

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Adeyemi v Industrial Radiator Co. Ltd.*,
2026 BCSC 1787

Date: 20260921
Docket: S212072
Registry: Victoria

Between:

Opeyemi Ebenezer Adeyemi and Faye Eva Adeyemi

Plaintiffs

And

Industrial Radiator Co. Ltd. and Rajinder Kapila

Defendants

Before: The Honourable Justice Veenstra

Reasons for Judgment

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(September 3-6 and 9, 2024)

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(January 19-23, 26-30
and March 17, 2026)

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Place and Dates of Trial:

Victoria, B.C.
September 3-6 and 9, 2024,
January 19-23, 26-30
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September 21, 2026

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Introduction

[1] This action relates to a disputed contract to purchase a newly constructed home in the Maple Bay area of Duncan, British Columbia, located at 6077 Sansum Drive (the “Property”).

[2] Unfortunately, the parties’ dealings were complicated by flawed understandings by the defendants of their obligations as builders, concerns about a claim for real estate commission, mysterious and unexplained dealings with respect to a new home warranty for the Property, and a decision to use a form of contract of purchase and sale found on the internet, rather than engaging a professional to draft the parties’ agreement. The plaintiffs moved into the Property prior to signing the written agreement and the agreement itself provided a long time before completion. As time passed, the parties’ relationships fractured as the value of the Property increased dramatically after a price had been agreed to. The plaintiffs stayed in the home after disputes arose, and they have been raising their family there for over five years.

[3] The plaintiffs seek specific performance of the agreement to purchase the Property. The defendants say that the agreement came to an end in June 2021.

[4] Because the principal players on each side share last names, I intend to use their first names – which is how they were described in the evidence at trial. I mean no disrespect by so doing.

Facts**Background**

[5] Industrial Radiator Co. Ltd. (“Industrial”) is owned by Rajinder Kapila, who is known as Roger, and his wife, Reetika Kapila. Both of the Kapilas were born and raised in India, then moved to Canada in the 1980s and 1990s. They have three children, all born in the 1990s. They began living in Duncan, BC, in about 2002. Roger is involved in the furniture business, and since 2017-2018 has run his own business in Duncan known as “Roger’s Furniture”. Reetika spent much time focused

on raising her children. She has worked in grocery stores and restaurants over the years. More recently, she has worked for Vancouver Island Health as a porter or in the kitchen, primarily on a casual on-call basis.

[6] The Kapilas have been involved in the construction or renovation of four homes in Duncan:

- a) When they first moved to Duncan, they bought a vacant lot on Sterling Bridge Place in the Maple Bay area, where they built a home with the help of friends who were in the construction business. For that project, their framer took a lead role in managing the construction, although the Kapilas were still involved in dealings with the municipality. They lived at the Sterling Bridge Place home for about a year after it was completed.
- b) They then moved to a different neighbourhood and purchased an older house that they renovated. They did not keep that house for long, as they needed the money for other things and also wanted to move back to Maple Bay.
- c) In 2006, the Kapilas purchased another vacant lot in the Maple Bay area, on Algonquin Road. They hired a general contractor who built a new house for them. They moved into the new house in November 2008.
- d) In about 2012, the Kapilas bought a lot at 6092 Sansum Road in Maple Bay, where they built a larger home. They moved into 6092 Sansum in 2013, and sold Algonquin about a year later. Roger's evidence was that for the construction of 6092 Sansum, he and Reetika contracted directly with the various trades for the construction work.

[7] In 2016, the Kapilas wanted to purchase a small lot in downtown Duncan. The lot was owned by Industrial, and the purchase of the lot occurred by way of a share purchase. After that transaction, the shares of Industrial were owned 50% by Roger and 50% by Reetika. Roger was the sole director.

[8] The plaintiffs are 15-25 years younger than the Kapilas. Opeyemi Adeyemi (“Opey”) was born and raised in Nigeria. Faye Adeyemi was born and raised in Belize. Opey moved to the Caribbean when he was 21 and soon met Faye. They married and both worked for a time as teachers in Belize. Opey moved to Canada, living initially in Alberta. He worked in the oil field to save some money, then studied business and accounting at Lakeland College in Lloydminster. After he had been there for a while, Faye and their eldest child joined him in Alberta.

[9] In 2017, Opey obtained his Bachelor of Business Administration degree with a major in accounting. He found work initially at a car dealership in Lloydminster, then worked for an accounting firm for a period of time, then was persuaded to return to the car dealership where he became their finance manager. He remained with that dealership until 2018, when the owner purchased a dealership in Duncan, BC – Island GM. The Adeyemi family then moved to Duncan where Opey held various management roles with Island GM.

[10] Leading up to the events of 2020 described below, neither of the Adeyemis had ever purchased or sold real estate or obtained mortgage financing. That said, Opey had a financial background, with particular focus on the automotive retail industry.

Construction of the Home

[11] In about 2016, there were discussions within Reetika’s family about her brother and parents moving from Edmonton to British Columbia.

[12] In the spring of 2016, the Kapilas had an opportunity to buy the Property, which at the time was a vacant lot just across and about three houses down Sansum Drive from their home at 6092 Sansum. A decision was made to use Industrial to buy the Property. The purchase price was \$129,000. The purchase transaction completed on May 27, 2016. There was evidence that Reetika’s brother, Nick Bhalla, and her father both contributed some funds in respect of either the purchase or the subsequent construction on the Property, although the evidence was somewhat vague.

[13] The Kapilas learned that in order to obtain a permit to build a residential home, they would need to comply with the *Homeowner Protection Act*, SBC 1998, c 31 [HPA], including by becoming licensed as a residential builder pursuant to Part 5 of the HPA and by securing mandatory home warranty insurance from a warranty provider pursuant to Part 8 of the HPA.

[14] Industrial obtained the necessary license, with Reetika as its nominee. In order to do this, she was required to take various on-line courses and demonstrate competency in the various mandated subject areas. Reetika's evidence was that she did most of the online work herself, but acknowledged that her daughter (who was then 19 or 20) "helped" her with some of the course modules. To meet the requirements of prior experience, Reetika pointed to her involvement in the four previous homes that she and Roger had either renovated or had constructed for themselves.

[15] Unfortunately, the production of documents related to Industrial's dealings with BC Housing, in respect of the licensing, and with Pacific Home Warranty Insurance Services, in respect of the warranty, was woefully inadequate. Reetika acknowledged she must have completed a membership application. When asked about other common documents such as a membership agreement, a technical qualifications form and a lender reference form, she could only answer that if they were required they were submitted. She did believe that they had provided personal guarantees to the warranty company as well as a personal net worth form. None of these documents were produced or in evidence.

[16] The parties did obtain a copy of North Cowichan's file, which contains a form issued by BC Housing in April 2017, confirming that Industrial was a licensed builder and that a warranty had been issued by Echelon General Insurance Company. That form had a "Seal" from Pacific Home Warranty, with a seal date of February 17, 2017. The only other pre-2020 document about the home warranty was a "Single Family Site-Built Enrolment Notification" dated February 17, 2017, and issued by Pacific Home Warranty – that document was in a "Home Information Book"

assembled by a real estate agent in 2019. The Home Information Book was disclosed during a break in the trial.

[17] The initial submission for a building permit went to the Municipality of North Cowichan in July 2016. That same month, Industrial retained Madrone Environmental Services Ltd. (“Madrone”) to provide geotechnical services. A professional geotechnical engineer, Nathaniel Tougas, did a site visit on July 25, 2016, and submitted a “Geo-Hazard Assessment” report on August 5, 2016. The Synopsis of the report states:

As requested by Mrs. Reetika Kapila of Industrial Radiator Co. Ltd., Madrone Environmental Services performed a Geo-Hazard Assessment of the Property at 6077 Sansum Drive, which consists of “steep slopes” (slopes 20% or greater) within the Hazard Lands Development Permit Area (DPA-4) of the Municipality of North Cowichan. We identified that the Property is subject to localized landslides and subsidence due to rock weathering. We conclude that the Property can be developed safely the intended use (i.e., the new construction of a single family dwelling) if the recommendations given herein are followed. We understand that this report will be used with the application of a building permit and that this report, together with a “save harmless” covenant in favour of the Municipality of North Cowichan, must be registered on title for an exemption from development permit requirements under DPA-4.

[18] In the final paragraph, Mr. Tougas concluded:

... it is our professional opinion that the land may be used safely for the use intended if the land is used in accordance with conditions specified in this report, and there is a registered covenant restricting the use of the land.

[19] Among the “conditions specified” is the following:

... the potential for subsidence from seismic events is negligible, assuming proper compaction effort and other foundation construction practices are performed.

[Emphasis added.]

[20] On March 16, 2017, a planning technician from North Cowichan wrote to Reetika advising:

I am sending you this email to provide next steps now that you have completed the geotechnical report for 6077 Sansum Drive.

The property is within the Development Permit Area – Hazards Lands DPA4 steep slopes which are considered to be terrain greater than 20%.

I am enclosing the wording for the steep slope covenant document preparation by your lawyer. The geotech report must be attached to and referred to within the covenant document. The covenant document itself is to contain an indemnity for the municipality (contained in wording). The covenant document and attached geotech report is to be submitted to me for review.

Owner signatures must be attached to the “form C” page of the covenant document. A letter of undertaking from your lawyer stating the covenant will be registered on title upon receipt of signature from our Director, Scott Mack, must also be included.

With the provision of the above and upon return receipt of a signed covenant document you may then proceed to building permit. I have the geotech report in my files (copy attached) – report is good from our standpoint and ready for inclusion in Steep Slope Covenant).

Any questions give me a call.

[21] The covenant described in this email was ultimately registered in the Land Title Office on April 11, 2017.

[22] Roger gave evidence that it was a “digging company” that recommended they go talk to geotechnical engineers. In light of what is in the report, and what was subsequently done with it, it seems clear that this was a requirement of the municipality in advance even of a building permit, and most likely not something suggested by an excavation contractor.

[23] On March 20, 2017, North Cowichan issued a building permit to Industrial. Industrial was listed on the permit as both “Owner” and “Builder”. Under “Special Conditions”, the permit noted:

The Municipality of North Cowichan is relying on the registered professional engineer or architect of record provided to ensure compliance to the current B.C. Building Code for design, plan certification and field reviews as provided for in section 290 of the Local Government Act and section 12 & 13 of the Municipality of North Cowichan’s Building Bylaw No. 3172, 2003.

[24] This document did not specify which aspects of the project would be dealt with by certified professionals, but as noted below, it was clarified by at least May

2017 that the structural and geotechnical engineers would be required to complete the necessary assurance paperwork.

[25] Reetika recalled that the construction business was busy in the spring of 2017, and that they had to initially wait until their framer was ready to begin working on the house. She said that she was primarily responsible for requesting quotations from other contractors, then when the quotes were in, she and Roger would decide which ones to accept.

[26] It appears that excavation work was performed by early May. Industrial then retained Madrone again. Mr. Tougas did a site visit on May 12, 2017, and wrote a letter (to which he attached his engineer's seal) dated May 15, 2017:

The building envelope was blasted within the encountered fractured shale/mudstone and leveled with blast rock. The sides of the excavation measured up to 2 m high, sloping near vertically, with lateral support from existing dwellings on the other side. The rear of the excavation measured up to 2.5 m high, sloping near vertically, with a 65% back slope up to 3.5 m high, above which is a bench supporting a 3.5 m high spoil pile sloping at about 70%. Traversing the veneer of rubble (up to 200 mm diameter) on the back slope initiated miniature rock slides that sometimes reached the east building corner pin within the excavation below. Based on these findings, I recommend:

1. remove rubble veneer (approx. 0.3 m in thickness) from the back slope above the excavation;
2. remove fallen rubble from between the building corner pins and the bottom of rock cut to provide a level working space for workers; and
3. do not undercut, steepen, or place more fill on the spoil pile above the back slope.

This report may be used by you for WorksafeBC standards up to 2 months from the report date. Please contact me if you require further clarification.

[27] I note that nothing in this letter addresses compaction or other foundation practices, which were requirements referenced in the original geotechnical report (as quoted above).

[28] A Mr. Gellein, a building inspector for North Cowichan, attended the site on May 19, 2017, to inspect the footings and foundations. His inspection report noted:

- 1) Geotech to provide Schedule B & Schedule C-B on completion

[29] On June 16, 2017, Mr. Tougas signed a Schedule B – Assurance of Professional Design and Commitment for Field Review. Mr. Tougas, who gave evidence at trial, explained that a Schedule B provides the municipality with an assurance that the registered professional (a professional engineer or architect) has provided a design meeting necessary standards and a commitment that the registered professional will conduct all necessary field reviews. He described it as one bookend, which is provided at the start of the process. Schedule C-B is the other bookend, and it confirms that the registered professional has conducted all necessary field reviews and that the aspect of the structure that they are responsible for is compliant with code and design.

[30] It appears that neither of the Kapilas understood this process. No arrangements were made for Mr. Tougas to conduct field reviews of the geotechnical aspects of the installation. There are no documents confirming that he reviewed such matters as compaction. Mr. Tougas' evidence was that he heard nothing further after submitting the Schedule B in June 2017 until several years later. [As set out below, it appears that the next contact with him was in about September 2020.]

[31] In July 2017, there was an issue that led to work stopping on the project. An internal email within the North Cowichan building department noted that Reetika was asking for written approval that work can begin again. Mr. Gellein responded on July 28, 2017, that:

... I spoke to both of them [the contractor and Reetika]. I am not giving written approval as they need to provide Letters of Assurance from both the Structural and Geotechnical Engineers. I put the ball back in their court.

[32] On August 4, 2017, the structural engineer, Mr. Grey (who had provided his Schedule B in August 2016, even before the permit was issued), wrote to Reetika (with a copy to Mr. Gellein) confirming that he had reviewed the matter with Mr. Gellein and that construction could proceed. Mr. Grey also asked for a copy of the geotechnical report. Presumably, the municipality by this point had both Schedule B documents. Construction proceeded.

[33] In September 2017, Mr. Grey inspected the framing work and, once that had been reviewed, he provided a Schedule C-B as to structural matters.

[34] Both Roger and Reetika gave evidence that at some point prior to completion of the house they learned that Reetika's brother and his family had decided that they wanted to live in Victoria and not Duncan. Reetika's evidence was that this occurred prior to installation of drywall. Both said that the property was listed for sale as an uncompleted home, with the hope that it would be bought by someone who would take over and complete construction. The timing of any such listing was vague, and no documents were in evidence with respect to any such listing. It was common ground that there was little if any interest, and no purchase agreement was ever entered into.

[35] The City's file indicates that a number of inspections occurred in the final few months of 2017. Then, on June 13, 2018, Mr. Gellein attended the house for a final inspection. He provided a list of outstanding requirements, the first of which was:

1. Review file for Geotech requirements re Geotech Schedule C-B.

[36] Reetika's evidence is that she was surprised to hear that there were any outstanding engineering documents. She said that she was not aware that there were two separate documents required (a Schedule B and a Schedule C-B). She said that Mr. Gellein explained it all to her, and told her that she needed to reach out to Madrone to get them to provide the Schedule C-B.

[37] Reetika's evidence was that she then tried to get in touch with Mr. Tougas through Madrone, but that it was very hard to get through. When she finally did get through, she was told that Mr. Tougas no longer worked there, but that only the engineer who performed the initial work can provide the Schedule C-B, and that Mr. Tougas' new contact information was not available.

[38] Reetika was not clear as to exactly when she began making efforts to get the Schedule C-B. Mr. Tougas' evidence is that he continued working at Madrone until January 31, 2019 – more than seven months after the final inspection report of

June 13, 2018. Then within 11 days of leaving Madrone, he began working at another local engineering firm. Mr. Tougas also confirmed that any member of the public can get contact information for any professional engineer by doing a search on the website of Engineers and Geoscientists BC.

[39] The other work listed on the June 13, 2018 final inspection report was relatively straightforward:

2. Provide house numbers visible from street.
3. Front entry stairs – lower flight – all risers and treads must be consistent within 6 mm.
4. Rear patio door – complete cladding stairs – max riser 7 7/8", treads s/risers, consistent within 6 mm.
5. Stairs to upper floor – max handrail height is 38".
6. Garage stairs – provide 3 consistent risers and graspable handrail.
7. Install range hood.
8. Stairs to lower floor – provide graspable handrails both sides – both flights.

Listing For Sale

[40] The listing history indicates that there was a brief initial listing of the property from June 12, 2018 (the day before the final inspection) to August 1, 2018, with Re/Max Realty, with a list price of \$929,000. It is not clear whether that listing actually proceeded to marketing efforts, or whether it was impacted by the result of the June 13, 2018 final inspection.

[41] On July 27, 2018, Industrial granted a mortgage in favour of the TD Bank, with a face value of \$250,000. Roger's evidence was that the only credit drawn on this mortgage was a \$60,000 line of credit.

[42] In early August 2018, Industrial entered into a listing agreement with Pemberton Holmes Ltd., with a Mr. Little being listing agent and the list price remaining at \$929,000. Mr. Little had the parties complete a Disclosure Statement, which Roger signed on August 2, 2018. That Disclosure Statement indicated that no

occupancy permit had been obtained. Both Roger and Reetika said they told Mr. Little they were working on obtaining the occupancy permit.

[43] The property was listed with Pemberton Holmes from August 8, 2018 to February 8, 2019. Both Roger and Reetika said they decided to let the listing expire at that point. Reetika said they were working on finishing the “little stuff” that remained to be done. Roger’s evidence was that they wanted to focus on getting the occupancy permit done, although it is not clear what if anything they did in that regard in the months following the expiry of the Pemberton Holmes listing.

[44] In April 2019, Trevor Friesen of Re/Max contacted Roger and Reetika and spoke with them about re-listing the property with his firm. The property was listed for sale on April 30, 2019 for a six-month term. The listing history indicates an original list price of \$969,000, with that amount being reduced during the course of the listing to \$947,800.

[45] Mr. Friesen prepared a property description for the property listing that specifically noted that the property came “complete with a 2-5-10 warranty” but made no reference of the lack of an occupancy permit.

[46] Mr. Friesen says that he became aware of the lack of an occupancy permit when he found a “listing book” left in the home by Pemberton Holmes, which had a copy of the Disclosure Statement. His evidence was that he and his colleague mentioned to the Kapilas several time that the occupancy permit was something they needed to “get done”. He said that there were several cosmetic deficiencies in the house as well that he encouraged them to deal with. His evidence was that over the time he had the property listed, there was only one offer, which they concluded was too low to even respond to, and that he was getting feedback that cosmetic deficiencies were impacting the market attractiveness of the property.

[47] Industrial called for another building inspection on August 7, 2019 – just under 14 months after the prior inspection. Mr. Gellein had retired, so this inspection was done by a Mr. Byron, who noted the following:

1. Provide non-slip application to ext. stairs.
2. Post address in visible location.
3. Provide geo-tech Schedule C-B.
4. Provide a landing in garage – door cannot swing over stairs.
5. Handrail not compliant on stairs to upper floor – handrail needs to be consistent throughout flight of stair @ 865 mm to 965 mm.
6. Install range hood.
7. Rear patio door stairs max rise 7 7/8”.
8. Ventilation system to be running @ time of next inspection.

Re-book final inspection when tasks are complete

[48] On November 14, 2019, Industrial re-listed the property with Re/Max Realty and Mr. Friesen by way of a Multiple Listing Contract on a standard form of BC Real Estate Association document. The list price on this agreement was \$899,999, with an expiry date of May 15, 2020. It provided that the vendor would pay a commission of 6% on the first \$100,000 of the purchase price and 1.5% on the remainder. It also included the following:

- A. The Seller agrees to pay the Listing Brokerage [the agreed commission amount] if:

...

- (ii) a legally enforceable contract of sale between the Seller and a Buyer who is introduced to the Property or to the Seller, by the Listing Brokerage, the Designated Agent (as hereinafter defined) a Cooperating Brokerage or any other person including the Seller during the term of this Contract is entered into:

- (a) within sixty (60) days after the expiration of the term of this Contract; or

- (b) within any time after the period described in (a) where the efforts of the Listing Brokerage, the Designated Agent (as hereinafter defined) or the Cooperating Brokerage were an effective cause; ...

[Emphasis added.]

[49] The plaintiffs say that the risk of a commission being payable to Re/Max pursuant to this provision played a significant role in the dealings that will be discussed below.

[50] Mr. Friesen prepared a new Disclosure Statement, also dated November 14, 2019, which simply struck out all of the representations so that the signors were making no representations. Mr. Friesen said that in his experience, it was common practice with a “new build” to complete a disclosure statement in this manner.

[51] At some point during the listing, the list price was reduced to \$869,900. The property description in the MLS listing was modified to say “Now \$100,000 in Price Reductions”.

[52] On December 6, 2019, the geotechnical engineer (Mr. Tougas) left the engineering firm he was then working for (WSB) and was off work for five months before he opened his own firm in May 2020.

[53] It appears that Roger made some sort of inquiry of the District in March 2020. There is an email in the District’s file on March 12, 2020, from one of their staff to Roger saying:

Please find attached inspection notices for your project at 6077 Sansum Drive. If you have any questions, or would like to schedule an inspection, we can be reached at ...

The Parties’ Dealings Prior to the CPS

[54] As noted above, the Adeyemis had moved to Duncan in July 2018. They lived in a rented basement suite property with their family.

[55] In late 2019, they began looking for a property to buy. They were quite taken with the Maple Bay area, and would often go for drives in the neighbourhood on Sundays.

[56] Opey’s evidence was that when he first saw the listing for the Property, the price was in the \$900,000s and he did not want to look at it any further. Faye, however, was quite taken with it. She loved the way it had large windows on both upper levels with views of mountains and lakes.

[57] At some point in about January 2020, the Adeyemis viewed the house with Trevor Friesen during an open house. Opey said that he was very concerned about the price (which he recalled was still around \$899,000) and did not walk through the entire house. His view was that they needed to keep saving up money for a more substantial down payment. But his impression was that once Faye had toured the Property, she would not really look at any other house.

[58] Faye recalled being quite taken by the open design with a kitchen with a large island. She gave extensive evidence as to the various features of the house that she loved. She said that she knew what she wanted for her kids, and that all that remained was to convince Opey.

[59] A few months later, the Adeyemis saw that the price had been reduced to \$869,900 plus GST. Faye said that when she saw this, she began to press Opey again that they should find a way to buy the house. Her recollection was that he finally relented to the extent that he told her “let’s go see it again and let’s talk about it”. Opey agreed that he did so, but he was also concerned that with the Covid pandemic, there was a lot of uncertainty, and he continued to be reluctant to make such a large financial commitment. That said, car dealerships had been designated as a service that would continue to operate, and he was continuing to earn his income. Thus, it might also be a good opportunity for them to get into the real estate market.

[60] As noted above, the term of the latest listing agreement expired as of May 15, 2020. As that date approached, Roger and Reetika made a decision not to renew the listing, feeling that the market was slowing again and the Property had been on the market for a long time.

[61] On about May 14, 2020, the Adeyemis reached out to Mr. Friesen. Mr. Friesen told them that his listing agreement was expiring, but that he would pass their contact information along to the seller. The evidence includes an undated text from Mr. Friesen to Reetika and Faye, which I infer was sent on about May 14, 2020:

Hi guys

Thought I would start a group chat for the two of you and then I will and Layne will excuse ourselves.

Faye meet Reetika. Reetika meet Faye.

Faye and her nice family saw your place with me a couple months or so back maybe a touch longer than that. They do like your home and are wanting and saving for a considerable down payment. They would be interested in renting your home for a bit then buy it off you. You guys can chat about the details. Faye has told me her plan but as it's a renter situation I think in the meantime so it doesn't concern me.

If you decide down the road to sell it to Faye Reetika please keep our efforts this past year in mind and I could help you guys with the paperwork and write things up for a reduced real estate fee.

Faye if you decide it's not the home to either rent or buy please get in touch and I would be happy to show you and your Husband some homes. I know we would have a lot in common with the car business background.

Reetika I will be out next couple days and remove the for sale sign and take away the lock box on the home.

Faye and Reetika I hope you guys can talk and figure things out and if not Faye please be in touch. Happy to help.

Trevor.

[62] Shortly after this text, there was a brief telephone conversation that was followed up by further texts in a group amongst Opey, Faye, Roger and Reetika, beginning with the following at 9:13 p.m. on May 14, 2020 (I have used the initials RT for Reetika and RG for Roger):

RT: Hi Faye. Hi Opey.

RG: Hi Guys

FA: Hi!

RG: How about Saturday later afternoon? Are you guys in Duncan!!

FA: Saturday is fine. Yes we live and work in Duncan.

[63] The four of them scheduled a meeting for Saturday, May 16, 2020, at Roger's Furniture. Each of the four gave evidence about the meeting. With respect to both this and subsequent meetings, their evidence differed on matters that were sometimes of less and sometimes of greater significance. It was common ground that they first met at Roger's Furniture and thereafter met at the Property, although they differed as to how much time was spent at each location and whether they

moved directly from one to the next or whether they went to the Property later in the day.

[64] It appears to be common ground that Opey made a verbal offer of \$820,000 for the Property, with completion to occur in one year. It was common ground that Roger was not happy with the offer. Opey's recollection was that Roger simply told them that he was not happy with the amount but that they would have to talk about it as a family. Roger's recollection was that he immediately rejected the offer. Reetika said that Opey and Faye said they wanted to rent the Property first before purchasing; both Opey and Faye said that they did not talk at this point about renting, and that their initial intent was to stay in their rental basement suite for the time being in order to better save money for the purchase. The parties also had different recollections as to whether Reetika's brother and parents were present at this time, and on whether the Adeyemis' children were there.

[65] Reetika gave evidence that, during this meeting, she advised Opey and Faye that there was no occupancy permit for the Property but they were working on it, explaining the need for a Schedule C-B from the geotechnical engineer. On cross-examination, she acknowledged that at her examination for discovery in 2024, she had said she did not recall if she had ever mentioned this prior to the signing of the Contract of Purchase and Sale in August 2020.

[66] Opey gave evidence that he had done various research by the time of this meeting into their capacity to finance the purchase of a home in the price range of the Property. He said that he had checked online at his bank's website, which gives advice as to how much mortgage financing was available based on income levels and possible downpayments. They had concluded based on this research that they could purchase a home for up to \$950,000, although he was not keen to go that high. On cross-examination, however, he acknowledged that for an \$820,000 purchase, the minimum down payment would be \$57,000, and they did not yet have that amount saved up.

[67] The next day was Sunday, May 17, 2020. At 4:25 p.m. that day, Mr. Friesen reached out to Faye by text to see if they had met with Reetika and Roger. Faye confirmed that they had. Mr. Friesen made various recommendations (that they include terms for home inspection and financing approval in any contract), and proposed that:

If you decide to buy it I can probably do paperwork for you guys at a better rate than if I were to just sell you the home then Reetika would have to pay realtor fees of about 6% on the first 100,000 and 3% on balance ... If you just rent for 6 months or a year then if u want to buy it it would be the best course of action for you guys

[68] Faye replied that:

Ok that sounds good! We would love to get your help with this! We met with them twice yesterday trying to figure out a way forward. We offered to buy the house at \$820,000 in 6-12 months but They didn't accept so we moved up to 840,000\$. They also offered to rent it to us for 3,500\$ month for the year until we buy but my husband thought it was too much knowing that we will eventually be the ones buying it. We are waiting to hear back from them to see what we do next. They have agreed to work something out with us so we're hoping all goes well and works out for all of us. We would like to set up a meeting with you and get some help to get everything sorted. ...

[69] She also confirmed to Mr. Friesen that they were "pre approved with our bank for 950". Opey's evidence was that this was not a formal mortgage approval, but rather the result of their research on the bank's website mortgage calculator.

[70] The texts indicate that Mr. Friesen had a telephone conversation with Opey and Faye around this time. Opey's recollection was that it was a general discussion about what was involved in buying a house and his explanation of why they wanted to wait in order to complete the transaction. Neither of the others remembered specifics of the call. With reference to the email discussed in the next paragraph, Opey said that he was not interested in renting the house, and that he would have told that to Mr. Friesen.

[71] At 8:34 p.m. that Sunday evening, Mr. Friesen emailed Reetika and Roger as follows:

So as per my phone call to the both of you after speaking at length to Faye and Opee.

If you do not feel this arrangement is fair enough for you please work a deal out with them and let me know of the specifics. This is now where they are OK starching to.

I am no longer representing you. I am also not as of yet representing them. This is simply a courtesy.

They will not move forward on your place without working with me. Its also to your financial interest to work with me on this. A reminder if you decide to work a deal with me or Layne being involved we will be owed 6% and 3% of the commission. We did bring you these clients to you while we were under contract. I am also doing a lot in good faith for you both. So lets cut to the chase and save you commission.

After discussion here is their new proposal.

\$840,000 plus GST (\$882,000)

Possession is Feb 1 2021

They have some money out of country \$\$ coming in which should be by the end of this year which will help them towards their goal of their down payment.

\$20,000 deposit to our brokerage after conditions removed which would be in the next couple weeks. If they do not go through on the deal that's your money. That's their risk not yours. A first time home buyer will not walk away from that much \$\$.

They will NOT rent your place in the meantime. They are OK with having Reetikas brother and family live there no problem to help with your family situation and with income you can generate from them. If you want them to rent they will rent the upstairs if you close it off for a maximum \$2000/mo.

They will walk through the house with you and write out a deficiencies list (as with every new build) which to their satisfaction will get completed by possession date.

Subject to inspection and finance and home owner warranty.

They are approved financing wise at the moment.

