
CANADA / JUDGMENT

1021846 B.C. Ltd. v. Hare

2018 BCSC 814

COURT

Supreme Court of British Columbia

DECIDED

16 May 2018

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2018 BCSC 814 1021846 B.C. Ltd. v. Hare

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1021846 B.C. Ltd. v. Hare,

2018 BCSC 814

Date: 20180516

Docket: S166405

Registry: Vancouver

Between:

1021846 B.C. Ltd.

Plaintiff

And

Ajit Hare and Hare Holdings Ltd.

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

R. Hira, QC

J.K. Bienvenu

Counsel for the Defendants:

L. Gold

Place and Dates of Trial:

Vancouver, B.C.

March 14-16, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 16, 2018

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I. Introduction

- [1] This is an action seeking to enforce an agreement to convey real property.
- [2] The plaintiff claims that by an agreement of purchase and sale dated March 25, 2016 (the "Contract") the plaintiff, as purchaser, agreed to purchase and the defendants, as sellers, agreed to sell two adjacent properties in Surrey, British Columbia, located at 13839 and 13853 58th Avenue, and legally described as follows:

PID 009-387-838: PL 10868 LT 3 LD 36 SEC 9 TWP 2 PART N ½ of SW ¼, 0.539 AC.; and

PID 009-387-871: PL 10868 LT 4 BLK 4 & 5 LD 36 SEC 9 TWP 2 PART N ½ of SW ¼,
(collectively, the "Properties").

The Contract was subject to certain conditions that were later waived by the plaintiff.

- [3] According to the plaintiff, the Contract was supposed to complete on January 18, 2017. On that date, the plaintiff tendered the purchase price but the defendants refused to convey the Properties. The plaintiff brings this action seeking specific performance or, alternatively, damages.
- [4] The defendants respond that the Contract was never binding because their promise to convey the properties was unsupported by consideration. In the alternative, the defendants say that if the Contract was binding at the time of its formation, the plaintiff had since repudiated it.

A. The Facts

1. Prelude to the Contract

- [5] Tarlok Sablok is the principal of the plaintiff company. He is a notary by profession but is also in the business of purchasing, assembling, subdividing and rezoning residential properties for resale. He recently incorporated the plaintiff for that purpose. He had purchased development properties before this transaction, but never in Surrey. He was particularly interested in finding an opportunity in the Newton area.
- [6] In mid-March 2016 he was approached by a realtor about potentially acquiring a development property in that area. He invited the realtor to his office. Accompanying the realtor was another realtor, Amandeep Singh, whom Mr. Sablok had not dealt with before.
- [7] Mr. Singh had only recently qualified as a realtor and had not yet brokered a single transaction. Mr. Singh testified that he told Mr. Sablok about his lack of experience, but Mr. Sablok remembers not being aware of it, at least not initially. Mr. Singh says he was eager to help Mr. Sablok find something to buy and to that end, took him to see another property in the area. Mr. Sablok was not interested in that property because it appeared to be too difficult to service.
- [8] Not to be deterred, Mr. Singh made some inquiries. He determined that a nearby lot had a tenant living on it. Mr. Singh spoke to the tenant and learned that the owner of that lot and the neighbouring vacant one was the personal defendant, Ajit Hare. Mr. Hare is also the principal of the defendant company. He owns a used automobile dealership and also invests in real property. Mr. Singh had previously purchased several vehicles for himself or his relatives from Mr. Hare's dealership.
- [9] Mr. Singh called Mr. Hare and asked whether he would be prepared to sell the Properties. Mr. Hare responded that he might be.

- [10] Mr. Singh then called Mr. Sablok and told him that he had an "uncle" who owned two properties on 58th Avenue in Surrey and might be interested in selling them. Mr. Singh was using the term "uncle" to connote an older gentleman rather than an actual relative, as is common in the Punjabi language.
- [11] Mr. Sablok asked for the address and drove by the Properties. After doing so, Mr. Sablok contacted Mr. Singh again to tell him that he was interested in discussing a potential purchase. He asked Mr. Singh to find out the price from his uncle. Mr. Singh inquired with Mr. Hare and determined that the price was \$2 million. Mr. Singh conveyed that information to Mr. Sablok.

2. Offer and Acceptance

- [12] According to Mr. Sablok, Mr. Singh suggested that Mr. Hare offer something less than the asking price and proceeded to draft an offer at \$1.9 million. Mr. Singh testified that it was Mr. Sablok who decided to make the initial offer of \$1.9 million. In any event, after several rejected drafts that left Mr. Sablok unimpressed with Mr. Singh's level of experience and contract drafting abilities, Mr. Singh sent Mr. Sablok an email at 12:42 pm on March 26, 2016 with an offer dated March 25, 2016 to purchase the Properties for \$1.9 million. Mr. Sablok signed it and returned the signed copy to Mr. Singh by email four minutes later, at 12:46 pm.
- [13] That offer stated that a \$100,000 deposit would be payable "UPON REMOVAL OF ALL SUBJECTS ON OR BEFORE APRIL 22, 2016." It also made the agreement subject to a "feasibility study at the city of surrey to determine and be satisfied with allowable subdivision of the subject properties on or before APRIL 30, 2016." Another clause made the agreement subject to the buyer's "searching and approving title to the property on or before APRIL 30, 2016."
- [14] Mr. Singh met with Mr. Hare to present the offer to him in person. Mr. Hare made changes in his own handwriting and then signed the document and gave it back to Mr. Singh. Mr. Hare's counter-offer bore hand-written changes that, among other things, increased the price to \$2 million, the deposit to \$200,000 and changed the subject removal dates throughout to April 7, 2016.
- [15] Approximately one hour later, at 1:42 pm on March 26, 2016, Mr. Singh emailed Mr. Sablok a copy of the counter-offer executed by Mr. Hare.
- [16] Less than an hour later, at 2:21 pm on March 26, 2016, Mr. Sablok responded by email to Mr. Singh with a counter-counter-offer of his own. By then, he had done a title search (Mr. Singh had not yet done so) and added in his own handwriting the name of the defendant company, the actual owner, as the vendor of the second property. He also reduced the deposit to \$125,000 and changed the subject removal dates throughout to April 18, 2016. The closing date was to be January 18, 2017.

[17] Mr. Singh took the signed counter-counter-offer to Mr. Hare at his dealership and Mr. Hare initialed the changes where indicated for both sellers and signed it.

[18] As executed by the parties, the Contract consisted of five pages in the standard form. The essential terms agreed upon were:

- (a) a price of \$2 million;
- (b) a deposit of \$125,000 due by April 18, 2016;
- (c) subject to the purchaser, by April 18, 2016:
 - (i) obtaining a feasibility study at the city of Surrey "to determine and be satisfied with allowable subdivision;" and
 - (ii) satisfying itself as to the state of title; and
- (d) a closing date of January 18, 2017.

