

CANADA / JUDGMENT

Toor v. Dhillon

2019 BCSC 481

COURT

Supreme Court of British Columbia

DECIDED

2 April 2019

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2019 BCSC 481 Toor v. Dhillon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Toor v. Dhillon,

2019 BCSC 481

Date: 20190402

Docket: S173080

Registry: New Westminster

Between:

Gurcharan Singh Toor, Kulwant Kaur Toor

Plaintiffs

And

Ranbir Kaur Dhillon, Jarnail Singh Dhillon

Defendants

Corrected Judgment: The spelling of the Presider's name on the last page of the Judgment has been corrected on May 2, 2019

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for Plaintiffs:

H.S. Nirwan

Counsel for Defendant:

N. Aggarwal

R. Sidhu,

Place and Dates of Trial:

New Westminster, B.C.

December 3-7 and 10-11, 2018

Place and Date of Judgment:

New Westminster, B.C.

April 2, 2019

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I. Introduction

[1] This is an action by the plaintiffs for specific performance of a contract entered into on June 9, 2015 for the purchase and sale of a residential house at 13251 89A Avenue, Surrey, British Columbia (the "Property") owned by the defendants. In the alternative, the plaintiffs claim damages in lieu of specific performance in an amount equal to the difference between the appraised value of the house at the time of trial and its appraised value at the time of entering into the contract of purchase and sale. In the further alternative, the plaintiffs claim damages based on general contract principles.

[2] The defendants submit that the plaintiffs' action should be dismissed on various grounds namely:

- a) There was no valid contract of purchase and sale;
- b) There was no consensus ad idem or "meeting of the minds";
- c) That the defence of non-est-factum applies;
- d) That the contract of purchase and sale was properly terminated by the defendants upon the failure of the plaintiffs to pay the required deposit on time; and
- e) That the plaintiffs were, in any event, not ready, willing, and able to complete the sale on the completion date.

[3] The defendants' first three submissions are inter-related in that they say they merely intended to enter an agreement to list their house for sale and believed this was what they were doing. They further say that the listing agreement was to be conditional upon the approval of their children.

II. Facts

A. The Contract Documents

- [4] The documents that underlie this action are on the standard forms of the Real Estate Board of Greater Vancouver. They included: a Contract of Purchase and Sale dated June 9, 2015 (the "Sale Contract"); a Contract of Purchase and Sale Addendum dated June 9, 2015 (the "Addendum"); a Property Disclosure Statement Residential dated June 9, 2015 (the "Disclosure Statement"); and a Limited Dual Agency Agreement also dated June 9, 2015 (the "Dual Agency Agreement").
- [5] The Sale Contract stated that it was between the defendants as sellers and the plaintiffs as buyers. The brokerage was identified as Omaxwell Realty and the person who prepared the document was identified as Harjeit Heir. The Sale Contract was for the purchase and sale of property described as 13251 89A Av, Surrey. Underneath the property description was the sentence "The Buyer agrees to purchase the Property from the Seller on the following terms and subject to the following conditions". The purchase price was stated as being \$852,000. Three other amounts had been written on the form but had a line or lines drawn through them, thus indicating a serial negotiation of the purchase price. The amounts that had a line or lines drawn through them were \$840,000, \$860,000 and \$848,000. The changes to the purchase price were initialled by the parties.
- [6] The Sale Contract provided that a deposit was to be paid as follows:
2. DEPOSIT: A deposit of \$20,000 which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows:

way of Bank draft on all the subject removal

All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to Omaxwell Realty in Trust and held in trust in accordance with the provisions of the Real Estate Services Act. In the event the Buyer fails to pay the deposit as required by the Contract, the Seller may, at the Seller's option, terminate this Contract

[Underlining indicates typed additions to the standard form clause]

- [7] Clause 3 of the Sale Contract provided:
3. TERMS AND CONDITIONS: The purchase and sale of the Property includes the following terms and is subject to the following conditions:

see addendum attached

[Underlining indicates typed additions to the standard form clause]

- [8] Clauses 4 and 5 of the Sale Contract provided that the sale was to be completed on July 30, 2015 and that the Buyer was to have vacant possession on July 31, 2015.

[9] Clause 7 provided that various items were to be included with the purchase, namely, "Clothes Washer/Dryer/Fridge/Stove/DW, Drapes/Window Coverings, Fireplace Insert, Garage Door Opener".

[10] Clause 8 of the Sale Contract provided:

8. VIEWED: The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on June 9, yr. 2015

[Underlining indicates typed additions to the standard form clause]

[11] Clause 12 of the Sale Contract provided that time was to be of the essence of the contract.

[12] Clause 18 provided that there were "no representations, warranties, guarantees, promises or agreements other than those set out ...".

[13] Clause 20C of the Sale Contract provided that the parties had consented to "a limited dual agency relationship with Harjeit Heir", the "DESIGNATED AGENT/LENCENSEE" of the brokerage "Omaxwell Realty" and further referenced the parties having signed "a Limited Dual Agency Agreement dated June 9, 2015".

[14] The Sale Contract included an addendum, as referenced in Clause 3. The addendum was the form contract entitled "Contract of Purchase and Sale Addendum" dated June 9, 2015. The Addendum comprised two pages, both of which contained the signatures of the parties. The first page of the Addendum included four unnumbered terms or conditions. In summary, these conditions were:

- a) A condition, for the sole benefit of the Buyer, that the sale was subject to a new first mortgage being made available to the Buyer on or before June 17, 2105, in the amount of \$750,000 at an interest rate of not more than 3%;
- b) A condition, for the sole benefit of the Buyer, that the Buyer, on or before June 17, 2015 obtain and approve "an inspection report against any defects whose cumulative cost of repair exceeds \$2000". The Seller was required to "allow access to the property for this purpose on reasonable notice";
- c) A term that the attached Disclosure Statement dated June 9, 2015 was incorporated into and formed part of the contract; and
- d) A representation and warranty of the Seller that the Property had not been used for the growing of marijuana.

[15] The second page of the Addendum contained three minor warranties of the seller relating to the appliances being in proper working order on the possession date, that the roof and outside of the house would be washed, and that the interior of the house would be cleaned and the garbage picked up.

[16] The Disclosure Statement referenced in the Addendum was also on the standard form contract of the Real Estate Board of Greater Vancouver and attached to the Sale Contract. As with the other parts of the Sale Contract, it too was signed and initialled by the parties.

[17] The Dual Agency Agreement was signed by the parties and Mr. Heir. It appointed Mr. Heir as the agent for both parties and provided, in part, as follows:

In order to facilitate the purchase and sale or lease of the Property, the Buyer/Tenant, the Seller/Landlord, and the Brokerage hereby acknowledge and agree each with the other as follows:

1. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that they each have an agency relationship with Harjeit Heir (the "Designated Agent") and that it is not a breach of duty to either of them for the Designated Agent to act as agent for both the Buyer/Tenant and the Seller/Landlord and they hereby authorize and consent to the Designated Agent acting for both the Buyer/Tenant and the Seller/Landlord as a limited dual agent with respect to the purchase and sale or lease of the Property.
3. The Buyer/Tenant and the Seller/Landlord acknowledge and agree that with respect to the purchase and sale or lease of the Property the Designated Agent will be the agent for both the Buyer/Tenant and the Seller/Landlord and will represent both parties as a limited dual agent with the following changes and limitations to its duties as agent:

A. despite Real Estate Services Act Rule 3-3 (a) and (b), the Designated Agent will deal with the Buyer/Tenant and the Seller/Landlord impartially;

B. the Designated Agent will have a duty of disclosure to both the Buyer/Tenant and the Seller/Landlord except that:

- (i) the Designated Agent will not disclose the Buyer/Tenant is willing to pay a price or agree to terms other than those contained in the Offer, or that the Seller/ Landlord is willing to accept a price or terms other than those contained in the Listing;
- (ii) the Designated Agent will not disclose the motivation of the Buyer/Tenant to buy or lease or the Seller/Landlord to sell or lease unless authorized in writing by the Buyer/Tenant or the Seller/Landlord;
- (iii) the Designated Agent will not disclose personal information, not otherwise necessarily disclosed in the transaction documentation, about the Buyer/Tenant or Seller/Landlord to the other party unless authorized in writing.

C. without limiting Clause 3B, the Designated Agent will disclose to the Buyer/Tenant defects about the physical condition of the Property known to the Designated Agent.

B. Contract Formation

1. The plaintiffs' evidence

- [18] The plaintiffs are husband and wife. Mr. Toor is 50 years of age, Mrs. Toor is 47. Both were born and received their education in India. Mr. Toor has the equivalent of a Grade 8 education. Mrs. Toor has the equivalent of a Grade 10 education. Mrs. Toor immigrated to Canada in 1997 and Mr. Toor joined her in 2002 or 2004. They have a son who was 14 years of age at the time of the trial.
- [19] The plaintiffs are of modest means. Mr. Toor is a painter. Mrs. Toor works at a bakery. Neither of them have proficiency in the English language. They both speak and understand some English but neither of them can read or write in English. They both required the services of an interpreter at trial.
- [20] In early 2015, the plaintiffs lived in a house at 133 and 90 Avenue in Surrey, which they owned. They decided to sell that house because it was too old and too small. In approximately May of 2015, they entered into a contract to sell their house. The sale of the house was to complete on July 30 with a possession date of July 31, 2015. With the sale of their house imminent, the plaintiffs began looking for a new house to purchase. They had very specific criteria for the new house. These were: it had to be located in the same general area; it had to have two basement rental suites; and it had to be approximately \$850,000 or less. The location was very important to the plaintiffs because they had lived in the area since immigrating from India, their respective places of employment were nearby, they had relatives in the neighbourhood, there was a Sikh temple nearby, and there was a special school nearby where their son could learn Punjabi. The price of the house and the availability of two rental suites were also important factors because the plaintiffs could not afford to pay more than \$850,000 and needed the rental suites to help with mortgage payments.
- [21] Prior to or at the time of commencing their house search, the plaintiffs obtained pre-approval for a mortgage from the Toronto-Dominion Bank ("TD Bank"). The exact amount of the pre-approved mortgage is not clear. Mr. Toor thought it was in the range of \$650,000 to \$660,000. Mrs. Toor thought it was for \$680,000.
- [22] As part of their house search, in early June 2015, the plaintiffs attended an open house just down the street from their then residence. The listing realtor of that house was Mr. Heir. On or about June 8, 2015, they viewed the house and spoke to Mr. Heir about the possibility of submitting an offer. He advised them that there were already several offers submitted on the house. The evidence is contradictory as to whether the plaintiffs submitted an offer on the house they were viewing but nothing turns on that. The plaintiffs asked Mr. Heir if he was aware of any other houses for sale in the neighbourhood. He advised them that there was a house close by and told them that he could arrange a viewing if they wished. They asked him to make such arrangements, which he did. That house was the Property.

