of both its defences and its counterclaim have been rejected. I will therefore focus on Sequoia's claim and Camacc's defences to it.

Parties

- [7] Sequoia is a BC Company in the business of marketing and selling privately owned "mid-market" companies in British Columbia and Ontario to prospective purchasers, with median values of about \$30 million. The two principals of Sequoia are Brent Cunningham and Chris Larmer.
- [8] Camacc was a BC technology company that built and installed custom video surveillance systems for commercial customers. In 2014 and 2015, Camacc was wholly owned by a BC company named 3xLogic Holdings Inc. ("3xLogic Holdings").
- [9] Ho Kim and Dennis Law, along with two other Canadian shareholders, founded Camacc in the 1990s. At some point well before the sale at issue in these proceedings, a company controlled by Mr. Schneider purchased 50% of the shares in Camacc, and Camacc was reorganized into one of a number of subsidiaries of the parent holding company, 3xLogic Holdings.
- [10] Mr. Kim continued as president and CEO of Camacc after the reorganization. Camacc managed the sales, marketing and customer service end of the security system business for its Canadian clientele.
- [11] Mr. Law was president and CEO of 3xLogic Systems Inc. ("3xLogic Systems"), the software licensing side of the business, also a wholly-owned subsidiary of 3xLogic Holdings. 3xLogic Systems produced and licensed surveillance software to Camacc and other members of the 3xLogic group of companies.
- [12] At the material time in 2014 and 2015, Mr. Schneider, through a series of companies he controlled and owned most of the shares in, held a 50% interest in both 3xLogic Holdings and its subsidiaries, including Camacc. Mr. Schneider was the president of the board of 3xLogic Holdings, and together with his son, controlled 50% of the voting rights on the board of 3xLogic Holdings. Mr. Kim and Mr. Law together with the two other original shareholders in Camacc, held the other 50% of 3xLogic Holdings shares, and Mr. Kim and

Mr. Law controlled the other 50% of the voting rights on the board of 3xLogic Holdings and its subsidiaries.

- [13] The same ownership group and directors were also shareholders and directors of a separate American company, 3xLogic Inc. ("3xLogic USA"), which was incorporated as part of a push to expand Camacc's original security system business into the United States.
- [14] The shareholding percentages and board makeup was mirrored across Camacc, 3xLogic Systems, 3xLogic Holdings, and 3xLogic USA, although it does not appear that the board of the subsidiary companies, such as Camacc, ever met separately or distinctly from their parent company, 3xLogic Holdings. I will refer to these companies collectively as the 3xLogic Group.
- [15] Jim Melby was the Chief Financial Officer for 3xLogic Holdings, and effectively the head financial officer for all its subsidiary companies. He was (and is) Mr. Schneider's "right hand man" to whom he entrusted the financial management of many of his companies, and the handling of the negotiations for the sale of Camacc.

FACTUAL FINDINGS

- [16] There are numerous factual issues in dispute. I heard evidence from Mr. Larmer, Mr. Cunningham, Mr. Kim (under subpoena by Sequoia), Mr. Melby, and Mr. Schneider. Sequoia also called Daniel Bresingham, who is now a vice-president of ADT, but at the material time was the Chief Financial Officer of Protection One. I also had the benefit of substantial email correspondence, and the redlined exchanges of draft agreements through their various revisions. I note that the documentary evidence included some email correspondence between Camacc and its legal counsel, Cassels Brock, which I was assured was properly before me.
- [17] On the basis of my review of all of the evidence, I was able to make the necessary factual findings to determine the contentious factual underpinnings of this case. Rather than describe all of this evidence, I will simply lay out my factual findings here.
- [18] In August 2014, the directors of the 3xLogic Group met in Orlando, Florida for what was officially a meeting of the 3xLogic USA board. In reality, I find that the directors of the 3xLogic Group did not distinguish the business of the various companies that they owned and were directors of, treating their board meetings as interchangeable. There are no formal board minutes of the Camacc board, for example, and neither Mr. Kim nor Mr. Schneider treated their directors' roles in these companies as distinct for decision-making purposes. Mr. Melby was aware that each company had distinct financials and tax obligations that he managed, but testified that they did not meet separately, other than to ensure that the requisite number of 3xLogic USA board meetings occurred annually in accordance with US law. With respect to corporate decision making, I am satisfied that he generally took his instructions from Mr. Schneider, regardless of which corporate hat Mr. Schneider was wearing.

- [19] At the Orlando meeting, Mr. Kim made a pitch for substantially increasing the revenues of Camacc through further investment in Camacc by the 3xLogic Group. The new CEO of 3xLogic USA opposed this on the basis that Camacc's expansion in Canada created competition for 3xLogic USA, particularly in relation to larger commercial multinational companies that had a presence in both the United States and Canada, and argued that this would undermine his efforts to increase the value of 3xLogic USA.
- [20] I find that Mr. Schneider was of the view then, and continued to be at trial, that expansion into the United States, particularly through the new 3xLogic USA company, ought to be the primary objective of the 3xLogic Group. He was not prepared to support any investments in Camacc that might lead to competition between Camacc and 3xLogic USA, which he referred to as a "channel conflict."
- [21] I find that Mr. Kim was upset with this, and proposed that "he" (being Camacc), should just be sold. Although no decisions were made at the Orlando meeting, Mr. Schneider indicated that if Camacc could be sold for \$20 million, he might be interested.
- [22] At a board meeting of 3xLogic Holdings on September 12, 2014, Mr. Kim presented a proposal to sell Camacc for \$20 million, with an anticipated distribution of \$1 million in estimated transaction costs, \$5 million to invest in 3xLogic USA towards its continued expansion, and \$14 million for Camacc's shareholders.
- [23] Four days later, 3xLogic Holdings' board authorized Mr. Kim to look for a broker who would be able to sell Camacc for \$20 million. Mr. Kim's proposed distribution of the funds was not specifically approved, and the evidence does not establish that the directors were committed to any particular distribution of the funds at that point, or the following year when the sale negotiations were ongoing.
- [24] Mr. Kim met with a number of brokers in the fall of 2014. Sequoia met with Mr. Kim and the Camacc team, and provided Mr. Kim with a preliminary opinion of value, which estimated an enterprise value for Camacc of between \$12.3 and \$15.1 million.
- [25] On November 5, 2014, Mr. Kim, as Camacc's president and CEO signed Sequoia's Business Marketing Services Agreement (the "BMSA") for the sale of Camacc. While no target price was specified or required, Sequoia's principals were under the impression that Camacc was prepared to proceed with a sale in the value range they had estimated.
- [26] The BMSA provided for a relatively low series of retainers upfront, but a much more substantial success fee due upon completion of a sale. The success fee is expressed in the BMSA as a percentage of the total consideration of a completed sale.
- [27] The BMSA described Sequoia's marketing process as involving three steps: first, to prepare the business for sale; second, to create a market; and third, to close a deal. The BMSA describes the second step as creating competition amongst different types of buyers, culminating ideally in multiple competitive offers and the acceptance of a letter of intent. The BMSA states that Sequoia's process will "maximize your company's value" in terms of

"price, speed, and terms." The BMSA also states that terms such as "cash at closing, vendor financing, target working capital, holdbacks, transition support, exit timing, warranties, etc., are all influenced by competition more than anything."

[28] The BMSA also describes Sequoia's process for negotiating a letter of intent on page 7, stating:

A Letter of Intent (LOI) from the buyer documents the major terms of the deal, including:

- Confirmation of the price and means by which it is to be paid
- Conditions precedent: matters agreed to be resolved before closing
- Confirmation that the LOI is non-binding; subjective to a Definitive Agreement of Purchase and Sale
- Restrictive covenants such as noncompete clauses
- Recognition that warranties and indemnities are to be detailed in the Definitive Agreement
- A limited period of exclusivity or no-shop clause
- A timetable of events

Critically important is that the LOI clearly establishes all business terms of the deal. Agreeing to agree at a later point surrenders negotiating position to the other side and certainly increases cost, time, and frustration to the due diligence and closing process. Savvy buyers view the oncoming due diligence phase as the beginning of the negotiations in an attempt to erode value agreed to in the LOI. Sequoia negotiates all the business items before accepting the LOI as a means to circumvent that strategy and to defend the value of your business.

These are issues that must be analyzed and documented well before the LOI phase to establish and defend the value of the business through closing. Failure to do so can ultimately result in a dramatic reduction of the negotiated purchase price at best; and a frustrated deal at worst.

[29] Sequoia's marketing strategy and rate structure includes a significant investment in time and resources by Sequoia before taking on a client, and even more so afterward. Sequoia generally meets with 30-40 prospective clients in a year, but only takes on three or four clients per year. Approximately two thirds of their time and effort, often over the course of about six months, is directed to the first two "steps" identified in the BMSA, including the development of marketing materials and a market for their client, and the securing of offers and a signed letter of intent from prospective purchasers. The last third of their time and effort, often over the course of about three months, is dedicated to negotiating the final purchase and sales agreement on the basis of the accepted letter of intent, and ensuring that the deal closes.