[19] Section 22 of the Contract stated as follows:

ACCEPTANCE IRREVOCABLE (Buyer and Seller): The Seller and the Buyer specifically confirm that this Contract of Purchase and Sale is executed under seal. It is agreed and understood that the Seller's acceptance is irrevocable including without limitation, during the period prior to the date specified for the Buyer to either:

A. fulfill or waive the terms and conditions herein contained; and/or

B. exercise any options(s) herein contained.

[20] At or about the same time, Mr. Hare also signed a fee agreement with Mr. Singh agreeing to pay him a commission of 3.2% on the first \$100,000 and 1.15% on the remaining portion of the sale price if a legally enforceable sale is entered into, payable on completion. Clause 2 of the fee agreement stated that "[t]he Brokerage and the Realtor are not the agent for either the seller or the buyer." Clause 6 stated that:

The Seller acknowledges and agrees that:

A. the Brokerage and the Realtor are not acting for either the Seller or the Buyer throughout the transaction and do not owe any agency duties to the Seller or the Buyer;

.

D. nothing in this Agreement, including the obligation of the Seller to pay the remuneration set out in Clause 3, shall be construed as creating an agency relationship between the Brokerage or the Realtor and the Seller or the Buyer .

[21] Soon after that, Mr. Sablok met with Mr. Singh at the Properties and Mr. Singh brought with him the copy of the Contract as executed by Mr. Hare.

3. Mr. Sablok's Unsuccessful Attempts to Change the Terms

- [22] On March 30, 2016, Mr. Sablok sent an email to Mike Kompter at Hub Engineering Inc. seeking his assistance in evaluating the development potential of the Properties. He told Mr. Kompter that he had signed a contract to purchase the Properties and that his subject removal date was "April 15, 2015 [sic]".
- [23] Mr. Sablok explained in his testimony at trial that he deliberately misled Mr. Kompter about the subject removal deadline in an effort to encourage him to move quickly so that Mr. Sablok would be able to meet the real deadline (i.e. April 18, 2016) with time to spare. The wrong year was evidently a typographical error. After further exchanges relating to these and other properties, Mr. Sablok sent Mr. Kompter an email on April 5, 2016 advising that his subject removal deadline for the Properties was April 16, 2016.
- [24] On April 5, 2016, Mr. Kompter sent Mr. Sablok a "layout plan" showing the Properties as they might be subdivided to yield eight separate lots. The next day, Mr. Sablok emailed Mr. Kompter to say that if he thought "we can achieve numbers close to your layout sketch, I can finalize the deal with the sellers, they are getting impatient." In fact, he had had no contact whatsoever with Mr. Hare and was again merely looking to keep the pressure on Mr. Kompter to ensure the deadline was met. Mr. Kompter had not yet been able to arrange a meeting with the city. He responded that it was up to Mr. Sablok "but the more time you can get is better." On April 13, 2016, Mr. Sablok followed up with Mr. Kompter to ask about his progress. In that email, he stated that the "subject removal date is April 17, 2016."
- [25] While he was waiting for a meeting date with the city, Mr. Sablok says he approached Mr. Singh to seek an extension of the subject-removal date from Mr. Hare. Mr. Sablok says that Mr. Singh agreed to ask Mr. Hare for an extension but when he did so, Mr. Hare refused.
- [26] According to Mr. Sablok, Mr. Singh suggested that he offer to remove the subject conditions immediately without doing the feasibility study in exchange for a drop in the price. Mr. Sablok says Mr. Singh told him that Mr. Hare had already agreed to accept a drop in price in exchange for an immediate waiver of subjects.
- [27] Mr. Singh remembers the conversation differently. He says that he next heard from Mr. Sablok on April 4 or 5, when he got a call inviting him to come to his office in Vancouver. According to Mr. Singh, Mr. Sablok said he was having trouble scheduling a meeting with the city and would be prepared to pay no more than \$1.8 million if he was required to lift the subjects on or before April 18, 2016. According to Mr. Singh, Mr. Sablok also offered to pay Mr. Singh an extra \$10,000 over his commission if he could arrange this. By then, Mr. Singh says he had shown Mr. Sablok other properties. Mr. Singh said he sent Mr. Sablok a form of fee agreement dated April 6, 2016 calling for him to pay \$10,000 in commission if the deal concluded, but Mr. Sablok never signed it. Section 5 of the proposed fee agreement stipulated that the fee would not be payable to Mr. Singh if the seller defaulted and failed to complete, but would be if it was the buyer who did so.

[28] In any event, whoever first suggested it, Mr. Sablok liked the idea of seeking a price reduction. On April 6 and 7, 2016, Mr. Sablok and Mr. Singh exchanged email drafts of proposed revisions to the Contract to achieve that end. In those early drafts, the Contract was replaced by two new contracts with the new \$1.8 million price allocated \$900,000 to each property. The subject removal date was extended in each contract to April 30, 2016. In an email dated April 7, 2016, Mr. Sablok sent Mr. Singh additional terms and conditions to insert into each of the two new contracts, as follows:

3. TERMS AND CONDITIONS: The purchase and sale of the Property includes the following terms and is subject to the following conditions:

The Seller hereby authorize the Buyer and/or its agents to make necessary application for the development of the property, e.g. subdivision and rezoning applications, as may be required and further agrees to execute those documents required to give effect to the development applications, including a Letter of Authorization.

The Seller agree to provide reasonable access to Buyer and its agents consultants & employees for the purpose of conducting requisite inspections, surveys, and soil tests during the currency of this Agreement.

The Seller will promptly provide to the Buyer such consents and authorization as the Buyer may reasonably request to permit the Buyer to obtain information relating to the property from governmental authorities.

The Buyer shall accept sole responsibility for and pay for all studies commissioned and authorized by the Buyer in respect of feasibility, engineering, survey, soil testing and development applications and any other costs pertaining to the development or rezoning of the property. The Buyer shall indemnify the Seller against all claims and/or actions for unpaid costs incurred by the Buyer in this regard.

(the "Additional Development Facilitation Terms")

[29] On April 7, 2016, Mr. Sablok emailed Mr. Singh copies of two cheques for \$62,500 to pay the deposit on each of the two new contracts.

[30] According to Mr. Hare, he did not hear from Mr. Singh again until Mr. Singh came to see him in his showroom on April 8, 2016. He brought with him photocopies of two cheques and two unsigned contracts offering to buy the Properties separately for \$900,000 each. Mr. Singh told him, he recalls, that if he were prepared to sign right away, the subjects would come off and the transaction could close immediately. He recalls Mr. Singh telling him that the buyer thought the price was too high because he was not sure whether he would get what he wanted from the city. He acknowledged in cross-examination that he might have been told that the buyer had been unable to get a meeting with the city yet.