- [23] On June 8, or possibly June 9, 2015, Mrs. Toor, together with her sister-in-law attended at the Property to view it together with Mr. Heir. She looked at the house, both inside and out. Mrs. Toor liked the house and advised Mr. Toor that he should also look at it. Mr. Toor did so together with his brother-in-law and Mr. Heir. He also liked the house. The plaintiffs accordingly asked Mr. Heir if they could make an offer.
- [24] On the evening of June 9, 2015, Mr. Heir attended at the plaintiffs' residence and filled out the Sale Contract and the Addendum with an offer in the amount of \$840,000. The documents were prepared by Mr. Heir on his Surface tablet (which device has been variously referred to in the evidence as a slate, iPad, iPod, laptop and computer but which I will hereafter refer to as the "Tablet"). The Sale Contract and the Addendum were signed by the Toors on the Tablet using a digital pen. No paper copy of the document was printed.
- [25] The plaintiffs also signed the Dual Agency Agreement and the Disclosure Statement with Mr. Heir on June 9, 2015. The precise time they signed these documents is not clear on the evidence.
- [26] The plaintiffs testified that Mr. Heir explained the various documents to them. In fact, they testified that many of the pages were actually read to them by Mr. Heir. In particular, he explained that the documents were an offer to purchase the Property that they had viewed earlier. Both plaintiffs testified that they knew and understood the purpose of the documents was to purchase the Property. They further knew and understood that the offer had completion and possession dates of July 30 and 31, 2015, that a \$20,000 deposit would be required, and that the document contained conditions relating to financing and inspection.
- [27] Mr. Toor waived a bit on cross-examination as to whether all parts of every document were explained to him by Mr. Heir but Mrs. Toor and Mr. Heir both testified that all of the documents were read and explained by Mr. Heir. I accept their evidence.
- [28] After the documents were signed, Mr. Heir left the plaintiffs' residence. He returned a short while later and advised them that the defendants had refused their offer but had countered at \$860,000. The plaintiffs then instructed Mr. Heir to make a further offer in the amount of \$848,000. Mr. Heir left and then returned again later. He advised the plaintiffs that the defendants had submitted another counter-offer in the amount of \$852,000. The plaintiffs accepted that counter-offer.

2. Mr. Heir's evidence

- [29] Mr. Heir testified that he and the defendants were acquaintances prior to the events giving rise to this action in that he sometimes retained Mr. Dhillon to do pressure washing jobs for him. He was aware that the defendants had an interest in selling their house as it had been previously listed for sale with two different real estate agents, Ham Kumar and a Mr. Baines. Mr. Heir had reviewed the real estate records and testified that the Property had, in fact, been listed for sale for a total of 1,384 days with these two agents.

- [30] Mr. Heir testified that in February 2015 he spoke with the defendants about the possibility of them listing their house for sale with him. He said the defendants refused to sign a listing agreement with him but they did tell him he could show the house to potential buyers. Mr. Heir testified that he did, in fact, show the defendants' house to possible buyers on at least ten occasions.
- [31] Mr. Heir testified that he first met the plaintiffs at an open house he was holding in May 2015. He says he told the plaintiffs there were already several offers to purchase the house being shown that day. However, he also told the plaintiffs he had another house for sale nearby. He arranged two appointments for the plaintiffs to view that other house which was the Property. He testified that on June 8, 2015 he showed the Property to Mr. and Mrs. Toor and that on June 9, 2015 he showed the house to them again but this time with a brother and sister. There is a slight discrepancy between the evidence of Mr. Heir and the evidence of the plaintiffs regarding who attended at the first and second showings but, in my view, nothing turns on this. More importantly, Mr. Heir confirmed that after viewing the Property the plaintiffs decided to submit an offer to purchase the house in the amount of \$840,000. He testified that he attended at the plaintiffs' residence at approximately 6:00 p.m. on June 9, 2015 to fill out the offer documents. He prepared the Sale Contract and the Addendum with input from the plaintiffs. He testified that the amount for the deposit to be inserted into the form, \$20,000, was provided to him by Mr. Toor. The completion and possession dates inserted into the Sale Contract, July 30 and 31, 2015, were to match the completion and possession dates of the plaintiffs' sale of their house. He also testified that he was advised by the plaintiffs that they had been pre-approved for a mortgage and that they wanted the house to be cleaned. It took approximately one hour to fill out the forms with the plaintiffs.
- [32] Once the forms were completed and signed on his Tablet, Mr. Heir went to the defendants' home. He testified that the defendants were very happy to receive the offer. He testified that he sat with the defendants at their dining table, together with their son Gurdeep Dhillon, and that he explained everything to them. He testified that the defendants asked him to go back to the plaintiffs with a counter-offer at \$860,000, which he did.
- [33] Mr. Heir testified that the plaintiffs rejected the defendants' counter-offer at \$860,000 and submitted a further offer of \$848,000 which he took to the defendants. The defendants rejected that offer but submitted a further counter-offer in the amount of \$852,000. He took this offer to the plaintiffs and they accepted it. He further testified that after the price had been agreed upon he again attended at the defendants' home to fill out the Disclosure Statement. He testified that this was done in the basement suite of the home and that it took approximately one hour to complete. It was approximately 11:00 p.m. by the time this was completed. The next day he provided printed copies of the various documents to both parties.

[34] Importantly, Mr. Heir testified that he had absolutely no concerns about the defendants' commitment to completing the sale, that Mr. Dhillon was not intoxicated, and that the defendants did not mention anything to him about wanting to speak to their children before committing to a sale.

[35] Mr. Heir was extensively cross-examined, however, his evidence was not seriously undermined in any way. In fact, in cross-examination he confirmed that he read and explained all of the documents to both parties including the Dual Agency Agreement, which was not addressed during his examination-in-chief, and he further confirmed that the defendants were happy with the sale. He did concede that the interim versions of the documents were not saved on his Tablet but stated that this was his normal practice.

3. The Defendants' evidence

[36] The evidence of the defendants is very different from that of Mr. Heir and the plaintiffs. I address credibility in detail later in these reasons but, in summary, much of the defendants' evidence made little sense, was inconsistent with their pleadings and other independent evidence, and was simply unbelievable.

[37] The defendants are both from India but have lived in Canada for approximately 25 years. Mr. Dhillon has a grade 6 education and Mrs. Dhillon has a grade 5 education. They each testified that they could not speak or read English. They both required the services of an interpreter at the trial.

[38] Prior to 2015, Mrs. Dhillon testified that the defendants had listed their house for sale with two realtors, Mr. Kumar and Mr. Baines, from 2010 to approximately 2014. Confusingly, she testified both in-chief and in cross-examination that the house was listed for sale so that it would not, in fact, be sold.

[39] Mrs. Dhillon testified that on June 9, 2015, Mr. Heir came to her house unannounced with two women. She knew Mr. Heir as her husband had previously done some pressure washing for him. She said Mr. Heir told her that he had a listing on an adjacent street and that he wanted to show her house to the two women as a comparison to the listed house.

[40] Mrs. Dhillon allowed Mr. Heir and the two women to view her house. They left after about five to seven minutes. Later that day, at about 5:30 or 6:00 p.m., Mr. Heir returned. She says she advised Mr. Heir that her husband was out mowing the lawn and left it to him to find her husband. She did not know if the two met.

[41] Mrs. Dhillon testified that Mr. Heir returned to their house a third time at about 8:30 p.m. She told him her husband had gone to bed to which he replied "tell him I am here". Mr. Dhillon then came downstairs and sat at the table with Mr. Heir. Mrs. Dhillon did not sit at the table with the two men but was either in the adjacent room or walking about. In any event, it is clear from her evidence that she was listening to the conversation between Mr. Heir and her husband. She testified that at some point Mr. Heir said to her "shall I list your house" to which she replied "no". Mr. Heir then asked her "what is the harm in listing?". She

says she replied that none of her kids were home and that they had no intention of selling the house. Mr. Heir then said "you can talk to your kids tomorrow". Mr. Heir then proceeded to get their signatures and initials on his Tablet and then left.

- [42] Mrs. Dhillon identified her signatures and initials on the various documents (with some minor exceptions) and initially testified that she did not know what the documents were and that no one explained the documents to her. Later, she testified that the documents they signed were to list their house for sale with Mr. Heir. She said Mr. Heir told them the house would be listed for \$868,000. She also testified that she did not agree to this price. She did not explain why she signed a listing agreement for a price she did not agree with.
- [43] Mrs. Dhillon further testified that just as Mr. Heir was leaving the house she told him that they had not yet decided to list their house to which he replied that she could let him know the next day. She testified that she telephoned Mr. Heir later that night and told him they were not going to list the house and that he should not put a sign on their property. She further testified, again confusingly, that later that night, when the children came home, she told them the house had been listed for sale and they became upset. No explanation was offered as to why she would advise her children the house had been listed for sale when she had told Mr. Heir they were not going to proceed with the listing.
- [44] Mrs. Dhillon's discovery evidence was put to her in cross-examination. At her examination for discovery she had testified that Mr. Heir said "I have brought an offer for you. It's very good." She refused to admit the question was asked and answered saying that she was not sure and that she was repeatedly telling Mr. Heir to leave because Mr. Dhillon was drunk. She further testified in cross-examination that Mr. Heir tricked them and lied to them. She was also asked in cross-examination about her initials on the Disclosure Statement and denied that the initials "RD" were her initials. She was then taken to her discovery transcript where, during the course of her discovery, she admitted the initials were hers. Notwithstanding her discovery evidence, she refused to admit at the trial that the initials belonged to her.
- [45] Mr. Dhillon's evidence is not dissimilar to that of his spouse. He testified that he works as a carpenter building pallets and that he does pressure washing jobs on the side. He knew Mr. Heir from before the events giving rise to this action as he had done pressure washing jobs for him.
- [46] Mr. Dhillon confirmed his wife's evidence that they had previously listed their house for sale with Mr. Kumar and Mr. Baines. He also confirmed his wife's evidence that they listed the house with no intention of selling it.
- [47] During his examination-in-chief, Mr. Dhillon initially testified that on June 9, 2015 he arrived home from work at about 4:45 p.m. and mowed his lawn. He then had two or three drinks and watched television for five or ten minutes before going to sleep. His wife then woke him and told him Mr. Heir was there. He went to meet Mr. Heir who told him that he was in the neighbourhood and thought he would come for a visit. Mr. Heir then said that he would list

their house and pulled out his Tablet. Mr. Dhillon says that he did not read what was on the Tablet because he was drunk. Mr. Heir told him to sign and initial on the Tablet in various places so he did as told. His evidence was that Mr. Heir did not explain any of the documents he signed. He later testified that he thought he was signing a listing agreement.

