Circuit Court for Harford County
Case No. C-12-CV-22-000776

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2225

September Term, 2023

THE KEELTY COMPANY

v.

LOCKSLEY MANOR, INC.,

Arthur,
Albright,
Moylan, Charles E. Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: September 30, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This case comes to us from the Circuit Court for Harford County after that court concluded, following a bench trial, that Appellant The Keelty Company ("Keelty") and Appellee Locksley Manor, Inc. ("Locksley") had never reached a meeting of the minds regarding Keelty's wish to purchase about 200 acres (including a golf course) ("the Property") from Locksley. As a consequence, Keelty failed on its claim for specific performance of what it claimed was a sales contract for the Property.

Keelty presents three questions for our review,[1] which we consolidate and rephrase as:

> Did the circuit court err in denying specific performance to Keelty because no contract had been formed for the sale of the Property?

For reasons below, we answer "no" and affirm the circuit court's judgment.

[1] Keelty phrased its questions as follows:

I. Did the Trial Court commit an error of law when it required the production of a single identical document executed by both parties to the Contract of Sale, in order for the plaintiff to meet its burden in establishing the formation of that contract?

II. Did the Trial Court commit an error of law when it considered an "impossibility of performance" defense (the lack of execution of the Intercreditor Agreement by the Harford Bank) prior to determining whether there had been a meeting of the minds as to all essential terms between the parties to the Contract of Sale?

III. Did the Trial Court commit an error of law when it failed to consider the Defendant's own culpability in the "impossibility of performance" defense?

BACKGROUND

I. Factual History

Locksley owned four parcels of land, comprising nearly 200 acres total, near Aberdeen, Maryland. Since 1994, Locksley had operated a public golf course, the Wetland Golf Club, on a portion of the Property. In conjunction with the golf course, Locksley maintained five buildings on the Property. The Property was subject to a loan from Cecil Bank.

A. The parties negotiate.

In May 2021, Keelty approached Locksley about purchasing the Property. Keelty wanted to develop the Property in phases. First, on the "most developable piece" of the Property, Keelty would develop residential building lots, and then follow, potentially, with commercial parcels on other portions. Keelty planned to develop the lots and parcels gradually.[2] A few months later, the parties started to negotiate and flesh out the basic terms of a sales agreement (the "Purchase Agreement"), including the purchase price (ten million dollars), the length of a study period, and due diligence requirements.

When negotiations started, Locksley's lender was Cecil Bank. Initially, Keelty offered to pay off this loan as part of the sale. This was reflected in early drafts of the deal, with language indicating that no money would change hands between Keelty and

[2] Ultimately, Keelty planned to first develop twenty-one residential building lots and build homes. Though Keelty would be purchasing the entire Property, only this small portion would be initially developed. Then Keelty would start on the approval process for developing the next phase of nine lots. From then on, Keelty would determine, "after consultation" with Locksley but in its own "sole discretion," the details and order for developing the remaining parcels and lots.

Locksley as an initial deposit because, instead, Keelty would be paying off the Cecil Bank loan as its "initial deposit" toward the purchase price.

In May of 2022, as negotiations continued, Locksley refinanced with a $2,000,000, twenty-year, loan from Harford Bank, creating a new lien on the Property.[3] As a consequence, Keelty and Locksley no longer negotiated for a payoff of the Cecil Bank loan.

Instead, Keelty and Locksley negotiated a deal that required the cooperation of Harford Bank.[4] Among other things, after a due diligence period, Keelty would make monthly payments against the Harford Bank mortgage and those monthly payments would be treated as deposits against the Property's purchase price. And, in order to enable Keelty to receive clear title to the lots as it purchased them, Harford Bank would partially release its lien against the Property as lots were purchased.

What deposits were due, and when the due diligence period started, were also negotiated. Within five business days of the "execution of this Agreement[,]" Keelty had

[3] Harford Bank's loan encumbered the entire Property with the exception of a single lot, Lot 12.

