
CANADA / JUDGMENT

Grewal v. Lal

2021 BCSC 844

COURT

Supreme Court of British Columbia

DECIDED

4 May 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 844 Grewal v. Lal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grewal v. Lal,

2021 BCSC 844

Date: 20210504

Docket: S30771

Registry: Chilliwack

Between:

Gagandeep Grewal

Plaintiff

And

Baljit Kaur Lal

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

P. Loewen

Counsel for the Defendant:

J. Klassen

Place and Dates of Trial:

Chilliwack, B.C.

December 9-13, 2019

February 8,9, 2021

Place and Date of Judgment:

Chilliwack, B.C.

May 4, 2021

- [1] In the spring of 2015 the defendant owned a home in Abbotsford that she had agreed to sell to the plaintiff. The defendant failed to transfer title to the property in accordance with their contract and this specific performance action concerns the plaintiff's claim for damages resulting from the defendant's failure to complete the agreement of purchase and sale (the "Contract").
- [2] The plaintiff buyer, Gagandeep Grewal, contends the defendant seller, Mrs. Baljit Kaur Lal, "refused or neglected to sell the property to the buyer" and thereby repudiated the Contract. Initially Mrs. Grewal sought specific performance of the contract but at trial elected to claim "damages for breach of the agreement, including but not limited to damages due to the delay in the completion of the agreement".

Background

- [3] The plaintiff is 38 years of age and is married to Mr. Lakhveer Sharma (Mr. Sharma). In 2015 and 2016 the plaintiff and her family lived in a rented house at 3234 Wagner Avenue, Abbotsford ("3234").
- [4] Some time in March 2015, the plaintiff learned that the defendant owned the residence at 3280 Wagner Avenue, Abbotsford (the "Wagner property"). The plaintiff and her husband, were interested in purchasing a home in the area, and Mr. Sharma made inquiries of the owner of the Wagner property to assess whether the house was suitable for his wife and family and whether he could negotiate a purchase. The Wagner property was a short distance from 3234.
- [5] Mr. Sharma's friend, Mr. Gagandeep Gill, had communicated to him that the defendant was interested in selling the Wagner property. Eventually, Mr. Sharma met the defendant's husband, Mr. Harbans Lal (Mr. Lal), in early April 2015 to discuss his interest in the Wagner property. Mr. Lal informed Mr. Sharma that he was interested in selling the property but he was, at the same time, building a new home and that residence would not be ready for occupancy until December 2015.

- [6] After some discussion, Mr. Lal and Mr. Sharma settled on a price for the house of \$428,000 but that Mr. Lal wanted a \$25,000 deposit; Mr. Sharma proposed a \$10,000 deposit. Mr. Sharma said the Wagner property incorporated many features he was interested in for a new home. It included a large recreation room, was close to the children's school, and was in a satisfactory neighbourhood.
- [7] Mr. Sharma contacted a realtor, Gary Tiwana for some assistance in preparing paperwork regarding the agreement; Mr. Tiwana eventually provided a draft contract of purchase and sale reflecting a purchase price of \$443,000 and a \$25,000 deposit for the Wagner property. That draft was signed by both the defendant and plaintiff but was replaced by subsequent drafts. In the past, Mr. Sharma had purchased three or four building lots and constructed homes for sale. In 80% of those transactions Mr. Sharma engaged Mr. Tiwana as his realtor.
- [8] On April 14, 2015, the plaintiff sent a \$25,000 deposit draft to the defendant but because of the delay in finishing Mr. Lal's new house, they decided to do the "paperwork" later. I assume they intended to prepare and sign a formal Contract of Purchase and Sale at a later date.
- [9] Mr. Lal's father eventually encouraged him to complete the paperwork and a new draft of their agreement was prepared and eventually signed by Mrs. Lal and Mrs. Grewal on June 9, 2015 (the Contract); the agreement was dated April 10, 2015 which was the date the plaintiff and defendant reached an oral agreement concerning the purchase and sale of the Wagner property.
- [10] The Contract fixed a completion date of December 31, 2015. The contract also included a term allowing for postponement of the completion date pending the completion of the construction of a new home being built by Mrs. Lal and her husband. The parties could delay the completion date until Mrs. Lal's new home was ready for occupation.
- [11] When the Contract was signed, it contained the following terms:
- a) The purchase price is \$443,000 with a deposit of \$25,000.
 - b) The seller and buyer agreed to a condition that "in the event, Seller's house is not ready for final occupancy, the completion, possession & adjustment dates will be postponed accordingly with an increment of 15 days. Seller will give 15 days notice in advance to move the dates until the final occupancy of his/her new home".
 - c) "The sale will be completed December 30, 2015 (Completion Date) at the appropriate Land Title Office" (the "LTO"). Possession and adjustment dates were December 31, 2015.
 - d) 10.: Tender or payment of monies by the Buyer to the Seller will be by certified cheque, bank draft, cash or Lawyer's/ Notary's or real estate brokerage's trust cheque.
 - e) 11.: All documents required to give effect to this Contract will be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 pm on the Completion Date.

- f) 12.: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller in accordance with the Real Estate Services Act, on account of damages, without prejudice to the Seller's other remedies.
- g) 13. If the Buyer is relying upon a new mortgage to finance the Purchase Price, the Buyer, while still required to pay the Purchase Price on the Completion Date, may wait to pay the Purchase Price to the Seller until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land title Office, but if, before such lodging, the Buyer has: (a) made available for tender to the Seller that portion of the Purchase Price not secured by the new mortgage, and (b) fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and (c) made available to the Seller, a Lawyer's or Notary's undertaking to pay the Purchase Price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings (the "CBA Standard Undertakings").
- h) 14. CLEARING TITLE: If the Seller has existing financial charges to be cleared from title, the Seller, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.
- i) 15. COSTS: The Buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.
- [12] Notwithstanding the parties' agreement to postpone the completion date in the event the seller's house was not ready for occupancy, which was to be triggered by the seller giving 15 days notice to move the dates until final occupancy, the parties entered into a new addendum to the contract (the "Addendum") on December 23, 2015 that reset the completion date for February 26, 2016; this date was later changed to March 26, 2016.
- [13] Mrs. Lal signed the Contract and the Addendum agreement moving the completion to February 26, 2016. On Mrs. Lal's behalf, Mr. Lal agreed to change the completion date to March 26, 2016 and initialed a change in the Addendum with the defendant's initials (the "Amendment"). Although Mrs. Lal disavowed placing her initials on the Amendment to the Addendum extending in the completion date to March 26, Mr. Lal testified that he placed initials for Mrs. Lal with her authority and consent. At all times, I find that Mr. Lal was authorized by his wife to act as her authorized representative in negotiating and attending to the transaction.

- [14] Similarly, at all times Mr. Sharma negotiated the purchase of the Wagner property on behalf of the plaintiff.
- [15] By mid-March 2016, the plaintiff had retained Mr. Kam Grewal a local solicitor to act for her regarding the purchase of the Wagner property at that time, Mr. Grewal, attempted to contact the defendant with a view to identifying her solicitor/ Notary Public who would attend to the vendor's role in the contract. On March 24, 2016 the defendant and her brother met with Kam Grewal. At that meeting the defendant requested plaintiff's solicitor to provide her with a copy of the Contract; she said she had not consented to the Amendment of the completion date from February to March. That document was given to the defendant. She informed the plaintiff's solicitor that her lawyer would contact Mr. Grewal.
- [16] March 26, 2016 was the Saturday of Easter weekend and the plaintiff's solicitor formed the view that the date for completion was moved to Tuesday, March 29, 2016 by operation s. 25 of the Interpretation Act, R.S.B.C. 1996, c. 238.
- [17] The defendants never received the vendor's statement of adjustments or form a transfer documents necessary to complete the Contract from Kam Grewal.
- [18] On March 29, 2016 neither party performed the obligation on them under the contract. They did not attend at the LTO to complete the contract. The plaintiff did not have the requisite funds in her solicitor's trust account nor was she in a position to require lender financing to be advanced. The defendant had not signed a Form A Transfer and on April 1 the plaintiff commenced this action with a claim for a Certificate of Pending Litigation.