- [48] In cross-examination, the number of drinks consumed by Mr. Dhillon during the late afternoon of June 9, 2015 increased from two or three to three or four and he clarified that the drinks were vodka. He further clarified that after having the drinks, he had dinner, took a shower, and watched television for about fifteen minutes before going to bed. He testified that he was still drunk when Mr. Heir arrived and that because of his intoxication he did not recall a lot of his meeting with Mr. Heir other than he signed a listing agreement on the Tablet. He initially testified that the list price was \$868,000 but then said he was not sure.
- [49] Several parts of Mr. Dhillon's examination for discovery were put to him during his cross-examination after he answered differently at trial. These are:
- a) At his discovery he testified that Mr. Heir told him he had brought an "offer". At trial he declined to confirm giving this evidence at his examination for discovery;
 - b) At his discovery he testified Mr. Heir brought an offer for \$840,000 and that they (the defendants) told him they did not want to sell for that price and would not sell for less than \$868,000. At trial he first refused to acknowledge giving this testimony at his examination for discovery saying that he was drunk. He then testified that he had just listed the Property;
 - c) At his discovery he testified that \$868,000 was a fair price for the house. At trial he again refused to acknowledge giving this testimony at his examination for discovery; and
 - d) At his discovery he testified that there were at least two meetings with Mr. Heir. At trial he testified that he did not know whether Mr. Heir returned after the first meeting and he did not recall giving this evidence at his examination for discovery.
- [50] Mr. Dhillon was specifically asked during his cross-examination for an explanation of the negotiation over the purchase price of the Property. He gave no explanation other than to say he knew nothing about it as he was drunk.
- [51] Mr. Dhillon also testified during his cross-examination that he did not know the difference between a listing agreement and a contract to sell property. When asked if he understood the difference, he replied that he was not educated, a frequent refuge throughout his testimony. However, he admitted during his cross-examination that he had purchased and sold a number of properties in Canada in addition to having listed his house for sale over several years.
- [52] Throughout his testimony, Mr. Dhillon made references to being drunk. He testified that Mr. Heir had deceived him and that if he had not been drunk he would have kicked Mr. Heir out of the house.

[53] At the end of his cross-examination, Mr. Dhillon was asked if Mr. Heir had told him the documents being signed were for a listing agreement. He replied that he could not recall as he was drunk.

C. Events of June 10-16, 2015

[54] During the period from June 10-16, 2015 there were several events that took place that are relevant.

1. Plaintiffs' evidence

[55] Mr. Toor's evidence of what transpired after June 9, 2015 was somewhat confused and obviously incomplete. He was aware the deposit had to be paid and the sale conditions had to be removed on June 17, 2015. He testified that on June 17, 2015, he and Mrs. Toor signed a document entitled "Removal of 'Subject to Clause' and Appointment of Conveyancer". He understood this document was to remove the conditions of the Sale Contract. On the same date, he provided Mr. Heir with the deposit by way of a bank draft which he identified as the document at Tab 3 of Exhibit 9. The document was a bank draft dated June 16, 2015 in the amount of \$20,000 made out to "Omax Real Estate Services". He testified he was told by Mr. Heir that there was a mistake with the draft but he was not specific as to the nature of the mistake. He further testified that Mr. Heir told him to have the mistake corrected and to deliver a corrected draft the next day. He testified that a new draft was obtained and delivered to the brokerage the next day. He identified the new or second draft as the document at Tab 4 of Exhibit 9 which was a bank draft dated June 18, 2015 in the amount of \$20,000 made out to "Omaxwell Realty In Trust". Two or three days after delivering the second draft, Mr. Heir called and advised that the defendants did not want to complete the sale.

[56] Mr. Toor did not know whether an appraisal of the Property was done before June 17, 2015.

[57] Mrs. Toor testified that after June 9, 2015, she and Mr. Toor attended at their bank and obtained a mortgage to purchase the Property. She recalled that the amount of the mortgage was \$680,000. She testified that the conditions of the mortgage were met before June 17, 2015. She further testified that the difference between the \$852,000 purchase price and the mortgage amount was to come from the sale of their own house which was expected to net them a bit over \$200,000.

[58] Mrs. Toor further testified that she and Mr. Toor met with Mr. Heir on June 17, 2015 at their home to remove the subjects to the Sale Contract and to provide him with a bank draft in payment of the deposit. She said Mr. Heir told them there was an error in the draft and gave it back. Mr. Heir told them not to worry that they could provide a corrected draft the next day. She says that they went to the bank the next day and had the draft corrected. She further testified that Mr. Toor took the corrected draft to Mr. Heir's office that day, June 18, 2015. Two or three days later, Mr. Heir told them the plaintiffs would not sell.

- [59] Mrs. Toor further testified that once they were told the defendants would not complete the sale, she and Mr. Toor looked for another house to purchase. She testified that they looked at eight different houses but none of them were acceptable. They were either too small or too expensive or the seller had already accepted another offer.
- [60] Mrs. Toor did acknowledge in cross-examination that no appraisal of the Property was done before June 17, 2015.
- [61] Both Mr. and Mrs. Toor identified Tab 16 of Exhibit 9 (the "Mortgage Approval Letter") as being the letter from TD Canada Trust confirming their approval on June 16, 2015 for a mortgage to purchase the Property in the amount of \$681,600 with an interest rate of 2.69%. The mortgage was subject to several conditions including that an appraisal of the Property was required. They each testified that the conditions of the approval were satisfied.

2. Mr. Heir's evidence

- [62] Mr. Heir testified that on June 10, 2015 he received a telephone call from Mrs. Dhillon asking for paper copies of the documents. He says he delivered the copies to both parties that day. He next received a call from Mrs. Dhillon on June 12, 2015 in which she advised him that the defendants did not want to sell the house because they would have to pay a mortgage penalty and their daughter did not want them to sell. He asked Mrs. Dhillon to put this in writing so that he could inform the buyer but this was not done. He further testified that he telephoned the plaintiffs and advised them of this telephone call but the plaintiffs told him they wanted to proceed. Nothing further happened until June 15, 2015 when Mr. Heir received a telephone call from the TD Bank about needing an appraisal of the Property. He called the defendants to make an appointment for the appraisal. Mrs. Dhillon refused to make an appointment because they did not want to sell the Property. He then called his managing broker to discuss the situation.
- [63] Mr. Heir further testified that on June 17, 2015 he met with the plaintiffs to remove the subjects on the Property by having them sign the "Removal of 'Subject to Clause' and Appointment of Conveyancer" form. He prepared this form and included a clause, on the advice of his managing broker, that the subjects were being removed without an inspection or appraisal because the seller would not allow access to the Property.
- [64] Mr. Heir further testified that he obtained the deposit draft from the plaintiffs on June 17, 2015. He noted that there was a mistake on the draft in that it was made out to Omax Real Estate Services rather than Omaxwell Realty. He called his managing broker to discuss if it could be accepted. His managing broker told him the plaintiffs should correct the name on the draft. He testified that he then advised the plaintiffs to make the correction and provide the draft to his office the next day. He confirmed that the draft was corrected and delivered to his office on June 18, 2015 and was deposited into the bank account on June 19, 2015. He also testified that he called Mrs. Dhillon to advise the subjects had been removed. She told him to not call her again.

[65] In cross-examination, Mr. Heir agreed that the deposit was not provided on June 17, 2015 as required by the contract because of the mistake in the name. However, he again confirmed that, after speaking with his managing broker, he told the plaintiffs to correct the draft and drop it off the next day. He also again confirmed the corrected draft was delivered to his office the next day on June 18, 2015. He agreed that the Real Estate Council rules required that he give notice to both the buyer and seller if a deposit is paid late but said he did not notify the defendants because the draft was just being corrected.

3. The defendants' evidence

[66] Mrs. Dhillon testified that she again called Mr. Heir on June 10, 2015 and told him they were not going to list the Property for sale. She also asked him to send copies of whatever documents that had been signed. She says he replied "okay, Sister" and told her "not to worry".

[67] According to Mrs. Dhillon nothing further happened until June 15, 2015 when Mr. Heir and his wife visited. She testified that Mr. Heir joked with her saying he got them one million dollars for their house. She said that she replied she was not going to sell or list.

[68] The next thing to happen was that she received a call from TD Bank asking to appraise the Property. She gave the phone to her son who told them that there would not be an appraisal. She was asked several times in cross-examination whether she would have allowed an appraiser access to the Property if one had come to the door. She was very evasive responding to this question and refused to answer it directly. Her answer was essentially a question as to why would she do so when she had not listed her property for sale.

[69] Mrs. Dhillon testified to next receiving a telephone call from Mr. Amrik Mattoo, the plaintiffs' lawyer, asking for the name of their lawyer. She asked why she needed a lawyer to which Mr. Mattoo apparently responded she should get a lawyer. The defendants then retained the firm of Buckley Hogan.

[70] Mr. Dhillon had very little evidence to give that is relevant to the events following June 9, 2015. He testified that on the morning of June 10, 2015, his children were upset about the "listing" and that his wife phoned Mr. Heir. He did not personally speak with Mr. Heir or write to him. When asked in cross-examination whether he would have allowed an appraiser onto the Property, he also evasively replied that he would have done so only if he had sold the house.

D. Other Witnesses and Evidence

[71] Gabby Dhillon, a financial advisor with TD Bank, was called as a witness for the plaintiffs. He had no personal involvement with the events giving rise to this action but has been the plaintiffs' advisor since 2017. He testified that he searched the records of TD Bank for any documents relating to the transaction at issue in this matter but was not able to find any. He identified the Mortgage Approval Letter as being a mortgage decision letter from TD Canada

Trust. The Mortgage Approval Letter confirmed that on June 16, 2015, the plaintiffs had been approved for a mortgage to purchase the Property. The mortgage was in the amount of \$681,600 with an interest rate of 2.69% and was subject to various conditions. Gabby Dhillon testified that the date on the Mortgage Approval Letter of March 23, 2018, was the date the document was printed and not the date it was originally prepared. He had no explanation for why the anticipated closing date in the letter was stated as being September 29, 2015. Finally, he had no personal information as to whether the conditions in the Mortgage Approval Letter had been satisfied.

