

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gupta v. Gill*,
2024 BCSC 193

Date: 20240207
Docket: S244012
Registry: New Westminster

Between:

Manav Gupta

Plaintiff

And

Baljit Singh Gill and 1364236 B.C. Ltd.

Defendants

And

**Ravi Gill, Diljot Kaur aka Diljot Mangat and City Realty Ltd. dba Remax City
Realty**

Defendants by way of Counterclaim

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

S. Sheena-Nakai

Counsel for the Defendants:

R. Mpania

Counsel for the Defendants by
Counterclaim:

M.K. Sterns

Place and Date of Trial/Hearing:

New Westminster, B.C.
November 16–17, 2023

Place and Date of Judgment:

New Westminster, B.C.
February 7, 2024

Table of Contents

INTRODUCTION 3

ISSUES..... 4

THE PARTIES, THE PROPERTY, AND THE RIGHTS OF WAY 5

FACTUAL BACKGROUND..... 7

SUITABILITY – THE LAW 14

POSITIONS OF THE PARTIES..... 15

 Baljit’s Position – Suitability 15

 The Plaintiff’s Position 18

 The Property Disclosure Statement 20

 The Representations 20

 Baljit’s Affidavit and the Response to Demand for Particulars 21

 Evidence from Examination for Discovery 22

 Baljit’s Actions after Learning of the Unregistered Right of Way..... 23

FINDINGS ON SUITABILITY – VENDOR V. PURCHASER 24

SUITABILITY OF THE COUNTERCLAIM..... 26

FINDING ON SUITABILITY – COUNTERCLAIM AGAINST REALTORS 33

BALJIT’S COUNTERCLAIM AGAINST THE PLAINTIFF 35

THE PLAINTIFF’S CLAIM AGAINST 236BC LTD..... 35

DAMAGES..... 40

SUMMARY 42

Introduction

[1] This matter proceeded by way of summary trial on November 16 and 17, 2023. There are two applications before me, both under Rule 9-7 of the *Supreme Court Civil Rules*:

- a) The plaintiff seeks judgment and assessment of damages.
- b) The defendants by counterclaim seek dismissal of the counterclaim.

[2] The underpinning of the action is a real estate transaction that did not complete. The plaintiff is the vendor. He claims damages against the defendant purchaser for failure to complete the transaction. He calculates his damages based on an appraisal of the property three months after the scheduled closing date.

[3] There are two defendants: an individual and a corporation. The individual defendant says that there was a defect in the property: an unregistered right of way. He alleges that the vendor knowingly withheld that information. On that basis, he says that he was not bound by the agreement. He also counterclaims against the plaintiff for the alleged misrepresentation and seeks the return of his deposit. In addition, he counterclaims against his real estate agents in negligence.

[4] As explained below, the individual defendant assigned the purchase contract to the corporate defendant. The corporate defendant then backed out of the assignment agreement. The plaintiff seeks a remedy directly against the corporate assignee.

[5] In this application, the following parties seek the following orders:

- a) Pursuant to Rule 9-7, the plaintiff seeks judgment and assessment of his damages against one or both defendants for their failure to complete the conveyance of the property.

- b) Also, pursuant to Rule 9-7, all of the defendants by counterclaim (comprising Mr. Gupta and the real estate agents) seek dismissal of the counterclaim against them.
 - c) The two defendants seek the dismissal of this application on the basis that the matter is not suitable for determination on a summary trial basis.
- [6] For the reasons set out below:
- a) I find that some portions of this matter are suitable for determination at a summary trial and I exercise my discretion to do so.
 - b) I grant judgment in favour of the plaintiff against the individual defendant.
 - c) I dismiss the plaintiff's claim against the corporate defendant.
 - d) I dismiss the defendant's counterclaim against the plaintiff.
 - e) I dismiss the defendants' counterclaim against the real estate agents.
 - f) However, I decline to exercise my discretion to assess damages on this application.

Issues

- [7] In these reasons, I address the following issues:
- a) Are the two applications suitable for resolution by summary trial?
 - b) Has the plaintiff established that the individual defendant, Mr. Baljit Gill, breached the terms of the contract to sell the property?
 - c) Have the real estate agents established that Mr. Baljit Gill has failed to establish that they were in breach of their professional duties to him?
 - d) Is the plaintiff entitled to relief against the assignee numbered company?

[8] My discussion below addresses a number of different claims and positions. That variety has influenced my writing of these reasons. I have addressed separately each of the issues below that relate to:

- a) the vendor's claim against the purchaser;
- b) the vendor's claim against the assignee of the contract;
- c) the purchaser's counterclaim against the vendor for the return of the deposit; and
- d) the purchaser's counterclaim against his real estate agents.

[9] Although I have addressed the claims separately, my findings of fact overlap between all issues. I also note that my findings on suitability mirror my findings on the substantive issues. In other words, by determining that I can make the necessary findings of fact, those same facts form the basis of my reasons on the substantive issues.

The Parties, the Property, and the Rights of Way

[10] This litigation revolves around the failed sale of a property located at 1007 Sparks Dr., Keremeos, British Columbia (the "Property"). A motel operates on the Property.