[4] According to the expert that testified at trial, the agreement that Keelty and Locksley contemplated was known as a "takedown" deal. Because most of the Property secured a mortgage on which Locksley was the borrower, and development was to occur in phases, Locksley's lender would need to cooperate in releasing part of the Property from its deed of trust as Keelty incrementally purchased the Property. In other words, in order for Keelty to be able to develop part of the Property, without first having to first pay the entire purchase price or the lender's loan, the cooperation of Locksley's lender, and its agreement to partially release its collateral, was "integral" to the development's taking place.

to pay a $50,000 initial deposit. The due diligence period would start on the "Effective Date," defined as "the later of the dates below the signatures of the Parties below." Commencing on the Effective Date, Keelty would have a 120-day due diligence period "for the purpose of making surveys, tests, inspections, investigations and architectural, structural, economic, environment, land planning and other studies of the Property[.]" No other offers would be entertained during the due diligence period, and Keelty retained "sole and absolute discretion" to terminate [the Purchase Agreement] during that time. If Keelty decided to proceed with the purchase at the end of the due diligence period, a second deposit would be due to Locksley from Keelty. Keelty would also begin to make a monthly payment of principal and interest to Harford Bank toward Locksley's loan balance, which payments would be treated as additional deposits toward the purchase price.

Keelty also wanted protections to ensure that the Harford Bank loan would be performed during the due diligence period. In the event that Locksley defaulted in its payment obligations or otherwise, Keelty wanted the opportunity to cure Locksley's defaults, or purchase the Harford Bank loan, in order to avoid "be[ing] forced to bid against somebody else[] at foreclosure."

To resolve this concern, Keelty's counsel proposed what it called a Recognition and Intercreditor Agreement (the "ICA"). The ICA was a separate agreement from the Purchase Agreement. It was a tripartite contract, involving and requiring the signatures of all three parties: Keelty as the buyer, Locksley as the seller, and Harford Bank as the

lienholder bank. The ICA recognized that Keelty would have a lien on the Property, subordinate to Harford Bank's lien. The ICA further required Harford Bank to notify Keelty of any defaults by Locksley, among other things. And Harford Bank would agree to partially release its lien against the Property as Keelty purchased lots.

The Purchase Agreement was revised to require that the ICA be signed by Keelty, Locksley, and Harford Bank "simultaneously with the execution" of the Purchase Agreement. Specifically, the Purchase Agreement provided:

> 8.9 **Intercreditor Agreement**. [Locksley], Harford Bank and [Keelty] have, simultaneously with the execution of this Agreement entered into a Recognition and Intercreditor Agreement (the "Intercreditor Agreement"), consenting to and recognizing [Keelty]'s rights under this Agreement (notwithstanding any default by [Locksley] under the Harford Bank Loan) as well as permitting the lien of the Deed of Trust and providing [Keelty] with cure rights under the Harford Bank Loan in the event of a default by Seller thereunder. As provided in Section 3.2.c, recording of the Intercreditor Agreement is a condition to the release of the Deposit to [Locksley] at the successful conclusion of the Due Diligence Period.
>
> 8.10 **Default by Seller Under Harford Bank Loan**. The Parties recognize that the documents evidencing the Harford Bank Loan provide for [Locksley] covenants (for example, a global debt service coverage requirement) that could cause a default thereunder notwithstanding that [Keelty] has timely made all payments. [Locksley] understands and agrees that, upon the occurrence of such a default by [Locksley], the Intercreditor Agreement will (i) permit [Keelty] to cure such defaults, to the extent subject to cure, and/or (ii) permit [Keelty] to purchase the Harford Bank Loan. [Locksley] consents to any such actions taken by [Keelty] and agrees that any and all amounts paid to Harford Bank by [Keelty], together will all reasonable costs and expenses incurred by [Keelty] in exercising such rights, shall all constitute credits against the Purchase Price and an "Additional Deposit" under this Agreement.

Keelty's counsel reinforced the significance of the ICA to the Purchase Agreement in multiple communications to Locksley and Harford Bank during the course of

negotiations. In an email sent August 1, 2022, to Locksley's counsel and Harford Bank's counsel, Keelty's counsel specifically underscored the necessity of executing both the ICA and the Purchase Agreement "contemporaneously since we can't proceed without both."

