

CANADA / JUDGMENT

Chan v. Chan

2025 BCCA 262

COURT

British Columbia Court of Appeal

DECIDED

29 July 2025

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2025 BCCA 262 Chan v. Chan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chan v. Chan,

2025 BCCA 262

Date: 20250729

Docket: CA50364

Between:

Caron Jones Chan

Appellant

(Respondent)

And

Kevin Chan and Yau Chuen Clara Chan

Respondents

(Petitioners)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Donegan

The Honourable Justice Warren

On appeal from: An order of the Supreme Court of British Columbia, dated

December 16, 2024 (Chan v. Chan, 2024 BCSC 2407, Vancouver Docket S234768).

Counsel for the Appellant:

J.C. MacInnis, K.C.

A.M. Cruise

Counsel for the Respondents:

K.E. Ducey

Place and Date of Hearing:

Vancouver, British Columbia

May 15, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 29, 2025

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Justice Donegan

The Honourable Justice Warren

Summary:

The parties entered into a settlement agreement in which the appellant agreed to purchase the respondent's interest in a property which was the subject of litigation. Subsequently, the transfer could not be completed due to a failure to agree on the terms of the release. The appellant challenges the chambers judge's findings that the settlement agreement implied a mutual release, the appellant had repudiated the agreement and the respondent was entitled to treat the agreement as at an end. Held: Appeal allowed. The judge did not err in finding the settlement agreement called for a mutual release. Although the underlying litigation was commenced by petition and no response had been filed, it was open to the judge to accept that there were claims being advanced by both parties and a mutual release was an implied term of the settlement. However, the judge erred in concluding the respondent was entitled to accept the appellant's breach as repudiation. The respondent's position on the closing date was that the appellant must agree to provide a release which went further than that implied. As neither party was ready and willing to complete the transfer, the respondent was not entitled to accept repudiation and the settlement agreement continues to be binding.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This appeal calls upon us to consider the circumstances in which a party may be said to have repudiated a contract and when repudiation may be accepted. The contract in this case was a settlement agreement bringing to an end a dispute between siblings about their respective interests in real property.
- [2] By petition filed in July 2023, Kevin Chan and his mother Clara Chan sought an order under the Partition of Property Act, R.S.B.C. 1996, c. 347, for the sale of property on Bennett Road in Richmond (the "Property"), and for the equal distribution of the net sale proceeds between themselves and the appellant, Caron Chan, Clara's daughter (I refer to the parties by their given names for ease of reference with due respect). Kevin and Clara jointly owned an undivided $\frac{1}{2}$ interest in the Property and Caron owned the other undivided $\frac{1}{2}$ interest in the Property.
- [3] The Petition and supporting material identified disputes with respect to beneficial ownership of the Property and the parties' respective responsibility for debt secured by a mortgage against it. An affidavit sworn by Clara in support of the Petition contained the following averments:
6. My husband contributed approximately \$160,000 towards the purchase of two properties [the Property and another property, located on Finlayson Drive]. This money was not intended to be a gift to Caron or Kevin at that time. My name was registered as the owner of a $\frac{1}{2}$ interest in the Property to confirm mine and my husband's interest in these properties. I was retired at that time, with very little income. Caron's name was registered as the owner of a $\frac{1}{2}$ interest in the Property.
 7. When we purchased the Property, a mortgage in the amount of \$90,000 was obtained to pay the balance of the purchase price of \$244,000.
 8. In exchange for being registered as the owner of a $\frac{1}{2}$ interest in the Property, Caron was to be responsible for making all of the mortgage payments for the Property, which were less than the rent she had been paying at that time, and for paying the expenses to maintain the Property. We did not discuss who would own the "beneficial interest" in the Property at that time (it is not a term that I was familiar with) but my husband made it clear that these properties, or any proceeds from these properties, were to remain in the Chan family.
 12. In February 2022, I transferred my interest in the Property to me and Kevin as joint tenants as I wanted to ensure that my interest in the Property would pass to Kevin and his children on my death by way of his right of survivorship.

