

CANADA / JUDGMENT

Ranisavljevic v. Sathasivam

2020 BCSC 413

COURT

Supreme Court of British Columbia

DECIDED

19 March 2020

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2020 BCSC 413 Ranisavljevic v. Sathasivam

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ranisavljevic v. Sathasivam,

2020 BCSC 413

Date: 20200319

Docket: S192588

Registry: Vancouver

Between:

Vesna Ranisavljevic

Plaintiff

And

Indran Sathasivam and Vignarah Sellathurai

Defendants

And

Vesna Ranisavljevic

Defendant by Counterclaim

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for Plaintiff:

Suzanne K. Sheena-Nakai

Casper Halloway

Counsel for Defendants:

Mike Stewart

Place and Date of Hearing:

Vancouver, B.C.

January 15-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 19, 2020

I. introduction and procedural background

- [1] This is a summary trial application brought pursuant to Rule 9-7 of the Supreme Court Civil Rules by the plaintiff, Vesna Ranisavljevic, for judgment against the defendant, Indran Sathasivam, for breach of contract.
- [2] Throughout their submissions, counsel for both parties referred to the plaintiff as "Ves", and to the defendant, Indran Sathasivam, as "Indran". I shall do the same in these reasons.
- [3] The contract in question ("the "Fraser Purchase Contract") was for the sale by Ves of her home at 5186 Fraser Street, Vancouver, British Columbia (the "Fraser Property") to Indran as purchaser. The specified purchase price was \$1,400,000, and the specified completion date was November 28, 2018. The sale to Indran did not complete on November 28, 2018, and Ves sold the Fraser Property to other purchasers about six months later for the sum of \$836,000. Ves now seeks damages of \$564,000, being the difference between the original sale price and the ultimate sale price. As well, Ves seeks an additional amount of \$114,861 for costs and expenses incurred on account of the delay in selling the Fraser Property.
- [4] In her Notice of Civil Claim filed on March 8, 2019, Ves sought damages against Indran for breach of contract, and against Vignarah Sellathurai ("Mr. Sellathurai") for inducing breach of contract and/or interference with contractual relations.
- [5] The Notice of Civil Claim was served on Mr. Sellathurai on March 13, 2019 and on Indran on March 27, 2019.
- [6] On April 3, 2019, Mr. Sellathurai filed a Response to Civil Claim denying any involvement in the Fraser Purchase Contract or the Fraser Property.

- [7] On April 17, 2019, Indran filed a Response to Civil Claim alleging, among other things, that Ves knew he needed to arrange financing, that she failed to provide access to the appraiser until 2 weeks prior to completion, that he intended to complete, and that Mr. Sellathurai had nothing to do with the Fraser Purchase Contract.
- [8] On July 5, 2019, Ves filed and delivered the Notice of Application for Summary Trial.
- [9] On September 6, 2019, Indran filed an Amended Response to Civil Claim and a Counterclaim seeking relief from Ves for breaching the Fraser Purchase Contract and alternatively, failing to mitigate, and advised that he intended to set an application for a Third Party Notice against Ms. Tita Cool ("Ms. Cool"), real estate agent for Ves, which he stated he would set at the same time as the summary trial application.
- [10] On September 6, 2019, it was made clear to Mr. Lin, then counsel for Indran, that the Counterclaim did not comply with Rule 3-4 of the Supreme Court Civil Rules because it was not filed at the same time as the Response to Civil Claim, and that he would have to apply for leave of the Court if he wished to pursue the Counterclaim. Mr. Lin refused to obtain leave.
- [11] On October 3, 2019, as there was no judge available to hear the summary trial, Mr. Justice Sewell conducted a Case Planning Conference. Counsel for Indran took the position that three days would be required for a summary trial. He said that he wished to have examinations for discovery, and that he wanted to have his Third Party Notice application determined. Mr. Justice Sewell ordered that the summary trial should be scheduled for three days in December 2019 or January 2020, that counsel were at liberty to schedule examinations for discovery prior to the summary trial, and that Indran should take immediate steps to set down his Third Party Notice application. Indran did not set down his Third Party Notice application, nor did he schedule examinations for discovery.
- [12] On December 13, 2019, a Notice of Discontinuance was filed with respect to the claim against Mr. Sellathurai.
- [13] Indran retained new counsel shortly before the hearing of this summary trial in January 2020.
- [14] During submissions before me, counsel for Indran took the position that Ves should disclose the amount of any settlement she reached with Mr. Sellathurai. Counsel for Indran provided no authority to support his position. Counsel for Ves took the position that she should not be required to disclose the particulars of the settlement with Mr. Sellathurai. She pointed out that the claim against Mr. Sellathurai was a tort claim, unlike the claim against Indran, which is for breach of contract. In the absence of counsel providing any authority, I declined to direct that Ves must disclose the terms of settlement with Mr. Sellathurai.
- [15] As the Counterclaim was not filed in compliance with Rule 3-4, as no leave has been sought or obtained from the Court, and as the claim against Mr. Sellathurai has been discontinued, the only outstanding matter to be dealt with on this summary trial application is the claim by the plaintiff Ves against the defendant Indran. The issues to be determined are first,

whether this matter is suitable for summary trial determination, second, whether judgment should be granted in favour of Ves against Indran, and third, the amount of any damages payable.

II. the evidence

[16] The evidence filed on this application for summary trial consists of the following affidavits and the exhibits attached to them:

- Affidavit #1 of Vesna Ranisavljevic, filed July 5, 2019;
- Affidavit #2 of Vesna Ranisavljevic, filed September 27, 2019;
- Affidavit #3 of Vesna Ranisavljevic, filed December 10, 2019;
- Affidavit #1 of Emperatriz Cool, filed July 5, 2019;
- Affidavit #1 of Natalia Santana, filed July 5, 2019;
- Affidavit #2 of Natalia Santana, filed July 5, 2019;
- Affidavit #3 of Natalia Santana, filed September 27, 2019;
- Affidavit #1 of Vignarah Sellathurai, filed September 10, 2019;
- Affidavit #1 of Indran Sathasivam, filed September 17, 2019;
- Affidavit #1 of Parm Bhangoo, filed September 17, 2019.

