IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wang v. Lu,*
2024 BCSC 126

Date: 20240129
Docket: S227860
Registry: Vancouver

Between:

Han Wang

Plaintiff

And

Donger Lu

Defendant

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	M.B. Morgan K. Coady
Counsel for the Defendant:	J. Wagner B. Wu
Place and Dates of Trial:	Vancouver, B.C. June 20-22, 2023
Place and Date of Judgment:	Vancouver, B.C. January 29, 2024

Table of Contents

Overview

[1] This is an application for summary judgment brought by the defendant, Donger Lu, in the context of a dispute arising out of a failed agreement for the purchase and sale of a residential property located at 1611 Drummond Drive, Vancouver, BC (the "Property").

[2] The Property is owned by Ms. Lu. Pursuant to a standard form contract of purchase and sale dated April 1, 2022 (the "Contract"), Ms. Lu agreed to sell the Property to the plaintiff, Han Wang, for a purchase price of $18,580,000.

[3] In April 2022, Mr. Wang removed subjects and paid a deposit of $900,000 (the "Deposit"). The purchase of the Property pursuant to the Contract was expected to close on September 29, 2022.

[4] However, in August 2022, Mr. Wang encountered issues obtaining insurance for the Property. More specifically, he was unable to obtain inhabited dwelling insurance, which his lender required prior to advancing funds pursuant to the mortgage financing Mr. Wang understood he had secured to purchase the Property. Upon making further inquiries, Mr. Wang eventually learned that the Property was insured as a vacant property.

[5] The sale of the Property did not complete. Instead, Mr. Wang commenced this action against Ms. Lu and filed a certificate of pending litigation against the Property (the "CPL"). Mr. Wang advances claims for breach of contract and negligent misrepresentation.

[6] Mr. Wang's breach of contract claim is predicated primarily on the assertion that it was an express or implied term of the Contract that the Property was habitable and insurable as such. He asserts that Ms. Lu breached the Contract because to her knowledge, and contrary to representations made to him prior to entering into the Contract and repeated thereafter, the Property is uninhabitable and incapable of being insured as an inhabited dwelling. He seeks specific performance of the Contract by way of Ms. Lu delivering the Property in a state in which it can be

insured as an inhabited dwelling. Alternatively, he seeks damages for breach of the Contract and breach of the duty of good faith and honest performance thereof.

[7] Mr. Wang also advances a claim in negligent misrepresentation. He alleges that Ms. Lu made material misrepresentations in the property disclosure statement dated December 28, 2021 (the "PDS") and failed to disclose the uninhabitable and uninsurable status of the Property in face of having represented it to be habitable and insurable as such.

[8] Ms. Lu denies the allegations made by Mr. Wang. She asserts that the Contract is valid and enforceable and that all of the conditions were waived by Mr. Wang. Ms. Lu denies having made any representations regarding whether the Property was habitable. Alternatively, she says that the Contract did not contain any such representations, that the PDS did not form part of the Contract, and that in any event, any such representations were specifically waived by Mr. Wang.

[9] Ms. Lu has also filed a counterclaim seeking, among other relief, a declaration that Mr. Wang breached the Contract, an order that the Deposit be paid to her, removal of the CPL, damages for breach of contract, and punitive damages.

[10] Ms. Lu's notice of application is not entirely clear as to what relief she is seeking or on what basis. In a draft form of order appended to her application, Ms. Lu seeks not only dismissal of Mr. Wang's claim, but also various other forms of declarations and orders, many of which are framed in the alternative or further alternative. Some of the relief sought roughly parallels her counterclaim. However, Ms. Lu confirmed in oral submissions that she is not seeking summary judgment on her counterclaim.

[11] The legal basis for this application is also unclear in that Ms. Lu seeks to have Mr. Wang's claim "struck" under Rules 9-4 and 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. Neither of these provisions provide for a claim to be struck. Moreover, the procedure for seeking a determination on a point of law contemplated in Rule 9-4(1) was not followed, nor was the application argued on

that basis. Accordingly, I have confined my consideration of the substantive merits of this application under Rule 9-6.

[12] Interpreting Ms. Lu's notice of application in light of the submissions made by the parties, I find that the issues properly before me for consideration are as follows:

a) Should Mr. Wang's claim be dismissed in its entirety by way of summary judgment pursuant to Rule 9-6?

b) If Mr. Wang's claim is not dismissed, should the CPL registered against the Property be cancelled pursuant to ss. 215, 256 and 257 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*]?

c) If the CPL is not cancelled, should Mr. Wang be required to post security pursuant to s. 257(1) of the *LTA*?

[13] Mr. Wang says Ms. Lu's application ought to be dismissed in all respects. First, he says summary judgment is not appropriate as the pleadings and evidence give rise to numerous triable issues. Second, he asserts that there are conflicts in the evidence generally and material inconsistencies in Ms. Lu's own evidence that give rise to serious credibility issues that cannot be resolved on this application, thereby also making this matter unsuitable for determination by way of summary judgment. Finally, Mr. Wang says that cancellation of the CPL is not warranted as he has pleaded a *bona fide* claim to an interest in the Property and Ms. Lu has not demonstrated hardship or inconvenience caused by registration of the CPL. With respect to the posting of security, he notes that he has already paid the Deposit.

Background Facts

[14] In setting out the factual background in these reasons for judgment, I do not intend to make any final findings of fact. The facts as set out below remain to be proven at trial. Nor have I attempted to provide a comprehensive review of all of the evidence adduced on this application. Rather, what follows highlights the material sequence of events with a focus on the factual issues that are material to my

consideration of whether there are triable issues that require this matter proceed to trial on the merits.

[15] Mr. Wang is a Canadian citizen who moved from China to Vancouver in 2008. He is currently the president of a real estate development company in Vancouver.

[16] Ms. Lu is retired. She immigrated to Canada in 2007. She and her former husband Ding Yun Hua, purchased the Property in 2013. The Property was transferred into her name as sole owner in 2014. Ms. Lu and Mr. Hua divorced in 2016. Ms. Lu retained title to the Property following the divorce. She testified that she continued to reside at the Property and that it has been her principal residence since 2013.

Pre-Contract Status of the Property

[17] The Property is situated in the Point Grey neighbourhood of Vancouver. The house located on the Property is approximately 100 years old.

[18] Ms. Lu and Mr. Hua originally planned to build a new home on the Property and had architectural plans commissioned for that purpose. However, Ms. Lu did not proceed with redeveloping the Property after she and Mr. Hua divorced.

[19] The Property was first listed for sale in November 2019. That listing expired without a sale and the Property was re-listed in December 2020 and June 2021. Ms. Elke Lee represented Ms. Lu as the listing realtor for each listing.

[20] In March and June 2021, trees fell on the house on the Property. Ms. Lu testified that the June 2021 incident caused damage to the roof and a window and required “significant emergency repair works”. Nonetheless, the June 23, 2021 listing for the Property described the house as “immaculate and well-kept”.

[21] Ms. Lu testified that the initial cleanup from the June 2021 tree incident started in July 2021. Due to the structural damage, lack of proper heating and number of tradespeople coming and going on the Property, and on the “recommendation of the insurance company”, she stopped sleeping at the Property,

staying at her son's house nearby instead. The evidence as to when this occurred is unclear; Ms. Lu's affidavit evidence is vague on this point, and there are inconsistencies throughout her evidence on the issue of whether she continued to reside at the Property after the June 2021 tree incident. There is no evidence she returned to sleep in the house at the Property after summer of 2021.

[22] Ms. Lu completed the PDS in December 2021 wherein she indicated that she was unaware of any: structural problems with any of the buildings on the Property; problems with the electrical or gas system; or latent defect that render the premises unfit for habitation. The PDS also provided that Ms. Lu was obliged to disclose material changes to the information set out therein:

> The Seller states the information provided is true, based on the Seller's current actual knowledge as of the date on page 1. Any important changes to this information made known to the Seller will be disclosed by the Seller to the Buyer prior to closing.

[23] Ms. Lu' s insurance coverage on the Property was set to expire at the end of February 2022. Ms. Lu testified that in mid-February, she was advised by her insurance broker that her existing insurer was no longer prepared to provide coverage for the Property as an inhabited dwelling, but would extend her existing owner-occupied policy for a three-month term, to May 31, 2022.