- [31] Mr. Hare was angry and confused. He says he told Mr. Singh that he thought the buyer was playing games. He asked Mr. Singh to leave the new offers with him. He called Mr. Singh the next day and conveyed a similar message. He asked Mr. Singh why the buyer was doing this and he recalls Mr. Singh saying that it related to the buyer's dealings with the city.
- [32] Mr. Singh's account of the meeting is similar. He says he told Mr. Hare that the buyer was not prepared to pay the full \$2 million price because the buyer was unable to get his feasibility study done in time. But he also told Mr. Hare that the buyer had cheques available and these were now cash offers. According to Mr. Singh, Mr. Sablok opted not to sign the new offers before presenting them to Mr. Hare, in the hope that Mr. Hare would sign them first. Mr. Hare complained that the buyer had not even signed the new offers and that Mr. Singh should get the buyer to sign before he would consider them. Mr. Singh agrees that Mr. Hare told him to leave the documents with him but testified that Mr. Hare called him the next day to tell him that he was not prepared to have anything to do with this agreement any longer.
- [33] Mr. Sablok denies instructing Mr. Singh to show the unsigned draft contracts to Mr. Hare. He says he would not have agreed to this because they were still a work in progress. It appears from the documents that Mr. Singh and Mr. Sablok then decided, for whatever reason, to try a different tack.
- [34] At 3:31 pm on April 8, 2016, Mr. Singh emailed Mr. Sablok a new form of addendum. This one had reverted back to the original, single-contract formula, but this time offering \$1.9 million for both properties. This draft of the proposed addendum had two new pages - erroneously marked 6 of 6 and 7 of 7 respectively.
- [35] Each of those pages contained the following proposed new term:
- All the subjects have been cleared and a deposit check in the amount \$62,500 will be provided on the name of AJIT HARE and buyer requests to reduce the amount of purchase of both properties to 1 million 9 hundred thousand (\$1,900,000).
- [36] Each page also bore the Additional Development Facilitation Terms.
- [37] At 2:08 pm on April 13, 2016, Mr. Singh emailed Mr. Sablok a further revised version of the proposed addendum. Mr. Sablok responded by email later that evening at 7:06 pm telling him to ignore that last version and use the one that he had just attached. That document consisted of two pages, marked 6 of 7 and 7 of 7, respectively. Page 6 began with the following handwritten note "FURTHER TO THE CONTRACT DATED MARCH 25, 2016, the Parties herein Agree as follow [sic]: ". After setting out the legal description of the Properties, that version states:

All the subjects have been removed and Two deposit cheques in the amount of \$62,500.00 each will be provided in the name of AJIT HARE and HARE HOLDINGS LTD. The purchase price is reduced for the both properties to One Million Nine Hundred Thousand Dollars (\$1,900,000). After the proposed new Development Facilitation Conditions, he added the following in his own handwriting: "ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME. THIS CONTRACT IS A BINDING AND FIRM CONTRACT BETWEEN THE BUYERS [sic] AND SELLERS.

- [38] Mr. Singh typed up the revised draft addendum as instructed and emailed what was now the final form of the document to Mr. Sablok at 9:32 am the next morning, April 14, 2016. Mr. Sablok returned the document with his signature on it at 11:21 am later that same morning. Although he appears to have signed that document indicating that his signature was affixed on April 13, 2016 (the date that the addendum itself bears), in fact his signature cannot have been placed on the document before the morning of April 14, 2016, given the sequence of the email transmissions.
- [39] Mr. Sablok says that, at Mr. Singh's suggestion, he prepared two bank drafts for \$62,500 to demonstrate to Mr. Hare that he was serious.
- [40] Mr. Singh took the signed addendum to Mr. Hare at the dealership. According to both Mr. Hare and Mr. Singh, Mr. Singh relayed to Mr. Hare that \$1.9 million was the buyer's final offer and Mr. Hare could "take it or leave it", it was up to him. Again Mr. Hare became angry and impatient. He reiterated his belief that the buyer was playing games. Again he asked Mr. Singh to leave the documents with him.
- [41] Mr. Hare says he called Mr. Singh the next day to advise him that he no longer wished to go through with the deal.
- [42] Mr. Singh recalls that Mr. Hare called him to say that he felt he was being tricked. According to Mr. Singh, Mr. Hare was suspicious that Mr. Singh might be personally involved with the numbered company that was the buyer. In any event, he recalls that Mr. Hare had no interest in doing business with him or the purchaser any longer. Mr. Singh says he relayed this message to Mr. Sablok, who responded that it was "no big deal" and that Mr. Singh should try and find him something else, which Mr. Singh proceeded to do.

4. Waiving the Subjects

- [43] Mr. Sablok remembers their conversation differently. He says that after several days of silence, he inquired of Mr. Singh, who told him that Mr. Hare was not prepared to reduce his price. Mr. Sablok says he considered whether he was prepared to proceed at the original price despite his lack of progress with the city, and decided that he was. He says he told Mr. Singh to prepare an addendum simply waiving the subjects without changing any of the original Contract terms.

- [44] Mr. Singh says he was confused by that instruction when he received it, because he thought he had clearly conveyed Mr. Hare's decision that the deal was dead and that Mr. Sablok had accepted that fact. Mr. Sablok insisted that they still had a day or two left and instructed him to prepare the addendum, so Mr. Singh agreed to do so.
- [45] Mr. Singh then prepared yet another series of draft addenda. The first was a draft addendum that he emailed to Mr. Sablok on April 17 at 10:27 am. It was very similar to the previous draft except that it did not stipulate a change in the Contract price - although it did still include the Additional Development Facilitation Terms.
- [46] Mr. Singh sent another version on April 18, 2016 at 11:02 am, and then another one at 11:06 am, this time with a note to disregard the last one. After a few more attempts they appear to have finally got it right. Mr. Singh sent Mr. Sablok the final version at 12:24 pm on April 18, 2016. That version purported to waive the subjects and to do nothing else.
- [47] Mr. Sablok responded with an email at 12:30 pm stating:
- Congratulations.
- Subject removal addendum all signed by the Purchasers and enclosed. Please advice the sellers immediately. Cheque for \$125,000 is Ready for you to pick up. Pl. acknowledge the receipt of this email. Regards, etc.
- [48] Mr. Singh responded as follows by email sent at 12:55 pm:
- Thank you & congratulations on the purchase of new property. I will be taking this to the seller.
- [49] Mr. Singh testified that Mr. Sablok told him what to say in that email and he sent the email as instructed. Mr. Sablok denies telling Mr. Singh what to say.
- [50] Because Mr. Sablok was busy that day, they agreed to meet at 7:00 pm later that evening. In the meantime, Mr. Sablok sent Mr. Singh an email at 4:55 pm to advise that he had two bank drafts totalling \$125,000 payable to the sellers and ready for pickup.
- [51] They met for tea at a mall in Surrey. They were joined by another realtor, a Mr. Gill. Mr. Sablok gave Mr. Singh the originally signed addendum waiving the subjects and the original bank drafts. Then, according to Mr. Sablok, Mr. Singh remembered that he needed to have Mr. Sablok sign another form to allow for the deposit to be paid directly to the seller, rather than held in trust with the realtor. Mr. Gill's office was nearby so they went to his office to print off the requisite form, which Mr. Sablok then signed.
- [52] Mr. Singh texted the executed addendum and the two bank drafts to Mr. Hare. Mr. Hare admits receiving them.