This is a better counter offer than your offer back to Chris and Tracey. Your family can still move in as planned. You can get the items addressed as planned but on your time table. And your helping a family, someone who actually loves your home not like Chris and Tracey who didn't care for it as much as thee guys I can tell you.

I will charge 3% and 1.5%. I am NOT flexible on that fee. By the time I pay my brokerage fees, I look at the amount of money we put into this listing which was more than \$2500 plus more importantly my time. It was unfortunate that the items we pointed out which would hurt the sale over the last year haven't been dealt with like we mentioned and now has caused a second great offer to come in lower then your asking price as per the condition.

Lets make a deal. Your next Realtor will charge no less than 6 and 3 and will still tell you exactly the same things we have been saying since day 1. Get it completed for maximum dollar. Its also likely over the next 6 months prices may fall on higher end places with a number of forecasts and opinions that suggest such. So are you going to risk selling it even less and pay more in commission ... maybe??

Let me know.

[72] With respect to the reference to money from out-of-country, the Adeyemis' evidence was that there was a possibility of them obtaining funds from Faye's mother who lived in Belize. Opey's evidence was that he was determined not to have to do so, because it was his view that they were capable of being and should have been financially independent from parents. However, Faye was so determined to secure the Property that she was willing to ask her mother for financial assistance.

[73] Mr. Friesen also sent a text to Opey and Faye, saying:

We will talk tomorrow I would assume.

I spoke with Roger on the phone and then Reetika.

I have sold them on the fact to the best I can that your the right people for the place and we should hammer out a deal. If this isn't to their satisfaction they can contact me or you directly. But I don't want to go through the couple hours of paperwork for one of you to say no. So in good faith and if you and I can all beg a verbal ok I'll help you all out.

\$840,000 plus GST

Feb 1 move in

\$20,000 deposit in about 2 weeks is held in trust. If you walk away from the deal it's gone. Subject to inspection, deficiencies getting fixed, finance, home owner warranty.

Told them no to you renting it. You would pay 2000/mo for upstairs if they close it off if they want.

Also told them you wouldn't move forward on a deal without myself as representing them. You need to have the liability off your shoulders. You need someone you can trust that is on your side. Someone who knows all the legal paperwork and will process all for you. And me charging ½ the fees to them a realtor would normally charge they won't get if they relist and try to sell it down the road.

Talk tomorrow.

[74] At 2:45 p.m. on the afternoon of Monday, May 18, 2020, Opey forwarded this text to Roger. At 3:43 p.m. that afternoon, Roger forwarded Mr. Friesen's email to

Opey. Opey's evidence is that these exchanges related to a meeting which was requested by Roger and which took place at the Kapilas' home. Roger on the other hand said that he did not ask Opey to send what he had received from Mr. Friesen. He acknowledged having sent Opey the Friesen email, but said he was "just sending it to him".

[75] Opey's evidence was that at this May 18, 2026 meeting, Roger told him that Mr. Friesen was asking them for a commission. Opey asked him why that was a concern for him, and said they just wanted to buy the house and that what happens with the commission was of no concern to him. He said that Roger told him that he and Faye needed to initially rent the house, so that Mr. Friesen would think they were renting and not buying. Opey's evidence was that Roger and Reetika were clear that in order for them to move forward, they needed Mr. Friesen out of the way. He said that he was initially against renting the place, but that when he saw Mr. Friesen's email and Faye began to support the Kapilas, he started to relent. He said that Roger was adamant that they not talk to Mr. Friesen any further, that if they were in contact with him they were to tell him that they were renting the Property and not buying it, and that they were to send Roger any future email correspondence they had with Mr. Friesen.

[76] Faye's evidence was to similar effect – that the Kapilas asked them to "work with them":

And one of the reasons why we should work with them is because of Trevor Friesen. Trevor Friesen is the realtor that showed us the house and referred us to them, and that he is going to be coming to them for the commission of the sale of the house. ...

They had said that they needed to get Trevor Friesen -- I really don't like using these words, to be honest with you, but these are their exact words. They needed to find a way to get Trevor out of the way, and that was the only way they were going to go ahead with the deal with us. They need to get Trevor Friesen out of the way. That's what they said to us repeatedly because he would have to be paid commission.

They wanted us to show them commitment, and one of the ways of showing commitment to them was to occupy the house immediately. This would also help to get Trevor to believe that we were there not purchasing the house but -- but to rent the house. They came up with this plan of presenting an idea or

creating an idea in -- just in case of Trevor Friesen coming back requesting what, now that I look at it, is due to him 100 percent. ...

That is where the rent idea came into plan. We had to have something documented in case Trevor came back anytime in the future between when we moved in or when we entered, whatever. He had -- we had -- there was a time frame. I remember them saying that he can come back within a time frame to get what was duly his, which was his commission, and we need to -- we need to help them to avoid that from happening. Roger said that this is the only way he was going to forward with this deal was if we agreed to doing this, right in that meeting.

[77] Faye's evidence was that at the end of the meeting, she and Opey said that they would talk about it. Then, Reetika made dinner for the group.

[78] Both Opey and Faye said that part of the pitch made to them was that the rental payments they made would be credited against the purchase price.

[79] Reetika's evidence was that when they met, Opey told them he was keen to rent the Property because he did not have money for a down payment and they were waiting for money from out of country. She said that Opey told them that they were pre-approved for a mortgage, but that she was suspicious because Opey did not have paperwork with him to prove that. She denied that the idea of renting was something that she and Roger presented as a way to avoid payment of commission.

[80] Roger's evidence was to similar effect. He said that it was the Adeyemis who said they did not have the money yet for a down payment, and were waiting for money from out of country. He said it was Faye's suggestion that they rent the house. He denied that he had told the Adeyemis that they needed to rent the house in order to avoid a commission claim, and did not recall a conversation about this topic.

[81] Both Reetika and Roger denied that there was any discussion about rent being credited against the purchase price.

[82] On Sunday, May 24, 2020, at 12:20 p.m., Opey sent a text to the group. His evidence was that this followed some further telephone discussions. The text states:

Good afternoon, my wife and I have decided on following terms: \$840,000 plus GST, \$20,000 deposit \$2,300 rent, we will pay the next property tax of \$3,800 and all utilities. 1 year closing date on paper but we are 99% sure will get it done by December. Please let us know by Month end if this works for you and if it doesn't we understand and appreciate you meeting with us. Thanks!

[83] Reetika responded by text just after 10 p.m. that evening, saying:

Hello, sorry for late response. Had a really hectic day. Had little bit discussion about your offer and soon we decide anything we'll let you guys know. Hopefully by tomorrow. Have a wonderful night.

[84] Opey's evidence was that a few days after this exchange of texts, Roger called him and asked him to come to Roger's Furniture. There, Roger advised that after discussions amongst the family (including his brother-in-law and father-in-law, each of whom had contributed some money), they had decided to move ahead with some minor changes. In particular:

- a) the purchase price would increase to \$845,000 plus GST;
- b) the down payment would increase from \$20,000 to \$25,000; and
- c) the only way they would move forward is if Mr. Friesen did not claim his commission. In order to make that happen, the Adeyemis had to agree to rent the house on paper and have a signed residential tenancy agreement.

Opey's evidence was that Roger told him that this latter point was something that his lawyer had advised him needed to be done. Opey's evidence was that he agreed to those terms, then immediately called Faye to advise her.

[85] Roger's evidence on direct was somewhat similar, except that he recalled that it was in a meeting at their home that there was a verbal agreement to \$845,000 plus GST, a deposit of \$25,000, and a rental of \$2,350 per month plus half the property tax. He said he was told by Opey that he would have the mortgage finalized within a year. However, when asked about this meeting on cross-examination,

Roger did not recall the terms of their discussion. He denied that he told Opey that the \$845,000 amount was only acceptable if no commission was payable.

[86] On Tuesday, June 2, 2020, Opey and Faye travelled to their bank in Victoria and obtained a bank draft in the amount of \$25,000, payable to Rajinder and Reetika Kapila. Opey's evidence was that they did this because they were keen to move forward with their agreement, and that they were so keen that it was not until they got to the bank that they realized they were not sure what names to put on the draft. He said that he called Roger who instructed him over the phone to use the names "Rajinder and Reetika Kapila". Opey's evidence was that this was when he first learned that Roger's legal name was Rajinder.

[87] Opey's evidence was that that later that afternoon, he called Roger and told him that he was on the way to Roger's Furniture with the bank draft, but that Roger responded that his lawyer had told him not to accept it at that point. Opey said he would still come over, and then when he arrived, he handed Roger the bank draft. Opey's evidence was that Roger then went into a back room somewhere and made a phone call, that Roger then came out and said that his lawyer in Surrey had told him that he needed to let three months pass before he could take any sort of payment – otherwise, Mr. Friesen might be able to claim a commission. Rather, Opey says that he was told that what they needed to do was get a rental agreement signed. His evidence was that Roger assured him that, although the Kapilas needed to have a signed tenancy agreement from the Adeyemis, the Kapilas would not sign it unless Mr. Friesen was to come asking for his commission. Opey also said that Roger assured him that in three months they would be able to formalize a purchase agreement.

[88] The plaintiffs read in to evidence the following from Roger's examination for discovery transcript:

Q: ... I'm asking you if you know why Opey brought you a cheque for \$25,000 at the beginning of June 2020.

A: Why Opey brought me a – I believe he – he brought me a draft for \$25,000 as a down payment for the house.

Q: Okay. And that's because at that point when he brought you the cheque you had reached a verbal agreement with him for him and Faye to purchase the property; isn't that correct?

A: Yes. It's correct, yeah.

Q: Yeah. It shouldn't be difficult. Okay. So now we've established that in June you had a verbal agreement for him to – for them to purchase the property. Do you remember what the terms of that verbal agreement were?

A: I don't remember the amount.

[89] Roger's evidence at trial was that when Opey brought this bank draft to him, he was concerned because it had personal names on it, and so he made a phone call to check who owned the house, and learned it was Industrial. For that reason, and because in any event there had not yet been a purchase agreement prepared, he gave the bank draft back to Opey. Roger did not recall having been called by Opey from the bank, and denied having told Opey to have the bank draft made out as it was made out. He also denied having told Opey that they had to wait three months to do a purchase contract.

[90] Reetika's evidence was that the bank draft was provided because, although the Adeyemis wanted to rent the Property first, they were trying to prove they had money.

[91] On June 8, 2020, Opey returned the \$25,000 bank draft to his bank. The draft was cancelled and the funds re-deposited into the Adeyemis' account.

[92] Later, on June 8, 2020, the parties met again at the Kapilas' home. The parties' evidence differed significantly with respect to this meeting.

[93] Opey's evidence was that Roger had asked him to prepare a residential tenancy agreement so that they would have a document that they could show to Mr. Friesen if he attempted to pursue a commission. He said that Roger gave him a form of tenancy agreement, which he brought home with him on June 8, 2020. When he got home, he learned that Faye had found the same form of document online and had printed a copy. He said they partially filled both of them out, then went over to the Kapilas house. His evidence was that Reetika had made dinner and they ate

together. He said that during the dinner, the Kapilas assured him that the residential tenancy document was just to make sure that Mr. Friesen did not come for his commission. He said that, in order to put him at ease, they promised that they would not sign it unless Mr. Friesen approached them to pursue a commission. Opey was adamant that neither copy of the document was signed by either of the Kapilas while they were there. He said that even at this point in time, he was quite happy to continue living in their existing rental property in order to better save money, but that Roger wanted them to move in and Faye was keen to do so.

[94] Faye's evidence was to similar effect. Her recollection was that she and Opey partially completed the two documents together and then went over to the Kapilas' house. She said that the Kapilas assured her that they were not going to sign it unless "Trevor came knocking".

[95] Reetika's evidence was different. She recalled that the Adeyemis arrived at their home with a residential tenancy agreement, and that this was at their initiative because they wanted to move into the home as renters. She said she noticed that the information about the address and the landlord was incorrect, so she asked them to fill out a second document. She said both documents were given to her already signed by the Adeyemis as tenants. She denied that there was any agreement not to sign it, but said that she did not get around to signing it while the Adeyemis were there that evening. Her evidence was that while they were all together, Roger signed one of the two documents. She also intended to sign it, given that she also had an interest in Industrial and felt she should do so, but she wanted to "check it one more time" before doing so. She said that the whole story about a promise not to sign the residential tenancy agreement unless Mr. Friesen approached them for a commission was a "story [the Adeyemis] made up".

[96] Roger's evidence was that the residential tenancy agreement was prepared because the Adeyemis wanted to move into the house but did not have the ability to get a mortgage at that time, and that they said "why don't we sign a rental agreement then we can move into the house." Roger's evidence was that when

Opey walked in with the rental agreement in hand, he told him “there’s still some work to be done and we still need to get the occupancy permit.” [Opey denied that the occupancy permit came up in discussions at any time before January 2021.] Roger said that he himself completed portions of the document, including the name and address for the landlord and the postal code for the rental address. He also added the words “plus GST” to the rent – then when he later learned that no GST is chargeable on rent for a residential property, he acknowledged it should not have been there. Roger’s evidence was that he signed one copy of the document while they were all together on June 8, 2020.

[97] The plaintiffs read in Roger’s examination for discovery evidence, including the following:

Q: Okay. Now, it’s not signed by the landlord. Now, why is that?

A: I do not remember.

Q: So there’s a text message, and we’ll get to it, where your wife Reetika says – she refers to this agreement and says “which we never signed”. Is there a reason why you never signed this, Mr. Kapila?

A: No there’s no reason.

Q: You just never signed it?

A: Yes, true.

[98] Prior to the January 2026 resumption of trial, the action proceeded on the basis that only one version of the actual residential tenancy agreement was available, which was at Tab 19 of the Joint Book of Documents and was originally from the defendants’ list of documents. This document was on a standard Residential Tenancy Branch (“RTB”) form of Residential Tenancy Agreement. It identified Industrial as landlord and the two Adeyemi’s as tenants. Although it contained the correct “Address of Place Being Rented to Tenants”, it provided an address for service for the landlord of 6098 Sansum Drive (rather than their actual address of 6092). It provided for a one-year term commencing July 1, 2020, as well as payment of a security deposit of \$2,300. It was signed and dated by both of the Adeyemis, but the spaces for landlord signatures were blank. It is this document that Roger was asked about in the discovery excerpt above.

[99] Just before the resumption of trial in January 2026, the defendants produced a photograph of a slightly different version of the residential tenancy agreement, which became Exhibit B and then Exhibit 16. Reetika's evidence was that over the weekend prior to the resumption of trial, she had been hunting through old documents in a dresser in her bedroom and had located this photograph. It was notable in that it contained a correct address for the landlord (6092 Sansum) and was also signed by Roger on behalf of the landlord.

[100] It was common ground that the Adeyemis did not ever pay the security deposit contemplated by the residential tenancy agreement. They said this was because it was never intended to be an operative agreement. Reetika's evidence is that she asked for the security deposit but that the Adeyemis refused to pay it.

[101] Later, on the evening of June 8, 2020, Faye sent an email to Mr. Friesen stating:

Thank you for checking in. I was unable to convince my husband on purchasing so we've decided to rent Reetika's home instead. Opey thinks the prices of houses will drop significantly in the next year or so.

Feel fre to let us know of any amazing deals you might come across. We would like to stay in the lower 700s.

[102] Mr. Friesen responded at 12:04 a.m. on June 9, 2020, saying "When it's time to buy in Opee's mind please reach out again. If it be Reetika's or another nice home we are here to help."

[103] Faye forwarded this email to Opey, who then forwarded it to Roger, with a cover note stating:

He's done. There should be no trouble from him.

I'm sorry for forwarding this so late but want to keep in the loop.

[104] Opey's evidence was that he sent this to Roger because Roger was so concerned about Mr. Friesen claiming a commission, and because he understood Roger wanted assurance before moving forward that Mr. Friesen was out of the way.

Roger did not respond to this email, but Opey said that when they saw each other the next day, Roger was very happy about it.

[105] Roger was asked about this email. He initially said that the printout was too small for him to read, then when presented with an enlarged version, said he was not sure if the email ever came to him.

[106] The Adeyemis moved into the house in mid-June 2020. It was common ground that the Kapilas agreed that the Adeyemis could move in earlier than the July 1 date in the residential tenancy agreement. Both of the Adeyemis said they were not aware when they moved in that there was no occupancy permit. Reetika acknowledged that she was aware that the municipal bylaw prohibits occupancy of a home if there is no occupancy permit, but she understood that the municipality would not enforce that if an owner was “working on it”. She said that she told the Adeyemis that it was an offence to live in the house with no occupancy permit, but that they still wanted to move in. She said that she did start working to try to get the permit.

[107] The municipality’s files contain an email of June 17, 2020, between various staff members, saying:

Retika and Roger Kapila are trying to complete their project. The engineer who signed on for the schedules is no longer with the company and she cannot locate him. She cannot find anyone else to sign off on the schedule for the project so they are asking how to proceed. She advised that the engineering companies and contractors she has contacted advised that it is North Cowichan’s fault that the project went ahead without engineering and this is why they are not able to help her now. Can someone respond?

[108] Mr. Tougas’ evidence was that he had begun working as a sole proprietor under the operating name “Geo2Go” on May 11, 2020, although he had been off work from mid-December 2019 to May 11, 2020. It is possible that it was during this hiatus that Reetika had made her initial attempt to locate him.

[109] One of the building inspectors, Mr. Killick, responded later, on June 17, 2020, saying:

Hi Retika, below is the email between you and Sean Grey, attached is a copy of the building permit that states the responsibility of the owner and builder.

Please provide any documentation you can regarding the bearing capacity of the soil/ground for the building, prior to pouring the footings.

[110] Opey and Faye both gave evidence that after moving in, they began to notice things that did not work. One of the most problematic issues was that when someone has a shower in the master bedroom on the top floor, there would be leaks into the kitchen ceiling below which made it difficult to work at the kitchen island. There were other issues with tiles lifting, a stove hood not working, and some electrical shorts. Opey says he stopped by Rogers Furniture to talk to Roger, and asked Roger to arrange to have people come and look at things. Opey says that he also asked questions about the home warranty, and whether it would cover any of these issues. He said that Roger suggested that the home warranty would not cover many of these things and even if it did, it would affect the premiums. Opey's evidence was that he also in these meetings pressed to get a purchase agreement done at the earliest opportunity.

[111] There is an email of June 24, 2025, from Opey to Roger advising that "there's an electrical problem in the laundry room. We get huge sparks anytime the washer hose touches the back of the dryer."

[112] On July 2, 2020, there is an email to Reetika from a Mr. Elliott of Madrone, noting some efforts he had made to find a way to satisfy the municipality:

Last we left off with regard to 6077 Sansum Drive, I had made communication efforts with the Municipality of North Cowichan, and particularly having direct discussions with their engineering department, explaining that no Schedule B 'Permanent' inspection had been completed prior to backfill, and that it was responsibility of the builder/construction manager to acquire said inspection and sign-off prior to backfill. I further explained that it was the responsibility of North Cowichan to have ensured such sign-off was complete prior to issuing an occupancy permit. Neither of these responsibilities had been fulfilled at time of my last discussion with them. ...

The above established, how has this matter progressed and how can I be of assistance?

[113] Reetika responded advising of her dissatisfaction, and noting that no other engineer is willing to take over a matter based on a report. Her recollection was that

she may have had one other call with Mr. Elliott, in which he said he could not provide a personal phone number for Mr. Tougas, but then later on Mr. Elliott's assistant called her, advised that Mr. Tougas was working in Nanaimo, and provided Reetika with a phone number for him.

[114] Faye also gave evidence that, as the summer heat arrived, they had problems with the air conditioning, with temperatures different on every floor, as well as a leak in the garage, stairs cracking on the main entrance stairway, and tiles in the upper bathrooms. The leaking into the kitchen ceiling continued, and they would occasionally see electric sparks on the pendant lights. Faye said that one person who was sent to look into the issue said he needed to expose some pipes to investigate, and cut out drywall from the kitchen ceiling as well as in a closet in the master bedroom.

[115] Reetika's evidence was that there was nothing wrong with the air conditioner settings, and that it was simply a matter of Faye not understanding how to adjust the temperature.

[116] Faye acknowledged that Reetika came and did some work on deficiencies, including painting the staircase to the basement and a fireplace wall, as well as grouting work in the basement bathroom.

The CPS

[117] Opey's evidence was that he continued to press Roger to agree to preparation of a formal written contract for the sale of the Property. He said that in about the second or third week of August, Roger told him that it was close to the three-month mark so he could go ahead and "get a contract". When Opey asked him what that meant, he said that because there was not going to be a realtor involved, it would be up to Opey to prepare a draft and then present it to Roger, and that if he was happy with it, they would proceed. Opey said that as a result of this, he went online and looked for contract templates. He chose one that "looked simple enough", added a list of the deficiencies that he was then concerned about, and then printed it off.

[118] Roger and Opey exchanged texts on the evening of August 22, 2020:

RG: Hi Opey. How are you

How you are doing with drawing the draft

OA: I'm fine sir, should have it finalized tomorrow afternoon. I can bring it when you get back from work.

RK: That will be great.

OA: Ok.

RK: No problem.

OA: It's my first. I find myself erasing and adding all the time so I will just simplify it. And I want it to be professional as well.

RK: Great.

[119] At about 10:53 p.m. that evening, Opey texted Roger to ask if he was still up. Roger confirmed that he was. Opey advised:

I'm all done and signed. Will drop it off shortly. We're going to Port Alberni in the morning.

Opey dropped off the document a few minutes later. His evidence was that they did not discuss the document at that time; rather, Roger said he would look at it. Roger confirmed that he did not sign the contract that evening. He explained that he wanted to read over the contract and make sure he was not doing anything wrong.

[120] August 22 was a Saturday. The following Wednesday, August 26, there were a number of texts between the parties. At 7:32 a.m., Opey sent a text in the group chat involving Faye, Reetika and Roger, saying:

Good morning Reetika and Roger, as you know by now that Faye is going back to work next week and my co-worker is moving to the basement. We really need the key for the main day because we won't be able to access the main from the basement. We also want to put a security system so we see when OJ leave for school and get back home. If we're changing the locks entirely we can go for mobile control. We just want to know if there's a key for the current lock before we spend to put in new ones.

Can we also finalize the purchase contract. Roger mentioned there furniture; you can come get them or make a deal it's concern. Sales price is plus GST. You can write plus GST and we both sign it. We want to get the contract and mortgage done real soon here. So let's get this figured so we can move to the next step.

[121] Opey's evidence was that around this time, he was regularly going out walking with Roger in the evenings, and that during one of those walks, he had mentioned that he had learned that having a rental income would help with securing favourable mortgage financing, and that he had understood that Roger was fine with that. In his evidence, Roger denied that he had previously discussed the idea of having one of Opey's co-workers living on the ground level.

[122] Just after 10 a.m., Reetika responded:

Hi opyee, I got surprised that you are getting someone to move in!!!! As our agreement rental can't rent someone else ????

I don't know what is your plan but that really upsets me. I believe we need to clear that before we sign and finalize everything.

[123] That text set off an exchange:

OA (10:19): I'm very sorry for upsetting you. I told Roger about my co-worker moving to the basement and I thought Roger would share that info with you. My understanding of the rental agreement we signed is to get Trevor out of the way for a couple months. I don't see us as renters. We are buying the house and this is the reason Faye is going back to work so we can get the mortgage done soon here. We can remain as renters if that's what you want Reetika and Faye can stay home for another year to home school ... don't have to go babysitter. I am very surprised that you're treating us as renters.

RT (10:23): No opyee, I'm not treating you guys as renters but according to rental agreement (which we never signed)

FA (11:11): This is very upsetting to be honest. We are getting everything in place to start the mortgage, including having someone in the basement to help with our application, and now to be feeling like we can't secure ourselves to make this happen sooner as we had promised makes me very uneasy. We are rushing everything including me leaving my kids and going back to work just to try to see how fast we can everything together. I worked hard to convince my husband to even consider doing this and now for something as simple as this to seem to be an obstacle is not good at all. If we are going to be going by the rental agreement, which I thought was just to offset Trevor, then we should fulfill that agreement and not what I thought we had all agreed on which was a private purchase. There are so many things that we would like to get done but we have made this the priority and now to be facing set backs like this is making me want to change my mind. I never know what is going on or how you guys feel about anything. Things needs to get done in the house urgently but we have just been waiting and waiting with little to no communication. I need to know where everyone stands because as of now I'm reconsidering a lot of things. I love this house but if it's not going to work I think it's best we know now because if we're just going to be renting then every other decision concerning a mortgage should not be influencing my

decisions right now. I apologize if this upsets anyone but I think we deserve to know where we stand. Are we renting or are we buying the house?

RT (11:48 a.m.): Faye calm down!!!! Opyee, nick and Roger decided to talk personally and stop I stopped my message on this group between and it's just simple question I asked cause Roger also didn't know that Dimpi's moving that soon. Same thing you did not get message from opyee what they decide. It's not a big deal or issues. I'm at work right now once again we all meeting according to the guys tonight.

[Emphasis added.]

[124] Reetika was asked both on discovery and on cross-examination about her comment that “we never signed” the rental agreement. At her examination for discovery, she could not recall why she had said that. On cross-examination at trial, she said that she was simply referring to the first version of the residential tenancy agreement, which did not get signed. With respect to the second one, while it was signed by Roger, she had not yet signed it, and in her view, she had to because “I’m a part of the company as well”.

[125] Roger was asked about this text, and its reference to the tenancy agreement not having been signed, on his examination for discovery, and his answers were read in by the plaintiff. The excerpt includes the following:

Q: Okay. Now, it's not signed by the landlord. Now, why is that?

A: I do not remember.

Q: So there's a text message, and we'll get to it, where your wife Reetika says – she refers to this agreement and says “which we never signed”. Is there a reason why you never signed this, Mr. Kapila?

A: No there's no reason.

Q: You just never signed it?

A: Yes, true.

[126] At trial, it was put to Roger that this text was accurate, and the agreement had never been signed. He disputed that assertion, saying it was “not true”. He said he did not respond to this text because he was busy at work and he decided to just explain his position to the Adeyemis when they met that evening.

[127] Reetika also said on cross-examination that she disagreed with Opey's assertion in his text that the rental agreement was only “to get Trevor out of the way

for a couple months". She believed that she had responded to this comment in a text, but could not identify any text in which she had done so. None was in evidence at trial.

[128] Opey's evidence was that Reetika's texts were quite upsetting to him:

When all of this was going on, we didn't have a contract in our hands. And Faye and I talked that morning that if this is what's -- because we were making a lot of decisions: sending the kids to babysitter; Faye going back to work; OJ, our firstborn, going back to school. And if we were going to continue renting, a. we would not stay in that house. We would go back into a smaller house where we continue to look or we would have just go and find a house right away to purchase in the area. We could have got out of this so early, two and a half months into it. And we were asking them in the text message in a very straight fashion. We did not beat around the bush. We wanted to know where we stand, if we were buying as we agreed on or if they were going to go by the sham *Residential Tenancy Act*, that they had promised me, they promised us that they would not use it or refer to it unless it was Trevor.

[129] Opey said that, as all these texts were being exchanged, he had a call from Roger. He said that Roger calmed him down, told him not to worry about Reetika, and confirmed to him that they had an agreement that the Adeyemis were going to buy the house, and that was the agreement. He asked Opey to come to his house that evening for a meeting.

[130] Roger said that he did not recall the exact conversation, but thought he recalled having explained to Opey that when you are a tenant you cannot have another tenant. He acknowledged having arranged for Opey and Faye to come to the house that evening.

[131] There was a meeting shortly after 8 p.m. that evening, which involved Opey, Faye, Roger, Reetika and Nick.

[132] Opey's evidence is that at this meeting, they went through the provisions in the contract document he had drafted in detail, including the provisions with respect to deficiencies. As they reviewed each clause, handwritten adjustments were made to the contract and initialled by Opey, Faye and Roger. I will deal with those discussions and adjustments below when I review the contract terms.

[133] His evidence was that as they discussed the deposit, he told Roger that he had his chequebook with him and could write a cheque for the \$25,000, but that Roger would not take the cheque that evening. He said that Roger told them he would get the deficiencies addressed and then accept the deposit. He said that Reetika and Nick were arguing with Roger about this, but they were speaking in the Indian language so he did not understand their exact words.

[134] Opey's evidence was that at the end of the review of the contract, Roger signed the contract.

[135] Faye's evidence is that at the start of the meeting, she wanted to clear the air and asked for assurances that she and Opey would be treated as purchasers as not renters. She told them that if she was not purchasing, then all the things she was doing like going back to work for purposes of the mortgage application could be put on hold. Faye's evidence is that Roger assured her they were not renters. She described Roger's "way" as being "so reassuring" and convincing, and that he told them he was a man of principle and what he said he would do he would do.

[136] Faye also gave evidence as to the discussion about payment of the deposit. She said that Opey had a chequebook with him and was ready to write a cheque for the \$25,000 deposit, but that Roger told him he would not take the cheque as of yet. He recalled Reetika looking upset and speaking to Roger in their native language. Ultimately, Roger and Reetika told them they were not going to take the cheque that evening, but would get back to them.

[137] Reetika agreed that the contract was signed on the evening of August 26. Her evidence was that Opey had brought them this document because he did not like the tenancy agreement, and did not want to be called a tenant. With respect to the deposit, Reetika said that she and Roger wanted the deposit to be paid that evening, but that Opey refused to pay it until the deficiencies were finished.