[24] Mr. Wang first viewed the Property with his realtor, Charles Yang, on March 12, 2022. Mr. Yang testified that he noticed a tarp on the roof and asked Ms. Lu's realtor, Ms. Lee, about it. Mr. Yang says that Ms. Lee told him that the roof was being repaired, prompting him to ask Ms. Lee if Ms. Lu was currently living at the Property. He testified that Ms. Lee responded that Ms. Lu was living at the Property. For his part, Mr. Wang testified that he observed the tarp on the roof, but it did not concern him because many of the houses in the neighbourhood were old, similarly had tarps and were undergoing repairs. There is no evidence from Ms. Lee confirming or refuting the defendant's evidence on this point. Rather, Ms. Lu filed an affidavit from a different realtor, Tina Kwok, who says she has been assisting Ms. Lee.

[25] On March 24, 2022, Ms. Lu's insurance broker advised her that no insurer was willing to insure the Property, other than one who was prepared to insure it as a vacant dwelling on a wreckage value basis due to its condition.

[26] Mr. Wang testified that he and Mr. Yang viewed the Property multiple occasions in March 2022 and that, during those viewings, Ms. Lee again advised them that Ms. Lu lived in the house. Neither Mr. Wang or Mr. Yang ever met Ms. Lu. Mr. Wang testified that he observed that the interior of the house was clean, contained limited furniture, and appeared to be habitable. Again, there is no evidence from Ms. Lee confirming or refuting the defendant's evidence on this point.

Contract of Purchase and Sale of the Property

[27] Mr. Wang testified that after viewing the Property; reviewing certain architectural plans Ms. Lu had had prepared; and satisfying himself that the Property met his requirements with respect to lot size, view, location, a pre-existing habitable house, and redevelopment potential, he instructed Mr. Yang to make an offer to purchase the Property.

[28] On March 27, 2022, Mr. Wang made an offer to purchase the Property for $18,180,000. Ms. Lu rejected that offer, but on April 3, 2022, made a counter offer at $18,580,000. A copy of the PDS was provided to Mr. Wang with the counteroffer. Mr. Wang accepted the counter offer on April 4, 2022, thereby entering into the Contract.

[29] Mr. Wang alleges that the Contract contained the following express or implied terms, among others:

a) Ms. Lu covenanted, represented and warranted that she had complied with all reporting and payment obligations in respect of the British Columbia Speculation and Vacancy Tax ("SVT") and agreed to supply any necessary forms, documents and declarations forthwith upon request by Mr. Wang (the "SVT Term");

b) on or before the completion date of September 29, 2022, Ms. Lu would deliver a statutory declaration regarding the City of Vancouver's Empty Homes Tax ("EHT") to Mr. Wang (the "EHT Term");

c) the Property was habitable and insurable as an inhabited dwelling (the "Habitability Term"); and

d) the representations contained in the PDS formed part of the Contract.

[30] The Contract also contained an entire agreement clause which provided as follows:

> 18. There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive completion of the sale.

[31] Mr. Wang testified that he arranged to obtain a mortgage through RBC Private Banking in the amount of $9,000,000. He was aware that he required home insurance for the Property for the mortgage to be approved, but had no concerns about obtaining insurance because he understood that it was a term of the Contract that the Property was habitable and therefore capable of being insured.

[32] On April 29, 2022, Mr. Wang paid the Deposit and removed the conditions in his favour in the Contract. On April 30, 2022, Mr. Wang initialled the PDS and a title search for the Property.

Post-Contract Events

[33] Mr. Wang did not have a home inspection completed for the Property prior to subject removal. He testified that this was because he had no concerns about the livability of the house as he understood Ms. Lu was living there, and all he required was that it could be lived in or rented out during the design and permitting process for redevelopment.

[34] Ms. Lu testified that her insurance broker suggested obtaining vacant dwelling insurance from June 1, 2022 onwards. She does not say when this occurred. For the

purpose of this application, this presumably occurred sometime after the Contract was entered into on April 4, 2022, given Ms. Lu's evidence that vacant dwelling insurance was acceptable to her since the Property was being sold to Mr. Wang and she understood that he intended to redevelop the Property.

[35] On April 30, 2022, Ms. Lu received a quote for vacant dwelling insurance for the Property, effective June 1, 2022. The quote was subject to a 72-hour supervision of the Property and a passed electrical inspection within 30 days. An electrical inspection was conducted on May 9, 2022 and the Property's electrical system was classified as "high risk". Repairs were completed in late May 2022, as a result of which the Property's electrical system was rated "medium risk".

[36] Throughout August 2022, Mr. Yang corresponded with multiple insurance brokers on Mr. Wang's behalf in an effort to obtain inhabited dwelling insurance for the Property. In furtherance of this, Mr. Yang testified that he requested additional information about the Property from Ms. Lee, who he asserts provided incomplete sections of an insurance application form titled "Habitational Insurance Application" in response.

[37] Mr. Yang then requested a copy of Ms. Lu's insurance policy and was provided with contact information for her insurance agent, William Wong. At some point in mid-August 2022, Mr. Wong provided Mr. Yang with a copy of the vacant dwelling insurance then in place for the Property. This is when Mr. Wang says he first learned that the Property was not insured as an inhabited dwelling. He also alleges that other critical information was withheld from him and not disclosed at this time, namely that the Property had been expressly denied inhabited dwelling insurance and that only vacant property insurance could be obtained.

[38] On August 18, 2022, Mr. Wang requested that the closing date be extended to October 2022. Ms. Lu refused the requested extension. She testified that she did so because she had committed to providing funds for her son to purchase a property in China and to complete a lease agreement for the purchase of a property for herself in London, England in the amount of £2,830,200 (collectively, the "Overseas

Properties”), which were both scheduled to complete shortly after the closing date under the Contract.

[39] In late August 2022, Mr. Wang says that he learned from RBC Private Banking that it required inhabited dwelling insurance in order to advance funds under the mortgage financing he understood he had previously secured from them to finance his purchase of the Property.

[40] In September 2022, Mr. Wang had the Property inspected. The inspection report revealed structural problems and problems with the water and electrical systems. Mr. Wang testified that after reviewing the inspection report and learning that the Property was insured as a vacant dwelling, he came to realize that despite representations to the contrary, Ms. Lu had not lived at the Property for some time.

[41] Mr. Wang testified that he also came to suspect that Ms. Lu’s EHT declarations—which were provided to him in September 2022 and declared the Property as her principal residence—were untrue. Ms. Lu did not provide a declaration regarding the SVT.

[42] Given the circumstances, Mr. Wang demanded that Ms. Lu provide a holdback sufficient to indemnify him for her breaches of the Contract. The amount offered by Ms. Lu was not acceptable to Mr. Wang as sufficient to remedy the uninhabitable and uninsurable condition of the Property.

[43] The purchase and sale of the Property did not complete as scheduled on September 29, 2022. Rather, Mr. Wang filed this action and registered a CPL against title to the Property. Mr. Wang asserts that he remains ready, willing and able to purchase the Property and intends to do so once it has been remediated to the point where it can be insured as an inhabited dwelling and when Ms. Lu has complied with the EHT and SVT Terms of the Contract.

[44] The Property was relisted for sale in October 2022. The listing did not mention the house on the Property.

[45] Ms. Lu conceded in oral submissions that the Property was vacant from June 2022 onwards and that as of the date of hearing, repairs to the Property remained ongoing. However, she asserts that the Property is in the same or better condition than when Mr. Wang viewed it in March 2022 because the May 2022 electrical repairs were completed.

[46] Mr. Wang says that Ms. Lu made various misrepresentations regarding the habitability of the Property including: the description of the home in the property listing, the representations made in the PDS, Ms. Lu's declaration that the Property was her primary residence in the EHT declarations, Ms. Lee's repeated assertions that Ms. Lu was living at the Property, and Ms. Lu's failure to disclose that she had been denied inhabited dwelling insurance for the Property (the "Habitability Representations"). Mr. Wang asserts that as a result of these misrepresentations, he was unable to obtain inhabited insurance for the Property, which in turn prevented him from obtaining the financing he had previously secured, and thereby completing the transaction in accordance with the Contract.

Issue #1 – Should Summary Judgment Be Granted?

Preliminary Procedural Point: Lack of Response to Amended NOCC

[47] The initial notice of civil claim in this action pleaded a claim for breach of contract and breach of the duty of good faith and honest performance of contractual obligations, and sought specific performance of the Contract. On May 5, 2023, Mr. Wang filed an amended notice of civil claim ("Amended NOCC"), as of right under Rule 6-1(1)(a) of the *Rules*. The Amended NOCC, in relevant part, added a claim in negligent misrepresentation and further particularized the claim for breach of the duty of good faith and honest performance of the Contract. Ms. Lu has not filed a response to the Amended NOCC, but confirmed in oral submissions that she is seeking summary judgment dismissing the Amended NOCC in its entirety.