[11] There are two rights of way that may, or may not, affect the Property. It is important to distinguish between them:

- a) Registered on the title to the Property is a statutory right of way in favour of FortisBC under Kamloops land title registration number KX158467 (the "FortisBC Right of Way").
- b) An unregistered right of way that was discovered later in the narrative. The second right of way exists on a document dated 1972 and entitled: "Plan Showing Right of Way of Keremeos Irrigation District in District Lots 749 & 174" (the "Unregistered Right of Way").

[12] The legal and practical significance of the Unregistered Right of Way is in issue on this application.

[13] Because there are two parties named “Mr. Gill”, I refer to those two individuals by their first names. I mean no disrespect by doing so. I refer to all others using the slightly more respectful “Mr.” and “Ms.”.

[14] The parties involved in this case are:

- a) Mr. Manav Gupta (“Mr. Gupta” or the plaintiff or the “vendor”), who is the registered owner of the Property.
- b) Mr. Gupta sold the Property to the defendant Mr. Baljit Gill (“Baljit”).
- c) Later, Baljit assigned the contract to purchase the Property to 1364236 B.C. Ltd. (“236BC Ltd.”). The principal of 236BC Ltd. is Mr. Balhar Jagpal.
- d) Baljit’s real estate agents are Mr. Ravi Gill (“Ravi”) and Ms. Diljot Kaur, aka Ms. Diljot Mangat (“Ms. Kaur”). Ravi and Ms. Kaur both work at City Realty Ltd. The realtor parties are all represented by the same counsel and take the same positions. I make no distinction regarding them in these reasons, except where one individual took a particular step.

[15] There are two non-party real estate agents in this narrative:

- a) Mr. Aman Ladwal (“Mr. Ladwal”) who acted as Mr. Gupta’s agent; and
- b) Mr. Rick Aulakh (“Mr. Aulakh”) who is an agent at City Realty Ltd. but who was not retained by any party to the transaction.

[16] As discussed below, 236BC Ltd. is a named defendant. It is represented by the same counsel as Baljit. It offered no evidence in defence of this application, apart from the affidavit of Baljit. Because of the distinct legal issues, I discuss the plaintiff’s claim against 236BC Ltd. under a separate heading.

Factual Background

[17] As noted, the plaintiff is the registered owner of the Property upon which he operates a motel business.

[18] In August 2021, the plaintiff retained the services of a real estate agent, Mr. Ladwal, to list the Property for sale.

[19] In the latter half of 2021, Baljit was in the market for commercial real estate. The exact nature of his desire for an investment property is disputed. As discussed below, Baljit says that he wanted a property that could be developed. Baljit retained the services of two real estate agents, Ravi and Ms. Kaur.

[20] With the assistance of Ravi and Ms. Kaur, Baljit located and eventually made an offer on the Property.

[21] Mr. Gupta and Baljit entered into a contract of purchase and sale dated December 13, 2021 (the “Contract of Purchase and Sale”). Mr. Gupta agreed to sell the Property to Baljit on the following terms:

- a) The purchase price was \$1,900,000.
- b) The subject removal date was December 30, 2021.
- c) A deposit for \$75,000 was to be paid within 24 hours of subject removal (the “Deposit”).
- d) The closing date was March 7, 2022.

[22] The Contract of Purchase and Sale contained the following relevant “subject” provisions:

- a) “[2] Subject to the Buyer[s] approving the property disclosure statement [“PDS”] and such statement will be incorporated into and form part of the contract.” (the “PDS Clause”).

- b) “[4] Subject to the Buyer[s] checking and approving the title search.” (the “Title Search Clause”).
- c) “[6] Subject to the Buyer[s] checking and approving all information regarding the property with city hall.” (the “City Hall Clause”).
- d) “[7] Subject to the Buyer[s] certifying and approving the CPS with their Lawyer/Notary.” (the “Legal Advice Clause”).

[23] The Contract of Purchase and Sale also contained the following provisions:

“The Buyer is satisfied with all the size, measurements and other information of the dwelling[s] and/or acknowledges that the size, measurements zoning information, and allowable land-use provisions, other the [sic] information they have received regarding the dwelling[s] and/or land[s] while thought to be accurate is not guaranteed to be accurate, and if important to the Buyer, should not be relied upon without verification with the proper authorities by the Buyer themselves prior to signing this contract.

The Buyer is advised that it would be prudent before final subject removal to: inspect for a buried oil tank, confirm availability of property insurance, check if property is on the Heritage registry, & Archaeological registry, confirm zoning & future zoning with the city, do a lot survey 7 [sic] confirm whether the property is in a flood plain or a peat bog area.

The Buyer and Seller acknowledges [sic] that the real estate licensees are not qualified to give legal, accounting or tax advice, and that any questions regarding legal documents, including charges registered against title, accounting for taxes payable should be answered by independent legal counsel and/or accountants. The Buyer and Seller acknowledge that they have been advised to seek independent legal, accounting and tax advice regarding this contract prior to signing this contract. All parties have been advised to and afforded the opportunity to seek independent legal/professional advice prior to entering into this Contract.”

