

CANADA / JUDGMENT

Kaltenegger v. Cao

2022 BCSC 2203

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2022 BCSC 2203 Kaltenegger v. Cao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaltenegger v. Cao,

2022 BCSC 2203

Date: 20221216

Docket: S171148

Registry: Vancouver

Between:

Jeffrey K. Kaltenegger

Plaintiff

And

Na Cao

Defendant

- and -

Docket: S1812350

Registry: Vancouver

Between:

Na Cao

Plaintiff

And

West Coast Realty Ltd. doing business as Sutton Group West Coast Realty and Jia (James) Liu

Defendants

Before: The Honourable Justice Kirchner

Reasons for Judgment

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I. Introduction

- [1] The plaintiff, Jeffery Kaltenegger, seeks damages from the defendant, Na Cao, for her unilateral decision to repudiate a contract of purchase and sale to buy Mr. Kaltenegger's home. The home is located at 917 Pacific Drive along the top of English Bluff in the Tsawwassen area of Delta, B.C. ("917 Pacific"). After reaching a binding agreement in November 2016, Ms. Cao and her husband, Xin Qiang Li, were told by friends that they were paying too much for the home so they decided not to complete the purchase and refused to pay the required \$300,000 deposit.
- [2] Ms. Cao now claims Mr. Kaltenegger misrepresented the land that was included in 917 Pacific and she was acting under a unilateral mistake about the land she agreed to buy. She says either the misrepresentation or the mistake entitled her to rescind the contract. At issue is a portion of the back lawn and an area of brush behind the lawn leading to the edge of English Bluff. To the uninformed observer, the entire lawn and possibly the brush area would appear to be part of 917 Pacific but in fact the brush area and a portion of the lawn belongs to the Tsawwassen First Nation ("TFN"). The property boundary runs through the back lawn of 917 Pacific.

- [3] Ms. Cao also claims she was entitled to rescind the contract on the principle of non est factum because she misunderstood a fundamental term of the contract. She claims that she and Mr. Li understood she was only bound to the contract if she paid the deposit. She blames her realtor, the defendant Mr. Liu, for giving her bad advice. Mr. Liu denies this.
- [4] Finally, Ms. Cao argues Mr. Kaltenegger failed to fulfill a condition of the contract, namely to deliver a title document showing that his former spouse had been removed from title. While she was in fact removed from title, Ms. Cao says she did not receive the updated title search document by the date specified in the condition.
- [5] By separate action, which was heard together with Mr. Kaltenegger's action, Ms. Cao sues her real estate agent, James Liu, and his brokerage, West Coast Realty Ltd., claiming Mr. Liu was negligent by failing to ascertain the location of the 917 Pacific's boundary with TFN's lands and by failing to research and advise Ms. Cao on a suitable purchase price for the property. She also claims Mr. Liu misrepresented the effect of the deposit clause in her contract with Mr. Kaltenegger, leading her to believe she could void the contract by not paying the deposit. Mr. Liu denies all these claims.
- [6] These two actions were tried together with evidence in one being evidence in both. They give rise to the legal and factual issues just summarized. In addition I must determine what, if any, damages Mr. Kaltenegger is entitled to if Ms. Cao wrongly repudiated the contract and what, if any, damages arise from any negligence on the part of Mr. Liu.
- [7] A summary of my findings is provided at the end of these reasons.

II. Background Facts

1. 917 Pacific

- [8] Mr. Kaltenegger was the owner of 917 Pacific, a unique property located at the top of English Bluff on the western edge of Tsawwassen looking out to the Strait of Georgia from the back yard. The view is unimpeded. There are some trees and shrubbery that grow along the top of the bluff but Mr. Kaltenegger says these never obstructed the view. Pacific Drive is considered to be among the best residential streets in Delta and certainly in Tsawwassen.
- [9] From the edge of the bluff to the west of the property, the land slopes steeply down to Tsawwassen Beach Road which provides access to houses along the waterfront. This land to the west of the 917 Pacific belongs to TFN. It was formerly reserve land under the Indian Act, R.S.C. 1985, c. I-5 but is now part of TFN's treaty land. TFN leases this portion of its land to the Northwest Holdings Society which is comprised of the occupants of the waterfront homes. I will refer to the area west of 917 Pacific as the "TFN Land".

- [10] The boundary between 917 Pacific and the TFN Land runs through what would otherwise appear to be the back lawn of 917 Pacific. The photomap attached as Appendix 1 to these reasons shows the approximate location of that boundary. Thus, the TFN Land encompasses part of the lawn behind 917 Pacific, the brush area past the lawn and the area down the slope to the ocean. Other properties on Pacific Drive's west side are similarly situated with their western boundaries running through the back lawns.
- [11] Despite the location of the boundary, Mr. Kaltenegger and his predecessor in title always maintained the entirety of the lawn to the brush area and did some minor landscaping along the edge of the brush area adjacent to the lawn. Mr. Kaltenegger had no rights or express permission to use this land but neither TFN nor the Northwest Holdings Society prevented him from doing so.
- [12] To the uninformed observer, the boundary between 917 Pacific and the TFN Land is undetectable without some extrinsic aid (like the appended photomap or a survey) or by uncovering the buried survey stakes. Since the lawn is maintained consistently and seamlessly, a reasonable person viewing the property would likely and reasonably believe the entire lawn is part of 917 Pacific.
- [13] Mr. Kaltenegger was told by the realtor when he bought the property in 2009 that the western boundary ran across the lawn but this did not concern him because he believed TFN would not build any structure on the small strip of land at the top edge of the bluff. For the seven years he lived at 917 Pacific, he had unimpeded use of the back lawn, including the TFN Lands, and unobstructed views of Georgia Strait.

2. Sale of 917 Pacific

- [14] On October 31, 2016, Mr. Kaltenegger listed 917 Pacific for sale. He was recently engaged and his fiancé did not wish to live in the home where Mr. Kaltenegger had lived with his previous wife. He retained Christina Watts as the listing agent. Ms. Watts is now retired but had considerable experience in the Tsawwassen market, working there most of her career. She listed the property on the Multiple Listings Service ("MLS") with a list price of \$4,898,000. The listing correctly identified the lot size as 14,392 square feet. The listing described the property as a "PREMIUM elegant Bluff property located on prestigious Pacific Drive". It boasts "stunning views from every corner".
- [15] Mr. Kaltenegger did not inform Ms. Watts of the location of the western boundary of the property. She had never walked the property lines and was unaware of the backyard's boundaries. She stated she did not know whether the entire lawn was part of 917 Pacific and, since there was no fence or marked division on the western boundary, she had no reason to speculate on where the boundary might be. She never investigated the boundary herself. She satisfied herself of the square footage of the lot using the property line measurements but did not ascertain the location of those lines. "Anything else," she said, "would be subject to survey for anyone to be aware of this."

- [16] On November 13, 2016, Ms. Cao and Mr. Li viewed 917 Pacific with their realtor, Mr. Liu. Ms. Watts was not present when the group arrived so Mr. Kaltenegger spoke briefly with Mr. Liu and led them into the house. He opened the back doors so they could view the yard. He discussed some features of the house with Mr. Liu but did not discuss the boundaries.
- [17] Ms. Watts arrived a few minutes later and Mr. Kaltenegger left. Ms. Watts waited in the kitchen while the group toured the home and the back yard on their own. She had some discussion with Mr. Liu but she did not talk about the property boundaries.
- [18] Ms. Cao and Mr. Li speak Mandarin and understand very little English. They could not understand what Mr. Liu was discussing with either Mr. Kaltenegger or Ms. Watts except to the extent that Mr. Liu, who speaks both languages, translated the conversations for them.
- [19] The group viewed 917 Pacific for about 20 minutes. They spent most of that time in the back yard because Ms. Cao's main interest was the view. Ms. Cao stood in the centre of the garden (which I take to be the lawn) and looked around. She did not walk to the edge of the lawn or determine what lay beyond it.
- [20] Ms. Cao and Mr. Li testified they believed 917 Pacific included all of the back lawn and the brush area extending to the edge of the bluff. Mr. Liu was under a similar impression. As I have said, I find a reasonable person, uninformed of the property boundaries, would reasonably assume the property extended at least to the end of the lawn. I am not persuaded a reasonable person would necessarily believe that it extended into the brush area or all the way to the edge of the bluff. I find the absence of a visible boundary marker (such as a fence) would cause a reasonable person - or at least their realtor who ought to be alert to such things - to question where the property line was located.
- [21] At no time did Ms. Cao, Mr. Li, or Mr. Liu discuss the boundary amongst themselves or seek to verify its location. They assumed what they saw was part of the property. They did not learn of the location of the western boundary until the latter half of 2021, almost five years after Ms. Cao repudiated the contract.
3. Negotiations and Offers for 917 Pacific
- [22] After viewing 917 Pacific, Ms. Cao, Mr. Li and Mr. Liu looked at other properties in Tsawwassen, including 241 English Bluff Road. During the drive back to Vancouver, Mr. Li and Mr. Liu discussed making offers on both 917 Pacific and 241 English Bluff Road. They continued these discussions over the phone in the afternoon and, that evening, Mr. Liu met with Mr. Li and Ms. Cao at their home on Acadia Road near UBC to prepare offers on both properties.
- [23] Based on the afternoon discussions, Mr. Liu prepared offers for both properties. In both offers, he typed "no Subject" into clause 3 of the standard form Contract of Purchase and Sale. Ms. Cao testified she and Mr. Li wished to make "no-subject" offers on both properties because they believed this would help them get the best price.

- [24] Mr. Liu translated and explained to Ms. Cao and Mr. Li what he considered to be the key provisions of the offers, namely the purchase price (clause 1), the deposit requirement (clause 2), and the terms and conditions (clause 3). He advised them of the risk of making a no-subject offer, namely that the seller could accept the offer as presented thus binding Ms. Cao, in whose name the offers were made, to the contract.
- [25] Ms. Cao and Mr. Li claim Mr. Liu told them that even if their offers were accepted, they could still void the contract without consequences by not paying the deposit. That, of course, is incorrect and Mr. Liu denies ever telling or representing this to Mr. Li or Ms. Cao.
- [26] After some discussion about price, Mr. Li and Ms. Cao decided to make an offer for 917 Pacific for \$4,280,000 with a completion date of January 5, 2017 and an offer of \$3,150,000 for 241 English Bluff Road with a completion date of January 12, 2017. Although the offers were made in Ms. Cao's name, she and Mr. Li were equally involved in the process. In fact, it was Mr. Li who communicated almost exclusively with Mr. Liu and provided him ongoing instructions, mostly using WeChat.
- [27] The following day, November 18, 2016, Mr. Kaltenegger made a counteroffer of \$4,680,000. Ms. Cao rejected this and Mr. Li instructed Mr. Liu not to respond to the counteroffer. Mr. Kaltenegger therefore made a second counteroffer on November 19, 2016 for \$4,550,000 with a \$300,000 deposit due by November 23, 2016. Mr. Li and Ms. Cao discussed this counteroffer with Mr. Liu and made a further counteroffer of \$4,450,000 which Mr. Kaltenegger accepted.
- [28] At some point during the negotiations, Ms. Watts learned that Mr. Kaltenegger's former spouse, Dianne Kaltenegger, was still on title for 917 Pacific even though Mr. Kaltenegger had previously paid Ms. Kaltenegger for her interest. The parties therefore agreed to add a clause to the contract which required Mr. Kaltenegger to provide Ms. Cao with a new title search by November 25, 2016 showing that Ms. Kaltenegger's name had been removed from title (the "New Title Search Clause"). Ms. Kaltenegger's name was removed from title by that date and Mr. Kaltenegger provided Ms. Watts with a new title search showing this. Ms. Watts believes she sent the new title search to Mr. Liu but she has no record of having done so. Mr. Liu has no record or recollection of having received it.
- [29] On November 21, 2016, the vendor of 241 English Bluff Road accepted Ms. Cao's offer for that property. Thus, by November 21, 2016, Ms. Cao had two binding contracts to purchase both 917 Pacific and 241 English Bluff Road.

4. The Deal Collapses

- [30] In the days before the deposits were due on both properties, Mr. Li and Ms. Cao spoke to some friends who suggested they were overpaying for both properties. On November 22, 2016, Mr. Li told Mr. Liu that he wanted to reconsider both deals. Mr. Liu responded, advising that Ms. Cao was legally bound to pay the deposits and complete the contract. He sent the following WeChat message to Mr. Li:

I just asked my manager, he said that if [we] did not pay the deposit by tomorrow evening, the other party is entitled to start a legal action against us. He said you'd better ask a lawyer first.

[31] Mr. Li then spoke with Mr. Liu over the phone and instructed him to try to negotiate a better price with Mr. Kaltenegger through Ms. Watts. Mr. Liu contacted Ms. Watts but after consulting with Mr. Kaltenegger she reported that he was unwilling to negotiate further on the price. Mr. Liu wrote to Mr. Li by WeChat as follows:

The other party just replied, saying not a penny less. If we don't pay deposit by tomorrow, they will ask their lawyer to send a lawyer's letter. There is nothing else I can do.

[32] Mr. Li responded with an audio message as follows:

Well, forget it, if he is going to handle it this way, that is fine. Let him send the lawyer's letter. We've decided not to buy it.

[33] Mr. Li and Mr. Liu continued to discuss the deposit on WeChat. On November 23, 2016, Mr. Li told Mr. Liu he was having trouble getting the money out of China for the down payment. However, Mr. Li admitted in cross-examination that this was not true. He described this as an "excuse" that he anticipated Mr. Liu would pass on to Ms. Watts in an effort to discourage Mr. Kaltenegger from suing.

[34] Also on November 23, 2016 Mr. Liu advised Ms. Watts by email that Ms. Cao would not be paying the deposit. By letter dated November 25, 2016, counsel for Mr. Kaltenegger wrote to Ms. Cao demanding payment of the deposit and extending the time for payment to November 28, 2016.

[35] On November 30, 2016, Mr. Kaltenegger elected to repudiate the contract in the face of Ms. Liu's refusal to pay the deposit and complete the sale. He renewed his efforts to sell the property but the market had begun to soften. On May 2, 2018, some 17 months later, he finally entered into a contract of purchase and sale with another buyer to sell 917 Pacific for \$3,480,000. This is \$970,000 less than what Ms. Cao had agreed to pay.

[36] Ms. Cao also refused to pay the deposit for the English Bluff Road contract but I am advised the vendor of that property took no legal action against Ms. Cao.