[53] Mr. Hare says that he was shocked and surprised to receive them. He says he immediately tried to call Mr. Singh four or five times that evening but got no answer. Mr. Singh says that Mr. Hare tried to call once but Mr. Sablok and Mr. Gill told Mr. Singh not to answer his phone.

[54] Mr. Hare recalls that he finally reached Mr. Singh a few days later and asked for an explanation. He asked why Mr. Singh had not responded to his phone calls. He remembers Mr. Singh informing him that Mr. Sablok had instructed him not to answer.

[55] The documentary record suggests that Mr. Hare and Mr. Singh had already spoken by April 19, 2016. On that day, Mr. Singh sent an email to Mr. Sablok stating as follows:

I called the seller regarding the subject clearance and about the drafts are ready to be delivered, but he refused to take those, your drafts are with me, I have submitted the copy of the drafts with the other documents to my office, PLEASE SEEK THE LEGAL ADVISE.

[56] Mr. Singh explained in his testimony that he had by then consulted with his supervisor who told him to tell Mr. Sablok to seek legal advice in respect of the transaction and to communicate with Mr. Sablok from then on only in writing.

[57] Mr. Sablok met with Mr. Singh once more on April 26. Mr. Singh returned the two drafts to him. Mr. Sablok made a photocopy of the drafts for his file and wrote the following note on it:

26,04.2016

Received Two Drafts from Amandeep Singh because the Sellers of the Properties 13839 & 13853 58th Ave. Surrey, B.C. refused to Accept the Drafts after subject removal.

for 1021846 B.C.Ltd.

[58] Mr. Sablok says he heard nothing from Mr. Singh or Mr. Hare after that. Nevertheless, he continued to believe that the Contract remained in effect despite Mr. Hare's refusal to accept the drafts. He directed Mr. Kompter to continue to prepare for the subdivision of the Properties on the assumption that he would soon be acquiring them.

5. The Plaintiff's Tender of Performance

[59] Prior to July 15, 2016, Mr. Sablok retained a law firm, MacKenzie Fujisawa LLP ("MFL"), on behalf of the plaintiff to commence an action to enforce the Contract. MFL did so and arranged for a certificate of pending litigation to be placed on title to the Properties. MFL then sent a copy of the claim, the certificate of pending litigation and the Form 17 charge as registered on title under cover of a letter dated July 15, 2016 addressed to the defendants at their address as shown on the Contract (i.e., 13574 66 A Avenue in Surrey). The letter stated as follows:

We are the solicitors for 1021846 B.C. Ltd. and write to you further to their Contract of Purchase and Sale with you dated March 25, 2016 for the Properties (the "Contract").

The Contract provides for payment to you of a deposit of \$125,000.00 upon removal of all subjects on or before April 18, 2016. The subjects were removed on April 18, 2016.

Upon removal of the subjects, our client provided Vancouver City Savings Credit Union official cheques for \$62,500.00 payable to Ajit Hare and for \$62,500.00 payable to Hare Holdings Ltd. to their realtor, Amamdeep Singh of Century 21 Coastal Realty Ltd., for delivery to you. Mr. Singh returned these official cheques to our client on April 26, 2016 and advised our client that you refused to accept these cheques.

We now have these cheques from our client in our possession and stand ready to deliver the official cheques to you representing the deposit at your request.

Our client stands ready, willing and able to complete their purchase of the Properties on January 18, 2017 as contracted for. To protect our client's interest in the Properties as a result of your refusal to accept the deposit funds, our client has filed a Notice of Civil Claim in the Supreme Court of British Columbia against you and has filed a Certificate of Pending Litigation against the title to the Properties. For your records, we enclose a copy of the Notice of Civil Claim, the Certificate of Pending Litigation and a Form 17 Charge with the Land Title Office Registration as noted thereon.

We will be taking all necessary steps to tender documentation to you on behalf of our client pursuant to the Contract well in advance of the January 18, 2017 completion date.

[60] Mr. Hare testified that he never received that letter because he had not been at the recipient address for twelve years. He was unable to explain, if that is so, how the property tax assessments for the Properties came to him, given that was the address shown not only on the Contract but also on the title search for the owners of both of the Properties. Nor was he able to explain how that address came to be put on title when he acquired the Properties in April 2009.

[61] Mr. Hare testified that it was only months later that he discovered by coincidence that there was a certificate of pending litigation on title to the Properties. He opted not to do anything about it at the time, he says, because he was not intending to sell the Properties any time soon.

[62] On December 26, 2016, however, he emailed a complaint to the Real Estate Council about Mr. Singh. The complaint stated as follows:

On 25th March 2016, I was presented an offer on my two properties namely 13839 and 13853 58th Avenue Surrey, BC.

The offer was made through a company called "1021846 BC Ltd" for \$1,900,000.

I changed the original offer of \$1,900,000 to \$2,000,000. I did not hear anything for about one week.

After one week Mr. Aman Singh visited my office to tell me that buyer did not like the price and offered the price of \$900,000 each for both property and that offer was not even signed by the buyer. I did not want to deal with unsigned offer.

Around 13th April 2016 Aman brought to me an addendum for subject removal. I asked him when there is no accepted offer on the property and what kind of subject removal we are talking about.

On the addendum, the buyer reduced the price to \$1,900,000. I refused to deal any further with that offer. There was no further negotiation.

Few days later, my agent Mr. Aman Singh sent me a copy of two cheques on my phone and I phoned him back right away. Aman told me that the buyer had instructed him to send a copy of cheques to me and not to discuss any further. They never gave me the cheques/draft physically.

Later I found out that the buyer has put certificate of pending litigation on my properties on 14th July 2016.

Both buyer and realtor have conspired together against me. The realtor told me that the buyer is a very crooked man. According to realtor, Buyer was a notary public himself and he has lost his license before and has been a bankrupt. He advised me to sell the property to him otherwise I will have to face hardship and go through the courts.

[63] MFL sent the defendants another letter on January 13, 2017, to the same address. That letter attached the closing documents and set out the instructions for closing.

[64] Mr. Hare testified at first that he did not receive that letter either, but later acknowledged that in fact it had been delivered to his house, which he maintained is at a different address from the one in the letter. He explained that he was confused by the address on the letter and assumed that he had never received it because he is no longer at that address.

[65] In any event, Mr. Hare must have received that letter because this time he engaged counsel, Mr. Gold, to respond to it.

