

CANADA / JUDGMENT

Kent v. Kalyk

2017 BCSC 1074

COURT

Supreme Court of British Columbia

DECIDED

26 June 2017

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2017 BCSC 1074 Kent v. Kalyk IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kent v. Kalyk, 2017 BCSC 1074 Date: 20170626 Docket: S179658 Registry: New Westminster Between: Trevor Kent Plaintiff And Francis Kalyk and Glenda Kalyk Defendants Before: The Honourable Mr. Justice Crawford Reasons for Judgment Counsel for the Plaintiff: R.S. Henderson C. Bielman Counsel for the Defendants: R.W. Cooper, Q.C. M. Elliot Place and Date of Trial/Hearing: New Westminster, B.C. March 1, 2017 Place and Date of Judgment: New Westminster, B.C. June 26, 2017

Introduction

- [1] The parties seek summary adjudication of arguments arising from the collapse of a contract of purchase and sale of a condominium located near Kelowna, British Columbia ("the Big White property"). The contract was entered into in December 2015.
- [2] The vendors, Mr. and Mrs. Kalyk ("the Kalyks") resided in Sydney, Australia. The purchaser, Trevor Kent ("Mr. Kent") resides in Rocky View, Alberta. Mr. Kent offered to purchase the Big White property for \$760,000 and to pay a deposit of \$40,000. A standard real estate offer form was proffered on December 13, 2015 and the Kalyks accepted Mr. Kent's offer on December 14, 2015 ("the Contract").
- [3] Paragraph four of the Contract provided for completion on January 29, 2016, at the Kelowna land title office. Possession was to be provided the same day.
- [4] Paragraph 12 of the Contract reads: Time will be of essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller in accordance with the Real Estate Services Act, on account of damages, without prejudice to the Seller's other remedies.
- [5] On December 23, 2015, Mr. Kalyk emailed Mr. Kent asking that the completion date be extended to February 18, 2016, to accommodate some personal issues. The Kalyks had sold their home in Sydney and that sale (which was closing in April 2016) would make it difficult

for them to attend and complete the sale of the Big White property. The Big White property had personal items which they were required to move ("the excluded goods"). As well, as non-resident vendors, they were required to obtain a Canada Revenue Agency Clearance Certificate ("CRA clearance certificate") regarding any potential tax owed to Canada.

- [6] At the time Mr. Kalyk made his request, Mr. Kent and his family were vacationing at the Big White property pursuant to a rental agreement with the Kalyks. Mr. Kent replied saying he would get back to the Kalyks after Christmas. On January 6, 2016, Mr. Kent advised Mr. Kalyk that for his own personal reasons, including his wish to use the property, the completion date could not be extended.
- [7] On January 13, 2016, Mr. Kent's counsel forwarded the transfer documents for execution by the Kalyks. Mr. Kent had signed the documents and all monies required to complete the transaction were in trust with his counsel.
- [8] Counsel for the Kalyks did not respond.
- [9] On February 1, 2016, Mr. Kent's solicitor noted the Kalyks' failure to complete the sale and that they had breached the contract and stated that Mr. Kent was considering his options.
- [10] A silence fell. The Kalyks flew from Australia to Kelowna on February 10, 2016.
- [11] On February 15, 2016, the Kents' solicitor wrote saying there had been no communication and that the contract was at an end. He requested the return of the Kents' deposit and advised there would be a claim for compensation.
- [12] The Kalyks' counsel responded saying that they would be ready to complete on February 18, 2016. Later, counsel offered to extend completion another 10 days.
- [13] On February 18, 2016, Mr. Kalyk maintained that he would be ready to complete on that day. Mr. Kent did not agree. The Kalyks left Canada on February 18, 2016. The parties could not agree on alternative terms and the matter drifted into litigation.
- [14] Both sides now claim damages from the other.
- [15] Mr. Kent says that he is entitled to damages for the Kalyks' failure to complete on time.
- [16] Mr. Kalyk concedes that although the failure to complete on January 29, 2016 amounts to a repudiation of the contract, Mr. Kent was obliged to clearly and unequivocally accept the repudiation and having failed to do so, the contract remained viable. On this basis, Mr. Kalyk claims he and his wife were entitled to extend the completion date to a date in February 2016, and as Mr. Kent failed to complete the purchase, Mr. Kent is liable for damages to the Kalyks.

- [17] The parties agreed the matter was suitable for summary trial pursuant to Rule 9-7. I have now read the affidavits and on consideration agree I can determine the action can be dealt with summarily. I should say I found the defendants' affidavits to be argumentative in places (and thus have been ignored) and at odds in places with the correspondence and supporting documents.
- [18] However, I found much of the factual basis and the opposing arguments in the correspondence, which is set out below. I note the correspondence is an amalgam of the two sides' documents and that Sydney is some 11 hours "ahead" of Calgary.
- [19] I have put the correspondence in sequence. Then follows some commentary of the affidavits, case law, discussion and ruling, and a summary assessment of damages. Given the findings, I have left the costs issues open for counsel to settle or bring back before me. The Evidence The Letters/Correspondence #1 From: Frank Kalyk [mailto:frank.kalyk@statechambers.net] Sent: Wednesday, December 23, 2015 12:35 PM To: Trevor Kent <tkent@thermalsystems.ca> Subject: Re: 103 The Aspens Dear Trevor I thought it best to write to you directly. You may not be aware but a few days after our sale of the Aspens [the Big White property] to you, we sold our home to downsize. The problem is that we had not expected that to occur and we need to look for somewhere to live. The residential market in Sydney is now "closed" until at least late January early February, although we are looking nonetheless at whatever we can find. We have a large task ahead of us and will need to spend all of January and much of February in it. The purpose of my email is to say that we are going to find it very difficult to close by end January and to ask if a delayed closure causes you any problem. Obviously for us, the sooner the better, and that is why we sought the earlier date in the contract, however, events have conspired against us. On the plus side, this delay would present an opportunity to you to extend your vacation at Big White this Christmas. If you want to do so, please let me know. Sincerely Frank Kalyk #2 Subject: RE: 103 The Aspens Data: Thursday, 24 December 2015 9:21:23 AM GMT+11:00 From; Trevor Kent To: Frank Kalyk Frank, I will discuss with my wife and get back to you after Christmas. Thanks, Trevor #3 On 6 Jan 2016, at 9:59 am, Trevor Kent <tkent@thermalsystems.ca> wrote: Frank, Sorry it has taken me longer than expected to get back to you. We vacated the property on Sunday and really enjoyed staying there. I wish that we were able to accommodate your request but our plans are to be there between February 12 through to the 28 as there are some shorter weeks in there for school holidays. Sorry but we are going to have to keep the deal as is. Best Regards, Trevor Kent #4 From: Frank Kalyk [mailto:frank.kalyk@statechambers.net] Sent: Wednesday, January 6, 2016 3:22 PM To: Trevor Kent <tkent@thermalsystems.ca> Cc: Peter MacLeod <peter@pcrealty.ca> Subject: 103 The Aspens Dear Trevor Thanks for your email. We are pleased you enjoyed the home. It really is a great property and we have had many enjoyable times there. As to closure, as I mentioned, we have sold our home here and this has caused us some problems. We need to close that sale by end April and in the meantime, we need to find a new home to live in and to organise the move. In addition, we have to be away in March. This left us January and February to arrange our move out of Canada and what we need to do here. Having not heard from you