III. Issues

[37] I will first consider whether Ms. Cao was entitled to rescind the contract either on the grounds of misrepresentation or mistake as to the unidentified western property line. I will next consider whether she was entitled to rescind the contract on the grounds of non est factum because her purported misunderstanding of the binding nature of the agreement. I will then decide if the failure to comply with the New Title Search Clause gave rise to a right of rescission.

[38] I will next address what, if any, damages Mr. Kaltenegger may be entitled to followed by consideration of his claim for special costs.

[39] I will then turn to Ms. Cao's claims against Mr. Liu and West Coast Realty and determine whether Mr. Liu was negligent performing his duties as a realtor for Ms. Cao or if he misrepresented the effect of the deposit clause in the contract. Finally, I will consider what, if any, damages Ms. Cao may be entitled to recover from Mr. Liu and West Coast Realty.

IV. Was Ms. Cao Entitled to Rescind the Contract?

1. Representation of 917 Pacific's Property Line

(a) Parties' Positions

[40] Ms. Cao argues Mr. Kaltenegger misrepresented 917 Pacific as including the TFN Lands. She argues that by seamlessly mowing the entire lawn area and maintaining some landscaping on the edge of the brush area, Mr. Kaltenegger created an impression that these areas were part of the property. She argues by presenting the property for sale in this state, without disclosing at least the approximate location of the boundary, Mr. Kaltenegger misrepresented what land was included in the property. She argues his silence in these circumstances constitutes a misrepresentation that entitles her to rescind the contract.

[41] She goes further and argues Mr. Kaltenegger knew or ought to have known that Ms. Cao believed the property included the TFN Lands and he entered the contract knowing Ms. Cao was mistaken and had been misled. Ms. Cao must establish that Mr. Kaltenegger knew this in order for her to succeed on her misrepresentation claim because the contract has an entire agreement clause (clause 8) that excludes most representations that are not made part of the contract. Innocent or negligent representations "short of recklessness that qualifies as deceit" are excluded by that clause: *Baynham v. Terry*, 2003 BCSC 422. There Justice Grist stated at para. 21: "Deceit will be found if a false statement is made, knowingly, or without belief in its truth, or recklessly, careless whether it is true or false." Ms. Cao must therefore bring her misrepresentation claim into this more stringent category.

[42] Mr. Kaltenegger argues he made no representation about the boundaries. He correctly identified the lot area in the MLS listing as 14,392 square feet and that is the size of the property Ms. Cao agreed to buy. He showed 917 Pacific in the state it had always been kept. He maintained the lawn and brush area in the same state throughout the time he owned the property and it was in a similar state when he bought the property in 2009. That is verified by satellite images dating back to 2008 presented through Michael Lomax, a witness called by Ms. Cao. Mr. Kaltenegger did nothing different to the yard when he listed the property and presented it for sale.

[43] Mr. Kaltenegger argues caveat emptor (buyer beware) generally applies to the sale of land and it applies here. Caveat emptor may be negated where there is fraud, non-innocent misrepresentation, or mistake (among other reasons that do not apply here): *Nixon v. MacIver*, 2016 BCCA 8 at paras. 31-33, 47. It may also be negated by a failure to disclose

known latent defects that make the property uninhabitable and are not discoverable through reasonable inquiry: Nixon, paras. 33-34, 47. Mr. Kaltenegger argues none of these exceptions apply here and it is for the buyer to ascertain the specific boundaries of a property if that is a concern to them. He argues property boundaries are discoverable through reasonable inquiry and they do not equate to known latent defect that must be disclosed.

(b) Legal Principles

- [44] Both Ms. Cao and Mr. Kaltenegger largely rely on general principles of contract law and misrepresentation. They have cited only two cases - one each - that specifically address a seller's obligation to disclose the location of a boundary where the appearance of the property might reasonably cause to buyer to misunderstand its boundaries. These two cases reach opposite conclusions on substantially similar facts. Neither is binding on me.
- [45] Ms. Cao cites an 1870 decision in *Denny v. Hancock* (1870), L.R. 6 Ch. App. 1 (Eng. C.A.), where a buyer refused to complete the sale of land when he discovered the property did not include an area he believed was part of the property when he agreed to buy it. The buyer inspected the property with a survey plan that had been provided by the seller. There was an iron fence on the ground that appeared to demarcate the western boundary of the property and three substantial trees inside the fence that were significant to the buyer. The three trees were not indicated on the survey plan, although other trees that stood within the property boundaries were specifically marked. The buyer argued he was misled by the survey plan and by the location of the iron fence which appeared to mark the western boundary.
- [46] The Vice Chancellor found the survey plan was not misleading because the three trees were not marked on it, whereas all of the trees that were actually on the property were clearly indicated. He found it "impossible that any rational man, if he thought he was entitled to have the trees as part of his purchase, would not have remarked upon the total absence of them from the plan." He said the buyer made no inquiry about the boundary but was bound to do so. He ordered specific performance of the contract.
- [47] The Court of Appeal overturned the Vice Chancellor's decision finding that the survey plan was misleading. James L.J. stated:

I have no doubt whatever that if I had done exactly what this gentleman [the buyer] did, and taken that plan in my hand, and gone through the property, and found a shrubbery, or ground covered partly with shrubs and partly with thorns, with an iron fence outside, I should have arrived at exactly the same conclusion as this gentleman did, and I should have gone to the sale and bid in the belief that I was buying the best up to the fence with those trees upon it.

- [48] He went on to find that the survey plan was "calculated to induce anybody to believe" the whole of the area was included in the property sold. As a result, James L.J. found the buyer bought the property under a mistake that was caused by the plan as drawn by the vendor's agent.
- [49] James L.J. noted that even apart from the plan, "there was on the ground an apparent visible boundary [the iron fence], quite distinct from the almost invisible real boundary" and this fact alone could have justified the buyer's refusal to complete.
- [50] Mellish L.J. reached the same conclusion. He said any person viewing the property "whether he carried a plan with him or not" would naturally assume the iron fence marked the boundary. He said this leaves only the question of whether the buyer's mistake was induced by the survey plan. Like James L.J., he found the plan was "calculated to deceive" and that, under those circumstances, the buyer "could not be compelled to complete the purchase."
- [51] By contrast, Mr. Kaltenegger cites *Stotts v. McArthur* (1991), 75 Man. R. (2d) 212, 1991 CanLII 12042 (C.A.) which has very similar facts to *Denny* but reaches the opposite conclusion. In that case there was a chain-link fence that enclosed what appeared to be the backyard of the property. However, the boundary was contained within the fenced area. The fence enclosed some 30 or 40 feet of the neighbouring land which was owned by the City of Winnipeg. A moveable frame shed and a small portion of a concrete swimming pool apron, both within the fenced areas, extended from the seller's property on to the City's land. The seller knew a portion of the fenced area was outside of the property but did not know the full extent of it. The seller did not disclose to the buyer that a portion of the fenced area was not part of the property. The buyer believed the entire fenced area was part of the property when he agreed to purchase it and sought to rescind the contract upon learning of the true boundary. He argued the seller's presentation of the property without disclosing his knowledge of the boundary was a misrepresentation.
- [52] The trial judge found the buyer had "ample opportunity to investigate the extent of the property" but neglected to do so. Despite this, he found the seller's silence constituted a misrepresentation. The Court of Appeal reversed this result, finding that "mere nondisclosure does not constitute misrepresentation". Speaking for the Court of Appeal, Philip J.A. said:
- [17] No authorities are cited in support of the statement of the trial judge that "silence ... in law constitutes a misrepresentation ...;" and his conclusion that the defendant, in the circumstances, "was obliged to disclose to the plaintiffs" that the backyard fence enclosed more land than he could transfer to them, and the existence of the other items that the trial judge characterized as defects.

- [18] This is not the law as I understand it. "The general rule is that mere nondisclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to a contract to disclose material facts to each other, however dishonest such nondisclosure may be in particular circumstances". See: Chitty on Contracts, General Principles (26th ed.), para. 419. The maxim caveat emptor is very much alive. In DiCasteri, Law of Vendor and Purchaser (3rd ed.), Vol. 1, at para. 239, the author comments on the duty of the vendor to disclose:

It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of the land which may be material to the purchaser's judgment. The purchaser must form his own judgment: caveat emptor. This principle, though much criticized, continues to demonstrate a disconcerting durability.

- [19] The essence of the plaintiffs' claim is their plea of fraudulent or negligent misrepresentation. [] The conclusion of the trial judge that the defendant was obliged to disclose defects was wrong in fact and in law. No such duty existed, and no liability for damages arose. The damages awarded for the defendant's failure to disclose cannot stand.
- [53] Ms. Cao argues this decision is qualified by the Court's observation that no authorities were cited in support of the trial judge's statement that "silence in law constitutes a misrepresentation " She argues Denny, along with other principles discussed in authoritative texts, support the notion that misrepresentation can occur by silence.
- [54] In *Misrepresentation* (Toronto: LexisNexis, 2016) at p. 177-178, Professor Bruce McDougall states that silence per se "is not a way of making a representation". He writes, "[m]ere non-disclosure of facts, outside fiduciary contexts, will not be sufficient to constitute misrepresentation." Something more is needed. He suggests, however, that depending on the nature of the representor's conduct within the context of the parties' relationship, a representation "can be made implicitly by conduct or even lack of expected conduct." He cites Denny as an example, suggesting the erection of the iron fence "was said to be a representation by action indicating the boundary of the property."
- [55] In *The Law of Contracts* (3d), (Toronto: Irwin Law Inc. 2020) at pp. 331-332 Professor John D. McCamus writes that traditional doctrine of contract law holds that a party negotiating a contract has no duty to disclose material facts to the other party. However, in exceptional circumstances, "silence or non-disclosure is treated, in effect, as misrepresentation and provides a basis for rescission " Professor McCamus identifies those exceptional circumstances as (1) where partial disclosure of true facts (or "half-truths") creates a misleading impression; (2) where a party actively conceals the truth; (3) where changing circumstances affect the truth of an earlier statement; and (4) in contractual relationships requiring the utmost good faith.
- [56] Ms. Cao argues that Mr. Kaltenegger's presentation of the property is a "half-truth" such that his silence as to the location of the western boundary constitutes a misrepresentation.

(c) Analysis

Presentation of the Property

- [57] I am not persuaded that the mere presentation of 917 Pacific in its ordinarily maintained state constitutes a misrepresentation. As outlined by Professors McDougall and McCamus, there is no duty to disclose material facts and the circumstances where silence or inaction might be a misrepresentation are narrow. Apart from Denny, silence has not been found to overcome caveat emptor as it relates to a buyer's responsibility to ascertain property boundaries.
- [58] Denny is distinguishable from this case in that the iron fence left the impression of a property boundary. There is no such fence or other apparent indicator on or near 917 Pacific to suggest a western boundary. While I agree with Ms. Cao that a reasonable person would likely believe the entire lawn area is part of the property, this would not inform the person of the actual location of the boundary. I am not convinced that a person could reasonably assume the edge of the bluff was a boundary line, there being nothing on the land to represent it as such. In my view, the absence of anything indicating a boundary should put a reasonable purchaser - or at least their realtor - to an inquiry about where the boundary might be located.
- [59] Even where a fence might suggest a boundary, Stotts stands for the proposition that it is still up to buyers to satisfy themselves of the location of a boundary and the seller has no obligation to disclose the location. Since there was no fence or visible indicator in this case to mislead Ms. Cao, I need not decide whether Stotts should be followed in British Columbia. I would observe, though, that determining property boundaries in British Columbia in 2016 is vastly different than it was in 1870 England when Denny was decided. Simple searches or inquiries can now be made by purchasers or their realtor to determine at least the approximate location of an unmarked boundary and alert buyers to the potential need for a survey.
- [60] For example, Ms. Lomax gave evidence of a website maintained by the Municipality of Delta called "DeltaMaps". This is an interactive online GIS-based tool that allows anyone with an internet connection - and certainly a realtor - to locate a property within Delta and see its boundaries, including as depicted on a photomap using a platform similar to Google Earth. The photomap appended to these reasons is from DeltaMaps. While this website cannot be relied upon to show the precise boundaries, its approximation is sufficient to identify an issue that may require further investigation or a full survey.
- [61] Ms. Watts testified that other sources of boundary information are readily available, including by checking with the municipality or potentially through MLS online services available to realtors.

- [62] In my view, an unmarked boundary line cannot be equated with a known latent defect that a seller must disclose. Boundaries are ascertainable through a buyer's reasonable inquiry. Contrary to Ms. Cao's submission, showing a property in its ordinarily maintained state, even if that state leaves a misapprehension that neighbouring land is included in the property, does not constitute a "half-truth" that converts a seller's silence into a misrepresentation.
- [63] Mr. Kaltenegger also argues that Ms. Cao and her realtor ought to have known that the actual western boundary did not conform with the contour of the bluff. He points to an unofficial plan of the lot taken from the DeltaMaps website and a much older plan from the Land Title Office records. Ms. Watts sent the DeltaMaps document to Mr. Liu by email dated November 18, 2016. It is not the photomap appended to these reasons but it shows the western property line of 917 Pacific in a slight "V" shape pointing back towards the property. The Land Title Office documents show the same shaped boundary. By contrast, the contour of the ridge at the top of the bluff forms a V-shape pointing out towards Georgia Strait. Mr. Kaltenegger argues that receipt of this plan, though unofficial, ought to have put Ms. Cao and Mr. Liu on their inquiry about the location of the western boundary if that was of concern to them.
- [64] I agree. In *Manita Investments v. T.T.D. Management Services*, 2001 BCCA 334 the vendor of a motel property had negligently misrepresented the boundaries of the property to the purchaser. The purchaser was also given a map depicting the correct boundaries of the property. The boundaries as correctly shown on the map did not accord with the seller's representations or what appeared to be the boundaries on a visual examination of the property. Speaking for the Court of Appeal, Justice Finch (as he then was) held that it was not reasonable for the purchaser to rely on the seller's negligent misrepresentation given the discrepancy between it and the map. He found that a reasonable purchaser having received the map would have been put on its inquiry and taken steps to ascertain the boundary of the subject property.
- [65] With the maps provided by Ms. Watts and the absence of any physical indicator of the property line on the ground at 917 Pacific, Ms. Cao, or at least Mr. Liu, had ample indication of the uncertainty of the western boundary. It was their responsibility to inquire about the matter if it was of concern to Ms. Cao.
- [66] Nor am I persuaded that Mr. Kaltenegger knew or ought to have known that Ms. Cao wrongly believed the western boundary extended to the edge of the bluff. Mr. Kaltenegger knew Ms. Cao was represented by a realtor and expected that if the property line was significant to her, she would further investigate the issue. The property line had never impeded his use or enjoyment of the land and he did not consider it would be an issue for Ms. Cao either. He said the following in cross-examination:

Q. You were concerned that if you disclosed the true boundaries your property would receive a lower price?

A. Absolutely not.

Q. You think it's still your property knowing it is much smaller than

A. Nobody in all the years I owned that property ever -- from First Nations people, I didn't even know about this Northwest Holding people [sic] company that they leased it from the First Nations. Nobody's ever came [sic] to me in all the time I owned that land saying I can't be on that property or to stay off it or anything like that. It wasn't a concern. It had a lovely view from anywhere on the property. I had no trees on the property. I would have never thought to tell somebody -- I enjoyed that property for eight --seven or eight years. We loved it. Everybody who came over loved it. We never had an issue with that bluff.