13. In February 2023, I asked Caron to either buy my interest in the Property or agree to a sale of the Property as I would like to get my affairs in order. I am currently 90 years old and not in good health. Caron has refused and claims that she owns 100% of the beneficial interest in the Property. That is not true and was never my intention. It has always been my intention that at least 50% of the Property belonged to me and is mine to do with as I wish.
14. I am aware that Caron refinanced the mortgage a couple of times as I was asked to sign the new mortgage papers. I did not receive any of the proceeds from these refinances. Now shown to me and marked Exhibit "D" to this my affidavit is a true copy of the mortgage currently registered against the Property.
- [4] The mortgage appended to the affidavit bears charge number BT075098. The reference to that mortgage in Clara's affidavit appears to be in support of the relief sought in the Petition: an order that "[t]he amount required to payout the mortgage registered under charge number BT75098 shall be paid from the respondent's share of the net sale proceeds".
- [5] The petitioners alleged that in December 2021, Caron refused Clara's request to live with her on the Property and that this amounted to constructive ouster, justifying a claim for occupational rent from January 1, 2022 onward.
- [6] On October 23, 2023, Caron accepted Kevin and Clara's offer to settle the dispute giving rise to the issuance of the Petition, by agreeing to purchase their interest in the Property for \$420,000. The parties did not discuss any other terms.
- [7] On November 9, 2023, Caron advised Kevin that she could complete the purchase by January 12, 2024.
- [8] Clara passed away on December 4, 2023, leaving Kevin as the executor and sole beneficiary of her estate.
- [9] By letter dated December 15, 2023, Caron took the position that Kevin held his interest in the Property and the property located on Finlayson Drive in trust for Clara's estate. On the same day, she commenced a derivative action on behalf of her mother's estate (the "Trust Action") demanding that Kevin transfer his interest in both properties to the estate and seeking a variation of Clara's will.
- [10] The notice of civil claim in the Trust Action was served on Kevin's counsel on January 9, 2024. On January 10, 2024, Kevin's counsel wrote to Caron's counsel accepting service and asking:

[Can] you please confirm whether your client intends to complete the agreement to purchase my client's interest in the Bennet Road property by January 12, 2024? My client remains ready, willing, and able to sell a ½ interest in the property to your client at a price of \$420,000. If your client fails to do so, it is our position that she will be in breach of the agreement to purchase my client's interest in the property.

[11] Counsel for Caron replied:

I note that our agreement was for more than just the purchase of a legal interest - it was a purchase of any interest Clara or Kevin might have in the property (Clara's affidavit in support of the Partition of Property petition alleged far more interest, so this was clearly part of our discussion). As such, we will be requiring a release from Kevin and from the administrator of Clara's Estate releasing our client from any claims relating to the property. I trust that this will not be an issue.

[Emphasis in original.]

[12] The parties agreed to extend the closing date for the purchase and sale of the Property to January 18, 2024.

[13] On January 16, Caron's counsel provided Kevin's counsel with a Form A Transfer, a Statement of Adjustments, a GST Certificate, a Certificate of Residency and a Release, all for execution by Kevin. Caron's counsel offered to accept return of the documents on undertakings, including an undertaking not to register the transfer documentation until he held funds sufficient to allow him to complete the transaction. On completion of the transaction, the balance payable to Kevin would be provided to his counsel on an undertaking "to not make use of or share the funds unless or until an executed release in the attached, or in another form agreed to" by Caron had been received by her counsel.

[14] Kevin's counsel responded:

it seems to me that the release should be a mutual release of all claims with respect to the Bennett Road property. The settlement was meant to be of all issues related to this property as there were claims going both ways. Can you redraft it as such?

When asked why a mutual release was sought, she replied:

Your client also asserted claims to the property in response to our claim. It was her assertion that the entire beneficial interest in the property belonged to her. The release should be mutual.

