

CANADA / JUDGMENT

Kaur v. Bajwa

2020 BCCA 310

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 310 Kaur v. Bajwa

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kaur v. Bajwa,

2020 BCCA 310

Date: 20201109

Docket: CA46631

Between:

Harjinder Kaur

Respondent

(Plaintiff)

And

Jugpreet Singh Bajwa

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

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

December 20, 2019 (Kaur v. Bajwa, 2019 BCSC 2273,
New Westminster Docket S192181).

Counsel for the Appellant:

J.S. Malik

Counsel for the Respondent:

R.S. Gill

Place and Date of Hearing:

Vancouver, British Columbia

September 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 9, 2020

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Hunter

Summary:

The appellant appeals the summary trial judge's conclusion that the respondent did not repudiate the parties' agreement for the assignment and purchase of a condominium. Held: Appeal allowed and matter remitted to the trial court. The judge erred in considering events subsequent to the purported repudiation to conclude that the respondent had not repudiated the agreement. The record is insufficient to make the findings required on the remaining issues, not considered by the judge, of whether the repudiation was accepted by the appellant, and whether the respondent would have been able to complete the agreement.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] This appeal arises out of the failed assignment and purchase of a condominium (the "Property"). The trial judge, who heard the matter by way of a summary trial, allowed aspects of the respondent's claim and dismissed the appellant's counterclaim. The appellant challenges the trial judge's finding that the respondent did not repudiate the assignment and purchase agreement that was entered into by the parties on September 29, 2016 (the "Agreement").

- [2] The parties agree that the trial judge's analysis, as it relates to the repudiation issue, contains a legal error. That error caused him to fail to consider certain other issues. This appeal is largely concerned with whether this Court can properly address those other issues on the basis of the record before it.
- [3] The central facts that underlie the appeal were concisely set forth by the trial judge:
- [1] Ms. Kaur seeks judgment allowing her claim and dismissing Jugpreet Bajwa's counterclaim on a summary trial. Mr. Bajwa asks that the action be dismissed, and the counterclaim proceed to trial. Alternatively, he seeks an order dismissing the application, on the ground that the case is not suitable for disposition on a summary trial.
- [2] Jugpreet Bajwa, his father, Jagbir Bajwa, and his sister, Amanpreet Bajwa, have all sworn affidavits. In these reasons, intending no disrespect, I will refer to these individuals by their first names.
- [3] In 2013, Jugpreet contracted to purchase a condominium unit that had not yet been built for \$309,900. He paid deposits totalling \$47,485. His contract to purchase the condominium was assignable, but only with the builder's consent.
- [4] In September 2016, Ms. Kaur contracted with Jugpreet to obtain an assignment of his rights to acquire and own the condominium. The agreement was made on September 17, 2016, and was revised on September 29, 2016.
- [5] The business terms of the agreement in its final form were that Ms. Kaur would reimburse Jugpreet for the \$47,485 he had paid, and pay him a further fee of \$45,000. If the builder consented to the assignment, Jugpreet would step into Ms. Kaur's shoes to complete the purchase. If the builder did not consent, Ms. Kaur would supply the funds to close the purchase and Jugpreet would convey to her the condominium within seven days of obtaining title.
- [6] Jugpreet is blind and was mostly represented in the discussions with Ms. Kaur by Jagbir and Amanpreet. Unfortunately, communications between Ms. Kaur and the Bajwas broke down. Ms. Kaur was not informed of the precise closing date for the purchase of the condominium. There is a dispute as to who is at fault in this.
- [7] Jugpreet acquired title to the condominium on May 25, 2017. Ms. Kaur learned of this through her notary on June 4, 2017.
- [8] Ms. Kaur commenced this action on June 26, 2017, claiming specific performance of a contract to acquire the condominium and other relief. She no longer claims specific performance. She now seeks orders for the return of the deposit, return of an additional \$17,000 paid by her at the time the first assignment was entered into, and an order setting out a procedure for the determination of damages.

[9] Jugpreet counterclaims, seeking an order that the deposit Ms. Kaur had paid him is forfeited, and damages for breach of contract.