Q. But you don't know what would happen in the future do you?

A. No but if somebody asked me where the property line was and the rules of whether you could use it or not use it, I still would have bought it.

Q. Do you not recognize that other people would have a different opinion?

A. The property is [] 14,000 square feet. You have the right to go get a map, do a survey or check the map to see where the property lines are. When I buy a house, I check property lines. Or look at -- I get a disclosure. Shows you where the house is relative to the property. If that was a concern, I would have asked more questions about what was going on.

Q. Basically, you thought the rule buyer beware applied to this transaction.

A. Honestly I didn't even think about it. When I sell the property I didn't think about that property line having an issue or a boundary where it is -- my property ends, where First Nation began. Never had a problem. Nobody ever complained to me. So I never even thought about it -- saying, hey, that's where my property ends be careful. It never even dawned on me to say that. I never had a problem in the eight years I owned that home.

Q. You recognize that when someone looked at your property as a buyer, that they would assume they were buying all of the property out to the edge of the bluff.

A. I'm not sure what they assumed. If they wanted to buy the property they could look at the details of the property with the City.

[67] Mr. Kaltenegger did not know what Ms. Cao understood about the western boundary. While he said he had not considered whether "buyer beware" applied to the transaction, I find he must have at least considered the possibility that Ms. Cao did not know that the western boundary crossed the back lawn. However, as the above exchange indicates, he considered that to be a matter for her to investigate. For the reasons I have outlined, I find he was correct. He did not do anything to conceal the boundary or mislead Ms. Cao as to its location. As I have said, simply showing the property in its ordinarily maintained state is not a misrepresentation.

[68] I therefore find that Mr. Kaltenegger did not misrepresent the property line for 917 Pacific and this issue did not permit Ms. Cao to rescind the contract.

Property Disclosure Statement

[69] Ms. Cao further argues Mr. Kaltenegger misrepresented the property in the Property Disclosure Statement entitling her to rescind the contract. Specifically, she argues Mr. Kaltenegger falsely answered the following questions:

- Are you aware of any encroachments, unregistered easements or unregistered rights-of-way?

Answer: No.

- Have you received any other notice or claim affecting the Premises from any person or public body? Answer: No

- Have you received any other notice or claim affecting the Premises from any person or public body? Answer: No.

[70] Ms. Cao argues that TFN or its lessee, Northwest Holdings Society, has encroachments, unregistered easements, or unregistered rights-of-way on the property in that the occupant of 917 Pacific is prohibited from trimming trees located on the TFN Lands to maintain the view. She further argues that Mr. Kaltenegger had received notices or other claims affecting the property, namely notices from the Northwest Holdings Society and TFN in 2013 imposing a moratorium on Pacific Drive property owners trimming trees on TFN Lands along the bluff.

[71] For a time, TFN and Northwest Holdings Society permitted the residents of Pacific Drive to trim trees along the bluff to maintain their views as long as they did not cut trees down or impact the slope stability. However, during the time Mr. Kaltenegger owned the property, a dispute arose after certain Pacific Drive residents (not Mr. Kaltenegger) were accused of "inappropriate trimming activity". Pacific Drive residents were apparently given a notice telling them to stop trimming trees on TFN lands. Mr. Kaltenegger does not recall receiving this notice, although he acknowledges that his former spouse might have. He said the dispute was not of concern to him because he did not need to trim trees on the bluff to maintain his view.

[72] On September 23, 2015, TFN passed a Tree Regulation that prohibits anyone from trimming trees on the bluff without prior authorization from TFN's Director of Lands. The matter is now in litigation with the Pacific Drive owners claiming, among other things, that Northwest Holdings Society and TFN are bound by an easement agreement that was under negotiation in 2018 and would permit Pacific Drive owners' access to TFN land along the bluff.

[73] Ms. Cao argues the restrictions on tree trimming and the notice to stop trimming trees ought to have been disclosed on the Property Disclosure Statement. Her arguments can be dismissed for four reasons.

- [74] First, "Premises" is defined in the Property Disclosure Statement as "the premises or bare-land strata lot located at 917 Pacific Drive, Tsawwassen V4M 2K2." Contrary to Ms. Cao's submission, it does not include the adjacent TFN Land and there is no basis to interpret it as doing so. There is no encroachment, unregistered easement or unregistered right-of-way on the "Premises" as defined in the Property Disclosure Statement.
- [75] Second, the moratorium on trimming trees on TFN's land is not a notice "affecting the Premises". No one has the right to trim trees on their neighbour's land. While the moratorium might impact the view from some of the Pacific Drive homes, it does not affect the properties themselves. Nor does it affect the view from 917 Pacific.
- [76] Third, the Property Disclosure Statement was not made part of the Contract and, by operation of the entire agreement clause (clause 8), it has no contractual force. Ms. Cao argues that Mr. Liu was negligent in not making the Property Disclosure Statement part of the contract but even if he was, the result is immaterial because Mr. Kaltenegger's responses in the statement were truthful as they related to 917 Pacific.
- [77] Fourth, Mr. Kaltenegger denies receiving notices from TFN or the Northwest Holdings Society regarding trimming of trees on the TFN Lands, although he was generally aware of a dispute over tree trimming between the Pacific Drive Owners Association and the Northwest Holdings Society. He does not dispute that his ex-wife may have received notices or that they might have been delivered to his home, but he does not recall seeing them himself. I accept that evidence. To the extent Mr. Kaltenegger may be bound by the Property Disclosure Statement, his obligation is to answer the questions truthfully to the best of his "current actual knowledge of the state of affairs of the property": Nixon at para. 48. I am satisfied he met this obligation.
- [78] Thus, I find that even if Ms. Cao could rely on the property disclosure statement, Mr. Kaltenegger made no misrepresentation in it and this does not provide a basis for Ms. Cao to have rescinded the contract.

2. Mistake of Fact

- [79] Ms. Cao argues she was (or would have been) excused from performing the contract by operation of unilateral mistake of fact, that being that the property included the TFN Lands. She argues the mistake is substantial in that:
- a) the TFN Lands, which she says measure 2,955 square feet, are significant both in size and to protect the view, such that their exclusion fundamentally changes the nature of the property she thought she was buying; and
 - b) there is a risk that TFN or its lessee might construct something on the TFN Lands, like a fence or another structure, that could diminish the enjoyment of 917 Pacific.

- [80] Counsel for Mr. Kaltenegger takes issue with the TFN Lands being measured at 2,955 square feet. The calculation was contained in the expert report of of Andrew Jenkins, a land surveyor who was qualified to give expert opinion evidence for Ms. Cao. His calculation was based on the work of a survey crew operating under his direction. Counsel argues there is too much uncertainty about how the TFN Lands were surveyed and measured to arrive at a reliable calculation of the area.
- [81] I find that nothing turns on the precise size or measurement of the TFN Lands. I accept from the aerial or satellite images (including that appended to these reasons) that the TFN Lands are of a fairly substantial size. Had Ms. Cao understood they were part of 917 Pacific Drive, it would constitute a fundamental difference between the nature of the property she thought she was buying and the property that she agreed to buy. In fact, I find it would be a fundamental mistake even if her understanding had been that the property extended only to the end of the lawn. However, I am not persuaded this substantial error would have entitled her to rescind the contract on the basis of unilateral mistake.
- [82] In *First City Capital Ltd. v. British Columbia Building Corp.*, [1989] B.C.J. No. 130 at para. 31, 1989 CanLII 2868, Chief Justice McLachlin, then of this court, summarized the application of unilateral mistake in contract law as follows:
- the equitable jurisdiction of the Courts to relieve against mistake in contract comprehends situations where one party, who knows or ought to know of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake. In such cases, it would be unconscionable to enforce the bargain and equity will set aside the contract.
- [83] Chief Justice McLachlin, at para. 29, observed it is not necessary to prove actual knowledge on the part of the non-mistaken party. She said "one is taken to have known what would have been obvious to a reasonable person in light of the surrounding circumstances".
- [84] In *1001790 BC Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321 at para. 50, the Court of Appeal added that a "lack of due diligence by the mistaken party in failing to read the document may weigh against unconscionability."
- [85] In essence, the basis for seeking relief in the case of a unilateral mistake is an allegation of fraud or equitable fraud: *Windjammer Homes Inc. v. Generation Enterprises*, [1989] B.C.J. No. 278 at para. 10, 1989 CanLII 2872 (B.C.S.C.). However, as McLachlin C.J.S.C. noted in *First City* at para. 27, fraud in this sense does not refer to the tort of deceit or strict fraud in the legal sense. Rather it refers to a "broader category of equitable or constructive fraud" which she described as "transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained."

- [86] Nevertheless, as explained in *Windjammer Homes* at para. 11, the non-mistaken party must still have acted in way as to "gain an advantage unfairly or in bad faith". This may amount to "snapping" at an offer to take advantage of the other party's mistake or doing nothing to enlighten the mistaken party. A degree of sharp practice is necessary.
- [87] I have found earlier that Mr. Kaltenegger did not know Ms. Cao misunderstood the boundaries of 917 Pacific but it must have occurred to him that she could be under a misapprehension. However, he considered that to be a matter for her to ascertain through her own inquiries, presumably assisted by her realtor, and not something he had a positive obligation to disclose. I have found him to be correct in this regard. He was not aware of what, if any, inquiries she or Mr. Liu might have made about the boundaries but it was not his duty to find out.
- [88] Thus, Mr. Kaltenegger cannot be imputed with constructive knowledge that Ms. Cao misunderstood the location of the western boundary. At best, he had reason to believe she may be acting under a misapprehension but, equally, there was reason for him to believe she may have investigated the matter if it was a concern for her. He engaged in no "sharp practice" and was entitled to rely on caveat emptor.
- [89] I would add that Ms. Cao's (or Mr. Liu's) lack of due diligence to question or investigate the location of the western property line, given the absence of any apparent boundary marker, is a further reason for rejecting Ms. Cao's plea for rescission based on mistake: 1001790 BC Ltd. at para. 58.
- [90] I find that unilateral mistake does not provide a basis for Ms. Cao to have rescinded the contract

3. Non est Factum

(a) Parties' Positions and Legal Principles

- [91] Ms. Cao argues she was excused from completing the contract because she misunderstood a fundamental term, namely the effect of the deposit clause. Clause 2 of the contract required Ms. Cao to pay a deposit of \$300,000 by November 23, 2016. She did not do so.
- [92] Ms. Cao claims she and Mr. Li believed she had the option not to proceed with the contract as long she did not pay the deposit. She claims Mr. Liu advised them when she signed initial offer that the contract would expire and be of no force or effect if they did not pay the deposit. She says they relied on Mr. Liu's advice and his explanation of clause 2 because neither of them can read English.
- [93] Ms. Cao argues her misunderstanding is material because it goes to the very question of whether a binding agreement was formed. On her purported understanding at the time she signed the agreement, she believed it was not binding on her until she paid the deposit and she argues the doctrine of non est factum excuses her refusal to complete the contract.

(b) Legal Principles

- [94] Non est factum is "a concept intended to give relief to the signer of a contract whose consent was genuinely lacking, who signed a contract by mistake, believing she signed something fundamentally different": 1001790 BC Ltd. at para. 48. The party seeking to avoid the contract has the onus of establishing the contract they signed was fundamentally different in nature to the one they believed they were signing, that they signed it as a result of a misrepresentation as to the nature and character of the document, and they were not careless in doing so: 1001790 BC Ltd. at para. 49; Marvco Colour Research Ltd. v. Harris, [1982] 2 S.C.R. 774 at p. 778.
- [95] In Farrell Estates Ltd. v. Win-Up Restaurant Ltd., 2010 BCSC 1752 at para. 100, Justice Dardi summarized the principles of non est factum as follows:
1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.
 2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
 3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

(c) Analysis

- [96] Ms. Cao relies on Zhang v. Soong, 2012 BCSC 758 where the defendant, Ms. Soong, an elderly woman who did not read English, was persuaded to put her home up for sale with considerable reluctance. Her realtor received an offer from the plaintiff, Mr. Zhang, and suggested a counteroffer to Ms. Soong. Ms. Soong deposed the realtor did not explain the counteroffer but simply pointed to where Ms. Soong was to sign. Ms. Soong deposed the realtor told her she could stop the sale at any time. The realtor denied this and recalled she explained the binding nature of the document to Ms. Soong. The buyer, Mr. Zhang, accepted the counteroffer and, when Ms. Soong refused to complete, he sued her for specific performance and applied for judgment in a summary trial.
- [97] Justice Gray accepted that Ms. Soong genuinely believed when she signed the counteroffer she could stop the sale at any time and found this would constitute a "fundamentally different" agreement than the one she actually signed (para. 88). She found at paras. 89-94 that it made no difference that it was Ms. Soong's own realtor - her "trusted advisor" - who represented the contract to her as one she could put a stop to any time.
- [98] Thus far, the case provides support for Ms. Cao's position.

- [99] However, because of conflicts in the evidence, Gray J. could not determine on the summary trial application whether Ms. Soong was careless in signing the contract. She ordered an expedited trial on that issue and after that trial gave oral reasons for judgment (which are not published) on that aspect of the case: *Zhang v. Soong* (31 August 2012), Vancouver Reg. No. S112627.
- [100] In her oral reasons, Gray J. accepted the realtor's evidence that she had not told Ms. Soong that she could rescind the contract. She stated at para. 45: "It is unlikely that a realtor would give that advice, because it is contrary to the documents and would lead to problems." She found Ms. Soong truly believed she had the right to rescind the contract and was mistaken in this respect. She found Ms. Soong must have misunderstood what the realtor told her. After finding the buyer played no role in Ms. Soong's misunderstanding, Gray J. observed he was the innocent party and Ms. Soong was in the better position to have avoided the mistake. For this reason, she ultimately found Ms. Soong failed to establish the defence of *non est factum*.
- [101] Here, if Ms. Cao believed she could unilaterally terminate the contract without penalty by not paying the deposit, her understanding would be fundamentally different than the contract she signed: Zhang at paras. 93-94. This mistake would be a fundamental one because it goes to the very question of whether a binding contract was made: Zhang at para. 88. That would leave the question of whether Ms. Cao was careless in signing the contract and whether Mr. Kaltenegger is the innocent party.
- [102] However, I need not get to that question because I am not persuaded that either Ms. Cao or Mr. Li actually believed they could void the contract by not paying the deposit. However, even if they did actually believe that, I find Mr. Kaltenegger was the innocent party and Ms. Cao was in the better position to have avoided the misunderstanding.