[48] Rule 9-6(4) requires a party seeking summary judgment to have first filed a responding pleading:

> Application by answering party

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> [Emphasis added.]

[49] An “answering party” is exhaustively defined in Rule 9-6(1) as a party who has filed a responding pleading that “relates to” a claim made in the originating pleading:

> "answering party", in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;
>
> [Emphasis added.]

[50] Ms. Lu says that her failure to respond to the Amended NOCC poses no impediment to her application for summary judgment because, by operation of Rule 6-1(6), her response to civil claim is deemed to be a response to the Amended NOCC and any new facts set out in the Amended NOCC are deemed to be outside her knowledge. Rule 6-1(6) provides:

> Failure to serve amended responding document
>
> (6) If a party on whom an amended pleading is served under subrule (4) (a) does not serve an amended responding pleading as provided in subrule (5),
>
> (a) the pleading he or she filed in response to the original version of the primary pleading is deemed to be the pleading he or she filed in response to the amended pleading, and
>
> (b) any new facts set out in the amended pleading are deemed to be outside the knowledge of the defendant.

[51] Ms. Lu adduced no authority interpreting Rule 9-6(4) as permitting her to proceed with this application in the absence of filing a response to the Amended NOCC. Nor has she adduced any authority supporting the proposition that Rule 6-1(6) operates to permit her to circumvent Rule 9-6(4) and obtain summary judgment dismissing claims in respect of which she has not filed a responding pleading.

[52] Ms. Lu’s reliance on Rule 6-1(6) may be more persuasive in situations where an amended pleading merely pleads new facts. However, I find it less compelling in circumstances like the present, namely where an amended pleading advances a

new cause of action and summary judgment is sought dismissing the new claim without a responding pleading having been filed.

[53] Such is the case here, where the Amended NOCC not only pleads additional material facts, but also advances a new claim for negligent misrepresentation, which remains unanswered in the defendant's pleadings. The deeming provision in Rule 6-1(6)(a) thus does not assist Ms. Lu in complying with Rule 9-6(4) because her response to civil claim only addresses the claims pleaded in the original notice of civil claim. Accordingly, despite seeking summary dismissal of Mr. Wang's claim in its entirety, Ms. Lu has not filed a responsive pleading that addresses the negligent misrepresentation claim she seeks to have summarily dismissed.

[54] In my view, interpreting Rules 9-6(4) and 6-1(6) in the manner proposed by Ms. Lu would be inconsistent with the modern approach to statutory interpretation, which dictates that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26 [*Bell ExpressVu*]. The modern approach and the related principles of statutory interpretation apply when interpreting the *Rules*: *Evans v. Jensen,* 2011 BCCA 279 at para 16; *Prime Time (Abby Lane) Inc. v. DGBK Architects*, 2022 BCSC 1799 at paras. 21–22.

[55] There are a number of core principles of statutory interpretation that aid in the case at bar. When considering the grammatical and ordinary sense of a provision, it should be presumed that the words are not intended to be tautological: *Bell ExpressVu* at para. 37. Relatedly, wherever possible, every part of a provision should be assigned meaning: *R. v. Hutchinson*, 2014 SCC 19 at para. 16. When considering the text of a statute, the words "take colour from their surroundings" and must be read as a component as part of the larger statutory scheme: *Bell ExpressVu* at para. 27.

[56] Bearing these principles in mind, I find that the proper construction of “after serving a responding pleading” as those words are used in Rule 9-6(4), taken together with the definition of “answering party” in Rule 9-6(1), requires an answering party to have served a responding pleading that “relates to” the cause(s) of action or claim(s) of the plaintiff in respect of which summary judgment is sought.

[57] Conversely, interpreting these provisions to permit a summary judgment application to be brought so long as any form of responsive pleading has been filed—even one that does not respond to the claims in respect of which summary judgment is sought—would be inconsistent with the ordinary sense of the words considered in their proper context, and would effectively ignore the definition of “answering party” in Rule 9-6(1).

[58] Interpreting Rule 9-6(4) in this manner is also consistent with the legislative intent of the *Rules*, as expressed in Rule 1-3(1), of securing the “…just, speedy and inexpensive determination of every proceeding on its merits” (emphasis added). In my view, a just determination of this application, which could result in dismissal of the plaintiff’s claim if granted, requires that the plaintiff know the defences being raised on the pleadings prior to being called on to defend a summary judgment application. Put differently, just as a plaintiff would not be entitled to summary judgment on claims not pleaded, nor should a defendant be entitled to summary dismissal of a claim that it has not responded to in its pleadings.

[59] This interpretation is also, in my view, consistent with the jurisprudence requiring that each party put its best foot forward with respect to the existence (or non-existence) of material issues to be tried on an application under Rule 9-6: see e.g. *Canada (Attorney General) v. Lameman,* 2008 SCC 14 at para. 11 [*Lameman*]. There can be little debate that a plaintiff will be better able to put its best foot forward to defeat a summary judgment application by establishing triable issues in respect of the defences raised when those defences are set out in the pleadings.

[60] Accordingly, I find that having failed to file a response to Mr. Wang’s negligent misrepresentation claim, Ms. Lu has not complied with Rule 9-6(4). That being said,

the parties addressed the negligent misrepresentation claim in their application materials and oral submissions. Accordingly, I find that the plaintiff has not been prejudiced in the present circumstances by Ms. Lu's non-compliance with the *Rules* and have considered below whether she is entitled to summary judgment in respect of the negligent misrepresentation claim.

Legal Principles

[61] Rule 9-6 permits a defendant to apply for summary judgment on all or part of a claim, providing in relevant part as follows:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
> >
> > (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
> >
> > (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
> >
> > …

[62] The principles that apply on an application for summary judgment are summarized by the Court of Appeal in *Zheng v. Bank of China (Canada) Vancouver Richmond Branch*, 2023 BCCA 43:

> [31] The balance that has been struck in R. 9-6 is to allow a party the opportunity to bring a preliminary application to show the court that a claim or defence has no merit and therefore it should not be allowed to proceed to trial. However, the burden on the applicant is high. It is not enough to show that the claim or defence has little merit, nor is it appropriate to ask the court to weigh competing evidence. Rather, the applicant must show that the claim or defence presents no genuine issue for trial and it is bound to fail.
>
> [32] This Court in *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2022 BCCA 97, noted that a defendant can succeed on a R. 9-6 application "by showing the case pleaded by the plaintiff is unsound [does not support a cause of action] or by adducing sworn evidence that gives a complete answer to the plaintiff's case": at para. 42, citing *Beach Estate* at para. 48.

> [33] However, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, or if the defendant's evidence fails to meet all the causes of action raised by the plaintiff's pleadings, the application must be dismissed: at paras. 42–43, citing *Beach Estate* at para. 48 and *Canada (Attorney General) v. Lameman,* 2008 SCC 14 at para. 11; see also *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500 at paras. 12–13. Where the plaintiff has pleaded a cause of action and facts in support are within the defendant's knowledge and control, a defendant bringing a summary judgment application must provide evidence that the pleaded claim is without merit*: Balfour v. Tarasenko,* 2016 BCCA 438 at para. 43.
>
> [34] A judge on a summary judgment application is not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27.

[63] As noted in *Zheng*, the bar on an application under Rule 9-6 is high. The onus on a party seeking summary judgment has been described as requiring that it be "plain and obvious", "manifestly clear" or "beyond a doubt" that there is no genuine issue of material fact requiring trial: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48; *Lameman*, at para. 11. Accordingly, summary judgment should only be granted where the respondent's case is bound to fail: *Deline v. Vancouver Talmud Torah Assn*., 2020 BCSC 251 at para. 36; *Beach Estate* at paras. 48, 66–67.

[64] Although an application under Rule 9-6 invokes the court's consideration of evidence, it is not a summary trial. I am not permitted to weigh evidence, assess credibility or draw unfavourable inferences against the party defending the application: *Zheng* at para. 34, citing *Aubichon v. Grafton*, 2022 BCCA 77 at para. 27. Any weighing of evidence beyond determining whether it is incontrovertible may only be done in a trial: *Beach Estate* at para. 49; *Tran v. Le*, 2017 BCCA 222 at para. 2; *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 32; *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 8–12 [*Skybridge*]. Accordingly, a matter is not appropriate for determination by way of summary judgment where determinations of fact are required: *Wang v. Niu*, 2022 BCSC 1027 at para. 51 [*Niu*], aff'd 2023 BCCA 153, citing *Skybridge* at para. 8.

[65] Further, issues of law should only be decided under Rule 9-6 if there is no real dispute about the material facts and the issue is well-settled by authoritative

jurisprudence. Rule 9-6 is not well-suited for determining novel points of law: *Niu* at para. 52; *Malak v. Hanna*, 2021 BCSC 115 at para. 10; see also *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2012 BCCA 491 at paras. 12, 19.