[20] The following provisions of the final assignment agreement of September 29, 2016, are relevant:

3. [Covenants by Assignee:]

The Assignee agrees to:

- (d) pay to the Assignor the full Purchase Price of \$309,900.00 plus GST (less deposit of \$47,485.00 paid to Assignor) if the consent of the Seller is not obtained and this Assignment is not completed. In such a case, Jugpreet Singh Bajwa will take the title to the Property as the buyer. This advance of funds to the Assignor is interest-free. If said advance is not made to the Assignor, then Assignee shall forfeit deposit of \$47,485.00 paid to Assignor.
- (e) pay to the Assignor the sum of \$45,000.00 once the title of the Property is transferred into the name of Harjinder Kaur.

4. Representations and Warranties:

The Assignor makes the following representations and warranties (which will survive the closing of the transaction contemplated by the Purchase Agreement):

...

- (g) Within one week of Jugpreet Singh Bajwa being registered on the title to the Property, Jugpreet Singh Bajwa shall transfer the Property for the sum of \$309,900.00 plus GST plus \$45,000.00 assignment fee solely to Harjinder Kaur.
- 5. The Assignor and the Assignee shall execute and deliver, at the request of the other, all such further documents and instruments and shall do all things that are necessary to give full effect to the intent and meaning of this Assignment.
- 7. Time shall be of the essence of this Assignment and of all the transactions contemplated in it.
- [4] Several further facts are relevant. First, though Ms. Kaur argued that her brother, Mr. Tejinder Grewal, did not have authority to act on her behalf, the trial judge did not accept this. Instead, he concluded that "Mr. Grewal had actual and ostensible authority to act for Ms. Kaur in her dealings with [the appellant] and his representatives."
- [5] Second, the trial judge said it was "clear that on April 9, 2017, [the appellant] advised Ms. Kaur through Mr. Grewal that the closing of the purchase was scheduled for late April or early May 2017". That closing date was later changed to May 25, 2017.

The Trial Judge's Findings

- [6] The trial judge made the following additional findings that are central to the legal issue that is raised by the appellant:
- [23] In his affidavit, Jagbir states:
43. On or about April 19, 2017, I received a telephone call from Tejinder. Tejinder advised me that the Plaintiff did not qualify for a mortgage to finance the purchase of the Property. We both agreed that without a pre-approval the Seller would not consent to the assignment. Tejinder then further told me that the Plaintiff also did not have the full amount to provide to Jugpreet to complete the purchase outright, as per the terms of the Second Assignment.
- [24] There is no evidence from Mr. Grewal concerning this conversation. He is a witness who could have been expected to swear an affidavit on Ms. Kaur's behalf and, in the absence of an affidavit from him I accept Jagbir's account of the conversation. Jagbir says, in effect, that he and Jugpreet accepted Mr. Grewal's statement as an anticipatory breach of Ms. Kaur's obligation to advance funds under clause 3(d) of the assignment agreement.
- [25] The Bajwas made no further effort to communicate with Ms. Kaur in advance of the closing. In particular, they did not advise her through Mr. Grewal that the closing had been postponed from late April or early May to May 25, 2017.
- [26] I do not think that Jagbir and Jugpreet were justified in taking Mr. Grewal's advice on April 19, 2017 that Ms. Kaur did not have the full amount required to complete the purchase of the property as establishing that she would not be able to raise the necessary funds in due course, especially when the closing was delayed until May 25, 2017.
- [27] I do not think that they were justified in concluding that Ms. Kaur was repudiating her obligation to make the advance required by section 3(d) of the assignment agreement.
- [28] By failing to notify Ms. Kaur or Mr. Grewal of the actual closing date, Jugpreet made it impossible for Ms. Kaur to advance the funds when they were required. In these circumstances, I do not think that clause 3(d) can be construed as requiring a forfeiture of the deposit paid by Ms. Kaur.