- [30] The evidence establishes that many of Sequoia's clients are the original founders of their businesses who have invested their time and expertise in the growing of their business. I find that Sequoia's business model relies significantly on their own assessment of their clients, and in particular their own assessment of their clients' willingness to proceed with a sale, often of a business that is closely held and close to their clients' hearts. This involves a significant risk to Sequoia, that if they have underestimated their client's willingness to sell their business at the value Sequoia estimates they could receive, Sequoia will not receive the commission, or "success fee", which is their primary form of compensation.
- [31] Sequoia acknowledges that they run a significant risk that they will invest up to six months of time, resources and expertise in developing a market for their clients and obtaining offers, without any promise of a success fee. However, they say that once a letter of intent to purchase the business is mutually accepted, the "Seller's Failure to Complete" clause mitigates that risk by requiring their client to pay them the success fee regardless. However, they have never before had to rely on this clause.
- [32] I find that the BMSA was tailored to Camacc, but contained a substantial amount of standard language, including the "Seller's Failure to Complete" clause and the other "Additional Terms and Conditions" on page 14 of the BMSA. That clause reads as follows:

Seller's Failure to Complete: If Seller fails to complete the sale of Sellers business after a Letter of Intent (LOI) has been mutually accepted by the Seller and a buyer for any reason other than a breach of the LOI by the buyer, Seller agrees to pay the Success Fee to Sequoia.

(the "Failure to Complete Clause")

- [33] The first provision of the "Additional Terms and Conditions" expressly defines "Seller" as Camacc.
- [34] I find that the BMSA was deliberately agnostic as to whether it contemplated that Camacc would be sold as an asset sale (in which case Camacc would be the vendor) or a share sale (in which case Camacc's owner, 3xLogic Holdings, would be the vendor). I find that both possibilities were expressly contemplated by the BMSA.
- [35] Mr. Schneider did not review the BMSA in advance of Mr. Kim entering the agreement, but did so shortly after it was signed. Mr. Schneider did not like everything about the BMSA (in particular its length and the amount of what he considered to be self-aggrandizing marketing material the BMSA contained), but I find he did not raise any objections, and was content to proceed with the BMSA and the potential sale of Camacc pursuant to it, through the services of Sequoia. Mr. Schneider was particularly interested to see if Sequoia could get an offer of \$20 million for Camacc.
- [36] On all of the evidence, including that of Mr. Schneider, I find that Mr. Schneider read the entirety of the BMSA, including the "Additional Terms and Conditions" portion of the BMSA on page 14 where the Failure to Complete Clause was located. I find that he took no issue with that clause. At trial his evidence suggested that he was more concerned with the term

entitled "Communications with Buyers," requiring that Sequoia be included in all sales negotiations, which was also one of the "Additional Terms and Conditions" on page 14 of the BMSA.

- [37] Sequoia proceeded to engage with its marketing process as outlined in the BMSA. Sequoia's efforts elicited considerable interest, and it obtained several purchase offers for Camacc, including three offers well above its preliminary opinion of value estimate. The preferred offer was from Protection One. It was for \$21.6 million, and met all of the stated 3xLogic Group objectives for the sale of Camacc, including that it was over \$20 million, in cash, and Protection One was prepared to proceed by way of a share sale.
- [38] I find that the shareholders and directing minds of Camacc and 3xLogic Holdings strongly preferred that the sale of Camacc be a share sale by 3xLogic Holdings rather than an asset sale by Camacc for tax reasons, and communicated that preference to Sequoia through its directors and officers as part of the negotiations.
- [39] Between April 9, 2015 and June 8, 2015, Camacc, 3xLogic Holdings and Protection One negotiated the terms of a letter of intent, with the assistance of Sequoia.
- [40] The negotiations with Protection One were initially handled by Mr. Kim. However, on June 1, 2015, Mr. Kim recognized that he was in a conflict of interest as a result of Protection One's stated desire to employ him after its purchase of Camacc, and he stepped down as the primary negotiator of the LOI on behalf of the 3xLogic Group. From June 1, 2015 onwards, Mr. Melby took over as primary representative in the negotiations.
- [41] Although not necessary for the relief sought, because 3xLogic Holdings is not a party to this proceeding, I find that 3xLogic Holdings did, through the conduct of its directors, president, and CFO, adopt the BMSA by working with Sequoia to market Camacc, and later to support and instruct Sequoia on the terms of the LOI and purchase and sale agreement.
- [42] On June 8, 2015, a written letter of intent (the "LOI") was entered into for the purchase and sale of Camacc's shares to Protection One. The LOI was signed by Mr. Bresingham on the signature line noted for Protection One, and countersigned by Mr. Schneider, on a signature line noted for 3xLogic Holdings. I find that the reason the LOI was signed by 3xLogic Holdings rather than Camacc was because the LOI contemplated a share sale of 3xLogic Holdings' shares in Camacc, rather than a sale by Camacc of its assets.
- [43] However, even after the LOI was signed, negotiations continued into August 2015 regarding whether the sale would proceed as an asset or share sale. Protection One preferred an asset sale. I find that it was due at least in part to Sequoia's efforts that the sale was successfully maintained as a share sale.
- [44] Although the LOI contemplated a July 31, 2015 closing date, I find that in fact the parties were soon working towards an August 31, 2015 closing date. 3xLogic Holdings did not retain its legal counsel, Cassels Brock, to negotiate, draft and review the necessary closing documents until July 19, 2015. Protection One proceeded with its due diligence, and on or

about August 13, 2015 Protection One provided Sequoia and Cassels Brock with a draft purchase and sale agreement (the "PSA"). This draft was returned by Cassels Brock with redline comments on or about August 19, 2015. Protection One provided a third draft of the PSA to Cassels Brock on August 24, 2015.

- [45] Sequoia provided substantive comments on the PSA throughout this exchange. Mr. Melby provided instructions, including sending an email to Cassels Brock on August 26, 2015, stating " the large A/R Money Mart collection won't be received by August 31st, so I don't want to close until after receipt of that money ."
- [46] The PSA contained 18 pages of representations and warranties by 3xLogic Holdings that were not the subject of any significant revision or comment throughout the exchange of drafts. The PSA included an indemnity clause to secure those representations and warranties. The initial draft PSA also proposed a 20% holdback to secure these representations, warranties, and indemnities.
- [47] Mr. Larmer described that first PSA as a buyer's "dream scenario" in relation to several aspects, including the amount of the holdback. In response, 3xLogic Holdings proposed a 5% holdback. Protection One responded with a 17.5% holdback with the indemnities limited to the holdback amount, and later proposed a 12.5% holdback with shareholder guarantees. I find that neither of these proposals was satisfactory to 3xLogic Holdings, but I also find that the negotiations on this point remained fluid. Mr. Bresingham's evidence, as well as his conduct at the time, strongly suggest that these were not issues that Protection One was going to let their acquisition fail on.
- [48] I find the same is true of the issue of the tail insurance provision included in Protection One's draft PSA. While I find this term, which would have required the purchase of hundreds of thousands of dollars in insurance, was not satisfactory to 3xLogic Holdings, I also find that by August 28, 2015, legal counsel for the parties had come up with less expensive alternatives for maintaining corporate insurance, and there was an active discussion as to who would have to pay for this. Again, on all the evidence, I find that this issue was fluid and progressing toward resolution at the end of August 2015.
- [49] Another key closing document, the Software Licencing Agreement regarding Camacc's future access to the software that it licenses through 3xLogic Systems, was drafted and exchanged as contemplated by the LOI. An early draft that met all of 3xLogic Holdings requirements had been provided to Protection One in early August, and seemed to be non-controversial until August 26 when it was returned with revisions that would have allowed Camacc (post-sale to Protection One) to have preferential rates to the 3xLogic Systems software for an expanded client group for a period of three years. I find that the 3xLogic Group was concerned that this revision had the potential to increase the competitive advantage of Protection One in relation to 3xLogic USA.