The Evidence

Mrs. Gagandeep Grewal

- [19] In or about March 2015 the plaintiff's husband, learned of the availability of the defendant's house to purchase. Mr. Lakhveer Sharma went to the defendant's home and in due course engaged in discussions about a purchase price. The defendant, her husband and the plaintiff and her husband were present. Mrs. Grewal believed this meeting was sometime in April 2015 shortly after her husband had viewed the property himself.
- [20] The plaintiff said that after some negotiation she agreed to purchase the Wagner property for \$428,000 with a deposit of \$25,000. No papers were signed at that time and it was contemplated that completion would be sometime in December 2015 because the defendant and her husband were building a home.
- [21] The plaintiff said that because prices had risen in the neighbourhood after the \$428,000 purchase price had been established, the defendants wanted more money and the purchase price changed to \$443,000. On April 10, 2015 the plaintiff delivered the deposit cheque to the defendant.

- [22] Two to three months later, the parties made their first effort to record the agreement in writing. This happened sometime in June 2015. There were several drafts of contracts of purchase and sale presented; one contract of purchase and sale dated June 8, 2015 (unsigned) included a purchase price of \$428,000 with a deposit \$10,000. This version set a completion date of March 29, 2016 but did not include terms allowing extensions of the completion date.
- [23] Another version of a contract of purchase and sale was prepared and incorporated a price at \$443,000 for the property and a \$25,000 deposit. This document was signed but not dated.
- [24] The third contract of purchase and sale (which is the subject matter of these proceedings), was originally dated June 2015 but this date was changed to April 10, 2015 although it was signed June 9, 2015.
- [25] The plaintiff denied that the parties had agreed to reduce the deposit from \$25,000-\$10,000 and she denied receiving a cheque for \$15,000 from the defendants to reflect the agreement changing the actual terms of the Contract.
- [26] The plaintiff testified that she, Mr. Sharma and Mr. and Mrs. Lal were present when the Contract was signed by the parties.
- [27] The plaintiff said that she did not examine title to the defendant's house and is not sure if she complied with the approval process set out the terms and conditions at paragraph three of the Contract.
- [28] Sometime in December 2015, Mr. Sharma met with Harbans Lal and discussed an extension to the agreement because the defendant's new home was not ready for occupancy. The defendant said she did not want an extension but eventually signed to extend completion to February 26, 2016.
- [29] The plaintiff said she also placed her initials on the Addendum Amendment when the completion date changed to March 2016.
- [30] She said by the revised completion date of March 26, 2016 she had obtained the money necessary to complete the purchase and paid \$82,994 into her solicitor's account on March 30, 2016. She had borrowed \$60,000 from Mr. Sibia, which she received by two different cheques; her bank records reflect that \$60,000 was deposited March 29 and she put her solicitor in funds to complete the contract on March 30.
- [31] At no time up until March 31, 2016 did the plaintiff speak with either the defendant or Mr. Lal.
- [32] She said that at the end of March 2016, her landlord had given notice that he wanted to retake possession of their house and she began a search for a new house. Around August 2017 she located and purchased a new house.

Mr. Gagandeep Gill

- [33] Mr. Gill had been a friend of the Mr. Sharma since 2005. He assisted the plaintiff's husband making a connection with Mr. Lal with a view to purchasing the defendant's house.
- [34] Eventually, Mr. Gill arranged appointments for the plaintiff with a solicitor, Mr. Kam Grewal, who was retained to act for the plaintiff in completing the Contract for the purchase of the Wagner property.
- [35] Mr. Gill had arranged the appointment between the plaintiff and Mr. Kam Grewal sometime before March 2016. His next involvement occurred after receiving a request from Kam Grewal to deliver some papers from his office to the plaintiff's home.
- [36] Mr. Gill collected papers from the lawyer's office on March 28, 2016 and went to the defendant's residence where he knocked on the door. He said someone could be seen in the window but there was no answer at the door.
- [37] The documents he collected from the lawyer's office were in a sealed envelope which he opened because he wanted to be certain that the address was correct. He does not remember the address he was directed to deliver the envelope to and he knew nothing about the documents except the address.
- [38] Mr. Gill remained at the plaintiff's residence for 9 to 12 minutes and then left with the documents. Later that evening, around 5 PM, Mr. Gill returned to the defendant's house and again knocked on the door. He said there was a light on and "it seemed someone was home" when he looked through the blinds but no one answered. He returned to the defendant's house again on March 29, 2016 at about 8 am. He knocked but no one opened the door; he believed someone was inside the house. After this third attempt he returned the documents to the plaintiff's solicitor and had no further involvement in this matter. He did not leave the envelope with the documents at the Wagner property following any of these attempts.
- [39] Under cross-examination he said approximately one week before completion he spoke with the defendant and indicated that the plaintiff's solicitor was attempting to contact them.

Mr. Lakhveer Sharma

- [40] Lakhveer Sharma is the plaintiff's husband and carried out the negotiations on her behalf resulting in the Contract.
- [41] Mr. Sharma had a history of property development and at times had bought and renovated properties he eventually sold for profit.
- [42] He and his family lived on Wagner Drive in 2015 when they became interested in buying the defendant's home. He described contacting the plaintiff's husband in early April 2015 about buying the Wagner property. He negotiated with Harbans Lal and eventually agreed the plaintiff would purchase the property for \$428,000. Mr. Lal had asked for a deposit of \$25,000 but Mr. Sharma offered \$10,000.

- [43] In June 2015, Mr. Sharma made contact with Mr. Tiwana, a friend and realtor to assist in preparation of the contract for the plaintiff's purchase. Mr. Sharma discussed the written contract with Mr. Lal and was informed the plaintiff had increased her asking price to sell to \$445,000. After some discussion they agreed on a purchase price of \$443,000 with a \$25,000 deposit.
- [44] Mr. Sharma did not know why the contract included a condition permitting the sellers to extend the completion date until their new home wasn't ready for occupancy. He said Mr. Tiwana put that clause in the document.
- [45] Although the Contract is dated April 10, 2015 the parties signed it on June 9, 2015.
- [46] By December 2015, the defendant's home construction was not complete and at his request, Mr. Tiwana prepared the addendum dated December 23, 2015.
- [47] The addendum was signed at the defendant's home.
- [48] Prior to February 26, 2015 Mr. Sharma asked a friend, Jaswant Sibia to lend the plaintiff sufficient money to complete the purchase. He also arranged mortgage financing but did not know which bank the money would come from.
- [49] Mr. Sharma said that Mr. Lau approached him in February 2016 requesting an extension to March 2016 for completion of the contract.
- [50] Mr. Sherman went to Kam Grewal's office a number of times including March 26, 2016. On March 29, 2016 Mr. Sharma received two cheques from Mr. Sibia, one for \$20,000 and one for \$40,000. These funds were deposited to the plaintiff's account and on March 30, 2016 she paid \$82,994.02 to her lawyers trust account at Rosborough and Co.
- [51] Mr. Sharma testified that after March 2016 he did not investigate the state of the plaintiff's new house construction. He was looking for a new residence for his family but could find nothing. He was asked about the steps he took to find another residence; he said the prices had gone up and it was difficult for them to afford a new house. In September 2017 they purchased a new home. In that interim, he had hoped they would win the lawsuit and eventually be entitled to purchase the Wagner property. He said they looked but could not find a home as large as the Wagner property. The only efforts he made to find a new property were to speak to Mr. Tiwana and Mr. Gill.