[138] The plaintiffs read in the following from Reetika's examination for discovery evidence:

Q: Okay. So we're going to just make this – you don't recall if you mentioned that there was no occupancy certificate to the Adeyemis prior to your husband signing the contract in the end of August 2020; is that right?

A: Right.

[139] Roger's evidence with respect to the August 26 meeting was that the Adeyemis walked into his house with a pre-filled contract, that they all sat together at the dining table, that he added information about the vendor into the contract, and then they signed it all together. His evidence with respect to the deposit is that he wanted Opey to pay half the deposit, then the deficiencies would be fixed, and then he would pay the rest. He agreed that Reetika wanted the full deposit to be paid, but said that he explained to her that they would fix deficiencies first and she was fine with that.

[140] I turn now to the CPS itself. The document is titled "Contract of Purchase and Sale – Private Deal Solely Between Seller and Buyer". In the space for "Date of Offer", it says "August 22nd 2020". There follows a box titled "Seller", which references Industrial and contains Roger's cell phone number and email. In the section for "Buyer", it lists both of the plaintiffs and provides cell phone numbers and email address for both of them. The evidence indicates that the information about the Seller was written in by Roger, while the information about the Buyer was written in by Opey.

[141] The body of the CPS describes the subject property both by its civic and legal addresses, then goes on to say:

The Buyer agrees to purchase the Property from the Seller on the following terms and subject to the following conditions:

1, PURCHASE PRICE

The purchase price of the Property will be \$845,000

[142] Next to the reference to \$845,000, there is a handwritten note "+ GST", with three sets of initials. As noted above, this was something discussed when the contract was first shared with Roger, and its addition was confirmed by Opey's first text of the morning on August 26.

[143] Section 2 provides that:

2. Deposit

A deposit of \$25,000 which will form part of the purchase, will be paid on the same day the contract is signed. The deposit will become non-refundable if the buyer decides not to proceed with the purchase with the exception of seller's failure to comply with the terms and conditions of the sale or contract.

[144] There is a handwritten note immediately above the reference to \$25,000, saying "12,500 Paid". This handwritten note is not initialled. I infer from the evidence that this handwritten note was added to the document after \$12,500 in respect of the deposit was paid (as discussed below, that was on about September 13, 2020).

[145] Section 3 is headed "Terms and Conditions". Several of the words in s 3 are either underlined or struck out by hand, which underlining or strike-out is noted below. Subsections (f), (h), (j), (l) and (m) all have three initials as well:

- a. New home warranty set by Homeowner Protection Act and Regulation
- b. Fix plumbing Issues resulting to current water or drainage leaks
- c. Complete tile work in basement bathroom
- d. Reprogram or fix air condition circulation on top level
- e. Fix or replace floor tiles, wall tiles and grouting in bathrooms on third floor
- f. Complete installations and repairs of light fixtures and coverings
- g. Install covers on vent openings in third floor ceilings
- h. Make necessary repairs to front double doors and rear ~~sliding door~~
- i. Complete paint jobs around the house including door pannels, ceiling edges etc.
- j. Proper installation of stovehood
- k. Replace broken windows on main floor and basement
- l. Repair or replace ~~broken stairs~~ at the main entrance
- m. ~~Replace locks~~ for main doors (no key for the door)

[146] With respect to these items, Opey explained that:

- a) With respect to light fixtures and coverings (item f), Reetika in their meeting said there was nothing wrong with the light fixtures and the coverings, and while Opey did not necessarily agree, he considered these items to be "granular" and agreed to cross them off;

- b) With respect to the sliding door (item h), he acknowledged that the Kapilas had already sent someone to fix it and that while it was not completely fixed, he was willing to live with it and so agreed to cross it off;
- c) With respect to the stove hood (item j), he again acknowledged that they had sent someone to work on it and that although they were not happy with the repair, they were willing to let this go;
- d) With respect to the stairs (item l), he said that in Reetika's eyes the stairs were not broken, but rather could be repaired. However, Reetika did say that if they could not be repaired, they would be replaced. On that basis, he agreed to cross out the word "broken"; and
- e) With respect to replacing locks (item m), he said that he had already agreed earlier in the day to replace the locks in the house so agreed to cross off that item.

[147] Sections 4 and 5 deal with completion and possession:

4. Completion

The seller and buyer have agreed that the sale will be completed on or before June 30th 2021 or 10 months from when contract is signed.

5. Possession

The buyer will have possession of the property immediately with monthly payment of \$2,300 (not included in house price).

[148] In s 5, immediately to the right of the words "house price", the letters "GST" are written in and then crossed out, and there are there are three initials. As well, immediately below the crossed out number \$2,300 the following is written in by hand:

\$3,560

Half of property tax

[149] Opey's evidence was that the \$2,300 was crossed out and replaced by the \$3,560 after a discussion about the rental amount. He said that Reetika demanded to know how much Opey's co-worker was going to pay to live in the basement, and

insisted that the amount of the monthly payment be increased by that amount. With respect to the property tax, Opey acknowledged that this was something they had agreed to back in early June, on the basis that if it was going to take them six months to a year to complete the purchase, it was only fair that they pay a portion of the property tax.

[150] Roger's evidence was to similar effect – that once Reetika had noticed the reference in a text to an extra person in the basement suite, they had agreed to “higher” the rent so that the person could stay in the house. Reetika also said that the \$3,560 was because Opey had already rented the basement to his friend.

[151] With respect to GST, Opey's evidence was that Roger had originally said that there should be GST on the monthly payments because they were going to be part of the purchase price, but Opey argued (with reference to his training as an accountant) that monthly payments in respect of occupancy of a residential home are not subject to GST.

[152] With respect to the words “not included in house price”, Opey could not explain why these words were used. He agreed that they were inconsistent with what he understood their agreement to be – that is, that the monthly payments would be credited against the purchase price. He acknowledged that they were in the formal signed agreement and they may have to live with that.

[153] Section 6 is headed “Included Items”, and says:

The puurchase price includes any buildings, improvements, fixtures, appurtenances and attachments thereto and all screen doors, windows, curtain rods, fixed mirrors, fixed carpeting, electric, plumbing, heating, air conditioning fixtures, appliances and ~~furnitures~~ as viewed by the Buyer at the date of inspection.

[154] Above the words “curtain rods” and “fixed mirrors”, the letters “N/A” are written in by hand. There are initials by those annotations, as well as by the strike-out of the word “furnitures”. Opey explained that these words were part of the template he used, but that they agreed at the meeting that there were no curtain rods or fixed

mirrors, and that the Kapilas were going to keep any of the furniture that was in the house.

[155] The remaining terms are not annotated:

7. Title

Free and clear of all encumbrances except subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown, registered or pending restrictive covenants and rights-of-way, in favor of utilities and public authorities, existing tenancies set out in clause 5, if any, and except as otherwise set out herein.

8. Tender

Tender or payment of monies by the Buyer to the Seller will be certified cheque, bank draft, cash or lawyer's / notary trust cheque.

9. Clearing Title

If the seller has existing financial charges to be cleared from title, the Setter, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the Seller agrees that payment of the Purchase Price shall be made by the Buyer's Lawyer or Notary to the Seller's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the Seller.

10. Costs

The Buyer will bear all costs of the conveyance and if applicable, any costs related to arranging a mortgage and the Seller will bear all costs of clearing title.

11. Maintenance

Maintenance of the property becomes the buyer's responsibility from the date this contract is signed.

12. Utilities

The buyer pays all utilities from the date this contract is signed and retro to occupancy date.

13. Acceptance Irrevocable

The Seller and Buyer specifically confirm that this Contract of Purchase and Sale is executed under seal. It is agreed and understood, that the Seller's acceptance is irrevocable until after the date specified for the Buyer to either; A. fulfill or waive the terms and conditions herein contained; and /or

- a. Fulfill the terms and conditions herein contained; and /or

b. Exercise any option(s) herein contained.

14. THIS IS A LEGAL DOCUMENT. READ THIS ENTIRE DOCUMENT BEFORE YOU SIGN.

15. Offer

This offer, or counter-offer, will be open for acceptance until 6:00 o'clock p.m. on *Monday, Aug 24th*, 2020, and upon acceptance of the offer, or counter-offer, by accepting in writing and notifying the other party of such acceptance there shall be a binding Contract of Purchase and Sale on the terms and conditions set forth.

[156] Immediately after this are the signatures of the plaintiffs, dated August 22, 2020. Section 16 then provides that:

16. Acceptance

The Seller hereby accepts the above offer and agrees to complete the sale upon the terms and conditions set out above.

Seller's acceptance is dated *Aug 26/2020*

This is followed by Roger's signature.

Signing of the CPS to June 30 2021

[157] Opey provided a cheque for \$3,560 to Roger on August 31, 2020, with a re line saying "Rental".

[158] Opey's evidence was that for two to four weeks following the signing of the CPS, there was a lot of activity, with Roger texting him regularly as to various contractors coming to work on items.

[159] Faye went back to work in September. She said that she did so in order to ensure approval of their mortgage application.

[160] There was a further meeting after work on September 13, 2020. Both Opey and Faye gave evidence about this meeting, which was not specifically contested by the defendants. Their evidence was that Roger asked to meet because Reetika had been "bugging him" about the deposit for the home. Opey said that he had his chequebook with him, and offered to pay the full \$25,000, but that Roger said that because he had not yet fixed all the things he said he would fix, he would not accept

the full amount. Opey then proposed to pay \$12,500, which both Roger and Reetika said they were content with. A cheque for \$12,500, dated September 13, 2020, and with a re line of “Half purchase deposit”, processed by the bank on September 21, 2020, was in evidence. I infer that it was at or shortly after this meeting that the handwritten note “\$12,500 paid” was added to the deposit provision in the CPS.

[161] I note that a second cheque, in the amount of \$3,050 and with a re line of “Half property tax”, is also dated September 13, 2020 and was also processed by the bank on September 21, 2020.

[162] On September 14, 2020, Reetika sent an email to Mr. Tougas, the geotechnical engineer, attaching a copy of his August 2016 report. This is the first documentary evidence of any contact between the Kapilas and Mr. Tougas since 2017. Reetika’s evidence was that she had finally been able to make contact with Mr. Tougas, but that he had told her he could not sign a Schedule C-B at the time because he had to write another exam, and that he would get back in touch as soon as he was able to do the work.

[163] Mr. Tougas said that there was no time when he was not capable of signing a Schedule C-B. He recalled having telephone conversations with both Reetika and Roger about their need for a Schedule C-B, and the sorts of testing that would be required to prepare one after the fact. Mr. Tougas said that after hearing from the Kapilas about the municipality’s requirements, he concluded that what they were seeking was certification with respect to a different geotechnical matter (bearing capacity) than what he had committed in his Schedule B to review.

[164] In that regard, I note that in the Schedule B form (which is a standard form under the BC Building Code), there are two different geotechnical categories: “Geotechnical – temporary” and “Geotechnical – permanent”. On the Schedule B that Mr. Tougas signed, he had identified only Geotechnical – temporary as being covered, and on the attachment, he had crossed out three of the four subcategories (shoring, underpinning and dewatering), leaving in place only the “Excavation” category.

[165] The Geotechnical – permanent category includes seven subcategories, including item “8.1 Bearing capacity of the soil”. It was this item that Mr. Tougas concluded the municipality now required his certification of. He also acknowledged that, if he was to submit a Schedule C-B with respect to a new subcategory, the municipality would inevitably ask that he also submit a Schedule B with respect to that subcategory. When asked on cross-examination whether he had considered bearing capacity of the soil at the time of his initial report and Schedule B, he said he most likely would have considered it at the time but concluded it was not necessary for this project.

[166] While it would appear that the Kapilas were in touch with Mr. Tougas beginning in mid-September 2020, there is nothing in the evidence to indicate that Mr. Tougas actually attended at the property for many months after this.

[167] At some point in September, there was a further discussion about the monthly payments. The friend who was going to live in the basement left, and it was agreed verbally that the monthly amount would be reduced to \$2,500. On October 1, 2020, Opey provided a cheque to Roger for \$1,440, bringing the total amount paid for September and October to \$5,000 (or two times \$2,500). The cheque had a re line of “October Rent Balance”, and was processed by the bank on October 5, 2020.

[168] There is also an invoice dated October 1, 2020, from a plumber. Roger’s evidence is that he was present when this plumber attended the Property, and that the plumber advised him that there was no leakage from the pipes but rather the problem was the shower enclosure. Roger said that they had the shower company come back to silicone the outer wall and put a plastic strip along the shower wall. He also understood that there remained work to be done to regROUT the tile in front of the shower door and re-silicone around the shower walls, which he understood to be necessary to prevent the leaking. His evidence was that the work did not get done because of disputes that arose in late June 2021 (which are described below). It is not clear why the work was not done between October 1, 2020, and June 21, 2021.

[169] Opey's evidence was that he and Faye saw three or four different plumbers over time. He was present when one of them explained to Roger what needed to be done to fix the plumbing, but that rather than do that work, Roger sent someone else to put plastic strips along the shower door, which did not stop the leakage. The documents include a text exchange dated November 15, 2020:

RG: Hi opyee, I'm just wondering if you get time to do the test in bathrooms?? Cause I'm trying to lineup the plumber ASAP from his busy schedule. Please let me know. Thanks

OA: Hi! Yes we did and it's still leaks. Sorry I don't let you know earlier.

[170] One of the plumbers in the fall of 2020 cut out drywall from the kitchen ceiling (below the master bathroom) and also from a wall in a master bedroom closet (which backed on to the master bathroom) in order to expose piping. The holes that were created by this remained open until June 2021.

[171] On November 1 and December 1, 2020, Opey provided Roger with cheques for \$2,500 each, with re lines saying "November rent" and "December rent". Each of those cheques was processed by the bank a day or two after the date.

[172] On December 22, 2020, Opey texted a video clip of the garage floor covered with water. Roger responded that Opey had to "remove the snow from the sundeck". [The sundeck is over the garage.] Opey responded that the garage "should not leak because there is snow on the deck. That means it has to get fixed."

[173] Around that time, Opey and Faye began to apply for mortgage financing. It was clear that Opey took the lead on approaching banks, with Faye providing input and supporting him as requested. The documents include a letter from Faye's employer confirming her employment status. Opey's evidence was that as of December 2020, the preferred method for banks to receive mortgage applications was by telephone, and that is how he made the applications he made.

[174] I note that disclosure of documents with respect to the Adeyemis various financing applications was an issue at trial. It became clear during Opey's cross-examination that a significant aspect of the defendants' theory of the case was that

the Adeyemis were not capable of financing the purchase of the Property. I do not know the extent to which there were specific pre-trial demands about this issue. While the Response to Civil Claim includes a pleading that the Adeyemis were not ready, willing and able to complete the purchase, it does not contain a specific assertion of inability to finance.

[175] In any event, a significant part of Opey's initial cross-examination at trial focused on the issue of capacity to finance, based on the documents produced to that point. Efforts were made even during the initial part of trial to obtain additional documents from the bank. Then, on the first weekend during the trial, the Adeyemis found further old emails involving Opey's discussions about financing. Those additional emails were among the reasons for the trial being adjourned on the fifth day for what turned out to be a lengthy period of time.

[176] The Adeyemis had, up to late 2020, used HSBC as their primary banking institution. However, Opey dealt with Bank of Montreal at his work and was interested in moving some or all of his personal banking there given the relationships he had. He ended up negotiating with respect to mortgage financing with respect to both institutions.

[177] Ultimately, of course, no mortgage was placed in respect of the Property, and it was clear that no efforts were made until shortly before trial to obtain any documents from either HSBC or Bank of Montreal. Banks do not keep files forever – especially those that relate to applications that do not actually lead to financing. It was clear to me that there were significant gaps in the production of documents with respect to financing from those institutions, and that gap was largely due to the lack of significant efforts to seek such documents until many years after the events in issue.

[178] Among the documents produced was a printout of various electronic records from HSBC dated December 30, 2020. Those notes clearly relate to an application for financing for a purchase of the Property. In the line marked "Status", it says "Rework-Conditionally Approved". It includes the following:

Purchase price \$795,000 – down payment \$80,000 – mortgage amount \$737,165 – effective rate 0.99% - closing date Apr 29 2021 – occupancy “Owner Occupied”

Security Address: 7066 Sansum

Comments: Existing couple / looking to purchase the ppty that they are currently renting fr the builder as their o/o home/private sale /D/P & 1.5% closing cost from own saving (RRSP & bonus in Jan) / Ratio within CMHC guideline / approval recommended / Mr. Employed w comssion inc – 2 yr T1, 3M bank statement, Covid cal ? T4S/latest paystub – use YTD to average 2019 T4/ MS. Full time employed, YTD not matching LOE, off fr Mar-Sep/Back to work in mid Sep / MS beacon is above 680-meeting CMHC guideline

[179] Opey says that the reason this describes the purchase price as \$795,000 (rather than the \$882,000 including GST in the agreement) was that Roger had asked him to pay a portion of the purchase price in cash on the side, so that it would not have to go through the company and be taxed. Roger denied ever having had a discussion about having any portion of the purchase price be outside the main transaction. Opey was confident that, with mortgage financing in the \$737,165 amount set out, he would be able to assemble enough funds to complete the purchase.

[180] With respect to the April 29, 2021 closing date, Opey said that he had told Roger that he would close the purchase as soon as he could, and he anticipated that he would have enough funds saved up by April 2021 to complete the transaction on the basis of this proposed financing.

[181] Opey was also asked about personal credit applications from HSBC's files dated December 31, 2020. It was put to him that the net worth statements in those applications did not demonstrate sufficient cash on hand to make up the difference between the \$737,165 mortgage amount and the \$882,000 purchase price (inclusive of GST). He agreed, but said that between a substantial year-end bonus that he had earned, which would have been due early in the new year, and the additional savings they were making, they would have been ready to complete by the end of April 2021.

[182] The Adeyemis wrote a cheque to Industrial dated January 1, 2021, for \$2,500. The re line of the cheque was left blank, and it was processed on January 5, 2021. Although the cheques provided in the previous three months had “rent” in the re line, from January 2021 onward the cheques either had blank re lines or simply stated the month.

[183] In early January 2021, the new property assessed values were released by the BC Assessment Authority. The assessed value of the Property increased from \$887,000 for 2020 to \$970,000 for 2021. When asked whether he had seen this notice, and become aware of the increase, Roger said he did not know when assessed values are released, and was unable to answer as to whether he knew the assessed value had increased.

[184] On January 4, 2021, a “Home Finance Advisor” from Bank of Montreal emailed Opey acknowledging completion of a mortgage application over the phone and providing contact information for any questions. The bank’s contact records reference a call on January 7, 2021, in which Opey told the bank that he preferred to deal directly with the branch. On January 8, 2021, there was an email from a Ms. Wang at a Victoria branch advising Opey that it was “nice talking to you again” and seeking further information about his mortgage application.

[185] Opey’s evidence was that at some point in January he received phone calls – first from HSBC and then a few days later from the Bank of Montreal. In each call, he was asked whether the Property was a “new build” and whether it had been previously occupied. When he confirmed that it was a new build that had not been previously occupied, he was told that he would have to provide the bank with a certificate of occupancy before completion.

[186] Opey’s evidence was that he did not even know a certificate of occupancy “was a thing”, given that he had not previously purchased a house.

[187] Opey’s evidence was that he stopped by Roger’s Furniture and told Roger that he would need to produce a certificate of occupancy in order to get financing.

He said that initially Roger told him he had it and would get it to Opey. Roger denied ever having said that he had an occupancy permit; rather, he said that all he ever told Opey was that they were “working on it”.

[188] Opey’s evidence was that after a few days, he began to start looking into things himself. He called the municipality and asked if he could obtain from them the certificate of occupancy. He was advised that before the municipality could release any information to him, he would have to provide an “Agent Authorization” form signed by the owner of the property, and advised that they would send him the form.

[189] On January 11, 2021, a Mr. Byron of the District of North Cowichan sent an email to Opey. The text of the email says simply “see attached”, and the attachment is a blank form of Agent Authorization for access to property records.

[190] Opey’s evidence is that he printed this form then drove over to Roger’s Furniture and asked Roger to sign it, so that he could use it to get the certificate of occupancy directly from the municipality. Opey’s evidence was that Roger told him to leave the form with him and that he would sign it and get it back to him. He never did. Roger’s evidence was that Opey asked him to sign the form but that he told him he would not sign it. He said that he simply told Opey that they were working on the occupancy certificate.

[191] Opey’s evidence was that:

I was growing frustrated because now I have heard from two banks that I need a certificate of occupancy, and this is the first time that I heard anything about certificate of occupancy. I don't know in Canada that you need -- I have never built a house before, never sold a house before. And after I did a little bit of research myself, then I realized that, you know, a new build need a certificate from the municipality or the City to say the house was completed and it's good to go. So, now I understand why the bank would need that to fund a new build, but Roger didn't sign it, didn't give it to me. ...

He said that after a period of time, he called the municipality himself and asked them for just a “yes or no” answer as to whether there was an occupancy permit.

Ultimately, they told him the answer was “no”, but that he would have to provide a signed authorization form before they could provide him with any more details.

[192] Among the emails produced by the Bank of Montreal is an email dated January 12, 2021, by which Opey provided additional documents to Ms. Wang. One of the documents requested was the contract of purchase and sale. With respect to that, Opey said:

The builder's lawyer is making adjustments to the offer to purchase, we should have it just in time after you've validated the documents.

[193] With respect to this, he said that he had learned from the bank that the contract they were provided needed to match up with the closing date for which he was seeking financing. He went to speak to Roger about this, and Roger told him that he would have his lawyer "make those adjustments to the date". Roger did not respond to this assertion.

[194] Opey also acknowledged that by this time, he was aware that Roger's company was actually the builder (hence the reference to the "builder's lawyer").

[195] On January 31, 2021, at 4:04 p.m., Opey sent a text to a group chat that included Roger, Reetika and Nick:

Hi Roger, Reetika and Nick:

Faye and I would like to use this means to inform you that your complete funds is ready. \$845,000 plus GST. Yes!!! We are extremely happy that we're able to do this 5 months ahead of schedule. Please let us know when you intend to obtain North Cowichan final occupancy as our approval is valid till April 16th. Please keep us in the loop. Thanks and have a great day.

[196] There was an almost immediate text response from Nick saying:

Hmmm ... Let's plan calmly what to say.

Followed very shortly by a second text saying:

Oops, wrong group.

[197] The defendants were unable to produce any alternate group chat from the time that showed what was meant by this latter comment.

[198] Nick's evidence is that he meant this text to be in a different family group chat, but that it did relate to the dealings with the Adeyemis. He said that he was aware that the Adeyemis were renting the house and talking about buying it. He explained that as a "responsible brother" he was saying let's calmly reply to this message and get back to them.

[199] Roger was asked about these texts in cross-examination. His evidence was that he did not know why Nick said what he said, and did not know whether Nick clarified in an alternate group chat what he meant by his text. It was put to Roger that he was aware the value of the Property had increased, that he and his family had already discussed this, and that they no longer wanted to sell to the Adeyemis. He disagreed with all of these propositions. His evidence was that he thought the market was "the same at that point", and that it was in the spring time that the market went up. He said that they remained ready to sell to the Adeyemis, but they "never saw any funds".

[200] Opey's evidence was that:

I couldn't type right after I saw that message. My heart was broken because I knew. I was starting to connect the things that people were telling me at work about Roger.

[201] He said that after a day or two, he went to speak to Roger at Roger's Furniture. He said that he told Roger at this time that he had learned from the municipality that there was no occupancy permit. He also confronted him about Nick's text, asking if there was "anything else going on that I don't know". Roger said they would organize a family meeting to discuss all of these things.

[202] Roger did not recall Opey coming to see him at the store about the January 31 texts. He denied that Opey expressed concern about Nick's response, saying that he did not recall Opey asking him about it and that he would not know what Nick meant anyway.

[203] Early on the morning of February 5, 2021, Opey sent an email to Ms. Wang at the Bank of Montreal saying:

We are looking at another property, can you advice us on the appropriate closing time that works for the bank. The agent said it's typically 4-6 weeks but I would like to confirm with you first.

[204] Ms. Wang responded that morning, advising that they allow at least two weeks before subject removal.

[205] Later that day, the Adeyemis made an offer to buy a townhouse in Duncan located on Somenos Road, which offer was accepted. The purchase price was \$475,000, they paid a deposit of \$10,000, and the completion date was April 29, 2021. The offer was subject to financing, with a deadline of February 19, 2021, for subject removal.

[206] At 10:03 p.m. that evening, Opey emailed Ms. Wang advising that:

We have an accepted offer on a different house. We went with a much smaller house in the end so we can have lots of money remaining from our income every month for long term investments.

[207] An internal note from the Bank of Montreal's files dated February 6, 2021, states that "Client called on Feb 6th. Decide not to proceed with the application with this property."

[208] On about February 9, 2021, Opey attended a meeting at the Kapila home. Faye was not there, but Roger, Reetika, Nick and other family members were all there.

[209] Opey's evidence with respect to this meeting was that:

- a) He began by asking Nick to explain the text, and that Nick was insistent that it was simply a text in the wrong group chat and had nothing to do with the sale of the Property to the Adeyemis.
- b) It was at this meeting that Roger admitted, for the first time, that the house did not have an occupancy permit, but Roger promised that it would get done. Opey asked that Roger sign the municipality's authorization form, but Roger told him that he would take care of the permit and that given

how busy Opey was, he should not be worried about dealing with the municipality.

- c) Roger explained that the City was going to need to dig around the basement to find out how deep the foundation is. Opey said he offered to expediate that, but Roger insisted that someone was coming to look at it.
- d) Reetika told him that the geotechnical engineer did not have his certification at the time the house was completed, and that when the City asked for a schedule from him, they could not even contact him. Opey offered to help make calls to track him down, but they told him they now had located him and he had told them it would cost \$4,000 because now he had his certification.
- e) When Opey asked about the homeowner's warranty, and whether they could claim on the warranty for any of the deficiencies, Roger told him there was an issue with it and that if they needed the warranty, his daughter would need to write some exams and it would be expensive. Roger promised that in any event all of the deficiencies would be rectified before completion.
- f) Roger confirmed that "they" were also the builder, and that because he was the builder he did not want there to be warranty claims because that would drive up his premium.

[210] Roger agreed that there was a meeting at his home in early February. He was not sure who attended, but believed that Reetika's parents were at the meeting. He did not recall a discussion at the meeting about Nick's text. His evidence was that Opey had previously been told that the Kapilas (through their company) were the builder and that they did not yet have an occupancy permit. He said that the discussion about the authorization form was in a different meeting. He said that, with respect to what was needed to get the occupancy permit:

- a) He did provide details to Opey about the reasons they had not been able to obtain an occupancy permit, including the need for a schedule from the geotechnical engineer;
- b) Although they may have provided some background as to difficulties getting hold of Mr. Tougas, his recollection was that by this time they had located Mr. Tougas; and
- c) He did not recall being told by Opey that he needed to have the occupancy permit in place by April 16 in order to take advantage of his mortgage approval.

[211] It was common ground at trial that the Adeyemis did not tell the Kapilas that they were purchasing the Somenos townhouse. Nor did they tell them at or around this time that they were going to purchase something else, or for any other reason not proceed with the purchase of the Property from the Kapilas.

[212] Opey's evidence at trial was that the actual intent that he and Faye had in acquiring the Somenos townhouse was to have a small rental property that might also be used for family should one of their parents ultimately move to Canada. He said that townhouses in this area were selling very quickly, there were multiple offers on this one, and they had to move quickly. He noted that the Somenos townhouse was about 1,100 square feet, as compared with the 3,500 square feet of the Property, and was too small for the size of their family – by that point they had two children and a third on the way. It also had only a single car garage while they had three vehicles.

[213] Opey's evidence was that, in his view, it helped their mortgage application in respect of the Property to have a tenanted investment property that increased their asset base and income and covered the related expenses. His evidence was that a nearby unit that was somewhat similar sold for about \$640,000 a couple of months after they purchased the townhouse, and that in his mind, even if it turned out to be an issue for financing, there was a strong market and they could have sold it quickly.

[214] Faye's evidence was that she did not recall Opey's emails with the banks but that as far as she was concerned, there was never a discussion that they were not going to buy the Property. She was adamant that she never changed her mind about purchasing the Property.

[215] With respect to the Bank of Montreal application, the person Opey was dealing with (Ms. Wang) was going to be away and forwarded some of the information to a Mr. Lin, a mortgage specialist, with a request that he process the Adeyemis' mortgage application for the Somenos townhouse. On February 10, 2021, Mr. Lin emailed Opey asking about mortgage rates, noting that he could offer a five-year fixed rate at 1.64%, a four-year fixed rate at 1.52% or a five-year variable rate that would start at 1.38%. On February 17, 2021, Mr. Lin emailed Opey to advise that the file was approved and the bank's fulfilment team was reviewing the documents.

[216] By February 17, 2021, Opey was also exploring possibilities with respect to renting out the Somenos townhouse. His real estate agent provided him with information with respect to his firm's property management arm, and suggested that the townhouse would likely generate rent of \$1,800 to \$2,000 per month.

[217] On February 19, 2021, the Adeyemis signed a condition removal form with respect to the Somenos townhouse.

[218] On February 23, 2021, the realtor advised that the sellers of the townhouse would be interested in renting the townhouse for two or three months after the sale completed at \$2,000 per month.

[219] Also on February 23, 2021, Opey sent an email to a Mr. Luo of HSBC, saying:

Great job today for convincing my wife to keep our banking with HSBC. You did an amazing job keeping everything together this afternoon because everything was already finalized with BMO.