III. suitability for summary trial

[17] The parties disagree about the suitability of this case for summary determination. Ves takes the position that it is suitable, and that a summary trial on affidavits will provide a faster and less costly resolution of the matter than proceeding to a full trial with witnesses. She submits that the nature of the case is such that a summary trial will permit a just decision on the issues. Indran takes the position that this case is not suitable for a summary trial.

[18] The powers of the Court hearing a summary trial application are set out in Rule 9-7(15), which provides:

9-7(15) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

- [19] In *Gichuru v. Pallai*, 2013 BCCA 60 the British Columbia Court of Appeal discussed the factors that should guide the court in exercising its discretion whether or not to grant judgment on a summary trial application. The Court wrote at paras. 30-32:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:
- [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion.

[Emphasis added.]

[20] Counsel for Indran takes the position that this matter is not suitable for summary determination and that the case should proceed to a full trial with witnesses. He submits, and I agree, that the decision about the suitability of proceeding with a summary trial is a matter within the court's discretion. He advances the following points at para. 17 of his written submissions:

The key factors that arise in this application in light of all the considerations of the nature of the case and history of the proceedings are (1) the amount involved in the dispute, (2) prejudice to the parties from any delay (3) credibility of the witnesses and (4) perhaps most importantly, issues with the evidentiary record.

[21] I shall consider each of these points in turn.

[22] First, Indran submits that the amount in dispute here is relatively large, being over \$675,000. While I agree that that is a significant sum, and while the amount in dispute is an important factor to consider, it is not necessarily determinative. Disputes in that amount may be decided by summary trial if it is possible to find the facts necessary to decide the issues and if it would not be unjust to do so: see, for example, *Clearly Canadian Beveridge Corp. v. Remic Marketing & Distribution, Inc.*, [1992] B.C.J.1867.

[23] Second, it is submitted that there would be more prejudice to Indran from proceeding by summary trial than there would be to Ves from declining to do so. I do not agree.

[24] I am not satisfied that prejudice to Indran has been demonstrated. At para. 30 of his affidavit, Indran states:

In the past three months, I have been experiencing a number of medical issues and have been in and out of the hospital a number of times. My medical issues first began about one year ago and was largely caused by stress.

[25] However, that affidavit was sworn September 16, 2019, and there is no evidence that he is currently experiencing medical issues that would interfere with proceeding on a summary trial.

[26] On the other hand, there would be clear prejudice to Ves from declining to proceed with her summary trial application. In anticipation that the sale to Indran would complete on November 28, 2018, Ves purchased another home to live in. She expected to have the sale proceeds from Indran to finance the purchase of her new home. She now finds herself having to make payments on interim financing that is expensive and difficult for her to afford. Any further delay would cause Ves substantial and continuing hardship. Ves has taken all reasonable steps to bring this matter to a timely resolution. The same cannot be said of Indran. He had the opportunity, for example, to conduct examinations for discovery, but he did not do so.

- [27] Third, Indran submits that there are disputed facts that ought to be resolved at a trial where the credibility of witnesses can be tested. The existence of disputed facts, however, is not necessarily a bar to summary determination. In *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, the British Columbia Court of Appeal observed at para. 22:
- [22] The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.
- [28] The Court went to say at para. 31 that in a suitable case, conflicts in the evidence may be resolved by reference to the documentary record:
- [31] It is clear that the judge was alive to the conflicts in the evidence. She was able to resolve the conflicts by making reference to and relying on the extensive documentary evidence before her. I agree with her decision in that regard.
- [29] Fourth, Indran refers to what he calls, "issues with the evidentiary record." In this regard, he points out, at para. 35 of his written submissions:

All of the affidavits filed in this matter contain variations on the introductory statement typically found in affidavits as follows "I have personal knowledge of the facts and matters hereinafter deposed to except where the same are stated to be upon information and belief, and where so stated I verily believe it to be true."

- [30] Indran submits that pursuant to Rule 22-2(13), affidavits on information and belief are not admissible to support an application for a final order without leave of the court.
- [31] I do not agree that this is a serious issue with the evidentiary record. First, the affidavits filed on behalf of Indran contain the impugned introductory statement, so it is difficult to discern how it lies in his mouth to complain of similar wording in the affidavits filed by the plaintiff. More importantly, this court is perfectly capable of identifying any portions of the affidavits that contain improper hearsay and according those portions no weight.
- [32] As will become clear in the reasons that follow, I am satisfied that the evidentiary record is sufficient for me to make the necessary findings of fact, including findings of credibility, for a just determination of this case, and that it would cause undue hardship to the plaintiff to delay the resolution of this matter by conducting a trial with witnesses.
- [33] For these reasons, I find that this matter is suitable for summary trial determination.