B. Locksley signs unrevised copy of the Purchase Agreement on August 4, 2022.

The parties eventually finalized the terms of the Purchase Agreement to be signed by the parties.

On August 4, 2022, Locksley emailed Keelty an executed signature page for the Purchase Agreement. We refer to the version of the Purchase Agreement that corresponded to the signature page Locksley returned as the "Locksley Version." Locksley did not attach an executed copy of the ICA to its August 4 email. In fact, the ICA had not been sent to Locksley to be signed with the Locksley Version.

Keelty did not sign the Locksley Version. Instead, the next day, August 5, 2022, Keelty responded via email to note an error in the Locksley Version.

> . . . See attached page 11 of the [Agreement]. My client picked up this change - since we're not putting up a $2m deposit, the deleted section doesn't make sense.
>
> Agree?
>
> Attached are pdfs of the final [Agreement] (with that change made) and the Exhibits - if you want to attach your client's signature page to it. The [ICA] is not an Exhibit. I will send that to [Harford Bank's attorney] and check in with him.
>
> The [Agreement] calls for both Agreements to be executed at the same (more or less) time, so my client approves this version but we need to see if the Bank does.

The aforementioned "change" was the removal of an eleven-word phrase: "so no actual monies shall be paid by Purchaser to Seller." As intimated in Keelty's email, this language arose during the earlier stage of negotiations when Keelty's payoff of Cecil Bank obviated a deposit paid directly to Locksley. The eleven-word phrase, as it stood in the Locksley Version, actually contradicted the provision of the Purchase Agreement that required Keelty to pay a $50,000.00 deposit to Locksley within five days of signing the Purchase Agreement.

To its email identifying this error, Keelty attached an annotated page of the Purchase Agreement that corrected the error, as well as a version of the Purchase Agreement that would have been identical to the one Locksley had just signed—but for the absence of the eleven-word phrase and Locksley's signature.

C. Keelty signs revised copy of the Purchase Agreement on September 22, 2022.

On September 22, 2022, Keelty emailed Locksley an executed copy of the Purchase Agreement, revised per the August 5 email. We refer to this version of the Purchase Agreement as "the Keelty Version." With the Keelty Version and the ICA attached, Keelty wrote:

> [A]ttached is the execution package:
>
> 1. Final Purchase Agreement (only "September" inserted on page one and change in Buyer signatory on signature page plus separate pdf of the Exhibits (unchanged).
> 2. Final [ICA] (only "September" added on page one and the legal from the Bank's DOT as Exhibit A).
> 3. [Keelty] signed signature pages.

4. [Locksley] signature pages for [the president of Locksley] to sign (notary needed for the [ICA]) – I will need Sam's originals to record the [ICA].

Once I have [Locksley's] signature pages, I will submit to [Harford Bank's representative and counsel] for [Harford] Bank's signature on the [ICA]. With that, we will finally be OFF!

D. Neither Locksley nor Harford Bank sign the ICA.

Although Keelty signed the ICA on the same day as it had signed the Keelty Version, Locksley had not executed the ICA when it signed the Locksley Version or anytime thereafter. Harford Bank never signed the ICA either.

E. Locksley contracts with Abertown on October 10, 2022, and emails Keelty to shut down their deal on October 12, 2022.

On October 10, 2022, Locksley executed a contract with Abertown, LLC ("Abertown"), for the sale and purchase of the Property. On October 12, 2022, Locksley emailed Keelty, indicating it would not be moving forward with the sale to Keelty:

> [T]his will confirm that I have been instructed to withdraw on any further negotiations on this matter. The offer previously made by my client that was not countersigned by your client is hereby withdrawn, and my client declines the counter-offer made in the form of the purchaser[-]signed contract that you sent to me.

Keelty responded to this with further correspondence demanding that Locksley confirm and comply with the Purchase Agreement between Keelty and Locksley. Locksley did not do so.

II. Procedural Posture

On November 9, 2022, Keelty filed suit against Locksley in the Circuit Court for Harford County, seeking to enforce the Purchase Agreement for sale of the Property.