Mrs. Baljit Kaur Lal

- [52] The defendant is a 54-year-old resident of Abbotsford. She came to Canada around 1988. Her first language is Punjabi and she speaks some English. She has worked for a uniform rental company since 2008. She has lived at 3280 Wagner Drive since 1991.

- [53] Mrs. Lal and her husband purchased a lot in 2015 with the intention of building a new home. She recalls conversations in late March or early April in which the plaintiff expressed an interest in buying her house.
- [54] The defendant said that the plaintiff and her husband were prepared to pay \$428,000 for the Wagner property. At the first meeting, no deposits were discussed and no documents were signed. Mr. Lal called the defendant and her husband on April 10, 2015 to inform them that papers were ready and the parties met at the plaintiff's home where the Contract was signed. She noticed that the price was set at \$443,000; she said the plaintiff requested this price because it was designed to assist them in securing mortgage financing. It was \$15,000 more than the agreed on price of \$428,000 and so the defendant agreed to return the \$15,000 she had received.
- [55] At trial the defendant tendered a cheque payable to Ranjit Khera for \$15,000; Mrs. Lal did not know anything about the name on the cheque or who the cheque was delivered to, but she believed it was a return of some of the deposit money to the plaintiff.
- [56] Although there were a number of drafts or proposed contracts of purchase and sale, none of those documents are germane to this litigation. The principal documents that are significant in this proceeding are the Contract and the Addendum.
- [57] The defendant denies that she initialed the changes on the Addendum agreement moving the completion date from February to March. From her husband, she was aware that the completion was extended to March 26, 2016 and believed this extension was granted at the plaintiff's request.
- [58] The defendant did not see the Contract or the Addendum again until attending at Mr. Kam Grewal's office when she was given a copy of the Addendum. She believed that the completion date had remained at February 26, 2016 and that the plaintiff had failed to complete on that day.
- [59] She could not recall when the \$25,000 deposit was received; it could have been April 13 or 14, 2015.
- [60] She was aware that she needed to be ready to vacate the house upon completion of the transaction. She said that between mid-March and the meeting at Mr. Kam Grewal's office, she had no contact with him. She went to the office on March 24 because Mr. Kam Grewal's office had called her. She met her brother and they called Mr. Kam Grewal and arranged a meeting.
- [61] At the meeting, attended by her brother and Mr. Kam Grewal, she wanted to see the extension agreement, the Addendum. She received a copy of that document and took it with her when she left the meeting. Nothing further was said about the document and they left the meeting after 5 to 10 minutes.

- [62] Faced with cross-examination on conflicting statements given by the defendant, she confirmed her discovery evidence that she was aware of the extension to March 26. At trial she said she was confused.
- [63] When questioned about the documents sent to her by Mr. Kam Grewal through registered mail, dated March 18, 2016, which might have been signed for on March 23, 2016, the defendant said she had not picked up those papers until after the long weekend [that is after March 29]. She denied signing for the document on March 23, 2016.
- [64] The defendant testified that when she went to the lawyer's office she was aware of the extension to February but not to March; she said she did not tell Mr. Kam Grewal that there was no deal or that she would not complete. She said she took the documents from his office.
- [65] She testified that she gave the documents to her lawyer sometime between March 24 and March 28; she did not know if the lawyer had replied to Mr. Kam Grewal. However, at trial she said that she only received the documents on March 28 and that her answers that the examination for discovery were not true because she mixed up the dates. She denied that her brother was told that the deal was dead; she only said that she had not given an extension.
- [66] She said she obtained the occupancy permission for the new property in June 27, 2016.

Mr. Omparksha Sharma (Om Sharma)

- [67] Om Sharma is a 44-year-old cabdriver who is the defendant's brother.
- [68] In March 2016 Om Sharma was with his sister who had received some telephone calls from Kam Grewal's law firm. There was uncertainty about the purpose of the calls and he suggested they meet Mr. Grewal at his office. On arrival they met a secretary and a gentleman (assumed to be Kam Grewal) who asked whether the plaintiff had come to sign documents. He and his sister asked to review the agreement but were required to produce identification before Mr. Grewal gave them a copy of the extension agreement. The defendant said she did not believe her initials were on the extension agreement; before leaving the defendant said that she would be talking to a lawyer who would get back to Mr. Grewal.

Harbans Lal

- [69] Mr. Lal is the defendant's husband and lives with his family at a home on Railcar Crescent in Abbotsford. The defendant had owned the Wagner property since 1993 and his wife had purchased the Railcar property to accommodate a new residence they planned to build.
- [70] In 2015 Mr. Lal and the defendant were introduced to the plaintiff and Mr. Sharma. After some discussion and negotiation, the defendant reached an agreement to sell the Wagner property for \$428,000. After reviewing a number of draft agreements, the parties eventually

arrived at a final purchase price of \$443,000 with a \$25,000 deposit. He said the plaintiff wanted the purchase price to reflect an additional \$15,000 for mortgage purposes and that the plaintiff had agreed to return \$15,000 of the deposit money after the agreement was made. This agreement was with Mr. Sharma.

- [71] Mr. Lal said that the construction on the Railcar property began in September 2015. By December 2015 construction was at the drywall stage and by February 2016 the work was not complete. He and his family moved into the Railcar property in July 2016.
- [72] Mr. Lal contended that Mr. Sharma had requested an extension of the contract completion date; he gave no reason for this request but wanted one additional month.
- [73] Mr. Lal confirmed that his wife signed the December 23, 2015 addendum agreement. He said changes to the completion date of February 26 were made about one week before February 26. He could not remember when the change in date from February 2016 to March 2016 was made but he confirmed initialing of the document on his wife's behalf. He said he did not receive a copy of this amendment to the December 23, 2015 addendum.

Positions of the Parties

- [74] The plaintiff's argument centres on three submissions. First, she alleges that the defendant was in anticipatory breach of the Contract because her conduct amounted to a total rejection of the obligations under the Contract without any justification for that conduct. Willfully intending to breach the Contract is important and can be acted on by the innocent party based on an apprehension of the likelihood of that party failing to perform the Contract.
- [75] Second, the plaintiff contends that due to the defendant having repudiated the Contract, the plaintiff was not required to go through the meaningless ritual of tender: see *Panegos v. O'Byrne*, 2019 BCSC 679; 0915406 B.C. Ltd. v. 0834618 B.C. Ltd., 2013 BCSC 1099.
- [76] Finally, the plaintiff contends that the defendant is not entitled to rely on the "time of the essence" clause to excuse her performance. She contends that neither party took steps to complete on the completion date and that time of the essence was deemed to have been waived and it remained open to both parties to re-establish "time of the essence" by providing notice to the other: see *Cox v. Crystal Graphite Corporation*, 2006 BCSC 2059.
- [77] The plaintiff argues that the defendant's husband was the defendant's lawful delegate and acted with her consent to extend the completion date to March 26, 2016. She also contends that the completion date was moved to March 29, 2016 in accordance with s. 25.5 of the Interpretation Act.