IV. findings of fact

- [34] Upon a review of all the affidavit evidence and the relevant attachments, I am satisfied that the following facts have been proven on a balance of probabilities.
- [35] Ves acquired the Fraser Property as registered owner in May 2011 .
- [36] About six years later, a real estate representative, Parm Bhangoo ("Ms. Bhangoo"), contacted Ves and advised that she represented developers who were interested in purchasing the Fraser Property along with adjacent properties for land development and rezoning. Ves advised Ms. Bhangoo that she was not interested in selling the Fraser Property at that time.
- [37] In 2018, a different real estate representative, Gary Terrado, who had assisted in the sale of the adjacent property at 5216 Fraser Street, approached Ves about selling the Fraser Property. Ms. Bhangoo also contacted Ves around this time and advised her that she represented developers who intended to purchase properties in the area for land development, and that Indran had already purchased 5216 Fraser Street for \$1,300,000.
- [38] Ves advised Ms. Bhangoo that she would not sell her home for anything less than \$1,400,000. Ves said she wished to have Mr. Terrado as her real estate representative, but Ms. Bhangoo asked that he not be involved. Ms. Bhangoo said that she could represent the interests of both the seller and the buyer in the transaction. Trusting and relying on Ms. Bhangoo to act in her best interests, Ves agreed. Ms. Bhangoo said the buyer would agree to the price of \$1,400,000, and that she would prepare the necessary paperwork.
- [39] On May 7, 2018, Ves and Indran entered into the Fraser Purchase Contract, whereby Ves would sell the Fraser Property to Indran for \$1,400,000. Other terms included a subject removal date of May 24, 2018, a deposit of \$65,000 within 48 hours of subject removal, and a completion date of November 28, 2018 (the "Completion Date").
- [40] The Fraser Purchase Contract was subject to a condition (the "Financing Clause") that Indran obtain a first new mortgage on satisfactory terms. That provision was for Indran's sole benefit. A further clause, (the "Reasonable Access Clause") provided:

The seller agrees to allow reasonable access to the Property for purposes of bank appraisal and all other purposes necessary or relevant to the Buyer in order to effect a successful Completion.

- [41] Indran signed a contract addendum removing the subject clauses on May 24, 2018, and he paid the deposit the next day. The contract addendum specifically included removal of the Financing Clause.

- [42] On May 25, 2018, Ms. Bhangoo sent an email to Ves which read:

Congrats! Your house is SOLD!

Please see the attached subject removal for 5186 Fraser Street.

- [43] On May 28, 2018, Ms. Bhangoo sent an email to Ves which read:

Please see the attached copy of the Deposit Draft for 5186 Fraser Street, the deal is FIRM.

[44] Once she had this assurance that the Fraser Contract was binding, Ves began to look for a new home. She engaged Tita Cool as her real estate representative. As it was critical to Ves that she have sufficient proceeds from the sale of the Fraser Property to finance the purchase of a new property, she had to limit her search to properties having a completion date after that of the Fraser Property. This limited her options.

[45] On October 14, 2018, Ves entered into a contract (the "Other Purchase Contract") to purchase a strata home on West 11th Avenue, Vancouver, B.C. (the "Other Property") for \$837,000, with a completion date of November 29, 2018.

[46] On September 24, 2018, Ms. Bhangoo on behalf of Indran requested Ves to provide access to the Fraser Property for an appraisal. As Ves was ill with cold and flu symptoms from the end of September until the end of October and as she was occupied with family issues, work commitments and the search for a new home, Ves made email enquires of Ms. Bhangoo about the requirement to provide access. On September 26, 2018, Ves wrote:

Hi Parm. Hope you're having fun in SF. I'm sick so having visitors is not an option. Am I legally bound to give this appraiser access to my home? Or am I being asked to do this as a courtesy to the buyer? Please clarify.

[47] Ms. Bhangoo replied that Ves was contractually bound to give access and said, "Please let me know when you're feeling better." Ves wrote back, saying, "I'll get in touch once I'm better."

[48] On October 1, 2018, Ms. Bhangoo wrote:

Hi Ves. I hope you are feeling better, please let me know when it is convenient for you so I set up an appointment for an appraiser to walk thru the property. Thanks.

[49] In her affidavit, Ms. Bhangoo states at para. 11:

From October 1-11, 2018, I repeatedly attempted to contact the Plaintiff to arrange the appraisal, but received no positive response in regards to allowing the appraiser to conduct a short walkthrough of the Fraser Property.

[50] Despite that assertion, the record of the email chain shows discussion of other topics but not of the appraisal walkthrough during that time period. That topic did not come up again until October 11, 2018, when Ms. Bhangoo wrote:

Hi Ves, the appraiser is calling every day to see when you will be able to accommodate a walkthrough for 5186 Fraser St. He is available tomorrow afternoon and Saturday but I have to let him know in advance, so please let me know when you're available. Thanks.

[51] Turning back to Ms. Bhangoo's affidavit, she states at para. 14:

From October 19-23, 2018, I called the Plaintiff on numerous occasions and left a number of voice messages asking her to return my phone call to discuss the appraisal and to address the "rent-back" matter. Despite the Plaintiff's text message on October 23, 2018 promising to call me back before Friday, she never returned my calls.

[52] Once again, however, Ms. Bhangoo's assertion that she called Ves numerous times regarding the appraisal, appears to be at odds with the written record of the email chain. Between October 12 and October 28, there was email correspondence on the unrelated topic of a possible "rent-back", but Ms. Bhangoo did not raise the topic of access for an appraiser. Surely if access had been an urgent matter, Ms. Bhangoo would have said so in the emails during this period, but instead, that topic did not come up again until Ves raised it on October 28, 2018.

[53] On October 28, 2018, Ves wrote to Ms. Bhangoo, offering access to the appraiser the following day. She wrote:

Tomorrow 4pm might work for the appraiser.

[54] Shortly thereafter, Ves wrote again, saying:

Pls let me know as soon as u can if it's a go (as per my last text).

[55] Ms. Bhangoo did not reply until October 29, 2018, when she wrote:

Hi Ves. I have been under the weather and was not able to do anything. I'll follow up today.

[56] Ves wrote back the same day:

I'm sorry ur not feeling well. No problem, let me know when u can.