The Issues on Appeal

- [7] No issue was raised with respect to the trial judge's determination that the matter was suitable for disposition by way of summary trial. Similarly, no issue was raised with respect to his conclusion that Ms. Kaur was not entitled to recover the \$17,000 payment that she had made to a middleman on the transaction.
- [8] The following distinct issues were argued on appeal:
- i) Whether the trial judge erred in concluding that Ms. Kaur had not anticipatorily repudiated the Agreement; and

ii) If so, whether this Court is now able to decide the balance of the issues that were raised before the trial judge.

The Appropriate Standard of Review

[9] Whether a party has repudiated a contract is a question of mixed fact and law: *Kuo v. Kuo*, 2017 BCCA 245 at para. 36. As such, a trial judge's finding on the issue, subject to a palpable and overriding error, is entitled to deference: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. That said, findings of mixed fact and law that are based on an extricable error of law can be overturned on the standard of correctness. In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 139-40, Justice Cromwell, in a concurring judgment, noted that the trial judge had committed a legal error by only considering whether an actual breach had occurred without also considering whether an anticipatory breach had occurred. He said, "the trial judge's legal error led him into a palpable and overriding error of mixed law and fact".

Discussion

Issue 1: Whether the trial judge erred in concluding that Ms. Kaur had not repudiated the Agreement

- [10] The trial judge concluded that the appellant was not "justified in taking Mr. Grewal's advice on April 19, 2017 that Ms. Kaur did not have the full amount required to complete the purchase of the property as establishing that she would not be able to raise the necessary funds in due course, especially when the closing was delayed until May 25, 2017."
- [11] The parties agree that the closing date was delayed to May 25, 2017 sometime after the telephone call on April 19, 2017. The appellant argues that whether Ms. Kaur repudiated the Agreement must be assessed as of April 19, 2017. It was on this day that her brother communicated that she was neither able to qualify for a mortgage to finance the purchase of the Property nor did she have the funds required to complete the purchase outright. At that time, the anticipated closing date was "late April or early May." It was not open to the trial judge to consider post-breach facts that were then unknown to the parties to decide whether Ms. Kaur had repudiated the Agreement.
- [12] The respondent agrees with the legal proposition that is advanced by the appellant. Notwithstanding that agreement, it remains important to understand why this is so.
- [13] In *Potter*, Mr. Justice Cromwell said:
- [149] The final point of terminology is concerned with "anticipatory" breach. An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": [John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)] at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed.

2009), at §7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

- [14] In *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, the Ontario Court of Appeal similarly described the various legal requirements that underlie an anticipatory repudiation at paras. 41-52. In particular, the Court confirmed that a "repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract", that "the test for anticipatory repudiation is an objective one", that "in objectively construing the purported breaching party's intention, the surrounding circumstances must be considered", that "a finding of anticipatory repudiation is reserved for cases in which the conduct at issue can be said to be serious", and that "before an anticipated breach of contract can be characterized as an anticipatory repudiation, the breach must deprive the innocent party of substantially the whole benefit of the contract": at paras. 42, 45, 46, and 50.
- [15] In *Kuo* at para. 40, this Court noted that "regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation". See also *Marcotte v. Marcotte*, 2018 BCCA 362 at paras. 45-49.
- [16] These various considerations and requirements are all engaged at the point in time that the breaching party communicates its inability or intention not to perform. In this case, that communication took place on April 19, 2017. The communication, that Ms. Kaur lacked both the ability to obtain financing and the funds to complete the purchase outright, would deprive the appellant of "substantially the whole benefit" of the Agreement. The communication appeared to be clear and unequivocal. There was no suggestion by Mr. Grewal that Ms. Kaur was still attempting to obtain financing or that she had other options open to her. The communication took place at a time when both Mr. Grewal and the appellant expected the transaction to close reasonably imminently. The Agreement contained a "time is of the essence" clause. A relevant aspect of the "surrounding circumstances" includes the fact that the April 19, 2017 conversation took place after several earlier unsuccessful attempts by the appellant, through his father and sister, to obtain confirmation that Ms. Kaur had secured financing. In one of those communications, on April 9, 2017, Mr. Grewal was apprised of the anticipated "late April to early May" closing date, and he was cautioned about the potential consequences of a breach of contract.
- [17] It was these, and potentially other, circumstances that the trial judge was required to consider in deciding whether, on an objective basis, Ms. Kaur had anticipatorily repudiated the Agreement. It was not open to him to consider the fact that the closing date was subsequently extended by the vendor of the Property and that that extension might then have provided Ms. Kaur with the ability to secure financing.