- [72] Mr. Mattoo, was called as a witness by the plaintiffs. He was the plaintiffs' solicitor and handled both the sale of the plaintiffs' house and their attempted purchase of the Property. He testified generally with respect to how residential real estate transactions are handled. He specifically testified that a back-to-back transaction such as was contemplated in this matter can be accomplished with cooperation between the various lawyers involved. He referred to two letters sent by his office to the defendants on June 22 and July 9, 2015. In both letters it is stated that the plaintiffs "remain ready, willing and able to complete the transaction". He further testified that on July 15, 2015 he received a letter from Buckley Hogan, solicitors for the defendants. In that letter, Buckley Hogan took the position that the contract was null and void on the grounds that the deposit was not paid in time and on the grounds that the defendants had signed a contract for a sale price of \$886,000 not \$852,000. Mr. Mattoo responded to Buckley Hogan with a letter dated July 20, 2015 disputing that the Sale Contract was null and void and again reiterating that the plaintiffs "remain ready, willing and able to complete the transaction". He further testified that by letter dated July 27, 2015, he sent the documents required to complete the transaction to Buckley Hogan for signature by the defendants. He received an email reply from Buckley Hogan advising "our client does not intend to complete on this deal". He confirmed that none of the documents required to complete the transaction were returned.
- [73] Mr. Mattoo further testified that the sale of the plaintiffs' house did complete. His trust ledger indicated that after payment of the mortgage, the plaintiffs received in excess of \$200,000 from the sale of their house.
- [74] In cross-examination, Mr. Mattoo conceded that as of July 30, 2015 he did not have the funds in his trust account to complete the purchase of the Property but testified that this was because of the defendants' refusal to permit an appraisal of the Property by the mortgagee.
- [75] Donna Fuller, the managing broker for Omaxwell Realty since 2017, was called as a witness for the defendants. She had no personal knowledge of the transactions but testified that the deposit clauses in the Sale Contract made the deposit payable on subject removal, which was June 17, 2015. She further testified that the corrected bank draft was received by her office and was deposited into their bank account on June 19, 2015. She was not at the office at the time and was not able to say when the draft was actually received. She also testified that if a deposit is late, the broker is required to obtain the seller's signature to a "Late Deposit" form, something which did not appear to have been done in this matter. She also confirmed that

the deposit is still being held by her company.

- [76] In cross-examination, Ms. Fuller acknowledged that where a real estate agent is acting as a dual agent, it is normal for the deposit to be provided to the agent who then delivers it to the brokerage. She also acknowledged that if a cheque is delivered after 5:00 p.m. it might be deposited the next day.
- [77] There are two expert appraisal reports in evidence prepared by Bakerview Realty Appraisers on behalf of the plaintiffs. The first report provides a valuation of the Property as of July 30, 2015, the intended completion date, in the amount of \$850,000. The second report provides a valuation of the Property as of Aug 29, 2018 in the amount of \$1,365,000. The appraisal reports also provided a history of the MLS listing of the Property. Specifically, according to the two reports the Property was listed for sale on the following dates and at the following prices:
- June 12, 2011 to June 30, 2012 at \$838,000;
 - August 5, 2012 to December 30, 2012 at \$855,000;
 - February 7, 2013 to August 31, 2013 at \$859,000;
 - September 9, 2013 to March 17, 2014 at \$859,000; and
 - June 10, 2014 to January 30, 2015 at \$859,000.

III. Credibility

- [78] The central point of the defendants' submissions and evidence is that they believed they were merely signing a listing agreement and not a contract of purchase and sale. Given that the evidence of the defendants is completely at odds with the evidence of the plaintiffs and Mr. Heir, I must determine whose version is correct which involves an assessment of credibility.
- [79] The principles applicable to an assessment of credibility are summarized at paras. 186 and 187 of the trial judgment in *Bradshaw v. Stenner*, 2010 BCSC 1398, *aff'd* 2012 BCCA 296, as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna*

v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [80] It is with these principles in mind that I have assessed the credibility of the parties and Mr. Heir.
- [81] The plaintiffs both struck me as forthright and honest witnesses. Their evidence was consistent with the documents underlying the transaction, in particular the evidence of price negotiation. Their evidence was also corroborated by the Mortgage Approval Letter and, for the most part, by the evidence of Mr. Heir. There are some discrepancies in their evidence and gaps in their recollections, particularly in the recollection of Mr. Toor. I attribute the discrepancies and gaps in their evidence to the fact that both plaintiffs are relatively unsophisticated in the purchase and sale of real estate and did not have a complete grasp of what was happening or why. They clearly relied very heavily on Mr. Heir. Additionally, both of the plaintiffs appeared intimidated by the court process and nervous when giving their evidence which undoubtedly accounts for some of the discrepancies and gaps. In any event, I generally accept the evidence of the plaintiffs as credible and reliable.
- [82] With respect to Mr. Heir, I note that he is not a completely disinterested witness in that he was to receive commission from the sale of the Property. However, the amount of the commission was relatively small at \$5,000. As with the plaintiffs, I found him to generally be a credible and reliable witness. He had a reasonably good recollection of the events. He appeared to answer questions in a forthright manner and was not evasive or argumentative. Additionally, as with the plaintiffs, his evidence is corroborated by the documents.
- [83] With respect to the defendants, I find they were not credible or reliable witnesses. My reasons for this are as follows:
- a) The defendants' evidence that they only discussed a listing agreement with Mr. Heir on June 9, 2015 is contrary to the allegations in their response to civil claim. In paragraph 4 of division 2 of their response to civil claim they plead that on or about June 9, 2015, Mr. Heir told them he had an offer to purchase their Property for \$840,000. In paragraph 5 of division

2 they plead that they "proposed to sell the Property for \$866,000". In paragraphs 6 and 7 of division 2 they plead they signed a contract of purchase and sale with a price of \$866,000. In paragraph 8 of division 2 they plead they advised Mr. Heir on June 10, 2015 that they "had decided not to sell the Property". The defendants did not even attempt to explain the extreme divergence between their evidence and their pleading;

- b) The defendants' evidence that they were signing a listing agreement is also inconsistent with the letter from their solicitors dated July 15, 2015 to the solicitors for the plaintiffs. In that letter, the defendants' solicitors state "It is our clients[] position that the contract of purchase and sale has been rendered null and void". That letter goes on to state that the defendants agreed to a sale price of \$866,000 not \$852,000. The position taken in this letter that there was an agreement of purchase and sale that was subsequently rendered null and void is again inconsistent with the defendants' evidence at trial that they believed they were signing a listing agreement. The defendants have led no evidence explaining this inconsistency;
- c) The evidence given by the defendants at trial was also inconsistent with their evidence at their examinations for discovery. Mr. Dhillon's evidence at his examination for discovery was that Mr. Heir came to them with an offer to purchase the house for \$840,000 and he (Mr. Dhillon) told Mr. Heir that they would not sell for less than \$868,000. Mrs. Dhillon's evidence at her examination for discovery was that Mr. Heir told her husband he had brought "an offer";
- d) Mrs. Dhillon's evidence that she allowed Mr. Heir to show the house to the plaintiffs, who were strangers to her, for no reason other than to compare it to a house on the next block makes very little sense. On the other hand, it would make sense for her to allow Mr. Heir to show the house to the plaintiffs if, as Mr. Heir testified, there was an arrangement for him to show the house to potential buyers;
- e) The evidence of the defendants that they had previously listed their house for sale either with no intention of selling it, as testified to by Mr. Dhillon, or to ensure that it would not, in fact, be sold, as testified to by Mrs. Dhillon, also makes no sense and is simply unbelievable;
- f) The evidence surrounding Exhibit 10 at the trial is a further example of the defendants' version of events not making sense. Exhibit 10 was an email from Mr. Heir to the defendants' son Gurdeep dated June 9, 2015 at 9:15 p.m. to which was attached signed copies of pages 5 and 6 of the Sales Contract, a commission agreement signed by the defendants, and a document entitled "Working with a Realtor", also signed by the defendants. Mr. Heir testified that Gurdeep was present during his meetings with the defendants and testified to sending Gurdeep the documents on June 9, 2015. The defendants deny Gurdeep was present at the meetings and denied that Mr. Heir sent them any documents on June 9 or 10, 2015. Exhibit 10 supports Mr. Heir's version of events;

- g) The fact that there was a series of meetings on the evening of June 9, 2015 between the defendants and Mr. Heir also supports Mr. Heir's version of events. The execution of a listing agreement does not require having multiple meetings in one evening;
- h) The fact that there were multiple offers and counter-offers the evening of June 9, 2015 is not consistent with a listing agreement but is consistent with a sale contract. It is difficult to imagine how anyone could reasonably believe they were addressing a listing agreement when there were several offers and counter-offers over the course of the evening. The offers and counter-offers were clearly indicative of a sale as were the mortgage and inspection conditions and the possession and closing dates;
- i) Mr. Dhillon frequently avoided answering questions saying that he was "drunk" and Mrs. Dhillon repeatedly referred to Mr. Dhillon as being "drunk". In contrast, Mr. Heir testified that Mr. Dhillon never told him he was intoxicated and Mr. Dhillon did not appear intoxicated. I find as a fact that Mr. Dhillon was not intoxicated. Mr. Dhillon testified in examination-in-chief that he had two or three drinks in the late afternoon. In cross-examination, the number of drinks consumed increased to three or four drinks of vodka. In any event, after having those drinks, he took a shower, ate dinner, watched a bit of television, and then took a nap before Mr. Heir arrived at the house with the first offer from the plaintiffs. Although Mr. Dhillon was very evasive in providing a timeline relative to his consumption of alcohol, given that he showered, watched television, ate dinner, and had a nap after drinking, several hours must have passed between the time of his last alcoholic drink and Mr. Heir's arrival with the first offer. Moreover, Mr. Heir did not leave the defendants' house until 11:00 p.m. on June 9, 2015. The defendants' evidence that Mr. Dhillon was drunk is simply not believable and I do not accept it; and
- j) Finally, when giving their evidence, both defendants repeatedly made references to their limited formal educations and attempted to portray themselves as being uneducated and naïve. They also testified to having been taken advantage of, or tricked, by Mr. Heir. I accept that the defendants have limited formal educations, however, they are far from naïve or inexperienced in relation to the purchase and sale of real estate. They had their house listed for sale for a lengthy period of time with two different realtors prior to the events of June 9, 2015. Moreover, and importantly, Mr. Dhillon testified that he had previously purchased and sold a number of properties. In view of the experience of the defendants with real estate transactions, I find that they were knowledgeable, to a not insignificant degree, concerning real estate transactions and were not taken advantage of or tricked by Mr. Heir. The defendants knew precisely what was transpiring in their interactions with Mr. Heir which was the negotiation for the purchase and sale of their home.