[66] Finally, as an application under Rule 9-6 seeks a final order, the affidavit material filed by the applicant in support thereof may not contain statements of information and belief: Rule 22-2(12) and (13)(b)(i); *Marzec v. Nemi*, 2022 BCSC 178 at para. 52, citing *Tundra Helicopters et al., v. Allison Gas Turbine et al*., 2002 BCCA 145 at para. 32; see also Justice G. Peter Fraser, John W. Horn, Justice Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia* (online)*,* 2nd ed (Vancouver: LexisNexis Canada Ltd., 2007) at 28.4 (Release 45, December 2023).

[67] Conversely, a party responding to a summary judgment application is permitted to rely on hearsay evidence. The responding party does not seek a final order; it seeks to dissuade the court from making a final order by way of dismissal of the summary judgment application. If the responding party were successful, the result would be for the matter to proceed to a trial on the merits. In such circumstances, the nature of a summary judgment application—namely one which, if successfully opposed, would enable the responding party to have a trial on the merits—renders it permissible for an application respondent to rely on hearsay evidence: *Marzec* at paras. 53–55, citing *Progressive Construction Ltd. v. Newton* (1980), 25 B.C.L.R. 330 at para. 17, 1980 CanLII 493 (S.C.) and *Anhalt v. Flowers*, 2013 BCSC 1378 at paras. 35–40, 54.

Analysis

Breach of Contract

[68] Mr. Wang claims that Ms. Lu breached the Contract by, *inter alia*, failing to disclose the uninhabitable and uninsurable status of the Property, and seeks specific performance thereof. Mr. Wang asserts that it was a term of the Contract that the Property was habitable and insurable as such, and that the representations contained in the PDS were incorporated into the Contract. Mr. Wang also claims that Ms. Lu breached the EHT Term and the SVT Term of the Contract.

[69] Determining Mr. Wang's claim for breach of contract will inevitably require interpretation of the Contract. The overriding goal when interpreting a contract is to determine the intent of the parties and the scope of their understanding at the time the contract was made. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 47. The central question is what was the parties' mutual and objective intention as expressed by the words of the contract: *Sattva* at para. 57.

[70] The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting: *Sattva* at para. 60; *Wade v. Duck*, 2018 BCCA 176 at para. 26. As *Sattva* makes clear, the surrounding circumstances or factual matrix within which the contract was formed are considered when interpreting a contract, but must not be allowed to overwhelm the words of the contract within the interpretation exercise: *Sattva* at para. 57.

[71] Generally speaking, Ms. Lu relies on the doctrine of *caveat emptor* and says that it bars Mr. Wang's claim for breach of the Contract. She also says that since Mr. Wang intended to redevelop the Property, it was not required to be habitable or insurable as such. Despite this, she also maintains that the Property was her principal residence throughout the material time, which she says negates any breach of the EHT or SVT Terms.

[72] In my view and as discussed further below, it is not plain and obvious that no triable issues arise in respect of Mr. Wang's claim for breach of the Contract. To the contrary, there are multiple aspects of the breach of contract claim that give rise to triable issues, the determination of which will require the evidence to be weighed, and credibility findings made.

Incorporation of the PDS into the Contract

[73] Dealing first with the PDS, Ms. Lu asserts that any aspect of Mr. Wang's claim predicated on the representations made in the PDS is bound to fail because it is plain and obvious that the PDS was not incorporated into the Contract. I disagree.

[74] It is undisputed on the evidence before me that the plaintiff provided the PDS to the defendant contemporaneously with her counter-offer—the offer that was accepted by Mr. Wang, thereby forming the Contract. The PDS was in turn signed by the defendant contemporaneously with subject removal. The plaintiff intends to argue at trial that these circumstances resulted in the PDS being incorporated into the Contract.

[75] Ms. Lu points to the language of the PDS, which provides that the representations contained therein were not incorporated into the Contract "unless agreed to by the buyer and the seller" and further specified that this "can be accomplished by inserting the following wording into the Contract of Purchase and Sale: 'The attached Property Disclosure Statement dated (date) is incorporated into and forms part of this contract'". The PDS also provides that it constituted a representation under the Contract "if so agreed, in writing, by the buyer and seller".

[76] However, it is not plain and obvious that the language of the PDS governs on this point. Rather, the jurisprudence suggests that when interpreting a contract of purchase and sale, the terms of that agreement, not the language in the property disclosure statement, are operative: see e.g. *Baynham v. Terry*, 2003 BCSC 422, at para. 17. In that case, the applicable term of the contract provided that the property disclosure statement formed part of the contract "if attached". The property disclosure statement was not physically attached to, but was completed contemporaneously with, the contract.

[77] The Court noted a misrepresentation claim may be precluded by the "no representations, warranties, guarantees, promises or agreements" clause in a contract of purchase and sale, but went on to conclude that the representations contained therein were nonetheless intended to be included as terms of the contract

where the PDS was made contemporaneously with the contract of purchase and sale being entered into:

> [22] In this case the remaking of the Property Condition Disclosure Statement, along with the Contract of Purchase and Sale, in my view, is not consistent with exclusions of representations from that contract. The Disclosure Statement was not "attached" in the sense of affixed with a staple, but the inference to be drawn from the remaking of the document in the presence of both the vendor and the purchasers, prefacing the execution of the Contract of Sale, is that the representations were meant to be included, not excluded, as terms of the agreement.

[78] Mr. Wang says the same result as in *Baynham* ought to follow here given that the PDS was provided to him contemporaneously with Ms. Lu's counter-offer, which he accepted thereby forming the Contract. He also notes that the Contract does not contain the language suggested in the PDS or otherwise require the PDS to be incorporated by express written agreement of the parties. Rather, Mr. Wang submits that the relevant clause of the Contract is worded more permissively by excluding any representations "…other than those set out in this Contract and the representations contained in the Property Disclosure Statement <u>if incorporated into and forming part of this Contract</u>" (emphasis added).

[79] In the circumstances, I find that it is not plain and obvious that a claim based on the representations made in the PDS is bound to fail on the basis that the PDS was not expressly incorporated into the Contract.

[80] Nor, contrary to Ms. Lu's submission, is this a question of law that can be determined under Rule 9-6(5)(c). As noted above, issues of law should only be decided under this sub-rule where there is no real dispute about the material facts and the issue is well-settled by authoritative jurisprudence. Such is not the case here in light of Ms. Lu's vague and at times inconsistent evidence regarding whether she continued to reside at the Property after the June 2021 tree incident, and if so, in what capacity and for which periods of time. Ms. Lu testified that the Property remained her principal residence throughout the material points in time, but also gave evidence that she did not sleep at the Property from summer 2021 onwards, and that it was vacant from June 2022 onwards.

Habitability Representations

[81] The Habitability Representations, including in particular Ms. Lee's alleged representations to Mr. Yang and Mr. Wang that Ms. Lu was living at the Property in March and April 2022, underpin Mr. Wang's claim that it was a term of the Contract that the Property was habitable and insurable as such. Ms. Lu is required to put her best foot forward on this summary trial application to demonstrate that no triable issue arises in respect of this aspect of Mr. Wang's claim. Yet there is no evidence before me from Ms. Lee confirming or denying the representations she is alleged to have made. The assertions regarding Ms. Lee's representations thus remain unanswered in the record before me. Moreover, Ms. Lu's own evidence about whether she was residing at the Property and at what points in time is vague and at times contradictory.

[82] Such evidence is, in my view, relevant to a proper elucidation of the surrounding circumstances that existed at the time the Contract was entered into, namely the facts known or facts that reasonably ought to have been known to the parties at or before the date of contracting. Those facts, once determined, comprise part of the factual matrix within which the Contract was formed, which in turn is considered when interpreting it.

[83] Similarly, whether Ms. Lu's EHT declarations were true and whether she complied with the SVT Terms also give rise to a triable issue. In order to determine whether these terms were breached, I would need to weigh Ms. Lu's own evidence, and consider it in light of Ms. Lee's alleged representations and other evidence that may shed light on whether and in what capacity—if any—Ms. Lu continued to reside at the Property from the summer of 2021 onwards.

[84] In addition, while it is common ground that Mr. Wang was interested in building a new home on the Property, this fact alone does not render it plain and obvious that it was not a term of the agreement that the Property be habitable, particularly in light of Mr. Wang's evidence that he intended to have the Property

occupied while undertaking the redevelopment process in order to avoid adverse tax consequences.

