

CANADA / JUDGMENT

## Mitchell v. Perry

2025 BCSC 2507

### COURT

Supreme Court of British Columbia

### DECIDED

18 December 2025

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2025 BCSC 2507 Mitchell v. Perry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mitchell v. Perry,

2025 BCSC 2507

Date: 20251218

Docket: S258067

Registry: New Westminster

Between:

Michael L. Mitchell and Lisa Anne Mitchell

Plaintiffs

And

Tyson David Perry and Yuko Himoto

Defendants

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiffs:

H.K. Brar

The Defendants, appearing in person:

T.D. Perry

Y. Himoto

Place and Date of Hearing:

Additional Written Submissions:

New Westminster, B.C.

October 7, 2025

October 30, 2025

Place and Date of Judgment:

New Westminster, B.C.

December 18, 2025

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## I. INTRODUCTION

- [1] The plaintiffs apply under the summary trial rule for an order that a real estate brokerage firm release a deposit it is holding in trust.
- [2] The deposit was made by the defendants under a contract to purchase the plaintiffs' home. The defendants were unable to complete the purchase because they were not successful selling their own home and could not afford to finance two properties. The plaintiffs claim forfeiture of the deposit in accordance with the terms of the contract.
- [3] The defendants seek relief from forfeiture, primarily on the basis the plaintiffs were able to re-list and sell the property at a higher price and it would be unconscionable for them to receive a windfall.

- [4] For the reasons that follow and despite the thoughtful submissions by the defendants as self-represented litigants, I find that the request for relief from forfeiture must be dismissed and grant judgment for the plaintiffs.

## II. BACKGROUND

- [5] Tyson David Perry and Yuko Himoto wanted to upgrade from their townhouse in Surrey to a home that would be more suitable for their growing family with three young children. Their total budget was between \$1,600,000 and \$1,700,000. They obtained pre-approval from their bank for a mortgage to finance the purchase, if they sold their townhouse for at least \$980,000.
- [6] Mr. Perry and Ms. Himoto retained a realtor to assist them with the process of buying and selling real estate. They toured a property in Langley that was owned by Michael L. Mitchell and Lisa Anne Mitchell (the "Mitchells"), and immediately fell in love with it.
- [7] Mr. Perry and Ms. Himoto made an offer of \$1,525,000 with a deposit of \$50,000. The Mitchells countered with a price of \$1,595,000 and a deposit of \$75,000. Mr. Perry and Ms. Himoto agreed to this price but asked to reduce the deposit to \$50,000, because they said they would need to use their line of credit for the deposit and \$50,000 was the limit on the line of credit. The Mitchells agreed to reduce the deposit to \$50,000.
- [8] On September 25, 2024, the parties entered into a contract of purchase and sale based on the model agreement developed by the British Columbia Real Estate Association and the Canadian Bar Association British Columbia Branch (the "Contract"). The basic terms of the Contract were: a purchase price of \$1,595,000; a deposit of \$50,000, to be held in trust by RE/MAX Crest Realty; and a completion date of January 8, 2025.
- [9] The Contract included a term that provided that the deposit was non-refundable and forfeited on account of damages if the buyers failed to pay the balance of the purchase price when it was due:

Time will be of the essence hereof, and unless the balance of payment is paid and such formal agreements to pay the balance as may be necessary is entered into 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, subject to the provisions of the Real Estate Services Act, on account of damages, without prejudice to the Seller's other remedies.

- [10] The Contract was subject to three conditions for the benefit of the buyers: mortgage approval, a satisfactory home inspection and approving the title search results.