The Defendant

- [78] The defendant argues that her husband never informed her that he had extended the completion date to March 26, 2016. Notwithstanding his assertion that he had authority to negotiate the Contract with the plaintiff, where her signatures were required she was not the one who placed the signature or initials on the document. Thus, she contends that the completion date of February 2016 passed without either side completing.
- [79] The defendant contends that the amount of the deposit she retained was not the amount set out in the Contract. Although the plaintiff paid a \$25,000 deposit at the time of the Contract formation, the defendants eventually returned \$15,000 to a third party that the defendant believed represented a return of the money to the plaintiff.
- [80] The defendant contends that the plaintiff was not ready, willing and able to close the Contract as at March 26, 2016 or at March 29, 2016. The mortgage documents had not been sent by the plaintiff's lawyer to the lender and thus no funds could have been requested or obtained for payment out on the completion date.
- [81] The defendant also notes that the closing documents were never delivered to her; this fact is not denied by the plaintiff. The only evidence concerning the closing documents was an attempt by Mr. Gill to deliver them on March 28 and March 29.
- [82] The defendant rejects the suggestion that she repudiated the Contract at any time. Through her brother she had arranged to attend the plaintiff's solicitor's office and was seeking a copy of the Amendment to the Addendum. Mr. Kam Grewal recorded that the defendant did not respond to the issue raised concerning the completion date. It is clear that the defendant told Mr. Kam Grewal that she would speak to a lawyer.
- [83] The defendant contends that the plaintiff failed to complete the Contract in the time set out in the amended Addendum and did not have in trust or available the funds necessary for completion. She contends that this was a default on the plaintiff's part and relieved the defendant of an obligation to complete the Contract. Essentially, both parties failed to perform their obligations under the Contract on the date and at the place stipulated in the Contract.
- [84] She relies on the principles set out in *Norfolk v. Aikens*, 1989 CanLII 245 (B.C.C.A.) [Norfolk]; *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 [Shaw Industries]; and *Toor v. Dhillon*, 2020 BCCA 137 [Toor].
- [85] The defendant also contends that the plaintiff did not tender closing documents on March 26 or March 29 and was not ready, willing and able to complete the purchase. She contends this failure absolved her of the obligation to execute the documents; she argues that because the plaintiff had not put the defendant in possession of the transfer documents for her signature, the plaintiff could not reset time of the essence.

- [86] In the alternative, she argues that if both the plaintiff and defendant had breached the Contract and neither cured their defects, then each had the right to insist on establishing a new completion date and the Contract should be considered at an end and the plaintiff's net deposit of \$10,000 should be returned.
- [87] Finally, the defendant emphasizes that the notice of civil claim seeks a declaration of specific performance and in the alternative damages for breach of the contract. At the commencement of the trial, the plaintiff advised that she was no longer seeking specific performance but limiting her claim to an award for damages. The defendant argues that, having relinquished her claim for specific performance and electing to rely on common-law damage calculation, the Court must consider the date of the breach as the date to measure the plaintiff's losses. In this case, the plaintiff has not claimed damages in lieu of specific performance; the claim is limited to common-law damages for breach of the contract. The defendant contends the plaintiff has not led any evidence to establish her entitlement to specific performance and in particular has not established the uniqueness of the property. Absent evidence of uniqueness, common-law damages can be awarded and those damages should be measured as at the date of the breach: see *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415.

Issues

- [88] I have identified the following issues for discussion:
1. Was the date for completion of the transaction February 26, March 26, or March 29, 2016?
 2. Did the defendant commit an anticipatory breach, and if so, did the plaintiff accept that repudiation?
 3. Were the parties ready, willing and able to complete on March 29?
 4. If both parties were in default, did the contract remain alive?
 5. Did either party set notice for new completion date?
 6. What remedies are available?
 7. Costs.

Summary of Facts

- [89] On many of the essential facts in this trial there was little controversy. My findings of the facts necessary to deciding this case are based on all of the evidence given at this trial. These facts are:
- a) On or about April 10, 2015 the defendant agreed orally to sell to the plaintiff the Wagner property for \$443,000 with a \$25,000 deposit paid directly to the defendant.

- b) At all times relevant to the Contract, Harbans Lal had full authority to act on behalf of the defendant. He was the person who negotiated the Contract and was authorized by her to make changes to the agreement.
- c) Lakhveer Sharma negotiated the terms of the Contract with Mr. Lal and with the authority of the plaintiff to act on her behalf.
- d) The contract was signed June 9, 2015 and incorporated all of the agreed upon terms including a December 30, 2015 completion date. The form of contract was the "Contract of Purchase and Sale" prepared by jointly the BC Real Estate Association and Canadian Bar Association (BC Branch).
- e) The December 30, 2015 completion date was subject to an extension pending the readiness of the defendant's house "for final occupancy". The extensions were to be granted incrementally every 15 days until the defendant could obtain occupancy. There was a burden on the defendant to give notice changing the completion date.
- f) On or about December 23, 2015 the defendant's new home was not ready for occupancy and the parties agreed to extend the completion date to February 26, 2016 provided that all other terms and conditions remained in force. Time was of the essence to this contract and remained of the essence.
- g) Sometime around February 26, 2016, the defendant's husband initialed a change to the December 23, 2015 Addendum agreement and established a new completion date for March 26, 2016.
- h) March 26, 2016 was a Saturday; March 25 was the Good Friday statutory holiday, and March 28 was Easter Monday statutory holiday.
- i) On March 18, 2016, plaintiff's solicitor wrote to the defendant with respect to the purchase scheduled for "March 28, 2016". This letter was sent to the Wagner property.
- j) On March 24, 2016, the defendant attended the plaintiff's solicitor's office at which time she received a copy of the extension agreement moving the completion date to March 26, 2016. She did not inform Mr. Grewal that she would not complete the sale of the property. Mr. Grewal told the defendant that he expected the transaction to complete on March 29, 2016, which was the first day after the statutory holidays and long weekend. The defendant said the transaction should have completed in February 2016 and she said that her lawyer would be in touch with the plaintiff's solicitor.
- k) The Interpretation Act operated to fix the completion date for March 29, 2016.

- l) Gagandeep Gill, a long time friend of the plaintiff, arranged for Mr. Grewal to represent the plaintiff in the purchase and sale transaction. Documents necessary for completing the Contract were prepared by Kam Grewal. Mr. Gill had discussions with the lawyer and was asked in an email by Mr. Grewal to collect the papers (from his office and "drop them at the defendant's home" on Monday, March 28, 2016).
- m) Mr. Gill collected the papers on the Monday and went to the property; he knocked on the door but no one answered. He saw someone inside the home but did not communicate with them nor did he leave the documents at the property. Mr. Gill returned to the property around 5 PM on March 28 and again knocked on the door. He believed someone was in the home but no one answered. He said he went back again on the morning of March 29 to leave the papers but no one was home; he took the envelope of documents given to him by Mr. Grewal and returned them to the lawyer's office.
- n) The vendor's sale documents including the Form A transfer were never delivered to the defendant.
- o) Before the end of business on March 29, the plaintiff's solicitor had not received mortgage funds from the plaintiff's lender and had not received the balance of cash required from the plaintiff to complete the purchase. The plaintiff's solicitor forwarded executed mortgage documents to her lender on March 30, 2016.
- p) Neither party attended at the LTO on March 29 in a state of readiness, willingness and ability to complete the contract.
- q) Neither party notified the other that, because the time for completion passed without either party tendering documents required from them at the LTO before the end of business March 29, a new date for completion of the contract would be set.
- r) When this trial commenced, the plaintiff informed the court that she was abandoning request for an order of specific performance and was electing to claim damages only. The plaintiff had purchased another property.

1. Completion Date

- [90] The first question I must address is whether the defendants repudiated the agreement before the completion date of March 29, 2016. This question requires the court to determine which date constituted the actual completion date under the amended Contract in view of the interposition of the completion date in the middle of the Easter long weekend.
- [91] A careful review of the Contract is important in construing the parties' obligations concerning the purchase and sale of the Wagner property. I accept that the April 2015 Contract includes the terms agreed on by the parties and remained the governing terms up to and including March 29, 2016.