- [50] In addition, a non-compete agreement had been proposed at the end of August 2015 (but not yet provided) by Protection One that would have restricted 3xLogic USA's ability to compete with Camacc after the sale. This proposal was also not acceptable to the 3xLogic Group.
- [51] I find that the genesis of the Software License Agreement changes was quite likely an August 11, 2015 email from Mr. Kim directly to Protection One, urging that the company negotiate for a more competitive position for Camacc after the sale, including at least some of the above negotiating positions. When this email was discovered by Mr. Melby, Mr. Law and Mr. Larmer, they complained that they were having to negotiate against themselves. Mr. Schneider considered it a betrayal.
- [52] Despite Mr. Kim's efforts, however, I also find on all the evidence that Protection One was not "dug in" on either of these issues. They had made the offer to purchase and signed the LOI without any of these terms, and specifically had acknowledged 3xLogic Holdings' concerns about competition. There are many indications of Protection One's motivation to complete this sale, in addition to Mr. Bresingham's evidence on that point. As a small example, before the end of August they had bought t-shirts for the Canadian team, and were preparing to pay to fly the Camacc team to Texas for training on August 31, even in the absence of a finalized deal. The evidence as a whole convinces me that Protection One would likely have proceeded with the purchase, even if they had not been successful in negotiating these fairly last-minute proposed terms described by Mr. Bresingham as "little itty-bitty things."
- [53] While I agree with Camacc that the proposed non-compete agreement and draft software agreement amendments were a departure from the terms proposed by the LOI, the evidence does not establish that this departure was one that Protection One was committed to. Rather, I find on the evidence that it was Mr. Kim's perceived betrayal that was more of a concern to Mr. Schneider. Mr. Schneider's evidence was that he had thought that having Mr. Kim remain a shareholder of the 3xLogic Group would ensure that he would be an advocate for them even after Camacc was purchased and Mr. Kim became an employee of Protection One. I find that Mr. Kim's email and the apparent resulting turn in negotiations was of significant concern to Mr. Schneider.
- [54] Throughout August 2015 Mr. Schneider was preoccupied with larger and more lucrative companies amongst his holdings around the globe. Mr. Schneider returned to the United States on August 27, 2015 and Mr. Melby brought Mr. Schneider up to date on the progress of negotiations with Protection One that evening.
- [55] At 11:22 pm on August 27, Mr. Melby sent an email to Mr. Kim and Mr. Law advising that Mr. Schneider was terminating negotiations for the sale of Camacc.
- [56] On Friday, August 28, 2015, Cassels Brock sent a letter to Protection One terminating the negotiations, three days before the working closing date of Monday, August 31, 2015. The letter stated as follows:

We are solicitors for 3xLogic Holdings Inc. (the "Company"). As a result of a failure to reach agreement in respect of the terms of the proposed acquisition of Camacc Systems Inc. by Protection One Alarm Monitoring, Inc., we have been instructed to advise that all further negotiations in respect of this matter are terminated effective immediately.

- [57] Following this, Protection One made a number attempts to resume negotiations for the purchase of Camacc, including an immediate request for a conference call to understand what the difficulty was. All of these attempts were rebuffed by Mr. Schneider, whom I find no longer wished or intended to sell Camacc to Protection One.
- [58] Camacc was not remarketed separately for sale, and Mr. Schneider swore an affidavit in October 2015 in which he was adamant that he had no interest in selling Camacc at all.
- [59] On September 2, 2015, Mr. Cunningham, on behalf of Sequoia, sent an email to Mr. Schneider, Mr. Kim, and Mr. Melby, attaching an invoice to Camacc for \$1,017,000, Sequoia's net success fee under the BMSA, pursuant to the Failure to Complete Clause. Sequoia received no response to that email.
- [60] In 2018, the 3xLogic Group sold all of its companies, including Camacc and 3xLogic USA, to a division of Stanley Black & Decker. I understand that there are monies held in trust from that sale pending the resolution of this law suit.

LEGAL ISSUES

- [61] The parties identify the issues in this proceeding differently: Sequoia says the issue is whether they have established that Camacc failed to pay the success fee in breach of the BMSA. Camacc identifies the issue as whether Sequoia has established that the Failure to Complete Clause used "clear and unequivocal language" and was valid and enforceable against Camacc, and whether Sequoia has established that it has strictly met all the preconditions for reliance on that clause. Inherent in this difference is the parties' disagreement as to the interpretive approach this Court ought to take to the BMSA and the Failure to Complete Clause.
- [62] I will start by determining the appropriate interpretive approach to the commission fee agreement under the BMSA.
- [63] I will then apply the appropriate interpretive framework to consider whether the Failure to Complete Clause in the BMSA is valid and enforceable on its face.
- [64] Finally, I will consider whether Sequoia can rely on the Failure to Complete Clause in these circumstances, and in particular whether Sequoia has established that each of the preconditions for relying on the Failure to Complete Clause were met, such that Sequoia is entitled to the commission on the uncompleted sale.
- [65] Sequoia bears the burden of establishing the validity of the Failure to Complete Clause and that it met each of the preconditions.

- [66] There is no dispute that Camacc has refused to pay the success fee on this uncompleted sale. Therefore, if I find that the Failure to Complete Clause is valid and enforceable against Camacc, and Sequoia has established all of the preconditions for relying on that clause, Sequoia will be successful in its claim for breach of contract.

PRINCIPLES OF CONTRACTUAL INTERPRETATION

- [67] Sequoia brings this action in breach of contract (it abandoned its claim in quantum meruit at trial). I must therefore consider the principles of contractual interpretation in relation to the BMSA and the Failure to Complete Clause.
- [68] Because this is a contract for the payment of a commission to an agent, Camacc argues that the law requires Sequoia to establish that the BMSA contains "clear and unequivocal language" that a commission is to be paid even in the absence of a completed sale, and strict compliance with the terms of those provisions.
- [69] Camacc relies on *Luxor (Eastbourne) Ltd. v. Cooper*, [1941] A.C. 108 (H.L.) [*Luxor*], where at p. 129 Lord Russell states, "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language." Camacc further relies on the statement by Lord Denning in *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625 (C.A.) at p. 630, quoted by the Supreme Court of Canada in *H.W. Liebig Co. v. Leading Investments Ltd.*, [1986] 1 S.C.R. 70 [*Leading Investments*] at para. 20, that "the ordinary understanding ... is that the [agent's] commission is payable out of the purchase price". Accordingly, they say "clear and unequivocal language" is necessary to modify this common understanding.
- [70] Camacc argues that the Supreme Court of Canada discussed and approved this principle in *Leading Investments*. In that case, Mr. Justice La Forest, writing the plurality decision of the court at paras. 17-18 and 21-22, approved the proposition that where an agent who is tasked with the sale of property wishes to be entitled to commission despite the absence of a concluded transaction, they must use "clear and unequivocal language" to achieve that result.
- [71] At issue in *Leading Investments* was whether a real estate broker was owed commission from the seller per the contract, where an agreement of sale was entered but the sale did not complete. The intended purchaser refused to complete the transaction after entering an agreement of sale. *Leading Investments* was heard by a panel of seven, and the plurality ruling comprised the reasons of Justice La Forest writing for himself plus two others, and Justice Le Dain writing for himself, concurring in the result but for different reasons.
- [72] Justice La Forest examined the context of commission contracts for sales by brokers and found that there is a general expectation that commissions will not be paid in the absence of a successful sale on the basis of a number of factors, including the obvious goal of such contracts to achieve a sale, and that real estate broker contracts are often signed by the

seller without legal counsel, which has led some courts to interpret real estate agency contracts contra proferentem. Justice La Forest also compared real estate listing agreements to hunting licenses, suggesting that while a "the broker may spend much time and effort but fail to achieve his goal in a particular case," the venture is worth it because they have other clients, and real estate commissions are substantial (para. 15).

[73] Justice La Forest found that, while the above points represent general understandings of how contracts with real estate brokers operate, that "parties need not conform to the common understanding" (para. 18). However, in order to depart from the general understanding and to have commission be payable upon an offer rather than a sale, he found that the contract must do so in "clear and unequivocal language" (paras. 19-20).

[74] This approach was also adopted by Justice Newbury (as she then was) in *J.R. McLean & Associates Ltd. v. Glenrobin Place Developments Ltd.*, 1994 CarswellBC 2204 (S.C.) where she stated at para. 47:

I would have thought that as a matter of commercial reality, a vendor of property whether residential or otherwise is unlikely to intend to bind himself to pay his agent's commission unless his property is actually sold and the purchase price is received. I therefore respectfully adopt the principle enunciated in *Leading Investments* that in construing a clause such as this "the words must be used in the light of the general context and the common understanding of these agreements" and that in the absence of clear and unequivocal language, the Court should not impute to parties an intention for commission to become payable upon an offer being accepted or an enforceable contract coming into existence.

[75] Camacc argues that the "clear and unequivocal language" standard set in *Leading Investments* applies to any departure from the "general understanding" that commissions are paid only upon a successfully completed sale, and this standard is therefore the applicable test for considering the Failure to Complete Clause in the BMSA.