until now, I had assumed my request to a deferral of closure was agreed. We could have done Canada in early January, with some difficulty and planning, but that opportunity has now passed. What we can do is to try to bring forward our trip to Canada to about the middle of February, to close then. Please let me know If you can work with this. If not, I don't know what else we can do. Sincerely Frank Kalyk #5 Wed 1/6/2016 3:41 PM Dear Trevor After some work, my wife has been able to obtain confirmation that we can change our arrangements and flights so that we can close on 17 February. We hope that you can see your way to agree to this. Please confirm asap, so she can lock in the necessary changes to our flights, before we lose these dates. Sincerely Frank Kalyk #6 On 7 Jan 2016, at 9:35 am, Trevor Kent tkent@thermalsystems.ca wrote: Frank, I am really sorry but the close date needs to stay as per our signed agreement. It is my understanding that Peter volunteered to move your items as required. I wish there was something I could do but I have put plans in place to close that day that cannot be changed. Regards, Trevor #7 Subject: Re: 103 The Aspens Date: Thursday 7 January 2016 10:01:21 AM GMT +11:00 From: Trevor Kent To: Frank Kalyk Cc: Peter MacLeod I am really sorry but the close date needs to stay as per our signed agreement. It is my understanding that Peter volunteered to move your items as required. I wish there was something I could do but I have put plans in place to close that day that cannot be changed. Regards, Trevor #8 Wed 1/6/2016 4:34 PM Dear Trevor It seems flights have now booked out for 17 Feb, so we cannot close that day. We can get flights now for 18 Feb. Please confirm asap, closure on that day, so we can lock in those flights. We would be out by 8am on that morning. Sincerely Frank #9 Wed 1/6/2016 4:46 PM Dear Trevor, Thank you for your reply. I guess there is nothing further I can say to you to obtain your agreement. It is regrettable that you did not reply to my request promptly so that I could have made arrangements, but unfortunately, our options are now limited. I think will now need to leave it to our respective lawyers to resolve. Our lawyers contact details are: Amanda Langhorn, Legal Assistant to Timothy T. Brown Email: alanghorn@porterramsay.com Sincerely Frank Kalyk #10 Wed 1/6/2016 5:09 PM Frank, While disappointing that may be the best solution. My lawyer in Kelowna is: Bryshun Mace 304 - 3330 Richter Street Kelowna, BC V1W 4V5 Ph: 250-868-1127 Fax: 250-868-1147 Attn: Roger Mace Email: roger@bryshunmance.com #11 Our File: 1556-001 January 13, 2016 VIA E-MAIL TO alanghorn@porterramsay.com Porter Ramsay LLP Barristers and Solicitors 200 1465 Ellis Street Kelowna, BC V1Y 2A3 Attention: Timothy T. Brown Dear Sirs/Mesdames: Re: Buyers: Trevor Kent and Aileen Kent Sellers Francis Gary Kalyk and Glenda Monica Kalyk Property PID 025-829-106, Strata Lot 11, Strata Plan KAS2516 Civic 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We are representing the Buyer in the above noted transaction, and we understand you represent the Seller. Accordingly, we are enclosing the following documents for signing by your clients:

1. Form A Transfer;
2. Seller's Statement of Adjustments;
3. GST Certificate;

4. Strata Parking Stall and/or Storage Locker Assignment We also enclose copies of the searches and tax information received. We also enclose a copy of the Certificate as to GST Registered Status of Buyer and attached CRA printout confirming their registration number. Please note that we are closing this transaction using the Land Title Office's Electronic Filing System ("EFS"). Once the documents are signed, please return the same via fax or email. PLEASE DO NOT RETURN THE ORIGINALS AS WE DO NOT REQUIRE THEM. We will accept return of the aforesaid documents on our undertakings as follows:
 1. We will not attempt to register the transfer documentation until such time as we hold in our trust account sufficient funds which, when added to the proceeds of any new mortgage, will allow us to complete this transaction in accordance with the contract of purchase and sale made between the Buyer and Seller and the approved Seller's statement of adjustments.
 2. To the best of our knowledge, if the Buyer Is obtaining a new mortgage, the Buyer has fulfilled all the new lender's conditions for funding except for submitting the new mortgage for registration and we know of no reason why the new mortgage should not be registered and funds disbursed thereunder in the ordinary course of business.
 3. Upon application being made for the registration of the transfer documentation and any new mortgage in the appropriate registry and upon completion of a satisfactory post-application for registration search of the title to the property indicating that the Buyer will, in the ordinary course of registry procedures, become the registered owner of the property free and clear of all charges, encumbrances and legal notations save and except any permitted encumbrances, any new mortgage and any existing financial charges which are to be discharged pursuant to the undertakings described below, we will requisition the new mortgage proceeds, if applicable, and upon receipt of such proceeds, we will disburse the funds in accordance with the approved Seller's statement of adjustments.
 4. If this transaction does not complete for any reason whatsoever on January 29, 2016, or if, for any reason, we are unable to comply with any of the above undertakings and disburse funds as aforesaid, we will return the transfer documentation to you, unused, forthwith upon demand or, alternatively, will make application to the appropriate registry to have the transfer, and new mortgage if applicable, withdrawn on demand and will return the transfer to you forthwith upon receipt. Our trust cheque for the balance due to the Seller on completion as specified in the approved Seller's statement of adjustments will be made available to you, in trust, on your undertakings as follows:
 1. To pay to each of the Seller's existing chargeholder(s) the amount required by its payout statement to pay out and legally obligate the chargeholder(s) to provide a Discharge of the following charge(s): Mortgage No, KX173430 In favour of HSBC Bank Canada and Assignment Of Rents No. KX173431 In favour of HSBC Bank Canada
 2. on the trust condition that they will provide you with the Discharge(s) within a reasonable period of time;