[24] Following the signing of the Contract of Purchase and Sale on December 13, 2021, Mr. Gupta, as a vendor, completed and signed a property disclosure statement dated December 16, 2021 (the “Property Disclosure Statement” or “PDS”). The Property Disclosure Statement was blank. In addition, clause 18 of the Contract of Purchase and Sale indicates that there are no representations apart from those contained in the contract document and the Property Disclosure Statement. The plaintiff submits that the wording of the Contract of Purchase and Sale, plus the

blank Property Disclosure Statement, indicated that he made no representations about the Property.

[25] The following matters are in dispute between Baljit and his realtors. I set the realtors' position out here. Below I discuss whether any conflict on the evidence is material to this application. Ravi and Ms. Kaur say:

- a) Baljit is a sophisticated and experienced purchaser of real estate. He owns three commercial properties in addition to his personal residence.
- b) In 2021 Baljit was looking for investment property with good rental income. Ravi and Ms. Kaur located the Property as one that may be of interest to Baljit.
- c) Ms. Kaur prepared an offer to purchase the Property and reviewed the terms with Baljit before it was presented. When advising Baljit about the Property, Ms. Kaur pointed out the existence of the FortisBC Right of Way. She says that she explained the FortisBC Right of Way to Baljit. Baljit asked no questions about it.
- d) Once the offer was accepted, the Contract of Purchase and Sale was drafted. Ms. Kaur reviewed and explained all of its terms and conditions, including the "subjects" to Baljit.
- e) The Contract of Purchase and Sale included the terms discussed above including the PDS Clause, the Title Search Clause, the City Hall Clause, and the Legal Advice Clause.
- f) Baljit reviewed and signed the Contract of Purchase and Sale.
- g) Baljit did not ask Ravi or Ms. Kaur any questions about the title search which noted the FortisBC Right of Way.
- h) When it was received, Ravi or Ms. Kaur provided the (blank) Property Disclosure Statement. Baljit did not ask any questions about it.

- i) Baljit travelled to Keremeos with Ravi on two occasions. The first trip was before the subject removal date. During that first visit, Baljit met and spoke with representatives of the Village of Keremeos. He understood that he could ask any questions about the Property that were important to him. Baljit did not ask any questions about any rights-of-way or other restrictions registered on the title. Baljit did not instruct Ravi to ask questions about the development potential of the Property.
- j) At the first visit to Keremeos, Baljit received contact information for the planning professionals and representatives of the Village of Keremeos. Baljit had the opportunity to contact those individuals if he had any questions. Baljit did not contact any representative of the Village of Keremeos.
- k) On December 30, 2021, Ms. Kaur met with Baljit to discuss “subject removal”. She explained the context of removing subjects. Baljit agreed to remove the subjects and provided Ms. Kaur with a cheque for the Deposit. The cheque was written by a third party, Mr. Sahota. Baljit reviewed, approved, and removed all of the “subjects”.
- l) Later, on December 30, 2021, Baljit requested an extension of the completion date to May 16, 2022. Mr. Gupta agreed to this extension on the provision that the Deposit would be released to Mr. Gupta. All parties agreed. The Deposit was released to Mr. Gupta.
- m) On the second visit to Keremeos, on or about April 24, 2022, Ravi travelled with Baljit and Mr. Balhar Jagpal (principal of 236BC Ltd.) and met with representatives of the Village of Keremeos. Again, Baljit did not instruct Ravi to seek any additional information from the representatives of Keremeos.
- n) On May 3, 2022, Baljit requested a further extension to June 20, 2022. Mr. Gupta agreed to that extension.

- o) As discussed below, on May 29, 2022, Baljit assigned the Contract of Purchase and Sale to 236BC Ltd. It is common ground that Baljit did not consult with Ravi or Ms. Kaur about this assignment. They learned of the assignment on June 20, 2022.
- p) Baljit learned of the Unregistered Right-of-Way from Mr. Jagpal on either June 18 or 19, 2022, which was before the final extended completion date of June 20, 2022.
- q) There is no dispute that Mr. Jagpal had learned of the Unregistered Right of Way from the Notary Public whom he retained for the conveyance. As discussed below, there is some evidence that either Mr. Jagpal or Baljit spoke to people who advised that the Unregistered Right of Way would inhibit building on, or development of, the Property.
- r) On the completion date of June 20, 2022, a meeting was scheduled at the realtors' office to sign the conveyance documents. Although there is some difference between the versions of the events at that meeting, it is clear that the following occurred:
 - i. Baljit advised Ravi and Ms. Kaur of the assignment of the Contract of Purchase and Sale to 236BC Ltd. He also advised that 236BC Ltd. could not complete the purchase of the Property.
 - ii. Baljit also advised Ravi and Ms. Kaur of the existence of the Unregistered Right of Way. He asked them why they had not notified him of its existence.
 - iii. According to Ravi and Ms. Kaur, Baljit asked what he should do. Ravi advised Baljit that he was obligated to complete the conveyance under the terms of the Contract of Purchase and Sale. Ravi further advised Baljit that he should speak with a lawyer.