[76] Camacc further argues that even if a commission clause does meet the "clear and unequivocal" standard, that is not sufficient to entitle an agent to a commission in the absence of a concluded transaction, unless the agent has met the preconditions specified in the agreement "very exactly". Relying on the cases of *Citifund Capital Corporation v. Empreus Holdings Ltd.*, 2021 BCSC 509 at para. 92 [*Citifund Capital*], citing *Citifund Financial Services v. Sayani* (1992), 67 B.C.L.R. (2d) 157 (C.A.), Camacc argues that where the facts do not "fall within the literal terms" based on a "plain reading of the document", the agent will not be entitled to a commission. It is not sufficient, for example, for an agent to achieve 90% of the requirements for the payment of a commission.

[77] Sequoia disagrees that the "clear and unequivocal" standard applies in this case, where there was no inequality of bargaining power between Camacc and Sequoia. Sequoia relies on *Kellner v. Stickland*, 1997 CarswellBC 2907 (S.C.), aff'd 1998 CarswellBC 2176 (C.A.), where this court rejected the principle that there is a presumed general expectation in commission contracts that the commission only be payable upon the conclusion of the sale and that any

departure from that norm must be made unequivocally clear. The court considered that the reasons of Le Dain J. and the minority in *Leading Investments* both endorsed the approach that "the entitlement to a commission is dependent upon the terms of the contract and not upon some concept of general expectations" (para. 24).

- [78] Sequoia further argues that any "clear and unequivocal" standard in commission contracts, and the strict interpretation of their terms, has been overtaken by the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva]. Although Sattva does not specifically address commission contracts, Sequoia argues that commission contracts should be interpreted in accordance with the general principles of contractual interpretation expressed in that case.
- [79] Finally, Sequoia submits that if I find that the applicable standard for interpreting the commission fee clause is one of "clear and unequivocal language", that the Failure to Complete Clause meets that standard.
- [80] Almost all of the commission cases relied upon by Camacc substantially predate Sattva. I agree with Sequoia that the contractual interpretation principles in Sattva apply equally to commission contracts. I also agree with Sequoia that Sattva does not contemplate general presumptions about commission contracts, or any other contracts, that must be specifically "clearly and unequivocally" negated through clear language. However, I consider that Sattva does support an approach that is strongly informed by the context and intended meaning of the contract, which may well include some of the practicalities, business realities and concerns regarding commission contracts noted by La Forest J. in *Leading Investments*.
- [81] The Supreme Court of Canada in Sattva explained the current approach to contractual interpretation as follows:
- [47] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(Reardon Smith Line, at p. 574, per Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[82] The Court in *Sattva* explained the role of surrounding circumstances in contractual interpretation as follows:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[83] Rather than a "general understanding" of the context of certain kinds of contracts, *Sattva* anticipates objective evidence of the surrounding circumstances that might inform the meaning of the words of a contract:

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King [v. Operating Engineers Training Institute of Manitoba Inc.]*, 2011 MBCA 80], at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

- [84] Overall, Sattva indicates that the surrounding context of a contract cannot overwhelm the words used in a contract, but courts must interpret the words of a contract so that they make sense in their context.
- [85] Further, commercial contracts are to be interpreted considering "the principle of commercial reasonableness and efficacy" and according to "sound commercial principles and good business sense": *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 [Resolute FP] at para. 79; *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (C.A.) at 770. A commercially reasonable interpretation is more likely than not to give effect to the parties' intentions: *Resolute FP* at para. 142. Contracts should be interpreted assuming that parties intend their contracts to "work": *Resolute FP* at para. 142.
- [86] I conclude that the contract in this case should be interpreted by considering the context of BMSA and what the objective intentions of the parties were in making it, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47. It can be assumed that the parties intended the contract to "work."
- [87] Sequoia bears the burden of establishing that the wording of the BMSA, understood in its surrounding circumstances known to the parties at the time of formation of the contract, establishes the mutual intention of the parties to be bound by the terms of the Failure to Complete Clause, and that that clause has the effect that Sequoia says it does. Those surrounding circumstances include that this was a brokerage contract for the sale of a business based largely on a commission fee structure.

VALIDITY OF SELLERS NON-COMPLETE CLAUSE

- [88] Camacc submits that, reading the BMSA as a whole, the contract conveys that the common understanding between the parties was that the success fee would only be paid upon the closing of a transaction.
- [89] Camacc argues that the Failure to Complete Clause on page 14 is inconsistent with the main body of the contract, which contemplates that the "success fee" will be payable upon the closing of the transaction. Under the heading "Fees" on page 10, the BMSA states that a "Success Fee is due and payable from the proceeds of the sale upon the closing of the transaction". At page. 12, the BMSA states, "Since our fee structure is contingent upon the sale of the business, your fee risk is minimized until the sale completes". Page 11 of the contract outlines the structure of Sequoia's fees in relation to its deliverables. That part of the contract states that the success fee is calculated as a percentage of the "total consideration" paid for the business. It does not include any stipulations that the fee is payable if the seller fails to complete the sale. Rather, it says that "the success fee is due and payable from the proceeds of the sale upon the closing of the transaction". Camacc argues that in a case like this where the sale did not complete, there are no "proceeds of the sale", and no "total consideration" for the success fee to be calculated from.

- [90] While I appreciate that there are references in the main body of the BMSA that describe the success fee in these terms, I do not consider that those paragraphs and phrases detract from the clarity of the Failure to Complete Clause on the Additional Terms and Conditions page. Nor do I consider that these provisions create ambiguity with respect to the meaning and intent of the BMSA in relation to the Failure to Complete Clause.
- [91] Camacc argues that the clause is "buried in the middle of the small print" of the BMSA. I do not agree. The Failure to Complete Clause is clearly stated in the contract, and is not buried in the midst of other provisions. The print is not noticeably smaller than the rest of the document, and it is part of one page of clearly contractual terms, titled "Additional Terms and Conditions". The subject of the clause, "Seller's Failure to Complete" is bolded. The entire contract is only 14 pages in length.
- [92] While I agree that the general tenor of the BMSA is that the success fee will be linked to and payable upon a successful completion of the sale of Camacc, I find that the Failure to Complete Clause provides a clear exception to that expectation once an LOI has been mutually accepted. To interpret the contract otherwise would require me to completely ignore the words of this clause. The clause states clearly the circumstances when a commission will be payable notwithstanding a failure to complete, and there is no uncertainty as to its meaning in the context of the BMSA as a whole. Were I to apply the "clear and unequivocal" test, I would find that the clause meets that requirement also.
- [93] I find that the Failure to Complete Clause is a valid and binding provision. I now consider whether Sequoia has established that it satisfied all of the preconditions for relying on this clause, and is therefore owed the commission.

PRECONDITIONS FOR ENTITLEMENT TO COMMISSION

- [94] The preconditions set out in the Failure to Complete Clause are as follows:
- a) The "Seller" enters into a "Letter of Intent (LOI)" with a buyer;
 - b) After entering into that "Letter of Intent (LOI)", the "Seller fails to complete the sale of Seller's business"; and
 - c) That failure to complete on the part of the "Seller" occurs for reasons "other than a breach of the LOI by the buyer".
- [95] Sequoia must establish that it has met each of the above preconditions.
- [96] Based on the arguments before me regarding each of these preconditions, I will address the following issues in turn:
- a) Whether the "Seller" entered into the LOI with Protection One;
 - b) Whether the LOI with Protection One was a "letter of intent" as contemplated in the Failure to Complete Clause, including whether:

- i. the LOI included the business terms required of a letter of intent as described in the BMSA; and
- ii. the LOI had expired; and
- c) Whether the sale of Camacc failed to complete because of a breach by Protection One.

A. Did the "Seller" Enter into the LOI with Protection One?

- [97] While Camacc is defined as the "Seller" in the BMSA, the LOI was formally accepted by the signature of Mr. Schneider indicating acceptance by 3xLogic Holdings. There was no reference to or signature line on the LOI for Camacc.
- [98] Camacc argues that the Failure to Complete Clause is therefore not triggered, because the LOI was not accepted by the defined "Seller", Camacc, but rather by its parent, 3xLogic Holdings.
- [99] Sequoia argues that Mr. Schneider entered the LOI on behalf of both Camacc and 3xLogic Holdings. It says that, although there was no signature block for Camacc, Mr. Schneider's signature served to make Camacc a party to the LOI either directly, or acting as an agent of Camacc.
- [100] Camacc objects that this alleged agency relationship was not pled, and that even if it had been pled, no agency relationship can be said to exist between a parent and subsidiary corporation in the absence of an express or implied contract of agency between them: G.H.L. Fridman, *Canadian Agency Law*, 3rd ed (Toronto: LexisNexis, 2017) at p. 6; *Covert v. Minister of Finance of Nova Scotia*, [1980] 2 S.C.R. 774 at p. 822; *Pioneer Distributors Ltd. v. Bank of Montreal* (1994), 97 B.C.L.R. (2d) 143 (S.C.) at p. 19.
- [101] Sequoia did plead that Mr. Schneider entered the LOI on behalf of Camacc. Accordingly, Camacc acknowledges that it is open to Sequoia to prove that Mr. Schneider in fact entered the LOI on behalf of Camacc in addition to 3xLogic Holdings, but says that he did not.
- [102] Sequoia relies on *Seip & Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222 for the principle that, where a director signs an agreement on behalf of one company and is the director of another, the court may find that the company that is not listed in the agreement is bound nonetheless, if its rights and obligations are dealt with in the contract, and if its conduct indicates that it adopted the contract.
- [103] In *Seip & Associates Inc.*, the Ontario Court of Appeal found that it was proper for the trial judge to have considered the fact that the same natural person who had signed the contract on behalf of one company was the directing mind of another company that was alleged to have adopted the contract by conduct. Doing so did not impermissibly pierce the corporate veil. It was relevant evidence in determining whether the second company bound itself to the contract through conduct. The court ultimately concluded that "[t]he conduct of all parties demonstrated a common intention that the Contract continued with [the unnamed company] as an owner, in conjunction with the other corporate defendants" (para. 38).