[85] Accordingly, I find that it is not plain and obvious that Ms. Lu's proffered interpretation of the Contract as excluding any express or implied term of habitability will prevail so as to render summary judgment is appropriate in respect of this aspect of Mr. Wang's claim.

Claim for Specific Performance of the Contract

[86] Third, I am not persuaded that the plaintiff's claim for specific performance is bound to fail, either because he was not ready, willing and able to complete on the closing date or because damages will provide an adequate remedy.

[87] Specific performance was historically granted as a general rule in cases involving real property, not because of the real nature of the land, but because damages were usually not seen as a complete remedy to the purchaser of land: *Lalani v. Wenn Estate*, 2011 BCCA 499 at para. 17, citing *Adderley v. Dixon* (1824), 57 E.R. 239 (Ch.) at 240. Land was "almost invariably" presumed to be unique, though specific performance could be denied where land was being purchased for resale or was one of several lots in a subdivision: *Lalani* at para. 17.

[88] That being said, specific performance is not to 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: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 1996 CanLII 209 at para. 22. The fact that other properties may be available in the same are in an active market does not necessary mean that a particular property is not unique, or that the prospective purchaser's subjective desires are not to be considered. As the Court noted in *Lalani* at para. 20 "If the availability of similar-sized properties in the area of the disputed property was the only consideration, most properties in any large city would not be 'unique'".

[89] I am satisfied that the plaintiff has adduced sufficient evidence of uniqueness in respect of the Property to give rise to a triable issue as to whether damages would

provide an adequate remedy. Mr. Wang testified that the Property was intended to be purchased as a wedding gift for him and his wife, and that they wanted a property with the potential to build a new home that they could live in with Mr. Wang's parents. Mr. Wang testified that the Property met certain unique characteristics that he required in a residential property: a large lot of 25,000 to 30,000 square feet that had a pre-existing habitable home on it, which home was approximately 10,000 square feet or could accommodate construction of a home of that size, and which had a view, preferably of the ocean. Mr. Wang's evidence is that the Property is uniquely suited to his requirements and that there are no alternative properties that have similar characteristics falling within the same price range.

[90] Moreover, the rule requiring a plaintiff seeking specific performance to show their willingness and ability to perform on the contractual closing date does not apply when the defendant is unwilling or unable to perform: *Toor v. Dhillon*, 2020 BCCA 137 at para. 82. Such were the circumstances in *Gill v. Zhang*, 2016 BCSC 1464. That decision arose from a trial on the merits in circumstances where a contract of purchase and sale did not complete on the completion date because a fire had occurred at the property and the purchasers sought additional information about the applicable insurance policy prior to completing. Justice Voith (as he then was) concluded that it was not open to the defendants to argue that the plaintiffs were in breach for failure to tender the purchase price when the inability to do so was brought about by the defendants' own breach in failing provide information or reasonable accommodations that would have allowed the plaintiffs to secure alternate financing and complete the transaction: at paras. 104–107.

[91] Mr. Wang asserts that similar circumstances arise here in that RBC refused to advance funds pursuant to the financing he had secured to purchase the Property because of the defendant's breaches of the Contract, arising from the Property being uninhabitable or uninsurable as an inhabited dwelling. I also agree with Mr. Wang that a triable issue arises in respect of whether Ms. Lu complied with the EHT Term as set out in clause 11A of the Contract. If proven at trial, this could also provide the

foundation for a finding that she was not ready, willing and able to perform the Contract on the closing date.

[92] I am not persuaded that Mr. Wang's claim for specific performance is bound to fail because he was not ready, willing and able to complete the Contract on the completion date. There are triable issues as to whether Ms. Lu was herself ready, willing and able to perform her obligations under the Contract, and whether in the event that Mr. Wang was not in a position to complete, his inability to do so was brought about by Ms. Lu's own breach of the Contract. If the plaintiff is successful in establishing that his inability to perform the Contract on the completion date arose from Ms. Lu's unwillingness or inability to perform her own obligations thereunder, then it may follow that Contract persists and a new completion date can be fixed by the parties or the court: *Toor* at paras. 5, 83.

[93] Accordingly, I find that it is not plain and obvious that Mr. Wang's claim for breach of the Contract, including his claim for specific performance thereof, is bound to fail.

[94] The parties made multiple additional submissions in support of their respective interpretations of the Contract. In many respects, this application was advanced as if it had been brought as a summary trial under Rule 9-7, rather than a summary judgment application. In the circumstances, and given my conclusion that the plaintiff's claim for breach of the Contract ought to proceed to trial, I decline to address the balance of the parties' submissions which are, in my view, best left for the trial or summary trial judge.

Breach of Duty of Good Faith and Honest Performance

[95] The general duty of honesty in contractual performance requires that parties not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This is not a duty of loyalty or of disclosure, nor does it require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance: *Bhasin v. Hrynew*, 2014 SCC 71 at para. 73.

[96] The scope of this duty was further articulated by the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger et al*, 2020 SCC 45:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty – the term invoked separately by Cromwell J. – will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.*, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. No reviewable error has been shown in the finding of dishonesty that took place in anticipation of the exercise of clause 9 here. I would not interfere with the trial judge's view here on a matter that is owed deference. Deference should be shown to the trial judge in reviewing her discretionary exercise of weighing the evidence, especially given credibility played a part in her analysis, as she explained.

[97] Mr. Wang alleges that Ms. Lu breached the duty of good faith and honest performance by withholding information about the uninhabitable and uninsurable nature of the home on the Property after the Contract was entered into. In particular, he alleges that Ms. Lu: failed to disclose that the electrical system was classified as “high risk” and in need of immediate repair in May 2022; failed to disclose that the Property was insured as vacant as of June 2022; provided partial and misleading insurance documentation in August 2022; and failed to disclose that she had been denied insurance on the Property as an inhabited dwelling. Ms. Lu says that this claim is bound to fail because it pertains to pre-contractual misrepresentations and provides no response to the actual allegations being advanced, which largely post-date the parties entering into the Contract.

[98] The onus is on a purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser who does not see defects that are obvious, visible and readily observable, or does not understand the implications of what they see, cannot impose the responsibility on the vendor to bring those things to their

attention: *Cardwell v. Perthen*, 2007 BCCA 313 at para. 48. Ms. Lu says this is determinative against Mr. Wang and in favour of summary judgment being granted, particularly as Mr. Wang did not have the Property inspected prior to removing subjects.

[99] Ms. Lu also asserts that insurability is a patent defect and, having failed to have the Property inspected, the doctrine of *caveat emptor* applies to defeat Mr. Wang's claim from breach of the duty of good faith and honest performance. However, *caveat emptor* does not operate to deny recovery where latent defects are established that render a property dangerous or uninhabitable. As the Court of Appeal instructs in *Nixon v. MacIver*, 2016 BCCA 8:

> [47] In summary, the doctrine of caveat emptor remains very much alive in the context of real estate transactions in BC: *Fraser-Reid*; *Cardwell CA*; *Wescan CA*. In general, purchasers bear the risk of defects in the quality of a property. Liability for this risk may shift to the vendor where there is established: (i) a breach of contract; (ii) active concealment (i.e., fraud); (iii) non-innocent misrepresentation; or (iv) an implied warranty of habitability in the case of newly-constructed homes. Liability for this risk may also shift where latent defects are established that render a property dangerous or uninhabitable. In short, a vendor has a common law duty to disclose: (i) a latent defect that is not discoverable through a reasonable inspection or through reasonable inquiries; and (ii) the latent defect renders the property dangerous or unfit for habitation. If a defect does not render a property dangerous or uninhabitable, caveat emptor applies regardless of whether the defect in question is patent or latent.
>
> [Emphasis added.]

[100] Moreover, failure to obtain a home inspection is not determinative in all cases, particularly where the defendant is found to have known, or been reckless to, the existence of the defects and their potential to render a property unfit for habitation: see e.g. *Cardwell* at paras. 23–25, 34–35.

[101] The evidence relevant to this aspect of the claim is not, in my view, incontrovertible so as to render summary judgment appropriate. Rather, the evidence will need to be considered and weighed on two key points, namely: (a) whether insurability was a latent or patent defect within the present constellation of facts and condition of the Property at the material points in time; and (b) what Ms. Lu

knew about the insurability of the Property and the corresponding impact on whether it could be lived in, and when. Nor does the law appear to be settled in this respect.