- [18] Two further conceptual considerations confirm that events that postdate an unequivocal communication of an anticipatory repudiation do not inform the question of whether a repudiation has taken place. First, an innocent party who elects to accept a repudiation immediately secures the right to bring an action against the repudiating party for the breach: *McCamus* at 689-90; *Elderfield v. Aetna Life Insurance Co. of Canada* (1996), 27 B.C.L.R. (3d) 1 at para. 15 (C.A.); *Dosanjh v. Liang*, 2015 BCCA 18 at para. 33.
- [19] The second consideration, viewed through a slightly different lens, is that an anticipatory repudiation, when accepted, brings the contract to an end: *Potter* at para. 144; *Dosanjh* at para. 33. The question of whether the innocent party has accepted the repudiation is a separate inquiry. Nevertheless, the fact that the contract between the parties is "at an end" necessarily means that events that occur thereafter are not relevant to the question of whether a repudiation occurred in the first instance.
- [20] Accordingly, the trial judge did err in his analysis of this first issue.

Issue 2: Whether this Court can decide the outstanding issues that remain

- [21] Because the trial judge determined that Ms. Kaur had not repudiated the Agreement, he did not then consider whether the appellant had communicated his acceptance of that repudiation to her.
- [22] Counsel for the appellant argued, in the first instance, that Ms. Kaur had repudiated the Agreement and that the appellant had accepted that repudiation. Alternatively, he argued that even if the appellant had not accepted Ms. Kaur's repudiation, the Court should determine that Ms. Kaur would, in any event, have breached the Agreement in that she would not have been able to obtain the financing or funding that she required.
- [23] In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 33, Justice La Forest noted: "[i]t is well established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level". More recently, in *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36, this Court sent a matter arising from a summary trial back to trial rather than deciding the outstanding issues on the basis of the record before it. Justice Tysoe said:
- [70] As the judge in the present case erred by failing to consider whether special circumstances existed, it is my view that her order cannot stand. As the evidence at the summary trial was in the form of affidavits which are before us, it is open to this Court to decide whether special circumstances did exist and thereby avoid the expense of a new trial: see *McGarry v. Co-operators Life Insurance Co.*, 2011 BCCA 214 at para. 81. However, it is my view that this is not an appropriate case for this Court to decide the issue of special circumstances.

- [71] At the hearing of this appeal, we were advised that the issue of the standing of Price Security in the underlying action was raised for the first time during the course of the summary trial. The issue was not fully canvassed at the summary trial, and there may have been additional evidence introduced at the summary trial if it had been previously raised. Detailed submissions on the issue of whether special circumstances existed were not made to us. In these circumstances, the appropriate remedy is to order a new trial.
- [24] In order to decide the matter before it, this Court would have to decide at least three issues: a) whether Ms. Kaur anticipatorily repudiated the Agreement; b) whether that repudiation was accepted by the appellant; and c) absent such an acceptance, whether Ms. Kaur would have been able, in any event, to secure the financing or funding that she required.
- [25] There are likely sufficient facts in the record to decide the first of these issues. However, on account of the conclusions I have arrived at in relation to the latter two issues, I do not consider that it would be appropriate to do so.

If Ms. Kaur anticipatorily repudiated the Agreement, was that repudiation accepted?