- [92] First, Mrs. Lal argued that the extension of the completion date from February 26, 2016 to March 26, 2016, was not executed with her knowledge or consent. I reject her assertion on this point because I accept Mr. Lal's testimony that the Amendment to the Addendum agreement extending the completion date to February 26, 2016 was made by him with the express authority of Mrs. Lal. It is clear to me that Mr. Lal conducted the negotiations for the sale of the Wagner property on his wife's behalf and, in fact, the extension was made at his request because his new home was not ready for occupancy. Mr. Lal was aware that the Lal's new house was not ready for occupancy by February 2016 and the extension was necessary. I reject Mrs. Lal's evidence to the contrary.
- [93] The next question is to determine what date for completion of the Contract would prevail in view of the fact that March 26, 2016 was a Saturday. Under the s. 29 of the Interpretation Act, Saturdays are not defined holidays and neither party was ready, willing or able to complete on the Saturday. However, s. 25.2(2) of the Interpretation Act provides that, if doing an act in a business office falls on a day in which the office is not open during regular business hours, the day falls on the next day the office is open.
- [94] The next business day after March 26 was March 29, 2016 because March 27 was a Sunday and March 28 a statutory holiday. It is important to note that the Contract did not call for completion of the transaction at the plaintiff's solicitor's office; the contract said: "The sale will be completed at the appropriate Land Title Office."
- [95] Counsel for the defendant argued that the Interpretation Act deals with acts scheduled to be done on holidays and Sundays, but solicitors have the ability to register real estate transactions on Saturdays. In this case, the contract was to be completed at the LTO. Although it may be possible for solicitors to register real estate transactions on Saturdays there was no evidence in this case as to the usual practice or generally accepted procedures adopted by the bar on this point. The application of the Interpretation Act to real estate transactions leads to the conclusion that the completion date of the Contract became March 29. Section 16 of the Land Title Act eliminates the need for the LTO remain open for business on Saturdays. I also take judicial notice of the fact that government offices in British Columbia including LTO offices are not usually open for business on Saturdays or holidays. This finding is supported by s. 16:
- 16 Except on Saturdays and holidays, the registrar must keep the Land Title Office open to the public for the transaction of business every day from 9 a.m. until 3 p.m.
- [96] In this case, the agreement between the parties was that the Contract was to be completed at the LTO. I conclude that the completion date of this Contract was thus moved to March 29, 2016 by operation of s. 25.2(2) of the Interpretation Act and s. 16 of the Land Title Act. This conclusion accords with the finding of McEwan J. at para 49 in *Addenda Capital Inc. v. 0781995 B.C. Ltd.*, 2016 BCSC 957.

2. Anticipatory Breach

[97] Next, I am satisfied for the following reasons that the defendant was not in anticipatory breach of her obligations to complete the sale to the plaintiff on or before March 29, 2016.

[98] The plaintiff contends the defendant committed an anticipatory breach of the Contract by:

- a) failing to provide the 15 days' notice for the extensions of the completion date under the Contract;
- b) indicating a refusal to close through words spoken by Mr. Om Sharma to Mr. Kam Grewal;
- c) failing to appoint a lawyer to arrange clear title of the RBC mortgage or prepare documents;
- d) acting in bad faith by declining to communicate with the plaintiff's solicitor and by evading service of transaction documents; and finally,
- e) she contends the defendant breached the Contract by filing a response to civil claim denying the agreement.

[99] The plaintiff referred to principles concerning anticipatory breaches of real estate contracts set out in *Douse v. Mascioli* (1997), 72 A.C.W.S. (3d) 88, 34 OTC 196 (Ont. Ct. Gen Div.), where Grossi J. explained:

14 [G.H.L. Fridman, *The Law of Contract*, 3d ed. (Toronto: Carswell, 1994) at 600] indicates that anticipatory breach occurs when, "a party, by express language or conduct, as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due." Fridman goes on to cite three elements that must be found before an anticipatory breach is established:

1. conduct which amounts to a total rejection of the obligations of the contract;
2. lack of justification for such conduct; and
3. acceptance of the repudiation by the innocent party.

If these elements exist then the innocent party may be freed from his obligations under the contract, and may pursue a remedy. On the issue of what sort of conduct amounts to a repudiation. Fridman [at 601] says that it must be of a serious nature and that repudiation is not lightly to be inferred from a party's conduct.

[100] More recently, in *Kaur v. Bajwa*, 2020 BCCA 310 [Kaur] the Court of Appeal discussed the principles concerning anticipatory breaches with reference to the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras.139 - 40.

[101] In *Kaur*, the Court quoted from *Potter*:

[13] In *Potter*, Mr. Justice Cromwell said:

- [149] The final point of terminology is concerned with "anticipatory" breach. An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": [John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)] at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at §7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.
- [14] In *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, the Ontario Court of Appeal similarly described the various legal requirements that underlie an anticipatory repudiation at paras. 41-52. In particular, the Court confirmed that a "repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract", that "the test for anticipatory repudiation is an objective one", that "in objectively construing the purported breaching party's intention, the surrounding circumstances must be considered", that "a finding of anticipatory repudiation is reserved for cases in which the conduct at issue can be said to be serious", and that "before an anticipated breach of contract can be characterized as an anticipatory repudiation, the breach must deprive the innocent party of substantially the whole benefit of the contract": at paras. 42, 45, 46, and 50.
- [15] In *[Kuo v. Kuo]*, 2017 BCCA 245] at para. 40, this Court noted that "regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation". See also *Marcotte v. Marcotte*, 2018 BCCA 362 at paras. 45-49.

[Emphasis added.]

- [102] In this case, I must decide if the defendant's behaviours amounted to a total rejection of her obligations or a clear and unequivocal repudiation of the Contract. First, I rejected the plaintiff's argument that the defendant breached the terms and conditions by failing to give notice to move completion dates pending final occupancy of their new home. In my opinion, the subject term allowed the defendant to trigger a delay in the completion date every 15 days after December 30, 2015 until her home was approved for final occupancy. If the seller did not give 15 days' notice, then the completion date would be December 30, 2015 or such other date that would be established by the seller's notice. This clause did not oblige the seller to give notice unless she wished to move the completion date. Further, when the parties executed the December 23, 2015 Addendum, the change was not a 15 day delay but an entirely new date for completion more than two months into the future because the defendants' house was not ready for possession. Similarly, when the parties extended the date for completion to March 26, 2016 it remained open to the defendant to unilaterally extend the completion date for 15 days on an ongoing basis, if she desired such an extension.

- [103] On this analysis, the defendant committed no breach of the Contract.
- [104] The next assertion of an anticipatory breach by the defendant turns on the assertion that point that the plaintiff fails to appoint a lawyer to arrange "clear title" of the RBC mortgage or prepare vendor documents.
- [105] Unlike many other cases, there was no overt statement by the defendant that she did not intend to complete the contract. On March 18, 2016, Mr. Kam Grewal sent a letter by registered mail to 3280 Wagner Drive. He requested that the defendant identify the lawyer or notary she would retain for the purpose of completing the transaction. He referred to the contract dated April 10, 2015 and an addendum dated December 23, 2015. He informed her that the completion date was March 28, 2016, which was a statutory holiday. He also warned the defendant that a failure to complete would constitute a breach of the Contract and an action might be taken. The defendant denied receiving a copy of this letter until the end of March 2016.
- [106] Although, I find much of the defendant's testimony in this proceeding to be unreliable and inaccurate in several areas, those flaws in her testimony lacking reliability do not affect the result in this case.
- [107] The only concrete evidence exists in the conversations between the plaintiff, Mr. Om Sharma and the plaintiff's solicitor on March 24, 2016. On March 21, Mr. Grewal believes there was a conversation with the defendant's husband concerning an extension of the completion date but no changes were made.
- [108] During the March 24 meeting, the defendant had asked for a copy of the contract. It is apparent she did not have a copy of the extension agreement and possibly not the Contract; however her husband had initialed the extension terms on her behalf. Mr. Kam Grewal was reluctant to provide a copy of the agreement to the defendant but eventually gave a copy to them. Mr. Kam Grewal's notes indicate that he told the defendant that the completion date falls on a Saturday and that parties usually complete on the next business day. She did not respond to this suggestion.
- [109] I accept that on the advice of Mr. Sharma the defendant indicated she would not be signing the purchase and sale documents that day but she would have a lawyer get back to plaintiff's counsel. Mr. Kam Grewal's notes indicate that Mr. Sharma told him that Mrs. Lal did not know which lawyer she planned to use at that point.
- [110] In *Hundley v. Garnier*, 2011 BCSC 414 at paras 161-173 (aff'd 2012 BCCA 199), the court considered an allegation of breach based on a vendor's actions prior to the completion date. Even despite the vendor's unhappiness efforts to avoid communication, and the mix up with their representation by a lawyer, the court was unable to conclude that they had said or done anything that would amount to a clear repudiation.