3. to provide us, within 5 business days of our payment of the sale proceeds to you, with copies of the following:
 - a. your letter paying out the existing chargeholder(s) with the payout monies;
 - b. the chargeholder's payout statement;
 - c. your cheque paying the payout monies to the chargeholder(s);
 - d. evidence of delivery or receipt of the payout cheque at the chargeholder's place of business. Upon receipt of such copies we undertake not to disclose the Seller's financial information disclosed by such documentation to the Buyer unless you have not provided us with satisfactory evidence of registration of the chargeholder's discharge in the Land Title Office within 60 days of the completion date, in which case we shall be released from such undertaking.
4. use diligent and commercially reasonable efforts to obtain the Discharge in a timely manner;
5. upon your receipt of the Discharge, you will promptly attend to the registration of the Discharge in the appropriate registry and provide us with registration particulars in due course;
6. to pay the balance of the sale proceeds to the Seller or as the Seller may direct. In addition to any undertakings set out above, the proceeds of sale will be provided to you on your undertaking to;
1. holdback, in trust, 25% of the land value and 50% of the improvement value prorated from the current assessed values to the actual sale price (the "hold back") until such time as you have provided us with Canada Revenue Agency Clearance Certificates for each of Sellers upon the following specific undertakings: (I) not to release any portion of the funds, except to Canada Revenue Agency for payment of taxes owing by the Seller(s); and (II) In the event you have not received a Clearance Certificate for the Seller(s) within the statutory time period, and if you have not received an extension from Canada Revenue Agency you will, upon request, return the hold back to this office We trust that you shall find the foregoing to be in order and look forward to receiving the signed documents in due course. Yours truly,
BRYSHUN MACE #12 From: Roger Mace <roger@bryshunmace.com> Sent: Tuesday, January 19, 2016 4:38 PM To: Tim Brown Cc: Pearl Weninger Subject: Kent purchase from Kalyk Tim I have left you a couple of voicemails, one on Friday and one yesterday and have not heard from you. As Advised, it is our client's position that this matter must close as scheduled, they have already scheduled to use the unit for the first two weeks of February. Our client is prepared to allow your client to retain one of the storage units in order to store their personal items until they come to Big White later in February. I am advised that the realtor has also offered to assist in storing any Items that the Kalyks require. I look forward to hearing from you. Yours very truly, Roger M. Mace #13 From: Roger Mace [mailto:roger@bryshunmace.com] Sent: Monday, January 25, 2016 8:19 AM To: Tim Brown Cc: Pearl

Weninger Subject: FW: Kent purchase from Kalyk Tim: Although we spoke, I have not received a concrete response. I want to stress that even if your client is unable to complete as scheduled, as they have not received their clearance certificate from CRA, our client will require possession as per the terms of the contract. We will have the full purchase funds in trust and will hold them pending your acceptance of the undertakings as found in our letter to you. Our Client is flying out this week in order to perform a final walkthrough prior to completion. Thank you. Yours very truly, Roger M. Mace #14 January 27, 2016 Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to your letter of January 26, 2016 and our various telephone conversations, we have now had an opportunity to speak with our clients and can advise that they are unable to close this purchase on January 29, 2016 nor are they able to deliver possession on that date. The new closing and possession date must be February 18, 2016 due to conversations that have taken place between our respective clients and subsequent arrangements dealing with flights from Australia and other work commitments of our clients. Our client advised your client of this in December of 2015 and did not hear back from your clients until it was too late to make arrangements to close in January. Our clients advise that they also have an issue with the non-resident holdback requirements and have been working with an accountant to obtain a Clearance Certificate. That cannot be obtained by January 26, 2016 but it is hoped that it will be resolved by February 18, 2016. We appreciate that this may come as a disappointment to your clients, however, our clients are unable to make alternate arrangements. Yours truly, Porter Ramsay LLP #15 Our File: 1556-001 January 27, 2016 VIA E-MAIL TO alanhorn@porterramsay.com Porter Ramsay LLP Barristers and Solicitors 200 1465 Ellis Street Kelowna, BC V1Y 2A3 Attention: Timothy T. Brown Dear Sirs/Mesdames: Re: Buyers: Trevor Kent and Aileen Kent Sellers Francis Gary Kalyk and Glenda Monica Kalyk Property PID 025-829-106, Strata Lot 11, Strata Plan KAS2516 Civic 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to your earlier letter of even date we would advise as follows. Your client's interpretation of the facts are incorrect. Your clients did request that our clients consider a later closing date however our clients did not agree to this request and advised your clients of their need for possession of the property on January 29, 2016. Further if a later closing date had been agreed upon an Addendum would have been prepared and signed by both the Buyer and Seller and no such addendum to the Contract of was ever prepared or signed. Regardless of the fact that your clients may not be able to complete this transaction on January 29, 2016 possession can be transferred to our clients as set out in the Contract of Purchase and Sale. As indicated to you by the writer in an earlier conversation between you, your clients' obligation to meet the requirements of the non-residency holdback is not of a concern to us. Our clients offered to provide extra storage for your clients' items until February 18, 2016 at which time your clients will be able to remove the items from storage. Your letter of even date purports to breach the terms of the Contract. As a solicitor Mr. Kalyk must understand the importance of Contract Law and

repercussions of breaching a Contract or unilaterally attempting to impose a change in the closing date. We trust you have advised your clients of the ramifications of such a breach. Please address the foregoing with your clients and advise us accordingly, stress our clients' need for possession on January 29, 2016, Yours truly, BRYSHUN MACE #16 Our File: 1556-001 January 27, 2016 VIA E-MAIL TO alanghorn@porterramsay.com Porter Ramsay LLP Barristers and Solicitors 200 1465 Ellis Street Kelowna, BC V1Y 2A3 Attention: Timothy T. Brown Dear Sirs/Mesdames: Re: Buyers: Trevor Kent and Aileen Kent Sellers Francis Gary Kalyk and Glenda Monica Kalyk Property PID 025-829-106, Strata Lot 11, Strata Plan KAS2516 Civic 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We confirm that on January 13, 2016 we delivered to your offices the Seller Documents Including a Form A Transfer, Seller Statement of Adjustment, GST Certificate and Parking Stall and Locker Assignment (the "Vendor Documents") we have prepared for execution by your clients as contemplated by the Contract of Purchase and Sale. In that letter we asked that you attend to having the documents executed and returned to us upon certain undertakings. We have not received the Seller Documents back and you have advised that your clients do not intend to complete the transaction as contemplated by the Contract of Purchase and Sale. We advise that the Buyers are ready, willing, and able to complete this transaction. Specifically, the Buyers have done the following:

- (1) They have approved and signed the Buyer Statement of Adjustments, a copy of which Is enclosed for your reference;
- (2) They have signed the Certificate as to GST/HST Registered Status of the Buyer, a copy of which Is also enclosed for your reference;
- (3) They have deposited In our trust account the sum of \$734,307.37 representing the balance of the monies due to complete this transaction and pay out the sale price due as shown on the Seller Statement of Adjustments. We further enclose duplicate copies of the original of the Form A--Freehold Transfer with respect to the subject property for your execution, together with the Seller Statement of Adjustments, GST Certificate and Parking Stall and Locker Assignment. We confirm that we are holding, in trust, the sum of \$734,991.69 due to Porter Ramsay, in trust as shown and in accordance with the Seller Statement of Adjustments. We advise that our clients are In a position to complete this transaction as contemplated by Contract of Purchase and Sale. Upon return of the duly executed Seller Documents and upon written receipt of your undertakings as set out In our letter of January 13,2016, we will close this transaction as set out In our letter of January 13, 2016 and we will direct deposit to your trust account the funds as set out In the Seller Statement of Adjustments. Yours truly, BRYSHUN MACE #17 On 29 Jan 2016, at 4:01 am, Trevor Kent <tkent@thermalsystems.ca> wrote: Mr and Mrs. Kalyk, It is my undertanding that it is your intention to breach our firm contract for the sale of the above property. I believe it necessary to inform you directly, that should that be correct, I will be pursuing all lawful means to recover my costs and associated damages. I urge you to reconsider your position and complete the transaction as contracted. Regards, Trevor Kent #18 From: Frank Kalyk