- [104] As I stated above, 3xLogic Holdings adopted the BMSA by conduct, and Mr. Schneider's signature of the LOI with Protection One is partial evidence of that. I find that the directors of 3xLogic Holdings, including Mr. Schneider, did not treat Camacc as distinct for the purposes of their decision making. I also find that Mr. Schneider's signature on the LOI on behalf of 3xLogic Holdings bound Camacc, either directly (as argued by Sequoia) or indirectly as a subsidiary company controlled by 3xLogic Holdings, to the exclusivity and confidentiality clauses in that agreement.
- [105] However, it is not necessary for Sequoia to rely on any of the above findings, or for me to determine if they sufficiently indicate Camacc's endorsement of the LOI. This is because it is apparent to me that the definition of "Seller" in the BMSA was not intended to be read in the limited manner relied upon by Camacc.
- [106] Notwithstanding the term of the BMSA defining the "Seller" as Camacc, I find that, when read as a whole and in the circumstances, the term "Seller" in the BMSA (including in the Failure to Complete Clause), meant Camacc, but also contemplated that the seller might be the owner of Camacc in the event of a share sale.
- [107] I make this finding despite the term "Seller" being defined as "Camacc Systems Inc." without reference to Camacc's ownership. To limit this term to Camacc, as distinct from Camacc's ownership for the purposes of a share sale, does not reflect the realities of the BMSA, or the objective intentions of the parties.
- [108] The BMSA contains an entire agreement clause in the "Additional Terms and Conditions" page, as follows:
- Entire Agreement. This Business Marketing Services Proposal constitutes the entire Agreement between Seller and Sequoia. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, expressed or implied, between Seller and Sequoia other than as expressly set forth in this Business Marketing Services Proposal.
- [109] An entire agreement clause does not prevent the court from interpreting the words of the contract in their context; See eg *Paddon Hughes Development Co. v. Pancontinental Oil Ltd.*, 1998 ABCA 333. As described in *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157:
- [124] The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear -- when it is not.

- [110] In this case, interpreting "Seller" such that it includes Camacc's parent company in the event of a share sale does not amount to adding a term to the contract, or a collateral agreement. Rather, I find it is necessary to interpret the term "Seller" in this case in the context of the BMSA as a whole, and in the context of the surrounding circumstances and commercial reality.
- [111] I have considered Camacc's argument that interpreting "Seller" to mean 3xLogic Holdings for the purposes of the requirement to sign the LOI would mean that the term "Seller" in the Failure to Complete Clause would have inconsistent meanings. I agree that the term "Seller" cannot mean 3xLogic Holdings alone, anymore than it can mean Camacc alone, and to read the BMSA and the Failure to Complete Clause as a reference to only one of these companies would not "work." However, I am convinced on all the evidence before me, that neither party intended to preclude Camacc's owner from the definition of Seller for the purposes of a potential share sale, and that the BMSA and the clause can be read harmoniously when this is understood.
- [112] At the time the BMSA was signed, it was open as to whether the sale of Camacc would go forward as an asset sale (in which case Camacc would be the seller) or a share sale (in which case 3xLogic Holdings, as the company that owned all of the Camacc shares, would be the seller). I find that the BMSA contemplated both scenarios, and so did the parties to the BMSA, Camacc and Sequoia.
- [113] I find that the intent of the parties and the purpose of the BMSA as a whole was to sell Camacc, either through an asset sale, or, preferably, by way of a share sale. Camacc, through its directors and shareholders, preferred a share sale, in which case 3xLogic Holdings would be the seller. Ultimately, Sequoia worked to negotiate that outcome on behalf of Camacc.
- [114] As desired, the LOI with Protection One contemplated a sale of shares rather than a sale of assets, which meant that 3xLogic Holdings was the proper signatory of the LOI for the sale of Camacc. I find that this was consistent with the BMSA, and that the BMSA is not only capable of being read to include the possibility that the Seller would include Camacc's owner in the event of a negotiated share sale, but that it is necessary to do so to properly reflect the intentions of the parties.
- [115] It is not necessary for me to find that, in the absence of 3xLogic Holdings endorsing the BMSA, 3xLogic Holdings also bound itself to pay the success fee in the event of a share sale. Given my conclusion that 3xLogic Holdings adopted the BMSA by conduct, this would be the logical conclusion. However, 3xLogic is not a party to this litigation and Sequoia seeks no relief directly from that corporate entity.
- [116] In all of the circumstances, including the language of the BMSA and the Failure to Complete Clause, the conduct of the parties, the principles of commercial reasonableness and efficacy as incorporated into Resolute FP, and the structure of how 3xLogic Holdings and Camacc were owned and operated, I find that the objective intentions of the parties were

that the reference to "Seller" in the BMSA meant both Camacc and also Camacc's owner, 3xLogic Holdings, in the event of a share sale. That is what the term "Seller" means in the BMSA and the Failure to Complete Clause.

1. Failure to Assign BMSA to 3xLogic Holdings

[117] Camacc notes that Sequoia did have an opportunity, after the LOI was signed and during the negotiations of the PSA, to seek to assign the BMSA formally to 3xLogic Holdings. Once the LOI, and more importantly the PSA, had been drafted as a share sale rather than an asset sale, such an assignment arguably would have better reflected the then crystallized intentions of the parties as to who the precise seller would be.

[118] The opportunity arose in August 2015 when legal counsel at Cassels Brock raised with Sequoia the possibility of Camacc assigning the BMSA to 3xLogic Holdings. The question was raised to address a clause in the draft PSA in which Camacc was asked to warrant that it was not liable for any commission fees on the sale. Before me in evidence is an email exchange in which Cassels Brock raises this possibility with Sequoia, but also cautions Sequoia that such an assignment attempt might open the BMSA (and I find, the success fee clause) to renegotiation. There is no suggestion that without such an assignment the success fee would not be paid.

[119] Sequoia (who had not retained counsel) chose not to seek an assignment of their BMSA to 3xLogic Holdings. The evidence establishes that this was because they were concerned that Mr. Schneider would try and renegotiate their success fee if they did, and they considered that the BMSA required that fee to be paid regardless of whether the sale was a share sale by 3xLogic Holdings or an asset sale by Camacc.

[120] Camacc argues that, in deciding not to assign the BMSA to 3xLogic Holdings, Sequoia forewent the opportunity to rely upon the Failure to Complete Clause in this case. I cannot agree. Nothing changed in the relationship or objective intentions of the parties after that date. Sequoia continued to act as broker of the sale of Camacc on behalf of both Camacc and 3xLogic Holdings after the LOI was signed, with Sequoia's efforts in the negotiations only intensifying as the closing of the sale got closer. After the signing of the LOI, the seller became more likely to be 3xLogic Holdings, but even that was not certain as negotiations continued.

[121] As I found above, throughout the life of the BMSA, the objective intentions of all the parties was that either Camacc or 3xLogic Holdings may be the "Seller" for the purposes of the BMSA, depending on the structure of the sale, and this intention did not change, even as it began to become more clear that the sale would go forward as a share sale.

[122] In the end, although Sequoia took some risk in not pursuing a formal assignment of the contract to 3xLogic Holdings, they were ultimately correct in their assessment that the BMSA was sufficient to require Camacc to pay the success fee regardless of the structure of the sale as a share sale, including pursuant to the Failure to Complete Clause.

B. Was the LOI with Protection One a Letter of Intent as contemplated in the Failure to Complete Clause?

[123] Camacc argues that the LOI between Protection One and Camacc was not a proper "letter of intent" because:

- a. It did not adequately establish all of the business terms of the deal; and
 - b. The LOI had expired.
1. Business Terms

[124] Camacc argues that the LOI entered into with Protection One was not the type of letter of intent contemplated by the Failure to Complete Clause. Therefore, the precondition in that clause that the Seller had entered into an LOI was not met.