[102] In the latter respect, Ms. Lu's evidence is vague and at times inconsistent as to what she knew about the insurability of the Property, when she knew it, and whether she continued to inhabit the Property at any time after the June 2021 tree incident. Mr. Wang has tendered evidence which, if accepted, could establish that Ms. Lu knew as early as July 2021 that she was not to reside at the Property, and as early as February 2022 that the Property was uninsurable as an inhabited dwelling. This evidence could also establish that Ms. Lu failed to disclose this information to him, and instead provided misleading information suggesting inhabited dwelling insurance could be obtained.

[103] Mr. Wang's evidence will need to be weighed, and credibility findings made, to determine whether these circumstances amount to a breach of the duty of good faith and honest performance of contractual obligations. Further, where the plaintiff has pleaded a cause of action and the facts in support are within the defendant's knowledge and control—which is the case in respect of this aspect of Mr. Wang's claim—a defendant bringing a summary judgment application must provide evidence that the pleaded claim is without merit*: Zheng* at para. 33; *Balfour v. Tarasenko,* 2016 BCCA 438 at para. 43. Ms. Lu has not met this burden.

[104] Accordingly, I find that it is not plain and obvious that there is no genuine issue of material fact requiring trial in respect of the claim for breach of duty of good faith and honest performance of the Contract. Ms. Lu's application for summary judgment in respect of this aspect of Mr. Wang's claim is dismissed.

Negligent Misrepresentation

[105] The test for negligent misrepresentation is well-established. Mr. Wang must show that: (a) Ms. Lu owed him a duty of care; (b) the representations in question must be untrue, inaccurate or misleading; (c) Ms. Lu acted negligently in making the representations; (d) that his reliance on representations was reasonable; and (e) the

reliance was detrimental in the sense that Mr. Wang suffered resulting damage: *Queen v. Cognos Inc*, [1993] 1 S.C.R. 87 at 110, 1993 CanLII 146 [*Cognos*].

[106] Mr. Wang's claim in negligent misrepresentation is predicated on a collection of assertions and representations allegedly made by or on behalf of Ms. Lu to the effect that the Property was habitable and insurable as such, including: the description of the home in the property listing, the representations made in the PDS, Ms. Lu's declaration that the Property was her primary residence in the EHT declarations, Ms. Lee's repeated assertions that Ms. Lu was living at the Property, and Ms. Lu's failure to disclose that she had been denied inhabited dwelling insurance for the Property.

[107] Mr. Wang asserts that the Habitability Representations were untrue, inaccurate or misleading. Mr. Wang submits that he relied on these assertions and Ms. Lu's silence to his detriment, as he entered into the Contract on the understanding that the Property was habitable and did not insist that the necessary repairs be completed prior to closing.

[108] Ms. Lu concedes for the purpose of this application that she owed a duty of care as seller of the Property to Mr. Wang as purchaser, but says that it is plain and obvious that Mr. Wang's claim fails the balance of the test for negligent misrepresentation. In this respect, Ms. Lu denies that the Habitability Representations were untrue, inaccurate of misleading, and says that she never made any positive statement about the insurability of the Property.

[109] With respect to the latter point, misrepresentations can be made by omission, inference or implication: *Cognos* at 130. Accordingly, the lack of a positive representation as to insurability by Ms. Lu does not provide a complete answer to Mr. Wang's claim.

[110] Regardless, the more problematic issue with this submission is that I would again need to weigh the evidence before me to determine whether the Habitability Representations, or any of them, were in fact untrue, inaccurate or misleading. In

order to find the necessary facts, I would also need to make credibility findings based on contested evidence, including that of Mr. Wang, Mr. Yang and Ms. Lu.

[111] Ms. Lu's own evidence in response to this aspect of the claim varies. She testified that the Property has been her principal residence since 2013, but also that she has not slept there since the summer of 2021 and that it has been vacant since June 2022. Ms. Lu also denied that she had given any thought to the insurance issue as of April 29, 2022 when Mr. Wang waived the conditions under the Contract, This evidence is difficult to reconcile with her evidence that her insurance advisor "recommended" she not live in the Property following the June 2021 tree incident, and other evidence which, if accepted, could suggest that the insurance issues were known to Ms. Lu as early as June 2021. These conflicts cannot be resolved without weighing the evidence and making credibility findings.

[112] The lack of evidence from Ms. Lee affirming or denying the statements she allegedly made to Messrs. Yang and Wang to the effect that Ms. Lu was living at the Property when they viewed the Property in March 2022 also weighs against a summary dismissal of the negligent misrepresentation claim.

[113] Nor is it plain and obvious that Mr. Wang's alleged reliance on the Property being habitable and insurable as such was unreasonable. Ms. Lu points to Mr. Wang's evidence that he intended to redevelop the Property and did not think about insurance prior to waiving the conditions under the Contract as determinative in her favour. However, an intention to redevelop the Property does not negate reasonable reliance, particularly given Mr. Wang's evidence that he intended to have the Property occupied during the permitting process. Regardless, any determination of whether Mr. Wang's alleged reliance was reasonable in the circumstances would again require me to weigh competing evidence.

[114] Moreover, Ms. Lu's contention that the misrepresentation claim is also bound to fail because Mr. Wang has not proven detrimental reliance misconceives the burden on a summary judgment application. Mr. Wang as responding party is not required to prove that RBC required inhabited dwelling insurance in order to

advance funds pursuant to the financing he understood he had previously secured to purchase the Property. All that is required of Mr. Wang on this application is to demonstrate a triable issue, which I find he has done on the evidentiary record before me.

[115] It is not enough to show that the negligent misrepresentation claim has little merit: *Zheng* at para. 31. Ms. Lu must show that the claim presents no genuine issue for trial and it is bound to fail. The evidence before me falls short of meeting that high bar. Accordingly, the defendant's application for summary judgment in respect of the negligent misrepresentation claim is dismissed.

Conclusion on Rule 9-6

[116] Ms. Lu has failed to establish that it is manifestly clear that there is no genuine issue for trial in respect of Mr. Wang's claim for breach of the Contract such that it is bound to fail. Her application under Rule 9-6 is dismissed in relation to that claim.

[117] Ms. Lu has not filed a responsive pleading to Mr. Wang's claims for negligent misrepresentation and breach of the duty of good faith and honest performance of contractual obligations in respect of the Contract. She is thus precluded by operation of Rule 9-6(4) from seeking summary dismissal of those claims. In the event that I am incorrect in that regard, I nonetheless find that Ms. Lu has not met the high onus on her to establish that it is beyond doubt that those claims are bound to fail.

[118] In the result, the defendant's application for summary judgment dismissing the plaintiff's claim is dismissed.

Issue #2: Should the CPL be Cancelled?

Should the CPL be Cancelled for Failing to Comply with s. 215 of the *LTA*?

[119] Section 215 of the *LTA* provides that a person who has commenced a proceeding and who is claiming an estate or interest in land may register a CPL against the land as follows:

> 215 (1) A person who has commenced or is a party to a proceeding, and who is
>
> (a) claiming an estate or interest in land, or
>
> (b) given by another enactment a right of action in respect of land,
>
> may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.

[120] The Court has inherent jurisdiction to cancel a CPL where a pleading fails to meet the pre-condition of a claim for an interest in land as required by s. 215: *Lipskaya v. Guo*, 2022 BCCA 118 at para. 64; *Xiao v. Fan*, 2018 BCCA 143 at paras. 19, 22. The relevant law was succinctly summarized in *Lipskaya* as follows:

> [64] The court has inherent jurisdiction to cancel a CPL that does not meet the preconditions for registration, that is, where no interest in land is claimed: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7; *Bilin v. Sidhu*, 2017 BCCA 429. An "interest in land" is claimed where title may change as a result of the proceedings: *V.B. v. K.B.*, 2013 SKQB 412 at para. 72. The court can cancel a CPL where damages would be adequate relief: *Wai v. Chung*, 2020 BCSC 34 at paras. 26–28. An application to cancel a CPL for non-compliance with s. 215 of the *LTA* does not involve a weighing of the evidence or an assessment of the strength of the claim—the court only considers whether such a claim is pleaded: *Yi Teng* at paras. 36–38.
>
> [Emphasis added.]

[121] The test to be applied on application to cancel a CPL that is alleged not to meet the preconditions of s. 215 is whether the facts pleaded, assuming them to be true, are capable of supporting a claim to an interest in land: *Xiao* at para. 27; *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2019 BCCA 357 at para. 39 [*Yi Teng*]. The test was succinctly summarized in *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 [*GMC Properties*]:

> [41] On an application to cancel a CPL for non-compliance with s. 215(1), the court does not analyse the merits of the claim brought by the claimant. Rather, the question is whether the facts pleaded, assuming they are true, are capable of supporting a claim to an interest in land. As Justice Mackenzie explained in *Yi Teng*, "[t]his connotes a nexus or causative link between the facts alleged, and the interest to which they would give rise if the facts were

> ultimately proved”: at para. 39. As she also noted, evidence is not considered on an application to cancel a CPL for non-compliance with s. 215(1): at para. 13.