- [11] Mr. Perry and Ms. Himoto arranged an inspection of the Mitchells' home. The inspector was unable to complete the inspection because he did not have access to all areas of the home. In his report, he noted some deficiencies. The parties negotiated a \$5,000 reduction in the purchase price to address these deficiencies.
- [12] On October 4, Mr. Perry and Ms. Himoto removed the buyers' conditions. The Contract became binding as of that date.
- [13] On October 8, the Mitchells entered into a contract to purchase another home in Langley. That contract became binding on October 22. The closing date was January 9, 2025.
- [14] Mr. Perry and Ms. Himoto listed their townhouse for sale on December 2, almost two months after they removed the conditions in the Contract. Their asking price was \$899,000, which was recommended by their realtor.
- [15] Mr. Perry and Ms. Himoto arranged multiple showings but received little interest in their property. On December 20, they instructed their realtor to seek an extension of the completion date to purchase the Mitchells' home. He told them that he would seek an extension but recommended that they also explore financing from a private lender. They made some enquiries of a broker and received one offer to advance \$200,000, which would not be sufficient to purchase the Mitchells' home if they could not sell their townhouse.
- [16] As the completion date neared, Mr. Perry and Ms. Himoto still had not received any offers to purchase their townhouse at the price their bank required before the bank would advance the loan they required to complete the transaction. Their realtor recommended that they obtain a second mortgage on the townhouse. He began negotiating on their behalf with private lenders. Even if they could secure a sufficient advance, however, Mr. Perry and Ms. Himoto could not afford the interest and fees associated with private financing.
- [17] On January 8, the closing date, the lawyer that Mr. Perry and Ms. Himoto had retained for the conveyancing informed the Mitchells' conveyancing lawyer that Mr. Perry and Ms. Himoto were not proceeding. The Mitchells' lawyer asked if they were walking away or looking for an extension. Their lawyer asked how long of an extension was available. The Mitchells' lawyer obtained instructions and confirmed that the Mitchells were ready, willing and able to proceed as agreed in the Contract.
- [18] When Mr. Perry and Ms. Himoto failed to proceed, the Mitchells required private financing to complete the purchase to which they had committed in October 2024. On January 9, they borrowed \$1,245,000 at an interest rate of 9.75% and monthly payments of \$10,115.63.
- [19] The Mitchells relisted their home for sale on January 16. On January 19, they accepted an offer to purchase the property for \$1,654,000. On January 24, they agreed to change the purchase price to \$1,649,000. The sale completed on March 27, 2025.

### III. ANALYSIS

## A. Suitability for Summary Trial

- [20] Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 makes the presiding judge a gatekeeper on a summary trial application. Sub-rule (15) provides that judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89.
- [21] I find that the issues are suitable for summary trial. All the necessary facts can be found based on the affidavit evidence, the Contract, and a small number of documents. None of the evidence on the material issues is disputed. Mr. Perry and Ms. Himoto admit the breach of contract. The only real issue is forfeiture of the deposit. The amount claimed is modest. This case is well-suited to the summary trial process. A full trial would not serve the interests of any of the parties.

## B. Calculation of Damages

- [22] As stated, the Mitchells sold their home for \$1,649,000, which is \$54,000 more than the price that Mr. Perry and Ms. Himoto agreed to pay.
- [23] The Mitchells incurred various expenses because Mr. Perry and Ms. Himoto failed to complete the purchase as agreed on the completion date, including mortgage payments to the private lender, financing fees, and property expenses until their home resold. Mr. Perry calculated that those expenses totalled \$43,597.87, meaning that, in his submission, the Mitchells realized a net gain on reselling their home of \$10,402.13.
- [24] Counsel for the Mitchells disputed Mr. Perry's calculations. I granted leave for the Mitchells to submit their own calculations in a written reply. The Mitchells calculated that they incurred damages in the amount of \$60,342.58, exclusive of legal fees. I agree with the Mitchells' calculations.
- [25] The parties agree on the payments the Mitchells made to Fortis BC, BC Hydro, TD Canada Trust, and a notary, as well as property taxes. These expenses amount to \$13,338.75. In addition, the evidence establishes that the Mitchells paid:
- a) \$2,750.00 to Fasken Martineau Dumoulin LLP in legal fees, disbursements and taxes, plus a lender discharge fee of \$75.
  - b) \$15,562.50 to PHL Capital Corp. as a commitment fee, which included a broker referral fee.
  - c) \$26,744.05 to PHL Capital Corp. in total mortgage payments for the private financing from January 9 to March 27, 2025.
  - d) \$997.50 to Walker Real Estate Appraisers for the two appraisals required by the private lender.
  - e) \$874.78 to Westland Insurance for home insurance for the relevant time, which included a one-time fee of \$94 for a vacancy permit.

- [26] As a result, the Mitchells incurred a net loss of \$6,342.58. These are their actual damages for the purposes of assessing the argument for relief from forfeiture of the \$50,000 deposit.