Ms. Cao knew the effect of the contract

- [103] I am satisfied Ms. Cao and Mr. Li knew the contract would be binding if accepted by Mr. Kaltenegger. I am also satisfied that Mr. Liu did not misrepresent the deposit clause in his explanation to Ms. Cao and Mr. Li.
- [104] Ms. Cao was clear in her evidence that she and Mr. Li wished to make a "no subject" offer because it would be more attractive to Mr. Kaltenegger and they believed it would get them a better price. There would be no strategic advantage in making a no-subject offer that was only binding at the buyer's option. Mr. Li and Ms. Cao are both experienced in matters of business and contracts. They would certainly appreciate and understand this logical flaw.

- [105] Ms. Cao and Mr. Li had also bought two other properties in Vancouver using the same standard form contract of purchase and sale. Mr. Li confirmed he had at least one of those contracts explained to him by his realtor. Presumably, this would have included an explanation of the deposit clause. Thus, if Mr. Liu had given incorrect advice about the deposit clause, Mr. Li and Ms. Cao would likely have noted the inconsistent advice and sought clarification.
- [106] Significantly, nowhere in the extensive WeChat communications between Mr. Li and Mr. Liu does Mr. Li state he or Ms. Cao misunderstood the binding effect of the contract. Nor does he question Mr. Liu about his advice on the contract, even after Mr. Kaltenegger began threatening litigation. Mr. Li claims he raised it verbally with Mr. Liu but given the volume of WeChat messages exchanged about offers, the contract, the deposit, and the prospect of legal action I find Mr. Li would likely have mentioned a misunderstanding of the contract or a misrepresentation at some point in these exchanges.
- [107] In fact, on January 7, 2017, after consulting with a "friend who has experience in this area" about Mr. Kaltenegger's (then potential) law suit, Mr. Li shared his litigation strategy with Mr. Liu and asked him to help negotiate a resolution with Mr. Kaltenegger's realtor. This is not consistent with Mr. Li believing Mr. Liu had placed him in this difficult circumstance of a binding contract with bad advice about the deposit clause.
- [108] The allegation that Mr. Liu gave bad advice was not raised until December 2019 - more than three years after Ms. Cao refused to complete the contract and after the parties were deep into litigation. The allegation was first made in a December 2019 amendment to the notice of civil claim in the Cao v. Liu action. Notably, in an affidavit sworn a year earlier, Ms. Cao did not attribute her purported misunderstanding of the contract to Mr. Liu's advice. The late introduction of this alleged representation undermines its credibility, particularly when the WeChat messages are silent about it.
- [109] I also find it is unlikely that Mr. Liu, as a realtor with some experience, would have represented to Ms. Cao and Mr. Li that an accepted offer could be avoided by not paying the deposit. Ms. Cao argues Mr. Liu was motivated by the prospect of a substantial commission on two sales of view properties in Tsawwassen and this clouded his judgment and advice. However, giving patently wrong advice that a contract could be voided by not paying the deposit would be a substantial risk for Mr. Liu, given the real potential for both offers being accepted and the false advice being exposed.

Mr. Li was contemplating multiple residential properties for investment

[110] Ms. Cao argues her evidence and that of Mr. Li about Mr. Liu's advice should be preferred over Mr. Liu's because it only makes sense for them to have put offers on two residential properties in Tsawwassen if they believed they would not be bound to buy both properties. The vital premise of this argument is that Mr. Li and Ms. Cao wanted to buy only one property for their own use and were not looking to residential properties in Tsawwassen for investment. I do not accept this premise.

[111] The WeChat communications between Mr. Li and Mr. Liu establish that Mr. Li was considering buying residential view properties in Tsawwassen for investment. On October 15, 2016, Mr. Li and Mr. Liu discussed residential and investment properties. Mr. Liu, who was in Beijing at the time, suggested Mr. Li consider buying property in Tsawwassen:

Mr. Liu:

This is the city with unparalleled ocean views, you can take the ferry to Victoria from this city. This is the city with the best real estate market last year. [] Nearby, the largest shopping center in BC just opened.

Mr. Li [audio message]:

I know, Xiao Liu, I know the city Tsawwassen. When you are back, let's go to see it, OK?

[112] Their exchange continued with a discussion about street-front commercial properties on 4th Avenue in Vancouver that could be torn down and replaced with condominium developments. Mr. Li then summarized his plan to Mr. Liu, stating he was interested in investing in both street-front commercial properties and residential view properties:

Mr. Li [audio message]:

Right, this is the situation. So I think there is also room for residential properties. That is, the type you mentioned, the - the [properties] with resources and views are also an option. Well, the street front [properties] that can be demolished to build apartments, when compared with this, are probably a very good option too. When you are back, I think you should help me find [properties] in good location, not in Richmond, in Vancouver. Look for good locations, Um.

[Emphasis added.]

[113] Mr. Li's reference in this last message to "residential properties" (plural) indicates not only that he was considering residential view properties for investment but that he may buy more than one.

[114] On October 23, 2016, Mr. Li again brought up the potential for residential properties for investment:

Mr. Li [audio message]:

Didn't we say that you will find several - several houses and we - the several of us will go to the To view the houses next week- around next Wednesday? To see the investment [sic]. One is that Anmore, one is in North Vancouver, one is... ah- Tsawwassen.

In terms of investment - investment potential, which of these places do you think has better investment potential?

[Emphasis added]

Mr. Liu responded by sending a link to a property and the following message:

Would you like to see land or new houses?

Mr. Li responded by audio message:

This -- this land is better. Um as to houses, if the value for money we can also have a look. For me, the purpose of buying [properties] is for investment. I want investment properties. If comparing the location... there are ocean views, and the ocean views are beautiful, I can build a [house] there myself, then [I] will live there for three or four year, four or five years, five or six years before selling it. I think I can buy several houses this time, I would also like to buy land. Because now I have some funds, [I] would like to - to buy land and houses.

[Emphasis added]

[115] It is evident from these exchanges that Mr. Li was not only considering residential properties with a view for investment, but in fact he was considering buying "several houses this time". That is consistent with making offers on two different residential properties in Tsawwassen, each with a view.

[116] I am also persuaded that Mr. Li and Ms. Cao were looking at Tsawwassen for investment purposes because they had no real plans or desire to move to Tsawwassen. They had bought their home on Acadia Road near UBC in 2013 for \$11.5 million. They invested another \$1 million into renovations to make the house suit their tastes. While the view did not compare to Pacific Drive, as Ms. Cao said, there was "no comparison" between the Pacific Drive house and the Acadia Road house. "Of course I like the current house much better," she said. The Acadia Road house is 7,317 square feet - almost twice the size of 917 Pacific. Significantly, six years after they walked away from the 917 Pacific purchase, they are still living in the Acadia Road house which undermines their suggestion that they were looking to downsize with their children going off to university.

[117] Prior to viewing 917 Pacific on November 13, 2016, Ms. Cao had only been to Tsawwassen to take the ferry to Victoria. She had not previously thought about moving there and expressed no desire to do so. She said she and Mr. Li were just "browsing properties" and wanted a property with an ocean view and at least the same lot size as Acadia Road. Acadia Road's lot is 23,513 square feet which is substantially larger than 917 Pacific's 14,332 square foot lot.

- [118] She said neither the 917 Pacific house nor the English Bluff Road house particularly suited their needs. The English Bluff Road house was old and could be torn down but the lot size was substantially smaller than Acadia Road and even smaller than 917 Pacific. The view was also not as good as 917 Pacific. She said 917 Pacific had a good view but the house was still "pretty good" and it would be "a waste" to tear it down and rebuild. She said this put her in a "dilemma". Neither property seemed suitable to what they wanted for a home.
- [119] Ms. Cao and Mr. Li spent very little time inspecting the 917 Pacific house. They spent some 20 minutes viewing the whole property, including the house. Most of that time was spent in the backyard because it was the view that most interested Ms. Cao. She said they spent a "bit of time" viewing the rooms of the house but that was not her "main focus." She did not go back to see the property again before making an offer or concluding an agreement. It is improbable that Ms. Cao would give up her Acadia Road home that was tailored to fit her tastes to live in the much smaller Pacific Drive home that she viewed for mere minutes.
- [120] Against the backdrop of never having spent time in Tsawwassen, never having had a desire to live there, very briefly viewing a house that was markedly substandard compared to the Acadia Road house and sat on a much smaller lot (albeit with a "killer view"), Ms. Cao and Mr. Li made a no-subject offer to buy this property in Ms. Cao's name. I find it is highly improbable they would have purchased this as a home for themselves based on this very brief inspection.
- [121] I acknowledge Mr. Li stated in one of his WeChat exchanges with Mr. Liu that he would be prepared to live in a house for a few years and sell it at a profit later. However, Ms. Cao and Mr. Li spent such little time viewing 917 Pacific that I do not accept they intended to make it their home.
- [122] This significantly undermines Ms. Cao's claim that she and Mr. Li would not have made two different offers on two different properties unless they believed the contracts were not binding until the deposit was paid. The evidence satisfies me they were looking to invest in multiple properties in Tsawwassen.
- [123] Finally, Mr. Li stated in his direct examination that he was still considering buying both the English Bluff Road property and 917 Pacific even before he claims to have learned of his misapprehension of the deposit clause. This testimony contradicts Ms. Cao's evidence that she and Mr. Li never intended to buy two properties in Tsawwassen.
- [124] On November 21, 2016, the owner of the English Bluff Road property accepted Ms. Cao's offer. At that point, Ms. Cao and Mr. Li had binding contracts to buy both properties. In direct examination, Mr. Li was asked what he thought he needed to do once both offers were accepted. His response and the exchange that followed demonstrate he was still considering buying both properties even though he claims he still thought Ms. Cao could void the contract by not paying the deposit:

Q. So now you had two accepted offers, what were you thinking about what you needed to do at that point?

A. At that time, I knew I need to make a quick decision -- whether I want to purchase these two properties. So in the next two days, I knew that I needed to think fast and then I talked to some of my friends regarding this.

Q. Did you get some information from them?

A. All my friends said what you purchased -- this price was way too high.

Q. So what did you do?

A. Then I decided I would not to purchase either one.

Q. You were not going to pay the deposit then?

A. Of course I would not pay the deposit. Paying the deposit would mean this contract would become valid.

Q. Why did you think you did not have to pay the deposit?

A. Because Mr. Liu told me before if you don't want to buy one of these properties or if anything happened, if you don't pay the deposit then the contract will become an invalid contract.

[Emphasis added]

[125] Notably, it is after this exchange that Mr. Li claims he learned the contracts could not be voided by not paying the deposit. Thus, even when Mr. Li claims he was under the misapprehension that he could avoid either or both contracts by not paying the deposit, he was still considering buying both.

[126] I thus find Mr. Li intended to buy residential view properties for investment and I reject Ms. Cao's assertion that they would not have put offers on more than one house unless they thought they could void the contract.

(d) Conclusion on Non est Factum

[127] For these reasons, I find Mr. Liu did not represent to Ms. Cao or Mr. Li they could void either the 917 Pacific Drive contract or the English Bluff Road contract by not paying the deposit. Nor am I satisfied that Ms. Cao or Mr. Li were under that misapprehension given their business experience, their prior dealings with real estate in Vancouver using the same standard form contract of purchase and sale, and the absence of any mention of this purported misapprehension in the WeChat messages. However, even if they were under such a misapprehension, for the same reasons given by Justice Gray in her unreported decision in Zhang at para. 45, I find Mr. Kaltenegger qualifies as an innocent party. He had no knowledge or means of knowing that Ms. Cao might have executed the contract under a purported misunderstanding and Ms. Cao was thus in the better position to avoid the loss. I therefore find Ms. Cao has not established the defence of non est factum.

4. The New Title Search Clause

[128] Lastly, Ms. Cao argues she was entitled to rescind the contract because Mr. Kaltenegger failed to fulfill what she argues is a condition precedent to deliver a new title search by November 25, 2016 showing Ms. Kaltenegger had been removed from title.

[129] Before Mr. Kaltenegger put 917 Pacific on the market he bought out his former spouse's interest in the property at the price she requested but due to an oversight her name was not removed from title. Mr. Kaltenegger only learned this during his negotiations with Ms. Cao.

[130] Ms. Watts proposed the New Title Search Clause be added to clause 3 of the contract and the parties agreed. The New Title Search clause reads:

The seller shall supply a new title search by November 25th 2016 to proof [sic] that Dianne Kaltenegger has been removed from title.

[131] Ms. Kaltenegger's name was removed from title by November 25, 2016 and Mr. Kaltenegger provided Ms. Watts with a new title search confirming this. Ms. Watts believes she forwarded the new title search to Mr. Liu by email but she has no record of doing so and Mr. Liu has no record of receiving it.

[132] Mr. Kaltenegger argues there is no evidence that Ms. Watts did not send the new title search to Mr. Liu. She "believes" she did. She said she no longer has some files as a result of closing her practice and moving to Nova Scotia. Mr. Liu could not recall receiving the new title search.

[133] I find Ms. Watts did not send the new title search to Mr. Liu. Both Ms. Watts and Mr. Liu produced their email correspondence for this file. It is clear they frequently communicated by email and those electronic files were available for production. I am satisfied that if Ms. Watts had sent the new title search to Mr. Liu it likely would have shown up in one or both of their email files. The fact she lost some physical files does not explain the absence of an electronic communication sending the new title search to Mr. Liu by email.

[134] However, I am also satisfied that the New Title Search Clause is not a condition precedent, the breach of which would have excused Ms. Cao from performing the contract. At most, it is a warranty that might have given Ms. Cao a right to claim damages if she could establish any loss from not having received the new title search.

[135] Ms. Watts characterized the New Title Search Clause as a "guarantee that we will remove Dianne" from title. She denied it was a condition precedent. She testified she would have used different language in drafting it as a condition precedent, including stating expressly that the contract was "subject to" delivery of the new title search and specifying whose benefit the clause was for.