[66] Mr. Gold wrote to MFL on January 16, 2017 taking the position that the Contract is unenforceable and that the defendants would not be completing. In an apparent effort to explain the defendants' position, Mr. Gold enclosed a copy of Mr. Hare's complaint to the Real Estate Council. The letter also alleged that Mr. Hare had never agreed to the January 18, 2017 completion date but had instead sought an earlier date. Mr. Gold alleged that the January 18, 2017 completion date had been written into the Contract by the buyer or the agent after Mr. Hare had already signed it. The letter said nothing about a repudiation.

[67] In his testimony at trial, Mr. Hare acknowledged that the January 18, 2017 completion date was indeed already in the Contract when he signed it.

[68] On January 18, 2017, MFL sent a letter in response to Mr. Gold, stating as follows:

Thank you for your letter on this matter of January 16, 2017. We confirm your advice that your clients will not be completing the sale of the 13853 and 13859 58 Avenue, Surrey, BC (the "Properties") properties to our client.

We confirm we have tendered closing documents and a closing letter dated January 13, 2017 on your clients for a closing of the sale of the Properties on January 18, 2017. That letter and those documents contemplate a completion date as set out in the March 25, 2016 Contract of Purchase and Sale (the "Contract") for the Properties between our respective clients. We note your client's comments on the completion date and advise that our client disagrees with this.

Our client is and remains ready, willing and able to complete the purchase of the Properties from your clients on January 18, 2017 in accordance with the Contract, the closing documents and the closing letter.

II. The Issues

A. Was the Contract binding when it was formed?

[69] The defendants argue that there was no binding contract between the parties because fulfillment of the two stipulated conditions (i.e., receipt of a satisfactory feasibility study and title search) were entirely within the discretion of the plaintiff. In such circumstances, there was no consideration flowing to the defendants in exchange for their promise to convey the Properties. In support of that submission, the defendants cite the decision of the Court of Appeal in *Mark 7 Developments Ltd. v. Peace Holdings Ltd.* (1991), 53 B.C.L.R. (2d) 217 (C.A.).

[70] The plaintiff responds that *Mark 7* does not apply in this case because s. 22 was written into the standard form of contract of purchase and sale to address the problem identified in that judgment. In that provision, the Contract specifically stipulates that it has been executed "under seal" (thereby avoiding the problem posed by the absence of consideration flowing to the sellers) and that it binds the sellers upon acceptance.

[71] I am not persuaded that s. 22 cures the *Mark 7* problem.

[72] First, there is authority suggesting that even where an instrument recites on its face that it was executed under seal, it should not be treated as having been so executed unless there is "some indication of a seal."

[73] A similar problem arose in *Grewal v. Khakh*, 2016 BCSC 2055. At issue in that case was whether a deed of trust reciting on its face that it was signed and sealed could be treated as an instrument under seal, enforceable as such regardless of the absence of consideration. The deed had in fact been signed but not sealed. In holding that it could not be treated as an instrument under seal despite the recital to the contrary, Johnston, J. stated as follows at paras. 45-47:

- [45] Ms. Sonya Khakh argues that since there is no seal on the trust instrument, it is not a deed, and not operative as such. She also points to the need for a seal to make her gratuitous promise enforceable. While the trust instrument contains the words, "the Trustee has hereunto affixed their hand and seal," Sonya Khakh says this, citing *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34.
- [46] Friedmann concerned "an established rule in our common law that an undisclosed principal cannot be sued on a contract executed by his or her agent when that contract is executed under seal ('the sealed contract rule')" (at para. 1). At para. 36 the Court said:

Today, while the creation of a sealed instrument no longer requires a waxed impression, there are still formalities which must be observed. At common law, a sealed instrument, such as a deed or a specialty, must be signed, sealed and delivered. The mere inclusion of these three words is not sufficient, and some indication of a seal is required: see, e.g., *872899 Ontario Inc. v. Iacovoni* (1998), 163 D.L.R. (4th) 263 (Ont. C.A.). To create a sealed instrument, the application of the seal must be a conscious and deliberate act. At common law, then, the relevant question is whether the party intended to create an instrument under seal.

In the case cited, *872899 Ontario Inc.*, the Ontario Court of Appeal concluded at paras. 23 and 24 (cited to 1998 CarswellOnt 2696):

The basic logic underlying the decision below is that the words "signed, sealed and delivered" anticipate three events - signing, sealing and delivering. No one would suggest that an unsigned document was "signed." Why then should a document which bears no trace of a seal be deemed to be sealed?

In these circumstances, I agree with Laskin J.A. [in *Royal Bank of Canada v. Kiska*, [1967] 2 O.R. 379 (C.A.)] and Misner J. [in *South-West Oxford (Township) v. Bailak* (1990), 75 O.R. (2d) 360 (Ont. Gen. Div.)] that the fiction should not be further extended. I also agree with the judge below that, in the absence of any other evidence as to the intention of the purchasers, "mere recitals are not sufficient to create a contract under seal."

[Citations added.]

- [47] There is no semblance of, nor any attempt toward, a seal on the deed of trust. Accordingly, the deed of trust is enforceable only if it is supported by consideration
- [74] So too here, there was no semblance of, nor any attempt toward, affixing a seal on the Contract. I appreciate that in *Grewal* and the cases upon which Johnston J. relied, the courts were dealing with a recital stating the deed was executed under seal, whereas in this case we are dealing with a positive covenant in the body of the Contract whereby the parties acknowledge to each other that the agreement has been executed under seal. Despite that distinction, I am unable to find that Mr. Hare "consciously and deliberately" intended to create an instrument under seal merely because he signed a document containing the words in s. 22. Such a finding would unduly "extend the fiction" referred to by Laskin, J.A. and Misner J., contrary to those authorities.

[75] If s. 22 does not suffice by itself to turn the Contract into an instrument under seal, the next question is whether s. 22 otherwise operates to make the defendants' promise to convey the Properties binding.

[76] In *Tau Holdings Ltd. v. Alderbridge Development Corp.* (1991), 60 B.C.L.R. (2d) 161 (C.A.), the Court had occasion to consider whether a contract subject to the following condition was enforceable:

The Vendor shall provide to the Purchaser within five (5) days of the date of this Offer and the Purchaser shall have approved by November 30th, 1989 an engineering, soils, and traffic reports in respect of the Lands and shall have obtained financing.

[77] In holding that the contract at issue in *Tau Holdings* was enforceable despite Mark 7, Lambert J.A., writing for the Court, distinguished Mark 7 on two grounds. The first was the fact that the condition in issue in *Tau Holdings* was not entirely discretionary as was the condition in Mark 7 because terms could be implied to narrow the discretion of the buyer so as to require reasonable approval of the reports. The second ground was that the agreement in *Tau Holdings*, like the Contract in this case, contained a clause purporting to make the agreement binding upon acceptance.

[78] *Tau Holdings* has itself been distinguished in a number of subsequent decisions of this Court, however.