[220] Notwithstanding the email of February 23, 2021, it appears that Opey continued to negotiate with both Bank of Montreal and HSBC. On March 1, 2021,

there was a further letter from Bank of Montreal confirming mortgage approval for a principal amount of \$440,237. Then on March 3, 2021, Opey advised Bank of Montreal that “Closing is moved back to original closing date April 29th because of construction delays of the sellers new house.”

[221] On March 10, 2021, Opey sent a further email to his two primary contacts at Bank of Montreal. This email was the subject of detailed cross-examination. In it, he said:

... I got a bad news from BMO credit card department today that I am not happy with. I called BMO Mastercard yesterday to increase my credit limit from \$1,000 as you suggested yesterday but I was declined.

The main reason this is important to us is simply because we don't want to apply for any credit for the next 5 yrs. We just want to focus on saving 80% of our income, invest and build wealth and were convinced that BMO is the right bank until today.

I really appreciate the great work both of you have done from day one so I would like you to look into this and if BMO's credit card department still won't do a credit limit increase then we will have to go with HSBC for our mortgage. I am very sorry but as much as I would like to switch to BMO, I can't overlook everything HSBC is offering.

This is what my wife and I initially declined from HSBC:

5 yrs .99 interest rate – which is fully approved

\$20,000 unsecured line of credit

Premier Credit Card – Starting limit of \$20,000

I am not asking for BMO to match the mortgage rate or give us line of credit but the card is pretty important for what I do.

[222] Opey's explanation of this email was that his goal was to make it clear that, although he preferred dealing with Bank of Montreal, they were going to have to fight hard for his business. He agreed that the only mortgage that was being discussed at this time was for the Somenos townhouse. He described the Property on Sansum Road as being “at a standstill”. He said that the message he was trying to communicate here is that he does not want “credit cards here and there”. He described himself as a follower of Dave Ramsay, an American personality who advocates for reducing debt, and that he wants to have a limited number of targeted

credit sources. Opey's evidence is that this was what he meant by not wanting to apply for more credit.

[223] Although it was clear that HSBC did approve and ultimately fund a mortgage for the Somenos townhouse, the document production with respect thereto was minimal (even with documents having been sought directly from HSBC). Among the few HSBC documents in evidence at trial was a letter of March 26, 2021, confirming approval of a loan for \$440,237 at a variable rate of prime less 1.46%, which at the time came to 0.99%. It was for the acquisition of the Somenos Road townhouse and was to be advanced on April 29, 2021.

[224] There is no indication in the documents of the Kapilas taking any steps in February or March 2021, to either deal with deficiencies or to secure the occupancy permit. Roger's explanation was that he was waiting for Mr. Tougas to write a test so that he could get his license back, following which he would need Opey to tell him it was okay to excavate around the house. [As noted above, Mr. Tougas' evidence was that he held all necessary licenses throughout.]

[225] The evidence included a letter dated April 6, 2021, from Pacific Home Warranty, addressed to Rajinder Kapila and Reetika Kapila. It stated:

Congratulations on enrolling your home in the Pacific Home Warranty Insurance Services warranty program, Canada's best. Your home is one of the most significant purchases you will make and we wish you many years of comfort and enjoyment.

Pacific Home Warranty Insurance Services is the administrator of your warranty. We will work hard to ensure that your choice of a PHW Member Builder is rewarded in the years to come.

Enclosed behind this letter you will find an Insurance Declaration Page that specifies the expiry dates of your warranty protections as provided by your warranty insurer.

Immediately following the Declaration Page, you will find the warranty certificate(s) that defines the warranty protection afforded to both you, and subsequent purchasers of your home. Please read this warranty certificate carefully as it defines what is and what is not covered by your warranty. The warranty certificate also defines what your responsibilities are as a homeowner with respect to such things as maintenance of your home.

...

Again, congratulations on the purchase of your new home, and welcome to the Pacific Home Warranty Insurance Services family.

[226] The attached Declaration Page included the following particulars:

... Possession Date

... 8/1/2018

Insured:

Rajinder Kapila & Reetika Kapila

...

Member Information:

Industrial Radiator Co. Ltd.

...

Commencement Date

Your Warranty Started on: 8/1/2018

Warranty Expiry Dates SBS-50-14

Coverage Details: SBS-50-14 (Site Built Single <1000K (L3 or L4)

Coverage	Effective Date	Expiry Date
Materials & Labour 1a	8/1/2018	8/1/2019
Mechanical Systems 1b	8/1/2018	8/1/2020
Envelope Coverage	8/1/2018	8/1/2023
Structural Coverage	8/1/2018	8/1/2028

Exclusions

Refer to Attached Limited Warranty Certificate

...

[227] The package also included a copy of a “Home Warranty Insurance Declaration Page Sticker”, which contained an instruction to “please detach this sticker and place on or near your electrical panel”. It was undisputed that this sticker was never placed in the Property. In addition, it included a five page set of warranty terms, the header of which stated “Home Warranty Insurance – Detached New Home (Fee Simple Ownership) – SBS-50-14”.

[228] It was also common ground that this document was not shared with the Adeyemis, and they only became aware of it when it was produced in this litigation.

[229] Opey's evidence was that he was not aware that the warranty had already started to run, and was not aware that the coverages for Materials & Labour and for Mechanical Systems had, by the spring of 2021, already expired.

[230] Reetika acknowledged receiving this letter, but said that she did not really understand it. She had no explanation for why the letter was sent to herself and Roger personally, when Industrial was the builder, and no explanation for why she and Roger were said to have purchased the Property. She did not know how Pacific Home Warranty came to send out this letter. She said that she did not give this letter to the Adeyemis because, in her view, they were just renters. She would have provided it to them when they actually purchased the Property.

[231] Roger, who gave evidence after having listened to Reetika's cross-examination, suggested that this letter was created by some sort of clerical or computer mistake. He said that the letter is inaccurate in saying that he and Reetika were purchasers, and it was inaccurate in referencing a possession date of August 1, 2018. He acknowledged that he never took steps to advise Pacific Home Warranty of any errors in the letter. Nor did he tell the Adeyemis that, according to the warranty company's record, two parts of the warranty had expired.

[232] I note that there was some confusion at trial as to whether this letter was dated April 6 or June 4, given the use of a numerical date in the form "4/6/2021". There was, however, another document from Pacific Home Warranty in evidence with a date of "02/17/2017", from which I infer that Pacific Home Warranty's practice was to use the American month/date/year format. As a result, I conclude that the letter of 4/6/2017 was dated April 6, 2021.

[233] On April 17, 2021, the geotechnical engineer, Mr. Tougas, showed up at the Property and asked for Reetika. Opey texted Roger to let him know that someone was at the house asking for her. Roger replied: "That's okay. Thank you. He knows that reetika is not there." The evidence indicated that Mr. Tougas was not there with respect to the Property, but rather to look at a different vacant lot the Kapilas owned nearby.

[234] The purchase of the Somenos Road townhouse was completed on April 29, 2021. It was funded by a mortgage loan from HSBC. The former owners remained in the Somenos Road townhouse initially, paying rent of \$2,000 per month. Opey acknowledged that they used at least \$35,000 toward the down payment. It was suggested to him that he and Faye no longer had the capacity to purchase the Property. Opey disagreed, saying that he and Faye were both working and were increasing their savings substantially every month.

[235] On May 12, 2021, Nick sent a text to Opey, Roger and Reetika, asking if he could come by with “his guy” on Saturday, May 15, 2021, to “fix the drywall” in the kitchen and upstairs closet. Although Opey confirmed that was fine, Nick texted on the Saturday morning to advise that his guy had cancelled and he would try to reschedule. Further texts were exchanged on May 20, 2021, when Opey advised that that evening did not work, but that the next day would be fine. However, that did not work for Nick and his guy.

[236] Opey’s evidence was that virtually nothing was done between the meeting of February 9, 2021, and late May 2021 to address the remaining deficiencies, and he was becoming concerned. On May 24, 2021, he prepared a detailed letter and delivered it by hand to Roger. The letter says:

My wife and I are using this means to communicate with you, Reteeka and Nick in regards to the closing of the residential property we purchased from you, located on 6077 Sansum Dr, Duncan BC V9L 0B3.

The sole intention of this letter is simply a call for openness, resolution and finalizing the last step of the purchase agreement we have. In addition to seeking openness, resolution and finalization, my wife is four months pregnant so we are definitely at a point in our lives that we can’t afford to go through life without being in control of our plans. Raising our kids in our own home is what we’ve always planned for and that’s why we work so hard to save every penny we earn so we can provide our kids a home at a very crucial stage of their lives.

The last five months have been the most difficult time since I met my wife 13 years ago. She’s a very strong a woman whom I get the drive and motivation from daily. However, she has gone into massive depression since we found out five months ago through our banker and the inspector for the city of North Cowichan that the house you sold to us has no certificate of occupancy, no new home owners warranty and several pending defeciciencies that haven’t

been addressed. We are still in shock that this vital information was never shared with us.

We feel that our silence, respect, non confrontational and easy going nature have been grossly taken advantage of by you, Reteeka and Nick. You have not followed through on a single obligation or promise for almost a year. We have been fed one lie after another, just think about that for a second. Not even one out of so many obligations was started and finished. On the other hand, my wife and I have always made sure we go above and beyond on any of our promises and obligations to you. We gave you our word on securing the mortgage before the one year closing agreement, we came through. We gave you our time, respect and money. We gave you every single penny you requested. Our record shows that we've given you \$48,600 to date. Why is it so difficult for you to do what you tell people you will do? We have been left in darkness throughout the entire process, the last time we heard from you in regards to certificate of occupancy and home owners warranty was February 9th of this year, thats four months ago. We wait patiently everyday for someone to give us an update. You have brought a huge misery to our little family and we can't take it any longer and if nothing is done we will be seeking legal and professional support because my family have really suffered in your hands. I am trying really hard to hold back my tears as I type this letter but I can't help it. Roger, Reteeka and Nick, my little family of four used to be a happy and bubbly but not anymore. Our kids can't play in the house because they now know that its not their home at the moment. Their room is so cold during winter and very hot during summer as the heat / a/c system is not working properly, we can't repair it on warranty as there is no home owner's warranty on a brand new house which is illegal and we can't fix it with our money as we don't know how this is going to end. My wife is pregnant and our two lil boys ... came up with a great idea to paint their little sister or brother's room, they were very sad when we told them no. Putting limitation or roadblocks is not what I want for my kids, we want to give our kids limitless opportunities to explore and have fun with their ideas and imagination at their young age. They are afraid to touch the walls, railings or do anything in the house because they know its not their home at the moment. Roger, my family can't take this any longer. Whatever needs to be done on your end should be done NOW! What happned to everything you said in the meeting on February 9th, the last meeting? I came home with hope and joy that night but it now seem like it was just another scheme to just strain us along, take money from us and keep us in the dark.

Let me remind you from my note of everything you, Reteeka and Nick promised to get done during the last meeting at your residence.

1. Digging The basement: You mentioned the City of North Cowichan demanded a portion of the basement to be dugged because they have to confirm the dept of the foundation. You asked if we were willing to split the cost with you which I answered yes because we want you to satisfy the City of North Cowichan so you can obtain the certificate of occupancy which we desperately need for the completing of our mortgage. You also said your engineer or geotech Nathan submitted the paper to the city but they can't find it which I said just let them come do what they need to do for certification purpose which we

both agreed. Reteeka also mentioned that Nathan was asking for \$4,000 because he spent over \$10,000 getting / renewing his certification which I also said we can cover it. We just wanted this done and over with. Four months later, we have not seen anyone from the city come dig the basement yet and not a single update from anyone.

2. B.C Home Owner's Warranty on New Homes: You also mentioned the home owner's warranty during the meeting on February 9th, which got me extremely excited because I thought you were eliminating every single obstacle and working towards obtaining the much needed certificate of occupancy for the completion of our mortgage. I wanted to know what needed to be done to obtain the home owner's warranty as am not familiar with the process which Reteeka immediately said her daughter has started the process. I asked again what needed to be done because I was curious and wanted to know and she finally said "my daughter has registered for the builder's course and upon completion we will have the warranty." Reteeka continued by saying its going to cost \$37,000. Again, because of my eagerness of getting this done and to move on, I said we will split the cost. I could see the surprise look on everyone's face because I had zero pushback, I was saying yes yes to everything. And again, four months later, we have not heard any update about this process.
3. Mortgage Approval Expiration: I was also informed during the meeting that you are not sure if everything will be completed before our mortgage approval expires April 16th, which I replied we can extend if need be. This got me very curious even in the middle of the excitement of the meeting I wanted to know how long everything will take so we can plan accordingly. Roger then said it will only take a few months, I asked few months like July or September? I wanted to know the timeline because we just found out my wife was pregnant with our third child so it was very important to know especially knowing that she will stop working at some point and we might not be able to meet the mortgage requirement if she's not employed. All of you chimed in by saying everything will be ready for sure before summer. Again, four months later, we have not seen anyone from the city come dig the basement, no sign of B.C home owner's warranty or inspector come through and ZERO update. Canada's Department of Finance just announced a new stress test which will hinder us from qualifying for a mortgage when my wife goes on maternity leave so, again we need to know what we are doing now so we can plan our life.
4. Departing Words : I was very relieved and filled with hope and happiness at the end of the meeting. The last time I felt this way was when we signed the purchase agreement for the house and when we moved in. Roger, you even told me to let my wife know that everything is under control as she was too stressed and depressed to join the meeting. So, what happened? What changed? if we are not priviledged to any information that we crucially need then we need to start to have a different conversation. We have watched so many beautiful houses sold in the area over the last 12 months, however,

we did not make any move because we thought we had purchased our own beautiful home.

After serious thinking, many many sleepless nights as a result of depression from this process, we have decided to stand up for our rights, demand to be involved with the process and stopped being played like a ping pong. This is our life, our money, our joy, dream and happiness and we want it all back, Hence, we want one of the following TWO THINGS to be done.

1. We want access to all the documents from B.C home owner's warranty and the City of North Cowichan in regards to the pending deficiencies and solutions for obtaining the certificate of occupancy so we can complete our mortgage.
2. If this house cannot be sold for whatever reason, then we are demanding a full refund of all the money we gave you and we are also seeking to be compensated as house prices have risen over the last 12 months. Four houses have been sold on this street since we signed the purchase agreement and moved in of which we missed out on all of them. We will also seek a compensation for everything my family have gone through during this time which I can't even quantify how much at this moment and if this is the route we choose to go then we will leave that up to our legal representation to determine.

Also, effective immediately, we will not give you any sort of payments as we've been giving you \$2,500 monthly for the last 12 months. This has stopped!

Please kindly choose one of the above resolutions so we know the next step to take.

[237] It was common ground that the Adeyemis did not make the \$2,500 payment for either June or July 2021.

[238] Opey's evidence was that he received no response to this letter. Roger's evidence was that he passed the letter on to his family and then eventually to a lawyer.

[239] Roger agreed that between May 20 and June 19, 2021, nothing was done to address the deficiencies at the Property.

[240] On June 15, 2021, Reetika called the municipality and asked them for a list of what is required for the occupancy permit to be issued. She acknowledged that this was her first contact with the municipality in over a year.

[241] The plaintiffs read in the following from Reetika's examination for discovery:

Q: But you knew that they – the Adeyemis required the occupancy certificate to obtain financing, didn't you?

A: They knew that; I knew that. I was working on it.

[242] At 3:15 p.m. on the afternoon of June 19, 2021, Roger texted Opey, advising that "Machine man be coming today to look around in the back yard to go some digging next week." Opey responded "Ok thank you very much. Faye is home."

[243] On June 21, 2021, Mr. Tougas emailed Roger and Reetika, saying:

Thank you for your call, Roger, notifying me that you've arranged an excavating contractor to dig out the foundation backfill material in 3 different locations to reveal the bottom of footings, as I've indicated is necessary for my field review of bearing capacity. If I can determine that the founding material is adequate to support the building, then I can issue a memo with Schedule C.

Please notify me by reply to this email what date and time those 3 test pits will be open and the bottom of footings ready for my field review, then I can arrange to drive down.

[244] Mr. Tougas said that this email followed a phone call. He was not sure when the call occurred, but believed it was close to this June 21 date.

[245] Reetika's evidence is that prior to this email, Mr. Tougas had identified where in the yard the three test pits should be located.

[246] Later on the afternoon of June 21, 2021, Nick texted Opey, saying "Hello, I have drywall guy free tomorrow after 5:30 p.m." Opey responded "Yes it works for us. Thank you." Nick then confirmed that they would be there by 6 p.m.

[247] The parties' relationship fell completely apart on Tuesday, June 22, 2021 – just eight days before the end of June 2021.

[248] The day began with a small excavator arriving to dig holes on the Property. Opey's evidence is that his next door neighbour – who is involved in the construction industry and who Roger does not like – asked him what was going on, expressed surprise that there was just one person there for the excavation, and expressed concern about the risk of damage to gas and power lines. Opey said that Roger

arrived, saw Opey speaking with the neighbour, and became upset. He told Opey not to “leak anything about the house”. Opey’s evidence was that he told Roger he was concerned about gas lines. He said that the excavator ended up breaking two drainage pipes, and its operator then decided he would come back the next day when he had help.

[249] Opey did acknowledge having a conversation with the excavator operator, asking him what he was there for and why, but that Roger intervened to tell Opey that he was not to ask the operator any questions.

[250] Roger’s evidence was that Opey was pestering the excavator operator with questions about the municipality’s requirement of a Schedule C-B, that this distracted the operator, and that it was this distraction that led to the broken drainpipes. Roger said that Opey got angry with the operator and kicked him out.

[251] The evidence included a video which Opey said was recorded by his security camera. It shows a discussion between Opey and Roger, in which Roger can be heard saying “don’t tell him what’s happening with the house”, and Opey can be seen pointing to the side of the driveway and commenting about gas lines. They can then be seen going to the side of the house to watch the excavator, and Opey comments that “he doesn’t know anything”.

[252] Opey’s evidence is that he understood the excavator was there because the City had asked for the foundation to be exposed. He said he was not specifically aware at the time that there was a plan for the geotechnical engineer to eventually attend so that a Schedule C-B could be obtained for purposes of obtaining an occupancy permit.

[253] At 5:49 p.m., Opey texted Roger, Reetika and Nick, saying:

Hi Roger, Reteeka and Nick. I would like a quick discussion about what’s going on because I really don’t want what happened this morning to repeat itself. So before anyone comes here to do any kind of work, we all need to be on the same page. I know this is a short notice but is needed. Thank you.

Reetika responded saying “Check your messages you were on for tonight at 6”, to which Opey replied:

Is it a yes or no for us to meet tonight? I just said something happened this morning and it needs to be addressed before we move on with anything.

[254] Roger said that he did not have the courage to have a meeting with Opey.

[255] Nick and his friend, Mr. Dhaliwal, arrived around 6:00 p.m. Opey said that he was concerned when it became apparent that they were there to replace drywall that had been removed the previous year to facilitate investigations by the various plumbers who had been there to try to address leaks. He said that when he asked questions, Nick told him he had no right to be asking questions, since he was just a renter. When Opey challenged that, Nick told him he and his wife were “losers and scammers”. Faye’s evidence was that she arrived home about this time, and asked Nick what was going on. He replied “Shut up, stupid”, and then told Opey and Faye’s children to “enjoy your last days because you’re about to get kicked out on the street”. Opey said that at this point he told Nick and Mr. Dhaliwal to leave, which they eventually did after he threatened to call the police.

[256] Nick’s evidence was that when he and Mr. Dhaliwal started to get to work, Opey followed them around with his phone in his hand and would not leave them alone, then started yelling and swearing, so they left.

[257] The evidence included a video from a security camera on the front porch. This was clearly at the tail end of the interaction, and shows Opey telling Nick to get out, complaining about being called a renter, and telling Nick to never come back. Opey can then be heard talking on his phone to “Roger”, complaining about being called a renter and accused of fraud.

[258] It was common ground that during a phone call between Opey and Roger, it was agreed that Mr. Dhaliwal could return on his own. Mr. Dhaliwal then came and put drywall on the areas that had been previously exposed – both in the master bedroom closet and in the kitchen ceiling.

[259] Beginning at 9:29 p.m. that evening, there was an exchange of texts between Roger and Opey:

RG: Drywall is now complete and as agreed the diggers will be there tomorrow morning with me.

If you want to discuss what happened this morning I will discuss with you. You reacted harshly this morning and we talked through it. But this evening, you invited Nick into the house to fix the drywall and then sent us the above text message 5 minutes after they started working. Then after swearing and threatening him you kicked him out. My kids could hear you down the street.

OA: Roger I am not going to go back and forth with you. I have cameras with every conversation recorded both this morning and tonight with Nick. Whoever is coming tomorrow will not be allowed anywhere here until we know what's going on.

RK: As I told you this morning, they are digging for the geotech request and schedule c.

OA: I have texted the excavating guy not to show up here tomorrow. We will not anyone run us over like you've done over the last year.

We will be right here whenever you are ready to be open about the whole situation. All we want is inclusion, explanation and timeline to everything which you continue to deny us. You even told the excavating guy not to give us any information.

[260] Opey then texted some photographs of the drywall boards that had been put up, and challenged whether anything was in fact complete. Later that evening, the texts continued:

RG (9:50 p.m.): Next step for drywall is the finishing. It will get done when you stop denying our workers from doing the job.

OA (9:51 p.m.): We need access to the documents, we ask for this in the letter we gave you. We did not receive any response and now people are showing up here and we are not allowed to talk to anyone. We need to talk about the agreement we have. No one addressed that yet. Please and please we don't want any drama tomorrow. Reach out to Mat not to show up here until we figure this out. We have gone 1 yr without seeing any kind of progress from you so I am sure we can wait another day until this is figured out! Thank you!

RG (10:08 p.m.): We want to give all documents in one time, which is why we need to complete Schedule C. You know with COVID that finding work is very difficult, and now that we have finally arranged it to be done, you are stopping them from completing our last job.

OA (10:42 p.m.): We are not stopping anyone, your intention is to make this very difficult on us and we've tolerated this for a year. Covid did not stop construction workers and you have never brought professional drywall people

ever. It's always Nick's friends and they only come after 5:30 when they've finished their day jobs. You left us in this house for a year with mold and exposed drywall in the kitchen roof and bathroom so am sure we will survive another day. I messaged you this evening about figuring this out. You, Reetika and Nick were all home, and you're 15 seconds away from here. You called me and said you and Reetika will come after the drywaller. No sign of anyone yet. Give us the documents we've asked for 6 months so we can see the deficiency list from the city and follow the work. For whenever reason you're refusing to grant us access and we are saying nothing will happen anymore until we have access.

Everything has gone your wall for a year. That's all we are asking. We are not stopping anyone to come work here, we are asking documents that we should have access to in the beginning. We've been mentally beaten down for a year so am sure we will survive one more day. We will be right here whenever you're ready, we are just 15 seconds away from you.

If there's no resolution to this tonight, please call Mat not to show up here tomorrow. I have 2 young kids and I don't another drama like what Nick showed in front of my young children. Thank you!

[261] There is no evidence of any further email or text communication between the parties over the next several days. Opey's evidence was that there was no communication. Roger, in his evidence, thought he may have had a phone call with Opey, although this was never put to Opey and there is nothing in any document suggesting that any such call occurred, or that any concrete steps were taken to reschedule the excavation or any other outstanding work.

[262] Reetika's evidence was that they stopped doing any work because Opey was refusing to let them do anything further. When asked why they would not share any documents with Opey about the municipality's requirements, her response was "Why would we give it to a rental?"

[263] On the afternoon of Monday, June 28, 2021, a lawyer (Mr. Mildenberger) sent an email to Opey and Faye, advising that he had been retained by Industrial, and saying:

The Contract of Purchase and Sale provided for a deposit of \$25,000 and monthly payments of \$3,560. I am advised that you paid half of the deposit and the monthly payments you paid were only \$2,300. By allowing the contract to continue my client agrees that it has waived the lateness of the remainder of the deposit. Similarly with the monthly payments. The actual payments received will be used to calculate the outstanding balance owing if you do decide to carry on with the purchase. The completion date was to

June 30, 2021 or ten months after contract is signed. The acceptance is dated August 26, 2020 so by that provision would have made the completion June 26, 2021. The latter of the two possible completion dates is June 30. In your letter you seem to indicate that you are unwilling or unable to complete the purchase. You have not provided a transfer form or statement of adjustments for my client to sign. You seem to indicate that you do not intend to complete by my client remains ready, willing and able to fulfill its obligation under the contract. If you do not complete the purchase by June 30, 2021 my clients will accept that act as a repudiation of the contract and will treat the contract as if it is at an end, retaining the deposit.

You also say in your letter that you do not intend to pay any further monthly payments. My client is not clear whether this means you intend to complete the purchase or to vacate the property on June 30. That is the end of the fixed term portion of the tenancy agreement. The tenancy carries on month to month after this date and you will be required to pay the rent on or before the first day of each month. If the rent is not paid my client will issue a ten-day termination and apply for an order of possession. Please let me know what your intentions are for your tenancy.

I am aware of the more recent exchanges between you and my instructing clients involving access to the property by tradespeople and equipment. My clients were attempting to have excavation performed so that the foundation would be visible for inspection by an engineer. My client will hold you responsible if any consequences flow from your denial of access for this critical work.

He recommended that the Adeyemis obtain legal advice.

[264] Both Reetika and Roger said they did not agree with some of what was said in this email. They disputed the assertion that monthly payments would be “used to calculate the outstanding balance owing”. They agreed that Mr. Mildenberger was a litigation lawyer and not a conveyancing lawyer, and was not retained to effect a transfer of title.

[265] About an hour after receiving the email from Mr. Mildenberger, Opey replied to it. In his email, he advised that they had a lawyer. He went on to suggest that Mr. Mildenberger did not have full information, and suggested that he ask his clients some questions, including:

- a) about whether there was a “fake rental agreement” for reasons related to “Trevor”;

- b) about “why did our mortgage not go through in December and January”;
and
- c) whether Mr. Mildenberger was aware that the Adeyemis had been “living in the house since last June without knowing that this house has no occupancy or final inspection from the municipality of North Cowichan.”

Opey concluded the email by saying:

We have never ever said we will not purchase or not willing to proceed. Your clients are the one using different tactics of frustrating us to walk away and loose our money, lost out on so many home sales in the area while they playing games. THAT WILL NOT HAPPEN!

He also advised that their lawyer “will be in touch”.

[266] Opey also reached out to Mr. Lin of the Bank of Montreal, who had processed the mortgage application in February. At 6:16 p.m. on June 28, Mr. Lin emailed him with a list of updated information he required. At 11:29 p.m., Opey emailed Mr. Lin with the documents he was seeking, and said:

We can provide a very detailed explanation to the bank if needed. We had all intention to move into the town house, we were very disappointed, sad and frustrated in January when we found out the house we are living in and planning to buy didn't have final occupancy from the city of north Cowichan and the builder wasn't ready to do it then, that's why we went searching for a new home. It was actually the same day we signed the mortgage documents at the lawyer, we told a coworker what we just did because we've been very private with everything and he advised us to fight for the house and not give up because we have a valid purchase agreement signed from August 2020. He also advised us to get a lawyer which we did and am glad we listened to him because that's why we are able to finalize it now. We were told not to move out of the house because it will be difficult to get our deposit back plus the market value of the house has increased significantly to over \$1.3 million so we have way more to gain than lose and our purchase price is \$845,000 plus GST. We told the people we bought the townhouse from about our situation and they decided to rent the townhouse from us because their new house is still under construction and they were planning to move to their parents house so they're renting month to month for \$2,000 monthly hence the reason we don't have a written rental agreement but they've been doing e-Transfers to our BMO chequing account monthly. We can also get them to sign a rental agreement if necessary.

We learnt our lesson the last time, it is very stressful dealing with 2 banks at the same time for a mortgage so we are not making that mistake again

NEVER AGAIN! BMO, you and [Ms. Wang] have ben so great and super professional and as you can see we are transitioning our investments and banking to BMO and we want to continue the relationship. So, to make it clear Spock, WE WILL NOT notify HSBC about this application because they will be all over us again. We sincerely value your time and work and want to work with only you and BMO.

[267] Opey's explanation for this email was that when he contacted the bank just prior to this email, he learned that the bank was going to treat the new mortgage application as a commercial application, for which a higher rate would be charged. He spoke with a friend who also worked for the bank, and learned that it would be important that the bank be willing to treat the Property as their primary residence in order to get the best possible rate.

[268] Opey's evidence was that they never actually intended to move to the Somenos townhouse – it was always too small for their growing family. However, he had to have an explanation as to why there were two properties that were mortgaged as if they were primary residences.

[269] Faye was asked about this email. She did not recall seeing it. With respect to the statement about having an intention to move into the townhouse, she was adamant that she never had any intention of moving out of the Property. She confirmed that it was January when she first learned that there was no occupancy permit.

[270] Opey and Mr. Lin exchanged further emails on the evening of June 29, 2021, with Mr. Lin asking about arrangements for an appraisal.

[271] By June 30, neither Roger nor Reetika had taken any steps to schedule an excavator or a visit by Mr. Tougas; nor were there any plans in place to address any of the outstanding deficiencies.

[272] Neither of the parties took any steps on June 30, 2021, to complete the transaction. In particular, it seems clear that:

- a) Industrial did not hire a conveyancing solicitor, did not have an occupancy permit for the Property and had no pending steps in place to obtain one, it was not in a position to provide a full new home warranty, and did not obtain a payout statement for the mortgage that was on title; and
- b) The Adeyemis did not hire a conveyancing solicitor, nor had they finalized any arrangements for financing, nor did they have funds in place to purchase the Property without financing, nor had they prepared a Form A Transfer or Statement of Adjustments.