[122] There must be a nexus or causative link between the facts alleged and the interest to which they would give rise if ultimately proved: *Yi Teng* at para. 39. If the facts would not give rise to an interest in land, then they are incapable of supporting such a claim and the pleadings do not meet the threshold criteria for issuance of a CPL under s. 215 of the *LTA*: *Lipskaya* at para. 64.

[123] The court does not consider evidence on an application to cancel a CPL for non-compliance with s. 215 of the *LTA*: *Xiao* at para. 27. The Court is not permitted to engage in an analysis of the merits of the underlying claim or to cancel a CPL for non-compliance with s. 215 of the *LTA* because the claim to an interest in land is weak or there is no triable issue: *Yi Teng* at para. 29. Where the applicant asserts that there is no merit to the claim for an interest in land (or no triable issue), the proper approach is to bring an application under Rule 9-6 for the summary dismissal of the part of the claim that relates to land: *Xiao* at para. 22.

[124] The defendant says the CPL should be cancelled because the plaintiff does not seek specific performance of the Contract to purchase the Property in the condition it was in on the date the CPL was filed, but rather to a “speculative amended land modified to meet an alleged habitability representation”. I disagree.

[125] The question at this stage is not whether the plaintiff can prove an interest in land; the issue is whether he is claiming such an interest: *Xiao* at para 27; *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society,* 2023 BCSC 1257 at para. 27 [*Montaigne*].

[126] A claim for specific performance of a contract of purchase and sale of real property is a claim which may result in a change of title and thus is a claim to an interest in land as contemplated in *Lipskaya*; see also *GMC Properties* at para. 81. The notice of civil claim herein meets this requirement as it pleads a claim for breach

of the Contract and seeks specific performance thereof. More specifically, Mr. Wang pleads that:

a) By way of the Contract, the defendant agreed to sell her right, title and interest in and to the Property to him (para. 4);

b) The Contract included the EHT and SVT Terms (at paras. 5(f) and (g));

c) Prior to and following execution of the Contract, the defendant led the plaintiff to believe that the Property was habitable (at paras. 8-10);

d) The plaintiff subsequently discovered that the Property was not habitable or insurable as such (at para. 14);

e) The defendant's failure to disclosure the uninhabitable status of the Property constitutes a breach of the Contract, which the plaintiff does not accept (at paras. 40-41);

f) At all material times, the plaintiff remains ready, willing and able to complete the purchase and sale of the Property once the defendant complies with her obligations thereunder (at para. 42); and

g) Claims an entitlement to specific performance of the Contract when the defendant has complied with the EHT Term and tenders the Property in habitable condition such that it can be insured as such (at para. 43).

[127] The strength of the plaintiff's claim to an interest in land and the relative uniqueness of the Property is not relevant at this stage of the inquiry under s. 215 of the *LTA* as I am not to consider evidence, engage in an assessment of the merits of the underlying claim, or cancel the CPL merely because the plaintiff's claim is weak: *Xiao* at paras. 23 and 27. The notice of civil claim and Amended NOCC plead facts which if established give the plaintiff an interest in the Property.

[128] Accordingly, assuming the facts pleaded in the notice of civil claim and Amended NOCC to be true, I find that the plaintiff has pleaded a claim capable of

supporting an interest in the Property. The defendant's application for cancellation of the CPL under s. 215 of the *LTA* is dismissed.

Should the CPL be Cancelled on Account of Hardship or Security Posted Under ss. 256 and 257 of the *LTA*?

Cancellation on the Basis of Hardship

[129] Alternatively, the defendant submits that the CPL should be cancelled for reasons of hardship under ss. 256 and 257 of the *LTA*. Section 256 provides as follows:

> 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a) particulars of the registration of the certificate of pending litigation,
>
> (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c) the grounds for those statements,
>
> apply for an order that the registration of the certificate be cancelled.
>
> …
>
> 257 (1) On the hearing of the application referred to in section 256 (1), the court
>
> (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
>
> (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
>
> (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
>
> (b) may refuse to order the cancellation of the registration, and in that case may order the party
>
> (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
>
> (ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking

> and compliance with further terms and conditions, if any, the court may consider proper.
>
> (2) The form of undertaking must be settled by the registrar of the court.
>
> (3) In setting the amount of security to be give, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
>
> …

[130] An applicant seeking discharge of a CPL must provide particulars of real or expected hardship that is causally connected solely to the registration of the CPL: *Save-A-Lot Holdings Corp. v. Christensen*, 2023 BCCA 35 at para. 30 [*Save-A-Lot*]; *Montaigne* at para. 52. The evidence of hardship must include particulars that demonstrate real hardship; general allegations of inconvenience are not sufficient: *Save-A-Lot* at para. 30, citing *Liquor Barn Income Fund. v. Becker*, 2011 BCCA 141 at para. 37 [*Liquor Barn*].

[131] The degree of hardship must be more than "trifling" or "insignificant" but a court is not required to be exacting in its analysis: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2014 BCCA 388 at para. 28 [*Youyi*]; *Montaigne* at para. 53. However, even if hardship is established, cancellation of a CPL does not necessarily follow. As explained in *Yi Teng*, s. 256 is discretionary in nature:

> [28] Section 256(1) authorizes an application for cancellation where the registered owner of land claims that the CPL is causing or likely will cause the owner to experience "hardship and inconvenience". Where an applicant establishes "hardship and inconvenience", cancellation of the CPL is not automatic. Rather, the court has a discretion under s. 257 to order the cancellation upon being satisfied that an order for security is proper and damages will provide adequate relief to the party in whose name the certificate was registered, and security is in fact provided. Or, the court may refuse to order cancellation, in which case it may order the party who obtained the CPL to give an undertaking as to damages and security: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 29.
>
> [29] This Court has held that where an application is brought under s. 256 and the action involves a claim for specific performance, the applicant must satisfy the court it is "plain and obvious the person seeking specific performance would not succeed on that claim at trial. If there is a triable issue as to whether damages would provide an adequate (or appropriate) remedy,

> the application should be dismissed and the matter proceed to trial" (emphasis in original): *Youyi Group* at para. 39.
>
> [Emphasis in original.]

[132] Where specific performance of an agreement of purchase and sale is sought, in order to obtain cancellation of a CPL under s. 256, the applicant must establish that it is plain and obvious that the claim for specific performance would not succeed, or have no reasonable chance of success, at trial: *Yi Teng* at para. 29. If there is a triable issue as to whether damages would be an adequate or appropriate remedy, the application to remove a CPL should be denied (*Youyi* at para. 39):

> [39] In my respectful opinion, these cases confirm the principle that where specific performance is being sought and the court is considering an application to order the cancellation of a CPL under s. 256 of the *Land Title Act*, it is for the applicant (here, the Vendor) to satisfy the court that it is plain and obvious the person seeking specific performance would not succeed on that claim at trial. If there is a triable issue as to whether damages would provide an adequate (or appropriate) remedy, the application should be dismissed and the matter proceed to trial. The chambers judge does not, then, decide on the merits whether damages will be adequate – only whether specific performance can be eliminated as having no reasonable chance of success. The fact that *Semelhago* and *Southcott Estates Inc. v. Toronto Catholic District School Board* 2012 SCC 51 have discontinued the presumption of uniqueness of land does not in my opinion change this principle; it means only that courts are likely to find that applications under ss. 256-7 are likely to succeed more often than they did pre-*Semelhago*. I will return to *Semelhago* and *Southcott* below.
>
> [Emphasis in original.]

[133] This is the case because removing a CPL where specific performance is sought deprives the plaintiff of the ultimate remedy it seeks: *Youyi* at para. 30; *Bilin* at para. 42. My role at this stage is only to determine if specific performance can be eliminated as having no reasonable chance of success, not to decide on the merits whether damages will be adequate: *Youyi* at para. 39; *Montaigne* at para. 58.

[134] For the reasons outlined above, it is not plain and obvious that specific performance is unavailable to the plaintiff on the pleadings in this case. Mr. Wang has also provided some evidence to support the uniqueness of the Property and its intrinsic value to him, which as noted above, include the size and location of the Property. Mr. Wang has established a triable issue on the pleadings that the specific

performance could be ordered; whether to do so will ultimately be for the trial judge after a trial on the merits.

[135] This alone is sufficient to dismiss the application under s. 256 of the *LTA*: *Montainge* at para. 66. However, s. 256 is discretionary and I must therefore also consider whether the defendant has established hardship sufficient to warrant removal of the CPL.