[79] In *Ledingham McAllister Homes Ltd. v. Forbes*, [1995] B.C.W.L.D. 2245 (S.C.), for example, Boyle J. found the following conditions to be unenforceable, as entirely within the discretion of the purchaser:

This offer to purchase shall be subject to the following conditions, which are for the sole benefit of the Purchaser and may be waived or removed unilaterally by the Purchaser at any time up to the date specified:

1. The completion of a feasibility study for the development of the subject property to the sole satisfaction of the Purchaser to be concluded within 90 days of acceptance of this Contract of Purchase and Sale.
2. The City of Surrey granting third reading for the re-zoning and approval satisfactory to the Purchaser in their sole discretion, on or before July 31, 1996.

[80] Justice Boyle held that those conditions, which are similar to those in issue here, were entirely discretionary because the Court could not, as Lambert J.A. had in *Tau Holdings*, imply terms sufficient to render them enforceable:

[36] The words "satisfaction" and "discretion" refer to no event other than a corporate decision one way or the other based upon unknown and, to repeat, unspecified subjective factors.

- [45] The feasibility study was left for acceptance or not to the "sole satisfaction of the purchaser". The rezoning approval or not by the Plaintiff, went even further into subjectivity with the phrase "in (its) sole discretion".
- [46] There is nothing to limit the margins of that subjective discretion.
- [47] The meaning of the words "satisfaction" and "discretion" in the document at issue cannot be ascertained by the Court by a review of the document as an entirety because there is nothing to test them against, to show what generally must be satisfied. Does "feasibility" refer to Subsoil Tests? Costs? Financing? Accessibility and Servicing or any of the many other considerations that developers must weigh? As for the words "sole discretion", they are absolutely unfettered by or related to any obligation in the document.

[Emphasis in original.]

- [81] So too here, the conditions in the Contract allowing the plaintiff, before proceeding, to determine whether it is "satisfied" with the anticipated feasibility study and the state of title are similarly ill-defined and unlimited. I therefore conclude that the conditions in issue in this case, particularly the first condition requiring the plaintiff to be satisfied with the anticipated feasibility study, fall into the unenforceable Mark 7 and Ledingham category, rather than the enforceable Tau Holdings category.
- [82] This leaves only the second ground in Tau Holdings for distinguishing Mark 7 - i.e., the covenant in s. 22 purporting to make the offer binding on the defendants upon acceptance.
- [83] In Ledingham, Boyle J. found that the second distinguishing ground in Tau Holdings was not applicable in that case either, because the defendant had accepted the plaintiff's offer only conditionally - i.e., subject to receipt of an opinion that the agreement was valid and binding. In this case, there was no such reservation in Mr. Hare's acceptance of the plaintiff's counter-offer on behalf of the defendants. Nevertheless, I have difficulty with the proposition that s. 22 could, on its own, bind the defendants to grant the plaintiff what would effectively be an option, despite the absence of consideration. There was no deposit paid as consideration to support the grant of such an option.
- [84] There is more recent authority suggesting that where the first ground in Tau is not satisfied, a "binding on acceptance" clause cannot operate by itself to render the agreement enforceable. In *Mill Creek Developments Ltd. v. P & D Logging Ltd.*, 2008 BCSC 125 at para. 31, Barrow J. found that "one but not both of the features in Tau which served to remove it from the analysis of Mark 7 are present". The first branch failed because, as in this case, the condition was found to be too subjective. In considering the potential application of the second branch of Tau Holdings, Barrow J. concluded as follows at para.33:

- [33] I conclude that notwithstanding the term to the effect that upon acceptance the offer would become a binding contract, no contract was formed. The condition precedent or subject to clause is simply too imprecise or too dependent on the subjective decision of the purchaser. It allowed the purchaser to purchase if it found the lot created by the subdivision to its liking and to walk away from the transaction if it did not.
- [85] Even more recently, in *Gordon Nelson Inc. v. Cameron*, 2017 BCSC 1269, Adair J. held that a "binding on acceptance" clause may, on a proper construction of the whole agreement, operate to render the agreement binding as an option where the impugned condition is too subjective to create a binding contract. But in that case the requisite consideration supporting the option would have come from a deposit accompanying the offer. Because there was no deposit paid on formation in this case, there was no consideration to support the grant of an option.
- [86] Because the Contract in this case was unenforceable at the time it was formed, it could not subsequently become enforceable when Mr. Sablok purported to waive the conditions and pay the deposit: *Saveheli v. Philp*, 2000 BCSC 815.
- [87] In *Saveheli*, the owners of a property had entered into two agreements with two different counter-parties to sell it. The first agreement contained two conditions. The first condition made the agreement subject to the buyer's "receiving and being satisfied" with a building inspection and report by November 15, 1999; the second made the agreement subject to the buyer's "receiving and being satisfied with information relative to tax implications re: Canadian/U.S. ownership" by November 15, 1999. In October 1999, before the subject removal date and before the buyer had waived either condition, the sellers entered into the second agreement to sell the same property. On the last day permitted to do so, i.e., November 15, 1999, the first buyer, like Mr. Sablok, purported to waive the two conditions. The second buyer brought an application for summary judgment seeking to have the first buyer's action for specific performance dismissed on the basis that the first agreement was unenforceable. In allowing the second buyer's application, Owen-Flood J. found that while the first condition in the first agreement was capable of being enforced, the second condition was "too wide to be enforceable." On that basis, he concluded at para. 17 "that there is and was no enforceable agreement" and dismissed the first buyer's claim for specific performance.
- [88] This action fails on the same grounds.
- [89] In the event I am wrong about the enforceability of the Contract at the time of its formation or later, however, I will also address the defence of repudiation that was advanced.

B. Was there a repudiation?

1. The Law on Repudiation

[90] The authorities dealing with the test for repudiation were recently summarised by Crawford J. in *Kent v. Kalyk*, 2017 BCSC 1074 as follows:

[58] In *League Assets Corp. (Re)*, 2016 BCSC 2262, Fitzpatrick J. described the manner in which repudiation can be conveyed at paras. 32-34:

[32] The relevant law [on repudiation] is not in dispute.

[33] In *McCallum et al. v. Zivojinovic* (1977), 16 O.R. (2d) 721 (C.A.), at 723, the court discusses the manner in which renunciation or repudiation may take place:

The renunciation of a contract may be express or implied. A party to a contract may state before the time for performance that he will not, or cannot, perform his obligations. This is tantamount to an express renunciation. On the other hand a renunciation will be implied if the conduct of a party is such as to lead a reasonable person to the conclusion that he will not perform, or will not be able to perform, when the time for performance arises: *Chitty on Contracts*, 23rd ed., vol. 1, para. 1342, at p. 626; 9 Hals., 4th ed., para. 548, at p. 376. ...

[34] Even when a person has indicated that he will not or cannot perform his obligations, this does not automatically result in termination of the contract. The innocent party has the option to accept the repudiation and elect to treat the contract as terminated. If not, then the contract remains effective and both parties remain subject to the provisions in that contract.