[125] Specifically, Camacc argues that, when read as a whole, the BMSA promises that the letter of intent that they would negotiate on behalf of Camacc would establish "all business terms of the deal" to prevent the erosion of value after the LOI was signed. Camacc relies on the BMSA as a whole, but note, in particular, the passages of the BMSA included above at paras. 27 and 28 of these reasons, including the statement: "Critically important is that the LOI clearly establishes all business terms of the deal."

[126] Camacc says that while the LOI negotiated with Protection One was a letter of intent, it did not establish "all business terms" that Protection One ultimately sought during the PSA negotiations. Camacc argues that, in order to rely upon the Failure to Complete Clause, Sequoia should be held to the standard of delivering on their promises in the whole of the BMSA that the LOI would establish all contemplated business terms, and prevent any erosion of value to these terms, during the due diligence phase and subsequent negotiations of the PSA.

[127] Camacc says that Protection One's subsequent demands for indemnities to secure representations and warranties, including a holdback for those purposes, was a significant erosion in the value of the "deal". The negotiations between Protection One and 3xLogic Holdings after the LOI was entered for these and other "concessions" indicates that these issues were not "established" by the LOI. Camacc says that these were all "business terms" rather than "legal terms", and that all "business terms" must have been established for the LOI to be capable of triggering the Failure to Complete Clause.

[128] I disagree, and find that Sequoia did negotiate and deliver a "letter of intent" in accordance with the BMSA, and satisfied this precondition of the Failure to Complete Clause.

[129] Much of the language from the BMSA that Camacc relies on for its argument regarding what Sequoia promised to deliver through its process, including the language noted above at paras. 27 and 28, is what Mr. Schneider rightly characterized as marketing material (or as so much "glorification") rather than contractually binding terms. They describe the benefits of Sequoia's process, but it is a stretch to say they promise anything. Although these terms

are not meaningless, and form part of the context of the BMSA, I find that they cannot be elevated to the level of binding representations as to what a future LOI negotiated on behalf of Camacc would include.

[130] In any event, on page 7, within the same sections of the BMSA relied upon by Camacc, the BMSA expressly states that "warranties and indemnities are to be detailed in the Definitive Agreement," and therefore should not be anticipated in the LOI. I find that security for said representations and warranties, such as holdbacks, indemnities or insurance, are linked to these warranties and indemnities, and to the due diligence process that takes place generally after the parties sign an LOI. It would not be consistent with the principle of commercial reasonableness and efficacy to interpret the BMSA as requiring that, in order to trigger the Failure to Complete Clause, an LOI would have to establish any holdbacks, indemnities or insurance linked to representations and warranties before the due diligence process. Such an expectation is also not supported on the language of the BMSA or the evidence before me.

2. Did the LOI Expire?

[131] Camacc further argues that the LOI expired on July 31, 2015, and therefore could not be the basis of triggering the Failure to Complete Clause in the BMSA.

[132] With respect to timing, Protection One's LOI provides: "We are available to begin diligence upon the mutual execution of this LOI and expect to close this transaction on or before July 31, 2015 (the "Closing Date")". Camacc argues that because the LOI expressly contemplated a closing date of July 31, 2015, and because the LOI was never amended to extend beyond that date, after July 31, 2015, the LOI was no longer a "letter of intent" for the purposes of the Failure to Complete Clause.

[133] Again, I disagree.

[134] While it may be that the exclusivity and confidentiality provisions of the LOI expired after July 31, 2015, I need not consider that as there is no allegation that either party breached these provisions. To the contrary, the parties continued their negotiations well after July 31, 2015, and by their subsequent conduct, were working towards a new target closing date of August 31, 2015 (or possibly later). The evidence establishes that the parties continued to pursue the non-binding terms and to comply with the binding terms of the LOI throughout this period.

[135] Furthermore, the Failure to Complete Clause does not require the LOI to still be active or binding. I find that, on its terms, the clause was engaged "after a Letter of Intent (LOI) [had] been mutually accepted," and was still valid at the time of the termination of negotiations by Mr. Schneider.

[136] I need not consider how the mutual acceptance of the LOI as a triggering event might be considered if the failure of the sale to close was due to the passage of the closing date in the LOI. That is not the case here.

3. Conclusion on the Conditions Precedent relating to the LOI

[137] The evidence establishes that Camacc's owners signed a mutually accepted LOI for the sale of Camacc as contemplated and intended in the BMSA. I find therefore that the evidence establishes that this triggering condition precedent was complied with. This is not a case of a less than complete realization of the required triggering event under the Failure to Complete Clause, as was the case in Citifund Capital.

[138] I turn then to whether the reason for the termination was a breach of the LOI by the buyer.

C. Was the Sale Terminated because of a Breach by Protection One?

1. What is meant by "breach"?

[139] For the Failure to Complete Clause to be triggered, Sequoia must establish that the sale failed to complete for a reason "other than a breach of the LOI by the buyer."

[140] Sequoia, who bears the burden here just as it does with the other preconditions, says that the termination had nothing to do with the actions of Protection One, and was a unilateral decision of Mr. Schneider's unrelated to any breach.

[141] Camacc says that the reason that the sale failed to complete was because of Protection One's breach of the LOI. Camacc argues that the term "breach" in relation to an LOI must mean something less than a legal breach. It says that Protection One breached the LOI by taking positions that would have devalued the consideration to 3xLogic Holdings contemplated in the LOI. This argument is connected to Camacc's argument above that the BMSA promised no erosion of value; however, here Camacc argues that, regardless of what was promised in the BMSA, Protection One's demands for these same concessions amounts to a breach of the LOI by Protection One.

[142] Other than the exclusivity and confidentiality clauses, most of the LOI was not binding or intended to be binding on its signatories. What then is meant in the Failure to Complete Clause in relation to a "breach by the buyer"?

[143] In its written submissions, Sequoia relied on a very technical meaning of "breach" and suggested that only a breach of one of these legally binding terms in the LOI by Protection One could be considered a breach. However, Sequoia conceded in oral submissions that this position was "too cute by half." I agree.

[144] I prefer Camacc's submission, accepted by Sequoia, that the clause contemplates a "moral breach" as described in S.M. Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2017) at p. 151. A moral breach may occur if the purchaser takes a position that departs so far from the material terms of the LOI that the purchaser has effectively walked away from the deal established in the LOI.

2. Must the Breach be the Reason for the Failure to Complete?

[145] Camacc argues that finding any breach of the LOI by Protection One would be sufficient to find that the Failure to Complete Clause was not triggered, even if the actual reason for the termination was not related to Protection One's breach.

[146] I do not agree. Finding a breach is not sufficient on its own--the breach of the purchaser must be the reason for the seller's failure to complete the sale. This is clear in the language of the Failure to Complete Clause itself.

[147] While Camacc's position may be correct if the issue was a legal breach of a contract, and where the issue is the enforcement of that contract, that is not the case here. As discussed above, "breach" in this context refers to the moral breach of the purchaser departing too far from the terms of the LOI, not a legal breach.

[148] Furthermore, the case law provided by Camacc on this point is not helpful, as the BMSA expressly refers to the breach being the "reason" for the termination.

3. Did Protection One breach the LOI?

[149] Applying this moral breach standard, Camacc submits that Protection One sought concessions and terms that were not contemplated by the LOI, thereby significantly eroding the value of the deal for Camacc, such that Protection One breached the agreement.

[150] Camacc pleads that the main concessions sought by Protection One in moral breach of the LOI were the additions of: (i) a holdback clause, (ii) unlimited indemnities, and (iii) a requirement for tail insurance. It further submitted in argument at trial that the LOI was also breached through Protection One seeking a non-competition agreement with 3xLogic USA, and a software supply agreement with 3xLogic Systems that went beyond what was contemplated in the LOI.

[151] Of greatest concern, says Camacc, were the revisions that Protection One sought to its draft software supply agreement that would allow Camacc and Protection One to purchase software from 3xLogic Systems for sale to an expanded client group, including end users and authorized dealers. This was unacceptable to Mr. Schneider, as it could create direct competition with 3xLogic USA, and risk a more direct conflict than the "channel conflict" they had sought to avoid from the outset.