[84] In conclusion, the defendants' evidence is completely inconsistent with: their pleadings; their evidence at their respective examinations for discovery; the letters of their lawyers, and, of course, the various contractual documents. Moreover, their evidence is simply unbelievable when considered in the overall context of what was transpiring. I prefer and accept the evidence of the plaintiffs and Mr. Heir over that of the defendants.

IV. Issues

[85] The issues in this matter are:

- a) Was there a valid contract between the parties for the purchase and sale of the Property?
- b) Does the defence of non est factum apply?
- c) Did the plaintiffs breach the contract by failing to pay the deposit on the required date?
- d) Did the defendants breach the contract?
- e) Were the plaintiffs ready, willing, and able to close the transaction?
- f) Are the plaintiffs entitled to specific performance or damages?

V. Analysis

A. Was There a Valid Contract Between the Parties for the Purchase and Sale of the Property?

[86] The defendants submit that there was no contract of sale between the parties. Specifically, they submit that:

- a) They believed the document they were signing on the Tablet was a listing agreement and they advised Mr. Heir they wanted to discuss the possible listing of their house for sale with their children. They say Mr. Heir assured them that the house would not be listed if their children did not approve;
- b) They signed the document on the Tablet without knowing what the document was and without Mr. Heir explaining the document to them;
- c) The document that they signed on the Tablet had many blanks; and
- d) The document that they signed was tampered with by Mr. Heir.

[87] The defendants separately submit that there was no consensus ad idem when they signed the Sale Contract. The defendants have addressed this submission as though it was a different issue from whether the parties entered into a valid contract but I do not consider it separately. In their consensus ad idem argument the defendants submit that:

- a) None of the parties were aware of what they were signing on the Tablet because they were relatively uneducated, did not read English, and the content of the document was not explained to them by Mr. Heir; and

- b) The parties had different intentions in relation to the document since the defendants believed they were signing a listing agreement not an agreement of purchase and sale.

[88] The central allegation of the defendants is that they believed they were signing a listing agreement with Mr. Heir rather than a contract of purchase and sale. I completely reject this allegation for the reasons stated in the Credibility section above. In summary, the allegation is inconsistent with and contrary to their response to civil claim, their discovery evidence, and the letter from their solicitors dated July 15, 2015, and it is simply unbelievable.

1. Findings of fact on contract formation

[89] Considering all of the evidence and my findings on credibility, I make the following findings of fact in relation to what transpired on June 8 and 9, 2015:

- a) In or about February of 2015, Mr. Heir and the defendants entered into an informal arrangement whereby Mr. Heir could bring potential buyers to show the Property with a view to a possible sale of the Property;
- b) The plaintiffs met Mr. Heir at an open house in the general neighbourhood of their existing home and the home of the defendants;
- c) Mr. Heir advised the plaintiffs that there were already multiple offers on the open house. He further advised them that he had another house for sale in the neighbourhood which he offered to show to them;
- d) Mr. Heir took the plaintiffs to view the Property on two occasions on June 8 and 9, 2015 and Mrs. Dhillon, pursuant to the informal arrangement with Mr. Heir, permitted the plaintiffs and Mr. Heir to view the Property;
- e) After the viewings of the Property, the plaintiffs decided to make an offer to purchase the Property and advised Mr. Heir of this;
- f) Mr. Heir attended at the plaintiffs' home on the evening of June 9, 2015 and wrote up an offer to purchase the Property on the Sale Contract and the Addendum. The offer was in the amount of \$840,000 with a \$20,000 deposit and was subject to two conditions, namely, the buyer obtaining a mortgage in the amount of \$750,000 by June 17, 2015 and the buyer obtaining an inspection report;
- g) The completion and possession dates in the Sale Contract were July 30 and 31, 2015 and were established so that they mirrored the completion and possession dates applicable to the plaintiffs' sale of their own house;
- h) Mr. Heir then attended at the home of the defendants and presented the offer to the defendants and Gurdeep. The defendants refused the plaintiffs' offer but signed the contract back with a counter-offer in the amount of \$860,000;

- i) Mr. Heir then attended at the plaintiffs' residence and presented the defendants' counter-offer to the plaintiffs. The plaintiffs did not accept the counter-offer but made a further offer in the amount of \$848,000;
 - j) Mr. Heir then attended at the home of the defendants and presented the \$848,000 offer to the defendants. The defendants refused the plaintiffs' offer but signed the contract back with a further counter-offer in the amount of \$852,000;
 - k) Mr. Heir then attended at the plaintiffs' residence and presented the defendants' further counter-offer in the amount of \$852,000. The plaintiffs accepted that offer;
 - l) Mr. Heir then returned to the defendants' residence and together with the defendants, filled out the Disclosure Statement;
 - m) At approximately 9:15 pm on June 9, 2015, Mr. Heir sent Gurdeep the two page Addendum, a commission agreement, and a brochure entitled "Working With a Realtor".
 - n) During the course of the evening on June 9, 2015, the parties and Mr. Heir also signed the Dual Agency Agreement;
 - o) Mr. Heir read to both the plaintiffs and defendants the Sale Contract, the Addendum, the Disclosure Statement, and the Dual Agency Agreement and he fully explained to both parties the nature, purpose, and effects of those documents such that both parties knew and were aware they were signing documents to effect the sale of the Property from the defendants to the plaintiffs; and
 - p) All of the documents presented, signed, and initialled on the night of June 9, 2015 were presented, signed, and initialled on Mr. Heir's Tablet. The Sale Contract, Addendum, Disclosure Statement, and Dual Agency Agreement at Tabs 1 and 22 of Exhibit 9 are true unaltered paper copies of these documents as presented, signed, and initialled on Mr. Heir's Tablet on the night of June 9, 2015. Mr. Heir did not alter or tamper with these documents.
- [90] The foregoing findings of fact are sufficient to dispose of the defendants' submissions that there was not a valid contract for the purchase and sale of the Property. Nevertheless, I wish to address some additional points raised by the defendants.
- [91] The defendants submit that the use of the Tablet somehow undermined or invalidated any contract entered into by the parties. They argue that the documents could not be fully and properly viewed by the parties on the Tablet and that the documents had blanks when they signed. They further submit that they were not sufficiently sophisticated to deal with "gadgets" of the modern age. I reject all of these submissions for the following reasons:
- a) First, the defendants have not referred me to any authorities that suggest contractual documents are invalid merely because they are prepared, filled out, presented, and/or signed on an electronic device. What is relevant, in my view, is whether the final documents, be they in digital or analog form, properly and fully express the intentions and agreement of the parties. As I have indicated in my findings of fact, the defendants had the documents

read and explained to them by Mr. Heir. The use of the Tablet to view and sign the documents does not invalidate what would otherwise be a valid contract;

- b) Second, I do not agree that any "blanks" in the electronic documents when signed affect the validity of the contract. The only "blanks" that were required to be filled in by Mr. Heir were on the Addendum and related to the rents applicable to the two rental suites. This information was provided by the defendants to Mr. Heir and included in the Addendum at some point during the various meetings with Mr. Heir on June 9, 2015. No issue is raised as to the accuracy of this information and, in my view, the inclusion of this information did not invalidate the documents. Even paper documents have blanks which may be filled in or altered during the course of negotiations.
- c) Finally, the submission that the defendants were not sufficiently sophisticated to deal with "gadgets" of the modern age does not assist the defendants, if true. I have found as a fact that Mr. Heir read and explained the documents to the defendants and that the defendants knew they were signing documents to sell the Property to the plaintiffs. The defendants were sufficiently sophisticated to understand this.

[92] The defendants have referred me to multiple case authorities on the doctrine of consensus ad idem which I do not intend to address in detail. I accept the defendants' submissions that a valid contract requires that the parties to the contract must have expressed their intention to be bound by mutually-agreed and reasonably certain terms: GHL Fridman, *The Law of Contracts in Canada*, 5th ed (Toronto: Carswell, 2006) at p. 14. I further accept that the onus of proof is on the plaintiffs and that the test is an objective one, namely, whether the parties have indicated to a reasonable bystander their intention to contract and the terms of the contract. The Law of Contracts in Canada, 5th ed at p. 15. Finally, I accept that there must be agreement between the parties as to the essential terms of the contract. However, all of these requirements are met in this matter. I have found that the parties intended to contract for the purchase and sale of the Property and did, in fact, contract for the purchase and sale of the Property upon the terms and conditions set out in the Sale Contract and the Addendum. Therefore, there was consensus ad idem between the parties.

[93] Finally, I wish to address the defendants' reliance upon certain parts of the cross-examination of Mr. Toor where they say he testified that he admitted he did not know what was written on some of the pages of the Sale Contract, and that not all of the pages were explained to him. They also referred to Mr. Toor's examination for discovery transcript where Mr. Toor admitted he did not read the "papers", did not know what was in them, and that they were not explained to him. In my view, these excerpts do not establish that there was no consensus ad idem between the parties. Mr. Toor did admit that he had no recollection of some parts of the documents being read to him and he sometimes could not recall who initiated some of the terms. He also at times testified that some parts of the documents were not explained to him. However, he was clearly very nervous when giving his evidence and did not have as good a memory of events as Mrs. Toor or Mr. Heir. When his evidence is considered together with that of Mrs. Toor and Mr. Heir, it is clear, and I

reiterate it as a finding of fact, that Mr. Heir did read and explain all of the documents to him. In any event, there is absolutely no doubt that Mr. Toor was fully aware the documents he was signing were to purchase the Property.

- [94] In conclusion, the parties intended to and did, on June 9, 2015, enter into a contract for the purchase and sale of the Property for the sum of \$852,000 and subject only to the terms and conditions set out in the Sale Contract and the Addendum. The sale was facilitated by Mr. Heir as a dual agent under the terms and conditions of the Dual Agency Agreement. There were no other terms and conditions agreed to. Specifically, the sale was not subject to or contingent upon the approval of the defendants' children.