- [111] I have concluded that the defendant's behaviour and conduct at the meeting with Mr. Grewal did not evince a clear intention that she would not be bound to the terms of the agreement. Her words indicated she would be seeking legal advice concerning the issue and did not constitute a repudiation of the Contract. Any uncertainty created by the defendant is contemplated in the Contract which affirms the completion of the transaction would take place at the LTO. The defendant's actions and demeanour up to March 29, 2016 did not manifest a "clear and unequivocal repudiation". The contract was not void from the outset.
- [112] I have no doubt that the defendant's sale documents had not been prepared and were not made available by Kam Grewal to the defendant on March 24 when the defendant visited his office. He confirmed that he gave the plaintiff a copy of the Addendum agreement; he said he could not recall if the defendant's sale documents had been prepared for her signature but there had been some discussion with him about the defendant not communicating with the plaintiff. If the completion documents had been ready for signature, I am certain Mr. Grewal did not give Mrs. Lal the Addendum, the transfer, and vendor statements of adjustments during their meeting because he had not completed these documents for the defendant.
- [113] I find that after the meeting between Kam Grewal and the defendant on March 24, Kam Grewal prepared the necessary documents for the defendant's signature including a Form A - Freehold Transfer and vendor's statement of adjustments; these were sent out for delivery to the defendant with a letter setting out Mr. Grewal's undertakings that were consistent with the terms of the Contract. In his letter, Mr. Grewal undertook that:
- a) We will not deal with the Transfer in any way until we have the funds required to complete in our trust account, with the exception of the Purchaser's Mortgage proceeds, if applicable; [and]
 - b) We will attend at the Land Title Office to register the transfer concurrently with the purchaser's mortgage, if applicable;
- [114] Mr. Grewal wrote a letter to the plaintiff on March 24, 2016 that enclosed the vendor's documents to be signed. Mr. Grewal told the plaintiff that the vendor's sale documents were to be dropped off at the vendor's address. Mr. Gill undertook this chore and after three visits to the property, the documents were returned to Mr. Grewal's office. For some unexplained reason, he did not leave the documents at the defendant's home. The documents were never delivered personally to the defendant nor were any copies left at the defendant's home.
- [115] On March 23, 2016, the lawyer for the plaintiff's mortgage lender delivered documents necessary to secure funding of \$354,400 from his client, Versatile Mortgage Corp.; this was the amount required in addition to the funds needed from the plaintiff to complete the transaction. The lender's solicitor included the following in his letter:

Please ensure all the above documents are returned at the same time. Documents will not be reviewed and mortgage funds will not be requested unless and until all executed supporting documents are returned.

- [116] The plaintiff attended her solicitor's office March 28, 2016 and signed the purchase and sale documents and the mortgage documents. The purchaser was required to pay \$82,994.12 in addition to the mortgage proceeds to complete the transaction into her solicitor's trust account before he could register any transfer, and those funds were deposited with Mr. Grewal. On March 28, Easter Monday, the plaintiff signed the purchaser's documents including the purchaser's statement of adjustments. In addition, on March 30 the plaintiff transferred \$82,994 into Mr. Grewal's trust account and Mr. Grewal sent the mortgage documents to the lender's solicitor on the same day.
- [117] On March 29, 2016 the plaintiff received loan proceeds from Mr. Sibia in two cheques from Gagandeep Grewal totaling \$60,000, representing a portion of the purchase proceeds the plaintiff expected to use for completing the Contract. On March 30, 2016 the plaintiff sent \$82,994.12 to her solicitor.
- [118] On March 30, 2016, the plaintiff's solicitor sent the signed mortgage documents including the Form B mortgage, standard mortgage terms, authority to pay, preauthorized payment documents and a consent form back to the lender's solicitor.
- [119] In spite of the defendant's report to Kam Grewal that she would have a lawyer contact him, there was, apparently, no communication from any lawyer on behalf of the defendant.
- [120] I have concluded that notwithstanding the defendant's dilatory approach to this purchase and sale agreement, there is insufficient evidence to persuade me that the defendant was guilty of an anticipatory breach of the contract.
- [121] It is clear that the plaintiff did not perceive that the defendant did not intend to complete the sale on March 29, 2016. Nothing in the plaintiff's actions up to and including March 30, 2016 indicate that she had treated the defendant's earlier comments and actions as anticipatory breaches of the Contract. The plaintiff clearly expected the transaction to complete on March 29 or March 30 in any event; Kam Grewal had returned the lender's documents to their solicitor in obvious anticipation of receiving mortgage proceeds when the transaction completed. It appears he was anticipating a new completion date after March 29, 2016.
- [122] To establish that the defendant had committed an anticipatory breach of the contract the plaintiff must persuade me that the defendant's behaviour on March 24 or March 29 was sufficient to "lead a reasonable person to conclude that she did not intend to fulfil her part of the contract". The conduct must be of a serious nature because repudiation by anticipatory breach cannot be inferred lightly from the circumstances.

[123] Although the plaintiff never successfully delivered a Form A property transfer to the defendant, either on March 24 or March 29, the defendant would have been obliged to sign such a document at the LTO in order to deliver title and permit the plaintiff to obtain mortgage financing. Although the defendant did not make herself readily available to the plaintiff's solicitor to sign the transfer documents, in view of her expressed intention to speak to a lawyer, the non-delivery of the documents to her house may have affected her ability to instruct a lawyer; the evidence is not clear on this point.

[124] I have concluded that notwithstanding the defendant's dilatory approach to this purchase and sale agreement, there is insufficient evidence to persuade me that the defendant was guilty of an anticipatory breach of the Contract.

3. Parties Not Ready, Willing and Able to Complete on March 29, 2016

[125] The first question to be asked is whether the plaintiff was herself ready, willing and able to complete on March 29. In particular, the defendant contends that the plaintiff failed to deliver the documents necessary to complete the transaction and that the plaintiff was not sufficiently in funds to complete.

[126] Due to the provision regarding '15. Costs' in the Contract, the plaintiff was required to prepare and tender the transfer documents for the defendant's execution.

[127] In *Shaw Industries*, the Court of Appeal changed the practice concerning the responsibility for preparation of a Form-A transfer (at page 12):

In my opinion now in British Columbia the rules are these:

1. Where the cost of conveyance is to be borne by the purchaser it is for the purchaser to prepare the transfer. It is for the vendor to be ready to execute it.
2. This rule will not apply in any circumstance where title to the lands is not registered in the Land Title Office in the name of the vendor. Thus, where the vendor must get in title he must prepare the documents.

Although the first rule was not the rule at common law, it is a rule perfectly apt to our system of registration of land title and has the virtue of simplicity.

As the vendor must execute the transfer and have his execution attested, the vendor may find himself having to attend at the time and place fixed for completion. Of course, if the instrument does not provide for the purchaser to bear the costs of the transfer then the common law rule will apply.