[273] Whether and to what extent the deficiencies listed in the CPS had been dealt with was a matter of dispute at trial. It was clear that at least some of them remained outstanding.

[274] This action was commenced by the plaintiffs on June 30, 2021, seeking specific performance of the CPS. Having commenced this action, the plaintiffs registered a Certificate of Pending Litigation.

Events after June 30, 2021

[275] The 2021 property taxes for the Property were \$7,453, which were due on July 2, 2021. Industrial paid those taxes. The Adeyemis did not contribute to this payment, nor did Industrial ask them to. Industrial would have received the Property Tax Notice in May or June 2021, which included information as to the 2021 assessed value.

[276] The Adeyemis reconsidered their position with respect to payment of the monthly \$2,500 amounts. Near the end of July 2021, three payments of \$2,500 each were sent by e-Transfer to Roger. The first was deposited on July 27, 2021, with a message of “June”; a second was deposited on July 29, 2021, with a message of “July Payment up to date”; and a third was deposited on August 2, 2021, The Adeyemis thereafter continued to make those monthly payments for an extended period of time.

[277] In October 2021, the person from whom the Adeyemis purchased the townhouse moved out. They then rented it out to a new tenant who remained there at the time of trial.

[278] In November 2021, Opey was appointed as General Sales Manager of a Hyundai dealership in Mississauga, Ontario. His evidence is that at the time, he was the only one in the family working and had to take opportunities that were available to him to move up within his career. He says he continued with the position in Mississauga for just over six months, then obtained a similar sales position at a dealership in Nanaimo which was within commuting distance of the Property. He said that while working in Mississauga, he returned home to Duncan every long weekend to spend time with his family.

[279] On February 25, 2022, a Notice of Trial was filed scheduling a trial of this matter for five days beginning May 8, 2023.

[280] In early 2022, BC Housing gave notice to Industrial that its Residential Builder Licence had not been renewed. According to the email providing notice, this meant that:

... you are prohibited from conducting business as a residential builder or holding yourself out as a “Licensed Residential Builder” as per section 14 of the Homeowner Protect Act. This prohibition includes continuing work on unfinished homes or selling new homes built under this license.

If you still wish to renew your license, you have a 30-day extension in which to ...

[281] Reetika said that she was unable to complete the necessary CPD credits to renew the license, and that in any event, she and Roger had decided not to proceed with building a house on the remaining vacant lot that they owned.

[282] The 2022 property taxes for the Property were \$7,796, which were due on July 4, 2022. Industrial paid those taxes. The Adeyemis were not asked to and did not contribute to this payment. The Property Tax Notice shows that the 2022 assessed value (which is based on property value as of July 2021) was \$1,303,000

– up from \$970,000 the previous year. Roger says that he “may have noticed” the increase in assessed value.

[283] Industrial received a formal letter from BC Housing dated July 14, 2022, confirming that its residential builder licence had been suspended, and that:

Without a valid Residential Builder License, a person is not permitted to carry on the business of a residential builder. You may not engage in, arrange for or manage the construction of a new home, advertise or imply that you are a Licensed Residential Builder, or sell or offer to sell your interest in a new home. This includes any new home for which a building permit has already been obtained or construction started but is not yet complete or sold.

[284] On December 30, 2022, Industrial issued a notice to the Adeyemis using a standard RTB form, giving a two-month notice to end a tenancy for purposes of landlord use of the Property. Reetika said that this notice was issued because the Adeyemis had not purchased the house and they were renters, and because her son wanted to move into the house. The Adeyemis disputed this notice.

[285] Beginning in February 2023, the Adeyemis ceased making the \$2,500 monthly payment that they had been making to Industrial. They did not resume those payments until June 2024 (as set out below).

[286] In February and March 2023, the May 2023 trial date that had been scheduled was adjourned, and a new Notice of Trial was filed scheduling the trial for eight days beginning September 3, 2024.

[287] In May 2023, Opey became General Manager of a Chrysler dealership in Wetaskiwin, Alberta. He began commuting to and from Wetaskiwin, while Faye and the children continued living at the Property. Opey’s evidence was that he would return to Duncan regularly to visit his family. He said that he tried to do so twice a month, although he was overseeing a large business with over 60 employees, and periodically had to cancel his travel plans.

[288] On May 31, 2023, Industrial issued a second RTB notice – this one seeking to end a tenancy for cause based on failure to pay rent. A dispute resolution hearing was scheduled for October 12, 2023.

[289] The 2023 property taxes for the Property were \$7,625, which were due in July 2023. Industrial paid those taxes. The Adeyemis were not asked to and did not contribute to this payment. The Property Tax Notice shows that the 2023 assessed value (which is based on property value as of July 2022) was \$1,463,000 – up from \$1,303,000 the previous year. Roger did not recall if he noticed the 2023 assessed value.

[290] On October 12, 2023, a hearing at the RTB was attended by counsel for both parties. The arbitrator concluded that:

Based on the undisputed evidence that the named parties are presently before the Supreme Court with regard to the matters at issue here, I have determined that the issues in the applicant's application are excluded from further consideration under the Act.

[291] On January 16, 2024, the municipality recorded that:

Retika Kapila called the office today to ask if their occupancy could be revoked to help them to evict the tenants that are in the home. Their lawyer suggested that if occupancy of the building is not permitted this could help the owners with the eviction.

[292] It appeared that the municipality elected not to take any steps in this regard.

[293] On February 8, 2024, Industrial filed a Notice of Application seeking payment of the \$2,500 per month amount, as well as a declaration that Industrial have an order of possession. This application was argued before Justice Branch, who gave various directions as to filing of further material. Then, on May 2, 2024, Industrial filed a Petition commencing Victoria action No. S246513. In that proceeding, Industrial sought an order for payment of occupation rent of \$2,500 per month until either trial of the present action or until the property is vacated, as well as an order for possession of the Property.

[294] Both the February Notice of Application and the May Petition came on before Justice Branch on May 31, 2024, who pronounced a consent order that:

BY CONSENT, the Petition Respondents, Opeyemi Adeyemi and Faye Adeyemi, within 14 days of the date of this order pay to the Petitioner the sum of \$40,000.00 in respect of their occupation of the subject premises from March 2023 to June 2024 inclusive.

BY CONSENT, the Petition Respondents, Opeyemi Adeyemi and Faye Adeyemi, pay to the Petitioner the sum of \$2,500.00 per month commencing July 1, 2024, and on the first of every month thereafter in respect of their occupation of the subject premises until the date of trial.

BY CONSENT, provided that the above noted payments are made, the Petitioner not seek a further order of possession based on non-payment concerning the occupation of the premises to date.

BY CONSENT, in the event that the Petition Respondents are successful at trial in their claim for specific performance of the Contract such that they are and were entitled to ownership of the Property effective on the Completion date set out therein, this order is without prejudice to the trial judge's ability to credit the funds paid by the Petition Respondents to the Petitioner as ordered herein against the funds otherwise owing for their purchase of the Property.

BY CONSENT, the balance of the relief sought in the Petition be adjourned generally.

[295] The Adeyemis then provided a bank draft to Industrial for \$40,000, and recommenced making the monthly payments.

[296] The 2024 property taxes for the Property were \$8,137, which were due on July 2, 2024. Industrial paid those taxes. The Adeyemis were not asked to and did not contribute to this payment. The Property Tax Notice shows that the 2024 assessed value was \$1,443,000.

The Trial

[297] The trial began on Tuesday, September 3, 2024. Over the course of the first week of trial, Opey gave his evidence and was cross-examined, and Faye began her examination-in-chief.

[298] Over the course of the weekend that followed, both parties discovered new documents which were exchanged between counsel. When the trial resumed on the Monday morning, counsel were agreed that the trial would have to be adjourned so

that each party could assess the new documents. A continuation was scheduled for seven days commencing December 9, 2024.

[299] Counsel for the plaintiffs subsequently withdrew. On November 25, 2024, I granted the plaintiffs' application to adjourn the trial date. They retained new counsel in January 2025, and at a judicial management conference on January 24, 2025, I directed that the trial be scheduled for a further seven days when the parties were available. It was then scheduled for 10 days beginning in April 2025; however, that trial date was adjourned to provide further time to obtain documents from financial institutions.

[300] During this break, the defendants obtained what was styled as a rebuttal appraisal report as well as an opportunity for Reetika to view the interior of the house. Reetika took photographs which show that the interior of the Property has been subject to what I would characterize as typical wear and tear arising from being lived in for several years by a family with small children (the Adeyemis, by the time of trial, had four children).

[301] Ultimately, the trial went ahead for 10 further days starting January 19, 2026. All of the evidence was completed at that time. At the conclusion of those days, I gave directions for written submissions and a further partial-day hearing was scheduled for March 17, 2026, to permit each of the parties to respond to the other's submissions.

Expert Evidence

Contractor Evidence

[302] In June 2004, the plaintiffs retained John Andersen to prepare an expert report with respect to deficiencies in the Property. Mr. Andersen performed two inspections of the house: the first on May 21, 2024, during which he viewed the house along with one of the plaintiffs, and the second on June 3, 2024, when he attended the house along with an electrician and an HVAC contractor. Mr. Andersen

also visited the relevant municipal building department to seek information with respect to the reasons why an occupancy permit had not been issued.

[303] Mr. Andersen completed his red seal carpenter's certification in 2010 and has worked in the construction industry ever since. He has worked as a tradesman and as a general contractor, including running his own business. Although the defendants challenged his qualifications, I accepted that Mr. Andersen is qualified as a carpenter and general contractor.

[304] Mr. Andersen confirmed in his evidence that he had not previously been qualified as an expert. It was clear that preparing an expert report for the court is not something he does with any regularity. His evidence was that his current business is largely focused on acting as a general contractor for home renovations. As I noted in my ruling on qualifications, his approach to the assignment in this case reflects the approach one would expect an experienced general contractor to take. He began by taking note of all of the concerns that had been identified, he went to the municipal office to try to identify any permitting issues, he conducted two inspections of the Property, and he engaged with specialty contractors in areas that were of concern but not within his specific expertise.

[305] Mr. Andersen's instructions were to do what he could without removing drywall or any other building components. His report reflects what information he was able to glean and what conclusions he was able to reach from that non-destructive form of investigation. It identifies those areas in which removal of drywall and other home components such as tiles and plumbing fixtures would be required to further investigate. It draws conclusions from descriptions provided to him by one of the plaintiffs of how some of the home systems behave during wet weather. It provided ranges of potential costs that were in most cases quite broad, which is reflective of the preliminary stage of his investigation. His estimates are, on the face of the report, in the nature of worst-case estimates reflective of the uncertainties described in the report.

[306] As I noted in my ruling on admissibility, it made sense in the circumstances of this case not to remove any building components or perform other sorts of destructive testing. Apart from the existence of a contested specific performance claim, there would be a concern about removing drywall or other building components while not in a position to fund subsequent repairs to completion. However, this clearly affected the degree of certainty with which Mr. Andersen was able to make recommendations and estimate costs.

[307] In my ruling on admissibility, I concluded after a review of *Mazur v. Lucas*, 2010 BCCA 473 at paras 36-40, that it was permissible for Mr. Andersen to have brought in an electrician and an HVAC contractor to assist him in reviewing concerns within their particular specialties, and to incorporate their recommendations into his opinion:

... the obtaining and reliance on sub-estimates from a potential subcontractor is a usual and customary part of the work of a general contractor, in much the same way that a medical doctor might obtain and rely on the opinions of medical specialists. It is part of the work of a general contractor to identify reliable subtrades, to review with them their proposed scope of work, and to ensure that it is appropriate to the project. In accordance with the principles outlined in *Mazur*, this is a situation in which it is appropriate to admit those parts of the report into evidence and consider at the conclusion of trial after hearing the submissions of the parties the appropriate weight to be given to Mr. Andersen's estimates.

[308] In terms of his observations, Mr. Andersen described leaking that appeared to be coming into the kitchen area. His report includes a photograph of the drywall patch in the kitchen ceiling, which he said shows staining from what must be presumed to be ongoing water leakage. He recommended that drywall be removed in areas where leakage has occurred. He provided a sizable cost estimate for this work (both drywall removal and plumbing system repairs), but no further details. It is clear that this is simply an order of magnitude number, based on replacing much of the plumbing in the house, that would need to be completely revisited once drywall is removed.

[309] Although his estimate for electrical work is much lower, it is similarly based on having to open up walls to perform further investigations. He acknowledged that

neither he nor the electrician he brought in observed anything out of the ordinary with the few basic tests they performed, and the need for further investigation is based on what was reported to him by the plaintiffs.

[310] With respect to the HVAC system, Mr. Andersen concluded that the furnace and heat pump are adequately sized, but expressed concern that there is restriction of airflow as a result of the installation of an AC coil directly in the supply plenum. The recommendation – which he developed in conjunction with an HVAC contractor – is to move the furnace down and built a proper plenum above it. The cost estimate for this work is \$4,500.

[311] With respect to building envelope, Mr. Andersen found signs of leakage around the structure. He expressed concern about the manner in which flashings had been installed and about the sun decks that act as the roof over the garage. He suggested that if removal of the sun decks is required, then it may give rise to a need to upgrade the substrate underneath as well as potentially address some structural damage. He suggests that all this “could cost upwards of \$100,000”.

[312] With respect to the main entry stairs, Mr. Andersen observed that the right side of the stairs has settled by about an inch, which has caused the baseplate of the railing to come detached. He expressed concern about the extent of this sagging, and suggested that there be further investigation of the cause, as well as rebuilding of the affected stairs. His cost estimate for this work is \$7,000.

[313] With respect to the roof, Mr. Andersen observed that there were no scupper grates on the scupper drains. He said that this has allowed the drains to become clogged, and found that one of them was completely clogged. He suggested that this causes water to pool and then backflow into the structure. He identified signs of water damage around the gas fireplace in the living room. He recommended installing scupper grates and then opening up the wall above the fireplace to investigate. He said that “if the fireplace or structure needs to be replaced I estimate this could cost \$10,000”.

[314] The final section of the report is headed “Cosmetic”. In it, Mr. Andersen identified concerns about windows out of square and doors out of alignment, which he suggested may indicate settling of the structure. He also expressed concern about the quality of installation of bathroom tiles, cracking in the tiles, and a lack of seal between the shower glass and the tile.

[315] He suggested that issues of doors and windows being out of square be addressed at the same time as the concrete deck issues are resolved, and that a professional tile setter be brought in after the plumbing investigation is complete to repair the various tile issues identified. He does not give a cost estimate for this work.

[316] Mr. Andersen was cross-examined on his various conclusions. He acknowledged that, other than a limited number of identified deficiencies, the building passed its final municipal building inspection. He also agreed that various documents and checklists were submitted to the municipality, including a checklist form with respect to the HVAC systems. He also acknowledged that some of his cost estimates, particularly the costs related to plumbing and building envelope systems, were worst-case estimates and could end up being a lot less once the recommended investigations were completed.

Appraisal Evidence

[317] Each party tendered an appraisal of the Property. Both reports were prepared on the assumption that any deficiencies have been corrected and that an occupancy permit has been obtained.

[318] The plaintiffs tendered the report of David Van Veen, CRA, of the Duncan, BC office of Cunningham & Rivard Appraisals Ltd. That report was prepared on June 5, 2024, and estimated the fair market value of the Property at that date as \$1,325,000. Mr. Van Veen completed a standard residential appraisal report based on analysis of four comparable sales (from January to May 2024) plus two current listings.

[319] The defendants tendered what was titled a “Responding Report”, but in fact was more in the nature of an independent appraisal report, prepared in a narrative format by Liam Fast, AACI, P.App, of D.R. Coell & Associates’ Victoria, BC office. The report was prepared on December 8, 2025, and estimated the fair market value of the Property as of November 27, 2025, to be \$1,210,000. Mr. Fast relied on three comparable sales in April and May of 2025.

Reliability and Credibility

[320] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, [1995] OJ No 639, 22 OR (3d) 514 (CA) at para 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness’s sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness’s testimony. The accuracy of a witness’s testimony involves considerations of the witness’s ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness’s veracity, one speaks of the witness’s credibility. When one is concerned with the accuracy of a witness’s testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[321] In considering both credibility and reliability, the evidence of a witness must be assessed for “its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”: *Faryna v. Chorny*, [1952] 2 DLR 354, [1951] BCJ No 152 at 357 (CA).

[322] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness’ evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para 186, aff’d 2012 BCCA 296. It includes:

- a) the ability and opportunity of the witness to observe events;
- b) the firmness of their memory;

- c) their ability to resist the influence of interest to modify their recollection;
- d) whether their evidence harmonizes with independent evidence that has been accepted;
- e) whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
- f) whether their evidence seems generally unreasonable, impossible or unlikely;
- g) whether the witness has a motive to lie; and
- h) the demeanour of the witness generally.

[323] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para 28.

[324] I had no concerns with Faye's evidence. I found that she spoke from the heart with respect to her connection to the Property. She clearly explained the reasons for her attachment to the Property and its importance to her family. I accept that she had minimal involvement in the various efforts to obtain financing. Her recollection of meetings was reasonably complete considering that she was testifying as to events that were four or more years in the past. Her evidence as a whole was logical and coherent.

[325] Opey's evidence in many ways tracked that of Faye. However, as between the plaintiffs, he bore the primary responsibility for dealing with financing, and two matters related to that financing were of concern to me. The first was with respect to the late document production. I accept that the Adeyemis may not have realized prior to trial the importance that the defendants were going to attach to issues related to financing. Once that became clear, Opey was able to track down several

additional emails, and the parties cooperated in ensuring that any available documents from the banks were obtained.

[326] That said, among the emails forwarded by Opey to his counsel during the weekend after the trial started was the email to Mr. Lin of Bank of Montreal on June 28, 2021 (quoted at para 266 above), which was missing its first paragraph. The first paragraph was not relevant to the Adeyemis' capacity or efforts to secure financing; however, it was arguably relevant to the issue of whether the Property was unique for the plaintiffs. The fact that this paragraph had not been included in what was disclosed in September 2024 was uncovered when the parties subsequently obtained the bank's version of the email. I acknowledge that Opey provided an explanation – that he was focused on producing emails related to financing, given the manner in which his cross-examination had unfolded, and thought he was simply focusing his production on that issue. It would be highly unusual for someone with experience in the litigation process to produce only a part of a document without identifying a redaction. I accept that Opey may not have understood this, but it still causes me to approach his evidence with some suspicion.

[327] The second issue of concern with respect to Opey's evidence was his refusal to deal directly with questions posed in cross-examination about his emails in February, April and June 2021, as they relate to the Adeyemis' initial intent in purchasing the Somenos Road townhouse. Those emails are problematic for Opey because what they say (that there was at one point an intent to move to the townhouse) is different from his own evidence – and in particular from Faye's evidence. I accept Opey's evidence that he was able to secure better mortgage terms by submitting an application on the basis that each Property was going to be their principal residence. I also accept Faye's evidence that she did not ever agree to move to the townhouse. Given the size of their growing family, I cannot see that the townhouse was a realistic consideration for them.

[328] It is important in considering this evidence to keep in mind that the purchase agreement for the townhouse, and the initial approach to the Bank of Montreal for

financing the townhouse, both took place in the brief hiatus between the January 31 emails (in which, in response to Opey advising that he had financing in place, Nick replied that the Kapilas had to think carefully about their response) and the February 9 meeting (in which Roger offered reassurances). It is also important to consider that within days of the February 9 meeting – and before removing conditions on the townhouse purchase – the Adeyemis were looking into rental and property management arrangements for the townhouse. The townhouse itself has been rented out since completion of the townhouse purchase. Finally, it is important to note that the events of January 31 to February 9 took place in the context of a rapidly rising real estate market, in which those who were not in the market were at risk of being left behind.

[329] Opey's refusal to acknowledge the inaccuracy of the information he was providing to the bank about the family's intention to live at the townhouse was problematic. But I conclude that that is the case. It is consistent with his ongoing efforts throughout the first few months of 2021 to create competition as between HSBC and the Bank of Montreal for their business – all aimed at securing the best possible financing terms.

[330] I have much greater concerns with the evidence of Reetika and Roger.

[331] Their evidence about efforts to obtain the Schedule C-B did not hold together. I can accept that Reetika did not initially understand that a Schedule C-B was required. In my view, the existence and nature of the registered professional program would be known to anyone with experience in the construction industry. Reetika's lack of understanding leaves me suspicious as to what portion of the BC Housing training modules for registered builders Reetika actually completed personally. She acknowledged being "helped" by family members, and it seems clear that she either missed or did not fully understand this part of the training materials. While the need for a Schedule C-B from the geotechnical engineer was highlighted in the municipality's reports in May 2017, it is possible that Reetika did not appreciate the significance of this clearly expressed requirement. However, from

the June 2018 final inspection report onward, it is clear that she knew that this was a key missing requirement.

[332] Reetika's explanation of her efforts from this point onward to secure the Schedule C-B makes no sense. As noted in the above chronology, Mr. Tougas continued to be an employee of Madrone for many months after June 2018, and was available at another firm for a long time thereafter. His hiatus from work from mid-December 2019 to mid-May 2020 was a year and a half after Reetika clearly knew of the need to obtain the Schedule C-B. Like any professional engineer, Mr. Tougas' contact information was available through an internet search of the regulator. The story that he could not be found for a long period of time simply does not hold together.

[333] Once Reetika was in contact with Mr. Tougas, there is no reliable explanation as to why he was not brought in immediately to do what was required. The explanations that they had to wait for Mr. Tougas to get a license, or to write an exam, are contrary to Mr. Tougas' own evidence. It seems clear that Mr. Tougas was simply not retained to actually do anything until June 2021.

[334] The parties gave conflicting evidence with respect to the \$25,000 bank draft obtained on June 2, 2020. In my view, the explanation given by Opey is more logical. The thought that the Adeyemis would drive to Victoria and obtain a bank draft, without first checking who it should be made out to, just to show they had financial capacity does not make any sense.

[335] Similarly, I conclude that the Adeyemis' evidence as to what led to their signing a form of Residential Tenancy Agreement on June 8, 2020, is also more internally coherent and, significantly, is consistent with the texts and emails exchanged between the parties in June and August 2020. Particularly significant in this regard are the texts of August 26, 2020, relevant portions of which are emphasized when quoted above, in which Reetika herself acknowledged that "we never signed" the rental agreement (which I infer to mean both herself and Roger),

and did not contest Opey and Faye's assertions that the purpose of the rental agreement was "to get Trevor out of the way".

[336] I acknowledge that at one time, Mr. Friesen himself had raised the idea of the Adeyemis renting. However, his very next communication said that they were not interested in pursuing that idea, and I accept the logic of Opey's view that their preference was to rent at their then-home until they were in a position to buy.

[337] I conclude that the entire purpose of the Residential Tenancy Agreement was to provide Industrial with a basis to deny any commission claim that might be made, and it was Industrial that insisted it be prepared. By my calculation, even at the reduced rate that Mr. Friesen proposed in late May 2020, commission would still have been in the range of \$15,000, and that would have been a concern to the Kapilas. I accept the evidence that it was agreed that Industrial would not sign the document unless a commission claim was made. I do not believe that Roger signed the document in June 2020 – or indeed at any time in 2020. I find the circumstances of the alleged finding of a photograph of a signed document in January 2026 to be unbelievable. I also do not believe the suggestion that there was ever an intent for Reetika to provide a second signature on this document (which was offered as an explanation for the texts about the agreement not having been signed by Industrial). There was never a suggestion that she was going to sign the CPS – which was a much more significant contractual commitment for Industrial. Nor do I believe Roger's evidence that he was "just sending" Opey the email he had received from Mr. Friesen about the commission he was seeking – Roger was simply not the type to share such communications unless there was a specific purpose.

[338] There were conflicts in the evidence as to when the Adeyemis learned that the Property was missing an occupancy permit. Mr. Friesen said that he would have told them about it. It is important to note the small number of contacts Mr. Friesen had with the Adeyemis. He showed them through the Property during an open house in about January 2020, then had a brief telephone conversation with Faye in mid-May 2020, at which time he simply put them in contact with the Kapilas. I infer from

Mr. Friesen's evidence that the time he would have mentioned the occupancy permit was at the open house in January 2020.

[339] I accept the evidence of both Faye and Opey that they did not understand that an occupancy permit was required and was missing. I do not see that as necessarily being inconsistent with Mr. Friesen having mentioned something about it during the open house. Mr. Friesen at that time would have been trying to put a positive light on things, and at most listed it as one of the things that would be taken care of before completion (like the obvious deficiencies that were such a concern to him). All this should also be considered in light of the Adeyemis' lack of experience in dealing with real estate. I believe Opey's evidence that, until he started to do research in January 2021, he did not know that occupancy permits "were a thing". To the extent anything was said about an occupancy permit in January 2020, the Adeyemis did not understand its significance.

[340] I do not believe the evidence of Reetika or Roger that they brought up the lack of an occupancy permit later in 2020. Their evidence on that point is inconsistent with the written communication in 2020 and 2021 as well as evidence given on discovery (as discussed above). In my view, it was not until January 2021 that the Adeyemis understood there was a need to obtain an occupancy permit.

[341] Finally, I do not believe the evidence of Roger and Reetika with respect to the April 2021 letter from Pacific Home Warranty, confirming that the Property had been sold to Roger and Reetika in 2018. Their suggestion that this was some sort of error on the part of Pacific Home Warranty is unbelievable. The alternative explanation – that they submitted documents to Pacific Home Warranty suggesting that the Property had been sold to them – makes a lot more sense. The Pacific Home Warranty letter provides that the running of the warranties had been triggered effective as of 2018. The result is that the bulk of the new home warranty (including aspects of the warranty that would cover the deficiencies that were in issue with the Adeyemis) would have expired before any claims could be made. Given that the

Kapilas had provided personal guarantees to the warranty provider, this was clearly something desirable to them.

[342] In my view, the evidence of the Kapilas was neither credible nor reliable, and where it conflicts with the evidence of the Adeyemis (and particularly that of Faye) I prefer the evidence of the Adeyemis.

Issues

[343] The positions advanced by the parties in their pleadings and submissions give rise to three primary contractual issues, plus two ancillary claims.

[344] The first issue to be determined is what are the terms of the contract, are those terms sufficiently certain to be enforceable, and is there an implied term as to provision of an occupancy permit.

[345] The second issue to be determined is whether either party was ready, willing and able to complete on June 30, 2021, and whether Industrial was in a position to terminate. If not, then what is the status of their agreement?

[346] The third issue to be determined is the appropriate remedy.

[347] The ancillary claims to be determined are the claims for misrepresentation and for breach of duty of good faith.

The Contract(s)

Positions of the Parties

Plaintiffs

[348] The plaintiffs say that there were two separate agreements reached: the first, an oral agreement to purchase the Property coupled with an oral agreement to “rent to own”, which was reached on June 2, 2020; and the second being a partly written and partly oral agreement to purchase the Property reached on August 26, 2020.

[349] The plaintiffs say that the June 2, 2020 oral agreement had the following terms:

- a) purchase price of \$845,000 plus GST;
- b) deposit of \$25,000;
- c) the plaintiffs are permitted to move in at earliest opportunity;
- d) the plaintiffs to pay \$2,300 per month, with these payments to be deducted from the purchase price;
- e) the plaintiffs to pay half of 2020 property taxes;
- f) written contract of purchase and sale to be executed within three months; and
- g) one-year closing date with efforts to close sooner.

[350] The plaintiffs says that the August 26, 2020 agreement takes the form of the written document signed that day by Roger, subject to the following subsequent variations:

- a) the monthly occupancy payment was varied from \$3,560 to \$2,500, and
- b) the amount of the deposit was varied to an initial \$12,500 payment, with a further \$12,500 to be paid once all deficiencies were rectified.

[351] The plaintiffs say that the second agreement superseded the first. They argue that the inclusion of a provision in the CPS that the monthly occupancy payments would not count against the purchase price was an error, but acknowledge that they may have to live with that provision.

[352] The plaintiffs acknowledge that the CPS does not contain an express term that an occupancy certificate be delivered prior to closing. Nonetheless, they say that there was an implied term in their agreement that Industrial would obtain an occupancy permit for the Property. They submit that given the prohibitions on occupancy of a home for which an occupancy permit has not been issued, and in light of the factual matrix in this case and the manifest intentions of the parties that

the home was being purchased to be lived in, an objective bystander would have concluded that an occupancy permit was required. The ability to legally occupy your residential premises and hence obtain mortgage financing must be seen as fundamental to the purchase of a home for residential purposes from a licensed builder. It was clearly understood by all parties at all material times that the whole point of the purchase of this home was to be a residence for the plaintiffs and their children.

[353] The plaintiffs further say that the shared intention that an occupancy permit be provided prior to completion was confirmed by the many representations made by Roger from January 2021 onward that an occupancy permit would be obtained.

Industrial

[354] Industrial says that the CPS is void for uncertainty. It argues that the CPS is not clear as to price. While s 1 may appear to be clear on its face, the plaintiffs' evidence of their understanding of s 5 of the CPS – and in particular as to whether their monthly payments are to be credited against the purchase price – creates confusion around the amount that will be owing at the time of completion.

[355] Industrial says in the alternative that, to the extent the CPS is not void for uncertainty, then it is clear that monthly payments will not operate to reduce the final purchase price due. To the extent necessary, they rely on the principle of *contra proferentem* and say that any ambiguity should be interpreted against the drafter (being the plaintiffs).