[15] On January 17, the transfer documents (other than the statement of adjustments, with respect to which there was a disagreement, later resolved) were returned to Caron's counsel on an undertaking not to make use of them until the settlement funds had been received and, among others, an undertaking reading as follows:

3. You will provide us with a mutual release of all claims related to the Property signed by your client, in a form to be agreed. We will undertake to use reasonable efforts to have our client sign the release, once the form is agreed, and return it to your office once signed.

Please confirm that our undertaking proposal set out herein is acceptable before filing the transfer. If the transfer is filed without confirming your acceptance, we take the position that our undertaking proposal has been accepted.

[Emphasis in original.]

[16] Given the undertakings sought, these documents could not be used to effect the transfer because there was no agreement as to the terms of the release.

[17] On January 18, 2024, Caron's counsel wrote:

Your undertaking proposal is unacceptable and inappropriate in the context of this settlement agreement. There is no circumstance under which your clients will receive the settlement funds undertaking free prior to the delivery of an acceptable executed release.

If there is a dispute as to the terms of the release (including whether the release must be mutual), such a dispute can be resolved by negotiation or by having the courts interpret the reasonably implied release which arose from the settlement agreement. There is no reason why doing this needs to hold up the subject conveyance, and it is our position that if the conveyance does not proceed due to your failure to do [sic] accept reasonable undertakings, it constitutes a breach of contract by your clients.

Our client is ready, willing and able to complete the purchase, by delivering the settlement funds on undertakings that are standard for settlement agreements between represented parties. The settlement agreement was a purchase of your clients' alleged interest in the subject property that was entered into in response to your clients' Partition of Property Act petition. This settlement was not a compromise of our clients' interest in the subject property, and as such, no release is implied.

We confirm that we are holding in our trust account sufficient funds to allow us to complete this transaction.

Consequently, we will accept the documents enclosed in your letter dated January 17, 2023 on our undertakings that upon an application being made for the registration of the Transfer and upon completion of a satisfactory post-application for registration title search, we will make payable to you for pickup/delivery/direct deposit our firm's trust cheque payable to Campbell Froh May & Rice, in trust, in the amount of \$420,000.

The balance payable to Campbell Froh May & Rice LLP in trust on completion will be delivered on your undertaking not to make use of or share the funds unless or until:

- a) We have received a fully executed released, in a form agreed to by the parties or pursuant to an order of the Court; or
- b) As ordered by the Court.

Please confirm your agreement with the above undertakings, and if so, we will arrange for the filing of the Transfer. If you do not allow our clients to register the Transfer, it is our client's position that you will be in breach of the settlement agreement.

[Emphasis added.]

[18] The parties did not agree to a form of release. The terms of the undertaking upon which the executed transfer documents were returned to Caron's counsel were not accepted. The transfer was not effected and funds were not paid out to counsel for Kevin on January 18, 2024.

[19] On April 12, 2024, counsel for Kevin wrote to Caron's counsel as follows:

as your client is not willing to complete the settlement on the terms agreed between the parties, my client accepts this breach as a repudiation of the settlement agreement and elects to treat it as at an end.

[20] On May 2, 2024, Caron's counsel responded as follows:

Caron has at all material times been ready, willing and able to complete the settlement agreement, which required only that she pay \$420,000 in exchange for any interest that Kevin and Clara Chan might have had in the property as of the time of the settlement agreement. We have been holding the settlement funds in trust since the completion date, and the only hold up on the settlement is:

1. your client's unjustified insistence on Caron providing a release as part of the settlement; and
2. your client's failure to take any steps to probate the Estate of Clara Chan, which will be necessary in order for a representative of the Estate to sign the release on behalf of Clara Chan.

It was never contemplated under the settlement agreement that Caron was going to give any consideration outside of \$420,000 for your clients' interest in the Property. [Your] subsequent insistence on a mutual release was therefore nothing more than a refusal to perform your clients' obligation under the settlement agreement unless additional consideration was provided. This refusal was a breach of contract.

At the time for the performance of the settlement agreement, Kevin and Clara were not willing or able to deliver what the settlement agreement required (ie, delivering a release of any interest they might have in the property), and therefore they were in breach of the settlement agreement. They remained in breach of the settlement agreement as of April 12, 2024, at the time you purported to terminate the settlement agreement on behalf of your clients.