[57] Two days later, on October 31, 2018, Ms. Bhangoo wrote:

Hi Ves, the appraiser is asking if tomorrow afternoon 4 pm will be good time. Please let me know. Thanks.

[58] Ves wrote back to confirm less than an hour and a half later, saying:

Sure.

[59] Despite the affidavit evidence filed on behalf of the defendant, I am satisfied from the email correspondence between Ves and Ms. Bhangoo, that at no time was it communicated to Ves that there was any urgency about the date on which access would be provided for the appraiser.

[60] In fact, the appraiser visited the Fraser Property on November 1, 2018, and he completed his appraisal the next day.

[61] As is apparent from the report dated November 1, 2018, the appraisal was not done on behalf of Indran, but rather on behalf of Mr. Sellathurai. The report estimated the value of the Fraser Property at \$1,270,000, but it acknowledged a range from \$1,176,200 to \$1,475,400 based on sales of comparable properties. The report stipulated that it could not be used by anyone other than Mr. Sellathurai without written consent.

[62] On November 13, 2018, Ms. Bhangoo on behalf of Indran requested that Ves reduce the purchase price for the Fraser Property and extend the completion date to March 2019 because the appraisal was less than \$1,400,000. Ves responded by email on November 15, 2018:

Hi Parm. As per your recent unsettling email to me re the fact that the buyer of my home has decided not to honour a binding legal agreement, I request that all future correspondences re this upsetting matter be brought to the attention of Tita Cool. Thank you.

[63] Through Ms. Cool, Ms. Bhangoo was informed that Ves refused to reduce the price or extend the completion date.

[64] Ms. Bhangoo advised Ms. Cool that Indran and Mr. Sellathurai were working together to purchase the 5216 Fraser Property and the Fraser Property to create a land assembly, and that Indran's purchase of the 5216 Fraser Property had limited his ability to raise funds for the completion of the Fraser Purchase Contract. As a result, Ms. Cool provided contact information to Ms. Bhangoo for Indran to obtain private financing for the completion of the Fraser Purchase Contract.

[65] On November 16, 2018, Ms. Bhangoo advised Ms. Cool she believed that her client Indran would be completing. In a text exchange on that date, Ms. Cool asked:

So as of right now your client is closing correct?

[66] Ms. Bhangoo replied:

As far as I know.

He never mentioned to me that he is not closing.

[67] On November 23, 2018 Ms. Cool informed Ms. Bhangoo that Indran was required to complete the purchase and sale of the Fraser Purchase Contract on the completion date and that no price reduction or extension had been agreed to. The parties proceeded to prepare the documents for completion.

[68] GMS Law Corporation ("GMS Law") was retained for the completion of the Fraser Purchase Contract and Ves retained the services of Yoshida Notary Public ("Notary"). On November 26, 2019, the Notary confirmed it was acting for Ves and requested GMS Law deliver the completion documents. On November 27, 2019, GMS Law delivered the completion documents to the Notary and stated:

To the best of our knowledge, if the Buyers are obtaining a new mortgage, the Buyers have fulfilled all the new mortgagee'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.

- [69] On November 27, 2019, the Notary delivered the executed completion documents to GMS Law. On November 28, 2019, the Notary confirmed that it had been informed that the client of GMS Law was unable to complete because the necessary funds had not been provided to GMS Law and confirmed that Ves was ready, willing and able to complete in accordance with the Fraser Purchase Contract. There was no response from GMS Law.
- [70] Ves retained Wes McMillan, of Allen/McMillan Litigation Counsel, to act for her with respect to the collapse of the Fraser Purchase Contract. On December 4, 2018, Wes McMillan wrote to GMS Law Corporation, the lawyers for Indran, stating that Ves had been ready, willing and able to complete the sale, that Indran repudiated the contract by failing to complete on the completion date of November 28, 2018, and that Ves accepted that repudiation. The letter stated that in addition to the forfeiture of the \$65,000 deposit, Ves was entitled to damages. There was no response.
- [71] Ves had planned to use the sale proceeds from the Fraser Property Contract to pay for the Other Property. When the Fraser Property Contract failed to complete on November 29, 2018, she had to obtain an extension of the completion date of the Other Purchase Contract to December 7, 2018 (the "Extension") to give her time to arrange financing. The eight-day Extension cost \$500 per day, for a total of \$4,000.
- [72] Ves completed the purchase of the Other Property on December 7, 2018, by obtaining a mortgage from Cambridge Mortgage Investment Corporation, for a term of 6 months with total interest payments of \$43,833 and a broker's fee of \$26,700 (the "Cambridge Mortgage").
- [73] When Indran failed to complete the Fraser Purchase Contract, Ves retained the services of Ms. Cool to re-list the Fraser Property for sale. I am satisfied that Ms. Cool used all reasonable efforts to market the Fraser Property, including an MLS Listing, open houses, and paid advertising.
- [74] The value of the Fraser Property declined significantly after the parties entered into the Fraser Purchase Contract. The appraised value was \$1,225,000 on November 28, 2018; \$1,150,000 on February 28, 2019; and \$1,125,000 on April 29, 2019.
- [75] Through his real estate agent, Jeremy Chandradas, Mr. Sellathurai offered to purchase the Fraser Property, but the offers he presented were for less than the appraisal that Mr. Sellathurai had obtained on November 2, 2018. Despite negotiations, no agreement was reached. Mr. Chandradas advised Ms. Cool that the issue with reaching an agreement was the partner of Mr. Sellathurai.