- [26] A repudiation, whether anticipatory or performed, "will not effectively terminate the contract unless the innocent party does accept the repudiation, and is prepared to treat the contract as ended": G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 595.
- [27] The legal significance of an accepted repudiation was explained in *Potter* at para. 144:
- If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.
- [28] The practical rationale for the requirement that an innocent party accept a purported repudiation rests on the need for both parties to understand whether they remain bound by the terms of their contract and to avoid having the repudiating party continue to fulfil that contract in the belief that it remains in effect. Accordingly, the innocent party is required to reject or accept the repudiation within a reasonable period of time and cannot adopt a "wait-and-see" approach, as its decision simultaneously determines the position and ongoing legal obligations of the repudiating party: *Ginter v. Chapman* (1967), 60 W.W.R. 385 at 389 (B.C.C.A.), *aff'd* [1968] S.C.R. 560; *Bridgesoft Systems Corp. v. British Columbia*, 2000 BCCA 313 at paras. 78-82; *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425 at para. 38; *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50 at paras. 56-57.
- [29] The onus is on an innocent party to establish that it has accepted a repudiation of a contract and that it has communicated that acceptance to the repudiating party within a reasonable time: *Ginter* at 392.

- [30] Though the need for an innocent party to communicate its acceptance of a repudiation is well-established, what actually constitutes effective acceptance is less clear. The usual starting point is that such acceptance must be "clear" and/or "unequivocal": Ginter at 392; Elderfield at para. 15; *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 45.
- [31] Direct communication by the innocent party of their acceptance of the repudiation is expected in most cases. Accordingly, mere silence on the part of the innocent party will not constitute an acceptance of an alleged repudiation. Rather, such silence will generally imply that the innocent party has chosen to treat the contract as still binding on both parties. In *Morrison-Knudsen Co. v. British Columbia (Hydro & Power Authority)*, [1978] 4 W.W.R. 193 at 249 (B.C.C.A.), this Court, quoting from *Denmark Productions Ltd. v. Boscobel Productions Ltd.*, [1969] 1 Q.B. 699 at 731-32 (C.A.), said that if an innocent party to a repudiation "elects in such a situation, or is taken by reason of silence to have elected, not to treat the contract as at an end, . the contract remains in force for the advantage or disadvantage, as events fall out, of either party". See also *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167 at para. 91.
- [32] At the same time, in *American National Red Cross v. Geddes Brothers* (1920), 61 S.C.R. 143 at 145, Chief Justice Davies of the Supreme Court of Canada stated that "an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved." See also *McCamus* at 697-98; *Kamlee Construction Ltd. v. Oakville (Town)* (1960), 26 D.L.R. (2d) 166 at 182-83 (S.C.C.); Ginter at 391-92.
- [33] The question of whether the appellant accepted the purported repudiation by Ms. Kaur is, on the existing record, problematic. The appellant's father, who spoke to Mr. Grewal on April 19, 2017, deposed that after that conversation, he and his son considered that Ms. Kaur had breached the Agreement. He further deposed that "shortly after" the telephone call with Mr. Grewal, they told Mr. Ahuja, the middleman who had introduced them to Ms. Kaur, that she had breached the Agreement and that they would now have to secure financing on their own in order to complete the purchase of the Property. They had no further communication with Mr. Grewal or Ms. Kaur in the weeks that ensued and until after the purchase of the Property had completed.
- [34] The appellant's belief that Ms. Kaur had repudiated the Agreement and his apparent acceptance of that repudiation would not, however, be enough. Instead, it was necessary for him to communicate that acceptance to Ms. Kaur or Mr. Grewal. There is no evidence of any such explicit communication by the appellant through his father or otherwise.
- [35] Whether such an acceptance might "be reasonably inferred from all the circumstances" is unclear. In *American National Red Cross*, the plaintiff was contracted to sell and deliver goods to the defendant. Before the due date for delivery, the plaintiff wrote a letter to the defendant saying it would be unable to carry out the contract. Upon receiving the letter, the defendant made an entry in its books that the contract was cancelled, but it did not expressly notify the plaintiff that it had accepted their repudiation of the contract. Chief Justice Davies looked to various circumstances in concluding that the repudiation had been accepted. This

included the fact that a representative of the plaintiff had admitted at trial that the plaintiff understood that the defendant had accepted its repudiation and had determined that the contract had been brought to an end.