Your clients' purported termination of the settlement agreement in your April 12, 2024 letter was therefore a wrongful termination. As you know, the wrongful termination of a contract constitutes a repudiatory breach of the contract, and the innocent party (in this case, Caron), can elect to terminate or affirm the contract. Caron elects to affirm the settlement agreement, and will insist on specific performance of the settlement agreement. The settlement agreement is a full answer to the petition for partition of property.

[21] Caron then applied to stay the petition proceedings for the purpose of enforcing the settlement agreement.

The decision under appeal

[22] The chambers judge, for reasons indexed at 2024 BCSC 2407 held:

A term requiring the execution of a release is implied

[23] The chambers judge, referring for guidance to *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62, 1989 CanLII 2744 (C.A.) at para. 35, held: "a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary": see also, *Norbert v. Origin At Longwood Retirement Community Inc.*, 2021 BCSC 1485 at para. 9; *Re Rickards Estate v. Diebold Election Systems Inc.*, 2004 BCSC 1357 at para. 23(5).

[24] She observed that, although there are cases that hold it is not an implied term of all settlement agreements that a release will be provided in exchange for the consideration, they can be distinguished. For example, in *Bradley v. Elford*, [1987] B.C.J. No. 362, 1990 CanLII 1768 (C.A.), there was no intention, express or otherwise, to release the debt that was the subject matter of the action. The agreement in that case called for discontinuance of the claim. Here, unlike in *Bradley*, there is no suggestion that the Petition will remain extant or that the claim might be revived after the settlement.

[25] The judge held:

[31] I am satisfied that the agreement that the petitioner would transfer his interest to the respondent for \$420,000 was intended, not as a mere conveyancing transaction, but to fully resolve and conclude all matters relating to the sale of the Property as more particularly set out in the petition.

[34] I find that the settlement agreement was intended to fully and finally resolve all matters, including the claims for occupational rent and costs, sought in the petition. That is exactly the type of settlement agreement which implies a promise to furnish a release.

[Emphasis added.]

A mutual release is required

[26] The judge was satisfied it was the parties' intention to settle all issues raised in the Petition. However, because the parties concluded the terms of the transfer prior to the commencement of the Trust Action, it could not reasonably be said that there was any intention that the agreement settle the dispute underlying the Trust Action.

[27] She clearly had negotiations as well as pleadings in mind when she considered the scope of the release implicitly agreed upon:

[38] In considering the scope of the release, the timing of both the commencement of the negotiations and the conclusion of the agreement is important. As noted, based on timing, I am satisfied that it was the parties' intention to settle all of the issues set out in the petition. In the circumstances, it is reasonable to conclude that both parties should have the certainty that this is the case.

[40] I find that the settlement agreement between the parties included an implied term that required a mutual release in respect of all issues raised in these petition proceedings.

Repudiation of the settlement agreement was accepted

[28] The judge held:

[52] As was the case in *Stewart* [*Stewart v. Stewart*, 2019 BCSC 985], as I have found, the settlement agreement also required the release of claims. However, as was also the case in *Stewart*, there is nothing that requires that the release be executed prior to or as a condition of the payment of the settlement funds. Indeed, as the court suggested in *Fieguth*, the issue of the release can well be determined after its completion by agreement or reference to the court. Determining the specifics of the release language later will not deprive the respondent of its benefit.

[53] By contrast, the timing of the obligation to pay the funds to affect the transfer is expressed: the \$420,000 was to be paid by January 18, 2024. In my view, by her refusal to release that payment to the petitioner on January 18, 2024, as expressly contemplated by the agreement, without release, the respondent [Caron] has sought to impose a term that does not exist and demonstrated an unwillingness to be bound by the agreement.

[54] Given the clear and unambiguous terms of the settlement agreement, a reasonable observer would conclude that it was the parties' intention that the transfer funds be paid to the petitioner on January 18, 2024. The respondent's entitlement to a release did not change the obligation to pay the funds on that date.