[128] In *Toor*, the Court of Appeal explains that a party that is not prepared to perform an agreement cannot rely on a "time of the essence" clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract (at para. 50). The court explains, in the context of a deposit paid on the correct date but with an incorrect payee, which was subsequently rectified the following business day, that beyond the breach

regarding time for payment, it is possible that there could be a breach for lack of payment of the deposit itself (at paras. 55-56).

[129] In *Hundley v. Garnier*, 2012 BCCA 199, the Court of Appeal Smith J.A. summarized the proper approach to a standard form real estate agreement and tender obligations:

[74] The drafters of this standard-form contract undoubtedly had the common law relating to the purchase and sale of land in mind when they prepared the document. It follows that, in the absence of a manifest contrary intention, of which there is none, the words used in the document must be construed in light of their meaning at common law.

[75] "Tender", in contract law, has to do with performance in those bilateral contracts in which one party cannot perform his or her primary contractual obligations without the concurrence of the other party. As stated by Professor S.M. Waddams in *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book Inc., 2010) at ¶ 582,

... Where the obligation consists of paying money, or otherwise transferring property, it cannot, of course, be fully effected by the obligor alone, but the obligor will be considered to have sufficiently indicated willingness and ability to perform on making a formal tender of performance. Such a tender must be made by actually offering the money, or the goods, or the deed, as the case may be. .

[130] In this case the plaintiff was responsible for the costs of the conveyance, and although they attempted delivery to the defendant in the days ahead of completion, they did not actually deliver the documents. Thereafter, on the day of completion (Tuesday, March 29) they did not attend the LTO to tender the documents, nor did the defendant appear at the LTO to execute the documents and transfer title. As is evident from the letter from the plaintiff to the lender's solicitor on March 30, 2016, the plaintiff was not in a position to close on March 26 or 29 at any rate.

[131] It was the plaintiff's obligation to prepare and tender the appropriate transfer documents and the purchase price on the completion date. As regards the failure to deliver the purchase price, this failure was in part caused by the defendant's own failure to sign the transfer. However, Kam Grewal knew that the plaintiff's lender would not fund the mortgage funds until the lenders documents had been returned and reviewed by the lender solicitor, yet he proceeded on the basis that the transaction would complete either on March 29 or someday after March 29 based on the fact that he did not return lender's documents until March 30.

[132] Thus the next question is whether the defendant was also in breach of the Contract. The plaintiff argues that the defendant took no steps to complete the transaction, and as a party in essential default, she cannot therefore rely on the plaintiff's failure to meet the strict time requirements under the Contract as an excuse for her non-performance.

[133] Tender of purchase monies and execution of the transfer of land are mutually dependent events for a contemporaneous closing. In *Gross v. Cottier* (1992), 71 B.C.L.R. (2d) 1 (C.A.), 1992 CanLII 1055 (B.C.C.A.) the Court said:

19 The obligation to clear title and transfer title free and clear of financial encumbrances and the obligation to pay the purchase monies are mutually dependent obligations. Where covenants are mutually dependent and are expected to be carried out contemporaneously, neither party need actually perform their obligations unless the other side shows its ability or willingness to perform its part of the bargain. See *Burtini v. Sovilj* (1975), 1975 CanLII 1031 (B.C.S.C.), 61 D.L.R. (3d) 505. A party failing to forge a link in the circuitous chain of closing a transaction such as here aborts the closing and forfeits the deposit.

[134] As stated in *Burtini et al. v. Sovilj Oballa Realty Ltd. v. Sovilj*, 1975 CanLII 1031, 61 D.L.R. (3d) 505 at 513-514 (B.C.S.C.):

Because a promisor must seek out his promisee and because both the defendant and the Burtinis made dependent promises one to the other, each was under an obligation to seek out the other so as to effect performance on the completion date. In practical terms the Burtinis ought to have informed the defendant that they or their agent would meet him at the Land Registry Office in Vancouver on June 1, 1973, at some time prior to the closing hour of 3:00 p.m. and would have with them the necessary documents and funds. Similarly the defendant should have advised the Burtinis that he would also present himself at the Land Registry Office, that he would sign the conveyance, take possession of it and deliver it to the Registrar of Titles in return for the purchase money. Completion would then be effected .

[135] In *Walia*, citing *Gross v. Cottier*, in turn citing *Di Castri* in *The Law of Vendor and Purchaser* (Carswell 1989) at pp. 14 to 16, the court notes:

The obligation to clear title and transfer title free and clear of financial encumbrances and the obligation to pay the purchase monies are mutually dependent obligations. Where covenants are mutually dependent and are expected to be carried out contemporaneously, neither party need actually perform their obligations unless the other side shows its ability or willingness to perform its part of the bargain. See *Burtini v. Sovilj* (1975),

[136] Concerning the impact of a "time of the essence" clause, Mr. Justice Goldie in *Salama Enterprises (1988) Inc. v. Grewal* (1992), 90 D.L.R. (4th) 146, 66 B.C.L.R. (2d) 39 (C.A.) said:

If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in the substitution of a later date for the one stipulated in the agreement. I do not think that it in any way affects the provision in the agreement that time is of the essence.

[137] The plaintiff argued that due to the defendant's failure to be ready, willing and able to execute the Contract, she was not required to take the formal step of tendering.

[138] As stated in *Norfolk* at p. 19:

Tender is a formal step. There are many authorities to the effect that if one side had made it clear that it will not complete it is not necessary for the other to go through the formal step of offering the necessary documents and consideration .

[139] It seems to me that if one party to a real estate transaction conducts themselves in a way that makes it practically impossible for the other to complete its obligations, then it would be unjust or inequitable to allow either party to insist on compliance with the time of the essence term. In this case, the defendant failed to make herself available to sign the Form A on or before March 29. It was the plaintiff's obligation to prepare this document and the plaintiff's failure to deliver the transfer documents to the defendant at her home made it impossible for the defendants to sign the documents before March 29. However, the defendant did not attend at the land title office on March 29, nor at the solicitor's office before, and cannot rely on the time of the essence clause in the agreement because she failed to sign the documents at the LTO.

[140] I am satisfied that neither party in this case met their obligations to complete this purchase and sale in accordance with the terms of the Contract. Most importantly, the place for completing the Contract was at the LTO and neither party attended. It would have been a simple enough matter for the plaintiff, who had already prepared a transfer form for the defendant's signature, to have attended at the LTO and obtained the defendant's signature to the transfer title; she could have paid the purchase price in accordance with the terms of the contract and received the signed transfer from the plaintiff. In my view, both parties were in essential default and the contract continued with either party retaining the option to reset time of the essence.

4. Contract Remains Alive

[141] The circumstances described in *Shaw Industries* at p. 9 are apposite to this case:

The simple and peculiar fact of this case is that neither side did anything it ought to have done by or on the day it ought to have done it. Neither even attempted to communicate with the other.

[142] In *Shaw Industries* the Court of Appeal explained that where both parties are in breach at the time of completion, time ceases to be of the essence, the contract continues to exist, and either party may reset the time requirement upon reasonable notice to the other:

So, therefore, we arrive at this question: What is the legal position when both sides are in breach of obligations under a contract in which time is of the essence?

The answer Miss Satanove propounds is that, as a matter of law, time ceases to be of the essence and either side can then give to the other a notice to complete the transaction at a new time.

She relies on *King v. Urban & Country Transport Ltd.* (1973), 1973 CanLII 740 (ON CA), 1 O.R. (2d) 449 (C.A.) which was cited with approval by this Court in *Norfolk v. Aikens*, *supra*.

There, the closing date (and I take "closing" to mean completion) of 30th June set out in the contract was a Sunday and the following day was, of course, Dominion Day (as it then was). Time was said to be of the essence.