[136] The standard-form wording of clause 3 of the contract of purchase and sale used in residential real estate transactions in British Columbia states:

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

There is then a blank space to insert terms and conditions followed by this standard-

form wording:

Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

[Emphasis added]

[137] This wording was considered in *Gulston v. Aldred*, 2011 BCCA 147 at para. 36. There it was held that a term of a contract of purchase and sale requiring the seller to remediate contaminated soil by a specified date was not a condition precedent because it did not state that the term was for the sole benefit of the buyer. The court said the standard-form wording of clause 3 "dictates which terms are intended to be conditions precedent for purposes of the contract". To qualify as a condition precedent, a term added to clause 3 "must state that it is for the 'sole benefit' of one of the parties."

[138] There is no basis to distinguish *Gulston* from the present case. The absence of the necessary language in the New Title Search Clause is fatal to Ms. Cao's argument that it is a condition precedent.

[139] In addition, the contract in this case states expressly in clause 3 that there are no subjects. Ms. Cao and Mr. Li knew and intended to make a no-subject offer and Mr. Liu made this express by typing "no Subject" in clause 3 itself. Ms. Cao and Mr. Li fully understood they were making a no-subject offer. The New Title Search Clause must be interpreted harmoniously with the "no Subject" language in clause 3 and it would be inconsistent to interpret it as a condition precedent in the face the express language that the contract contained no subjects.

[140] Returning to *Gulston*, the Court of Appeal found the clause requiring remediation of contaminated soil was a warranty, the breach of which would permit the buyers to claim damages against the seller but would not entitle them to rescind the contract. In *Tang v. Zhang*, 2012 BCSC 214 at para. 18, aff'd 2013 BCCA 52 *Stromberg-Stein J.* (as she then was) found a clause similar to the New Title Search Clause to be a warranty. That clause stated: "The sellers will provide the Title Search and PDS to the buyer". *Stromberg-Stein J.* found delivery of the title search and property disclosure statement was not fundamental to the contract and amounted at best to a warranty.

[141] I find the same here with the New Title Search Clause. The purpose of the clause was to ensure that Ms. Kaltenegger's name was removed from title before the contract was to complete. That was done by November 25, 2016, the date on which the new title search was

to have been provided. Removing Ms. Kaltenegger's name from title was fundamental to the contract because only Mr. Kaltenegger was named as a seller. However, failing to deliver proof of that which had been done by November 25, 2016 was not "tantamount to frustration of the contract" and thus was not a fundamental term of the contract: Gulston at paras. 46-48.

[142] Thus, while I find Mr. Kaltenegger, through his agent, failed to comply with the obligation to deliver the new title search to Ms. Cao by November 25, 2016, this was at best a breach of a warranty entitling Ms. Cao to claim damages if she suffered any. It did not permit her to rescind the contract.

5. Conclusion on Rescission

[143] For these reasons, I find Ms. Cao was not entitled to rescind the contract. Her refusal to pay the deposit and complete the contract constitutes a breach of the contract for which Mr. Kaltenegger is entitled to claim damages against her.

V. Mr. Kaltenegger's Damages

[144] Mr. Kaltenegger claims damages assessed as the difference between the purchase price in Ms. Cao's contract and the purchase price in the May 2, 2018 contract he concluded almost 18 months later. That difference is \$970,000.

[145] He also claims damages for bridge financing costs in the amount of \$172,925.78 needed to complete the purchase of his new home without the benefit of the sale proceeds of 917 Pacific. Lastly, he seeks a total of \$48,890.21 for the maintenance costs for 917 Pacific between completion date in his contract with Ms. Cao and the completion date for the May 2, 2018 contract.

1. Damages for the Loss on the Sale

(a) Legal Principles

[146] The measure of damages for breach of a contract of purchase and sale for land is summarized as follows in Di Castri's *The Law of Vendor and Purchaser*, 3rd ed (Toronto: Thomson Reuters) (looseleaf updated May 2018), Vol. 2, Ch. 17, §889:

The measure of damages is the difference between the contract price and the resale price together with any actual costs incurred as a result of the breach. Absent a resale, the measure, basically, is the difference between the contract price and the market value at the date of the breach; normally, this is the completion date. Reasonable steps must have been taken to mitigate damages. The deposit must be taken into account. Additional amounts, such as a second real estate commission, have to be justified. To be recoverable, damages must be reasonably foreseeable.

The end result sought is to ensure that the vendor is placed, so far as money can do it, in the same position as if the contract had been performed.

The question may be put thus: how much worse off is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the non-performance of the contract?

[147] As a general rule, damages for breach of contract are ordinarily assessed as at the date of breach, but courts have a discretion to chose a different date that would arrive at a more just result: *Ranisavljevic v. Sathasivam*, 2020 BCSC 413 at para. 114. In the case of real estate, assessing damages at the date of breach may not fairly compensate the vendor who makes reasonable efforts to resell the property in a falling market: *642947 Ontario Ltd. v. Fleischer* (2001), 209 D.L.R. (4th) 182 at para. 41, 2001 CanLII 8623 (Ont. C.A.); *Ranisavljevic* at para. 115. In *Cassidy v. Smith*, 2008 BCSC 1778 at paras. 28-29, Williamson J. adopted the following principle, quoting from *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.):

a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date".

[148] It is evident from the authorities Mr. Kaltenegger cites that what constitutes a "reasonable time" after the date of breach will depend on reasonableness of the vendor's actions in trying to sell the property. For example, in *Ganges Kangro Properties Ltd. v. Shepard*, 2014 BCSC 1326, *aff'd* on other grounds 2015 BCCA 522, Justice G.C. Weatherill assessed damages based on a sale almost two years after the breach. He found at para. 310 that the market declined soon after the sale collapsed and the inability to sell the property was through no fault or failure of the vendor.

(b) Mr. Kaltenegger's Efforts to Sell

[149] Mr. Kaltenegger relisted 917 Pacific on November 25, 2016, before Ms. Cao's breach was confirmed. The list price was \$4,680,000, which he set with Ms. Watts' advice. This was about halfway between the the original list price of \$4,898,000 and the \$4,455,000 Ms. Cao had agreed to pay. Ms. Watts testified the objective in reducing from the original list price was to generate new interest in the property. She was also concerned about market impacts she attributed to the Province's introduction of a foreign buyer's tax in August 2016.

[150] On January 31, 2017, Ms. Watts re-listed the property at a reduced price of \$4,380,000. Her objective in lowering the price and re-listing the home was to get out ahead of other listings for what she hoped was going to be a "good spring market".

[151] On April 5, 2017, Mr. Kaltenegger received a subject offer from an individual named Sauola Singh Gill to purchase the property for \$4 million with a \$250,000 deposit. However, the offer included most of the household chattels, including the furniture, electronics, and pool

equipment. Only Mr. Kaltenegger's personal items "including personal art and sentimental items" were excluded. Mr. Kaltenegger counter-offered at \$4,350,000 with the deposit to be paid \$100,000 to him and \$150,000 to Ms. Watt's brokerage in trust. He also added two televisions to the list of excluded items. Mr. Gill did not respond to this counter-offer. Ms. Watts, who was acting in a dual agency on this offer, believes Mr. Gill did not respond because of the price.

- [152] Ms. Cao argues it was unreasonable for Mr. Kaltenegger to reject Mr. Gill's offer of \$4 million, or at least to only come down by \$30,000 in his counter-offer. However, this offer was unusual in that it included most of the contents of the home. While the counter-offer was only a small drop from the list price, that list price did not include the contents of the home. I am not persuaded it was unreasonable for Mr. Kaltenegger to counter-offer as he did.
- [153] I would add that this offer contained a number of subjects, including for an inspection and financing. Even if Mr. Kaltenegger had accepted the offer, we do not know if the deal would have closed.
- [154] On April 8, 2017, three days after Mr. Gill's offer, Mr. Kaltenegger received another subject offer from Gao Zhi Qiang and Luo Xiang Ping for \$3,850,000. Mr. Kaltenegger countered at \$4,350,000 and this was met with a further counter-offer of \$4 million, which Mr. Kaltenegger accepted. However, the buyers did not remove the subjects due to lack of financing and the deal did not complete.
- [155] On June 1, 2017, Mr. Kaltenegger re-listed the property with Ms. Watts at the same price of \$4,380,000 but received no offers before her listing expired.
- [156] Throughout her time trying to sell the property, Ms. Watts advertised it in Real Estate Weekly and once a month in the Vancouver Sun. She showed it on her own website and, of course, through MLS. She said she held a lot of open houses with "very qualified high-end purchasers looking at the property". Despite this, the two offers in April 2017 were the only ones she received.
- [157] After Ms. Watts' listing agreement expired in October 2017, Mr. Kaltenegger decided to try a different realtor. He listed the property with Allen Schwabe of Sutton Group - Seafair Realty. Mr. Schwabe had sold houses in Tsawwassen for two of Mr. Kaltenegger's relatives. He listed the property for \$4,398,000 but received no offers. Mr. Kaltenegger cancelled his listing after two months on December 12, 2017.
- [158] Mr. Kaltenegger then listed the property with John Zhou and Cynthia Miao of New Coast Realty whom he chose because they appeared very active in the Tsawwassen real estate market. After looking at comparable sales and discussing the price they listed the property at \$4,388,000. Mr. Kaltenegger also offered a \$20,000 bonus for any realtor who introduced a purchaser to the property on a completed transaction.

- [159] On February 22, 2018, Mr. Kaltenegger dropped the price significantly to \$3,599,000. Ms. Miao testified this was below what she considered to be the market price and suggested any experienced realtor would recognize that. She said it was a strategy to attract more interest in the property with an expectation of receiving bids above the asking price. She said the strategy did not work well so they put the price back up in April 2018.
- [160] In the meantime, Mr. Kaltenegger received offers on March 21, 2018 and April 2, 2018, both for \$2.5 million. Mr. Kaltenegger considered these low-ball offers that did not merit a response. Ms. Miao agreed and Mr. Kaltenegger did not counter either one.
- [161] On April 5, 2018, Mr. Kaltenegger re-listed the property with Mr. Zhou and Ms. Miao at \$3,980,000. Re-listing, rather than simply dropping the price, was a strategy to try to get new interest in the property. They dropped the price below \$4 million in an effort to catch potential buyers looking for properties below that threshold. I note, though, that this did not seem to work with the February price drop. Mr. Kaltenegger continued to offer the \$20,000 bonus to a buyer's realtor as an incentive.
- [162] On April 9, 2018, Mr. Kaltenegger received a subject offer for \$3 million. On his realtors' advice he counter-offered \$3.88 million (which was in the higher end of the range advised by the realtors). He received no response to this counter-offer.
- [163] On April 25, 2018, Mr. Kaltenegger met with Mr. Zhou and Ms. Miao to question them on whether they could sell the property and when. They assured him they were motivated to find a sale and they could sell it.
- [164] On May 2, 2018, Mr. Kaltenegger received an offer from a Guo Hui for \$3.2 million. Mr. Kaltenegger countered at \$3.58 million and Ms. Guo countered that at \$3.4 million. Mr. Kaltenegger further countered at \$3.48 million, which Ms. Guo accepted. The contract was finalized on May 7, 2018 and the subjects removed on May 15, 2018.
- [165] This sale did not complete, apparently due to Ms. Guo being unable to get funds out of China. However, since there was a completed contract, Mr. Kaltenegger relies on the difference between Ms. Gao's contract and Ms. Cao's contract to assess his damages against Ms. Cao. He eventually sold the property to another buyer for \$2.9 million in June 2018 and I understand has pursued Ms. Guo for the loss from her May 2018 contract.

(c) Analysis

- [166] Ms. Cao argues any damages should be assessed as at the date of the breach. She tendered an expert report of Calvin Lai, a real estate appraiser who assessed the value of 917 Pacific as of November 23, 2016 at \$4,050,000. Ms. Cao argues the difference between this value and the contract price should be the full extent of any damages (which equals \$400,000).
- [167] Ms. Cao argues damages should only be assessed at the date of a subsequent sale when there is a falling market. She argues the Metro Vancouver real estate market was not falling between the date of breach and the May 2, 2018 contract. She points to data released by the

Real Estate Board of Greater Vancouver suggesting the market for detached homes in Greater Vancouver was stronger in May 2018 than it was in November 2016. Mr. Kaltenegger and Mr. Liu dispute the admissibility of this data for the truth of its contents but I need not address that.

- [168] The trendline Ms. Cao relies upon in the Real Estate Board's data suggests the market for detached homes hit a peak in July 2016 and then declined until about February 2017. The Province introduced the foreign buyer's tax in August 2016 which may have contributed to this decline but there is no expert evidence before me linking the two. The market began to climb again after February 2017 and, according to the data, in July 2017 reached the same peak that was seen in July 2016. It then remained relatively stable until May 2018.
- [169] Thus, according to this data, the market in Metro Vancouver was falling when Ms. Cao breached the contract and it continued to fall for another few months until February 2017 when it began to recover.
- [170] In *Albrechtsen v. Panaich*, 2017 BCSC 1361, Master Muir found that the market for real estate in Surrey had "softened" in the fall and winter of 2016 due to the foreign buyer's tax. She assessed damages for a breach that occurred in September 2016 based on a sale five months later in February 2017 that was \$350,000 less than the original contract price. This is the same softened market in which Mr. Kaltenegger was trying to sell 917 Pacific.
- [171] The fact the market in Metro Vancouver began to recover after February 2017 does not rule out assessing damages based on the May 2018 sale. As noted, the Real Estate Board data indicates the market did not recover to its July 2016 high until July 2017 and then plateaued. Mr. Kaltenegger and his realtors were trying to sell the property in real time. They did not have the benefit of the market trendline that is now in evidence. It is clear the market had fallen and uncertainty had crept in with the foreign buyer's tax. The reasonableness of Mr. Kaltenegger's conduct must be assessed in this context and not "judged to a nicety against the best course which hindsight might disclose": *Panarctic Oils Ltd. v. Menasco Manufacturing Company*, 1983 ABCA 42 at para. 53.
- [172] Moreover, the Real Estate Board data is for Metro Vancouver and does not consider the fact that 917 Pacific is a unique property, a point with which Ms. Cao's expert real estate appraiser agreed. Ms. Cao's argument that the market for 917 Pacific was not falling is undermined by that appraiser's opinion. He appraised 917 Pacific at \$4,050,000 as of November 2016 and \$3,850,000 as of April 2017. It sold in May 2018 for \$3,480,000. This trend suggests a declining market, at least for this unique property, that extended beyond July 2017.
- [173] Given the long period 917 Pacific was on the market with little in the way of offers, there is some merit in Ms. Cao's argument that Mr. Kaltenegger's asking price was too high. However, I am not persuaded he acted unreasonably. At all times he was taking advice from realtors experienced in the Tsawwassen market who were actively marketing the property. They were attempting to sell in an uncertain market. Ms. Watts said there was considerable

uncertainty in the market due to the foreign buyer's tax and it was "anybody's guess as to where [the market] was going to be headed." The cancellation of the George Massy Tunnel replacement project also caused uncertainty. Both Ms. Watts and Ms. Miao believed the asking price was appropriate and Mr. Kaltenegger was acting on their advice.