[356] Industrial says that it was not required to provide the plaintiffs with an occupancy permit. There is no express term in the contract for an occupancy permit, and Industrial relies on a presumption against adding to a contract terms that the parties have not expressed. Industrial says that there is no evidence of custom or usage or that this is a particular class or kind of contract that would mandate the implied term that is sought. Industrial says that the plaintiffs were aware that the Property had no occupancy permit, and despite that knowledge, failed to seek an express term that the occupancy permit be provided. Industrial submits that it cannot

in the circumstances be said that it was the “presumed intention” of the parties that the contract carry such a term.

[357] Industrial notes that, in one of his texts to the plaintiffs, Trevor Friesen had recommended that any contract include a “subject to financing” term and a “subject to inspection” term. Industrial says that the plaintiffs failed to contract for those subject provisions. A subject to financing term would have protected them in the event their financial institution demanded something (i.e. an occupancy permit) that they otherwise had no contractual right to, while a property inspection may well have uncovered the lack of an occupancy permit.

Legal Context

Contract Interpretation Principles and Certainty

[358] The current approach to interpreting contracts was concisely explained by Justice Rothstein in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633:

[47] ... the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba*

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.
[p. 115]

[359] With respect to surrounding circumstances, Justice Rothstein explained that:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085, 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[360] Some of these principles were recently summarized and confirmed in *Culos Development (1996) Inc. v. Baytalan*, 2025 BCCA 265 [*Culos Development*] at para 28:

- a) When interpreting a contract, the court may look to objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not to evidence of the parties' merely subjective intentions;

- b) While evidence of an agreement's factual matrix may be used to clarify the parties' objectively ascertainable intent, it may not be used "to contradict that intention or create an ambiguity where one did not previously exist"; and
- c) While evidence of surrounding circumstances will be considered in interpreting the terms of a contract, it should not be permitted to "overwhelm" the express terms of a written contractual provision, and evidence of an agreement's factual matrix ought not be relied upon to such an extent that the court ends up effectively creating a new agreement: see also *Sattva* at para. 57.

[361] The words of a contract should be understood so as to give effect to the agreement rather than to destroy it: *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al.*, 2000 NSCA 95 at para 81, leave to appeal ref'd [2000] SCCA No 526.

[362] As noted by Justice Gottardi in *Chan v. Dhaliwal*, 2025 BCSC 220 [Chan] at para 63:

[63] The test for determining whether there has been a meeting of the minds is objective. The subjective understanding of a party is irrelevant. The question is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract; it is whether a reasonable person in the situation of that party would have believed and understood that the other party was consenting to the identical term. If a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Berthin v. Berthin*, 2016 BCCA 104 at para. 46; *Panesar v. Sidhu*, 2022 BCCA 397 at para. 33; *Latif v. Nair*, 2024 BCSC 398 at para. 22.

[363] In *Argo Ventures Inc. v. Choi*, 2019 BCSC 85, Justice Shergill summarized key principles with respect to certainty of terms:

[133] The law of offer and acceptance requires that the offer be certain and unambiguous: *Private Career Training Institutions Agency v. Prana Yoga Teacher College Inc.*, 2013 BCSC 17 at paras. 42-43.

[134] Certainty will exist when the words of a contract are found by the court to be capable of being given a reasonably certain meaning: *Mitsui* at para. 82.

[135] Courts will lean heavily against finding contracts void for uncertainty: *Berthin v. Berthin*, 2016 BCCA 104 at para. 47, citing *Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399. An agreement will not fail for uncertainty simply because it may be difficult to interpret: *Mitsui* at para. 52.

[136] However, where the original contract is incomplete because the essential provisions intended to govern the contractual relationship have not been settled or agreed upon, or the contract is too general or uncertain to be valid in itself, the contract can be found to be unenforceable: *Berthin* at para. 48 citing *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 19 D.L.R. (4th) 97 (Ont. C.A.) at 103-104.

[364] The essential terms of a contract for the sale of land are, generally speaking, the parties, the property and the price: *McKenzie v. Walsh* (1920), 61 SCR 312; applied in *Hanley v. Bradley*, 1993 CanLII 1404, [1993] BCJ. No 1750 (SC).

Implied Terms

[365] The leading statement of principle with respect to the implication of terms in contracts is Justice Iacobucci's judgment in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619, 1999 CanLII 677. That case involved a construction tender in which there was a generally worded privilege clause, saying that the lowest tender would not necessarily be accepted. The owner accepted a non-compliant tender. At paras 27-30, Justice Iacobucci noted that:

[27] ... The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.

[28] While in the case of a contract arising in the context of a standardized tendering process there may be substantial overlap involving custom or usage, the requirements of the tendering process, and the presumed intentions of the party, I conclude that, in the circumstances of the present case, it is appropriate to find an implied term according to the presumed intentions of the parties.

[29] As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be

careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[30] In this respect, I find it difficult to accept that the appellant, or any of the other contractors, would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted. However, I find no support for the proposition that, in the face of a privilege clause such as the one at issue in this case, the lowest compliant tender was to be accepted. ...

[366] The officious bystander test was considered in some depth by Justice Pardu in *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514 at paras 31-36:

[31] The officious bystander test was most famously articulated in *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206 at 227, [1939] 2 All E.R. 113 at 124 (C.A.):

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. Thus, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course."

[32] The business efficacy test in its modern form originated in *The Moorcock* (1889) 14 P.D. 64, [1886-90] All E.R. Rep. 530 (C.A.) at 68:

In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties...

[33] *The Moorcock* concerned a contract between a wharf operator and a ship owner; the court implied a warranty that the ship could be safely moored at the wharf with "the object of giving to the transaction such efficacy as both parties must have intended" (p. 68, 70).

[34] The business efficacy test was reviewed more recently by the Privy Council in *Attorney General of Belize v. Belize Telecom Ltd.*, [2009] UKPC 10, [2009] 2 All E.R. 1127, at para. 22:

Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background,

one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. ...

[35] Implication of a contractual term does not require a finding that a party actually thought about a term or expressly agreed to it. Often terms are implied to fill gaps to which the parties did not turn their minds (*Belize Telecom*, para. 31).

[36] On the other hand, a court will not imply a term that contradicts the express language of the contract, or is unreasonable: *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.* (1984), 43 O.R. (2d) 401 (C.A.).

[367] With respect to the question of reasonableness, Justice Pardu noted the comments in John D. McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012), at 781:

Thus, it is plainly the case that the implied terms must themselves be reasonable. One would not expect a court to imply terms into an agreement that it considered to be unreasonable. Further, keeping in mind that the implied in fact term rests on the presumed intentions of the parties, courts quite understandably presume intentions of the parties that are reasonable. In other words, in attributing to the parties hypothetical intentions as to what they would have agreed to if the matter had been raised at the time of contracting, courts assume that the parties would behave reasonably and would agree to a reasonable term. Indeed, in the absence of actual but unexpressed intentions it is inescapable that courts would apply a reasonable intentions standard. In other words, although necessity appears to be the threshold that must be met before engaging in the exercise of implying the term, the formulation of the term to be implied is very much an exercise that rests on a concept of reasonableness. At the same time, however, the implied term is tailored to the needs of the actual transaction of the actual parties rather than to some hypothetical reasonable transaction; accordingly, to the extent that relevant actual intentions of the parties are manifest in the transaction, they must form a basis for the implied term.

[368] Justice Pardu then went on to note that:

[44] The court's warning in *M.J. B. Enterprises* about the need to be "careful not to slide into the intentions of reasonable parties," mandated an analysis rooted in the actual relationship between the parties and the specific contractual context, rather than a detour into an abstract analysis of what in general, a reasonable person might have agreed. In *M.J.B. Enterprises* itself the court went on to assess the reasonableness of the proposed implied term in the specific context, but also relied on the general reasonableness of such a term, saying, at para. 30, "...I find it difficult to accept that the appellant, or

any of the other contractors, would have submitted a tender unless it was understood by all that only a compliant tender would be accepted.”

[369] The need to be cautious in adding implied terms to a contract was emphasized by Lord Wright in *Luxor (Eastbourne) Ltd v Cooper*, [1941] 1 All ER 33 (HL) at p 52-53, in a passage cited by Justice Finch (as he then was) in *Olympic Industries Inc. v. McNeill* (1993), 86 BCLR (2d) 273, [1993] BCJ No 2565 (CA) at para 25:

.... There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the party should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts.

[370] While I was referred to no authority specifically finding an implied term to provide an occupancy certificate, I was referred to *Tabata v. McWilliams*, 1982 CanLII 2159, 40 OR (2d) 158 (CA), in which a lawyer who had acted for the purchasers of a home was found negligent in failing to advise the purchasers that an occupancy permit was required. A part of the house collapsed after completion, as a result of defects that would have been uncovered if the municipal inspection necessary to obtain the occupancy permit had been carried out. The lawyer had sent a due diligence letter to the municipality and had been advised that an occupancy permit was required, but did not communicate this to their clients. Justice Arnup commented that:

In the particular circumstances of this case, we think it was both reasonably foreseeable and within the reasonable contemplation of the parties that if the defendant had done what he should have done when he learned that an

occupancy permit was required and had never been obtained, the defects in the construction in all probability would have been ascertained. The plaintiff would then have had a right to refuse to close or to require an occupancy permit to be obtained by the vendors, in which case the defects in all probability would have been required to be fixed before the permit was issued. ...

[371] My attention was drawn to *Dhanesar v. Pandher*, 2026 BCCA 63, in which a contract for the purchase and sale of a house to be constructed on bare land strata property required the vendor to provide the purchaser, prior to completion, with either an unconditional occupancy certificate or satisfactory evidence that construction was complete. The respondent failed to deliver an occupancy certificate. The trial judge focused on whether the purchaser had exercised in good faith its discretion to determine the acceptability of the other “satisfactory evidence”. The Court of Appeal found errors in the manner in which the trial judge had assessed the purchaser’s exercise of her contractual ability to decide whether she had other “satisfactory evidence”. Given that there was an express provision in the contract in *Dhanesar* dealing with completion of construction, I do not see this case as being particularly helpful.

Analysis

[372] While I accept that the elements of an agreement for the purchase and sale of the Property were all been present in June 2020, prior to the plaintiffs moving in, I agree with the plaintiffs’ position that the written CPS effectively superseded the parties’ prior arrangement. In my view, their contractual rights effectively merged into the CPS and this case will revolve around the proper interpretation of the CPS.

[373] In most real estate cases in British Columbia, the dispute turns on standard form real estate contract wording developed by the various real estate boards and the Canadian Bar Association, BC Branch. The differences are on stark display in this case, as the CPS was drafted by Opey based on a precedent he found online, while the agreement by which the Adeyemis purchased the Somenos Road townhouse uses a typical standard form. Among the clauses in the latter form that are not found in the CPS are:

- a) provisions for completion, which specify that “the sale will be completed on ... at the appropriate Land Title Office” (s 4 of the Somenos Road contract), with “All documents required to give effect to this Contract [to] be delivered in registrable form where necessary” (s 11); and
- b) a “Time of the Essence” clause, which states:

11. Time: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as entered into on or before the Completion Date, the Seller may, at the Seller’s option, terminate this Contract ...

[374] While the CPS in this case does not take the form of a standard form contract, that does not mean it is uncertain or otherwise unenforceable. It clearly identifies the parties to the agreement, the property, and the purchase price. It sets out various express terms and conditions to the sale, including:

- a) provision of a new home warranty in accordance with the *HPA*;
- b) correction of various listed deficiencies; and
- c) a requirement to provide clear title (with listed exceptions) upon completion.

[375] I will deal first with the issues of certainty that arose. As noted above, the alleged uncertainty relates to the purchase price – specifically, the plaintiffs’ oral evidence of what they understood to be the purchase price (with a credit for the total of the monthly payments made), which differs from the written terms of the CPS.

[376] In my view, the terms of the written document are clear. The payments that are made are, pursuant to s 5 of the CPS, “not included in house price”. The plaintiffs did not advance any interpretation of the language of that section that would provide for the monthly payments to be applied against the purchase price. They also acknowledged that they may have to live with the results, even though they thought the deal was otherwise.

[377] Neither party advanced a claim for rectification. In my view, the wording of s 5 is clear, and the monthly payments do not reduce the house price. In light of that conclusion, Industrial's argument as to uncertainty falls away.

[378] The plaintiffs advanced a claim that the monthly rental payments made prior to the signing of the CPS should count against the purchase price. I do not accept that assertion. The purchase price agreed to in the CPS as of August 26, 2020, is agreed to after those first three payments. Given that the parties' rights merged into that written agreement, there is no room for argument that the actual purchase price had been reduced at the time of the written agreement.

[379] I note that there is one other potential issue as to certainty – that is the wording of s 4 with respect to closing date, which provides that the parties have agreed to completion “on or before June 30th 2021 or 10 months from when the contract is signed”. Ten months from signing of the contract would be June 26, 2021. Neither party argued that this was uncertain, and it is clear that Industrial took the position in Mr. Mildenberger's letter (from which it has never resiled) that the later of these two dates should be used.

[380] I turn to the question of implied term.

[381] The plaintiffs tendered in evidence the District of North Cowichan's Bylaw 3172 (Building Bylaw). The version tendered as Exhibit 10 was current to December 4, 2020 (having been most recently amended in August 2020). The version tendered as Exhibit 11 was current to October 31, 2025 (most recently amended in September 2025). The wording quoted below is unchanged as between the two versions.

[382] Section 14 imposes duties upon the owner of a building, including to ensure that construction complies with the BC Building Code as well as Bylaw 3172 (s 14(2)). As well, s 14(4)(b) requires that an owner must

before occupying a building ... obtain an occupancy certificate from the Building Inspector ...

[383] Section 16 provides that:

- (1) No person may occupy a building or structure, or part of a building or structure, until the Building Inspector issues an occupancy permit in the form prescribed by the Building Inspector.
- (2) An occupancy permit must not be issued unless
 - (a) all required letters of assurance have been submitted, or
 - (b) all aspects of the work requiring inspection and acceptance under section 15(4) have been inspected and accepted. ...

[384] Section 20 provides that:

- (1) A person who violates a provision of this Bylaw is guilty of an offence and liable on conviction to
 - (a) a fine not exceeding \$10 000 plus the cost of prosecution, or
 - (b) imprisonment for at most 6 months.
- (2) A separate offence is considered to be committed on each day during which a violation continues.

[385] The CPS relates to the purchase and sale of a residential property. It was at all times intended that the Adeyemis would occupy the property. That was the fundamental purpose of the contract. This is not a case in which the agreement is for a property under construction, which contemplates that the purchaser would take over the construction process and complete it.

[386] I note what I view as somewhat comparable circumstances in which the court will imply terms as to fitness for purpose. One such example is the implied warranty of habitability: see *Strata Plan NW 2294 (Owners) v. Oak Tree Construction Inc.* (1994), 93 BCLR (2d) 50, 1994 CanLII 1236 (CA) at para 4. I do not suggest that the implied warranty of habitability applies in the circumstances of this case (it generally arises in the case of a contract for a home to be built or completed after the contract is signed). It is also important to note that it is sufficiently well established that it has become a warranty implied by law, and not one that exists by virtue of the “officious bystander” test.

[387] The *Sale of Goods Act*, RSBC 1996, c 410, which has its roots in a codification of the pre-1893 common law, contains various warranties as to

reasonable fitness for a purpose, where a purpose is communicated as part of the transaction: s 18(a).

[388] I reference these not because either of them directly applies, but because they reflect an expectation that is inherent in many aspects of the common law that those who buy property for a specific purpose may, in appropriate circumstances, have reasonable expectations that the property will be usable for such purposes.

[389] In this case, anyone occupying the Property as it currently stands, without an occupancy permit, faces fines of \$10,000 per day and imprisonment for up to six months. As well, it is clear that the manifest intention of the CPS was that the plaintiffs were purchasing a completed home that was ready for them to live in with their children – it was not intended as a construction project to be completed. The plaintiffs are not builders – they are individuals who at the time of the CPS were buying their first home from a licensed residential builder. In addition, I conclude on the evidence that the Adeyemis did not appreciate until several months after the CPS that there was an issue with respect to the lack of an occupancy permit. In all of these circumstances, I agree that an objective bystander would have concluded that there was an implied term in the CPS requiring Industrial to obtain an occupancy permit. I agree that the ability to legally occupy your own home is fundamental in the circumstances of this case.

[390] While not fundamental to my conclusion, I would note one other significant factor in this case. The issues with the occupancy permit lie not with some technicality, but rather with a failure to take the required steps to ensure that geotechnical issues are properly addressed in connection with an area designated as “hazard lands” due to steep slopes. The Geo-Hazard Assessment report approved construction on hazard lands on the assumption that certain steps are taken. The City required an engineer’s verification that those safety-related steps were taken. That engineer’s verification is deemed by the City to be fundamental to its approval of occupancy. I see the safety-related nature of the occupancy permit

issues in this case as further supporting my view that an objective bystander would have concluded that an implied term was required.

Ready, Willing and Able**Positions of the Parties*****Plaintiffs***

[391] The plaintiffs submit that neither party was in a position to complete the CPS on June 30, 2021. As a result, either party was entitled to reset a closing date upon reasonable notice to the other after curing their own default. The plaintiffs further submit that in the absence of a time of the essence clause, Industrial was not in a position in any event to demand strict compliance with the June 30, 2021 deadline.

[392] The plaintiffs say that Industrial was in default as a result of its failures to:

- a) obtain an occupancy certificate;
- b) be in a position to provide a warranty in accordance with the CPS (and in particular, one that had not already largely expired);
- c) complete the repairs listed in the contract; and
- d) be in a position to provide title clear of its existing mortgage.

[393] The plaintiffs say that they were under no obligation to close until these matters were dealt with. In addition, with respect to these alleged breaches:

- a) Although Industrial repeatedly represented to the plaintiffs that it was working on getting the occupancy permit, it was not in fact doing so and did not make anything more than token efforts between the time of the final inspection in June 2018 and the bringing in of the excavator on June 22, 2021. The plaintiffs were entitled to an occupancy permit. Because Industrial refused to sign an authorization, the plaintiffs had no ability to communicate with the municipality, and the pursuit of an occupancy permit (not to mention all information related thereto) was

entirely within the control of Industrial. The plaintiffs say that the entire story about Mr. Tougas being unavailable (other than for a few brief months) or needing to write an exam was fabricated. The only reason no steps were taken until the very last minute was that Industrial did not retain Mr. Tougas to do anything until the very last minute.

- b) With respect to the new home warranty, the plaintiffs say that Industrial put it out of its power in either April or June 2021 to provide the contracted-for warranty when it informed Pacific Home Warranty that the property had been transferred to the Kapilas as purchasers in 2018, which triggered the running of the warranty from August 1, 2018. The result of this was that the bulk of the warranty (including the aspects of the warranty that would have covered the deficiencies that had been identified and required repair) had expired by late June 2021. The plaintiffs say that the Kapilas' explanation that this was simply an error on the part of Pacific Home Warranty is again without any basis in fact and simply unbelievable. Whether they could have taken any steps to unwind the passing of the warranty was unknown because they never attempted to do so.
- c) With respect to the home deficiencies referenced in the CPS as requiring repair before completion, the plaintiffs say that (i) these repairs were not completed, and (ii) they are described in the CPS as being conditions, which means their completion was required before completion could be demanded.

[394] The plaintiffs say that the defendants' inability to complete cannot be laid at the feet of the plaintiffs. The plaintiffs had no control over the new home warranty, did not deny workers access to the Property to enable the plaintiffs to obtain an occupancy certificate, were not responsible for arranging payout of the mortgage registered against title, and were not responsible for remedying the deficiencies.

[395] The plaintiffs say that their email of May 24, 2021, affirmed their desire to complete the transaction and sought good faith disclosure of efforts to obtain the

occupancy permit. At no point did they indicate a desire to walk away from the deal. Rather, that email was aimed at compelling Industrial to comply with its obligations. The plaintiffs say that it is telling that there was no response to this email until the June 28, 2021 email from Mr. Mildenberger.

[396] The plaintiffs submit that Industrial repudiated the contract by:

- a) the email of June 28, 2021, from Mr. Mildenberger, demanding that the transaction complete despite Industrial's breaches; and
- b) its Response to Civil Claim, purporting to accept a repudiation by the purchasers when none had occurred, and asserting that the CPS was at an end.

[397] The plaintiff says that they have affirmed the contract through their filing of the Notice of Civil Claim on June 30, 2021, and by advancing their claim of specific performance continuously since that time.

[398] With respect to Industrial's argument that only a fundamental breach by a vendor would allow a purchaser to delay completion, the plaintiffs argue that:

First, the distinction between a warranty or condition is irrelevant here as the plaintiffs are not arguing that the defendants' breach entitled the plaintiffs to treat the contract as over. What the plaintiffs have always done is affirm the contract and require the vendor to complete. Where the vendor is in breach of a non-fundamental condition (a warranty) or a condition the purchaser is entitled to delay closing until that condition is satisfied. The breach that delays closing does not need to be fundamental.

[399] The plaintiffs rely with respect to this on the judgment in *Chan*, which is discussed below under "Legal Context". They say that in this case, Industrial was in breach of the CPS, had not cured its own default, and thus even if time had been of the essence, was in no position either to demand strict compliance with a deadline or even to set a new deadline for completion.

Industrial

[400] Industrial says that the plaintiffs were not ready, willing and able to complete on June 30, 2021, because they were in “essential default”. Industrial says that the plaintiffs breached the CPS by failing on the closing date of June 30, 2021 to:

- a) pay the purchase price;
- b) prepare a Form A transfer for Industrial’s signature; and
- c) otherwise take steps to convey the Property.

[401] Industrial also says that the plaintiffs breached the CPS by failing to:

- a) pay the full deposit of \$25,000;
- b) make monthly payments on time, specifically by making late payments for June and July 2021 and from March 2023 to June 2024;
- c) pay half of the property tax for the years 2021 through 2025;
- d) reasonably maintain the Property from when the CPS was signed; and
- e) pay all utilities from the date the CPS was signed.

[402] I note that some of these reflect allegations of default after June 30, 2021. For purposes of analysis, I will consider those in the context of remedy since they were not in existence as of the time that Industrial says the contract came to an end.

[403] Industrial says that the plaintiffs’ failure to pay the \$2,500 amounts for June and July 2021 on time, after having evinced an intention to that effect in their May 24, 2021 letter, constituted a repudiation of the CPS. Industrial also says that the plaintiffs did not have mortgage funding in place as of June 30, 2021, and were incapable of purchasing the Property. Industrial says that these failures, combined with their failure to tender payment of the purchase price or provide a transfer form on June 30, 2021, were all acts of repudiation. Industrial says that it accepted this repudiation and that is the end of the matter.

[404] Industrial acknowledges that its lawyer's email of June 28, 2021, reflected a waiver of the failure to pay the full \$25,000 deposit and to pay less than the \$3,460 monthly payment, which were the amounts reflected in the CPS. However, Industrial said that those waivers were conditional on the plaintiffs completing the contract on June 30, 2021.

[405] Industrial disputes the plaintiffs' submission that it (Industrial) was not ready, willing and able to complete on June 30, 2021. Industrial says that the lawyer's email of June 28, 2021, was a "tender" that made clear they were ready to complete, and that Industrial was ready to do what it was legally required to do to perform the CPS.

[406] Industrial says that it was only the plaintiffs who were not ready, willing and able to complete. Industrial says the Court should infer that the plaintiffs, in June 2021, intended not to complete the purchase. Industrial says that the plaintiffs chose to purchase the Somenos Road townhouse in lieu of the Property, and that the purchase of the townhouse used up enough of their borrowing capacity that they were not in a position by June 30, 2021, to obtain mortgage funding.

[407] Industrial says that it was clear by the time of the May 24, 2021 letter that the plaintiffs had no intention of completing, and in fact knew they could not complete. Industrial says that the Court should conclude that the plaintiffs had formed a plan to not complete, to lock the Property down with a certificate of pending litigation, and to sue in the hopes of enriching themselves based on a perceived increase in market value.

[408] With respect to the plaintiffs' allegations of breach, Industrial says that:

- a) For reasons set out above, it was under no contractual obligation to provide an occupancy permit;
- b) With respect to the new home warranty, Industrial says that it did not matter that the warranty had already commenced and that the first three years of coverage – including all coverage for "Materials and Labour" and "Mechanical Systems" – had already expired. The CPS simply required

whatever new home warranty existed at the time of contract and completion. In any event, Industrial submits that to the extent the warranty had already run part of its course, that was an error on the part of Pacific Home Warranty and not attributable to Industrial. Finally, even if Industrial had breached the term requiring a new home warranty, such breach was not fundamental to the bargain the plaintiffs entered into and could be remedied by an award of damages; and

- c) With respect to the alleged deficiencies, Industrial disputes that there were any substantial matters remaining to be completed as of June 30, 2021. Further, it says in any event that even if it was in breach, it was in breach of warranties and not conditions, and any breach did not deprive the plaintiffs of substantially the whole benefit of the contract. In those circumstances, the plaintiffs were still required to complete.

[409] With respect to this latter point, Industrial says that to the extent it had not remedied the deficiencies listed at s 3 of the CPS, the plaintiffs would have a right to sue for damages but not the right to refuse to complete the purchase of the Property. The plaintiffs' remedy was to complete the purchase and then later claim for damages, in the event they could establish that any were sustained.

[410] Industrial says that the breaches alleged by the plaintiffs were not fundamental to the contract. Had the plaintiffs completed, they would have gotten substantially the whole benefit of the contract – being the Property itself. They cannot use those breaches as justification for their own failure to complete. Where the party seeking specific performance is itself in fundamental breach and has shown an intention not to complete the contract, it cannot rely on the principles in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264, 1991 CanLII 3955 (CA) [*Shaw Industries*].

[411] Industrial's submission is, in effect, that before a party can refuse to complete on the specified closing date, relying on a breach by the other party, then purport to affirm the contract and sue for specific performance, the breach in issue must be

shown to be a fundamental breach of the sort that would have allowed the suing party to have terminated the contract. Industrial relies on Justice Southin's use of the words "essential default" in *Shaw Industries*, and says that essential default is equivalent to a fundamental breach. Industrial says that it was not in essential default when its lawyer wrote the letter on June 28, 2021, that it could have put itself into a position to complete on June 30, 2021, and that as a result it was within its rights to terminate the CPS.

[412] Industrial relies on the judgment in *Greenberg v. Shanghai Real Estate Limited*, 2010 BCSC 1837. In that case, the plaintiffs had contracted to purchase a property in Whistler. The property was nearly complete, but the plaintiffs took the position that some work remained to be done and sought an extension, which was refused. When the completion date arrived, the plaintiffs asserted that there had been a breach by the vendor, and on the basis thereof, the plaintiffs purported to terminate the contract. The plaintiffs sought return of their deposit. They were unsuccessful:

[18] ... looking to the disputed clause in the context of the whole of the agreement, I cannot conclude that failure to repair a maintenance item identified in the inspection report constitutes a breach of a fundamental term of the contract ...

[19] ... it is unreasonable to suggest that a slightly bent shut off valve, which has not been established to have had any effect on the actual workings of the valve, could have been intended by the parties to be fundamental to an agreement for the purchase of a multi-million dollar home. The terms of the agreement are not consistent with this interpretation. Even if it was a term of the agreement that the valve would be repaired, which is denied here, then the term was a warranty only and did not entitle the plaintiffs to repudiate the contract. Failure to repair the valve did not deprive the plaintiffs of substantially the whole benefit of the agreement and so could constitute a breach of warranty at best (*Rinzema v. Morrow* (2005), 37 R.P.R. (4th) 275 at paras. 33 and 43 (Ont. S.C.J.)).

[20] The defendant was not in fundamental breach of the contract by failing to repair the main water shut off valve. It follows that the plaintiffs were in breach of the contract when they failed to complete on the completion date. The defendant accepted the plaintiffs' repudiation of the contract and treated the contract as at an end.

[413] Finally, Industrial submits that there is no evidence that, as of the time of trial, the plaintiffs had financing in place. Industrial acknowledges that Opey said on

multiple occasions that the plaintiffs had no problem obtaining financing, but he tendered no proof of a current financing approval.

Legal Context

[414] Before embarking on a discussion of cases involving contracts with time of the essence clause, I note that the CPS did not contain such a clause. As explained in *Toor v. Dhillon*, 2020 BCCA 137 [Toor] at para 54:

[54] If time is of the essence, strict compliance with time limitations is necessary; however, in the absence of a time of the essence clause, substantial performance may suffice: *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265. In the context of the present case, contractual requirements as to time will be interpreted strictly when time is of the essence, but in the absence of a time of the essence clause, such requirements will be interpreted reasonably in accordance with normal contract interpretation principles.

[415] The principles that govern in cases where time is of the essence, but neither party was ready, willing and able to complete at the completion date, were summarized by Justice Southin in *Shaw Industries*. In that case, the vendor had failed to clear title on the date fixed for completion, and it appears that both parties simply allowed the completion date to pass. Justice Southin adopted the principle outlined in *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 (CA) at 455-456:

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.

[416] Justice Southin explained that:

... it does not follow that because the purchaser failed to give a notice before the 6th October the vendors could treat the purchaser's failure to complete as a repudiation.

From the proposition that the contract still subsists, it follows that neither party is relieved of his own contractual obligation to complete by the failure of performance of the other. He cannot treat that failure as a repudiation. In order that he may do so, he must himself first give such a notice and must at the time thereby fixed for completion be himself ready, willing and able to perform.