The court obviously concluded that the closing date pursuant to the contract was 2nd July. The judgment does not indicate that a place of closing was specified.

The court having held that neither party was ready to close on the contractual date i.e. 2nd July, said at 455-6:

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.

[Emphasis added.]

[143] Therefore, given the plaintiff's failure to be in funds, failure to provide the transfer documents to the defendant, and the failure of the defendant to take steps to complete the Contract, I have found both parties were in essential default of their respective obligations under the Contract. Neither party was ready, willing, or able to complete on March 29, 2016. Having found the defendant to be in default of her obligations under the Contract, she cannot rely on the strict time requirements under the Contract to argue that the plaintiff was in breach. Therefore, following the failed closing date of March 29, 2016, the contract remained alive, and it was open to either party to reset time as of the essence with reasonable notice to the other.

5. Resetting Time of the Essence

[144] I have concluded the contract remained alive after March 29, at which point both parties time ceased to be of the essence and it was open to either party to reset a time for completion. On April 1, 2016 the plaintiff filed a notice of civil claim with the Court seeking and order for specific performance of the Contract. On April 22, 2016 the defendant filed their response suggesting the contract was void for various reasons, and alleged the plaintiff's failure to complete was a breach.

[145] I have rejected the argument that the Contract was void.

[146] A further complicating factor is that at trial, the plaintiff informed the Court that she would not be seeking the remedy of specific performance, nor damages in lieu of specific performance, instead they will be seeking common law damages. The Court was informed at trial that the plaintiff had purchased an alternate property.

- [147] The defendant argues it is necessary to find that the plaintiff's actions in purchasing another property and abandoning the Contract without resetting time of the essence amounted to a unilateral breach of the Contract. The plaintiff 'jumped the gun' so to speak. Due to their unjustified repudiation of the agreement, the defendant claims to be entitled to retain the deposit.
- [148] As quoted above, in *Shaw Industries*, the court found that when neither party was ready, willing, and able to complete on the closing date and the vendors sought to accept the buyers' inaction as a repudiation of the agreement, the contract subsisted. The court held that the vendors needed to first reset the time is of the essence and thereafter prove that they were ready, willing, and able to close on the new date. They failed to do so, and as the court put it, when they purported to accept the purchaser's repudiation, "the vendors jumped the gun." and the purchasers were granted specific performance of the contract.
- [149] In *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69, 1992 CanLII 570 (B.C.C.A.) the court dealt with a situation of anticipatory breach by the buyers, with no acceptance of that breach by the vendors, when at the date of closing, the buyers still arrived to tender. The court compares the results in *Norfolk and Gross*, and helpfully summarizes the legal framework contrasting anticipatory breaches and actual breaches of real estate contracts:

28 In our view, the distinction between *Norfolk v. Aikens* and the *Gross* case flows from the fact that in the *Gross* case there was an actual breach on the part of the purchaser rather an anticipatory breach.

29 In *Gross* the solicitors failed to agree on a closing procedure based on solicitors' undertakings. The closing accordingly was governed by clause 2(c) of the standard form. We have earlier set out that clause. It stipulated completion shall take place at the appropriate Land Title Office and that time is of the essence. The purchaser's solicitor was advised the closing would take place in the manner prescribed in clause 2(c) and on the date of completion the sellers' agent attended at the Land Title Office with an executed transfer and discharges of existing mortgages. No one arrived on behalf of the purchaser. Mr. Justice Carrothers said this deliberate absence was "... tantamount to refusal or neglect to pay the purchase price within the time prescribed." Thus, there was an actual breach on the part of the purchaser which is to be contrasted with the anticipatory breach in the case at bar and in *Norfolk v. Aikens*. The legal results are quite different: where there is an actual breach the injured party has a choice of remedies and his election may be made in the court room. In the case of an anticipatory breach, if the innocent party elects to keep the contract in being, no cause of action arises until there is an actual breach. If the innocent party wishes to crystallize his rights before the time for performance and elects to accept an anticipatory repudiation as putting an end to the contract he must so notify the other party and thereupon his rights to damages arise.

- [150] On this point, the decision in *Domicile Developments Inc. v. MacTavish*, 1999 CanLII 3738 (Ont. C.A.), 45 O.R. (3d) 302 (C.A.) [*Domicile*], was considered in *Toor* at paras. 48 and 50:

[48] In *Domicile Developments Inc. v. MacTavish* (1999), 1999 CanLII 3738 (ON CA), 45 O.R. (3d) 302 (C.A.), Laskin J.A. expressed the rule in this way:

A time is of the essence provision means that on the closing date an innocent party may treat the contract as ended and sue the defaulting party for damages or it may keep the contract alive and sue for specific performance or damages. In order to take advantage of a time of the essence provision the innocent party must itself be "ready, desirous, prompt and eager" to carry out the agreement. A time of the essence provision can be raised as a defence only by a party who is ready, willing and able to close on the agreed date

[Emphasis added.]

[]

[50] In my view, this principle applies in British Columbia. As a result, a party who is not prepared to perform an agreement cannot rely on a "time of the essence" clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract.

[151] The facts in *Domicile* are similar to the facts in this case, as are the court's comments:

Domicile did not give MacTavish reasonable notice of a new closing date. Instead it unilaterally ended the agreement by selling to a third party and seeking damages from MacTavish. Because it did not reinstate time of the essence by setting a new closing date, *Domicile* was not entitled to end its agreement with MacTavish. Therefore, in failing to give MacTavish an opportunity to close the transaction after September 15, *Domicile* itself breached the agreement. Because of *Domicile*'s breach, MacTavish could no longer be held liable. The trial judge came to the opposite conclusion because he did not consider the effect of *Domicile*'s inability to close on September 15. As a consequence, he did not consider *Domicile*'s obligation to set a new closing date on reasonable notice to reinstate time of the essence.

[152] In this case, I have found that neither the plaintiff nor defendant was ready, willing and able to complete the Contract on March 29. Neither party was entitled to bring the Contract to an end in these circumstances, neither party can be said have accepted the others breach of the Contract, and the Contract remains in force until one of the parties sets a new closing date and is in a position to complete the Contract on that date: see *Toor* at para. 83.

[153] Because the Contract remains alive and either party is entitled to reset the completion date, or to have the completion date set by the Court: see *Toor* at paras. 86-88. The plaintiff initiated this litigation seeking specific performance, and so I will consider whether it is appropriate for the Court to make an order setting a new completion date.

6. Remedies

[154] The plaintiff's stated position at trial was that she seeks damages in lieu of specific performance or alternatively common-law damages.

- [155] I am satisfied the defendant continues to own the Wagner property and, if a remedy of specific performance were available after a new completion date is established, she could be compelled to transfer title to the plaintiff.
- [156] Alternatively, if the defendant fails to transfer the property at the new completion date, the plaintiff may pursue her remedy of damages in lieu of specific performance. The parties are not yet at this point.
- [157] I do not accept that the plaintiff's election to seek damages alters their position under the Contract unless and until such time as a new completion date has passed and one or other party is not ready, willing and able to complete.
- [158] The issue concerning the setting of a new completion date was not addressed during argument in this case. In my view, the proper remedy in the circumstances is to direct that a new date for closing be settled, and the parties will be subject to the terms of the Contract until that completion date has arrived: see Toor at para 88. The Court will assist the parties in setting a new closing date as happened in Toor.
- [159] The parties have liberty to make further application and submissions concerning the resetting of the time for completion of the Contract.

7. Costs

- [160] On the question of costs: first, submissions shall be made by the either party seeking costs from the other and those submissions must be delivered within 30 days of this order. Responding submissions will be delivered within a further 14 days.

"Armstrong J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/08/2021BCSC0844.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/grewal-v-lal-2021>

Prepared on 27 October 2026 · Esheria