[174] At the same time, Mr. Kaltenegger was obligated to seek at "the highest price obtainable within a reasonable time after the completion date" to mitigate his damages: Cassidy at para. 31. Had he undervalued the property when listing it, he may have been accused of failing to seek out the highest price obtainable.

[175] For these reasons, I am not persuaded Ms. Cao has met the burden of proving Mr. Kaltenegger failed to mitigate his losses as it relates to the value of the property. I am satisfied Mr. Kaltenegger acted reasonably and I would award him damages under this head in the amount of \$970,000.

2. Damages for Bridge Financing and Carrying Costs

[176] I am not persuaded Mr. Kaltenegger is entitled to damages for either bridge financing or the cost of maintaining 917 Pacific after Ms. Cao's breach. In my view, these damages are not in the parties' reasonable contemplation and are therefore too remote to award. I base this conclusion on the fact that Mr. Kaltenegger bound himself to the purchase of his new home after Ms. Cao's breach.

[177] In *Gagne v. McCarthy*, 2011 BCSC 493, Justice Barrow summarized the basic principles of damages for breach of contract in the context of a contract of purchase and sale for property:

[17] As a general rule, damages for breach of contract are intended to put the party not in breach in the same position he or she would have been in had the contract been performed. Doing so is intended to meet or fulfill the parties' expectations upon entering into the contract (see generally *Johnson v. Agnew*, [1979] 1 All E.R. 883 at p. 896; and *Mavretic v. Bowman* (1993), 76 B.C.L.R. (2d) 61 (C.A.) at para. 6-9). This general rule is subject to the duty imposed on those seeking to recover damages to mitigate their losses. The law also permits recovery for consequential losses, such as interest or other carrying costs flowing from the breach and for the reasonable costs of efforts to mitigate. The extent to which these consequential damages may be recoverable is limited [to] two principles: causation and remoteness. The test for determining whether a particular claim is too remote in the context of damages for breach of contract is whether the losses claimed were "reasonably contemplated by the parties as liable to result from the breach" (per Estey J. writing for the court in *Baud Corporation, N.V. v. Brook*, [1979] 1 S.C.R. 633 at p. 647).

[Emphasis added.]

- [178] As Mr. Kaltenegger correctly points out, courts have awarded damages for losses associated with an innocent seller having to maintain two properties after a buyer fails to complete on a binding contract. This is because it is foreseeable and in the parties' reasonable contemplation that the seller might have committed to buy another home before the buyer's breach. In *Spiridakis v. Li*, 2020 ONSC 2173 Justice Boswell stated:
- [177] It is a very common experience for people to sell one home and buy another. Indeed, in this case, both the plaintiffs and defendants were selling and buying on the same day. It would have been, in my view, entirely foreseeable to a reasonable person that the plaintiffs would be purchasing another home at the same time they were selling the Stouffville property.
- [118] It is also a very common experience for people to require the equity from the home they are selling in order to fund the purchase of their new home. Again, it would have been entirely foreseeable to a reasonable person that the plaintiffs would need the sale proceeds from the Stouffville home in order to purchase their new home.
- [Emphasis added.]
- [179] In all the cases cited by Mr. Kaltenegger, the innocent seller had committed to buying another property before the buyer's breach: *Gagne* at para. 3; *Albrechtsen* at para. 21; *Ranisavljevic* at para. 45. That is not the case here.
- [180] Mr. Kaltenegger entered into a contract to buy a new home on October 23, 2016, prior to Ms. Cao's breach, but that contract was subject to Mr. Kaltenegger entering into an unconditional agreement of purchase and sale for 917 Pacific. Although his agreement with Ms. Cao was unconditional, he did not waive the condition precedent on his agreement to buy the new home before Ms. Cao's breach. Rather, after the breach he sought and received extensions from the seller of his new home for the removal of that condition to December 31, 2016, February 18, 2017, and finally March 18, 2017. The sellers of the new home would not agree to further extensions after March 18, 2017 and Mr. Kaltenegger had to remove the subject or lose the home.
- [181] Mr. Kaltenegger argues he had little choice but to remove the subject and proceed with the purchase of his new home. He wanted to live in Tsawwassen where his children lived and his fiancé would not move into 917 Pacific. He said the new home was the only one he and his fiancé found that suited them and they would have lost it if they did not waive the condition precedent by March 18, 2017. Mr. Kaltenegger argues he was entitled to "get on with his life".
- [182] In my view, it could not reasonably be contemplated that Ms. Cao would be liable for losses Mr. Kaltenegger suffered by binding himself to an agreement to buy another home before 917 Pacific sold. Nor would it be in the parties' reasonable contemplation that Mr. Kaltenegger's fiancé would refuse to live in 917 Pacific, even temporarily, in the circumstances. Nor could it be reasonably expected, and I do not accept, that Mr. Kaltenegger's new home is the only one in Tsawwassen that would make him and his fiancé

happy. Surely over time another suitable property would come on the market. I heard no evidence that the new home was particularly unique in this respect.

[183] Mr. Kaltenegger cites no authority for the proposition that it is reasonable or in the parties' reasonable contemplation that a wronged seller would bind themselves to a contract to buy another house after a defendant failed or refused to complete the sale of the first house and it remained unsold.

[184] The bridge financing and the carrying costs for 917 Pacific all flow from Mr. Kaltenegger's decision to commit himself to buying his new home. Had he not done so, he would have continued to live at 917 Pacific until the property sold. In that case, he not only would have avoided the bridge financing costs but he would have suffered no loss for the property taxes and upkeep on 917 Pacific since he would have been paying those or similar expenses no matter where he lived. He may be entitled to receive the difference in property taxes and upkeep costs for 917 Pacific and his new home but I heard no evidence of what that difference might be.

[185] I therefore decline to award damages for property tax, bridge financing, utilities, and landscaping.

3. Conclusion on Mr. Kaltenegger's Damages

[186] I therefore award Mr. Kaltenegger damages in the amount of \$970,000 for the difference in value between the price Ms. Cao agreed to pay and the purchase price of the May 2, 2018 contract. I make no award of damages for property tax, bridge financing, utilities, or landscaping costs for 917 Pacific because these losses flowed from Mr. Kaltenegger's decision to bind himself to the purchase of a new home after Ms. Cao's breach. In those circumstances, it is not in the parties' reasonable contemplation that Ms. Cao would be responsible for those losses.

VI. Special Costs

[187] Mr. Kaltenegger seeks an order of special costs against Ms. Cao for making unfounded allegations of fraud, namely that he represented 917 Pacific as including the TFN Lands "knowing it was not true" and that he knew or ought to have known Ms. Cao believed the whole of the TFN Lands were part of 917 Pacific. Although Ms. Cao did not use the word "fraud" or "fraudulent" in her third amended response to civil claim, Mr. Kaltenegger argues the words "knowing it was not true" amount to the same thing. He further argues the allegation was made late into the litigation, just before a summary trial scheduled for December 2021. He argues the claim was advanced deliberately to avoid that summary trial and has now created the need for what became a 16-day trial.

[188] Ms. Cao argues she was simply putting before the court the legal question of whether the presentation of the property without disclosing the approximate location of the boundary constitutes a misrepresentation. She acknowledges the framing of this issue technically

amounts to an allegation of fraudulent misrepresentation but this was necessary to advance the legal question. Her counsel deliberately avoided the term "fraud" in the pleading to minimize the sting of the allegation. In her submission, there was a genuine novel legal issue that she fairly raised as to what constitutes a representation or a misrepresentation in the circumstances of this case and she should not be penalized with special costs for having raised it.

- [189] Unproven allegations of fraud may result in an order for special costs where the totality of the circumstances show the unsuccessful party made the allegations maliciously, frivolously, recklessly, or without foundation: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 10; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 at para. 7. The rationale is to "protect parties falsely alleged to have committed fraud, whose reputations may be damaged, by deterring the pursuit of such a claim where the evidence, on an objective assessment, does not support it": *Fibercom Systems Inc. v. Rogers Cable Inc.*, 2005 BCSC 673 at para. 15.
- [190] An unsuccessful attempt to prove fraud does not automatically result in special costs: *0981352 B.C. Ltd. v. Sarpal*, 2021 BCSC 417 at para. 39. In *Hung v. Gardiner*, 2003 BCSC 285 at para. 16, Justice Joyce discussed when the pursuit of an unmeritorious claim might lead to special costs:
- [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations
- [Emphasis added]
- [191] This passage was referred to by the Court of Appeal in *Cimolai v. Hall*, 2007 BCCA 225 at para. 68 and more recently by Chief Justice Hinkson in *Sarpal* at para. 40.
- [192] In *Fibercom Systems* at para. 17, Justice E.R.A. Edwards said the evidence of fraud should be so weak that the allegation was "obviously unfounded" before special costs will be ordered. They may also be justified where the allegation of fraud was "malicious, reckless or advanced for an improper purpose, such as settlement leverage."
- [193] In my view, Ms. Cao's pursuit of the boundary issue does not warrant an order for special costs. Mr. Kaltenegger knew the property line for 917 Pacific crossed the back lawn and this was certainly not apparent to a reasonable person viewing the property. I have also found that Mr. Kaltenegger must have known Ms. Cao could be operating under a misapprehension about the boundary line.

- [194] These are the essential facts Ms. Cao relied upon for her claim. Although I have not accepted her argument, I find her claim is not "obviously unfounded" and it was not raised frivolously or maliciously. The fact that counsel found only one case each that was on point with these facts and these two cases reached opposite conclusions indicates some (surprising) novelty on the substantive legal point. Neither case is from B.C. and both are dated.
- [195] Nor do I find Ms. Cao raised the issue for an improper purpose. She and her counsel were candid that they only learned of the boundary issue in 2021, when a subsequent purchaser of 917 Pacific commenced an action against Mr. Kaltenegger over the same issue. That action was filed in June 2021 and Mr. Kaltenegger filed his response to civil claim on October 7, 2021. Ms. Cao filed her third amended response to civil claim in this case, adding the boundary issue, on October 20, 2021. I accept this had the effect of derailing the summary trial scheduled for December 2021, but I am not persuaded this was Ms. Cao's motivation.
- [196] Mr. Kaltenegger further argues the allegation of fraudulent misrepresentation was unnecessary because the same result could be achieved through a claim of negligent or innocent misrepresentation: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 26; *Fibercom Systems* at para. 7. However, I am not persuaded the same result could have potentially been achieved because Mr. Kaltenegger's knowledge of the property line rule out either negligent or innocent misrepresentation.
- [197] To be clear, my conclusion that special costs are not warranted is not based on Ms. Cao's avoidance of the terms "fraud" or "fraudulent" in her response to civil claim. I agree with Mr. Kaltenegger that a litigant cannot escape the potential consequences of an unfounded allegation of fraud by couching it in softer language. Here, Ms. Cao's counsel avoided the terms because the allegation did not turn so much on a deliberate effort to deceive Ms. Cao, but rather on the legal effect of presenting the property in its ordinary state without disclosing the location of the boundary. Counsel thus thought it was unnecessary to use the specific language of fraud. That is commendable, but not the reason I decline to award special costs.

VII. Ms. Cao's Claims Against James Liu

1. Introduction

- [198] Ms. Cao claims damages against Mr. Liu in negligence for "any amounts for which [she] may be found liable in [the Kaltenegger] action S171148 and the costs of defending that action." Despite framing the relief she seeks in these terms, her claim was brought as a stand-alone negligence claim and not a claim for contribution or indemnity. She argues Mr. Liu was negligent in:
- failing to determine the western boundary of 917 Pacific before Ms. Cao offered to buy the property or failing to advise her to obtain a survey;

- b) failing to provide Ms. Cao with "the correct advice" on the value of the property and failing to properly investigate the history of its purchases;
- c) failing to include the Property Disclosure Statement as a condition of the contract;
- d) failing to ensure the New Title Search Clause was a subject clause for the sole benefit of Ms. Cao as a buyer; and
- e) misrepresenting that her offer for 917 Pacific would only be binding if she paid the deposit.

[199] The last three of these arguments can be dispensed with summarily:

- a) I have earlier found that the Property Disclosure Statement related only to 917 Pacific and not to the TFN Lands. I also found it contained no misrepresentations. Thus, even if Mr. Liu had a duty to ensure it was made part of the contract, Ms. Cao has suffered no loss as a result of any breach of that duty.
- b) I have found the parties did not intend the New Title Search Clause a condition precedent for the sole benefit of Ms. Cao. Nor was there a reason to do so. If Mr. Kaltenegger failed to remove Ms. Kaltenegger from title and Ms. Kaltenegger would not agree to the sale, Ms. Cao could presumably repudiate the contract and/or sue Mr. Kaltenegger for damages. Making the New Title Search Clause a condition precedent for Ms. Cao's sole benefit would not have put her in a better or worse position.
- c) I have found as a fact that Mr. Liu did not advise Ms. Cao that the contract would only be binding if the deposit was paid. Thus, I need not address the allegation of negligent misrepresentation because no such representation was made.

[200] This leaves the first two issues for consideration, namely whether Mr. Liu was negligent in failing to determine the boundaries of the property and whether he was negligent in advising Ms. Cao on the purchase price for 917 Pacific.

[201] Mr. Liu maintains he was not negligent in either respect. Regardless, he argues Ms. Cao suffered no loss or damage as a result of his actions or inactions. He says Ms. Cao cannot claim damages that result from her decision to breach her contract with Mr. Kaltenegger, something Mr. Liu advised her not to do. He also says she suffered no loss at his hands because if she had completed the contract as he advised she would have acquired a property with a market value in the range of what she paid for it.

2. Standard of Care for Realtors

(a) Legal Principles

[202] The parties do not dispute the general standard of care expected of realtors acting for a client, but they dispute the specific obligations imposed on Mr. Liu for this transaction.

[203] With respect to the general standard of care, in *Beacock v. Moreno*, 2019 BCSC 955 at para. 109 Justice Dardi summarized the following elements that a plaintiff must establish to succeed in a claim of negligence against a realtor:

- a) the realtor defendants were possessed [sic] a special skill;
- b) the realtor defendants undertook to apply that skill for the assistance of the plaintiff;
- c) the plaintiff relied upon such skill;
- d) the conduct of the realtor defendants fell below the requisite standard of care of a reasonably prudent brokerage and real estate agent at the material time; and
- e) the plaintiff suffered damage as a result of the breach of the standard of care by the realtor defendants.