- [76] On January 9, 2019, Ves entered into a contract to sell the Fraser Property to 1185297 B.C. Ltd. For \$1,250,000. Unfortunately, 1185297 B.C. Ltd. did not remove subjects.
- [77] Prior to the subject removal date for 1185297 B.C. Ltd., Mr. Sellathurai presented a subject-free offer of \$1,250,000 to purchase the Fraser Property. Ves could not accept Mr. Sellathurai's offer because she was at that time bound by the agreement with 1185297 B.C. Ltd. Once 1185297 B.C. Ltd. did not remove subjects, Ms. Cool contacted Mr. Chandradas to see if Mr. Sellathurai was interested in presenting an offer. Despite repeated assurances by Mr. Chandradas that "they" would present an offer, no further offer was presented.
- [78] Despite Ms. Cool's marketing efforts, she did not receive any further offers, and after conducting a comparative market analysis, she recommended a reduction in the listing price, to which Ves agreed.
- [79] After the price reduction, the only interested buyers were Christopher Ross and Leanna Yee. They initially presented an offer for \$950,000, which Ves accepted, but they did not remove the subjects. Subsequently, on May 23, 2019, Ves entered into a contract with them for the final sum of \$836,000, with a completion date of June 6, 2019 (the "Final Contract").
- [80] The Final Contract completed on June 6, 2019, and the proceeds of sale were used to pay the closing costs and to redeem the Vancity Mortgage and partial payment for the Cambridge Mortgage Investment Corporation. Ves did not receive any of the proceeds of sale.
- [81] After June 6, 2019, Ves attempted to obtain conventional financing to pay the balance of the Cambridge Mortgage. When these attempts were unsuccessful, Cambridge Mortgage Investment Corporation commenced foreclosure proceedings on the Other Property. As a result, Ves was forced to obtain private financing of \$600,000 plus monthly interest payments of \$4,250 (the "Second Private Mortgage") in order to repay the Cambridge Mortgage to prevent the sale of the Other Property in foreclosure. The Second Private Mortgage requires full payment of principal on or before May 1, 2020.
- [82] Ves states that she has no other source of financing and that she risks a further foreclosure proceeding if she is not awarded judgment in this summary trial application.

V. issues

- [83] Ves claims that Indran breached the Fraser Purchase Contract by failing to complete on the completion date. Indran claims that Ves breached by failing to provide reasonable access to the appraiser. If Indran was in breach, then the issue of damages arises. This in turn involves questions of the appropriate valuation date for determination of the quantum of loss, and the issue of mitigation of loss.

Was Ves In Breach for Failure to Provide Reasonable Access?

- [84] Indran alleges that Ves failed to provide reasonable access to the Fraser Property as required by the Reasonable Access Clause. He says that this impeded access for appraisal purposes, which resulted in his being unable to obtain financing by the completion date.
- [85] Indran does not assert that Ves denied access completely, but rather that she delayed access, and that this was unreasonable. His position is that reasonable access means access within a day or two of the request.
- [86] It is noteworthy that the Reasonable Access Clause does not specify a time within which access must be provided; it simply requires "reasonable access." The clause provides:

The seller agrees to allow reasonable access to the Property for purposes of bank appraisal and all other purposes necessary or relevant to the Buyer in order to effect a successful Completion.

- [87] During submissions, there was some suggestion by Indran's counsel that the interpretation of the Reasonable Access Clause required expert evidence to determine what was reasonable. I do not agree. The clause is written in plain, ordinary English. We are not dealing here with a term of art that can only be understood by experts. The question of reasonableness is well within the scope of what can properly be determined by the court without the assistance of expert opinion.
- [88] The facts are straightforward. Indran did not request access until September 24, 2018, when Ms. Bhangoo made the request on his behalf. As Ves set out in her affidavit, she was ill with cold and flu symptoms from the end of September until the end of October. She was also busy with issues of family, work, and looking for a new home. On September 26, 2018, Ves wrote to Ms. Bhangoo that she was sick and for that reason, she did not want visitors. Ms. Bhangoo told her that she was contractually bound to give access and said, "Please let me know when you're feeling better."
- [89] On October 1, 2018, Ms. Bhangoo wrote:
- Hi Ves. I hope you are feeling better, please let me know when it is convenient for you so I set up an appointment for an appraiser to walk thru the property. Thanks.
- [90] As set out in my review of the facts earlier in these reasons, there then followed an exchange of emails, dealing mostly with issues other than the timing of access. One such issue was the possibility of a "rent back". Although Ms. Bhangoo asserts in her affidavit that she tried to make telephone contact, the emails exchanged do not support an inference that she conveyed any sense of urgency to Ves about arranging a time for the appraiser to have access.
- [91] It was Ves who raised the topic again on October 28, 2018, offering access to the appraiser the following day. Ms. Bhangoo did not reply until October 29, 2018, when she wrote that she had been under the weather and not able to do anything, but that she would follow up. Then on October 31, 2018, Ms. Bhangoo wrote to Ves asking if the appraiser could come at 4 pm the next day. Ves agreed to this less than an hour and a half later, saying "Sure." The

appraiser then visited the Fraser Property on November 1, 2018, and completed his appraisal for Mr. Sellathurai the next day.

- [92] I am satisfied on the evidence that the access provided by Ves was reasonable in all the circumstances. She offered access more than four weeks before the closing date. No one conveyed to her any information that Indran would be unable to obtain financing unless she provided access earlier. On the contrary, Indran had indicated that obtaining financing was not an issue for him, because he removed all subject clauses, including the Financing Clause, on May 24, 2018. The appraisal conducted on November 1, 2018 was an appraisal for Mr. Sellathurai, and it could not be used by anyone else without consent. It has not been shown, therefore, that access for Mr. Sellathurai's appraiser was necessary for Indran to obtain financing.
- [93] Finally, Indran himself never contacted Ves directly to inform her that obtaining access for Mr. Sellathurai's appraiser was an urgent matter, and we have no evidence of what communications passed between Indran and Ms. Bhangoo in this regard.
- [94] In all the circumstances, I conclude that Ves did not breach the Reasonable Access Clause of the Fraser Purchase Contract.
- [95] Alternatively, even if one took the view that Ves did not provide reasonable access and thereby breached the Reasonable Access Clause of the Fraser Purchase Contract that would still not excuse Indran's failure to complete on November 28, 2018, because he clearly affirmed the contract after the alleged breach by Ves.
- [96] The law regarding repudiation of a contract was conveniently summarized by Groberman J.A. in *Dosanjh v. Liang*, 2015 BCCA 18, at para. 33-37:
- [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.