Keelty alleged that Keelty and Locksley had agreed to the terms of a written contract of sale that included all material terms, creating a binding contract. The Complaint identified the August 5 email exchange as the point in time that a binding contract was created. In its Complaint, Keelty characterized the discrepancy between the Locksley Version and the Keelty Version—the removal of the eleven-word phrase—as a "minor corrective revision" of "an irrelevant provision of [the Purchase Agreement] that concerned an abandoned component of the deal[.]" Keelty described Harford Bank's execution of the ICA as "the only ministerial task [left] to be accomplished[.]" The Complaint alleged that, "as of September 12, 2022, [Keelty] was able to confirm that Harford Bank approved of the [ICA]."

Locksley generally denied the allegations in Keelty's Complaint and specifically denied "that there was ever a 'sale' of [the Property]." Keelty proceeded to trial on a single count[5] of Breach of Contract/Specific Performance.

On October 24, 2023, the bench trial began. Trial testimony came from seven fact

[5] Keelty pled a second count for fraud based on Locksley's "surreptitious[]" negotiations and agreement with Abertown. This count was dismissed prior to trial by agreement of the parties.

For its part, Locksley filed a counterclaim against Keelty on three counts: tortious interference with contractual relations, tortious interference with prospective advantage, and malicious use of process. Abertown successfully intervened and filed a third-party complaint for a declaratory judgment on the rights of the parties relative to the Property, as well as counts against Keelty for tortious interference with contract relations and tortious interference with prospective advantage.

The court ordered judgment in favor of Keelty on Locksley's counts and judgment in favor of Abertown on its count of declaratory judgment and in favor of Keelty on Abertown's other two counts. These rulings were not appealed by Appellees Locksley or Abertown.

witnesses and one expert witness. Exhibits included communications between the parties and their counsel during the course of negotiations and through the breakdown of the deal, as well as the various versions of the Purchase Agreements throughout the Keelty-Locksley negotiation and documentation of the Locksley-Abertown contract.

On November 1, 2023, in an oral opinion, the trial court found that there was no contract between Keelty and Locksley because Keelty had failed to prove mutual assent:

> So from this Court's vantage point, the case is not so much about the defenses. The issue is[:] has [Keelty] proven mutual assent. And where the document signed by [Locksley] here calls out for the simultaneous signing of the ICA, and where simultaneous from this Court's vantage point means existing or occurring at the same time, and where [the president of Locksley] was not presented the ICA when he signed [the Purchase Agreement], and where the case law, when it concerns itself with what mutual assent means, mutual assent begins with the word mutual. It's not one party intending to be bound. It's the parties themselves. More than one intending to be bound. And here we don't have a mutual assent.
>
> We did not have the parties simultaneously executing these two documents, which this Court, after considering all of the testimony presented in this case, the ICA was an essential component of [the Purchase Agreement] between these parties. It was called out as something that was needed.
>
> The testimony was [Keelty] wanted it and needed it, and it had to be not only signed, but signed and notarized because it had to be filed in the land records in order to be a truly effective document. So, whichever version of this particular agreement, whether it's the [Locksley Version] or the [Keelty Version], there's a lack of mutual assent as to both, quote unquote, "versions of this." The [Keelty Version] document is a bit easier because it wasn't even signed by [Locksley].
>
> Also, the Court finds where you don't have both signatures on the same version of [the Purchase Agreement], you can't define the due diligence period. And the due diligence period is the heart and soul of [the Purchase Agreement] itself.
>
> Again, prior to the October 13th email [in which Keelty first characterized the eleven-word change as "gratuitous"], it was important to [Keelty] to remove the language in the [Locksley Version] of [the Purchase Agreement], from this Court's vantage point. The email bore that out, and it

> was only after the deal was declared off the books was it called a gratuitous change. In fact, [the version with the eleven words removed is] the only version [Keelty] signed.
>
> So in summary, [Keelty's] attempt to waive the ICA here in open court was found to not be effective.[6] The ICA was an integral part of the parties' agreement. It was never signed. It was not signed simultaneously. And the fact that [Keelty] [itself] sought to change the terms of [the Purchase Agreement] and did, in fact, sign one that was never signed by [Locksley] [itself] causes this Court to conclude [Keelty] has failed in [its] burden to prove that there is mutual assent to [the Purchase Agreement]. The [Locksley Version] document and the [Keelty Version] document are not an enforceable contract. I make that finding with respect to the request to declaratory relief.