- [152] The LOI also provided that 3xLogic Holdings would enter a non-competition agreement with Protection One. Camacc says that Protection One's attempt to require 3xLogic USA to also enter a non-competition agreement was an attempt to add in a further business term that was contrary to the original LOI that would also hurt 3XLogic USA's competitive position.
- [153] Camacc submits that it was forced to discontinue negotiations with Protection One when it became clear that Protection One would not resile from its negotiating position demanding the above concessions.
- [154] Sequoia, on the other hand, says that there was no material departure from the business terms of the LOI, and that the alleged concessions regarding holdbacks, indemnities and insurance were legal terms to be worked out during the due diligence process and drafting of the PSA, rather than "business" terms. Sequoia says that these terms can only be properly negotiated after the purchaser has done their due diligence, and the contemplation of these terms is to be expected, and does not constitute a moral breach of the deal struck in the LOI.
- [155] Sequoia further says that, if I should find that the concessions amounted to a moral breach of the LOI, Protection One never refused to resile from the alleged concessions, and that this was not the real reason that Camacc terminated the negotiations. There is no evidence that the parties were at an impasse in negotiations. Mr. Larmer testified that from his perspective, the negotiations were occupying all of his time, but were moving "back and forth" as they would ordinarily. No party had expressed a "final" position.
- [156] Sequoia says that the negotiation emails between the parties indicate that at the time of termination, the gap between the parties' positions was narrowing. The tail insurance issue was simply an issue of how to continue Camacc's existing insurance after the sale given the share sale structure, and was a legal question more than a business term. The holdback amount was still being negotiated between legal counsel and was a legal point of negotiation, but was progressing towards a reasonable resolution. The holdback percentage proposed by Protection One towards the end of August was still fairly high, but accompanied by a very favourable limit on liability. Sequoia argues this was not a business term that eroded value in the LOI, but an ordinary incident of the legal negotiations of representations and warranties to be expected in the papering of a share sale transaction.
- [157] Sequoia argues that the issues regarding the software agreement and non-competition with 3xLogic USA were introduced by Camacc for the first time at trial, years after the actual termination, and therefore were not credible concerns that Camacc or the 3xLogic Group held at the time of termination. In any event, Sequoia says the evidence at trial from those actively engaged in the negotiations was that these issues could and would have been resolved.

[158] Sequoia says that the real reason for the termination of the sale by Mr. Schneider was not because of any of the above concessions or negotiating positions taken by Protection One, but rather a unilateral and arbitrary decision of Mr. Schneider, for reasons that remain unstated.

a) Findings on reasons for termination

[159] Considering all of the evidence before me, I find that Mr. Schneider's decision to terminate the negotiations was not due to a breach of the LOI, moral or otherwise, by Protection One.

[160] First, I find that it was always contemplated, first in the BMSA, and then in the LOI, that representations and warranties may be sought from Camacc, and/or 3xLogic Holdings as Camacc's owner, and that the seeking of holdbacks and indemnities to secure those representations or warranties was not a breach, moral or otherwise, of the LOI.

[161] Second, I find that the negotiations around the holdbacks and indemnities were ongoing, and there was no credible indication that Protection One was fixed in its position or unwilling to resile from its position at the time of the termination.

[162] Although the suggested holdback represented a delay in receipt of the full amount of the purchase price in the millions (had there been no further negotiated reduction), I find on the evidence before me that the inclusion of these provisions in the draft PSA was not a breach of expectations set in the LOI, did not significantly erode the value of the deal, and did not compromise the position or goals of 3xLogic Holdings in any event. I make this finding notwithstanding the language in the LOI as a "cash" deal payable at closing.

[163] Sequoia notes that in the termination letter, Camacc did not express any breach of Protection One as the reason for terminating negotiations. I agree with Camacc that there was no legal requirement for Camacc to expressly state such a breach if that was the reason they terminated negotiations. However, I find that the lack of any indication of a breach in the letter is some evidence that a breach from Protection One was not at the top of Mr. Schneider's mind when he sent the letter. However, this fact alone is far from determinative.

[164] With respect to the draft software agreement and proposed non-compete with 3xLogic USA, I find these concerns were also not at the fore of Mr. Schneider's mind when he terminated the negotiations. I agree with Sequoia that Camacc's reasons for terminating the negotiations have evolved over time, and that these alleged concessions were not expressed in any way at the time, were not amongst the alleged concessions pled by Camacc in the months after the termination, or even in their 2019 amended pleadings.

[165] Mr. Schneider's evidence is the best available evidence of what his reasons for the termination were. Mr. Schneider considered himself to be the "directing mind" of 3xLogic Holdings (notwithstanding that in this matter I find that the 3xLogic Group was clearly of two minds, with the other 50% of the directors and shareholders wanting to proceed with the sale). As president of the various corporate boards, Mr. Schneider considered that he

was able to make the decision not to proceed with a sale of Camacc. The propriety of Mr. Schneider's decision to terminate the negotiations is not before me, and I accept that Mr. Schneider did effectively terminate those negotiations, and ensure that neither Camacc nor 3xLogic Holdings entered into a sale of Camacc with Protection One.

[166] As a witness, Mr. Schneider was frequently unresponsive. He considered every question posed to him in cross examination to be an argument rather than a question, and responded in kind. Even in direct examination, this was his tendency.

[167] I observe that Mr. Schneider's evidence frequently did not support Camacc's theory of its case, or the pled reasons for termination. He did not accept the proposition put to him in direct examination that 3xLogic Holdings was concerned about the holdback because it needed the holdback funds immediately, or that they had a business reason for rejecting the holdback clause. Rather, the thrust of Mr. Schneider's evidence was that he objected to holdbacks in principle, together with the representations and warranties they secured. He asserted that in his decades of conducting mergers and acquisitions, he did not engage in sales transactions that required him to provide any meaningful warranties or representations about the company he was selling.

[168] However, the absence of representations and warranties, or holdbacks and indemnities to secure them, was not a requirement of the BMSA, and, I find, was not communicated to Sequoia as a requirement for the sale. Nor was it reflected in the LOI, or the PSAs drafted and exchanged through legal counsel throughout the PSA negotiation period on behalf of 3xLogic Holdings.

[169] In any event, Mr. Schneider indicated in his evidence that he could live with a holdback, if it was small enough. As noted above in my factual findings, the evidence before me establishes that the holdback issue was moving towards resolution and that the gap in the parties' positions was narrowing at the time of Mr. Schneider's decision to terminate the negotiations.

[170] While I accept that the tail insurance was a significant and unnecessary expense by all accounts, I am satisfied with Mr. Larmer's evidence that this issue was also close to being resolved. Protection One's underlying concern was that Camacc's insurance coverage be continued after ownership transferred. By the time of termination, there was an option on the table for Protection One to pay for "head" insurance, which would have greatly reduced, or even avoided, any cost to Camacc.

[171] With respect to the software agreement with 3xLogic Systems and the non-compete agreement with 3xLogic USA that Protection One sought, I find that those two issues arose late in negotiations, likely in part because Mr. Kim encouraged Protection One to negotiate for a more competitive position for Camacc's future. I agree that these two terms were not anticipated in the LOI. Further, these terms could have frustrated the initial discussions that the 3xLogic Group boards had about the sale of Camacc in August and September of 2014, where the board expressed the need to avoid a "channel conflict".

- [172] Mr. Law was the director directly involved with the software aspect of 3xLogic as CEO of 3xLogic Systems. At the time of termination of negotiations, the evidence establishes that he had already directed counsel for 3xLogic Holdings to respond to Protection One and relay that the changes they sought regarding the software agreement were not acceptable. Mr. Kim's evidence was that both he and Mr. Law considered that these issues could be addressed, and the documentary evidence indicates that both were urging Mr. Schneider to allow the negotiations to continue to resolve these issues.
- [173] I do not accept Camacc's argument that they had no choice but to terminate negotiations because Protection One refused to resile from this negotiating position. The evidence does not support that conclusion.
- [174] Given Protection One's previous assurances, and Mr. Kim's apparent efforts to address any difficulties with closing through his relationship with Protection One, I find that objectively there was no basis for Mr. Schneider to have concluded that Protection One would not resile from its negotiating position on these points. There was no reason he could not have gone back to Protection One stating his position on the outstanding issues. The evidence establishes that he never expressed, or directed the expression, of a final non-negotiable position on these issues to Protection One.
- [175] After speaking to Mr. Schneider, Mr. Melby sent an email to Mr. Kim and Mr. Law on August 27, 2015, effectively explaining that there was no hope the transaction would close. He mentions the issue of the holdback, tail insurance, and software agreement, but also notes cash flow and working capital concerns, and that "the drop in the Canadian dollar is another deal stopper for the U.S. group." Mr. Schneider disagreed that the currency fluctuations were of any concern to him.
- [176] In response, Mr. Kim sought a directors' conference call to see if the outstanding issues could be resolved, going so far as to indicate that the Canadian shareholders were willing to bridge some of the differences themselves and take some of the brunt of the currency changes. Mr. Bresingham and Mr. Larmer also attempted to set up conference calls to try and understand Mr. Schneider's reasons for terminating the negotiations, and find solutions to address them.
- [177] Mr. Schneider was clear in his evidence that all of these efforts were pointless. He was not going to change his mind regardless of what might be proposed.
- [178] In Mr. Schneider's affidavit prepared in October 2015, Mr. Schneider swears that 3xLogic Holdings "has absolutely no intention of selling CAMACC now or in the future", because doing so would not serve the interests of its stakeholders. This also supports the conclusion that the negotiations were not terminated because of a breach by Protection One, but because a sale of Camacc was no longer considered advantageous at any price.