### C. Frustration of Contract

- [27] Mr. Perry and Ms. Himoto also raised frustration of contract in the response to the summary trial application. Mr. Perry did not pursue it vigorously in oral submissions. In my view, it is of no assistance.
- [28] The doctrine of frustration of contract may relieve contracting parties from their bargain by bringing the contract to an end. The doctrine applies "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract': Naylor Group Inc. v. Ellis-Don Construction Ltd., 2001 SCC 58 at para. 53.
- [29] Frustration cannot be relied on merely because the purchaser finds, for whatever reason, that they do not have the funds to complete. This is because frustration requires a supervening event that radically changes the performance of the contract. While a lack of money affects a party's ability to perform an obligation, it does not normally alter the nature or purpose of the obligation itself: Wilkie v. Jeong, 2017 BCSC 2131 at paras. 37-39.
- [30] The difficult situation that Mr. Perry and Ms. Himoto found themselves in, still owning one property, with an obligation to purchase a second property, and no financial ability to do so, did not destroy the basis for the Contract with the Mitchells. It did not change the parties' contractual obligations. It did not result in something different from that which was undertaken. To the contrary, the fundamental purpose of the Contract, namely, the transfer of title to the Mitchells' home in exchange for the purchase price, was entirely unaffected. Accordingly, the Contract was not frustrated.

### D. Deposits and Relief from Forfeiture

- [31] The purpose of a deposit in a real estate transaction is to secure the buyer's performance of the contract. In other words, a deposit is designed to motivate the parties to do what they promised to do in the contract. Consistent with this purpose, the deposit is forfeited by a buyer who fails to complete, even if it bears no relationship to the seller's loss: Tang v. Zhang, 2013 BCCA 52 at paras. 22, 24 and 30(3).
- [32] Real estate deposits are sometimes referred to as "earnest money", a meaningful pledge to signify the buyer's commitment. If the amount to be forfeited is excessive, it may be characterized by the court as a penalty. A penalty is unlawful unless it can be justified as a genuine pre-estimate of the loss the seller will incur because of the breach: Tang at paras. 26 and 30(4).

- [33] In British Columbia, real estate deposits are typically in the range of 5% of the purchase price. However, parties are free to agree on a higher or lower amount. There is no fixed percentage at which a deposit becomes a penalty. In *Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385, for example, the Court of Appeal found that a 20% deposit was reasonable: paras. 11 and 25.
- [34] The deposit in this case was approximately 3% of the purchase price. It was clearly "earnest money" to secure the buyers' performance, and not a penalty.
- [35] Often, as in this case, the seller will incur expenses associated with re-selling the property, such as additional mortgage payments, utilities and insurance. The seller cannot claim the deposit plus these expenses. If damages are proven, the deposit will be applied against them: *Tang* at para. 30(5).
- [36] It follows that, where the seller's damages are less than the deposit, as in this case, the seller's recovery is limited to the amount of the deposit. However, it also follows that the buyer cannot recover the deposit simply because the seller resold the property at a higher price and may receive a "windfall" if the deposit is forfeited.
- [37] As the Ontario Court of Appeal said in *Rahbar v. Parvizi*, 2023 ONCA 522, at para. 59: "if purchasers were allowed to reclaim their deposits in a rising real estate market simply because vendors resold their property at a higher price it would eviscerate the very purpose of deposits."
- [38] However, the buyer may have a remedy in equity for relief from forfeiture. The court's jurisdiction to grant relief against forfeiture is codified in s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253:

### Relief against penalties and forfeitures

24. The court may relieve against all penalties and forfeitures, and in granting the relief impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.
- [39] The leading case in Canada on relief from forfeiture is *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, where the Supreme Court of Canada provided some general factors to consider, at 504:

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: [citations omitted].

- [40] Mr. Perry relies on these factors, as well as the decision by the Ontario Court of Appeal in Ontario (Attorney General) v. 8477 Darlington Crescent, 2011 ONCA 363, where Justice Doherty said, "Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture": para. 87.
- [41] However, as noted by Justice Warren (before she was appointed to the Court of Appeal) in Wilke, neither of these decisions concerned "forfeiture of a deposit paid as earnest money by a purchaser on a real estate transaction" (para. 51). In Wilkie, Warren J. distilled the principles from three Court of Appeal decisions that considered relief from forfeiture of a real estate deposit:
- [61]
3. Two things are necessary to give rise to that equitable relief: first, the sum forfeited must be out of all proportion to the actual damage suffered by the seller, which cannot be assessed until the seller's actual losses have crystalized, and, secondly, it must be unconscionable, in the traditional equitable sense of unconscionability, for the seller to retain the money. Therefore, if the transaction is not unconscionable in the traditional sense, it is not necessary to consider whether the sum forfeited is out of proportion to the vendor's actual loss.
- [Emphasis added.]
- [42] This formulation of relief from forfeiture is sometimes referred to as the Stockloser test, after Stockloser v. Johnson, [1954] 1 All E.R. 630 (C.A.), at 638. It may be stated as follows:
- a) the sum forfeited must be out of all proportion to the damage; and
  - b) it must be unconscionable for the seller to retain the money.
- [43] In Gagliardi v. Al-Karawi, 2023 ONSC 6853, Justice Chown of the Ontario Superior Court of Justice observed following an exhaustive review of the caselaw that Canadian courts "typically" apply the Stockloser test in real estate deposit cases, but some courts also weigh the factors from Saskatchewan River Bungalows (para. 44). Justice Chown concluded that the appellate court in Ontario had not resolved which test for relief from forfeiture applies in deposit cases (para. 77).
- [44] To the extent there is an unresolved question in Ontario, however, Wilke establishes that the Stockloser test governs in British Columbia.
- [45] The second branch of the Stockloser test, unconscionability, is very difficult for a buyer to meet in the context of a normal real estate transaction between arms-length parties. In Wilke, Warren J. said this:

- [64] To set aside a transaction for unconscionability it is necessary to find, not only an imbalance in the relationship between the parties and the terms agreed to, but also that the party against whom the relief is sought "was guilty of morally culpable or reprehensible [conduct]"
- [46] The indicia of unconscionability include inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of bona fide negotiations, the nature of the relationship between the parties, the gravity of the breach, the conduct of the parties, etc. This is not a closed list; however, "the finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case": *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at paras. 25 and 30.

E. Are the Defendants Entitled to Relief from Forfeiture?

- [47] I find that the sum to be forfeited is out of all proportion to the damage. The deposit of \$50,000 is approximately eight times the Mitchells' actual damages of \$6,342.58. I consider that to be a large discrepancy.
- [48] However, I am unable to find that it would be unconscionable for the Mitchells to retain the money. There is nothing to suggest that their conduct was anything but entirely proper. They were entitled to refuse the last-minute request for an extension of the closing date. They had committed to their own purchase agreement, with a deposit that they would forfeit if they did not close the next day. They were forced to take a significant risk on high-interest bridge financing, not knowing how long it would take to re-sell the property.
- [49] The Mitchells were aware that Mr. Perry and Ms. Himoto needed to use their line of credit to raise the deposit. However, there is no evidence that the Mitchells sought to leverage this information to their advantage. Indeed, they agreed to reduce the deposit below 5% to accommodate the limit on the line of credit.
- [50] Ms. Himoto has congenital deafness and limited English language skills. However, there is nothing to suggest that she and Mr. Perry, as married partners in this transaction, suffered under a disability that would put them at a disadvantage. Mr. Perry is fluent in the English language and expresses himself clearly.
- [51] There was no inequality of bargaining power between the parties that resulted in an unfair bargain. Both parties were represented by real estate agents.
- [52] I accept Mr. Perry's evidence that he and Ms. Himoto explored all their options and found no viable alternative for completing the purchase that would not have put them in significant financial jeopardy. I acknowledge that they relied on their realtor for advice concerning the terms of the Contract and the strategy to sell their townhouse, and now question some of that advice. I appreciate that they are now stuck paying down a line of credit without a new home to show for their efforts.

- [53] While these circumstances evoke empathy for Mr. Perry and his family, they do not establish the unconscionability required for relief from forfeiture. Notably, in *Liu*, our Court of Appeal directed that "[i]n looking at the issue of unconscionability, the conduct of a vendor must be considered" (para. 28; emphasis added). Here, it would not be unconscionable, in the legal sense, to permit the Mitchells to retain the benefit of the contract they negotiated, which expressly provided that the deposit would be forfeited to them in the event Mr. Perry and Ms. Himoto failed, for whatever reason, to complete the transaction on time.
- [54] The real estate market requires certainty and predictable outcomes. Unconscionability must be assessed based on precedent, not an individual judge's notion of what might be fair in the circumstances. Mr. Perry has said all that could be said on behalf of his family. However, the law and the facts require that the request for relief from forfeiture be dismissed.

#### IV. CONCLUSION

- [55] Judgment for the plaintiffs is granted on the summary trial application. There will be an order that RE/MAX Crest Realty release the \$50,000 held in trust plus any interest accrued to the plaintiffs.
- [56] The plaintiffs are entitled to their costs of the action, to be paid by the defendants following an agreement on a bill of costs or assessment by the registrar.

"Elwood J."

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