[55] The respondent's refusal to release the funds to the petitioner on January 18, 2024 and to impose an undertaking that was not contemplated by the parties constitutes a repudiation of the settlement agreement.

[29] On April 12, 2024, Kevin accepted that repudiation, bringing the agreement to an end. For that reason, the judge dismissed Caron's application to stay the petition proceedings.

Grounds of appeal

[30] The appellant contends the chambers judge erred in concluding it was an implied term of the settlement agreement that the parties would exchange mutual releases and in finding there had been repudiation by the appellant. In any event, she says, even if the judge correctly found a mutual release was implicitly agreed upon and the appellant wrongly refused to sign a mutual release, she erred in failing to find that both parties had repudiated

the agreement. She submits neither was entitled to treat the contract as at an end and specific performance should have been ordered.

Discussion

The scope of the implied release

- [31] As this Court noted in Fieguth, and as the chambers judge recognized, it is necessary to separate the question of formation of contract from its completion. There is no doubt in this case there was a contract to settle the dispute that gave rise to the Petition. As a rule, unless there is reason to find a contrary intention, an agreement to conclusively settle an action (as opposed to a discontinuance, with the potential of resumption of litigation or a disagreement that has not given rise to litigation) will implicitly call for the execution of a release. Where there are mutual claims (even, as here, claims underlying the dispute that have been advanced but have not yet been formalized in pleadings, because pleadings have not been closed), settlement implies agreement to release those claims.
- [32] Uncertainty with respect to contractual terms in this case was capable of resolution by implying the term that the parties were required to release each other of and from claims raised in the petition proceedings. In *Fang v. Bob Landscaping Corp.*, 2025 BCCA 27, Justice Bennett, writing for the Court, adopted the approach to determining the essential terms of a contract described by Justice Stratas in *Apotex Inc. v. Allergan, Inc.*, 2016 FCA 155, including the following passage:
- [33] When courts find that there has been an agreement on essential terms, they will often imply non-essential terms into the agreement: McCabe, above at para. 20; Fieguth, above; Hughes, above at para. 6. The lack of agreement on non-essential terms will not stand in the way of a finding of an agreement. Put another way, "it is not necessary that the original contract include all the ancillary terms that are already implicit in its content": Ward, above at para. 54. "Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement": RTS Flexible Systems, above at para. 45. For example, assuming an agreement on essential terms is otherwise in place, courts can imply terms concerning the granting of a release, the manner of payment and the timing of payment: [Fieguth], above at para. 21; *Hodaie v. RBC Dominion Securities*, 2012 ONCA 796 at para. 3; *Imperial Oil Ltd. v. 416169 Alberta Inc.*, 2002 ABQB 386, 310 A.R. 338. Often these will be "mere formalities or routine language": Bawitko, above at p. 106.
- [33] In my opinion, the chambers judge was correct to find the settlement agreement was intended to finally resolve multiple issues and was not a "mere conveyancing transaction".