The court entered judgment in favor of Locksley on Keelty's remaining count for breach of contract and specific performance.

Thereafter, Keelty filed a Motion to Alter/Amend Judgment, making essentially the same arguments as those now before us. The trial court denied the motion with a written Memorandum Opinion and Order. It addressed the failure to sign the ICA and Keelty's attempt to waive the requirement of the Purchase Agreement that the ICA be executed simultaneously:

> [T]he ICA portion of the purchase and sale agreement was not a minor detail of [the Purchase Agreement]; it was material. This document had to be signed not only by [Locksley], but [Harford Bank] had to sign it as well. The facts showed that without the ICA the orderly development of the property could not take place. [Harford Bank] would not release its loan against the property without the assurances provided from the ICA. Otherwise [Keelty] would have to pay the entire loan balance at settlement. Those terms were not within either version of the purchase and sale agreement. [Locksley] had not signed the ICA. Communications [Keelty] to [Locksley] reflected that the earlier version of the purchase and sale agreement contained an ambiguity that made

[6] Before the trial court, though not in its pleadings, Keelty indicated it was "willing to waive [the] condition [of the ICA's execution]." Here, Keelty does not challenge the trial court's conclusion that this attempt at waiver was ineffective.

the document confusing and subject to multiple interpretations.

The court explained the reasoning of its oral ruling and rejected the remainder of Keelty's arguments:

> In its analysis, the Court concluded there was no enforceable contract to maintain the action for specific performance as there was no meeting of the minds based on the facts presented by the case. [Keelty] failed to show that there was a mutual assent to the material terms of [Keelty's] purchase of [Locksley's] real property, and in particular how [Keelty] was going to pay for it.
>
> In summary, this was a case sounding in specific performance. As such this Court in the exercise of its discretion found that [Keelty] failed to prove that there was mutual assent and that the material terms to the contract were fair and reasonable and certain.

Keelty then noted this timely appeal.

STANDARD OF REVIEW

We have set forth the standard of review for a bench trial:

> In our review of an action tried without a jury, we[] must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. Questions of law, however, require our non-deferential review. When the trial court's decision involves an interpretation and application of Maryland statutory and case law, we must determine whether the lower court's conclusions are legally correct. Where a case involves both issues of fact and questions of law, we will apply the appropriate standard to each issue.

Floyd v. Baltimore City Council, 241 Md. App. 199, 207 (2019) (quoting *Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253, 266–67 (2012) (cleaned up)); Md. Rule 8-131(c).

The interpretation of an agreement is a question of law the appellate court reviews de novo. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177–82

(2015). Whether a contract has been formed—including a finding of mutual assent—is an issue of fact, however, and is subject to clear error review. *Rahmi v. Rahmi*, No. 135, Sept. Term, 2023, 2024 WL 510027, at *6 (Md. App. Feb. 9, 2024) [7] (confirming that "whether a contract exists is a factual inquiry subject to a clearly erroneous standard of review" and that acceptance, and its necessary component of mutual assent, are key questions in that factual inquiry). *See also Cheston L. Eshelman Co. v. Friedberg*, 214 Md. 123, 132 (1957) (indicating that whether an acceptance occurred was a question of fact properly determined by the fact-finder).

DISCUSSION

Keelty argues that the trial court erred by concluding that, in order for Keelty and Locksley to have formed a contract, their agreement must have been evidenced by a single document signed by both of them. According to Keelty, this error led to the court's erroneous conclusion that because such a document was not executed by both parties, there was no meeting of the minds between them and no contract. Additionally, Keelty points to the eleven-word discrepancy between the Locksley Version and the Keelty Version, and argues that because this discrepancy was not a material part of the parties' agreement, it was error for the circuit court to conclude that this discrepancy prevented the forming of a contract between them. Both of these arguments fail.