[mailto:frank.kalyk@greenwaychambers.com.au] Sent: Thursday, January 28, 2016 12:23 PM
To: Trevor Kent <tkent@thernalsystems.ca> Cc: Tim Brown <TBrown@porterramsay.com>
Subject: 103 Aspens Purchase Dear Trevor I have been very up front with you as to the personal difficulties we have faced. I have offered a number of proposals which would have partly or wholly addressed the effect of those difficulties on you. You will also recall that I had proposed that the contract provide for an earlier settlement, with later licence to us to arrange the collection of our belongings. You rejected that proposal. We were unable to reach an agreement beyond that we should leave the matter to our lawyers to try to resolve. We did so, and regrettably, without any intended criticism, the lawyers were unable to advance matters beyond a position that you required settlement at the end of January, and we were unable to accommodate you. It has just not been possible to meet a settlement date for the end of this month. We held off arranging travel and diaries in the hope that our communications would provide an acceptable solution. After the failure of our communications, we have ordered our affairs to complete at the earliest available time. We are now locked in to travel as we have advised you. I note that you want to use the property from 12 February. We are only proposing a delay to 18 February, some 6 days. In addition to the above, whilst we immediately instructed our accountants to obtain tax clearance certificates, those are not yet obtained. This alone precludes settlement at this time. I understand your position, and Glenda and I are sympathetic to it. I am truly sorry that you feel as hard as you do and that you are not a little sympathetic to our own position. We are resigned to the fact that you and your lawyers have threatened legal proceedings. We intend nonetheless to do everything we can to complete the sale in accordance with our contract.

Sincerely Frank Kalyk #19 Subject: 103 Aspens Purchase - Without Prejudice Date: Friday, 29 January 2016 8:29:40 AM GMT+11:00 From: Trevor Kent To: Frank Kalyk, Frank Kalyk, Glenda Kalyk Mr & Mrs. Kalyk, Some of your information below is incorrect. We have offered numerous proposals which would have which helped you at least partially out of your personal difficulties. Including renting the unit back to you for when it is available and use of storage room until you are able to clean it out. No productive response was received therefore we booked our own flights, took time off work, readied trades, set up accounts etc to take possession as per our contracted dates No response was received until I received the attached email from our joint realtor. The 6 days that you were unable to concede have substantial value as it is a school holiday time and my extended family was excited to use it at that time. Possession and completion are separate items which I would assume that you would understand or have explained to you. I have also attached the letter from your lawyer which I don't see as any type of attempt to resolve this amicably. I am sympathetic to your personal difficulties just not your handling of this matter. Please complete the transaction as contracted Regards, Trevor Kent #20 Our File: 1556-001 February 1, 2016 VIA E-MAIL TO alanghorn@porterramsay.com Porter Ramsay LLP Barristers and Solicitors 200 1465 Ellis Street Kelowna, BC V1Y 2A3 Attention: Timothy T. Brown Dear Sirs/Mesdames: Re: Buyers: Trevor Kent and Aileen Kent Sellers Francis Gary Kalyk and Glenda Monica Kalyk Property PID 025-829-106, Strata Lot 11, Strata Plan KAS2516 Civic 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We confirm that your clients failed and/or neglected to complete this

transaction on Friday, January 29, 2016 pursuant to the terms of the Contract of Purchase and Sale dated December 13, 2015 (the "Contract") and therefore your clients have breached the said Contract. We would advise that our clients have suffered losses and damages as a result of your clients' failure and/or neglect to close this transaction on the scheduled closing date of January 29, 2016. Our clients are now considering their options with respect to this matter. Yours truly, BRYSHUN MACE #21 Our File: 1556-001 February 15, 2016 VIA E-MAIL TO alanghorn@porterramsay.com Porter Ramsay LLP Barristers and Solicitors 200 1465 Ellis Street Kelowna, BC V1Y 2A3 Attention: Timothy T. Brown Dear Sirs/Mesdames: Re: Buyers: Trevor Kent and Aileen Kent Sellers Francis Gary Kalyk and Glenda Monica Kalyk Property PID 025-829-106, Strata Lot 11, Strata Plan KAS2516 Civic 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We confirm that on February 1, 2016 we wrote to you and advised that your clients were in breach of the Contract of Purchase and Sale dated December 13, 2015 (the "Contract") by choosing not to complete the transaction on the completion date. We confirm that we advised that time was of the essence and our clients required your clients to complete as contracted for. We further confirm that we have not heard from your office since that date. Without any agreement to extend the date of completion, the Contract came to an end when your clients failed to complete. We advise that we will be requiring the realtor holding the deposit money, Premier Canadian Properties to return the deposit money to our clients. Your clients' failure to meet their contractual obligation and the resultant termination of the Contract has resulted in our clients' suffering losses and damages. We can advise that our clients will be seeking compensation for such losses and damages. Yours truly BRYSHUN MACE #22 February 15, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to your letter of February 15, 2016 and telephone conversation with the writer of even date, we confirm that your clients have instructed you to convey to us that they consider the Contract to be at an end that they will not be completing the purchase of the Property. Our clients are ready, willing and able to complete the sale of the Property on February 18, 2016 and will be tendering the requisite documents on that date. Yours truly, Porter Ramsay LLP #23 February 16, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to our recent communication we have met with our clients and they advise that, they were extremely concerned at their inability to complete their sale by January 29. The circumstances have been explained already and we do not think we should repeal them now. Our clients, perhaps unsuccessfully, tried to arrange all of the things that had to be done to give the buyers full access to the property and a clear CRA

certificate at the earliest possible time. That time was thought to be February 18. The sellers did not intend to demand completion on that date or any other date. We and our clients apologize for any misunderstanding in that regard. The sellers are in fact prepared to permit settlement at a time reasonably convenient to the buyers. Please let us know what time suits and we will make arrangements to accommodate them. Our clients' accountant will today have the CRA certificate. They have signed all necessary transfer documents. Our clients will also now make a further payment on their mortgage, which will need to be paid if settlement does not occur on February 18. They will ensure the property is left clean and vacant to enable your clients' immediate enjoyment. They will remove their personal effects and will put them into storage at their cost, to await your clients' decision before either transporting them to Australia if the sale proceeds or returning them to the property, if it does not. Accordingly, please advise us now when your clients would wish to complete their purchase. We will reply separately to your letter of February 16 later today. Yours truly,