- iv. Ravi and Ms. Kaur say that Baljit stated that he would be willing to complete the conveyance if the realtors lowered their commission.
- v. When the realtors did not agree to lower their commission, Baljit instructed them to seek a further extension on the closing date.

[26] Baljit's affidavit does not specifically deny any of the points raised above. His counterclaim pleads that he was an inexperienced investor in real estate and that he relied completely on his realtors. However, his affidavit does not include that information. Baljit's affidavit says the following:

- a) Through his realtors, Ravi and Ms. Kaur, he advised the seller's realtor that he was interested in purchasing the Property only if he would be able to develop and build anywhere on the Property.
- b) In response to Ravi and Ms. Kaur, the vendor's realtor represented that the Property had development potential that was suitable to Baljit's needs, and that he would be able to build on the front, back, and side areas of the Property.
- c) The vendor's realtor further represented that he would be able to build on all areas of the Property.
- d) At all material times, Ravi, Ms. Kaur, and the vendor's realtor were aware of Baljit's requirement that he be able to build on all areas of the Property.
- e) He accepted the seller's offer to sell the Property for the amount of \$1,900,000 plus GST based on the representation regarding his ability to build anywhere on the Property.
- f) He acknowledges that he sought two extensions on the closing date: first to May 16, 2022, and second to June 20, 2022.
- g) Baljit's affidavit does not address the evidence that he agreed to the release of the Deposit to the vendor in exchange for the first extension.

- h) On or about May 29, 2022, Baljit assigned the Contract of Purchase and Sale to the numbered company defendant, 236BC Ltd.
- i) After signing the contract to 236BC Ltd, Mr. Jagpal became aware of the Unregistered Right of Way. Mr. Jagpal backed out of the assignment agreement because the Unregistered Right of Way had potential effects barring some building and construction on the Property.
- j) The disclosure of the Unregistered Right of Way came as a complete shock to Baljit. The plaintiff and the defendants by counterclaim had not informed him of the Unregistered Right of Way.
- k) Baljit's affidavit states: "I was advised by various builders that I would not be able to build on all areas of the Property due to the Right of Way." I return to this statement below.
- l) Baljit decided to "rescind" the Contract of Purchase and Sale and its assignment. He has demanded that the Deposit be returned with interest. (I note that the plaintiff argues that Baljit "repudiated" the contract, and the plaintiff accepted that repudiation.)

[27] As noted, Baljit's affidavit evidence is that he had spoken to "various builders". The plaintiff takes significant issue with Baljit's evidence on this issue. and submits that the evidence is contradicted by prior statements.

- a) At his examination for discovery, Baljit could not recall any details about who these people were. Later, in his examination for discovery, he indicated that he had only spoken to Mr. Jagpal who, in turn, had spoken to the "builders". The plaintiff submits that any alleged information from the "builders" is either unattributed hearsay or double unattributed hearsay. Either way, it is inadmissible.

- b) Even if admitted into evidence, there is no evidence to suggest that any of those builders attended the Property, viewed any documentation with respect to the Property, or had any knowledge of Keremeos.

[28] I discuss below my consideration of Baljit's evidence on the issue of suitability.

Suitability – the Law

[29] There is no great divide between the parties on the law to be applied on the question of suitability.

[30] Since the introduction of the summary trial process in the late 1980s, much has been written on the issue of suitability. The well-spring of the jurisprudence is, of course, Chief Justice McEachern's prescient decision in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.).

[31] For the current test, both parties cite the decision of our Court of Appeal in *Gichuru v. Pallai*, 2013 BCCA 60, wherein Justice D. Smith summarized the law as follows:

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

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

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and

whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:

[34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R. 18A motion. [Emphasis added in *Gichuru*.]

[32] I have those considerations in mind as I decide on the issue of suitability. As discussed below, the defendants rely on the guidance from our Court of Appeal indicating that this Court should not decide on cases where it would be “unjust” to do so.

Positions of the Parties

[33] Although Baljit is the defendant in the plaintiff’s proceeding, I set out his position first, because it frames the issues.

Baljit’s Position – Suitability

[34] I note at the outset of this discussion that Baljit’s submissions focussed primarily on the suitability argument. Apart from his affidavit, Baljit tendered no evidence that would support his position or lead to a finding that Baljit should prevail in the action, against either the plaintiff or the real estate agents. As discussed below, his counsel submits that further evidence will be developed when the matter proceeded to trial.

[35] I also note that, at the hearing, counsel for the defendants made submissions in support of Baljit's position. Some of those submissions were based upon the evidence, primarily Baljit's affidavit. However, counsel also made submissions that were not based on the evidence tendered at this hearing. For example, there was no evidentiary basis for counsel's submissions that:

- a) Baljit was an unsophisticated real estate investor who relied completely upon his agents;
- b) the representations regarding the development potential of the Property were primarily made orally as opposed to the Property Disclosure Statement, which was in writing; and
- c) the representations might have been made at a meeting between Mr. Gupta and Baljit.

[36] When I say there is no evidence to support these submissions, I again note that Baljit's affidavit was the only evidence tendered by the defence. That affidavit does not address the three issues described in the paragraph above. Further, it does not respond to the vast majority of the content of the affidavits of Ravi and Ms. Kaur.