[35] In *Dosanjh v. Liang*, 2015 BCCA 18 [Dosanjh], the court adopted the trial judge's summary of the rights of a party to accept a repudiation of a contract:

[33] The trial judge summarized the general law with respect to a party's right to accept a repudiation of a contract at para. 50 of her judgment:

The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows:

A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.

If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.

If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.

If the innocent party wishes to accept the repudiation, he or she must make his or her election known.

Once made, the election is irrevocable.

[59] For an election to be timely, it must be communicated within a reasonable time: *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 45 [Brown]; *Dosanjh* at para. 37.

[60] An election can be communicated directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: *Brown* at paras. 45-48; cited with approval in *Trieu v. Diep*, 2015 BCSC 950 at para. 37.

[61] The Court in *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425 [A & G Investment] stated:

[38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position.

[62] These cases make plain that the law requires an irrevocable election by the innocent party to be communicated in a timely way to the repudiating party so that both parties' rights and obligations under the contract can be determined. In *A & G Investment*, *Goepel J.A.* described the purchaser's attempt to rely on a breach by the seller that had occurred four months prior to its reliance on it as lacking timeliness: at para. 39.

2. The Parties' Submissions on Repudiation

[91] The plaintiff submits that none of the three elements of a repudiation, as summarised by *Crawford J.* in *Kent*, were made out on the evidence in this case. In particular, there was no clear and unambiguous communication from Mr. Sablok to Mr. Singh (in his capacity as agent for the defendants) that he was repudiating the Contract. Second, there was no acceptance of the repudiation by Mr. Hare. Third, there was no communication of Mr. Hare's acceptance of the repudiation, even if it did occur, back to Mr. Sablok (Mr. Hare and Mr. Sablok had no direct communication at all between them and Mr. Singh was acting as agent solely for the defendants, the plaintiff argues).

[92] The defendants respond that the evidence established all three elements of a repudiation. They say that the first element was satisfied when Mr. Sablok instructed Mr. Singh to convey to Mr. Hare that the addendum of April 13, 2016 purporting to reduce the Contract price from \$2 million to \$1.9 million was Mr. Sablok's "final offer" (Mr. Hare was, he said, given the choice to either "take it or leave it"). The defendants say that the second element was satisfied when Mr. Hare responded to Mr. Singh on the following day that he had no interest in doing business with them any longer. Finally, they say that the third element was satisfied because Mr. Singh was acting as agent for both parties, such that Mr. Hare's statements to Mr. Singh were effectively made to Mr. Sablok as well.

3. Discussion on Repudiation

[93] I agree with the defendants that if I accept:

- (a) the evidence of Mr. Singh as to how Mr. Sablok instructed Mr. Singh to present the proposed April 13, 2016 addendum to Mr. Hare; and
- (b) the evidence of Mr. Hare and Mr. Singh as to how Mr. Hare responded when he received that message,

then that conduct could constitute a repudiation of the Contract that was accepted by Mr. Hare, because Mr. Sablok had effectively told Mr. Hare that he was no longer willing to pay the original Contract price and Mr. Hare responded that in light of the plaintiff's conduct he no longer wished to proceed.

[94] I also agree with the defendants that Mr. Singh was acting as intermediary for both parties in the limited sense described by Pearlman J. in *Birdi v. Luch*, 2016 BCSC 1361. At issue in that case was whether a binding contract of purchase and sale of real property was formed. The defendant seller (Ms. Luch) had signed a fee agreement with the broker (Mr. Bhartie) stating that the broker was not acting as agent for either party. Ms. Luch argued that no contract can have been formed because she had had no contact directly with the plaintiff. Pearlman J. found that the broker had acted as the "intermediary" between the parties such that a contract could validly be formed between them through him. He explained his conclusion as follows, at paras. 65-70:

[65] In *Gwininitxw v. British Columbia (Attorney General)*, 2013 BCSC 1972 at para. 43, the court referred to two distinct definitions of the term "agent" identified by Mr. Justice Butler in *Dawson v. Tolko Industries Ltd.*, 2010 BCSC 346:

Mr. Justice Butler identified two distinct definitions of agency that emerge from the jurisprudence, a broad definition where "anyone who does something for another is for that very limited purpose an "agent"" (at para. 31, citing Southin J.A. in *Penderville Apts. Development Partnership v. Cressey Development Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.)), and the legal concept of agency as described in G.H.L. Fridman, *Canadian Agency Law*, 2d ed. (Markham: LexisNexis Canada Inc., 2012) at para. 34 (emphasis in original):

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

- [66] By the Fee Agreement, Ms. Luch expressly agreed that Century 21 and Mr. Bhartie were not agents for her or for the plaintiff. She also acknowledged and agreed that nothing in the Fee Agreement, including her obligation to pay the finder's fee "shall be construed as creating any agency relationship" between Century 21 or Mr. Bhartie and the seller or the buyer. Ms. Luch had an understanding of listing agreements and appreciated that she was not employing Mr. Bhartie to sell the property.
- [67] I find that there was no relationship whereby Ms. Luch, as principal engaged Mr. Bhartie as her agent for the sale of the property, with the ability to affect her legal position with the plaintiff by making a contract on her behalf.
- [68] However, Mr. Bhartie was an agent for both the plaintiff and the defendant under the broad definition of that term in *Penderville Apts. Development Partnership v. Cressey Development Corp.* (1990), 43 B.C.L.R. (2d) 57 (C.A.).
- [69] On the plaintiff's instructions, Mr. Bhartie brought Ms. Birdi's offer to purchase the Property to the defendant. Ms. Luch accepted the plaintiff's offer by executing the Contract. After Ms. Luch initialed and signed the Contract, she gave it back to Mr. Bhartie. On January 27 or 28 2016, the realtor informed the plaintiff by telephone that Ms. Luch had accepted her offer. He later delivered an executed copy of the Contract to Ms. Birdi.
- [70] While the Contract requires the seller to notify the buyer of her acceptance of the offer, it does not prescribe a particular method of notification. Here, Mr. Bhartie was acting as the intermediary between the buyer and the seller. Ms. Birdi received notice of Ms. Luch's acceptance of her offer when Mr. Bhartie telephoned her and communicated the defendant's acceptance, and again, when he delivered a copy of the executed Contract to her.
- [95] So too here, I find that Mr. Singh was acting at the material time as Mr. Sablok's intermediary in his communications with Mr. Hare, such that it was possible for Mr. Hare to signal his acceptance of Mr. Sablok's repudiation through Mr. Singh.
- [96] What remains to be determined is whether I accept the evidence of Mr. Hare and Mr. Singh as to what occurred in that regard.
- [97] I have concerns about the credibility of all three of the witnesses who testified.
- [98] With respect to Mr. Sablok, the defendants submit that he was capable of dishonesty when it suited him, such as when he deliberately misled Mr. Kompter about the subject removal date in the Contract and the fictitious pressure he was supposedly getting from the sellers. The defendants also argue, with some force, that it is unlikely that Mr. Sablok followed Mr. Singh's lead in his dealings with Mr. Hare, as Mr. Sablok repeatedly tried to convey in his testimony. I agree with the defendants that is more likely that it was Mr. Sablok who told Mr. Singh what to do at each turn. In addition to their relative degrees of knowledge and experience in the area, the paper trail is more consistent with the defendants' version of their respective roles.