Porter Ramsay LLP #24 February 17, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We refer to your letter received on February 16, 2016. We take that letter to state your clients' preferred position. That letter is not, on its face, a notice of rescission of the contract and is not understood by us as such. We do not agree with the conclusions reached by you in that letter, as we now set out below. You seem to consider, as your letter makes clear, that without more, the contract came to an end after it was not completed on January 29, namely on January 30. That suggestion is rejected. The position you assert is contrary to the authorities. See for example, *Bonilla v. Ciurariu*, 2008 BCSC 923 (CANLII), and *Meadowland Development Company Ltd. v. Haverstock (Trustee of)*, 1990 CanLII 4204 (NS SC). We suggest that the correct legal analysis of the position as asserted by the buyers is that they allege a repudiation of the contract by the sellers. However, your clients have not given notice of an election to accept any alleged repudiation nor of any purported rescission of the contract. Accordingly, the contract remains on foot and the sellers remain ready, willing and able to complete. The time, if there was one, for any rescission of the contract by the buyers, has passed. In any event, on its proper construction, condition 12 of the contract does not give the buyers a right to terminate as you suggest. That condition must be read as a whole. In *Bark-Fang v. Cooper*, 49 S.C.R. 14, Ildington J. said, "The term of this contract making time of the essence thereof is so coupled with a specific mode of enforcing it as to form a necessary part thereof." Condition 12 is a clause giving specific remedies to the sellers only. Read as Ildington J says, it is apparent that its intention it to give the sellers the rights set out in the event that completion does not occur on the date identified in condition 4. Those rights are not given to the buyers, as to whom the presumption that time is not to be of the essence is not displaced by the contract. We note that even the sellers are not permitted to bring the contract to an end without notice, as you seem to suggest the buyers are entitled to do. Even if the condition were to be

construed as you suggest, your clients have, since January 19, advised that they were electing to claim compensation and further, they have stood by, knowing that our clients were traveling to Canada from Australia for the express purpose of completing their sale and knowing that our clients had done so on the understanding that the buyers proposed to complete their purchase on February 18. In these circumstances, your clients have elected not to rescind the contract, if that course was open to them, and they are now estopped from relying on a failure to complete by January 29 as a ground for any such rescission. For these reasons, the buyers had no right, on February 18, 2016 when your letter was received, to accept any alleged repudiation or to terminate the contract, had they sought to do so. Accordingly, and in light of the above, a binding contract subsists between our respective clients. Finally, as your clients are well aware, our clients have been precluded from completing the sale by the absence of a clear CRA certificate, requiring a hold back of funds and insufficient funds to pay out HSBC, the present mortgagee, so as to obtain a discharge of its mortgage. As your clients are aware, this was beyond our clients' control and they have done all that is reasonably possible to obtain a CRA certificate to remedy this issue. The inability of the sellers to complete arising from such a circumstance, and by reason of statute, does not amount to a repudiation grounding a right to terminate the contract. We note also that there have been numerous communications between the parties and the common agent with a view to resolving the present impasse and the buyers' refusal to confirm that they will complete the sale when the sellers attend for that purpose on February 18, 2016. The Buyers have made it clear that they will complete the purchase in the event that "compensation" is paid to them for the delay in completion. As you are well aware, any claim for damages which the buyers may wish to advance is a matter which does not impact on their obligation to complete the contract. Further, the buyers have not stated the amount of that "compensation" which they seek. They have provided no particulars of it, nor have they provided any material which properly evidences any financial loss suffered. Your approach in this regard is most unhelpful. As you would be well aware, any "compensation" recoverable could be recoverable only by way of damages assessed by reference to the financial loss and nominal damages only. See *Holland J. in Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services*. We do not understand how in the present case your clients could have suffered any such damages at all, and as we have noted above, you have done nothing to enlighten our understanding. Indeed, the totality of the buyers' conduct leads us to ask whether your clients have simply decided that they no longer wish to purchase the property for reasons which they have not disclosed and which lie wholly outside the contract. In the circumstances, we again confirm that our clients wish to complete their sale and they are ready, willing and able to do so. We now have in hand the CRA certificate and it is available for use in closing. We again confirm that we propose to close on February 18, 2016. Time is of the essence in that regard. If your clients do not wish to complete on that day, but confirm to us today their commitment to complete at a time within 10 days of February 18, 2016 our clients are prepared to meet the buyers' preference, on the basis that that time also will be of the essence. Yours truly Porter Ramsay LLP #25
February 18, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers

Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs/Mesdames: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB We enclose herewith the following documents executed by the Seller (in registrable form where required):

1. Form A Transfer;
2. Seller's Statement of Adjustments;
3. GST Certificate;
4. Certificate of Residency; and
5. Clearance Certificates - the originals of which will be provided in due course. The enclosed documents are returned to you on your undertakings as outlined in your letter of January 13, 2016. We do not accept the undertakings placed upon us in your letter but undertake as follows
 1. To pay to HSBC Bank Canada the amount required by its payout statement to pay out and legally obligate the chargeholder to provide a discharge of Mortgage No. KX173430 and Assignment of Rents No. KX173431 on its trust condition that the chargeholder will provide us with the discharge within a reasonable period of time.
 2. to provide your office, within 5 business days of our receipt of the sale proceeds, copies of the following:
 - a. our letter paying out the existing chargeholder(s) with the payout monies;
 - b. the chargeholder's payout statement;
 - c. our cheque paying the payout monies to the chargeholder(s);
 - d. evidence of delivery or receipt of the payout cheque at the chargeholder's place of business. Those copies will be provided to your office on your undertaking not to disclose the Seller's financial information disclosed by such documentation to the Buyer unless we have not provided your office with satisfactory evidence of registration of the chargeholder's discharge in the Land Title Office within 60 days of the completion date, in which case you shall be released from such undertaking.
 4. use diligent and commercially reasonable efforts to obtain the Discharge in a timely manner,
 5. upon our receipt of the discharge, we will promptly attend to the registration of the discharge in the appropriate registry and provide your office with registration particulars in due course; and

6. to pay the balance of the sale proceeds to the Seller or as the Seller may direct. Kindly deposit sale proceeds to our TD Canada Trust trust account located at #100 - 1633 Ella Street, Kelowna, BC, V1Y 2A8, Trust Account No. 7891-5261344, Transit No. 02770 and fax a copy of the trust cheque together with confirmation of same as soon as possible. Further to our letter to you of February 17, 2016, if your clients require further time to complete this purchase we ask that you kindly advise what date would be preferable or acceptable to your clients. The sellers are willing to accommodate your clients up to an further 10 days beyond today's date. Time shall remain of the essence for any date proposed by your client during the 10 day window referenced above. By cover of this letter and its enclosures we confirm our client is ready, willing and able to close today or at anytime within the next 10 days. We understand that this entire transaction has been extremely taxing on all parties but the prospect of a protracted litigation will only serve to tax the parties further, both financially and emotionally. It is hoped that pragmatism will prevail and the parties can get on with their lives. We look forward to hearing from you. Your truly, Porter Ramsay LLP #26
February 18, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs/Mesdames: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to our letter of February 18, 2016 enclosing executed vendor documents, we have yet to receive confirmation of registration or sale proceeds from you nor an indication of when or if your clients intend to complete the purchase. We reiterate that our clients have agreed to extend the closing date to any date on or before February 29, 2016, being 10 days beyond February 18, 2016. Time shall remain of the essence. We look forward to hearing from you Yours truly, Porter Ramsay LLP #27 March 1, 2016 Our File: 72623.1.26 Your File: 1558-001 Via Email Bryshun Mace Lawyers Barristers & Solicitors 304 3330 Richlar Street Kelowna, BC V1W 4V5 Attention: Roger M. Mace Dear Sirs/Mesdames: Buyer: Trevor Kent and Aileen Kent Seller: Francis Gary Kalyk and Glenda Monica Kalyk Property: PID 025-829-106, STRATA LOT 11 DISTRICT LOT 4109S SIMILKAMEEN DIVISION YALE DISTRICT STRATA PLAN KAS2516 Civic: 103 7700 Porcupine Road, Kelowna, BC V1X 4KB Further to our letter of February 18, 2016 enclosing our clients' executed vendor documents, our letter to you mistakenly dated February 18, 2016 but forwarded to you on February 23, 2016, and our recent telephone conversations, your clients have failed to complete the purchase of the Property, in breach of Contract. Our client offered a reasonable time for your clients to complete the purchase of the Property and the final completion date was February 29, 2016. Time was of the essence for the completion of the sale. Our client has elected to accept your clients' repudiation of the Contract and this letter shall serve as our clients' notice to yours of their acceptance of the repudiation. The Contract is now terminated and our clients will be retaining the deposit paid by your clients pursuant to paragraph 12 of the Contract on account of damages suffered by our clients and without prejudice to any other remedies available to our clients. We confirm that our clients have re-listed the Property for sale in an effort to mitigate their damages. Yours truly, Porter