The underlying reason for this is that a party to a contract for the sale of land, who is in essential default, cannot be heard to complain of the wrongdoing of the other until he has given the other the opportunity to do right and is himself ready to do right. To cast stones, one must be without sin or at least have expiated one's sin.

[Emphasis added.]

[417] In *Ockey Developments Ltd. v. Suncoast Projects (2004) Ltd.*, 2007 BCCA 105, the parties disagreed as to whether the vendor was required to deliver an environmental certificate prior to completion. Justice Newbury concluded that it was not, and thus the vendor was not in breach. As a result:

[33] ... the case at bar is distinguishable from *Shaw Industries*, where the vendors were clearly in breach and were therefore found to be disentitled from treating the purchaser's breach as a repudiation of the agreement. Here, the question of breach on the part of the Vendors is one that would have to be tried should the Purchaser have, and wish to pursue, a damage claim – a subject on which the trial judge was not required to rule in order to dispose of the application before him.

[34] As far as specific performance is concerned, however, it seems to me that the Purchaser's failure to complete the transaction on the closing date because of the Vendors' "failure" to deliver a Certificate of Compliance amounted to a fundamental breach and entitled the Vendors to consider the agreement as at an end. In this regard, I note this court's decision in *Laredo Development Ltd. v. I.R. Capital Corporation* (1993) 87 B.C.L.R. (2d) 170, in which *Shaw Industries* was distinguished on the basis that in the latter case:

... neither party exhibited a prior intention not to complete. The day for completion simply arrived and went without either having done what was required of it in order to complete that day. In the present case, more than a week before the time for performance arrived, and at a time when the purchaser could not be expected to be ready to close, the vendor demanded performance for which the agreement did not call, and thereafter made it plain that it would not perform in accordance with the agreement. [Para. 57; emphasis added.]

[418] In *667975 B.C. Ltd. v. Purewal*, 2009 BCCA 220, there was an agreement to subdivide property, with the purchaser responsible to undertake subdivision, and with five of the six subdivided lots to be conveyed to the purchaser. Time was of the essence of the contract. The purchaser failed to advance the subdivision, then later sued for specific performance. Justice Levine distinguished the case from *Shaw Industries*:

[25] Therefore, if the Vendors were in breach of the Contract for failing to disclose the required remediation of the house (and given the overriding obligation of the Purchaser to carry out the subdivision it is doubtful that the Vendors had any such obligation), it was a minor matter that did not in any way lead to the failure of the Purchaser to complete. The Vendors had no contractual obligation to complete the remediation of the house, by the Completion Date, or at all. Since the Purchaser was not in a position to complete on the Completion Date, quite apart from the remediation of the house, and there had been no extension, the only proper conclusion on the evidence is that the Vendors were entitled, in accordance with Condition I of the Contract, to terminate it.

[26] *Shaw Industries Ltd.*, relied on by the trial judge and the Purchaser on appeal, is distinguishable on the facts. In that case, neither party exhibited an intention not to complete the contract. The completion date simply passed without either party having done what was required to perform. It was in that context that Southin J.A. for the Court held that time ceased to be of the essence and either party was entitled to reinstate a new closing date.

[Emphasis added.]

[419] In *Toor*, the vendor decided not to proceed with the transaction shortly after it was signed and repudiated the contract. Despite learning this, the purchaser went ahead and waived conditions, but then was a day late paying the deposit. Time was of the essence of the agreement, and the vendor then attempted to rely on this lateness as a basis to resist specific performance. Justice Hunter referenced the *King v. Urban & Country Transport Ltd.* case (which had been previously referenced by Justice Southin in *Shaw Industries*), noting its reliance on a longstanding proposition that “time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself ready, desirous, prompt and eager to carry out his agreement”, which he noted has been adopted in various other provinces, and which he concluded applies in British Columbia as well: para 50. He concluded at paras 51-53 that:

[51] The vendors submit that while this principle may apply at the time of completion, it has no application to an anticipatory breach. They rely on the proposition that an unaccepted repudiation has no legal effect. I agree that a party cannot rely on an unaccepted repudiation to justify its failure to perform its contractual obligations, but the question of reliance on a time of the essence clause is narrower. The principle that a party cannot rely on a time of the essence clause when it is not prepared to perform its own obligations does not relieve the innocent party of its contractual obligations; it simply relieves the innocent party of the requirement to comply strictly with time requirements in the contract when performing these obligations, if it wishes to

affirm the contract. In the case at bar, the position of the vendor constituted a continuing repudiation in the sense explained in *Dosanjh v. Liang*, 2015 BCCA 18, at paras. 41–46. Accordingly, it is not necessary to consider whether the time of the essence principle would be affected by a single act of repudiation.

[52] An analogy may be drawn to the well-settled law that when one party has made it clear that it will not complete a transaction, the other party is not required to tender closing documents or the purchase price on the agreed upon completion date: *Norfolk* at p. 19. Similarly, when one party has made it clear that it will not complete a transaction, and the other party wishes to affirm the contract, the innocent party is not relieved of its obligation to pay the deposit, but is relieved of its obligation of strict compliance with the time requirements for payment.

[53] In this case, the continuing position of the Vendors reflected by their repudiation of the Contract on June 12 and June 15 demonstrates that the Vendors were not “ready, desirous, prompt and eager” to carry out the agreement on July 15 when they purported to rely on the “time of the essence” clause to terminate the Contract; their position continued through the repudiation by their solicitor on July 29. Accordingly, they were not entitled to rely on strict compliance with the time provisions in the Contract. The question then is whether the Vendors were entitled to treat the Contract as at an end for failure by the Purchasers to comply with the contractual requirements concerning payment of the Deposit without reliance on the “time of the essence” clause.

[Emphasis added.]

[420] In *Lal v. Grewal*, 2024 BCCA 149 [La], time was of the essence in a real estate contract. Neither party took any steps to complete the transaction. The purchaser later sued for specific performance; the seller defended on the basis that the contract was unenforceable. The purchaser later purchased a replacement property, and elected to claim only damages at trial. On appeal, Justice Griffin agreed that the vendor was in breach:

[15] The very minimum obligation Mrs. Lal had to perform was to sign the Form A transfer at closing, even if it was to be prepared by the purchaser. But she failed to do anything to show her willingness and readiness to sign the Form A transfer on any date, before, on, or after March 26 or 29: she did not inform the purchaser or the purchaser’s solicitor where she could be reached to sign the transfer document; she did not request the transfer document; she did not hire her own solicitor or notary and put that person in touch with the purchaser’s solicitor (despite telling the purchaser’s solicitor in advance of closing that she would speak to a lawyer); and she did not lead evidence that would suggest she showed up at the solicitor’s office or the Land Title Office to sign the transfer on March 26 or 29. In other words, she did not do anything at all to indicate she was available to sign the transfer.

[16] In addition, Mrs. Grewal points out on appeal that Mrs. Lal also did nothing to ensure she could meet with her obligation under the contract to provide clear title at closing. There was a mortgage on the property but she did not contact the bank in order to obtain the precise amount owing and took no steps to discharge that mortgage. While clause 14 of the contract allowed the seller to wait to discharge the mortgage upon receipt of the purchase funds, this could only be done if the seller retained a lawyer or notary who provided standard professional undertakings with respect to the receipt of the purchase proceeds and use of those proceeds to discharge financial charges. Since Mrs. Lal made no such arrangements, she was not in any position to provide clear title on closing.

[421] Justice Griffin confirmed the principles summarized above from *Shaw Industries*:

[19] A party who is not ready to close on the agreed date, cannot end the agreement for the other side's lack of readiness to close on the agreed date. In such a situation, the contract continues and either party or the court may reinstate time of the essence by setting a new closing date: *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 at paras. 38–40; 1991 CanLII 3955 (C.A.); *Toor v. Dhillon*, 2020 BCCA 137 at paras. 79–83; see also *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302 at 307, 1999 CanLII 3738 (C.A.).

[422] In response to the argument that the purchaser precluded the vendor from signing a Form A by failing to provide one, Justice Griffin said:

[22] In *Shaw Industries*, the seller did nothing towards the closing, and did not communicate with the purchaser or the purchaser's lawyer. This Court noted that it was the purchaser's obligation to prepare the transfer as a matter of practice, because under the contract the purchaser bore the costs of the conveyance. However, despite it being the purchaser's obligation to prepare the transfer, it was the seller's obligation to be available to sign it.

[23] Thus, in *Shaw Industries* this Court found that the seller could not simply stand by and do nothing but rely on the purchaser's failure to perform its obligations on time, and then claim the purchaser's failures amounted to repudiation. The Court noted that the agreement required completion in the Land Title Office, and the parties had not made other arrangements. Therefore, the seller's failure to attend in the Land Title Office to sign the transfer was in breach of the seller's obligations at closing: paras. 6, 16.

[24] In the present case, the facts found by the judge as to Mrs. Lal's conduct, were very similar to those involving the seller in *Shaw Industries*. Mrs. Lal at a minimum had an obligation to make herself available, in some way, to sign the transfer and she did not do so. She cannot stay silent, do nothing, and then argue that the time of the essence clause was an essential clause.

[423] In this case, each of the parties asserts that the other's pre-June 30, 2021 communications evince an intention not to complete. The governing principles with respect to anticipatory breach were concisely stated in *Douse v. Mascioli*, [1997] OJ No 2570, 10 RPR (3d) 205 (Gen Div):

[14] [G.H.L. Fridman, *The Law of Contract*, 3d ed (Toronto: Carswell, 1994) at 600] indicates that anticipatory breach occurs when, "a party, by express language or conduct, as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due." Fridman goes on to cite three elements that must be found before an anticipatory breach is established:

1. conduct which amounts to a total rejection of the obligations of the contract;
2. lack of justification for such conduct; and
3. acceptance of the repudiation by the innocent party.

If these elements exist then the innocent party may be freed from his obligations under the contract, and may pursue a remedy. On the issue of what sort of conduct amounts to a repudiation. Fridman [at 601] says that it must be of a serious nature and that repudiation is not lightly to be inferred from a party's conduct.

[424] In *Kaur v. Bajwa*, 2020 BCCA 310 [*Kaur*] at para 13, Justice Voith quoted from *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para 149:

[149] The final point of terminology is concerned with "anticipatory" breach. An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": [John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)] at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at §7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.

[425] In *Kaur*, Voith J.A. continued at paras 14-16:

[14] In *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, the Ontario Court of Appeal similarly described the various legal requirements

that underlie an anticipatory repudiation at paras. 41–52. In particular, the Court confirmed that a “repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract”, that “the test for anticipatory repudiation is an objective one”, that “in objectively construing the purported breaching party’s intention, the surrounding circumstances must be considered”, that “a finding of anticipatory repudiation is reserved for cases in which the conduct at issue can be said to be serious”, and that “before an anticipated breach of contract can be characterized as an anticipatory repudiation, the breach must deprive the innocent party of substantially the whole benefit of the contract”: at paras. 42, 45, 46, and 50.

[15] In *Kuo* at para. 40, this Court noted that “regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation”. See also *Marcotte v. Marcotte*, 2018 BCCA 362 at paras. 45–49.

[16] These various considerations and requirements are all engaged at the point in time that the breaching party communicates its inability or intention not to perform. ...

[426] I turn now to the recent judgment in *Chan*, in which the contract of purchase and sale for a home included a term that the seller agreed, at their cost, to professionally install a fully functioning platform stairlift on an interior stairway. Time was of the essence in the contract. The purchaser made efforts to extend closing to allow additional time for this work to be done; the vendor refused to consider any extension and took the position that the purchaser had repudiated, purported to accept that repudiation, and terminated the contract.

[427] Justice Gottardi concluded that the breach of the “Revised Lift Clause” was fundamental, noting at para 79 what was said in *Williams v. Ron Will Management & Construction*, 2009 BCCA 543:

[15] Whether a breach is fundamental does not appear to depend upon any express terms of the contract. The determination of a fundamental breach is a teleological question not one that involves construction of the contract in the narrow, literal sense. The concept of fundamental breach seems to transcend the normal issues of contractual interpretation. It involves investigation of the underlying nature and purpose of the contract into which the parties have entered, and the respective benefits designed to be obtained or ensured by the agreement.

[Emphasis added in *Chan*.]

[428] Then, at para 91, Justice Gottardi commented that:

[91] ... even if I am incorrect and the defendant's breach of the Revised Lift Clause is not fundamental, his allegation of anticipatory repudiation must nevertheless fail. Taking into account all of the evidence and surrounding circumstances, I reject the proposition that these statements, made by Ms. Chan's realtor on the scheduled completion date amount to a "clear and unequivocal" repudiation of the contract. These messages were clearly attempts by the plaintiff to salvage the transaction in light of the now apparent failure on the part of the defendant to install the Platform Lift. ...

[429] This alternative approach (on the basis that the breach was non-fundamental) is explained beginning at para 98:

[98] I find that under the terms of the contract, as signed on June 1, 2021, the defendant was obliged to install a Platform Lift by the completion date. This obligation was not discharged by any subsequent events. It is accepted by all parties that the defendant failed to install the Platform Lift by the completion date. I find that due to the defendant's failure, the plaintiff refused to complete the purchase on the closing date. I also find that the plaintiff made efforts to amend the contract in order to give the defendant more time to complete his obligation under the contract. This was demonstrated both by the plaintiff's attempt to extend the completion date and by the proposed addendums. I also find that the defendant sought to treat the contract as terminated four business days after the closing date had passed.

[99] In other words, the plaintiff, faced with a non-fundamental breach of the CPS, refused to complete on time. Notably, the plaintiff did not refuse performance entirely. Rather, it is clear from the evidence that she was ready, able, and willing to perform so long as the Revised Lift Clause was addressed in some capacity by the defendant – either by a holdback, an extension, a credit, or by the installation of the Platform Lift itself. The plaintiff was actively accommodating the defendant and attempting to find a resolution in haste before closing. The defendant, despite their own breach, fundamental or otherwise, relied on the time is of the essence clause and insisted the plaintiff complete on time.

[100] I find that it is neither reasonable nor equitable for the defendant to seek strict application of the time is of the essence clause when they in fact were the party who was in breach of the contract. Our Court of Appeal in *Toor v. Dhillon*, 2020 BCCA 137 at para. 50 stated clearly that the "party who is not prepared to perform an agreement cannot rely on the "time of the essence" clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract".

[101] The ongoing communications and negotiations between the parties on December 30th clearly show that Ms. Chan was not seeking to renege her contractual obligations completely, nor would she have been justified in law to do so. However, given the defendant's non-compliance with the Revised Lift Clause, she was relieved from the requirement to comply strictly with the time requirements in the contract: *Toor* at para. 51. It was reasonable for Ms. Chan to assume that the negotiations would continue after the closing date had passed, and that a new closing date would be set: *Toor* at para. 83.

[102] As such, I do not find that by failing to complete on December 30, 2021, that the plaintiff had repudiated the agreement. Indeed, I agree with the plaintiff that it was the defendant who repudiated the CPS on January 6, 2022 when his lawyer sent a letter to Ms. Chan purporting to accept their repudiation and to keep their deposit.

[103] In support of their argument on this point, the plaintiff relies on *1050438 B.C. Ltd. v. Penguin Enterprises Ltd*, 2019 BCSC 2138 [*Penguin*]. *Penguin*, as stated by the plaintiff, stands for the following propositions:

1. Firstly, where the seller has non-fundamentally breached the CPS on closing date, the seller is himself not ready, willing, or able to close and is therefore no longer entitled to rely on the time is of the essence clause or to force the buyer to close on time: *Penguin* at paras 66–79; see also *Lal v. Grewal*, 2024 BCCA 149 [*Lal BCCA*] at paras. 18–19.
2. Secondly, under the above circumstances, where the buyer refuses to close on the closing date, the contract continues to subsist and time is no longer of the essence. At that point, either party could give notice to set a new completion date: *Penguin* at para. 87; see also *Lal BCCA* at para. 19.
3. Thirdly, under the above circumstances, if the seller terminates the contract before the buyer could set a new completion date, the seller would have “jumped the gun” and would have himself been in breach of the CPS: *Penguin* at para. 79; see also *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, 1991 CanLII 3955 (B.C.C.A.) at para. 3, 79 D.L.R. (4th) 641.

[104] In *Penguin*, the buyer and seller of the North Vancouver Hotel executed a contract of purchase and sale. The seller was ready, willing and able to close on the closing date, save for it not having provided an environmental report to the buyer. The buyer refused to complete on the closing date on that basis. The seller terminated the contract shortly thereafter, stating that the buyer failed to complete on the completion date.

[105] In assessing the events leading up to and on the closing date, Justice Brundrett found that “the Seller was not ready, willing and able to close on [completion date] because he had failed to provide the stage 2 environmental report and this obligation was not waived by subsequent events”. The seller in *Penguin* was also insisting that time was of the essence in relation to the buyer’s failure to close. On that issue, Brundrett J. reiterated that a pre-condition to a litigant insisting upon time being of the essence of the agreement is that the litigant not be in default: at para 78. Justice Brundrett went on to find that:

[79] ... the Seller cannot complain of the wrongdoing of the Buyer when he was in default under the contract. To borrow words from *Shaw Industries*, the Seller jumped the gun by terminating the contract.

[emphasis added]

Justice Brundrett found in favour of the buyer, and also held that the seller had breached its duty to act in good faith.

[106] I find that the circumstances in the present case are quite similar to those set out in *Penguin*. As in *Penguin*, the defendant insists on time being of the essence notwithstanding the fact that he was himself in default. Given the back and forth discussions around the future installation of the lift that took place on December 30, 2021, a new closing date should have been established. As in *Penguin*, I find that the defendant “jumped the gun” by terminating the contract on January 6, 2022.

Analysis

[430] I begin by noting that the CPS contains no provision stating that “time is of the essence”. This must be kept in mind in considering those authorities involving contracts which contain such a provision.

[431] I will start with Industrial’s allegations of breaches pre-dating June 2021, and in particular the failure to pay the full \$25,000 deposit and the monthly amounts of \$3,560 in the CPS. I accept the plaintiffs’ evidence that there was a post-CPS agreement to (a) reduce the deposit to \$12,500 until the deficiencies were dealt with, and (b) reduce the monthly payments to \$2,500 when the Adeyemis ceased renting out the lower floor. As part of that agreement, Industrial accepted the payment of the first \$12,500 as of September 13, 2020, and implicitly waived any default with respect thereto. In any event, I agree with the plaintiffs that any defaults with respect to these payments were waived by Industrial through its lawyer’s communication on June 28, 2021. I have reviewed that communication, and do not read the communication as reserving the right to withdraw the waiver if the transaction did not complete on June 30, 2021.

[432] In my view, in the weeks leading up to June 30, 2021, it became clear that Industrial was doing nothing of substance to put itself in a position to complete the CPS. It was anything but ready, desirous, prompt and eager to carry out its obligations under the CPS. In particular, I conclude that Industrial had intentionally delayed the taking of any steps to advance the process toward obtaining an occupancy permit until the last possible moment. It is extremely strange that Mr. Tougas was brought to the neighbourhood in mid-April to do work for the Kapilas on a different property, but was not asked at that point to deal with the Schedule C-B for the Property.

[433] In my view, by the time the excavator arrived on June 22, 2021, it was unrealistic to think that all of the steps that needed to be taken to secure the occupancy permit could have been taken by June 30, 2021. Mr. Tougas' evidence made it clear that timelines were unpredictable. He described the potential range of time estimates as being "humungous". He explained that given the municipality appeared to be now requiring him to certify a new aspect of geotechnical engineering, he would most likely be required to submit a new Schedule B as well as the Schedule C-B. He confirmed that he could not say that his work would all have been done within eight calendar days. In my view, Roger's asserted belief that all could be done within a day or two was not grounded in reality, and was at best wishful thinking.

[434] It is important to consider the parties' actions in the first half of 2021 as a whole. In January, Opey advised the Kapilas that he had financing in place, and that the financing he had would expire in April. In my view, the texted response from Nick was quite telling as to what the Kapilas' true intentions were at that time. Opey received assurances at the meeting on February 9, 2021, that things would happen, but the evidence is clear that nothing of substance happened until the latter part of June.

[435] Industrial's non-response to Opey's May 28, 2021 letter was, in my view, telling. In my view, it was clear that by this point at the very latest, the Kapilas were looking for a way out of the CPS.

[436] In all of the circumstances, and keeping in mind the lack of a time of the essence clause, it was entirely unreasonable for Industrial to have a litigation lawyer send an email after 2:00 p.m. on June 28, 2021, demanding that the transaction be completed on June 30, 2021, when Industrial knew that the Adeyemis' financing commitment had expired in April and nothing in the interim would have suggested to them that there was an imminent need to reapply. One business day's notice is simply not reasonable in the circumstances.

[437] As well, I do not see it as unreasonable that the Adeyemis were waiting until there was some prospect of completing the CPS before renewing their application for mortgage funding.

[438] I have considered Industrial's submission that the Adeyemis had no intent after April 2021 to purchase the Property. I do not accept that submission. I accept their evidence that they did not see the Somenos townhouse as a viable home for their family. The fact remains that they have continued to reside in the Property since then, despite the deficiencies, and despite the stress, cost and inconvenience of this litigation.

[439] I turn to Industrial's submission with respect to the failure of the Adeyemis to pay the \$2,500 amount on June 1, 2021. In my view, this failure must be read in light of the letter of May 28, 2021, which in my view was in substance an affirmation of the parties' contract, together with an expression of concern as to the lack of progress on Industrial's side in meeting the obligations it had agreed to undertake. In my view, in light of the nature of the contract (being for the purchase of a property for over \$800,000), the failure to make one payment of \$2,500, which payment relates to the pre-completion occupancy of the Property and not to the purchase price, does not represent an expression of an intention not to be bound by the contract, nor is it a breach that goes to the root of the contract.

[440] In light of my conclusions that:

- a) time was not of the essence of the contract;
- b) circumstances were such that it was unreasonable to make a demand on the afternoon of June 28 to complete on June 30; and
- c) the lawyer's email of June 28, 2021, expressed an intention that the CPS would be at an end if not completed on June 30, 2021

I am of the view that the June 28, 2021 email constituted an anticipatory breach and repudiation of the CPS. The plaintiffs responded to that anticipatory breach by

affirming the CPS through the commencement of this action. The defendants confirmed their intent to repudiate through their Response to Civil Claim.

[441] I would have come to the same conclusion even if there had been a time of the essence clause in the CPS, although through a slightly different reasoning path. In my view, as of June 30, 2021, Industrial was not ready, willing and able to complete the CPS, nor had it shown itself to be ready, desirous, prompt and eager to carry out its obligations under the CPS. It was not in a position where it could insist upon performance by the plaintiffs of their obligations. Specifically, for the reasons set out above, I conclude that there was an implied term requiring an occupancy permit prior to completion, and Industrial was in breach of that implied term. I also conclude that Industrial was in breach of its obligation to provide a “new home warranty set by [the *HPA*] and Regulation”. In my view, what was contracted for by this provision was a full home warranty as provided for in the *HPA*, not whatever remained after documents were submitted triggering the running of the warranty as of 2018.

[442] With respect to deficiencies, it is my view that at the very least the leakage from the upstairs bathrooms into the main level kitchen continued to be a substantial issue. As well, I do not accept Industrial’s submission that the Adeyemis prevented them from completing the work required to fix deficiencies or obtain the occupancy permit. In particular, I do not think that Opey’s requirement of information as to exactly what digging was to be done, and assurance of what steps were in place to avoid damage to pipes and utilities including the gas line, were unreasonable. I conclude that Roger’s refusal to engage with those requests was part of the defendants’ strategy to extricate themselves from the CPS.

[443] At the same time, the plaintiffs were not in a position to complete the transaction either, having not taken the necessary steps to extend their financing commitment. In my view, both parties were in essential default as of June 30, 2021.

[444] Thus, to the extent time was of the essence, it ceased to be of the essence and either party will be in a position – when it has done what it needs to do to be in a position to complete the CPS – to give reasonable notice.

[445] Industrial made a submission that it is only a circumstance in which one party to a contract is in fundamental breach that the other party will be justified in not completing in circumstances like this. In my view, that is not an accurate reflection of the law. Rather, the cases focus on whether the party who wants to rely on the other's failure to complete was itself in essential default, rather than being ready, desirous, prompt and eager to carry out its obligations. In my view, the test set out by the cases is different than the test applied to determine fundamental breach. There may well be defaults that are sufficiently trivial that they do not amount to essential default, and do not prevent a party from being seen to be ready, desirous, prompt and eager to complete.

[446] In my view, in the circumstances of this case, Industrial was in breach in many different ways:

- a) It had failed to obtain an occupancy permit;
- b) It was not in a position to deliver a home warranty for new construction;
- c) It had not completed the repairs of the deficiencies listed in the CPS; and
- d) It had not put itself in a position to provide clear title, as no steps had been taken to obtain a payout statement for the mortgage or to have a conveyancing solicitor in place to provide the required undertakings.

[447] I conclude that Industrial was in essential default, and can in no way be said to have been ready, desirous, prompt and eager to complete.

[448] As a final point, I do not accept Industrial's submission that the plaintiffs would have been unable to secure the financing to complete. While a significant amount of trial time was devoted to cross-examination on this issue, I see it as having been reasonable for the Adeyemis to wait until there was some reasonable expectation

that Industrial was going to be in a position to deal with its contractual obligations before renewing their efforts to secure financing. I also accept that, given their combined income and asset base, I accept that Opey's belief that financing was available to them was realistic.

[449] For all of these reasons, it is my view that Industrial wrongfully repudiated the CPS. The Adeyemis have affirmed the CPS and sought specific performance, I now turn to that final issue.

Remedy

Positions of the Parties

Plaintiffs

[450] The plaintiffs submit that specific performance is the appropriate remedy. They say that the Property is unique to the plaintiffs. The Property has been the home of the plaintiffs for more than five years. The plaintiffs rely on Faye's evidence as to the many reasons the Property is special to her, including its location in a neighbourhood they love, the fact they have raised their children in the home, their children have friends on the street and in the neighbourhood, they go to the neighbourhood school. She also referenced the Property's large windows and the views she loves.

[451] The plaintiffs submit that the fact that the family has remained at the Property while Opey has commuted for work purposes for over two years demonstrates the importance of the Property to the plaintiffs and their family. The plaintiffs say that it would be hard to fathom a more unique property with more special value to a purchaser than this one.

[452] The plaintiffs say that they have a binding and enforceable agreement for the purchase of the Property, which is unique to them. They seek specific performance with an abatement of the price to allow them to complete the necessary work and obtain the occupancy permit. They submit that the price should be reduced by:

- a) \$264,000, being the mid-point of the range of repair costs in the Andersen report, estimated by Mr. Andersen; plus
- b) \$4,600, being the amounts the plaintiffs paid for their occupancy of the Property in July and August 2020, while the oral agreement governed. They say that the oral agreement clearly provided that payments were to be credited against the purchase price.

[453] Alternatively, they say that the Court's order for specific performance should allow the vendor a period of 90 days to rectify the deficiencies and obtain an occupancy permit.

[454] In the final alternative, the plaintiffs say that if the Court determines that it is unable to order specific performance, then damages should be assessed as at date of trial. They submit that such damages should be calculated based on the appraisal evidence, and that the report of Mr. Van Veen should be preferred. They say that the sample size of comparables used by Mr. Fast (three, with one deemed unreliable) is too small for a reasonable analysis, and that his downward price adjustment based on market decline is arbitrary.

[455] The plaintiffs submit that an award of \$450,000 would reflect a fair assessment of the loss in value, based on the difference between the purchase price in the CPS and Mr. Van Veen's estimate of value at the time of trial. They further say that to this must be added the \$140,000 that they paid after June 30, 2021, plus the \$4,600 paid for July and August. They submit that a total award of damages should be \$594,600.

[456] The plaintiffs submit that, but for the failure of the defendants to comply with the contract, the plaintiffs would currently own a home valued at approximately \$1.4 million, towards which they would have paid \$140,000 in mortgage payments, and that they would have been able to make principal repayments instead of paying for the costs of this litigation.

Industrial

[457] Industrial says that specific performance is not an available remedy in the circumstances. It says that the Property was not unique. Industrial relies upon the communications the plaintiffs had with the Bank of Montreal, stating that they had decided to move into the Somenos Road townhouse, as evidence contradicting their own self-serving evidence of uniqueness. Industrial also relies on the plaintiffs' acknowledgement that they had been keeping track of other three bedroom homes that were selling in the Maple Bay area. Industrial says that these other homes were readily available substitutes.

[458] Industrial also relies on what was said to the Bank of Montreal in emails in June 2021 – that the plaintiffs had intended to move to Somenos Road, then changed their mind based on advice from friends and colleagues that they should fight for the property, and that they had, in the year they had been living in the Property, missed out on their opportunity to get into a rising market. Industrial says that the plaintiffs' motive, made apparent in the Bank of Montreal emails, is that they have proceeded with litigation not because the Property is unique and special, but rather because there is potential for a large profit to be made.

[459] Finally, Industrial says that the Somenos Road townhouse was a "replacement property", and that a party who has purchased a replacement property can no longer argue that the property in dispute was unique: *Lal* at paras 47-48.

[460] Industrial then says that, even if specific performance was an available remedy in the summer of 2021, the plaintiffs became disentitled to that remedy when they again repudiated the CPS by failing to make monthly payments from March 2023 to June 2024. Industrial says that this was a calculated bad faith measure intended to hurt the defendants. Given that specific performance is an equitable remedy, that conduct should disentitle the plaintiffs to the relief they seek.