[204] The standard of care owed by a real estate broker was summarized by Professor Fridman in the following passage from *Studies in Canadian Business Law*, endorsed in *Beacock* at para. 106 and in *Brown v. Douglas*, 2010 BCSC 1059 at para. 39 (rev'd on other grounds 2011 BCCA 521):

An agent who is receiving a reward must not only exercise reasonable care, but he is also deemed to possess reasonable skill, thus as real estate brokers hold themselves out to the public as being experts in property valuation and sale, they must display the qualities which are generally associated with their calling and in offering advice and information must use due care.

[205] In *Beacock* at para. 107, Justice Dardi went on to say:

[107] It is clear that there is an implied duty of care between a realtor and a client to possess reasonable skill related to property valuation and sales. A realtor is to exercise the skill of a reasonably prudent realtor in the circumstances.

[206] As I understand these authorities, since realtors are deemed to possess these general skills that are particular to their profession, the first two elements of the analysis summarized in *Beacock* (special skill and undertaking to apply that skill) will easily be met in most cases. So too will the third element (reliance) when a realtor has been retained by the plaintiff. Thus, I do not accept Mr. Liu's argument that Ms. Cao and Mr. Li were not relying on him for advice because they were experienced in business and had previously bought two properties in British Columbia. By engaging a realtor who is "deemed to possess reasonable skill" in matters specific to the profession, including "property valuation and sales", it is given that any client expects their realtor to provide competent advice in respect of those matters and to exercise due care in providing that advice.

[207] This general standard of care is a question of law that does not vary between cases: *Zedah v. Moadebi*, 2017 BCSC 2164 at para. 33. However, when translating that general standard to specific obligations, expert evidence is typically required unless the alleged negligence involves non-technical matters or is obviously below the standard of care: *Zedah* at para.

33. In *Brown* at para. 41, Willcock J. (as he then was) said a person who seeks to impose a broader duty on a realtor, such as a duty to make specific inquiries on behalf of the client or to warn the client of particular risks of a transaction, bears the evidentiary burden of establishing the nature and extent of the specific duty.

[208] Here, the specific obligations asserted relate to the steps, if any, Mr. Lui should have taken to ascertain the location of the western boundary and the steps he should have taken to ascertain the market conditions in the area and advise Ms. Cao and Mr. Li on the market value for 917 Pacific. For those issues, I turn to the expert evidence.

(b) Expert Evidence and Analysis

[209] Ms. Cao tendered an expert report of William Binnie who is the managing broker at Royal LePage Sussex Realty offices in Vancouver, West Vancouver, and, until recently, the Sunshine Coast. He has owned and managed other brokerages, worked for a time in sales, served as a council member on the Real Estate Council of British Columbia, and was Director and President of the Greater Vancouver Real Estate Board from 2001 to 2004.

Duty to investigate and advise on property boundaries

[210] Mr. Binnie opines that "[i]nvestigating the boundaries of a property" is a "basic piece of information about a property". He suggests that "taking a fence as the boundary or not looking further into the meanderings of a driveway that may be partially on a neighbor's property are not acting in the best interests of the client". He states the topography of some properties makes it "even more obvious that it is important to determine boundaries". He opines that realtors in these circumstances should take steps to find out if a survey is available, research available municipal resources and maps, walk the property to look for boundary markers, and, in the absence of informative data, advise the client to get a survey if the boundary line is important to them.

[211] I find Mr. Binnie's opinion somewhat ambiguous on this issue. He certainly opines the duty to investigate boundaries arises when there is something like a meandering driveway that might alert the realtor to a potential issue but it is not clear if he is suggesting a realtor must investigate boundaries in every case. Concerns about boundaries will not arise in all cases. For example, specific boundary locations will not ordinarily be an issue in the purchase of a typical 33' x 122' residential lot in Vancouver, absent some indication of an encroachment or other concern.

[212] However, I find that being alert to patent uncertainties about a property's boundaries is one of the "special skills" expected of a realtor, and realtors have a duty to alert their clients to circumstances where a property boundary may be uncertain. This does not mean realtors must conduct a survey or locate the pins indicating the property line. However, where it is reasonably apparent there is uncertainty about a property's boundary, I find realtors have a duty to be alert to such uncertainties, inform their clients of those uncertainties, and, if the boundary is a concern to the client, recommend steps to ascertain its location. Depending

on the circumstances and the importance of the issue to the client, this may range from simple inquiries about the boundary to recommending a full survey.

- [213] I find there was patent uncertainty about the western boundary for 917 Pacific and Mr. Liu ought to have been alert to that uncertainty. There is nothing in the back yard or on the TFN Lands to indicate where the boundary lies. It would be unreasonable for a realtor to make assumptions about the location of the western boundary when there are no visual indicators of a property line. Why would a realtor assume the crest of the bluff to be the boundary? If the boundary appeared uncertain, this should give the realtor pause to question any assumptions, including that the whole back lawn is part of the property. In my view, a lay person buying a property with the assistance of realtor would expect their realtor to be attuned to issues as basic as the property lines for the lot and advise the client where there may be a potential issue. (Given the absence of anything to indicate a western boundary line for 917 Pacific, I need not decide whether a realtor's duties include questioning whether a boundary indicator, such as a fence, correctly marks the boundary.)
- [214] Given the topography of 917 Pacific's back yard, I find Mr. Liu should have been alive to the uncertainty of the boundary and cautioned Ms. Cao and Mr. Li about this uncertainty. He ought to have suggested they take steps to ascertain the location of the boundary if that was important to them.
- [215] Mr. Liu argues it was unnecessary to warn Ms. Cao and Mr. Li about the uncertain boundary because it was not important to them. He points out that neither of them walked the perimeter of the property or investigated the bluff to determine for themselves what access existed off the western side. Ms. Cao testified she assumed she could walk down the bluff to the beach but she did not investigate to confirm this. Mr. Liu argues Ms. Cao was solely interested in the view and the location of the boundary was therefore unimportant to her. He says they wanted to make a "no-subject" offer and making an offer subject to a survey would have been inconsistent with their intentions.
- [216] I do not accept these arguments for the simple reason that we can never know what Ms. Cao and Mr. Li would have done or wanted if they had been alerted to the boundary issue. They claim they would not have bought the property but I put little weight on that evidence since they would be expected to take that position to backstop their repudiation of the contract for other reasons. Given their clear attraction to the "killer view" (as Ms. Cao described it), I would not infer the location of the boundary would necessarily have stopped them from buying the property.
- [217] However, it was Mr. Liu's obligation to alert them to the uncertainty and because of his failure to do so, we cannot now know with certainty whether they would or would not have offered to buy 917 Pacific knowing where the boundary lies.

[218] In my view, Mr. Liu failed to meet the standard of care expected of him as a realtor. He failed to identify the patent uncertainty of the western boundary and failed to alert Ms. Cao and Mr. Li to that uncertainty. I will consider what, if any, damages flow from this below.

Duty to advise on market conditions and approximate value

[219] With respect to a realtor's obligations to advise a purchasing client on the value of a property being considered, Mr. Binnie opines there is a duty to conduct research and use reasonable efforts to discover relevant facts respecting any real estate that a client is considering buying. He quotes from and adopts the Professional Standards Manual published by the Real Estate Council of B.C. on this issue as follows:

A buyer's agent has a duty to inform the buyer as to current market conditions and provide information regarding the approximate value of the property being considered. This can be done with a Comparative Market Analysis (CMA), a copy of which should be retained on the file.

[220] In his report Mr. Binnie opines that industry practices "clearly obligate" a realtor to complete a Comparative Market Analysis, which is a written report of properties recently sold, currently for sale, and those not sold during the listing period. He suggests the analysis should contain at least three to five comparable properties to compare with the property under consideration. He states using only one comparable is not good practice because there are "too many variables that could be involved in a [single] sale". He states that even an apparently good comparable should be backed with more information.

[221] On cross-examination, Mr. Binnie withdrew his opinion that a formal Comparative Market Analysis is required. He conceded that in another case he had opined that the standard of care does not require a realtor to provide a Comparative Market Analysis. In fairness to Mr. Binnie, he had been alerted to the inconsistency with his earlier opinion before he testified in this case and he suggested in an email to counsel that it might be a good idea to amend his report. He maintained, though, that the type of information in a Comparative Market Analysis should be collected and analyzed by the realtor for the purchaser's benefit even if a formal written analysis is not required.

[222] Mr. Liu did not perform a Comparative Market Analysis for 917 Pacific or do the kind of work contemplated by one. He provided information about only one comparable property: a September 28, 2016 sale of 963 Pacific Drive for \$4,338,000. That property has a similar lot size to 917 Pacific. The house is a little bigger and much newer than 917 Pacific, but 917 Pacific had been renovated. Unlike 917 Pacific, it had no pool. Mr. Liu maintained the view from 963 Pacific is not as good because it is obstructed by trees, but he was basing this opinion on photographs from the listing and not his own observation. He pointed out to Ms. Cao and Mr. Li that this property was sold in five days.

- [223] Ms. Watts, who had extensive experience in the Tsawwassen real estate market, testified the view from 963 Pacific is not as good as 917 Pacific because it is closer to the B.C. Ferries causeway. She also said 917 has better privacy and, despite the house being older, it is "architecturally nicer". Of course Mr. Liu did not have Ms. Watt's opinions to pass on to Ms. Cao and Mr. Li.
- [224] Apart from providing this one comparable, Mr. Liu did no other market research for 917 Pacific and looked at no other comparable properties. He limited his search for comparable properties to Pacific Drive and English Bluff Road. He did not search beyond these two streets. He maintained these two streets were unique in Tsawwassen because they were located along the bluff looking out to Georgia Strait. Thus, he said, other properties - even in Tsawwassen - would not be of any comparative value.
- [225] By limiting his search in this way, he failed to identify an October 3, 2016 sale of a home on Glenwood Drive in Tsawwassen, which also runs along the top of the bluff between Pacific Drive and English Bluff Road. It is a somewhat smaller house than 917 Pacific and had not been renovated. The lot is also smaller and it does not have a pool. It sold for \$3,300,000. Thus, it is not as close a comparable as 963 Pacific but would have provided some further information about the market for view properties on the bluff.
- [226] Mr. Liu also limited his search to sales in the previous six months, believing earlier sales would not be indicative of current market values. He did not consider looking at older sales and doing a time-value adjustment using market data to supplement the one comparable he found. In fact, he testified he does not know how to do a time-value adjustment for older sales. Mr. Binnie opines that "when current market data is difficult to get because of a lack of homogeneous properties or sales experienced realtors can overcome this by broadening the search criteria and making adjustments." He states: "The Real Estate Board published [sic] statistics that makes it easy for a licensee to make price adjustments to reflect market price changes if the time frame of comparable sales is greater than a few months."
- [227] Apart from providing just the one comparable of 963 Pacific Drive, Mr. Liu did not advise Ms. Cao and Mr. Li on the market value for 917 Pacific. He said it is not his practice to give advice on price, only on comparables. He felt he did not need to advise them on price because they were not first-time buyers and Mr. Li is very experienced in business. He said Mr. Li "has his own opinions on the price".
- [228] I accept the standard of care for a buyer's agent requires the realtor to inform the buyer as to the market conditions in the area and provide information about the approximate value of the property as set out in the Professional Standards Manual. Although this manual is not legally binding on realtors, I am satisfied this part of it sets a reasonable standard for realtors that members of the public would expect them to meet. This does not mean a realtor must prepare a formal Comparative Market Analysis in every case as Mr. Binnie conceded in cross-examination. Indeed, the wording of the Professional Standards Manual does not characterize that as a "duty". By contrast, advising a buyer of current market

conditions and providing information of approximate value of the property is described as a "duty" in the manual and, consistent with Mr. Binnie's opinion, is something I find that clients would reasonably expect of their realtors. If it were otherwise, a realtor's role would be reduced to "simply bringing sellers and buyers of real estate together", a standard which has been rejected: *Chand v. Sabo Bros. Realty Ltd.*, [1979] 2 W.W.R. 248 at para. 42, 1979 ALTASCAD 5 (CanLII) (A.B.C.A.).

- [229] I agree with Mr. Binnie that simply showing Ms. Cao and Mr. Li the 963 Pacific Drive comparable without any analysis or further information about the market conditions in Tsawwassen or other sales does not meet the standard required of a realtor in assessing market conditions and providing information on the approximate value of the property. A realtor is not held to the standard of a professional real estate appraiser, but the standard does require something more than showing the client a single comparable sale with no further research or explanation.
- [230] Despite the extensive submissions from Ms. Cao on the point, I do not propose to recreate the kind of analysis Mr. Liu ought to have done. It is sufficient to find Mr. Liu's reliance on a single comparable and his limited (if any) advice on market conditions and approximate value of 917 Pacific falls short of the standard of care for a realtor receiving a commission.
- [231] I will say, however, that I do not find the market value analysis using B.C. Assessment values performed by Ms. Cao's counsel in closing argument to be of assistance. All the realtors who testified in this case said they do not use B.C. Assessments because they are not reliable indicators of market value. Mr. Binnie said the assessed value "never reflects fair market value on its own" and, while he said it is one piece of data that a realtor might consider, he agreed it is a "poor indicator" of market value.
- [232] In *Dosanjh v. Liang*, 2015 BCCA 18 the Court of Appeal cautioned against using B.C. Assessment data to determine property values outside of some types of family law cases where better evidence of value cannot be easily ascertained. Speaking for the court, Groberman J.A. said the basic difficulty with using B.C. Assessment values as evidence of property value is "the court has no basis on which to evaluate [the assessment's] cogency." Here, Ms. Cao attempted to lead evidence about how B.C. Assessment values are arrived at, but I found this to be expert opinion evidence (or at least expert evidence tendered in support of an opinion) for which notice had not been given under Rule 11-6(3) of the Supreme Court Civil Rules. I therefore did not permit her to lead that evidence.
- [233] The frailties of counsel's analysis are starkly demonstrated by the fact that the time-adjusted value he advanced using the B.C. Assessment data results in a value for 917 Pacific Drive of \$2,532,000 as at November 2016. Yet, Ms. Cao's own expert evidence appraised the property at \$4,035,000 as of that same date. This is a difference of more than \$1.5 million.

[234] Whatever else Mr. Liu was required to do to meet the standard of care to provide advice on market conditions and information about the approximate value of 917 Pacific, I do not accept that he was required to perform the type of analysis that counsel for Ms. Cao did using B.C. Assessment data.