[34] Neither party quarrels with these general propositions, which are well-supported in the case law. As I will indicate, however, the last proposition - that an election, once made, is irrevocable - requires some qualification to ensure that it is not inappropriately applied in cases of repeated or continuing repudiation.

[35] A court will not find that an innocent party has affirmed a contract in the absence of clear evidence leading it to that conclusion. The trial judge expressed the proposition as follows:

[55] Affirmation may be express or implied, but the court should be careful not to find that a party has affirmed a contract without very clear evidence that he or she has irrevocably chosen to go on with the contract. This is explained in Chitty [Chitty on Contracts, 31st ed (London, UK: Sweet & Maxwell Ltd., 2012) vol 1] at 1696-97 as follows:

[The innocent party] will not be held to have elected to affirm the contract unless, first, he has knowledge of the facts giving rise to the breach, and, secondly, he has knowledge of his legal right to choose between the alternatives open to him. Affirmation may be express or implied. It will be implied if, with knowledge of the breach and of his right to choose, he does some unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated. Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach. The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation

[36] The judge then cited *Yukong Line Ltd. of Korea v. Rendsburg Investments Corporation of Liberia*, [1996] 2 Lloyd's Rep. 604. She also referred to the following passage from *Abraham v. Coblenz Holdings Ltd.*, 2013 BCCA 512:

[28] In my view, an innocent party is not required to communicate its acceptance of a repudiation immediately. An innocent party must have a reasonable opportunity to assess the circumstances it finds itself in, to assess its options, and to explore the possibility of resolving the situation. That is particularly so where, as here, the tenants had invested a substantial amount of money in the premises and were not willing to walk away without trying to negotiate a workable arrangement. What matters is whether, in all of the circumstances, the tenants acted reasonably in communicating their course of action so as not to prejudice the other party by inducing it to act as if its repudiation of the agreement had not been accepted: *Allen v. Robles*, [1969] 3 All E.R. 154 (C.A.).

- [37] I accept that, where a party has repudiated a contract, the opposite party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept the repudiation. I also accept that, at least until that reasonable period of time has elapsed, a court should be slow to treat equivocal statements or acts as affirmations of the contract. The court's solicitude toward the innocent party, however, must not extend to ignoring unequivocal acts or statements of affirmation made by a party that is aware of its legal rights.
- [97] In the present case, if there was a breach of the Fraser Purchase Contract by Ves, Indran made it clear that he affirmed the Fraser Purchase Contract.
- [98] On November 16, 2018, more than two weeks after access was given to Mr. Sellathurai's appraiser, Ms. Bhangoo advised Ms. Cool she believed that her client Indran would be completing. In a text exchange on that date, she told Ms. Cool that as far as she knew, Indran was closing.
- [99] Moreover, in his own affidavit filed on this summary trial application, Indran states at para. 11:

From the time of entering into the Fraser Purchase Contract until learning that the Plaintiff has sold the Fraser Property to another person for a much lower price of \$836,000, I have always intended to complete on the Fraser Purchase Contract, whether purchasing the Fraser Property myself or assigning the Fraser Purchase Contract to another party.

- [100] It is thus clear that even if one viewed the conduct of Ves, with respect to the provision of access, as a repudiation of the contract, Indran affirmed the contract and intended to complete. Moreover, this intention to complete was communicated by his real estate representative, Ms. Bhangoo, to Ves' real estate representative, Ms. Cool, on November 16, 2018.
- [101] Accordingly, Indran was required to complete the purchase of the Fraser Property on the Completion Date, either because, as I have found, Ves did not breach the Reasonable Access Clause, or because, if she did, Indran affirmed the contract and communicated his intention to complete.

Did Indran Breach the Contract by Failing to Complete on the Completion Date?

- [102] As set out above, on November 13, 2018, Indran, through Ms. Bhangoo, asked Ves to reduce the purchase price and to extend the Completion Date for the Fraser Property to March 2019.
- [103] On November 15, 2018, Ves informed Ms. Bhangoo that all future correspondence should be through her new real estate representative, Tita Cool.

- [104] On November 23, 2018 Ms. Cool informed Ms. Bhangoo that Ves did not agree to any price reduction or extension, and that Indran would have to complete the contract on the Completion Date.
- [105] On November 26, 2018, Ms. Cool informed Ms. Bhangoo that Ves would not negotiate and that they have said no to both an extension and a price reduction.
- [106] Ves retained the services of the Notary, and GMS Law was retained for Indran. On November 27, 2019, the Notary delivered the executed completion documents to GMS Law.
- [107] On November 28, 2019, the Notary confirmed it had been informed that the client of GMS Law was unable to complete because the necessary funds had not been provided to GMS Law. The Notary confirmed that Ves was ready, willing and able to complete in accordance with the Fraser Purchase Contract. There was no response from GMS Law.
- [108] Ves retained litigation counsel who informed GMS Law on December 4, 2018, that Ves had been ready, willing and able to complete the sale, that Indran repudiated the contract by failing to complete on the completion date of November 28, 2018, and that Ves accepted that repudiation and would seek damages in addition to forfeiture of the \$65,000 deposit. There was no response.
- [109] I agree with the submission of Ves' counsel that any discussions before the Completion Date regarding Indran's request for an extension are not evidence of a waiver of the time is of the essence clause, and such discussions after the Completion Date could only be considered in relation to a possible new contract, which the parties never entered into. Ves had irrevocably accepted Indran's repudiation of the Fraser Purchase Contract. That contract was terminated and could not be revived.
- [110] In short, Indran breached the Fraser Purchase Contract by failing to complete on the Completion Date when Ves was ready, willing and able to complete. Ves accepted Indran's repudiation, and she is entitled to damages for Indran's breach.