Ramsay LLP The Affidavits

- [20] Both Mr. Kalyk and Mr. Kent filed two affidavits, though Mr. Kent's second affidavit spoke only to his claim for damages.
- [21] Mr. Kalyk's second affidavit was largely a repeat of his first affidavit and contained argument. I have expressed some of my concerns about Mr. Kalyk's affidavit evidence earlier, and some comments are made below.
- [22] Mr. Kent's evidence is that he wanted to proceed on the closing date, and if that was not possible, he was amenable to taking possession on the closing date. His purchase monies were in trust and the transfer and payment could be completed later.
- [23] Mr. Kalyk's affidavit spoke of the unexpected sale of his Sydney house (which was not on the market) and how that changed his plans to travel from Australia to Kelowna in January 2016. Since Mr. Kent had, in earlier discussions, mentioned a possible completion in February 2016, (but Mr. Kalyk successfully obtained the earlier January 29 completion date) Mr. Kalyk wrote to Mr. Kent on December 23, 2015 requesting a deferral of the completion date anticipating that such an extension would be granted. Mr. Kent replied that he would provide an answer after Christmas. Mr. Kent did not respond until January 6, 2016.
- [24] Having not heard anything in the interim, Mr. Kalyk says he did not book any flights to Canada. This is at odds with para. 15 of Mr. Kalyk's second affidavit where he said that as soon as the contract was made he knew he needed to book air tickets to Canada in early January 2016. As well it is consistent with the annotation on the Kalyks' airline ticket exhibited to Mr. Kalyk's second affidavit which I note below at para. 40 indicates contact with the airline agent on or prior to December 17, 2015.
- [25] When Mr. Kent advised on January 6, 2016 that he would not agree to a delayed completion date, Mr. Kalyk said he could no longer organize flights so that he and his wife could arrive in Canada prior to the original completion date. He deposed the earliest they could arrive in Kelowna, given their various commitments, would be February 11, 2016, (2nd affidavit, para. 22) and he estimated that they would need until February 18, 2016, to prepare the property for closing and to acquire the CRA clearance certificate. I was unable to find reference to the February 11 date in the correspondence which speaks to closing initially on February 17, and then on February 18 (see letter #8 in the correspondence above). In fact, the correspondence speaks of "flights being booked out for the 17th" and "can get flights for the 18th", which belies the affidavit narrative.
- [26] Mr. Kalyk says he secured the February flights but was advised by Mr. Kent after he had booked them that Mr. Kent wanted to complete the contract on the date originally specified. Again, I do not find that in the correspondence.
- [27] Mr. Kalyk acknowledges Mr. Kent's counsel provided the transfer documents on January 13, 2016, and suggested the inclusion of an undertaking as to a holdback regarding non-resident sales to deal with the Kalyks' difficulties in obtaining the CRA clearance certificate before the

original closing date. Mr. Kalyk also notes that because he had agreed to sell the Big White property to Mr. Kent for less than the price for which he had acquired the property, he would realize no capital gains. That given, he did not know what the possible holdback requirement might be.

- [28] He says that due to his and his wife's delay in being able to travel to Canada to remove the excluded goods and to obtain the CRA clearance certificate, the Kalyks were unable to close on January 29, 2016.
- [29] I have some difficulty with this position. Mr. Kalyk knew the completion date and that he needed to book airline tickets immediately and he then sold his Sydney house with a completion date in April. The one matter not in his control was the CRA clearance certificate.
- [30] On January 19, 2016, Mr. Kent's counsel wrote to Mr. Kalyk's counsel confirming he wished to close as scheduled as Mr. Kent and his family planned to use "the unit" for the first two weeks of February. To facilitate this, Mr. Kent was prepared to allow the Kalyks to retain one of the storage units to store their personal items until they were able to travel to Kelowna to remove them later in February. As well, the realtor would assist in storing the Kalyks' items. Thus, the removal of "excluded goods" was not a major issue.
- [31] On January 25, 2016, Mr. Kent's counsel wrote to the Kalyks' solicitor confirming Mr. Kent's wish to take possession according to the original terms of the contract. He reiterated that he had Mr. Kent's full purchase funds in trust and would hold them pending the Kalyks' counsel's acceptance of the undertakings in the sale letter. Mr. Kent's counsel advised that Mr. Kent, who lives in Alberta, would be flying out to Kelowna to "perform a final walk through prior to completion".
- [32] I am not aware why the suggestion that possession be granted on January 29, 2016, and the transfer of title and financial issues be dealt with later could not be accommodated.
- [33] On January 27, 2016, the Kalyks' solicitors wrote saying they had spoken with their clients and were unable to close the purchase on January 29, 2016, or deliver possession on that date. In that letter, they said "the new closing and possession date must be February 18, 2016, due to the conversations that have taken place between our respective clients " and closed by saying "we appreciate this may come as a disappointment to your clients, however our clients are unable to make alternate arrangements".
- [34] This is a unilateral dictum from a party not able to complete. It does seem at odds with the parties' January correspondence that they would leave it to the lawyers to resolve. Evidently, little discussion took place. Then, as noted, a unilateral assertion was made to change the completion date.
- [35] The parties then chose to write directly to each other. That did not help.