[37] As a result, and to be clear, I am not considering the defence's unsupported submissions as evidence. I consider Baljit's evidence to be restricted to that which is contained in his affidavit and the extracts from his examination for discovery. Further, as discussed below, I consider Baljit's evidence to be circumscribed by a prior response to the demand for particulars.

[38] Baljit's position is that, based upon his affidavit, the evidence establishes (for the purpose of this application) that:

- a) he was an unsophisticated investor who relied completely upon his real estate agents;
- b) he was looking for a property that was suitable for development;

- c) he advised his real estate agents of this requirement;
- d) through his real estate agents, Baljit advised the vendor (plaintiff) of his development requirements;
- e) the plaintiff knew, or ought to have known, about the Unregistered Right of Way and he withheld that information from Baljit;
- f) the plaintiff's real estate agent represented that the Property had development potential and that Baljit would be able to build on all areas of the Property;
- g) in deciding to purchase the Property, Baljit relied on the representations made by Mr. Gupta through Mr. Gupta's agent to Baljit's agents;
- h) after agreeing to the terms of the Contract of Purchase and Sale, Baljit extended the time for completion of the transaction;
- i) on May 29, 2022, he assigned the Contract of Purchase and Sale to the 236BC Ltd.;
- j) 236BC Ltd then advised Baljit of the Unregistered Right of Way; and
- k) he was advised by "various builders" that he would not be able to build on the Property due to the Unregistered Right of Way.

Hence, he was entitled to back out of the Contract of Purchase and Sale, based on the plaintiff's deliberate and fraudulent representations. To the extent that there are any gaps in the evidentiary basis for his defence, Baljit submits that he should be entitled to assemble that evidence for trial.

[39] Further, Baljit's real estate agents, Ravi and Ms. Kaur, either negligently or deliberately failed to perform the appropriate searches, and as a result, failed to discover the Unregistered Right of Way; thus, they failed to inform Baljit about the Unregistered Right of Way, its significance or effects.

[40] On that basis, Baljit submits that in the action:

- a) he was entitled to “rescind” the Contract of Purchase and Sale based upon material misrepresentations;
- b) he is entitled to the return of his Deposit; and
- c) if he is found liable to the plaintiff, then, to the extent that he is held liable for any damages, those damages should be paid by the real estate agents that he retained.

[41] In respect of this application, Baljit submits that these claims are not suitable for summary trial because:

- i. there are conflicts on the evidence;
- ii. the evidence tendered is not sufficient to proceed to judgment, and proceeding in a summary fashion would result in an injustice to him;
- iii. he needs further time to develop the evidence, including interviewing witnesses and retaining experts relating to the standard of care of real estate agents and the impact of the Unregistered Right of Way.

The Plaintiff’s Position

[42] In answer to Baljit’s position on suitability, Mr. Gupta submits:

- a) There is no real dispute on the evidence;
- b) To the extent there is a dispute on the evidence, any such conflict can be resolved based upon the pleadings, the documents, and the testimony of all parties and witnesses; and
- c) Baljit’s evidence is demonstrably false.

[43] As a result, the matter is:

- a) suitable; and
- b) the plaintiff should prevail on both liability and damages.

[44] A summary of the plaintiff's position on the merits of the litigation is:

- a) Pursuant to the Contract of Purchase and Sale, Baljit was required to satisfy himself regarding the appropriateness and title of the Property. For that reason, the "subject" clauses were included in the contract.
- b) The Contract of Purchase and Sale and the Property Disclosure Statement are clear. The vendor made no representations about the Property.
- c) Baljit removed the "subjects".
- d) Hence, he was bound to the terms and required to complete the conveyance.

[45] The plaintiff submits that there is no real conflict on the evidence. The plaintiff points to the following evidence which, he submits, will allow me to determine the factual issues in his favour.

[46] The plaintiff submits that the defence position is entirely dependent upon Baljit's evidence relating to the alleged misrepresentations. The plaintiff submits that Baljit's evidence on crucial issues is demonstrably false, or internally inconsistent.

[47] I start this discussion with two propositions that are not in dispute. The evidence establishes that Baljit never met with Mr. Gupta. Baljit alleges that he relayed his requirements about development potential through Ravi and Ms. Kaur to the plaintiff's agent. Correspondingly, Baljit alleges that Mr. Gupta, through his agent, represented that the Property could be developed as Baljit wished. Those propositions are not disputed by Baljit. In fact, he is the only person who puts forward that scenario.

[48] The plaintiff submits that there are several fatal evidentiary flaws in Baljit's affidavit.

The Property Disclosure Statement

[49] First, the plaintiff notes that his Property Disclosure Statement was blank, and the Contract of Purchase and Sale provides that there are no other representations. By submitting a blank statement, the plaintiff indicated that he was making no representations about the Property. That is the contract between the parties.

The Representations

[50] Second, the evidence of the real estate agents does not support Baljit.

[51] The only evidence supporting Baljit's position is his affidavit. In that affidavit, Baljit says that:

- a) he told his agents about his interest in developing the Property; and
- b) the plaintiff, as a vendor, made the relevant representations about the development potential of the Property through the vendor's agent to Baljit's agents (Ravi and Ms. Kaur).