- [99] Mr. Hare's testimony was also problematic in many respects. I am troubled by his failure to assert that there had been an accepted repudiation as he now alleges until long after the events in question. Mr. Hare's first written statement about this transaction was his complaint to the Real Estate Council of December 26, 2016, in which he asserted, contrary to his testimony at trial, that the Contract had never been finalised at all. His main complaint about the two new proposed contracts for \$900,000 was not that they constituted a repudiation of a contract he had agreed to earlier, but rather that they were unsigned and he "did not want to deal with an unsigned offer." With respect to the proposed addendum of April 13, 2016 offering \$1,900,000, Mr. Hare's complaint was that it was not a valid addendum because there had been no accepted offer before then, not that he accepted it as a repudiation of an agreement he was otherwise bound by.
- [100] There was nothing in the complaint about the worst of the professional misconduct that Mr. Hare attributed to Mr. Singh in his testimony at trial - for example, Mr. Singh's deliberate refusal to take his call after sending him the signed addendum purporting to waive the subjects on April 18, 2016.
- [101] After receiving formal notice through MFL that the plaintiff was suing him to compel performance, Mr. Hare evidently instructed Mr. Gold that the Contract was not enforceable because the January 18, 2017 closing date was inserted after he had signed it and without his agreement, an allegation he later abandoned. Once again, there was no mention in that letter of his allegation at trial that the defendant had repudiated the Contract and that he had accepted that repudiation.
- [102] His puzzling assertion that he never received the documents that were sent to the address shown both on the Contract and the title searches was never properly explained.
- [103] Finally, I have reservations about the reliability of the evidence of Mr. Singh as well. The plaintiff submits that his testimony was inherently untrustworthy because of his ongoing relationship with Mr. Hare, about which he was not entirely forthcoming. Mr. Singh did acknowledge in cross-examination that his memory of these events is not entirely clear due the amount of time that has elapsed in the interim. He appears to have been confused at various stages about what Mr. Sablok was trying to do and what Mr. Hare was saying in response: for example, he appears to have thought that Mr. Sablok was offering Mr. Hare an immediate closing (i.e., a "cash deal") but in fact all that was on offer was an immediate payment of the deposit. He was often argumentative and non-responsive in cross examination.
- [104] After accounting for all of these frailties in the evidence, I have concluded that Mr. Sablok must have instructed Mr. Singh to tell Mr. Hare that the addendum offering \$1.9 million was his "final offer" and that the sellers could either "take it or leave it." That version of events simply rings truer than the competing account of Mr. Sablok to the effect that he made those post-Contract offers at Mr. Singh's urging and without intending to signal his refusal to pay the original Contract price.

- [105] Noteworthy in this regard is how the addendum offering \$1.9 million evolved. In what appears to have been one of the earliest versions, prepared by Mr. Singh and sent to Mr. Sablok at 3:31 p.m. on April 8, 2016, there were to be two addenda (erroneously labelled pages "6 of 6" and "7 of 7" respectively). In each, the proposed price reduction was tentatively sought in the following terms: "buyer requests to reduce the amount of purchase of the [sic] both properties to 1 million 9 hundred thousand (\$1,900,000)" [emphasis added]. In a subsequent version that Mr. Singh sent to Mr. Sablok at 2:08 p.m. on April 13, 2016, the supplicatory language had been dropped and the desired price reduction was simply declared for both of the Properties as follows: "The purchase price is reduced for the [sic] both properties to One Million Nine Hundred Thousand Dollars (\$1,900,000)" [emphasis added].
- [106] Mr. Sablok was evidently trying to pressure Mr. Hare through this exercise in brinkmanship into agreeing to reduce the price to \$1.9 million, i.e., the amount of his original offer. In other words, he was bluffing and simply misjudged the reaction he would get from Mr. Hare. He may have thought he would succeed in doing so because Mr. Singh had assured him, incorrectly as it turned out, that Mr. Hare would accept a price reduction in exchange for an immediate waiver of the conditions. It appears that Mr. Sablok took that chance but miscalculated.
- [107] Although I recognise that there are serious problems with Mr. Hare's credibility, much of the difficulty stems from his confusion over whether there had ever been a binding contract in the first place. His mistake about whether the January 18, 2017 closing date was in the Contract when he signed it does not change his clear message to Mr. Singh that he did not want to proceed with the Contract when presented with the clear message that the buyer was no longer willing to pay the agreed upon price. That same mistake explains why he did not react for many months after receiving the addendum purporting to waive the conditions on April 18, 2016 - he did not believe there was a binding contract in place so the purported "addendum" that Mr. Singh sent him on that date had no legal effect, as far as he was concerned. His readiness, when confronted with the true facts, to admit his mistake and retract the allegation that the January 18, 2017 closing date was added after he signed the Contract tends to support, rather than undermine, his credibility.
- [108] Unlike Mr. Hare, Mr. Singh has no apparent motive to lie about the discussion. The plaintiff argues that Mr. Singh was motivated to fabricate his story to align with that of Mr. Hare so he could qualify for the \$10,000 commission under the unsigned fee agreement with Mr. Sablok. But the only signed fee agreement Mr. Singh had in hand was the one with Mr. Hare, which would entitle him to a commission only if the Contract completed or if it was Mr. Hare who was in breach. The testimony that Mr. Singh gave at trial would not help to bring about either scenario. I am not persuaded that Mr. Singh's subsequent purchase of a vehicle from Mr. Hare's dealership, in the face of Mr. Hare's threatened complaint to the Real Estate Council, undermines Mr. Singh's credibility on the basis that he is too closely aligned with Mr. Hare.

[109] I have concluded that Mr. Sablok repudiated the Contract (assuming it was ever binding) by clearly communicating to Mr. Hare through Mr. Singh that he was no longer prepared to pay the \$2 million price, given the status of his feasibility study and Mr. Hare's refusal to extend the subject removal deadline. Mr. Hare effectively accepted that repudiation by clearly communicating to Mr. Sablok, through Mr. Singh, that he no longer wished to do business with them at any price and was treating the Contract as dead. At that point, the Contract, if it ever had been valid, was a dead letter and Mr. Sablok could not subsequently revive it by purporting to waive the subjects several days later.

III. Conclusion

[110] The action is dismissed, with costs to the defendants.

"Milman J"

The Honourable Mr. Justice Milman

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Prepared on 29 October 2026 · Esheria