What Damages is Ves Entitled To?

- [111] Ves claims that she is entitled to:
- (a) The forfeiture of the \$65,000 deposit;
 - (b) Loss of sale Price on the Fraser Property in the sum of \$564,000, which is the difference between purchase price in the Fraser Purchase Contract and the purchase price in the Final Contract;
 - (c) Consequential damages comprising of:
 - (i) payments made by Ves to Hesham Abouelhassan to extend the completion of the Other Purchase Contract, in the sum of \$4,000;

(ii) all payments made by Ves to Cambridge Mortgage Investment Company, in the sum of \$70,533;

(iii) expenses and costs in connection with the Second Private Mortgage, in the sum of \$37,500; and

(iv) all costs associated with the upkeep and maintenance of the Fraser Property between the Completion Date and June 6, 2019, including property taxes and utility bills, in the total sum of \$2,828.

[112] Indran takes the position that the amounts claimed are unduly high, because it was unreasonable for Ves to take six months to sell the Fraser Street Property. He submits she should have sold earlier, and that if she did, the loss would have been considerably less. He submits that she failed to mitigate her loss.

[113] The basic principle in assessing damages for breach of contract is that the innocent party should be put in the position he or she would have been in if the contract been performed: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 at para 206.

[114] The general rule is that damages are to be assessed at the date of the breach, but this rule is not absolute. In appropriate circumstances, judges have a discretion to use a different date if that would arrive at a more just result.

[115] In cases involving assets that are very liquid, in the sense of being easily sold, and in cases where the market for an asset is stable, in the sense that prices change little over time, the choice of date for assessing damages may be immaterial. However, where the market for an asset is rapidly rising or falling, and where it may be difficult to find a suitable buyer, the choice of date for assessment of damages can substantially affect the quantum.

[116] This is one such case. The evidence here is that when Indran failed to complete, the real estate market, or at least, the market for properties like the Fraser Street Property, was falling rapidly, and during the months that followed, it was not easy to find a suitable buyer.

[117] In these circumstances, how should the court exercise its discretion in choosing a date for the assessment of damages? In *Cassidy v. Smith*, 2008 BCSC 1778, Williamson J. listed a number of factors relevant to the exercise of that discretion. He wrote, at paras. 26-32 :

[26] In *Ansdell v. Crowther* (1984), 11 D.L.R. (4th) 614, 55 B.C.L.R. 216 (C.A.), Anderson J.A. reviewed the law concerning the date for the assessment of damages. At 626, he concluded:

It follows from the above that only in exceptional circumstances will the vendor be able to obtain an assessment of damages as of the date of the trial.

[27] A number of cases placed before the court indicate that in exercising its discretion as to the date at which damages should be assessed, the court may take into account the date upon which a resale of the property subject to the repudiated contract could have been made within a reasonable time after the contract's completion date.

- [28] In *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.), the purchaser repudiated the contract before closing. The vendor sued for damages. The date at which the damages should be assessed was the principal issue. In considering this question, the court set out a number of propositions. These included that while ordinarily courts assess damages at the date of closing, the court may choose a date different from the date of closing by taking into account the plaintiffs duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.
- [29] At 421, the court went on to say that as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date".
- [30] These propositions were considered favourably in a subsequent decision of the Ontario Court of Appeal, *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 (C.A.).
- [31] Are there exceptional circumstances here? Acting on the general rule, described above, that in a falling market the court should award the vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the completion date, I would assess damages at a date sometime after the April 29, 2008 completion date, but before the date of these proceedings.
- [32] I conclude three months after the breach is a reasonable period. Damages will be assessed as of June 17, 2008.
- [118] Similar principles were articulated by Laskin J.A. in *642947 Ontario Ltd. v. Fleischer* (2001), O.J. 4771 at para. 41:
- [41] The judgment of Morden J.A. in *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.), is the principal authority in this court on the assessment of damages for breach of an agreement of purchase and sale. In that case, the purchaser agreed to buy an apartment building but repudiated the contract before closing. The vendor sued for damages and both the trial judge and this court held the purchaser liable. The main issue in this court was when the damages should have been assessed. At the risk of doing a disservice to the thorough and thoughtful reasons of my colleague, I summarize what he wrote about the choice of the date for assessing damages for breach of an agreement to buy land in the following six propositions, which are relevant to this appeal:
- (1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.
 - (2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be performed, the date of closing.*

- (3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.
- (4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property - for example an apartment building - hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.
- (5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421).
- (6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.

[119] These judgments were cited with approval by Dillon, J. in *Greenberg & Greenberg v. Shanghai Real Estate Limited*, 2010 BCSC 1837, and by MacKenzie J. in *Panegos v. O'Byrne*, 2019 BCSC 679.

[120] In the present case, Ves submits that she should be awarded the difference between the contract price Indran had agreed to pay in the Fraser Purchase Contract, and the price she eventually obtained for the property in the Final Contract, some six months later. The question here is whether she acted reasonably in taking six months to sell the property in a declining market.

[121] As previously noted, in *Cassidy v. Smith*, the court found three months to have been a reasonable period after the date of completion for the assessment of damages. A period of almost four months was approved in *Hassel v. Khoshgoo*, 2010 BCSC 233. Counsel have not provided me with any authority where damages were assessed at a date six months after the original completion date.