[36] In this case, Mr. Grewal did not file any affidavit material in circumstances where, as the trial judge noted, he might have been expected to. Furthermore, following the April 19 telephone call, he had no further dealings with the appellant. These facts are not enough, without more, to conclude or infer that Mr. Grewal understood that the appellant, through his father, had accepted Ms. Kaur's repudiation and considered the Agreement to be at an end. They are, however, considerations that inform "all of the circumstances" and that may, if tested further, establish that Mr. Grewal knew or understood from the April 19 telephone call that the appellant considered the Agreement at an end. What communications Mr. Grewal had with Ms. Kaur following the April 19 telephone call, in light of her own apparent inactivity for the next month or more, is similarly a matter that is not addressed by Mr. Grewal or by Ms. Kaur in either of the two affidavits that she filed, and that may also shed light on "all of the circumstances" that existed between the parties.

[37] The point, however, is that the existing record before this Court does not allow it to properly consider such issues, or other potential issues that might be raised at trial, and to make the finding that the appellant seeks.

If the appellant did not accept Ms. Kaur's purported repudiation, would she, in any event, have been able to secure the funding or financing required under the Agreement?

[38] The thrust of this part of the appellant's submission relies on various pieces of evidence that indicate that Ms. Kaur did not obtain financing until after the appellant had purchased the Property from the original vendor. Ms. Kaur has deposed that she did not learn that the Property had been purchased by the appellant until she was told this by her notary around June 5, 2017. The mortgage broker she retained has deposed that when he attempted to schedule an appraisal of the Property in order to secure a mortgage for her, he learned that the appellant had already purchased the Property. The mortgage commitment letter that Ms. Kaur was provided is dated June 1, 2017. A further mortgage in the amount of \$95,000, which was to be placed on Ms. Kaur's residence, is dated June 5, 2017. All of these activities and all such financing postdate May 25, 2017 -- the date that the appellant purchased the Property.

[39] None of these activities or timelines, in circumstances where Ms. Kaur must be taken to have known, through her brother, that the initial intended closing date for the Property was scheduled to take place in "late April or early May", are easily understood.

[40] Nevertheless, on a principled basis, unless the appellant clearly communicated, through his father or otherwise, that he accepted Ms. Kaur's purported repudiation of the Agreement, that agreement remained in place and both parties remained bound by their obligations under it.

- [41] Clause 11 of the contract between the original vendor of the Property and the appellant provided: "The Completion Date of the purchase and sale of the Strata Lot will take place on the date set by the Seller on not less than 15 days notice by the Seller to the Buyer". Clause 5 of the Agreement provided that both the appellant and Ms. Kaur "shall do all things that are necessary to give full effect to the intent and meaning of this Assignment".
- [42] The interplay of these two agreements was not addressed by either party. If the Agreement between the parties remained alive after April 19, the question becomes whether the appellant was required to provide Ms. Kaur with notice of any change in the intended completion date.
- [43] If the appellant was under such an obligation, the question becomes whether Ms. Kaur, had she been advised that the completion date was extended to May 25, would have been able to obtain the financing she required under the Agreement. The fact that she obtained financing after the appellant acquired the Property does not necessarily mean, in circumstances where Ms. Kaur was not told of the new completion date, that she would not have been able to obtain such financing a few weeks earlier. Though Ms. Kaur deposed that she was "[a]t all material times ready and able to complete on the Property", this does not appear to have been the case on April 19, when Mr. Grewal spoke to the appellant's father. Whether it might have been true some weeks later, but before May 25, is not addressed by either Ms. Kaur or her mortgage broker in their respective affidavits.

Conclusion

- [44] This is an appeal where the amounts involved and the passage of time militate in favour of an efficient and practical result. Unfortunately, there are numerous outstanding issues of fact, at every stage of the relevant legal analysis, that cannot properly be decided on the basis of the existing record. Furthermore, some relevant issues were not addressed by the parties either before the trial judge or on appeal. Accordingly, I would allow the appeal, set aside the order of the trial judge, and remit the matter for a new trial. The appellant is entitled to costs of the appeal with the costs of the summary trial to be determined by the judge who hears the trial.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Hunter"

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