B. Did the Defendants Breach the Contract?

- [95] The evidence establishes beyond a doubt that the defendants refused to comply with their obligations under the Sale Contract. Specifically, they repudiated the contract on June 12, 2015 when Mrs. Dhillon advised Mr. Heir that the defendants did not want to sell the Property because they would have to pay a mortgage penalty and their daughter did not want them to. The defendants confirmed this repudiation on June 15, 2015, when Mrs. Dhillon advised Mr. Heir that they were not going to sell the Property and would not allow an appraiser to inspect the Property on behalf of the TD Bank. Their repudiation of the contract was further confirmed on July 15 and 27, 2015 by their solicitors Buckley Hogan. Finally, by reason of and in furtherance of their repudiation, the defendants refused to sign the documents required to complete the transaction that were sent by Mr. Mattoo under cover of his letter dated July 27, 2015. As a result, the defendants were not in a position to complete the transaction on July 30, 2015.

- [96] Subject to the specific defences raised by the defendants, which I shall address, I hold that the defendants wrongfully repudiated the Sale Contract on June 12, July 15 and 27, 2015.

C. Does the Defence of Non est Factum Apply?

- [97] The defendants rely upon the defence of non est factum and have referred me to a number of authorities on the issue. It is again not necessary to address all of the authorities referred to. It is sufficient to refer to *Alton v. Lower Mainland Motocross Club*, 2017 BCSC 2460, at paras. 46-47, where the principles of non est factum from *Farrell Estates v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752 are summarized at paras. 46 and 47:
- [46] Mr. Alton relies on *Farrell Estates v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752. That case states that non est factum is a narrow document that applies when a party fails to realize the essential nature of the transaction. It is often induced by fraud and should be kept within narrowly prescribed limits for persons of full capacity. The doctrine is one of fundamental mistake. If there is no evidence of fraud, deliberate misrepresentation, or deceptive behaviour, the key question is whether the relevant contractual terms were reasonably brought to the plaintiff's attention through the form of the contract itself. If the answer to that question is yes, then the plaintiff cannot claim non est factum.

[47] The analysis in determining non est factum is not purely subjective, and involves an objective component, namely, what would a reasonably careful person believe when reading the contract? The court in *Farrell Estates* stated at para. 100:

[100] The principles of non est factum, as formulated in the weight of the authorities, can be summarized as follows:

1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.
2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[98] It should be apparent from my factual findings that the defendants have not met the heavy onus on them of proving non est factum. I have found as a fact that the parties intended to sign a contract for the purchase and sale of the Property and that they entered into such a contract on the terms set out in the Sale Contract and the Addendum, both dated June 9, 2015. Further, I have found as a fact that the terms of the Sale Contract were read and explained to the defendants by Mr. Heir and therefore were brought to their attention. I have rejected the defendants' evidence that they believed they were entering into a listing agreement. It follows that the Sale Contract entered into was not fundamentally different from what was intended. In fact, it was exactly what was intended.

[99] Therefore, the defence of non est factum has no application.

D. Did the Plaintiffs Breach the Contract by Failing to Pay the Deposit on the Required Date?

[100] I repeat here the terms of the Sale Contract relating to the payment of the deposit:

2. **DEPOSIT:** A deposit of \$20,000 which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows:

way of Bank draft on all the subject removal

All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to Omaxwell Realty in Trust and held in trust in accordance with the provisions of the Real Estate Services Act. In the event the Buyer fails to pay the deposit as required by the Contract, the Seller may, at the Seller's option, terminate this Contract

[Underlining indicates typed additions to the standard form clause]

[101] The parties agree that the above clause, together with the "time of the essence" clause, required that the plaintiffs pay the deposit of \$20,000 on June 17, 2015, which was the date set out in the Addendum for the removal of the financing and inspection conditions and which was the date the plaintiffs did, in fact, remove the conditions.

[102] The defendants submit that the deposit was not, in fact, paid and delivered to Omaxwell Realty until June 19, 2015, and that the Sale Contract is therefore null and void.

[103] I make the following findings of fact in relation to the deposit issue which are amply supported by the evidence of the plaintiffs and Mr. Heir:

- a) On the evening of June 17, 2015, the plaintiffs delivered to Mr. Heir, a bank draft dated June 16, 2015 in the amount of \$20,000 made out to "Omax Real Estate Services";
- b) Shortly after being given the first draft, Mr. Heir noted that it was incorrectly made out to "Omax Real Estate Services";
- c) Mr. Heir called his managing broker who instructed him to have the plaintiffs correct the mistake;
- d) Mr. Heir then advised the plaintiffs to have the draft made out in the correct name of "Omaxwell Realty" and to deliver the cheque to his office the next day;
- e) Mr. Heir also told the plaintiffs "not to worry";
- f) None of the parties were requested to sign a "Late Deposit" form by Mr. Heir or the brokerage; and
- g) The plaintiffs attended at their bank the next day and obtained a second bank draft dated June 18, 2015 in the amount of \$20,000 and made out to "Omaxwell Realty in Trust".

[104] The only factual dispute relating to the deposit is whether the second bank draft was delivered to Omaxwell Realty on June 18 or 19, 2015. The defendants submit it was delivered on June 19, 2015, that being the day that it was deposited by Omaxwell. However, this submission is contrary to and inconsistent with the defendants' response to civil claim. At paragraph 14 of division 2 of their response to civil claim, the defendants plead that the plaintiffs paid a deposit to Omax Real Estate Services on June 17, 2015. At paragraph 15 they plead the plaintiffs paid another deposit of \$20,000 to Omaxwell Realty In Trust on June 18, 2015. Having pleaded the second bank draft was delivered on June 18, 2015, it is not open to the defendants to now argue that it was delivered on June 19, 2015.

[105] In any event, I accept the evidence of the plaintiffs and Mr. Heir that the second bank draft was delivered on June 18, 2015. This evidence is consistent with the date on the second draft and is not inconsistent with the evidence of Ms. Fuller who did not have any first hand knowledge of when the second draft was delivered. She merely assumed it was delivered on the same day it was deposited. Additionally, in cross-examination, she conceded that in

some circumstances a cheque might be deposited the day after it is received by the brokerage.

- [106] Therefore, I find as a fact that the bank draft dated June 18, 2015 was delivered to the offices of Omaxwell Realty on June 18, 2015.
- [107] The question now becomes whether this was a late payment of the deposit. The plaintiffs submit that Mr. Heir, as the agent of the defendants, waived the requirement that the deposit be paid on June 17, 2015. The plaintiffs rely upon *Cheema v. Chan et al*, 2004 BCSC 1342. In *Cheema*, as in the present case, the real estate agent was acting as a limited dual agent for both the buyers and the sellers and the real estate agent advised the buyer that the deposit could be paid a few days late. In these circumstances, Justice Burnyeat held that the real estate agent was acting as the agent for the sellers and had their authority to waive the contractual requirement that the deposit be paid within 24 hours:
- [50] The deposits of \$10,000.00 each had to be paid within 24 hours of acceptance of either the Offers or the Counteroffers. However, if the deposits were not made within 24 hours, the Offers or the Counteroffers were not void. Rather, the Contracts were "... at the sellers' option ..." terminable. However, Mr. Evans as the agent of the Defendants was in a position to waive the 24 hour requirement and I find that he did so. In any event, the Defendants did not exercise their option to terminate the Contracts as a result of any alleged failure by Mr. Cheema to pay the Deposits as required.
- [108] The defendants have not referred me to any authorities contrary to *Cheema* or otherwise indicating that a dual agent does not have the authority to waive or alter the date for the payment of the deposit. Accordingly, I accept *Cheema* as good law on this point.
- [109] Additionally, as a matter of general agency law, Mr. Heir had the ostensible or apparent authority of the defendants under the Dual Agency Agreement, to waive or alter the date by which the deposit had to be paid and he did so by advising the plaintiffs they could provide the corrected draft the next day and by telling the plaintiffs not to worry. The parties in this matter did not have any direct dealings with one another. All of their dealings were through the medium of Mr. Heir. Mr. Heir was appointed as the agent of each of the parties and authorized to act for each of the parties pursuant to the terms of the Dual Agency Agreement. The limitations on Mr. Heir's authority are contained in the Dual Agency Agreement. None of the limitations limit his authority to alter the date by which the deposit was to be paid.
- [110] I acknowledge that Mr. Heir gave evidence during the course of his cross-examination that the rules of the Real Estate Council require that both parties be given notice of a late deposit. He testified that this was not done in this case because the original bank draft was just being corrected. I make no comment on whether, in fact, the rules of the Real Estate Council, which are not in evidence, required Mr. Heir to notify the defendants. That is a matter between Mr. Heir and the defendants and, perhaps the Real Estate Council. What is important and relevant for the present purposes is that the plaintiffs had no knowledge of

any limitation on Mr. Heir's authority and no reason to believe that Mr. Heir did not have the authority to extend the date for providing the deposit to June 18, 2015. The plaintiffs relied on his advice and his apparent or ostensible authority to give that advice on behalf of the defendants.

[111] I therefore find that the date for the delivery of the deposit was extended to June 18, 2015 and that the deposit was delivered on that date. Therefore, the plaintiffs did not deliver the deposit late and were not in breach of the Sale Contract.

E. Were the Plaintiff's Ready, Willing, and Able to Close the Transaction?

[112] The defendants submit that the plaintiffs were not ready, willing, and able to close the transaction on the completion date of July 30, 2015 as the plaintiffs did not have the funds to complete. More specifically, the defendants submit that the Mortgage Approval Letter contained several conditions that were not satisfied and, as a consequence, there were no mortgage funds available to the plaintiffs on the closing date. The plaintiffs' response to the defendants' submission is twofold; first they submit that they were not required to tender and second, they submit that they were nevertheless ready, willing, and able to complete.

[113] Regarding the requirements of tender, the plaintiffs rely upon *Van Dyk and Van Dyk v. Durno et al*, 2005 BCSC 691, where it was held that a buyer is relieved of the obligation to tender when the seller has made clear an intention to not proceed with the sale. I accept this as an accurate statement of the law and agree that the defendants' clear and unequivocal expression of intent to not proceed with the sale relieved the plaintiffs of any obligation to tender the payment price on the completion date. However, that is not an answer to the defendants' submission that the plaintiffs were not ready, willing, and able to complete. As set out in *Norfolk v. Aikens*, [1989] 64 D.L.R. (4th) 1, tender and "ready, willing and able" are two different things:

I have earlier set out the submissions which Mr. Winstanley has made to us. In my opinion, they confuse two questions:

1. When is tender required?
2. When must a party be ready, willing and able to complete?

Tender is a formal step. There are many authorities to the effect that if one side has made it clear that it will not complete it is not necessary for the other to go through the formal step of offering the necessary documents or consideration. Thus, Mr. Winstanley's first proposition is correct.