[461] Industrial further says that the plaintiffs have not proved that they are even now ready, willing and able to complete the purchase.

[462] Industrial says that in any event, even if specific performance was otherwise available, the delays in this litigation have been such that would not be reasonable to fix a new closing date: *Lal* at paras 43-44.

[463] Industrial says that if specific performance is not available, then the plaintiffs have no available remedy. Specifically, Industrial says that there is no authority for the proposition that if a defendant seller is not ready, willing and able to complete, then a buyer who is also not ready, willing and able to complete may then still sue for damages.

[464] With respect to damages, Industrial says that damages for breach of contract should be assessed at the time of breach: *Mavretic v. Bowman* (1993), 76 BCLR (2d) 61, 30 RPR (2d) 161 (CA) [*Mavretic*]. Industrial says that there is no evidence before the Court of the value of the property as of June 30, 2021, and as a result, the Court should conclude that no damages have been proven and dismiss the claim.

[465] If damages are to be assessed at the time of trial, then Industrial submits that damages should be calculated based on the Fast appraisal which is closer in time to the trial, and that the Court should thus value the property at \$1,210,000.

[466] With respect to the claim for abatement, Industrial says that Mr. Andersen's report does not provide a reasonable basis on which to assess any firm numbers. The ranges of possible costs given are broad, and reflect a lack of certainty and, in Industrial's submission, a lack of reliability. Thus, Industrial says that there is no reasonable, qualified estimate to repair upon which the Court could base an award of damages. Industrial says that the claim for abatement has not been proved as a matter of fact.

[467] With further respect to the claim for abatement, to the extent the plaintiffs rely on "Additional Defects" above and beyond those set out in the CPS, Industrial relies on the doctrine of *caveat emptor*. They say that the plaintiffs failed to undertake any legitimate pre-contract inspection of the Property and did not make the CPS subject

to inspection. Industrial says that the plaintiffs have not identified any latent defects, and to the extent the alleged Additional Defects constitute patent defects, they have failed to meet the onus on them to have conducted sufficient inspection to identify those defects prior to finalizing the CPS.

[468] Finally, Industrial says that the expenditures said to underlie the abatement claim are out of all proportion to the benefit obtained and the cost of the house, and that for that reason the abatement claim should be dismissed: *Serebrennikov v. Sawyer's Landing Investments 1 Ltd.*, 2010 BCSC 1276 [Serebrennikov] at paras 35-40.

[469] Finally, with respect to damages, Industrial says that the plaintiffs' purchase of the Somenos Road property – even if not strictly speaking a substitute property – should be considered an act taken in mitigation of their loss. Industrial submits that:

- a) The purchase of Somenos Road should be considered to be in full mitigation of the loss, or alternatively
- b) At the very least, any damages should be reduced by the amount by which the Somenos Road property has increased in value since it was purchased. Although there is no appraisal evidence of this, Industrial says that based on the assessed values of that property its value has increased by at least \$100,000.

[470] Since this act of mitigation occurred two months prior to the completion date for the Property, Industrial says that the Court should use as its starting point the 2022 assessed value (which is said to be based on actual value as of July 1, 2021), which is \$532,000. Industrial says that the assessed values increased to \$632,000 after one year, then later fluctuated between \$568,000 and \$577,000. It says that any damages award should be reduced by \$100,000 to reflect this increased value.

Legal Context

Availability of Specific Performance

[471] Key principles underlying the availability of specific performance as a remedy were summarized by Justice Francis (as she then was) in *Deol v. Sinnathamby*, 2021 BCSC 722:

[27] The primary award for breach of contract is generally monetary damages. Specific performance is a discretionary remedy, supplementary to the common law remedy of damages: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada, 2011) at 739. Specific performance is only available as a remedy where monetary compensation is inadequate: *Chan v. Chadha Construction*, 2000 BCCA 198 at para. 10.

[28] Historically, it was commonplace for specific performance to be granted as a remedy in the context of contract disputes involving real property. However, the modern approach favours damages, rather than specific performance, as a remedy for breach of contracts involving real property. In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at 429, Sopinka J. noted the exceptional nature of specific performance as a remedy when land is in issue:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

[29] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 52 [Youyi], Justice Newbury considered the effect of *Semelhago* and *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, on the remedy of specific performance and the circumstances in which it will be granted:

In my respectful view, the Supreme Court merely recognized in those cases that in light of the advent of condominiums and other forms of interest in land, the uniqueness of real estate should no longer be presumed. As I read the two cases, the Supreme Court has not signalled that specific performance is ‘on the way out’ or that contracting parties should no longer expect to be held to their bargains.

[30] In *Youyi* at para. 56, the Court of Appeal held that, post-*Semelhago*, the Court should not apply a “presumption of replaceability” when determining whether damages will provide an appropriate remedy, or whether specific performance is warranted. In that paragraph, Newbury J. quoted with approval from *Raymond v. Anderson*, 2011 SKCA 58 at paras. 13-14, wherein the court held:

Semelhago does not, however, stand for the proposition that the presumption of uniqueness has been supplanted by a presumption of replaceability. . . . The only change wrought by *Semelhago* is in the approach of the courts to determining the appropriate remedy; judges

must no longer presume the inadequacy of damages as a remedy whenever real property is involved. But, this assessment is not a search for uniqueness. Rather, it is appropriate to characterize a judge's assessment in cases of this nature as an inquiry into whether, in the circumstances, damages would be an inadequate remedy. [Emphasis added.]

[31] In fashioning an appropriate remedy, the court should examine the specific plaintiff and property in each case: *Youyi*, at para. 57. This is a fact-dependent inquiry.

[32] In *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350, Lowry J.A. noted that in cases involving homes, there are often a combination of factors that subjectively and objectively make a property unique:

[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.

[33] Uniqueness is a matter of proof and the onus lies on the party seeking the remedy. However, a plaintiff is not required to prove a negative and demonstrate the complete absence of comparable properties: *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.), aff'd (2003) 63 O.R. (3d) 304 (C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 145 (cited with approval in *Youyi* at para. 45).

[34] While the factors or characteristics that make a property unique are important, the more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties: *Youyi* at para. 45.

[472] Specific performance may be available even with respect to a development property. As explained by Justice Abrioux in *Culos Development*:

[57] It is of assistance to outline the legal framework. Specific performance emerged as a doctrine when the courts of common law were restricted to the enforcement of contracts through monetary awards, and the courts of Chancery were, accordingly, relied upon to prevent the law from generating injustice or outcomes perverse to its own purposes. Historically, the general rule was that, subject to certain equitable bars, the buyer of land was always entitled to specific performance on the theory that "land is property that has a fixed location and a special value" and, therefore, is inherently unique: *Adderly v. Dixon*, (1824) 57 E.R. 239. Under Canadian common law, this is no longer the case: *Semelhago* at 429. This is because, as the Supreme

Court of Canada held in *Semelhago*, at a time when real property is routinely purchased solely for investment or re-sale purposes, it is often treated “much in the same way as other consumer products”, and the assumption that each piece of land holds a “peculiar and special value” can no longer hold: at 428–429. There is no longer a special rule or presumption that applies where specific performance is sought in respect of a contract for the sale of land; the ordinary principles governing specific performance apply, such that specific performance of a contract will generally be awarded where damages would be inadequate compensation for a breach (or prospective breach) of an agreement.

...

[60] The court’s inquiry into whether monetary damages would constitute adequate compensation begins with an assessment of uniqueness in the sense of whether substitutes are “readily available, but does not end there”: *Youyi* at para. 45. Uniqueness “means that the property has a quality (or qualities) that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere”: *Youyi* at para. 45. As such, a party seeking specific performance “need not show that the property is incomparable” and is not required to “prove a negative and demonstrate the complete absence of comparable properties”: *Youyi* at para. 45; see also *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.), aff’d [2003] 63 O.R. (3d) 304, leave to appeal dismissed [2003] S.C.C.A. No. 145.

[61] Damages “are considered to be an adequate remedy where the claimant can readily get the equivalent of what he contracted for from another source” (*Chitty on Contracts* at s. 27-010); accordingly, a property will be unique where its characteristics are such that an equivalent may not be readily obtained. Establishing uniqueness requires evidence of these characteristics: *Guraya v. Kaila*, 2019 BCCA 367 at para. 52.

[473] The judgment of Justice Lax in *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 OR (3d) 341, 2001 CanLII 28012 (SC), aff’d [2003] OJ No 350, 2003 CanLII 52131 (CA), leave to appeal ref’d [2003] SCCA No 14, has been influential in British Columbia. As explained by Justice Lax:

[55] ... *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.

[56] What then are those factors that will determine when 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.

[57] 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 Ferrier 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.

...

[59] 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. ...

[60] It is important to keep in mind that uniqueness does not mean singularity. It means that the property has a quality (or qualities) that makes 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.

[474] However, even where the subject matter of the claim is a residential property, specific performance may not always be available. In *Serebrennikov*, the plaintiff had purchased a home to be constructed in a new residential subdivision, which was anticipated to be completed by August 2006. Construction was delayed, and was not yet complete at the time of a summary trial in 2010. In November 2007, the plaintiff had purchased and moved into a new home on the same street in the same subdivision. The plaintiff sought specific performance with abatement, explaining that he intended to hire a contractor to complete the original home and then move into it.

[475] Justice Goepel declined to grant specific performance, reasoning that:

[30] ... I find that the Sawyer's Landing Home is especially suitable for the purchaser. It was a new home in a desirable area which contained many features the plaintiff found attractive.

[31] That is, however, not the end of the enquiry. To succeed, the plaintiff must also establish that a readily available substitute property is not available. The substitute property need not be identical to the original property: *Li v. Au*, 2006 BCSC 671.

[32] While the plaintiff has emphasized the differences between the Current Home and the Sawyer's Landing Home, the premises have much in common. They are located in the same subdivision, on the same street. Both are new homes. Both provide adequate space for a home office. The size difference is minimal. Most importantly, by paying in excess of \$500,000 for the Current Home, the plaintiff has objectively demonstrated that the Current Home is an acceptable substitute. The plaintiff's decision to purchase the Current Home distinguishes this case from others involving personal residences such as *Van Dyk v. Durno*, 2005 BCSC 691, *Sihota v. Soo*, 2010 BCSC 886, *Taberner, Ali and Chan*. In those cases, unlike this, there was no evidence of a readily available substitute property.

[476] Similarly, in *Lal*, in which the purchaser had, by the time of trial, purchased a different property, Justice Griffin commented:

[41] The judge failed to appreciate the significance of the fact that by the time of trial, Mrs. Grewal had purchased another residential property, and had advised the court that she was no longer seeking specific performance. The judge's order was a form of specific performance in that it treated the contract as still alive and enforceable.

[42] The exceptional remedy of specific performance requires evidence that a property is unique to the extent that its substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 22, 1996 CanLII 209. Clearly a substitute property had been found.

[43] Furthermore, even if a contract subsists and a new date can be fixed for completion, either by one of the parties or by the court, that new date must be reasonable: *Toor* at paras. 76–79 citing *Shaw Industries* at para. 18.

[44] Thus, even if keeping the contract alive was an available remedy, and Mrs. Grewal had not made the concessions she did, I have difficulty agreeing that it would be reasonable to fix a new date for closing more than five years after the original closing date failed, especially considering the volatility of real estate prices.

[45] In my view, what the trial judge ought to have done is focus on Mrs. Grewal's claim for damages, in light of the legal implications of Mrs. Lal's response to civil claim.

Specific Performance with Abatement

[477] Specific performance with abatement (sometimes referred to as specific performance with compensation) is a longstanding jurisdiction although rarely exercised. As noted in R.J. Sharpe, *Injunctions and Specific Performance* (looseleaf) at §11:3, the courts have consistently (since at least the judgment in *Mortlock v Buller* (1804), 10 Ves Jun 292 at pp 315-316, 32 ER 857) followed the principle that a purchaser is entitled from a vendor, who is unable to convey the entirety of what was promised, to receive a conveyance of whatever the vendor has, with appropriate compensation. Difficulty of assessment will not bar abatement, and the rule applies both in the case of title defects and in the case of deficiency in the quantity or quality of land being conveyed.

[478] In *Serebrennikov*, Justice Goepel considered in *obiter* some of the principles applicable to awards of specific performance with abatement. He noted at para 36 the discussion of Justice Gans in *Sokoloff v. 5 Rosehill Avenue Developments Inc.* (1998), 21 RPR (3d) 176, [1998] OJ No 4911 (Gen Div):

[22] The more vexing question to be answered at this juncture is the amount of compensation the Sokoloffs are otherwise entitled to as a result of the problems with which they are beset. While I find the article by Charles Harpum, *Specific Performance with Compensation as a Purchaser's Remedy - a Study in Contract and Equity* (Cambridge Law Journal (1981)) pp. 47-82, of assistance in describing the legal foundation for an award of compensation, theory and practice do not admit of easy reconciliation. I have nevertheless drawn the following from the material provided:

1. Assessing compensation is, for all intents and purposes, the same task as assessing damages for breach of contract.
2. In instances involving specific performance, a purchaser, in so far as such is possible, is to be placed in the same position as if the contract had been performed - in this respect, the purchaser can recover damages for loss of bargain.
3. Damages for loss of bargain can be established by:
 - (a) providing the purchaser with a rateable reduction from the purchase price without regard to the actual value of the land,
 - (b) reimbursing the purchaser for the cost of remediation,
 - (c) providing the purchaser with the difference between the value of the land without the defect and with the defect,

- (d) providing the purchaser with the difference between the purchase price and the value of the land without the defect.
- 4. In cases of this nature, the court is not wedded to any particular methodology so long as it has regard to the material circumstances, including the intention of the parties, in determining the purchase price at first instance.

[479] In *Serebrennikov*, Justice Goepel went on to consider at paras 37-38 the judgment in *514953 B.C. Ltd. (c.o.b. Gold Key Construction) v. Leung* (2007), 64 BCLR (4th) 76 (CA), in which the Court of Appeal reviewed in detail how a court should determine damages in the case of faulty construction. In *Leung*, the Court noted that in building cases, pecuniary loss is based on either the diminution of value or the cost of curing the defective performance. Justice Goepel drew from *Leung* the proposition that:

[38] ... the cost of reinstatement is not the proper measure of damages when the expenditure would be out of all proportion to the benefit to be obtained. In such cases, the appropriate measure of damages is the difference in value, even though it might result in a nominal award.

[480] That of course is a proposition that applies to assessment of damages generally, but it is clear that the same principle applies in determining whether the cost of remediation is an appropriate measure to use when ordering specific performance with abatement. Justice Goepel thus expressed the view that, even if he had concluded that specific performance should be ordered, he would have declined to order specific performance with abatement on the basis that the proposed expenditures would be out of all proportion to the benefit to be obtained, in terms of the value of the property.

Damages in Lieu

[481] With respect to the assessment of damages, the defendants rely on *Mavretic* for the proposition that the usual measure of damages – even in the case of a contract to sell land – is the date of trial. *Mavretic* involved a vendor plaintiff who initially sought to have a contract to sell to the defendant purchaser specifically performed. There had been wide variations in the market price between the time of

breach and the time of trial. The majority (McEachern C.J. dissenting) concluded that damages should be assessed as of the time of breach and not the time of trial.

[482] *Mavretic* predates *Semelhago*, in which damages in lieu of specific performance were awarded as of the date of trial, and in which the Court concluded at para 16 that “it is not inconsistent with the rules of the common law to assess damages as of the date of trial”, and at para 18 that, in the circumstances of that case, the appropriate date for the assessment of damages was the date of trial.

[483] In this case, the plaintiffs advance an alternative claim to damages in lieu of specific performance. With respect to such claims generally, as explained by Justice Levine in *Inmet Mining Corp v. Homestake Canada Inc*, 2003 BCCA 610 [*Inmet*]:

[203] The law is clear that an innocent party to a breach of contract may accept the breach, treat the contract at an end and sue for damages, or not accept the breach, keep the contract open and sue for specific performance, or in the alternative, damages in lieu thereof. It is also clear that the innocent party may claim all of these remedies in the alternative and is not required to elect among them until judgment: see *Dobson v. Winton and Robbins Ltd.*, [1959] S.C.R. 775 at 779, cited in *Clendering v. Cedarhurst Properties Ltd.* (1977), 31 B.C.L.R. 153 at 156 (C.A.) and *Fletton v. Peat Marwick Ltd.* (1988), 27 B.C.L.R. (2d) 209 at 214 (C.A.).

...

[205] ... Inmet could keep the contract “open” by claiming specific performance to the date of judgment. If the court determined that specific performance was not an appropriate remedy (because the property was not unique), or specific performance was awarded but could not be enforced, as occurred in *Johnson and Gaspari v. Creighton Holdings Ltd.* (1984), 13 D.L.R. (4th) 570 (B.C.S.C.), then common law damages would be the appropriate remedy.

[206] Here, the trial judge determined that specific performance was an appropriate remedy, but refused to grant it in the circumstances. Thus, damages in lieu of specific performance was the appropriate alternate remedy. As held in *Johnson* (which has been discussed and applied by this Court in numerous cases, including *Ansdell et al. v. Crowther* (1984), 55 B.C.L.R. 216 (C.A.); *Kemp v. Lee* (1984), 58 B.C.L.R. 219 (C.A.), approving (1983), 44 B.C.L.R. 172p (S.C.); and *Fletton*), whether damages are assessed at common law or in equity, the principles for measuring damages are the same. They are intended to put the parties in the position they would have been in if the contract had been performed. In most of the cases reviewed, including *Semelhago*, *Wroth*, *Johnson*, and *Kemp*, damages were assessed as the difference between the purchase price of the property and the value when the claim for specific performance was terminated.

[484] The principles in *Inmet* were applied in the context of an award of damages in lieu of specific performance in *Bajwa v. Habib*, 2019 BCSC 721 at para 23. Similarly, in *van Dishoeck v. Centre Stage Holdings Ltd.*, 2023 BCSC 1500 at paras 181-182, Chief Justice Hinkson found the principles in *Inmet* to be applicable to an award of damages in lieu of specific performance through reference to both *Semelhago* and to *Lalani v. Chow*, 2011 BCCA 499 at paras 22-23. See also Sharpe, *Injunctions and Specific Performance* (looseleaf) at §10:14.45.

[485] In my view, to the extent that a party has advanced and maintained a viable claim to specific performance, the principles set out in *Inmet* govern the determination of the time at which to assess damages.

Analysis

[486] As noted above, I have already concluded that neither party was ready, willing and able to complete as of June 30, 2021. The Adeyemis affirmed the ongoing agreement in the face of Industrial's repudiation. In those circumstances, it is open to the Adeyemis to advance a claim for specific performance.

[487] I conclude that the Property is unique to the plaintiffs. I accept Faye's evidence in particular as to the connection that she has with the Property. It has been her family's home for several years. It is where they have celebrated birthdays and special holiday times over the years, and where her two youngest were welcomed into the world. I accept the factors she identified as to the characteristics of the Property that are special. The fact that other, different properties were available in the same neighbourhood, and that the Adeyemis might have considered them had the Property not been available to them, does not in my view detract from the uniqueness of the Property and its special, intrinsic value to them.

[488] In my view, the evidence does not support Industrial's submission that the Somenos townhouse constitutes a replacement property. To the extent the Adeyemis had thoughts of living there, those thoughts were short-lived. Within days of signing the agreement to purchase it, and before condition removal, they were already putting arrangements in place to rent out the townhouse. An investment

property is not the same thing as a replacement property. This case is clearly distinguishable from cases like *Lal*, in which the plaintiff not only found a new property to which she moved, but she had elected at trial to seek damages rather than specific performance. It is also different from *Serebrennikov*, where the plaintiff purchased a new home of similar size and characteristics in the same neighbourhood and moved into it.

[489] I turn to Industrial's submission that the plaintiffs should be disentitled to the remedy of specific performance as a result of post-June 2021 conduct; specifically:

- a) failing to make timely payment of some of the \$2,500 monthly amounts after June 30, 2021;
- b) failing to pay half of the property taxes and the full amount of bills from the municipality in respect of what are categorized as utilities; and
- c) a failure to reasonably maintain the Property.

[490] Although the allegation of failure to reasonably maintain the Property was raised in submissions, there was very little evidence to support it (other than a general question as to what was done to maintain the Property). It is clear that the plaintiffs did regular house cleaning and tasks such as lawnmowing. I am not satisfied that the evidence satisfied any significant failure with respect to maintenance.

[491] With respect to property taxes and municipal utilities, it was clear on the evidence that the plaintiffs were not notified of or asked to contribute to any of these bills after June 30, 2021. In those circumstances, I can see no way in which a failure to make payments that they were never asked to make can disentitle the plaintiffs to specific performance.

[492] The four-week delay in making the monthly payment in July 2021 (as noted above, it was paid on July 29 rather than July 1) is a matter that was corrected

quickly and in my view was a *de minimis* breach for much the same reasons as I have set out above with respect to the delay in making the June 2021 payment.

[493] As set out in more detail above (beginning at para 284), disputes arose between the parties at the end of December 2022 when Industrial served on the plaintiffs a two months' notice to end a tenancy. Both Faye and Opey gave evidence as to the disruption to their lives when that notice was received on New Year's Eve, and that the notice is the reason they ceased making the monthly payments. Once the monthly payments stopped, Industrial issued another notice seeking an immediate order for possession based on an alleged failure to pay rent. Both of the tenancy notices were premised on the parties' relationship being governed by the June 8, 2020 Residential Tenancy Agreement, notwithstanding that there was at the time no version of that document signed by Industrial.

[494] Although proceedings at the RTB were eventually stayed in favour of the present action, the RTB proceedings were soon followed by the Petition which I have described above. That petition was resolved by way of the consent order of Justice Branch made May 31, 2024. Within days of that order, the Adeyemis had provided a bank draft for \$40,000, and recommenced making monthly payments.

[495] In my view, Industrial, having commenced multiple proceedings on the strength of a Residential Tenancy Agreement that I have concluded was never intended to govern the parties' relationship, and was created solely for the purposes of protecting Industrial from a commission claim by its former realtor, is in no position to allege that the plaintiffs' conduct has been inequitable. I do not see the plaintiffs' conduct, in all of the circumstances I have outlined, as being sufficiently unreasonable or inequitable to disentitle them to equitable relief in the form of specific performance.

[496] The final issue with respect to the availability of specific performance arises from Justice Griffin's comments in *La/* about whether it is reasonable to fix a new date. I do not read Justice Griffin's judgment as stating that it will never be appropriate for specific performance to be ordered five years after the original

completion date. In my view, reasonableness is a case-specific matter. In this case, it is significant that the plaintiffs have been living in the Property since 2020. That significantly impacts the equities of the case. I note as well that the agreement provides for, and the plaintiffs have paid, agreed amounts in respect of their occupancy.

[497] Finally, it is my view that the plaintiffs sought to move this case forward as quickly as possible. With the exception of the one adjournment sought by the plaintiffs after the withdrawal of their lawyer, they have moved this matter forward as quickly as possible in light of systemic delays. In my view, it was reasonable for them not to want to move forward without counsel – this claim is both legally and factually complex, and they were well-served to have capable counsel to complete the trial. The bulk of the delay in this case was systemic, and it is difficult to think that a party with a strong connection to a family home could lose that home as a result of systemic delays.

[498] In my view, it is not unreasonable in the circumstances of this case to order specific performance, notwithstanding the time that has passed since the original completion date.

[499] I turn finally to the claim for abatement. Mr. Andersen's report is reviewed above. As is clear from that review, Mr. Andersen was very limited in his ability to provide a complete evaluation of the issues with the Property as a result of his instructions to conduct no destructive testing. I agree that his comments about the possibility that the plumbing as a whole may need to be replaced are not adequately supported. Given that he observed no electrical issues, I do not think any weight can be given to his electrical estimate. I accept that his recommendation with respect to the HVAC system is adequately supported. I also accept his recommendation as to a need to repair the main entry stairs. With respect to the latter point, I acknowledge that repairs to this building component were partially crossed out of the CPS, but I conclude that the settling of the stairs has become much more pronounced since the date of signing.

[500] I accept that there continues to be a need to repair plumbing in and around the master ensuite bathroom, to finish grouting and sealing the tiles in that room, and to ultimately finish the drywall in those areas. This is only a small subset, however, of the much larger scope of work identified with respect to plumbing.

[501] I am not satisfied on the evidence that there has been adequate evidence of a structural issue or with respect to envelope issues in respect of the garage and the sundeck above it.

[502] In my view, the following remedial work is justified on the basis of the evidence:

- a) plumbing, tiling, sealing and drywall finishing re master ensuite bathroom – \$15,000;
- b) HVAC system – \$4,500; and
- c) front entry stairs – \$7,000.

[503] An order for specific performance will leave the plaintiffs with the responsibility to secure an occupancy permit. There was evidence that Mr. Tougas proposed to charge fees of \$4,000 for the required engineering work. There would also be charges for excavation. In my view, there should be compensation of \$5,000 in respect of the steps required to obtain an occupancy permit.

[504] Finally, there is the question of the new home warranty. To the extent that Pacific Home Warranty considers the warranty periods to have begun running as of 2018, they will by the time of completion be almost fully complete. Industrial says that this was simply an error that can be corrected. In my view, the order I propose to make gives them time to ensure that a proper commencement date be applied to the warranty. In my view, that date should be no earlier than the date that the plaintiffs moved into the Property. Should Industrial be unable to revise the warranty periods, then I think a reasonable credit to the plaintiffs, considering that I have already included a credit in respect of certain repair costs, would be \$10,000.

[505] Considering the value of these items in relation to the contract price and the value of the Property, and having regard to the discussion in *Serebrennikov* and the cases it reviews, I am satisfied that these expenses are of a magnitude for which it is appropriate to award cost of remediation. I therefore conclude that there should be an abatement of either \$31,500 or \$41,500, depending on the warranty status.

[506] In my view, however, there are also credits to Industrial that must also be accounted for. While it seems clear that both parties were uncertain as to whether amounts in respect of property taxes and municipal utilities should have been paid from June 2021 onward, it is my view that they should, both as a matter of interpretation of the language of ss 5 and 12 of the CPS and as a matter of doing equity between the parties given the lengthy time that has passed. While I accept that the parties appear to have treated the reference to the buyer paying “all utilities from the date this contract is signed” as referring to things such as electricity and gas, I do not see any reason to consider specific municipal charges for garbage collection and other services to the property that are separately billed as not also being “utilities”.

[507] On my review of the evidence, the following should be credited to Industrial:

- a) 50% of property taxes of \$7,453 (2021), \$7,796 (2022), \$7,625 (2023), \$8,137 (2024), and \$8,428 (2025), which I calculate as \$19,720; and
- b) \$192.27 in respect of residential garbage, sewer and water (bill issued December 31, 2023).

[508] I would estimate the total amount of these credits, including an amount for 2026 taxes as well as annual municipal utilities for other years, as being about \$25,000.

[509] In my view, the net reduction in purchase price, considering the abatement and the credit in respect of taxes and utilities, should be \$16,500, which shall be reduced to \$6,500 if Industrial is able to secure confirmation from the home warranty provider that the home warranty commencement date is no later than June 15, 2020.

[510] I would thus order specific performance of the CPS, with a reduction in the purchase price of either \$16,500 or \$6,500, with completion to occur three months from the date of this judgment. The parties have liberty to apply for directions, if necessary to implement this order.

Other Claims

Misrepresentation:

[511] Roger is named as a defendant in this action. The claims pleaded against him are in misrepresentation. Those claims are also advanced against Industrial. Roger was of course the sole director of Industrial and presumably primarily spoke in respect of the Property in his capacity as director.

[512] In closing submissions, the plaintiffs described the claim in misrepresentation as an alternative claim. They acknowledged that, if the order for specific performance is granted, then the issue of damages for misrepresentation becomes unnecessary as the misrepresentation damages are encompassed within the specific performance with abatement.

[513] In my view, given the order I have made, there is no need to deal with the claim in misrepresentation. That claim is subsumed in the order I have made for specific performance.

Bad Faith Damages:

[514] The plaintiffs say that they were strung along for a year with no real efforts taken to obtain an occupancy certificate. They have lived in limbo for a further five years. Regarding bad faith damages, they submit that these damages are to compensate for the stress and anguish caused by such conduct as well as the loss which occurred from being “strung along”. The plaintiffs say that an appropriate award of damages for the stress and anguish caused to them as a result of Industrial’s bad faith conduct would be \$75,000.

[515] I have granted equitable relief in this matter, in the course of which I have assessed and drawn conclusions on the parties’ conduct and their treatment of each

other. I have made equitable adjustments in respect of the parties' relationship. In my view, and in light of the relief granted, a separate award of damages in respect of bad faith conduct would be somewhat duplicative and is unnecessary in the context of this case.

Conclusion

[516] I order specific performance of the CPS, with a reduction in the purchase price of either \$16,500 or \$6,500, depending on the home warranty status as noted above. Completion is to occur three months from the date of this judgment. The parties have liberty to apply for directions, if necessary to implement this order.

[517] The plaintiffs have been substantially successful and would ordinarily be entitled to tariff costs. Should either party seek costs other than the usual order, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 20 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate. If neither party makes a submission with respect to costs, and the parties are otherwise unable to resolve costs, then the plaintiffs will have their costs on Scale B.

[518] If the parties identify any mathematical errors, or if there is any issue that I have failed to deal with that was properly before me or that arises from these reasons for judgment, then the parties may seek clarification or determination of those matters, with the same schedule for submissions as in respect of costs.

“Veenstra J.”