[52] The plaintiff notes that both Ravi and Ms. Kaur deny that Baljit ever advised them about the need for the Property to be developed. It follows that they did not advise Mr. Gupta's agent of that requirement. The realtors further deny that Mr. Gupta or his agent provided any such representations about the Property. There is no affidavit from Mr. Ladwal (the vendor's agent). Mr. Ladwal is not a party to the counterclaim.

[53] Hence, the plaintiff submits, that there can be no finding that the vendor made any representations to the purchaser. Any such representations would have to have been made through the realtors, and the realtors deny any such representations. At best, Baljit's claim is based upon inadmissible hearsay evidence, in circumstances where the alleged speakers of the information deny making the statements.

Baljit's Affidavit and the Response to Demand for Particulars

[54] Third, the plaintiff notes that the basis of the defence position is summarized in Baljit's affidavit #1 which states:

12. The Seller's realtor represented that the Property had development potential that were (sic) suitable to my needs and that I would be able to build in front, back and sides areas of the Property.

[55] The plaintiff submits that this statement must be viewed in light of the pleadings. In that regard, the plaintiff notes that he received Baljit's response to civil claim (filed July 15, 2022). Baljit's response raised the allegations of misrepresentations. The plaintiff immediately (on July 18, 2022) issued a demand for particulars wherein he demanded particulars of the alleged representations made by the plaintiff. In response, Baljit provided the following particulars:

4. The Seller's agent Rick Aulakh represented to [the defendant] that the Property had development potential ... and that [the defendant] would be able to build in front, back and sides areas of the Property ...

[56] The plaintiff submits there is a fatal flaw in this statement: Mr. Aulakh was not the plaintiff's real estate agent.

[57] As noted above, the plaintiff's agent was Mr. Ladwal. Mr. Aulakh had no association with the plaintiff. In fact, Ms. Kaur's evidence discloses that Mr. Aulakh was a realtor who worked at the same real estate office as Ravi and Ms. Kaur. However, he was not retained as a realtor by any party in respect of this transaction. There is evidence that Mr. Aulakh did attend a meeting in Keremeos with Baljit.

[58] Hence, three things:

- a) Baljit's affidavit #1 simply refers to the "Seller's realtor". Given Baljit's response to demand for particulars, that statement must mean Mr. Aulakh, who was not the plaintiff's realtor.
- b) Even if the allegation in the response to demand for particulars is true, the plaintiff cannot be bound by representations made by a stranger to the contract.

- c) On the issue of suitability, Baljit cannot resile from the position that he took in his response to demand for particulars.

[59] Based on the three points made above, the plaintiff submits that I can make the necessary factual findings regarding the evidentiary impact of Baljit’s affidavit #1. He submits that on the specific issue of the alleged misrepresentation by the plaintiff, Baljit’s evidence establishes that the plaintiff made no representations. On that basis, he submits that I can determine the necessary facts and grant judgment for the plaintiff.

Evidence from Examination for Discovery

[60] Fourth, the plaintiff also points to Baljit’s examination for discovery and the answers he gave before and after the lunch break.

[61] Before the lunch break, when asked about the specific misrepresentations, Baljit stated that Ravi (his own agent) failed to advise him about “a property easement” (at Q. 412). It was clear from the context of his answer that he was referring to the FortisBC Right of Way that was registered on the title as a statutory right of way. Baljit testified that a builder told him not to purchase the Property because of the statutory right-of-way:

- 419 Q. So the builder told you because of the statutory right-of-way registered against title, you could not build on the property; is that correct?
 - A. Not any, but lot of it will go to waste.
- 420 Q. Right, and the wastage was only going to be because of the registered right-of-way; correct?
 - A. Yes, because of that.
- 421 Q. And no other reason; correct?
 - A. For now, just that.

[62] The discovery then broke for lunch. Immediately after lunch, the following interchange occurred;

- 424 Q So, do you wish to add anything to your response prior to lunch with respect to the reasons that you did not complete the purchase of the Keremeos property?

A. Yes. Balhar Jagpal told me there's easement there and he found out from the City and which was not disclosed to me.

425 Q. And is that the right-of-way that's registered on title?

A. That as well as the easement, that's why I'm mentioning easement again.

[63] Baljit goes on at Q. 431 to clarify that the "easement" was discovered by Mr. Jagpal's notary when he was working on the assignment of the Contract of Purchase and Sale. Hence, there is no dispute that when Baljit talked about the "easement", he was talking about the Unregistered Right of Way.

[64] The plaintiff submits that this U-turn in his evidence demonstrates that Baljit's affidavit evidence should not be accepted.

Baljit's Actions after Learning of the Unregistered Right of Way

[65] Fifth, the plaintiff points to Baljit's actions after learning of the existence of the Unregistered Right of Way. For this, the plaintiff relies on the following evidence:

- a) Baljit's evidence from his examination for discovery (Q. 438–Q. 440), where he testified that Mr. Jagpal advised him (Baljit) of the existence of the Unregistered Right of Way "a few days" before the (last extended) closing date of June 20, 2022.
- b) Affidavit evidence of Ravi and Ms. Kaur, which, the plaintiff submits, is uncontroverted.