- [36] On February 1, 2016, Mr. Kent's counsel wrote to the Kalyks' solicitors confirming the non-completion of the transaction on January 29, 2016, and asserted that the Kalyks had breached the contract. The letter advised that Mr. Kent had suffered losses and damages and that Mr. Kent was considering his options with respect to the matter.
- [37] The correspondence then falls silent until February 15, 2016. Mr. Kalyk deposes relying on the February 1, 2016 letter as it fails to assert Mr. Kent is accepting the breach and, in Mr. Kalyk's opinion, resulted in Mr. Kent leaving the contract in place. Mr. Kalyk says this prevented him from relisting the property, offer it for sale or rent it. Mr. Kalyk also did not seek any clarity from Mr. Kent about whether he considered renting or relisting the Big White property.
- [38] The law gives an innocent party a reasonable time to elect whether to proceed with a purchase and in either case seek damages, if appropriate.
- [39] The Kalyks travelled to Canada on February 10, 2016 to remove their chattels and to prepare the Big White property for sale to Mr. Kent. It is not clear to me on the evidence whether Mr. Kent knew when the Kalyks travelled since earlier correspondence had suggested no airline tickets were available on February 17, 2016, but could be booked for February 18, 2016, which was unilaterally declared the new closing date by Mr. Kalyk. More curiously, the airline ticket put in evidence shows the Kalyks flying to Vancouver and on to Kelowna on February 10, 2016, yet no communication appears to have ensued between the parties between then and February 15, 2016, correspondence.
- [40] In his second affidavit, Mr. Kalyk produced his air ticket. It is dated January 4, 2016 though he says it was not confirmed until January 7, 2016. In his counterclaim, Mr. Kalyk seeks the air ticket as an item of damages in the amount of \$15,178.62. The booking not only includes the flight to Vancouver but also flights to Frankfurt and Paris where the Kalyks stayed until April 6, 2016, and from there to Sydney via Zurich and Hong Kong. Not only does the claim for damages seem excessive, the booking also notes (at p. 101) "final ticket date 17 dec 15" and "final due date 22 dec 15".
- [41] I infer from the ticket that Mr. Kalyk had in fact done as he deposed and contacted his travel agent when the Big White property sale was made in mid-December to arrange the flight to Vancouver (and perhaps beyond). This puts in doubt some of Mr. Kalyk's evidence as to having difficulty in flying to Kelowna in mid-January 2016 to complete the sale.
- [42] On February 15, 2016, Mr. Kent's solicitors forwarded a letter to Mr. Kalyk's solicitors confirming their advice of February 1, 2016, that the Kalyks were in breach of the contract by not completing the transaction on the completion date. They asserted that time was of the essence and that they had not heard from Mr. Kalyk's solicitors since they had claimed that the Kalyks were in breach of the contract.

- [43] Counsel continued: Without any agreement to extend the date of completion, the contract came to an end when your clients failed to complete. We advise that we will be requiring the realtor holding the deposit money, Premier Canadian Properties to return the deposit money to our clients. Your client's failure to meet the contractual obligation and the result in termination of the contract has resulted in our client suffering losses and damages. We can advise that our clients will be seeking compensation for such losses and damages.
- [44] The Kalyks responded through their solicitors by writing on the same day: we confirm that your clients have instructed you to convey to us that they consider the Contract to be at an end, that they will not be completing the purchase of the Property. Our clients are ready, willing and able to complete the sale of the property on February 18, 2016 and will be tendering the requisite documents on that date.
- [45] On February 16, 2016, the Kalyks' solicitors wrote a letter indicating that they had: tried to arrange all of the things that had to be done to give the buyers full access to the property and clear CRA certificate at the earliest possible time. That time was thought to be February 18. The sellers did not intend to demand completion on that date or any other date and are in fact prepared to permit settlement at a time reasonably convenient to the buyers.
- [46] In that letter, the Kalyks' solicitors also advised that the CRA clearance certificate was now at hand and the transfer documents had been signed. They asked when Mr. Kent wished to complete the purchase.
- [47] On February 17, 2016, the Kalyks' solicitors advised that the February 15, 2016 letter from Mr. Kent's solicitors, was, in their view, "not on its face a notice of rescission of the contract and is not understood by us to be such".
- [48] I need not repeat the arguments set out in the February 17, 2016 letter. In sum, it was asserted the contract was still in effect when the Kalyks offered to complete the transaction as the Kents had failed to accept the Kalyks' repudiation; the time of essence clause was solely for the sellers' benefit; the failure to obtain the CRA certificate was not a repudiation; and that time would be of the essence for the February 18 closing, although that time could be extended.
- [49] According to their affidavit, the Kalyks left Canada on February 18, 2016.
- [50] By letter forwarded February 23, 2016, the Kalyks' solicitors indicated their clients' willingness to complete the sale and forwarded executed vendor documents, but Mr. Kent declined to proceed with the purchase.

- [51] By letter of March 1, 2016, the Kalyks' solicitors said their clients had offered Mr. Kent reasonable time to complete the purchase and sale with a final completion date of February 29, 2016, where time was of the essence. The Kalyks subsequently elected to accept Mr. Kent's repudiation of the contract and gave notice that the contract had been terminated and that the Kalyks were entitled to retain the Kents' deposit pursuant to paragraph 12 of the Contract, on account of damages suffered by the sellers, without prejudice to other remedies.
- [52] On March 4, 2016, the Kalyks' solicitors wrote to Premier Canadian Properties requesting the Kents' deposit held in trust be released to their offices on account of damages suffered by their clients.
- [53] I note there were attempts to settle the matter for a lesser amount. In my view, those were proper efforts to end the dispute which I regard as privileged. Consequently, I have not taken them into account.
- [54] On May 3, 2016, litigation commenced.
- [55] Both sides claim damages. Both sides through counsel provided lengthy arguments with respect to the facts outlined in the correspondence. With respect, the arguments were already found the correspondence. Law
- [56] In *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375 Myers J. described how to properly characterize a vendor's failure to convey property it had agreed to sell:
- [303] I do not think it is disputed by the defendants that the breach committed by them is a fundamental one. There can be nothing more fundamental in a contract to convey land than the vendor refusing to convey it.
- [57] As to an innocent purchaser having the right to terminate, Ryan J.A. said in *Gulston v. Aldred*, 2011 BCCA 147 [Gulston] at paras. 49-52:
- [49] What, then, should the Court make of the failure of Ms. Aldred to meet the time requirement of May 29? The respondent accepts that this breach was a fundamental breach by virtue of clause 12 of the contract, a fundamental term which specified that "time is of the essence".
- [50] Where there is a breach of a fundamental term, the innocent party has two options. As this Court stated in *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*, (1978) 85 D.L.R. (3d) 186 at para. 130: ... However, it is not every breach which determines a contract and puts an end to contractual obligations. There are breaches compensable in damages only and breaches called fundamental breaches which can bring the contractual relationship to an end and free the parties from further performance. When faced with a fundamental breach the innocent party is put to an election. He may elect to affirm the contract and to hold the other party to the performance of his obligations and sue for damages as compensation for the breach. He may, on the other hand, elect to treat the

breach as a fundamental breach and accept it as such. Thus he would terminate the contract and thereafter be relieved of any further duty to perform and he could sue at once for damages or quantum meruit for performance to that point. It is essential that such election, an election between inconsistent rights, be made promptly and communicated to the guilty party. Once made, the election is binding and cannot be changed. [Emphasis added.]