- [34] The appellant agrees that a release was an implied term of the agreement but submits the agreement called only for a unilateral release. She contends she did not seek relief against the petitioners in the petition proceedings; in fact, she could not have, because no counterclaim can be made in proceedings commenced by petition. She says the chambers judge did not deal with the question she posed: what claim did she make in the proceedings from which she might be releasing Kevin?
- [35] Referring to the judgment of Roscoe J.A. in *Sinanan v. Woodyer*, 1999 NSCA 74, the appellant says, in the absence of a counterclaim, a court should not find there to be an implied term that a defendant will release the plaintiff. *Sinanan* is also cited as authority for the proposition that, while a court may import or imply into the contract additional terms in order to establish the nature and scope of the contractual obligations binding the respective parties, "there has to be strong evidence to support the conclusion that the implication of a term is permissible in the circumstances": at para. 47, citing G.H.L. Fridman in *The Law of Contract in Canada*, 2nd Ed., (Toronto: Carswell, 1986) at para. 13.
- [36] In *Sinanan*, the Court concluded:
- [48] On the facts of this case, there was not, in my opinion, strong evidence that it was reasonably necessary to imply a term into the settlement contract that the appellants would release the respondent from whatever claim they might have against him in relation to the capital account, since there was no claim in the proceeding relating to the capital account. The issues concerning its existence, amount or status were not in any way put before the court in this action. While it could easily be implied, based on custom and usage, that it should be a term of a settlement contract that the plaintiff would provide a release to the defendant upon receipt of funds settling a lawsuit, it is not the normal course of practice that the defendant would also release the plaintiff. Likewise, there is no statutory requirement to imply a term to require mutual releases. However, in light of my conclusion that such release is not an essential term, it is not necessary to come to any firm conclusion on this matter which goes to the completion, not the formation of the settlement.
- [37] The appellant says the only claims in the partition proceedings were claims against her: for partition and sale of the Property and for occupational rent and costs. When the Settlement Agreement was concluded, on October 30, 2023, the appellant had not filed a response and had made no claims against the respondents and there was no "strong evidence" to support the conclusion that a mutual release should be implied. However, as the respondent points out, the affidavit in support of the Petition referred to Caron's claim to a 100% beneficial interest in the Property. That claim might have been determined if the Petition had been heard. Further, while the proceedings were settled at a very early stage, there was a prospect that on hearing the Petition, the Court could order pleadings to be filed, move the proceedings to the trial list and give directions for the conduct of a trial, pursuant to Supreme Court Civil Rule 22-1(7). A counterclaim might then have been brought.

[38] The construction of the agreement between the parties in this case required the judge to make findings of mixed fact and law. We owe the judge's findings deference. The chambers judge was aware of and referred to the view expressed by Kevin's counsel that "there were claims going both ways": at para. 13. Given Caron's assertion that she was entitled to beneficial ownership of 100% of the Property, referred to in Clara's affidavit in support of the petition, it was open to the chambers judge to find an agreement to exchange the mutual release in the form she describes was implied.

Repudiation and acceptance of the repudiation

[39] In my view, the principal issue on this appeal is whether the dispute that arose with respect to completion of the agreement gave rise to a right on the part of either party to treat it as at an end. The judgment in Fieguth assists greatly in answering that question. In that case, Chief Justice McEachern observed that we should not be quick to find disputes with respect to completion of settlements to amount to repudiation:

[36] Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[44] It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[40] Even where one party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions that have not been agreed upon or are not reasonably implied, the court must consider the position of the other party. In *King et al. v. Urban & Country Transport Ltd. et al.* (1974), 1 O.R. (2d) 449, 1973 CanLII 740 (C.A.), neither party was ready to close on the contractual date for closing. Justice Arnup surveyed cases where non-compliance with "time of the essence" provisions could not be used as a defence by a party who was not ready, willing, or able to close on the agreed date: *Foster v. Anderson* (1908), 16 O.L.R. 565; *aff'd without reasons*, 42 S.C.R. 251, 1909 CanLII 7; *Consolidated Press Ltd. v. Gibson et al.*, [1933] O.R. 458, 1933 CanLII 181 (C.A.); *Thomson Groceries Ltd. v. Scott*, [1943] O.R. 290, 1943 CanLII 100 (C.A.); and *Shaw and Shaw v. Holmes and Holmes*, [1952] 2 D.L.R. 330, 1952 CanLII 285 (O.N.C.A.). He held at 455:

There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; LeBel, J., quoted from and followed them in *Watts v. Strezos*, [1955] O.R. 615, [1955] 4 D.L.R. 126. If applied literally, they cannot be reconciled with cases holding that the contract still subsists if neither party is ready to close, and in my view cannot be applied at all in such cases.

[41] Recently this Court in *Lal v. Grewal*, 2024 BCCA 149, held:

[19] A party who is not ready to close on the agreed date, cannot end the agreement for the other side's lack of readiness to close on the agreed date. In such a situation, the contract continues and either party or the court may reinstate time of the essence by setting a new closing date: *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 at paras. 38-40; 1991 CanLII 3955 (C.A.); *Toor v. Dhillon*, 2020 BCCA 137 at paras. 79-83; see also *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302 at 307, 1999 CanLII 3738 (C.A.).