But his second and third propositions do not address the question of whether a person who seeks specific performance must show, in order to succeed, that he was ready, willing and able to complete on the day and in the manner fixed by the agreement.

[114] The issue before me is not one of tender but whether the plaintiffs were/are ready, willing, and able to complete the transaction. I intend to address first the plaintiffs' ability to complete the transaction on the closing date. However, there is an issue as to whether the appropriate date is the completion date or some later date. As will be seen, in my view, in the circumstances of this case, the relevant time is the date for completion as ordered by the court, if specific performance is granted.

1. Were the plaintiffs ready to complete on the completion date?

[115] The evidence at trial has clearly established that the plaintiffs expected to receive and did receive slightly in excess of \$200,000 from the sale of their home, which funds were to form part of the purchase price of the Property. The evidence further establishes that TD Bank had agreed to finance the purchase by way of a mortgage in the amount of \$681,600 and a Mortgage Approval Letter to this effect was prepared. The exact date the plaintiffs were approved for the mortgage is not entirely clear. Mr. Heir testified he received a call from the mortgagee on June 15, 2015 about having an appraisal of the Property done, which suggests the approval was on or before June 15, 2015. On the other hand, the Mortgage Approval Letter itself states the plaintiffs were approved on June 16, 2015. I do not consider that anything turns on whether the approval was June 15 or 16, 2015. What is relevant and important is that the plaintiffs were approved for a mortgage in the amount of \$681,600. The mortgage funds and the funds from the plaintiffs' sale of the Property were more than sufficient to cover the purchase price of the Property.

[116] However, the defendants submit that I should not take into account the mortgage funds as the mortgage was subject to various conditions and the plaintiffs had not met those mortgage conditions. The Mortgage Approval Letter did contain several conditions summarized as follows:

- Satisfactory confirmation of down payment;
- Satisfactory confirmation of annual income of borrowers;
- Copy of firm purchase and sale agreement;
- Firm sale of the plaintiffs' house with all conditions removed;
- Valid lease of the rental suite in the Property; and
- Full appraisal required.

[117] With the exception of the appraisal condition, I accept the plaintiffs' evidence that all of the other conditions in the Mortgage Approval Letter were satisfied. The condition that there be confirmation of a down payment was satisfied as the down payment was to come from the sale of the plaintiffs' house and was in an amount slightly in excess of \$200,000. The condition that there be a copy of a firm purchase and sale agreement was easily satisfied by providing the Sale Contract and the Addendum to the mortgagee. The condition that there be a firm sale of the plaintiffs' house was also satisfied as that sale did complete on July 30,

2015 as intended. The condition that there be a valid lease of the rental suite in the Property was satisfied as the Addendum discloses that the two suites in the Property were rented at a monthly rent of \$800 each. The final mortgage condition, other than the appraisal requirement, is the requirement that the plaintiffs confirm their annual incomes. Although the evidence is not entirely clear, the Mortgage Approval Letter does appear to acknowledge that this condition was already satisfied. Specifically, the letter appears to state that Mr. Toor provided a letter of employment (referred to in the document as "LOE") followed by what appears to be an amount of \$60,060 and that Mrs. Toor provided a pay stub (referred to in the document as "curr stub") evidencing an income of \$21,235. Regardless of whether this is a proper interpretation of the Mortgage Approval Letter, given that obtaining confirming income information is not particularly onerous, I have no hesitation in accepting the plaintiffs' evidence that they had satisfied the condition that they confirm their income information.

[118] With respect to the condition in the Mortgage Approval Letter that an appraisal of the Property be obtained, the evidence is clear that this condition was not satisfied. The evidence is equally clear that this condition was not satisfied because the defendants refused access to the mortgagee's appraiser. The defendants were somewhat evasive when cross-examined in relation to allowing the mortgagee's appraiser access to the Property. They both implied they would not allow access as they were not selling the house. Mr. Heir's evidence was unambiguous. He testified that on June 15, 2015 he spoke with Mrs. Dhillon and she refused to allow the appraiser access to the Property. I accept Mr. Heir's evidence.

[119] Thus, it was the conduct of the defendants, and only the conduct of the defendants, that prevented the plaintiffs from having the mortgage funds to close the transaction. In my opinion, the defendants cannot rely upon their own conduct to defeat the plaintiffs' right to specific performance.

2. Is the completion date the appropriate date?

[120] Thus far, I have discussed this issue as though the plaintiffs were required to be ready, willing, and able to complete on the completion date. However, the decisions of the Court of Appeal in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, [1991] 79 D.L.R. (4th) 641 (B.C.C.A.) [Shaw] and *Basra v. Carhoun*, [1993] 82 B.C.L.R. (2d) 71 (B.C.C.A.), hold that where both parties are unable to complete the contract on the completion date, there is an implied waiver of the time of the essence provision and a plaintiff seeking specific performance need only prove it will be ready, willing, and able to complete on the date to be set by the court if specific performance is granted.

[121] In *Shaw*, it was held that when both parties are unable to complete the contract, time ceases to be of the essence and either party can give the other notice to complete the transaction at a later date.

So, therefore, we arrive at this question: What is the legal position when both sides are in breach of obligations under a contract in which time is of the essence?

The answer Miss Satanove propounds is that, as a matter of law, time ceases to be of the essence and either side can then give to the other a notice to complete the transaction at a new time.

She relies on *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 (C.A.) which was cited with approval by this Court in *Norfolk v. Aikens*, *supra*.

There, the closing date (and I take "closing" to mean completion) of 30th June set out in the contract was a Sunday and the following day was, of course, Dominion Day (as it then was). Time was said to be of the essence.

The court obviously concluded that the closing date pursuant to the contract was 2nd July. The judgment does not indicate that a place of closing was specified.

The court having held that neither party was ready to close on the contractual date i.e. 2nd July, said at 455-6:

There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; LeBel, J., quoted from and followed them in *Watts v. Strezos*, 1953 CanLII 164 (ON SC), [1955] O.R. 615, [1955] 4 D.L.R. 126. If applied literally, they cannot be reconciled with cases holding that the contract still subsists if neither party is ready to close, and in my view cannot be applied at all in such cases.

* * *

It has been found as a fact that the defendants were neither ready nor willing to close on July 2nd. Therefore, the argument based upon time being of the essence fails. Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable, and stating that time is to be of the essence with respect to the new date. Neither side did this in this case. However, the findings of the trial Judge as to the efforts of B to close on July 2nd, July 3rd and July 4th lead inevitably to the conclusion that it was entirely reasonable to insist upon a closing on July 4th and that there was no reason in law for the vendor to refuse to close on the basis of the documents which B then had and which he tendered to D.

I accept this as a correct statement of the law and it follows that I agree with Miss Satanove's answer.

[Emphasis in original.]

[122] In *Basra*, the Court of Appeal affirmed that when both parties are unable to complete the contract, time ceases to be of the essence and further held that in such circumstances a plaintiff can obtain specific performance despite not being ready, willing, and able to complete on the completion date provided the plaintiff is ready, willing, and able to complete at a later date to be ordered by the court.

28 In the case at bar, then, it is clear that time ceased to be of the essence on February 28, 1990 when neither party was ready to close the transaction, but on that date the contract still subsisted. Therefore, the purchasers were entitled to give the vendor reasonable notice that they wanted to complete. In my opinion, such notice was given when the plaintiffs commenced this action. Indeed, the respondents conceded in their factum that the purchasers satisfied the notice requirement by promptly commencing their action.

29 Thus, the case at bar is like *Shaw*, where the contract still subsisted and the purchaser, by bringing its action for specific performance, made it clear that it was ready, willing and able to perform. No date being specified it is up to the court to fix a reasonable time for completion if a decree for specific performance is granted. See *Hanson v. Cameron*, 1948 CanLII 21 (SCC), [1949] S.C.R. 101 (S.C.C.).

30 More problematic is the issue of when must it be proved that the purchasers were ready, willing and able to complete. To use the vernacular, the plaintiffs are "between a rock and a hard place". On the one hand, it is part of their claim that they are entitled to treat the "time is of the essence" clause as vitiated that they, like the vendors, were in substantial default on February 28, 1990. On the other hand, in order to succeed in a claim for specific performance the purchasers must prove that they were ready, willing and able to complete. But when?

.

45 On the basis of *Shaw* and *King* it is apparent that a plaintiff can succeed in an action for specific performance despite not being ready, willing and able to perform at the original completion date if the plaintiff is ready, willing and able to perform at some later date, to be determined by the giving of reasonable notice or fixed by the court.

[123] The proposition that a plaintiff seeking specific performance need not always be ready, willing, and able to complete on the completion date was recently noted by Justice Tammen in 1124259 BC Ltd. v. 1069185 BC Ltd., 2018 BCSC 1655, at para. 145.

[145] The plaintiff submits, and I accept, that it need not prove that it was ready, willing and able to complete at all times between the original closing date and time of judgment in order to succeed in its claim. In certain circumstances, it is open to a party to keep a contract alive by either reinstating the "time is of the essence" clause on its own, or by suing for specific performance, as was done here. In those circumstances, it falls to the court to set a new closing date, if the court decides that the party is entitled to specific performance.

[124] The matter before me is similar to *Shaw* and *Basra* in that none of the parties were in a position to complete the transaction on July 30, 2015. The evidence of Mr. Mattoo, which I accept, is that he sent the completion documents to Buckley Hogan for signature and the documents were never returned. The only response he received was an email from Buckley Hogan advising "our client does not intend to complete on this deal". The completion documents were never signed. It is therefore apparent, and I find as a fact, that neither party was in a position to complete the transaction on the completion date. The plaintiffs

then, like the plaintiffs in *Basran*, immediately and promptly commenced this action for specific performance. In fact, they commenced it on the same date as the completion date, July 30, 2015. Therefore, the relevant date for the plaintiffs to be ready, willing, and able to complete is the date to be fixed by the Court and the issue is whether the plaintiffs have proved they will be ready, willing, and able to complete the transaction in the event that specific performance is ordered.