Specific performance is not available as a remedy where there is no contract to

[7] An unreported opinion issued on or after July 1, 2023 may be cited for its persuasive value, but only if no reported authority adequately addresses the issue before the court. Md. Rule 1-104.

specifically perform. *Cochran v. Norkunas*, 398 Md. 1, 21 (2007); *DeLeon Enters., Inc. v. Zaino*, 92 Md. App. 399, 405–06 (1992) ("Specific performance must be based on a valid and enforceable contract."). More specifically, "[t]o grant specific performance there must be a meeting of minds. This requires that the contract be clear, certain, and definite in all its essential and material terms." *DeLeon Enters., Inc.*, 92 Md. App. at 406. Under Maryland law, a contract forms only upon a meeting of the minds—i.e., manifestation of mutual assent—between the parties. *Cochran,* 398 Md. at 14, 23 ("It is universally accepted that a manifestation of mutual assent is an essential prerequisite to the creation or formation of a contract."). "Manifestation of mutual assent includes two issues: (1) intent to be bound, and (2) definiteness of terms." *Cochran,* 398 Md. at 14 (citing 1 Joseph M. Perillo, Corbin on Contracts, § 2.8, p. 131 (Rev. ed. 1993)).

In determining whether a contract has been formed, particularly whether the parties have manifested an intent to be bound, we look to the plain meaning of the documents involved, asking "what a reasonably prudent person in the same position would have understood as to the meaning of the agreement." *Cochran*, 398 Md. at 17. But we are not precluded from considering the surrounding circumstances. "[P]arol evidence may be used to contravene the legal existence of a contract. Parol evidence presupposes the existence of a legally effective written agreement. Thus, parol evidence need not be excluded until it is established that a contract is in effect." *Id.* at 15, n.6 (internal citations omitted).

With these principles in mind, we see no error in the trial court's conclusion that

Locksley and Keelty never formed a sales contract because they never manifested mutual intent to be bound to one. Here, there was no dispute that when Keelty returned its version of the Purchase Agreement to Locksley, neither Locksley nor Harford Bank had signed the ICA. Yet, the Purchase Agreement plainly provided that the ICA had been signed simultaneously. It said, "[Locksley], Harford Bank and [Keelty] have, simultaneously with the execution of this Agreement entered into a Recognition and Intercreditor Agreement (the "Intercreditor Agreement")[.]" Because a reasonably prudent person would have understood this to mean that no contract would be formed if the ICA had not been signed simultaneously with the Purchase Agreement, and it wasn't, a contract was not formed. *See Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177 (2015) ("[I]f parties do not intend to be bound until a final agreement is executed, there is no contract." (cleaned up)).

The surrounding circumstances only confirm that without the ICA having been signed simultaneously by Lockley, Keelty, and Harford Bank, the parties did not intend to enter into the Purchase Agreement. The ICA was, as the trial court found, "integral to the purchase and sale agreement being able to go forward[.]" Among other things, the ICA would allow Keelty to cure any defaults by Locksley, recognize Keelty's junior lien on the Property, and require Harford Bank to partially release its lien on the Property as Keelty purchased lots. Keelty itself recognized the centrality of the ICA, reminding Locksley and Harford Bank on August 1 that the Purchase Agreement and ICA had to be signed "contemporaneously since we can't proceed without both." Nonetheless, by

August 5, when Keelty noticed the eleven-word error in the Purchase Agreement, Harford Bank had not signed the ICA or approved the eleven-word change. On September 22, when Keelty signed the Keelty Version and asked for Locksley's signature pages on the Purchase Agreement and the ICA, Keelty even then recognized that the ICA would have to be signed by Harford Bank before the parties could "finally be OFF!"