[66] Ms. Kaur's affidavit #1 notes Baljit had requested, and she had obtained, extensions of the closing date until June 20, 2022. She met with Baljit at her office on June 20, 2022. At that meeting Baljit informed her:

- a) of the assignment of the contract to 236BC Ltd.;
- b) of the existence of the Unregistered Right of Way;
- c) that Mr. Jagpal (236BC Ltd.) did not want to complete the assigned deal because of the Unregistered Right of Way;

- d) if Ravi and Ms. Kaur lowered their commission, then Baljit would agree to close on the Property; (Ravi and Ms. Kaur did not respond to that suggestion.) and
- e) Baljit needed more time to complete the conveyance and requested that Ravi and Ms. Kaur seek another extension to the completion date.

[67] Based upon those conversations, Ms. Kaur drafted an addendum extending the closing to June 23, 2022. The fact that the documents were drafted is not in dispute. However, the vendor would not agree to a further extension without a further deposit of \$100,000. In response to that position, Baljit indicated that he was able to pay an additional \$10,000. The vendor refused those terms. As a result, the closing date was not extended, and the deal collapsed.

[68] The plaintiff submits that this evidence, which is not challenged by Baljit, indicates that Baljit learned of the Unregistered Right of Way prior to June 20, 2022, but was still willing to proceed with the purchase of the Property if certain conditions were met.

Findings on Suitability – Vendor v. Purchaser

[69] In my opinion, I am able to make the findings of fact necessary to decide the plaintiff's claim against Baljit, and I exercise my discretion to do so.

[70] As noted above, the process of determining whether the matter is suitable for determination has also led me to decide this issue in favour of the plaintiff.

[71] First, I accept the submission that, on this summary trial, Baljit is bound by his response to the demand for particulars. In that response, he provided particulars of the representations made by the plaintiff. Baljit described the representation as coming from Mr. Rick Aulakh, but:

- a) there is no evidence suggesting that Mr. Aulakh was the vendor's agent;
- b) Mr. Ladway was the vendor's agent; and

- c) Mr. Aulakh was an agent who worked in the same office as Baljit's realtors.

[72] Baljit's later affidavit evidence was that the representations regarding the development potential of the property were made by "the Seller's realtor". Put simply, I cannot accept that statement as true. Baljit had already provided particulars describing the representations as coming from Mr. Aulakh.

[73] Second, I accept the plaintiff's submission that Baljit cannot successfully proffer a defence to the plaintiff's case without corroborating evidence from Ravi and Ms. Kaur. Put another way, I find that the conflicting evidence from Ravi and Ms. Kaur is fatal to Baljit's defence to the plaintiff's claim. I say this because Baljit's version of events required the following communications to have occurred:

- a) Baljit communicated to Ravi and Ms. Kaur his interest in purchasing a property suitable for development;
- b) Ravi and Ms. Kaur then relayed that interest through Mr. Ladwal to the plaintiff;
- c) The plaintiff then responded with the representations regarding the development potential of the Property. That representation was made via Mr. Ladwal to Ravi and Ms. Kaur; and
- d) Ravi and Ms. Kaur then relayed that representation to Baljit.

[74] The first obvious gap in this chain relates to the representations being made by Mr. Aulakh (addressed above). The second gap in this scenario is that Baljit's real estate agents do not support Baljit's version of events on the issue of the vendor's representations. According to Ravi and Ms. Kaur, Baljit never informed them of his interest in developing the Property. As a result, they never inquired about the development potential. Hence, no representation was made by Mr. Gupta.

[75] While the conflict between Baljit and his agents could present an evidentiary issue between those parties, the plaintiff is unaffected by that dispute. On Baljit's

version of events, the representations were conveyed through the real estate agents. The real estate agents deny any such representations (in both directions). This is not an issue where I can believe Baljit and disbelieve Ravi and Ms. Kaur. By definition, Baljit has no personal knowledge of any statement made by the vendor (or his realtor) to Ravi and Ms. Kaur. There is no evidence from the vendor's realtor, Mr. Ladwal, who is not a party to this action. Hence, there is no evidence that the vendor made any representation about the Property.

[76] In my opinion, these two determinations, on their own, are sufficient to dispense with Baljit's arguments on suitability.

[77] In coming to this decision, I place no weight on the plaintiff's submission regarding Baljit's examination for discovery and his apparent inability to distinguish between the FortisBC Right of Way and the Unregistered Right of Way. I gave Baljit the benefit of the doubt on the incongruent answers that he gave before lunch, and then corrected them.

[78] It follows, however, that I find that the plaintiff's claim against Baljit is suitable for determination on summary trial. It further follows that I find in favour of the plaintiff in respect of the claim in breach of contract. I find that the plaintiff has established that there was an enforceable contract. The other side of that coin is that the defence has failed to establish that there was any misrepresentation made by the vendor. The contractual terms govern.

[79] I address the issue of damages below.

[80] I now move on to the suitability of Baljit's counterclaim against Ravi and Ms. Kaur.