[125] Gabby Dhillon, the plaintiffs' financial advisor, testified that the plaintiffs were pre-approved by him for a mortgage in May 2018. This is some evidence the plaintiffs will be ready, willing, and able to complete on a date to be fixed but it is not sufficient as Gabby Dhillon did not testify as to the amount of the pre-approved mortgage. However, given that: (1) the plaintiffs were previously approved for a mortgage on the Property in the amount of \$681,600 by TD Bank; (2) the value of the Property has increased substantially since the date of that approval; and (3) the plaintiffs are still employed as they were at the time of the original approval, it is certain that the plaintiffs will have no difficulty in obtaining the necessary financing to complete the transaction should specific performance be ordered. Accordingly, I conclude the plaintiffs have proven that they will be ready, willing, and able to complete the transaction on whatever date is set by the Court if specific performance is ordered.

[126] In conclusion, the plaintiffs were not ready, willing, and able to complete on the completion date but their inability to complete was due solely to the conduct of the defendants and the defendants cannot rely upon their own breach and repudiation of the contract to defeat the plaintiffs' right to specific performance. In any event, in the circumstances of this case, the plaintiffs need only prove, and have proved, they will be ready, willing, and able to complete the transaction on whatever date is set by the Court if specific performance is granted.

F. Are the Plaintiff's Otherwise Entitled to Specific Performance or Damages?

[127] In *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350, the Court of Appeal held at para. 23, that specific performance is available where the buyer can prove the property is unique in the sense that a substitute is not readily available and there is a fair, real, and substantial justification for the relief sought.

[23] Where specific performance once was regarded as a presumptive remedy for a seller's substantive breach of a contract for the purchase and sale of real estate, it is now accepted that the purchaser seeking that remedy must prove that the property is unique to the extent that a substitute would not be readily available and that there is a fair, real, and substantial justification for the decree that is sought: *Semelhago v. Pramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 ¶ 21-22. The considerations are most recently discussed in *United Gulf Developments Ltd. v. Iskandar* (2004), 235 D.L.R. (4th) 609, 2004 NSCA 35. See also *Cormack v. Hardwardt*, [1998] B.C.J. No. No. No. 2684 (S.C.), and *Taberner v. Ernest & Twins Development Inc.* (2001), 89 B.C.L.R. (3d) 104, 2001 BCSC 367.

[128] The comments of the Court of Appeal in *Ali* at paras. 29 and 30 are relevant:

[29] In my view it is particularly significant that what the purchasers seek to acquire is not the subject of a commercial venture; it is to be their home. It is a house as opposed to one of many suites in a high-rise building, or one unit in a row of similar townhouses. That is not to say that such homes could not be unique, but a house will often have characteristics, if only in appearance, that tend to be unique. It may be that only one aspect of a home will render it unique to a prospective purchaser in the sense that it is unlikely that a substitute will be readily available, but it is more likely that a number of features, viewed in combination, will do so. The determination can be based on both objective factors and the subjective considerations of the purchaser seeking the equitable relief.

[30] I see little room to question the finding that the house and the property in this case are unique. There is a combination of features that it is evident Beames J. was satisfied would not be readily available in a substitute house on other property in the municipality. The evidence of other houses of similar size and asking price does not undermine her conclusion. I consider her finding of fact that the house and property are unique is reasonably supported by the evidence.

[Emphasis added.]

[129] The Court of Appeal recently revisited the requirements of specific performance in *Aulakh v. Nahal*, 2019 BCCA 57, where, at paras. 10 and 11, they referred to and confirmed their earlier decision in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388:

[10] In *Youyi*, Newbury J.A., writing for the Court, adopted principles of assistance in addressing the issues in this appeal:

[44] The implications of *Semelhago* were discussed at length in 2004 in *United Gulf*, The Court of Appeal emphasized that the question of whether damages will be an adequate remedy in any given case is a largely factual inquiry that is broader than an assessment of the uniqueness of the land in question:

. the applicability of the specific performance remedy will not depend entirely on the issue of uniqueness. As indicated in *Neighbourhoods of Cornell Inc. v. 14401066 Ontario Inc.* [(2003) 11 R.P.R. (4th) 294 (Ont. S.C.)], uniqueness is only part of the equation. The essential question is whether damages are capable of compensating the loss and whether accurate assessment of damages will be possible, or whether the exercise will be chiefly speculative and conjectural. [At para. 19; emphasis added (in original).]

[45] The Court also quoted at length with approval from *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001) 2001 CanLII 28012 (ON SC), 56 O.R. (3d) 341 (S.C.), *aff'd* (2003) 2003 CanLII 52131 (ON CA), 63 O.R. (3d) 304 (C.A.) (lve. to app. *dism'd*, [2003] S.C.C.A. No. No. No. 145), in which Lax J. had reasoned:

Semelhago asks us to examine in each case, the plaintiff and the property. The danger in framing the issue as one of uniqueness (a term that carries with it a pre-Semelhago antediluvian aroma) is that the real point of Semelhago will be lost. It is obviously important to identify the factors or characteristics that make a particular property unique to a particular plaintiff. The more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties. This will depend on whether money is an adequate substitute for the plaintiff's loss and this in turn will depend on whether the subject matter of the contract is generic or unique.

What then are those factors that will determine whether it is just to order specific performance? The inquiry begins with Semelhago by asking if a substitute property is readily available, but it does not end there. The jurisprudence now goes further and I have attempted to summarize below some of the emerging principles.

Uniqueness is a matter of proof and the onus lies on the party seeking the remedy. However, the plaintiff is not required to prove a negative and demonstrate the complete absence of comparable properties. As Mr. Justice Farrier said in *Greenforco*, this would place an expensive and unacceptable burden on a plaintiff. He also stated that the appropriate time to determine if a substitute property is readily available is at the time of breach. As he explained, this is the time that the innocent party has to assess his position and decide whether to keep the contract alive or to accept the repudiation and sue for damages.

There is both a subjective and objective aspect to uniqueness. While it is difficult to be precise about this, it strikes me that normally, the subjective aspect will be less significant in commercial transactions and more significant in residential purchases, unless the motivation in the latter case is principally to earn profit. In terms of the subjective aspect, the court should examine this from the point of view of the plaintiff at the time of contracting. In some cases, there may be a single feature of the property that is significant, but where there are a number of factors, the property should be viewed as a whole. The court will determine objectively whether the plaintiff has demonstrated that the property has characteristics that make an award of damages inadequate for that particular plaintiff. Obviously, investment properties are candidates for damages and not specific performance.

It is important to keep in mind that uniqueness does not mean singularity. It means that the property has a quality (or qualities) that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere. To put this another way, the plaintiff must show that the property has distinctive features that make an award of damages inadequate. The plaintiff need not show that the property is incomparable. [At para. 17; emphasis added (in original).]

I agree with these comments.

[11] At paras. 56 and 57 of Youyi, this Court said the determination of whether damages will provide an adequate or appropriate remedy is "largely fact-dependent" and requires "a close examination of the facts". These observations should be reflected in the deference we afford to the findings impugned on this appeal. As this Court concluded in *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350, the question whether property is so unique as to warrant an order of specific performance is a question of fact for determination by the trial judge

[Emphasis in original.]

[130] Thus, in assessing whether the plaintiffs are entitled to specific performance I must address not only whether the Property is unique but also whether damages will be an adequate remedy. This involves inquiring into the availability of substitute properties at the time of the breach. In assessing the uniqueness of the Property, there can be both subjective and objective aspects with the subjective aspects being more significant for residential properties. The onus is on the plaintiffs to show the Property has distinctive features that make an award of damages inadequate.

[131] The plaintiffs have testified to several factors that go to the uniqueness of the Property. These are:

- The Property is relatively large with eight bedrooms and seven bathrooms and comprises 4,676 square feet;
- The Property is located in their existing neighbourhood where they have lived since arriving in Canada;
- The plaintiffs' places of employment are near the Property;
- The plaintiffs' relatives live near the Property;
- There is a Sikh Temple near the Property;
- There is a school nearby where their son can learn Punjabi;
- The Property has two rental suites which the plaintiffs need to assist with their mortgage payments as they are of moderate means; and
- The price was only slightly above the maximum amount the plaintiffs could afford, being \$850,000.

[132] The foregoing factors, especially the existence of two rental suites and the close proximity of a Sikh Temple and a school for Punjabi children, are certainly sufficient to establish that the Property is unique on either an objective or subjective basis. However, I must also consider the availability of substitute properties and whether damages could be an adequate remedy.

[133] The only evidence as to the availability of substitute properties is the evidence of the plaintiffs. The defendants led no evidence that there were other comparable properties available for purchase by the plaintiffs. The plaintiffs' evidence is that they looked for another house to purchase that was comparable to the Property. The other properties they looked at were either too small or too expensive or the seller had accepted a prior offer. I accept the plaintiffs' evidence that they could not locate a property comparable to the Property and, in the absence of any evidence to the contrary from the defendants, I find that there were no substitute properties.

[134] I now consider whether damages are an adequate remedy.

[135] If damages were to be awarded to the plaintiffs in this matter, the damages would be assessed as of the date of the breach: *Dosanjh v. Liang*, 2015 BCCA 18, at para. 55. That presents a serious difficulty for the plaintiffs as the value of the Property has increased significantly since the completion date of July 30, 2015. There are two appraisal reports in evidence prepared by Bakerview Realty Appraisers on behalf of the plaintiffs. The first report provides a valuation of the Property as of July 30, 2015, the intended completion date, in the amount of \$850,000. The second report provides a valuation of the Property as of August 29, 2018 in the amount of \$1,365,000. If I were to assess damages as of the date of the breach, the plaintiffs would be entitled to only nominal damages since the appraised value of the Property at the time of breach, \$850,000, is almost equal to the agreed purchase price of \$852,000. Moreover, given the substantial rise in the value of the Property, it is apparent that the plaintiffs, who are of modest means, have no hope of purchasing a substitute property if one were available. It follows that damages are clearly not an adequate remedy in the circumstances.

[136] Accordingly, I conclude that the plaintiffs have established that the Property is unique, that there were no comparable substitute properties, and that damages would not be an adequate remedy. Therefore, the plaintiffs are entitled to specific performance.

[137] I would add that if the plaintiffs had elected to take damages in lieu of specific performance, I would have assessed the damages in lieu of specific performance at \$513,000 (\$1,365,000 - \$852,000). In my view the substantial rise in the value of the Property would have justified such an award as in *Semelhago v. Paramadevan*, [1996] 2 SCR 415.

[138] The parties are at liberty to speak to costs and to seek directions to give effect to these reasons.

"Giaschi J."

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