(c) Conclusion on Standard of Care

[235] For these reasons, I find Mr. Liu failed to meet the standard of care expected of him as a realtor in two respects. First, he failed to observe the patent uncertainty of the western boundary of 917 Pacific and alert Ms. Cao and Mr. Li to this uncertainty. Second, he failed to take reasonable measures to research and inform Ms. Cao and Mr. Li of the current market conditions for the English Bluff area of Tsawwassen and provide them adequate information or analysis about the approximate value of the property being considered.

[236] Having found Mr. Liu did not meet the standard required of him as a realtor in these two respects, I must now consider whether Ms. Cao has proven any damages that flow from these breaches.

3. Has Ms. Cao Proven Damages Caused by Mr. Liu's Breaches?

[237] Although Ms. Cao has shown Mr. Liu failed to meet the standard of care in two respects, she must still prove that she suffered damage as a result. Mr. Liu's negligent acts or omissions must have been a cause of that damage.

(a) Causation Generally

[238] In considering causation, it is important to understand the nature of Ms. Cao's claim against Mr. Liu. She has not named Mr. Liu as a third party in Mr. Kaltenegger's action. Rather, she has sued Mr. Liu in a separate action for negligence. Thus, while the damages she claims are described in the notice of civil claim using the language of an indemnity - "Damages, including any amounts for which the plaintiff may be found liable in [the Kaltenegger] action S171148 and the costs of defending that action" - her claim is an independent one in negligence against Mr. Liu. She argues she is entitled to be fully compensated from Mr. Liu for any damages she must pay to Mr. Kaltenegger, plus the cost of defending his lawsuit because this is what is necessary to put her in the position she would have been but for Mr. Liu's negligence.

[239] I do not agree. Careful attention must be paid to the causal link between Mr. Liu's acts or omissions and the damage suffered by Ms. Cao as a result. A realtor is only liable for the losses caused by the realtor's own negligence: *Bowman v. Martineau*, 2020 ONCA 330 para. 12.

[240] Ms. Cao argues that but for Mr. Liu's negligence, she would not have agreed to purchase 917 Pacific and she would not have been placed in the position of being sued by Mr. Kaltenegger. In that case, she says, she would have suffered no loss or damage.

- [241] However, the damage Mr. Kaltenegger suffered, for which Ms. Cao must now compensate him, was not caused by Mr. Liu's acts or omissions. It was caused by Ms. Cao refusal to complete her binding contract with Mr. Kaltenegger against Mr. Liu's advice.
- [242] Mr. Liu's negligence did not entitle Ms. Cao to break her contract with Mr. Kaltenegger. In this regard I reject Ms. Cao's reply submission that she "properly did not complete" her contract with Mr. Kaltenegger because of Mr. Liu's negligence. Mr. Kaltenegger is an innocent party and there is nothing "proper" about Ms. Cao breaking her contract with him because of her own agent's negligence. She was bound to complete that contract and, had she done so, she would be entitled to sue Mr. Liu for whatever damages flowed from her now owning a piece of property for which she believes she overpaid and is not the full property she thought she was buying.
- [243] None of the authorities cited by Ms. Cao support her position that she can claim damages against Mr. Liu for all of Mr. Kaltenegger's losses or that she "properly did not complete" the contract: Jackson and Powell, *Professional Liability* 7th ed. (London: Sweet & Maxwell, 2012); *MacCulloch v. Corbett* (1982), 133 D.L.R. (3d) 43 at paras. 39-42, 1982 CanLII 3046 (N.S.C.A.); and *McMorran's Cordova Bay Ltd. v. Harman & Co.* (1979), 17 B.C.L.R. 173 at para. 11, 1979 CanLII 767 (C.A.). These authorities stand for the proposition that where a lawyer gives negligent advice that forces a client into litigation to mitigate the effect of the negligent advice, the client may recover the cost of that litigation from the lawyer. None of these authorities support the proposition that the negligent advice excuses the wronged client from performing a contract with an innocent party.
- [244] In fact, *McMorran's* stand for quite the opposite. There, a client was selling land and the law firm negligently failed to advise the client of a term in the purchaser's offer that made the deal much less attractive than the client had understood it. Had the law firm informed the client of the term, the client would not have accepted the offer. The law firm's negligence, though, did not excuse the client from closing the deal with the innocent purchaser. Seaton J.A. at para. 5, speaking for the court on this point, stated that the law firm, "probably correctly, advised that the respondent [client] was bound to complete" (emphasis added). The client took that advice and completed contract. That is exactly what Ms. Cao ought to have done here. It was her choice - against Mr. Liu's advice - not to complete.
- [245] Mr. Liu cannot be held liable for losses Ms. Cao has suffered by her decision to breach the contract with Mr. Kaltenegger. That is a very different assessment of damages than one based on Ms. Cao completing the contract and then suing Mr. Liu for losses she may have suffered as a result of purchasing 917 Pacific Drive.

(b) The Boundary Issue

- [246] Ms. Cao suffered no loss or damage as a result of Mr. Liu failing to identify and raise with her the question of where the western boundary is located. Matters would be different if Ms. Cao had completed the contract but since she did not, she suffered no loss based on her misunderstanding of the location of the western boundary.
- [247] If Ms. Cao had completed the contract, she would have purchased a 14,392 square foot property that she believed included the TFN Lands. In fact, she would have acquired a 14,392 square foot property that does not include the TFN Lands. In that case, she may have had a claim for damages against Mr. Liu on the basis that she entered into a transaction she would have avoided if Mr. Liu had advised her on the boundary issue. In my view, those damages would have been measured as the difference in value between the 14,392 square foot property she thought she had bought and the 14,392 square foot property she actually bought: *Bowman v. Martineau*, 2020 ONCA 330 at paras. 23-24.
- [248] However, Ms. Cao did not complete the transaction. She did not acquire a property that was different than the one she thought she was buying. She acquired no property at all. It therefore cannot be said that she suffered a loss by not acquiring the TFN Lands.
- [249] However, if this conclusion is wrong, I still find Ms. Cao has not proven damages that flow from Mr. Liu's breach. The only evidence that seeks to value the difference between the lot she thought she was buying and the one she actually contracted to buy is an appraisal by Jass Saran who appraised the difference in value between 917 Pacific Drive as a 14,392 square foot lot and a hypothetical 917 Pacific Drive as a 17,347 square foot lot that includes the TFN Lands. However, assuming the additional 2,955 square feet is an accurate measurement of the TFN Lands, this would not be the correct way to measure Ms. Cao's loss.
- [250] Mr. Saran's report analyzes the difference in value between the actual and hypothetical properties based on two different lot sizes. He used a "paired sales analysis" where he compared two similarly-situated properties of slightly different sizes and assessed the difference in value between the two. He used four sets of comparables for this analysis, all of which were located in either Surrey or Langley. He concluded that the larger lots had, on average, an 8% higher value per square foot compared to their paired smaller lots. He then applied this 8% difference in value to the hypothetical 17,347 square foot 917 Pacific Drive.
- [251] However, Ms. Cao's loss, had she bought the property, is not based on it being a smaller lot than she believed it to be. It is based on her misunderstanding of what land fell within the 14,392 square feet. Thus, an analysis that seeks to value the difference between the actual and hypothetical properties based only on lot size is not informative of her loss. In my view, the loss is the difference in value between the actual lot and a hypothetical 14,332 square foot lot that extended to the bluff. That is not what Mr. Saran's report measures.

[252] This is not a criticism of Mr. Saran's work or opinion. He did precisely what was asked of him. The problem is the task he was given does not measure Ms. Cao's loss, had she bought the property.

[253] In the absence of any other evidence to indicate the value of this loss, I find Ms. Cao, if she were entitled to damages over the boundary issue, has not proven what those damages are.

(c) Advice on Value

[254] I turn next to whether Ms. Cao has suffered a loss as a result of Mr. Liu's limited advice on market conditions and price.

[255] Mr. Lai, the expert land appraiser called by Ms. Cao, appraised 917 Pacific at \$4,050,000 as of November, 23, 2016 which is the date Ms. Cao breached the contract. This is the midpoint of a range of values he assessed to be \$3,704,971 to \$4,370,023. In his opinion, the property could be valued at the high or low end of this range or anywhere in between. He also agreed in cross-examination that appraisals are subjective and another reasonable appraiser could value the property at slightly above or slightly below either endpoint in the range he identified. He also agreed that different appraisers might be five to 10 per cent apart when assessing a unique suburban property, but this was a general statement that was not specific to 917 Pacific or to the range he identified for that property. He agreed 917 Pacific is a unique property and it might be inferred from this that a different appraiser could assess 917 Pacific to be five or 10 per cent more than the range he set, but he was not asked that question in cross-examination.

[256] Mr. Liu is not held to the standard of a real estate appraiser in providing advice to his clients on property values: *Phelan v. Realty World-Empire Realty Ltd.* (1994), 38 R.P.R. (2d) 128, 1994 CanLII 2755 (B.C.S.C.). Mr. Binnie's opinion is that Mr. Liu's obligation was to provide information about the approximate value of the property. This qualification must leave some room for error outside the scope of what an appraiser might opine. I conclude from this that advice from a realtor about the approximate value of a property could not be negligent if it falls within a range of values determined by a qualified appraiser.

[257] Here, Ms. Cao agreed to pay \$4,450,000 for 917 Pacific. Mr. Liu's evidence is that he gave Ms. Cao and Mr. Li no advice on market value for the property but since they ultimately agreed to pay \$4,450,000, this is the most they were induced to pay based on whatever advice Mr. Liu may have given. It thus serves as a marker for the extent to which Mr. Liu's advice was negligent.

[258] The \$4,450,000 is \$80,000 higher than the top end of Mr. Lai's range. That is a difference of less than 2% from the high end of the range. That difference is not so significant that it makes Mr. Liu's advice (as a realtor rather than a land appraiser) negligent. In my view, this qualifies as "slightly above" the endpoint of Mr. Lai's range. As stated in *Phelan*, "even a gross over-valuation does not itself prove negligence".

- [259] Moreover, even if Mr. Liu had done a more extensive Comparative Market Analysis, he undoubtedly would have landed on 963 Pacific as being the closest comparable to 917 Pacific. Mr. Lai agreed in cross-examination that 963 Pacific was the best comparable available for 917 Pacific. The \$4,450,000 that Ms. Cao agreed to pay for 917 Pacific is not out of line with that sale.
- [260] Thus, had Ms. Cao paid the deposit and completed the purchase according to the terms of the contract, she would have owned an asset with a market value which, in the high end of a range as determined by an appraiser, was close to the purchase price. The market was falling at the time and, as we have seen, the market value for 917 Pacific did fall substantially after Ms. Cao's breach. However, the standard of care does not require Mr. Liu to predict the market's future and Ms. Cao was not planning to flip the property any time soon. She could have, and on the evidence would have, held the property either until an opportune time came to resell it or to build on it and move in.
- [261] Thus, while I find Mr. Liu did not meet the standard expected of a realtor in researching and advising on the current market conditions in the English Bluff area or in providing information about the approximate value of 917 Pacific, his ultimate advice resulting in a purchase price of \$4,450,000 is not such a marked departure from the range of value as assessed by a professional real estate appraiser that it constitutes negligence for a realtor. I therefore find Ms. Cao has not established she is entitled to any damages that result from Mr. Liu failing to meet the standard of care in advising her about market conditions and providing information about the approximate value of the property.

4. Conclusion on Ms. Cao's Damages

- [262] For these reasons, I find Ms. Cao has not proven that she suffered any loss or damage that was caused by Mr. Liu's negligence. Her losses were caused by her refusal to complete the sale of 917 Pacific according to her contractual obligations and not by Mr. Liu's acts or omissions. Her claim against Mr. Liu and West Coast Realty is therefore dismissed.

VII. Summary and Costs

- [263] In summary, I find Ms. Cao was not entitled to rescind her contract with Mr. Kaltenecker. Mr. Kaltenecker's presentation of 917 Pacific for sale in its ordinarily maintained state is not a misrepresentation as to its boundaries and he had no duty to identify even the approximate location of the western boundary as he understood it. To the extent Ms. Cao was mistaken about the property she was buying, Mr. Kaltenecker engaged in no unconscionable or bad faith conduct to take advantage of what might have been a misapprehension. It was for Ms. Cao to investigate the property line if that was important to her.
- [264] Ms. Cao and Mr. Li did not misunderstand the deposit clause of the contract and did not believe the contract was voidable if they did not pay the deposit. I am satisfied Mr. Liu did not give them this advice. Even if they did believe, incorrectly, that they could void the

contract, Mr. Kaltenegger is the innocent party and Ms. Cao was in a better position to understand the contract she was signing and must bear responsibility for any misunderstanding. She therefore cannot rely on non est factum to excuse her wrongful repudiation of the contract.

[265] Finally, I find the New Title Clause cannot be interpreted as a condition precedent based on binding authority of the Court of Appeal: *Gulston*. Even without that authority, I would have found the clause is a warranty, not a condition precedent, and the breach of that warranty would sound in damages not rescission.

[266] I find Mr. Kaltenegger is entitled to damages in the amount of \$970,000 for the difference in value between his contract with Ms. Cao and the subsequent contract of purchase and sale he concluded on May 2, 2018 with another buyer. Since he committed himself to buying his new home after Ms. Cao's breach and not before, I find he is not entitled to damages for bridge financing for the new home or property taxes, utilities and maintenance costs for 917 Pacific. Nor is he entitled to an award of special costs.

[267] I find that Mr. Liu did not meet the standard of care expected of a realtor when he failed to identify the patent uncertainty of 917 Pacific's western boundary and failed to caution Ms. Cao and Mr. Li about that uncertainty. However, Ms. Cao has not proven that she suffered damages as a result of this breach. Her losses based on the damages she must pay Mr. Kaltenegger were caused by her refusal to complete the sale of 917 Pacific according to her contractual obligations and not by Mr. Liu's acts or omissions.

[268] I also find that Mr. Liu failed to take reasonable measures to ascertain market conditions and provide Ms. Cao with information on the approximate value for 917 Pacific. However, Ms. Cao has not proven Mr. Liu's failure to meet this standard of care resulted in negligence since price she offered to pay for 917 Pacific is not so far out of the range of its market value at the time to constitute negligent advice from Mr. Liu. Ms. Cao's claim against Mr. Liu and West Coast Realty is therefore dismissed.

[269] Subject to any submissions the parties might wish to make about matters I have not been apprised of, I would order that Ms. Cao pay Mr. Kaltenegger's, Mr. Liu's, and West Coast Realty's costs at scale B. To be clear, Mr. Liu and West Coast realty are entitled to one set of costs between them.

"Kirchner J."

Appendix - Photomap of 917 Pacific with Approximate Boundaries

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