- [51] In the case at bar, Mr. Gulston did nothing on May 29. He received the municipal certificate on June 10 and expressed satisfaction with it. It was not until August 19 that he purported to terminate the contract. He did not do so on the basis that he had not received the municipal certificate on May 29 but for other reasons set out in a letter prepared by his solicitor.
- [52] Mr. Gulston did not promptly communicate an election to Ms. Aldred that he was terminating the contract for breach of the remediation clause. Instead, for several months following he treated the contract as still in place.
- [58] In *League Assets Corp. (Re)*, 2016 BCSC 2262, Fitzpatrick J. described the manner in which repudiation can be conveyed at paras. 32-34:
- [32] The relevant law [on repudiation] is not in dispute.
- [33] In *McCallum et al. v. Zivojinovic* (1977), 16 O.R. (2d) 721 (C.A.), at 723, the court discusses the manner in which renunciation or repudiation may take place: The renunciation of a contract may be express or implied. A party to a contract may state before the time for performance that he will not, or cannot, perform his obligations. This is tantamount to an express renunciation. On the other hand a renunciation will be implied if the conduct of a party is such as to lead a reasonable person to the conclusion that he will not perform, or will not be able to perform, when the time for performance arises: *Chitty on Contracts*, 23rd ed., vol. 1, para. 1342, at p. 626; 9 Hals., 4th ed., para. 548, at p. 376. ...
- [34] Even when a person has indicated that he will not or cannot perform his obligations, this does not automatically result in termination of the contract. The innocent party has the option to accept the repudiation and elect to treat the contract as terminated. If not, then the contract remains effective and both parties remain subject to the provisions in that contract.
- [35] In *Dosanjh v. Liang*, 2015 BCCA 18 [Dosanjh], the court adopted the trial judge's summary of the rights of a party to accept a repudiation of a contract:
- [33] The trial judge summarized the general law with respect to a party's right to accept a repudiation of a contract at para. 50 of her judgment: The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows: · A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract. · If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for

damages immediately without waiting for the time that the contract should have been performed. · If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own. · If the innocent party wishes to accept the repudiation, he or she must make his or her election known. · Once made, the election is irrevocable.

- [59] For an election to be timely, it must be communicated within a reasonable time: *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 45 [Brown]; *Dosanjh* at para. 37.
- [60] An election can be communicated directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: *Brown* at paras. 45-48; cited with approval in *Trieu v. Diep*, 2015 BCSC 950 at para. 37.
- [61] The Court in *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425 [A & G Investment] stated:
- [38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position.
- [62] These cases make plain that the law requires an irrevocable election by the innocent party to be communicated in a timely way to the repudiating party so that both parties' rights and obligations under the contract can be determined. In *A & G Investment*, Goepel J.A described the purchaser's attempt to rely on a breach by the seller that had occurred four months prior to its reliance on it as lacking timeliness: at para. 39. Discussion
- [63] In this case, the context was clear. The vendor did not provide title on the completion date.
- [64] The issue is when did Mr. Kent's solicitors make it clear that they accepted the vendor's breach, the contract terminated, and that Mr. Kent was seeking damages for the vendor's default?
- [65] The Kalyks argue that Mr. Kent did not make a clear and unequivocal election in a reasonable time since they submit Mr. Kent did not make his election known before or after February 15, 2016. Until then, the Kalyks argue, the contract survived.
- [66] I agree that, on the vendors' breach, Mr. Kent did not make an immediate election. The February 1, 2016 letter said the vendors were in breach of the contract; they had suffered loss and damages and were considering their options. That was equivocal.
- [67] Equally equivocal, say the Kalyks, is Mr. Kent's solicitor's February 15, 2016 letter.

- [68] I agree with the Kalyks that it is not correct in law to say the contract terminated upon the Kalyks' failure to complete on January 29, 2016. As the cases state, a repudiation must be conveyed and "accepted". In one of the cases cited, a solicitor went so far as to draft a "Notice of Revocation" to communicate his client's acceptance of the repudiation. But is the February 15, 2016 letter equivocal?
- [69] I find the February 15, 2016 letter (incorrectly) states the contract is at an end. However, Mr. Kent also seeks return of the deposit monies and damages. In my view, these statements together (the contract is at an end, return the deposits, and there will be a claim for damages) constitute an election to accept the sellers' breach, rescind the contract and preclude the right to demand specific performance. One cannot claim return of the deposit and seek specific performance, for the deposit is part of the purchase price. The repudiation was "accepted". While I find this plain on the face of the letter, I accept it could also be reasonably inferred.
- [70] Following Mr. Kent's solicitor's February 1, 2016 letter, the Kalyks were silent. During that time, they also failed to affirm the sale contract. Indeed it is curious as to why they would fly to Kelowna on February 10, 2016 and sit silent until February 15, 2016.
- [71] I find Mr. Kent's response on February 15, 2016 constitutes a timely election on the facts of a residential house sale, and may be contrasted with the cases referred to above. Only after Mr. Kent's solicitor wrote saying the contract was at an end, they wanted their deposit back, and there would be a claim for damages, did the Kalyks respond, attempting to keep the contract alive and offering to complete three days later.
- [72] The Kalyks further argue there is an implied term that extended the completion date, given the vendors' Australian residence, the travel issues, and the difficulty in obtaining the CRA clearance certificate.
- [73] I disagree. In this modern age with instant communication and Powers of Attorney, sales can be perfected at a distance. Indeed it can be seen in the letter of January 13, 2016 where the solicitor stated the documents could be sent by fax or email and the original documents were not needed. I decline to find an implied term regarding business efficacy when all that can be said is that it accommodates the sellers' home sale and travel plans.
- [74] The CRA certificate was an issue for the vendors and could have been dealt with by their solicitors. The Kalyks did not need to travel to Canada to complete the sale.
- [75] The Kalyks also argue that paragraph 12 of the standard form agreement as to the essentiality of time is solely for the benefit of the vendor. The argument seems to be novel.

- [76] I agree that paragraph 12 only provides for the vendor to be able to forfeit the deposit. I disagree that the time of the essence clause does not affect both parties to a sale of land. It has a lengthy history and affects both parties if they do not complete on the completion date; see the same clause before the Court of Appeal in *Salama Enterprises (1988) Inc. v. Grewal* (1992), 90 D.L.R. 4th 146 and *Garson J. (as she then was) in Wali v. Lee*, 2003 BCSC 237. And see *Gulston*, *supra*.
- [77] Given my decision that the February 15, 2016 letter constituted a clear election, I now turn to Mr. Kent's claims for damages. Damages
- [78] Below is a list of the damages sought by Mr. Kent, and explanations for claims I disallowed:
a. Interest \$1,942.56 b. Rental Cost \$10,500.00. I disallow this item. The parties had arranged this as a precursor to the purchase and Mr. Kent had "full value" over the Christmas holiday.
c. Home Inspection \$510.00 d. Flights \$1,918.99 I allow this item at \$634.32 e. Car Rental \$200.00 f. Accommodation \$174.80 g. Mileage to recover stored items \$640.00 h. Lost Rentals \$8,100.00. I disallow this item as no rental occurred nor am I persuaded there was any actual loss to the plaintiff. i. Accounting \$1,764.01 j. Legal \$7,398.75
- [79] In sum, I allow the claim at \$13,264.44. If counsel cannot agree on costs, they may arrange to argue the matter before me by arranging a date with trial scheduling. "Crawford, J."

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