[136] The defendant testified that she is retired and has no income. Accordingly, she says that "the ongoing expenses occurred as a result of sale of the Property not proceeding [are] continuing to cause me to suffer loss and damages; and most concerning, with the mortgages, suffering [sic] extreme hardship."

[137] However, the defendant provided little evidence to substantiate her assertions of hardship. With the exception of a commercial office located at 514-6378 Silver Avenue, Burnaby, British Columbia (the "Office"), there is no evidence from Ms. Lu regarding her savings or other assets she may have in this jurisdiction or overseas. Ms. Lu provided copies of the first pages of her 2020 and 2021 Notices of Assessment from the Canada Revenue Agency, but the subsequent pages—which would have indicated her income, or lack thereof—were notably missing from her affidavit material.

[138] Ms. Lu also provided no evidence as to how she funds her daily living expenses generally, or the costs associated with maintaining the Property (separate and apart from the mortgage costs discussed below), more specifically. Notably, Ms. Lu does not say that she is unable to pay the ongoing carrying costs or property taxes for the Property on account of the CPL. To the contrary, she testified that has been paying the "ongoing maintenance and upkeep expenses, as well as property taxes estimated at over $100,000" for the Property.

[139] In October 2022, Ms. Lu obtained $5,500,000 loan through Amber Mortgage Corporation at an interest rate of 10% per annum compounded monthly for the first year, and 18% thereafter (the "Amber Mortgage"). Ms. Lu also incurred an

administrative fee of $110,000, a commitment fee of $25,000, and legal fees of $10,000 to obtain the Amber Mortgage. The Amber Mortgage was secured against the Property, the Office and two additional properties owned by her son.

[140] Ms. Lu testified that she used the funds from the Amber Mortgage to complete the purchase of the Overseas Properties, and that the financial hardship she is experiencing derives from the high carrying costs of the Amber Mortgage. She asserts that her combined monthly interest payments are approximately $85,521.19, namely $60,083.33 for the Amber Mortgage and $25,468.86 for a pre-existing HSBC mortgage on the Property.

[141] Ms. Lu testified that while she obtained loans from friends of $500,000 CAD and $100,000 USD to assist her in making these interest payments, she nonetheless faced financial hardship arising from the purchase of the Overseas Properties. I am unable to give much weight to the assertion that these funds were provided as loans to Ms. Lu as the supporting documentation appended to her affidavit is in Chinese and has not been translated. Documents submitted to this Court must be in English, or accompanied by an English translation: Rule 22-3(2); *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 at para. 13.

[142] I am cognizant of the defendant's evidence that she would have faced a 5 million RMB penalty for walking away from the purchase of the home for her son in China, and would have lost her deposit of £283,020 had she not completed the purchase of the London property. However, the evidence before me suggests that Ms. Lu entered into those agreements in the summer of 2022, and then decided to complete the purchases of the Overseas Properties in the fall of 2022. The record before me suggests that by this point in time, the issues with the habitability and insurability of the Property, and their corresponding impact on the Contract, were known. Nor has she tendered any evidence as to what other alternatives existed to fund the purchase of the Overseas Properties, e.g. whether her son had other sources of funds to purchase a home for himself.

[143] In the circumstances, given Ms. Lu's multiple property purchases and opaque financial circumstances, I am unable to conclude that the interest being paid by Ms. Lu and the hardship she alleges she is experiencing by consequence thereof, results solely from the registration of the CPL: see e.g. *Save-A-Lot* at para. 40. Nor has she established that the CPL was or is an obstacle to her finding available financing on terms more favourable than the Amber Mortgage. Generalizations, unsupported by specific proof of hardship and inconvenience are not sufficient: *Save-A-Lot* at para. 43, citing *Liquor Barn* at para. 37; see also *Kaur v. Chandler*, 2018 BCSC 1283 at para. 47; *Montaigne* at para. 79.

[144] I also reject the defendant's submission that she is experiencing hardship on account of the CPL preventing a sale of the Property to an anonymous buyer. The defendant's evidence in support of this assertion consists of various contracts of purchase and sale in which the buyers' names have been redacted. The weight that can be given to this evidence is questionable as it constitutes inadmissible double-hearsay as tendered: Rule 22-2(13); *Wilson v. Hunt*, 2023 BCSC 492 at para. 26. Moreover, the defendant has not established that this offer is a *bona fide* arms length transaction: see e.g. *Access Mortgage Corporation (2004) Limited v. Western Arres Capital Inc*., 2020 BCSC 1703 at para. 32. Nor do I find Ms. Kwok's evidence that the Property would be "easier and faster to sell at a higher sale price if the CPL was removed" compelling, as this is likely true in the majority of cases where a CPL remains on title to a property listed for sale.

[145] Considering the evidence as a whole, I find that the defendant's lack of financial disclosure, considered in conjunction with her purchase of the Overseas Properties makes it difficult to ascertain the true extent of hardship—if any—being suffered on account of registration of the CPL. In this respect, I agree with the plaintiff that the hardship alleged by the defendant is not causally connected solely, or even in material part, to the registration of the CPL. Rather, Ms. Lu's own evidence was that she "faced tremendous financial stresses arising from my commitments to fund the purchases of the [Overseas Properties]" (emphasis added). She also testified that this litigation and associated costs contribute to her ongoing

stress. In my view, to the extent that the defendant is experiencing financial hardship, it is caused in large part by factors other than registration of the CPL, including in particular her decision to purchase the Overseas Properties.

[146] Finally, even if the defendant had established hardship under s. 256 of the *LTA*, I would exercise my discretion under s. 257 in favour of maintaining the CPL: *Youyi* at para. 29. In this respect, I agree with the plaintiff that to order removal of the CPL would effectively result in the dismissal of his *bona fide* claim for specific performance. Having concluded that that claim is not bound to fail, I am not to decide on the merits of whether damages will be adequate: *Youyi* at para. 39.

[147] Accordingly, the defendant's application for cancellation of the CPL on the basis of hardship under ss. 256 and 257 of the *LTA* is dismissed.

Should the Plaintiff be Required to Post Security?

[148] Finally, and while not strictly necessary in light of my finding that the CPL ought not to be removed under s. 256 of the *LTA*, I will nonetheless address the defendant's request for an order pursuant to s. 257(1) of the *LTA* that the plaintiff post security of $2,000,000.

[149] An order for security is an extraordinary measure, which need not be ordered where there is an arguable case and the claim is not frivolous or vexatious on its face. As explained in *Kaur*:

> [110] The imposition of an undertaking as to damages, while discretionary, will often flow from a decision refusing to cancel a CPL. However, ordering that security be posted for that undertaking is an extraordinary measure where the Court should take into account the plaintiff's likelihood of success. Where there is an arguable case, and the claim is not frivolous or vexatious on its face, security by the plaintiffs need not be ordered: see *Re Cloverlawn-Kobe Development Ltd. v. Tsogas* (1979), 104 D.L.R. (3d) 279 at 286-87 (B.C.S.C.); *Lam v. Vancouver City Savings Credit Union*, 2004 BCSC 1119 at para. 24.

[150] In determining whether an order for security is appropriate, courts have resisted an attempt to forecast damages. However, that factor, together with the relative merits of the parties' cases, whether the party filing the certificate will be in a

position to pay any award should they be unsuccessful, and any specific costs to the land owner arising from the certificate's registration, are all relevant considerations in determining whether to order security be posted: *Daum v. Meek Hotels Ltd*., 2009 BCSC 373 at para. 50.

[151] The defendant did not engage with these factors but instead simply submitted that $2,000,000 in security represents "a rough proxy" of her alleged damages to date. In my view, it is not appropriate to order the plaintiff to post security for damages. Doing so is an extraordinary measure, and security need not be posted where the claim is arguable and not frivolous or vexatious on its face, as I have found to be the case here: *Kaur* at para. 110; see also *Montaigne* at para. 82. It is also material in this respect that the plaintiff has already effectively posted security in the amount of $900,000 by way of the Deposit, the return of which the defendant seeks in her Counterclaim, and also owns two other real properties in this jurisdiction.

[152] In the result, the defendant's application for security to be posted pursuant to s. 257(1)(b) of the *LTA* is dismissed. However, it is in my view appropriate that Mr. Wang be required to provide an undertaking as to damages, and I so order.

Conclusion

[153] The defendant's application for summary judgment dismissing the plaintiff's claim is dismissed. The defendant's application for cancellation of the CPL, or alternatively that security be posted, is also dismissed.

[154] The plaintiff is entitled to his costs of this application, payable at Scale B.

"Hughes J."