Keelty's contention that the trial court erroneously required that signatures appear on a single document in order to form a contract overlooks what happened here.[8] Certainly, a contract can be comprised of more than a single document, and when more than a single document is involved, those documents should be construed together. *Rourke v. Amchem Prods., Inc.,* 384 Md. 329, 354 (2004). In *Rourke*, asbestos defendants agreed to designate a claims administrator for the purpose of evaluating, settling, paying, or defending plaintiffs' claims. When the administrator, in a subsequent letter, agreed to plaintiffs' post-agreement requests for partial payments, leaving plaintiffs the possibility

[8] As we understand it, Keelty is not arguing that the Locksley Version and Keelty Version were counterparts of the Purchase Agreement such that together, they would constitute a binding contract. To be sure, contracting parties may mutually agree that their signatures appear on counterparts, rather than one document, with each counterpart having the same effect as the original. *Pattison v. Pattison*, 491 Md. 551, 581 (2025) (Killough, J., dissenting) ("Such a clause typically allows contracts to be executed in 'counterparts, and each counterpart will have the same force and effect as an original and will constitute an effective, binding agreement on the part of each of the undersigneds.'" (citing secondary source)). Keelty and Locksley envisioned as much when they were negotiating the Purchase Agreement, specifying that "[a]ll counterparts [would] collectively constitute a single agreement." But the Locksley Version and Keelty Version were not counterparts. *See* Counterpart Definition, *Black's Law Dictionary* (12th ed. 2024) (defining counterpart as "[o]ne of two or more copies or duplicates of a legal instrument"). Keelty's removal of the eleven-word phrase meant that the two versions no longer duplicated each other.

of further remedies "in contract," our Supreme Court construed the agreement and letter together, determining that letter modified the agreement, but did not extinguish the agreement's arbitration provision. *Id.* at 356.

But *Rourke v. Amchem Pros., Inc.* is readily distinguishable from this situation. In *Rourke*, there was no dispute that the parties had entered into the agreement and had modified it with the post-agreement letter. In other words, there was no dispute that a contract had been formed and modified. Instead, the court was asked to determine the extent to which one provision of the agreement, its arbitration provision, continued to control after the letter. Here, although the Keelty Version purported to change or correct the Locksley Version, neither version was a formed contract because neither carried the signature of both parties, and neither was accompanied by a simultaneously-signed ICA. Accordingly, there was no occasion for the trial court to construe the Locksley Version and the Keelty Version together.

Keelty's characterization of its removal of the eleven-word phrase from the Keelty Version as immaterial does not help either. To be sure, "the mere inclusion of words requesting a modification of the proposed terms" does not necessarily mean a contract has not formed. Restatement (Second) Contracts, § 61, Comment a. But where a purported acceptance adds qualifications upon which the acceptance hinges, the reply to the offer would be a counter-offer. Restatement (Second) Contracts, § 59. In making such a reply, the offeree has terminated her own power of acceptance: she cannot then accept the previous offer, Restatement (Second) Contracts, §§ 38 & 40, unless her counter-offer

includes language indicating that regardless of the counter-offer the original offer shall not be terminated. *Ebline v. Campbell*, 209 Md. 584, 590, modified on other grounds, 209 Md. 584 (1956) (cleaned up).

Keelty's August 5 email was a counter-offer to, and thus a rejection of, the Locksley Version, and did not include any "non-termination" language. In that email, Keelty proposed to change the Locksley Version by omitting the eleven words, to seek Harford Bank's approval for the change, and to reiterate that the ICA still had to be signed. Keelty never indicated it would revert to the Locksley Version if Locksley rejected Keelty's counter-offer. Instead, Keelty said

> Attached are pdfs of the final [Agreement] (with that change made) and the Exhibits - if you want to attach your client's signature page to it. The [ICA] is not an Exhibit. I will send that to Bob and check in with him.
>
> The [Agreement] calls for both Agreements to be executed at the same (more or less) time, so my client approves this version but we need to see if the Bank does.

Although Keelty eventually signed the Keelty Version and the ICA, Locksley never did (and Harford Bank did not sign the ICA).[9] As a consequence, no contract was formed.