- [179] I find on the basis of all the evidence, including Mr. Schneider's evidence, that the reason he terminated the negotiations was not because of Protection One's draft PSA or the positions Protection One was taking. Nor was it because Protection One refused to resile from any of those positions (they did not).
- [180] While Mr. Schneider was an argumentative witness, and I was not able to place significant weight on much of his evidence, what came through in his testimony was that, above all else, he would not allow a sale of Camacc if doing so would affect the value of 3xLogic USA and its ability to compete, including competing in the Canadian market.
- [181] I find that Mr. Schneider's primary focus, and allegiance, was to the expansion of 3xLogic USA. The expansion of Camacc's business into the larger and more lucrative US market was the very reason for his initial investment in Camacc. I find that Mr. Schneider came to the conclusion, very late in the process, and perhaps in part in light of the discovery of Mr. Kim's attempts to place Camacc in a more competitive position after its purchase by Protection One, that a separate sale of Camacc to another industry player would raise some of the same concerns that the CEO of 3xLogic USA raised at the August 2014 board meeting, and was not consistent with his interests, regardless of the contractual terms that might be negotiated to protect those interests on paper.
- [182] Ultimately, Mr. Schneider was bullish that the sale that was ultimately negotiated in 2018--a sale of both of 3xLogic USA and 3xLogic Holdings, with Camacc still a part of the 3xLogic Group--was better than the sale he terminated in 2015 of Camacc alone. He took credit for terminating the sale to Protection One as his own "very wise" decision.
- [183] Camacc concedes that Mr. Schneider's concern about the ultimate value of 3xLogic USA was a factor in Mr. Schneider's decision to terminate the negotiations, but says that this one concern cannot be disentangled from the whole package of concerns, including the issue of holdbacks and the positions Protection One was taking in the PSA negotiations.
- [184] I do not agree. Mr. Schneider's concerns about Protection One's positions during negotiations did not amount to a breach by Protection One of the LOI, moral or otherwise.
- [185] The evidence, together with the timing of the termination decision just three days before the target closing date of August 31, 2015, suggests to me that Mr. Schneider's real concern in terminating the negotiations at that time was not that a deal might close based on Protection One's still fluid negotiating position, but that the deal might close at all.
- [186] I find that the evidence establishes by the end of August 2015, no deal with Protection One for the sale of Camacc would have been acceptable to Mr. Schneider. This was not because of the concessions that Protection One sought, or any potential breach of the LOI by Protection One, but rather because of how Mr. Schneider came to view Protection One's investment in Camacc (on any terms) as interfering with Mr. Schneider's financial goals in relation to 3xLogic USA and the 3xLogic Group as a whole.

4. Post-Termination Correspondence

[187] After 3xLogic Holdings terminated negotiations, Protection One made threatening and aggressive statements in reaction to Camacc backing out of the deal. Camacc argues that it would have been unthinkable for 3xLogic Holdings to have sold Camacc to Protection One given its aggressive communications and threat to "crush" them if they did not come back to the negotiating table.

[188] However, the evidence establishes that this post-termination communication was not relevant to Mr. Schneider's reasons to terminate discussions. By the time that Protection One sent the threatening message on September 8, and even before Mr. Larmer communicated Mr. Bresingham's "feedback" to Camacc backing out of the deal on August 29, Mr. Schneider was clear that the "train had left the station" three days before, and there was no chance that the sale to Protection One would go through.

5. Breach of Mr. Bresingham's "Representation"

[189] I also reject Camacc's argument that it terminated negotiations because Protection One breached a representation made by Mr. Bresingham on behalf of Protection One, and that this representation formed an express term of the LOI.

[190] Camacc alleges that Mr. Bresingham made a representation to 3xLogic Holdings prior to signing the LOI that "Protection One would ensure that the terms of the draft definitive agreement that it would subsequently provide to 3xLogic would not require 3xLogic to make any material concessions beyond those reflected in the letter of intent". Camacc argues that this representation was an express term of the LOI, and that Protection One breached this term by requesting holdbacks and indemnities during the PSA negotiations.

[191] Sequoia says that this alleged representation never occurred.

[192] I do not accept Mr. Schneider's evidence that Mr. Bresingham made such a representation to him. Mr. Schneider's evidence on this point at trial was contradictory to his evidence during discovery. During his evidence at discovery in May 2017, which was closer in time to the alleged representation, Mr. Schneider was unwavering that nobody at Protection One had made such a representation to him, and that if any representation had been made by Protection One, it was made to somebody else and later communicated to him. He stated that any representations would have been made through Sequoia.

[193] At trial, Mr. Schneider said that he was able to remember Mr. Bresingham's representation to him after looking at his calendar. I find it difficult to reconcile this evidence with Mr. Schneider's lengthy and adamant evidence in discovery that no such representation, or even conversation, had occurred.

- [194] Mr. Bresingham testified at trial that he had no recollection of such a conversation with Mr. Schneider, and, as an experienced financial officer involved in many merger and acquisition deals, that he would not have made a promise that he would not seek material concessions in advance of the due diligence process. I accept Mr. Bresingham's evidence on the point.
- [195] In any event, Mr. Schneider's trial evidence does not amount to evidence that Mr. Bresingham made a representation that Protection One would not demand any "material concessions." At best, Mr. Schneider's trial evidence, if accepted, would establish that Mr. Schneider told Mr. Bresingham that his approach to the sale of his companies was for the buyer to examine the business, and then for the buyer to make a choice to either go forward with the purchase, or not. Mr. Schneider said that Mr. Bresingham agreed. However, Mr. Schneider did not give any evidence of how Mr. Bresingham "agreed", or of Mr. Bresingham saying anything in particular about holdbacks, indemnities, representations, warranties, or not seeking any of the other alleged "concessions" sought by Protection One.
- [196] Mr. Melby's evidence that he recalls Mr. Schneider having a conversation with Mr. Bresingham is of no assistance to the court in establishing that any particular representation was made by Mr. Bresingham to Mr. Schneider at that time.
- [197] I find that the evidence falls far short of establishing the existence of a representation by Protection One with respect to the LOI or the PSA, let alone one that was breached.

THE COUNTERCLAIM

- [198] Camacc advances its counterclaim and its claim for setoff only in the event that it is found to be liable to Sequoia. Camacc submits that if it is found to be liable to Sequoia, then Sequoia should be liable to Camacc for breach of contract for failing to perform its obligations as set out in the BMSA and/or for negligent misrepresentation. Those obligations are alleged to be the negotiation of a letter of intent that "clearly establishes all business terms of the deal" in order to avoid value-eroding efforts by an opportunistic buyer. Camacc says that if it is contractually liable to Sequoia under the Failure to Complete Clause, then it is only because of Sequoia's breaches of its promises in the BMSA and the resulting deficient LOI.
- [199] I have already found that the terms relied upon by Camacc in the BMSA did not constitute legally binding representations on Sequoia's part as to the content of a letter of intent, and that the LOI that was signed by Mr. Schneider complied with Sequoia's obligations under the BMSA. I therefore dismiss Camacc's counterclaim.

CONCLUSION

- [200] I find that Sequoia discharged its duties under the BMSA diligently. It executed the campaign it said it would on behalf of Camacc, secured an offer much higher than it had estimated, and over \$1.5 million more than Camacc's ownership group had set internally.

That offer was negotiated by Camacc and its ownership group (which were indistinguishable in their decision making processes) as a share sale at Camacc's request in the form of a mutually acceptable LOI, and that LOI had not changed in its essential terms when Mr. Schneider unilaterally decided to terminate negotiations toward the closing of the sale.

- [201] Sequoia has established that the Failure to Complete Clause was valid and applicable. Sequoia has also established that the preconditions for its reliance upon the Failure to Complete Clause have been met, including that the LOI falls within the letter of intent contemplated by that clause, notwithstanding that, it was signed by 3xLogic Holdings and not Camacc, and that the LOI did not address the possibility of holdbacks, indemnities, or tail insurance. Sequoia has also proven that the reason the sale did not complete was not a breach, legal or moral, by the purchaser (Protection One), but rather because of concerns internal to the 3xLogic Group, and Mr. Schneider in particular.
- [202] I find that Sequoia is therefore entitled to the success fee as invoiced on September 2, 2015. Camacc breached the BMSA when it failed to pay Sequoia that success fee.
- [203] I order that Camacc pay the amount of \$1,017,000, plus pre-judgement interest, to Sequoia. Camacc's counterclaim is dismissed.
- [204] Subject to any submissions the parties may have with respect to costs, Sequoia has been successful in this action and is entitled to its costs.

Marzari J.

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