[42] The jurisprudence requires us to consider whether Kevin was ready, willing and able to complete the transfer of the Property to Caron on January 18, 2024 and thereafter, on the date he purported to accept Caron's breach as repudiation of the contract.

[43] The chambers judge held that by refusing to release \$420,000 to Kevin on January 18, 2024, Caron had sought to impose a term that did not exist and demonstrated an unwillingness to be bound by the agreement. On that date, the position being taken by Kevin's counsel precluded Caron's counsel from effecting the transfer except on undertaking to "provide [Kevin's counsel] with a mutual release of all claims related to the Property signed by [Caron], in a form to be agreed", and Kevin's counsel did not confirm that Kevin would sign the same release. Kevin was not insisting upon execution of the release by Caron before the transfer and he was not insisting upon specific wording, but he was requiring Caron's counsel to undertake to provide a mutual release of all claims related to the Property signed by Caron and without providing an assurance that he would do the same. In doing so, he was also seeking to impose terms that did not exist and demonstrating an unwillingness to be bound by the agreement.

- [44] First, the chambers judge concluded it was an implied term of the settlement that the parties would exchange mutual releases, not that completion of the transfer was conditional upon Caron's lawyer's undertaking to provide a mutual release signed by Caron. Leaving aside the scope of the release demanded, Caron's lawyer could not accept such an undertaking because the signing of a release by Caron is a matter beyond the lawyer's control.
- [45] Second, the chambers judge concluded it was an implied term of the settlement that the parties would exchange mutual releases "in respect of all issues raised in these petition proceedings": at para. 40. There is a subtle, but important distinction between the release described in the undertaking sought by Kevin's counsel and the release the judge found the parties had implicitly agreed to exchange. It should be borne in mind that a dispute with respect to the Property other than those raised in the petition proceedings had been identified before the settlement, in the Trust Action initiated by Caron on December 15, 2023 as a derivative action on behalf of her mother's estate.
- [46] Kevin acknowledges that the settlement of these proceedings was not intended to settle the Trust Action. He says a release of "all claims related to the Property" executed by Caron and given to Kevin would not have stood as a bar to the Trust Action because that action was not brought by Caron in her own capacity, but was a derivative action brought by the estate. That may be so, but Caron was nevertheless being asked to agree to a term other than that which was implied, the effect of which was uncertain. In my opinion, we need not finally determine what the effect of a mutual release of all claims related to the Property might have been; it is enough to say that the effect might have been different from a release of all claims raised in the petition proceedings.
- [47] Third, no assurance was provided on Kevin's behalf that he too would sign the mutual release once its terms were settled. Rather, his counsel only agreed to use reasonable efforts to have him sign it.
- [48] While Kevin was entitled to insist upon a mutual release, in my view, he was not entitled to insist that Caron abandon her position that a unilateral release had been agreed upon before the transfer could be effected. This, in effect, is what he did.
- [49] In my opinion, the appellant is correct to say neither party was entitled to accept the other's repudiation on January 18, 2024 or April 12, 2024 because neither party was ready and willing to effect the transfer of the Property, pay the proceeds of sale to the vendor on either date, and leave resolution of the terms of the release for agreement or court order. The failure to agree upon the terms or form of the release did not discharge Kevin from the obligation to transfer his interest in the Property to Caron and Caron's corresponding obligation to pay Kevin \$420,000.

- [50] For that reason, I am of the view that it was not open to Kevin to accept a repudiation of the contract on April 12, 2024. The Settlement Agreement continues to stand as a bar to the proceedings. I would allow the appeal and stay these proceedings.
- [51] If the parties are unable to agree on a new closing date and perform their mutual obligations under the agreement, as a result of an obstacle to specific performance, for example, such disputes with respect to performance that cannot be settled must be addressed in the trial court.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Justice Warren"

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Prepared on 26 October 2026 · Esheria