Keelty next argues that the court erred when it "considered a[n] 'impossibility of performance' or 'failure of a condition precedent' defense (the lack of execution of the [ICA] by the Harford Bank) prior to determining whether there [was mutual assent] between Keelty and Locksley." Keelty contends that "[t]here cannot be a condition to a

[9] Harford Bank's president testified that Harford Bank's counsel was never given the authority to approve the Purchase Agreement or the ICA, and there is no indication any person with authority to do so did so.

contract without there first being a contract, and the [trial court's] blending of the affirmative defense into the primary issue of contract formation was legal error."

Keelty confuses a condition that accompanies an offer to enter into a contract with a condition that excuses performance of a contract. Under Maryland law, and as our Supreme Court recently held, "[a]n offer can come with or without conditions." *Pattison v. Pattison*, 491 Md. at 562 (citing *Am. Med. Spirits Co., v. Mayor & City of Council of Balt.*, 165 Md. 128, 133 (1933)). In *Pattison*, Ms. Pattison offered to settle the parties' divorce case, forwarding to Mr. Pattison a settlement agreement with Ms. Pattison's signature. 491 Md. at 556. The agreement required Mr. Pattison to pay Ms. Pattison a monetary award in installments over two-and-a-half years and to sign a promissory note to secure the obligation. *Id.* at 556–57. The promissory note was attached as an exhibit to the settlement agreement. *Id.* at 557. A cover letter accompanying the documents said, "[t]his Agreement is delivered to you in settlement of the parties' outstanding disputes *on condition* that the Agreement and Note be executed by [Husband] today [September 25]."[10] *Id.* Mr. Pattison received the settlement agreement and promissory note on September 25 but did not sign them until September 28. *Id.*

Our Supreme Court (and this Court) found that no contract had been formed between the Pattisons because Mr. Pattison had failed to sign the agreement and

[10] The agreement also required Mr. Pattison's business and living trust to guarantee payment of the monetary award. *Pattison*, 491 Md. at 564. Ms. Pattison "assumed" the guarantee would be signed by September 28 but did not condition her offer on the guarantee being signed by September 28. *Id.*

promissory note by the September 25 deadline, the explicit condition Ms. Pattison had included in her cover letter accompanying the documents. *Pattison,* 491 Md. at 564. Our Supreme Court reiterated that

> Since the offeror was at liberty to make no offer, it was free to determine and impose whatever terms it might choose, and among these it might require that its offer be accepted within a designated time in a specific manner. If no acceptance is made in the manner and within the period fixed by the offer, the offer necessarily expires.

Id. at 562–63. The Supreme Court concluded that "[a]ny reasonable person in the parties' positions would understand that [Ms. Pattison's] offer was conditioned on [Mr. Pattison's] signing the Agreement and Note on September 25." *Id.* at 564.

In contrast to the failure of a condition that accompanies an offer, the consequence of which is that a contract is not formed, failure of a condition precedent or impossibility are defenses used by a party seeking to avoid obligations under a valid, fully formed contract. *See Stone v. Stone*, 34 Md. App. 509, 515 (1977) (distinguishing between impossibility that arises after formation and impossibility foreseeable at the time of formation and acknowledging that, while in both cases the contract forms, only in the former could performance be discharged); *Harford Cnty. v. Town of Bel Air*, 348 Md. 363, 385 (1998) (explaining how the doctrine of legal impossibility discharges performance of contractual obligations); *Patriot Constr., LLC v. VK Elec. Services, LLC*, 257 Md. App. 245, 261 (2023) (confirming that failure of a condition precedent excuses non-performance, as there is no duty of performance and can be no breach by non-performance). Fundamentally, if a contract is not formed, failure of a condition precedent

or impossibility (whether that impossibility was foreseeable at the time of formation or arising after formation) never become an issue.

Locksley's failure to sign the Keelty Version (and the ICA) forecloses Keelty's ability to argue failure of a condition precedent and impossibility. Here, and as we discussed above, the Keelty Version was a counter-offer. It was conditioned on Locksley and Harford Bank signing the ICA. Locksley never signed the Keelty Version or the ICA, and Harford Bank did not sign the ICA. As a consequence, no contract was formed. Whether Locksley would (or would not) have been able to perform without the ICA having been signed was irrelevant because Locksley had no obligation to perform.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.