[122] Nevertheless, every case must be considered on its own particular facts, and the question here is whether Ves acted in a reasonable manner to keep her losses to a minimum. I am satisfied on the evidence that she did.

[123] Indran breached the Fraser Purchase Contract on November 28, 2018, and just eight days later, on December 6, 2018, Ves re-listed the Fraser Property for sale, with Ms. Cool as her agent. The evidence shows that Ms. Cool employed all reasonable marketing techniques, including an MLS Listing, open houses, and paid advertising.

- [124] Unfortunately, the market was declining, as demonstrated by the evidence. The appraisal obtained on behalf of Mr. Sellathurai dated November 1, 2018, valued the property at \$1,270,000. The next appraisal on November 28, 2018 was for \$1,225,000. An appraisal on February 28, 2019 was for \$1,150,000, and the appraisal on April 29, 2019 was for \$1,125,000.
- [125] Indran submits that there were other offers for the Fraser Property, higher than the Final Contract price of \$836,000 that Ves could have, and should have accepted. The evidence, however, does not support that submission.
- [126] Indran refers first to his own suggestion in the fall of 2018 that Ves extend the closing date to the spring of 2019. There is no evidence, however, that Indran was ever in a position to pay the purchase price of \$1,400,000.
- [127] Next Indran refers to evidence that Mr. Sellathurai made an offer of \$1,100,000 on December 12, 2018. That, however, was considerably below the appraised value at the time. Ms. Cool delivered a counter-offer of \$1,325,000, but Mr. Sellathurai never responded.
- [128] Ves entered into a contract on January 9, 2019, to sell the property to 1185297 B.C. Ltd. for \$1,250,000, but that sale did not complete because 1185297 B.C. Ltd. failed to remove the subjects.
- [129] Mr. Sellathurai presented a further offer, this time for \$1,250,000, but Ves was unable to accept, because this was during the time that she was bound by the agreement with 1185297 B.C. Ltd. Once 1185297 B.C. Ltd. did not remove the subjects, Ms. Cool contacted Mr. Chandradas to enquire if Mr. Sellathurai would present a new offer, but no further offer was presented.
- [130] Ves did not receive any further offers, despite Ms. Cool's marketing efforts. Ms. Cool conducted a comparative market analysis that led her to recommend a reduction in the listing price. Ves agreed.
- [131] The only interested buyers following the price reduction were Christopher Ross and Leanna Yee, who made an offer for \$950,000. Ves accepted that offer, but Mr. Ross and Ms. Yee did not remove the subjects. Ves then entered into the Final Contract with Mr. Ross and Ms. Yee on May 23, 2019, and the property sold for \$836,000 on June 6, 2019.
- [132] I am satisfied on the evidence that Ves took all reasonable steps to mitigate her loss from Indran's breach of contract. She promptly re-listed the property with an agent who took all reasonable steps to market it. She did not turn down any reasonable offer. She was simply unable to sell the property at a reasonable price until the property sold under the Final Contract, some six months after Indran's breach.
- [133] In these circumstances, it is reasonable and fair to measure damages at the time of the Final Contract rather than at the time of the breach. Ves is entitled to damages of \$564,000, being the difference between the original contract price of \$1,400,000 and the Final Contract price of \$836,000.

- [134] Ves is also entitled to consequential damages to compensate for the financing and other additional costs associated with the Other Property and the cost of upkeep and maintenance for the Fraser Property: see *Gulston v. Aldred*, 2011 BCSC 1051 at paras. 8, 19-20; *Panegos v O'Byrne*, 2019 BCSC 679 at para. 38; and *Hassel v Khoshgoo*, 2010 BCSC 233 at paras 32 - 26.
- [135] At the time of Indran's breach, he was aware that Ves required the sale proceeds from the Fraser Purchase Contract in order to complete her purchase of the Other Property. Ves incurred fees for the extension of the completion of the Other Property, the Mortgage and Second Private Mortgage expenses, and carrying costs of the Fraser Property solely because of Indran's breach of the Fraser Purchase Contract.
- [136] I accept the calculation of those costs and expenses as set out in the plaintiff's affidavits, namely:
- \$70,533 for the Cambridge Mortgage, comprising interest payments of \$43,833, and a brokerage fee of \$26,700;
 - \$37,500 for the Second Private Mortgage, comprising interest payments of \$25,500, and a brokerage fee of \$12,000;
 - \$4,000 for the extension of the Other Purchase Contract, at \$500 per day for eight days; and
 - \$2,828 for taxes and utilities for the Fraser Property from January to June 2019.

VI. summary and conclusion

- [137] I am satisfied that this case is suitable for determination on this summary trial. Notwithstanding that the affidavit evidence raises some credibility issues, the record before me is such as to permit finding the facts necessary for determination, and it would not be unjust to give judgment.
- [138] I find that the defendant Indran Sathasivam breached the Fraser Purchase Contract by failing to complete on the Completion Date of November 28, 2018, when the plaintiff Vesna Ranisavljevic was ready and willing to do so, and the plaintiff is entitled to the return of the deposit and damages totalling \$678,861, assessed as follows:
- \$564,000, being the difference between the original contract price of \$1,400,000 and the Final Contract price of \$836,000;
 - \$70,533 for the Cambridge Mortgage, comprising interest payments of \$43,833, and a brokerage fee of \$26,700;
 - \$37,500 for the Second Private Mortgage, comprising interest payments of \$25,500, and a brokerage fee of \$12,000;
 - \$4,000 for the extension of the Other Purchase Contract, at \$500 per day for eight days; and

· \$2,828 for taxes and utilities for the Fraser Property from January to June 2019.

"Ehrcke J"

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Prepared on 26 October 2026 · Esheria