Suitability of the Counterclaim

[81] The real estate agents, Ravi and Ms. Kaur, are defendants by counterclaim. They are not third parties. Baljit alleges that they negligently, or deliberately, failed to advise Baljit about the Unregistered Right of Way. He alleges that:

- a) he was an unsophisticated real estate investor who relied completely on the advice of his realtors;
- b) their acts or omissions constitute a breach of the standard of care owed to the clients of real estate agents; and
- c) their acts or omissions have caused him the losses flowing from the failure of the conveyance.

[82] Ravi and Ms. Kaur submit that:

- a) Baljit's evidence on this summary trial fails to address the requisite elements of a professional negligence claim;
- b) hence, I am able to dismiss the counterclaim against them.

[83] Ravi and Ms. Kaur acknowledge that there is a substantive conflict in the evidence between theirs and Baljit's:

- a) Baljit says that he advised the realtors that he wanted to purchase a property with development potential.
- b) Ravi and Ms. Kaur deny that Baljit told them any such thing.

[84] Despite this conflict, Ravi and Ms. Kaur submit that a combination of admissions and documentary evidence should lead me to conclude that the counterclaim against them should be dismissed.

[85] First, Ravi and Ms. Kaur note the obvious: Baljit bears the onus of proof on the counterclaim. I accept that submission.

[86] Second, Ravi and Ms. Kaur submit that there is no evidence that Baljit was an unsophisticated investor. Although Baljit makes that allegation, it is not supported by any evidence from Baljit. That issue is not mentioned in his affidavit. In addition, Ravi and Ms. Kaur submit that the available evidence points in the opposite direction:

- a) At the time they were retained, Baljit owned three commercial properties in addition to his family home. This fact suggests that he was experienced.
- b) Without seeking any input or advice from Ravi and Ms. Kaur, Baljit assigned the Contract of Purchase and Sale to 236BC Ltd. This assignment suggests a significant level of sophistication.

[87] I will address this piece of the evidence on its own. I accept that there is no evidence that Baljit was unsophisticated, but I do not consider that issue to be determinative of the outcome of the counterclaim. In other words, the debate over Baljit's level of sophistication is not an essential element to Baljit's claim against his realtors. I do not base my decision on that piece of the evidence.

[88] More importantly, Ravi and Ms. Kaur submit that a plaintiff suing real estate agents in negligence, faces the onus of establishing the constituent elements of the tort. They submit that:

- a) there is no evidence that they had a duty to search for unregistered charges against title;
- b) there is no evidence from Baljit indicating that the standard of care of a reasonably prudent realtor required them to discover the existence of the Unregistered Right of Way; and
- c) there is no evidence of any damage suffered.

[89] To be clear, the realtors admit that they owed a general duty of care to their client. They also admit that they did not know about the Unregistered Right of Way. Hence, there is no conflict in those aspects of the evidence. They submit that the issues are whether those failures:

- a) constitute an omission that breached a duty of care or fell below the standard of care; or
- b) caused any damage.

[90] On these issues, Ravi and Ms. Kaur rely on the decision of Justice Dardi in *Beacock v. Moreno*, 2019 BCSC 955. They refer to two propositions from that case.

[91] First, Dardi J. set out the five elements that a plaintiff must establish to succeed against a realtor in a professional negligence claim:

[109] The authorities establish that in order to succeed in a claim in negligence against the realtor defendants, the plaintiff must prove on a balance of probabilities that:

- a) the realtor defendants were possessed a special skill;
- b) the realtor defendants undertook to apply that skill for the assistance of the plaintiff;
- c) the plaintiff relied upon such skill;
- d) the conduct of the realtor defendants fell below the requisite standard of care of a reasonably prudent brokerage and real estate agent at the material time; and
- e) the plaintiff suffered damage as a result of the breach of the standard of care by the realtor defendants.

[92] Second, relying on *Beacock*, Ravi and Ms. Kaur submit that, in actions claiming professional negligence, the plaintiff is required to adduce expert evidence on both the breadth of the duty of care and the standard of care of realtors, unless the actions of the realtor fall in the description of “common experience”. Again, Dardi J. in *Beacock* wrote:

[106] In *Brown v. Douglas*, 2010 BCSC 1059 [*Brown SC*], rev'd on other grounds 2011 BCCA 521, Willcock J. (when he was a member of this Court) summarized the governing principles regarding the duty of care of a real estate agent:

[38] To some extent a common duty of care is implied from the relation of principal and agent and from a basic appreciation of the role of the agent in the market. Expert evidence is not necessary to establish a standard of care based on common experience: *Burbank v. R.T.B.*, 2007 BCCA 215, 279 D.L.R. (4th) 573; and *Summit Staging Ltd. v. 596373 B.C. Ltd.*, 2008 BCSC 198, 68 R.P.R. (4th) 280.

[39] In *Phelan v. Realty World*, [1994] 38 R.P.R. (2d) 128 (S.C.), Baker J. adopted the following description of the duty of care of an agent to his principal set out in Fridman, *Studies in Canadian Business Law*, at 334:

An agent who is receiving a reward must not only exercise reasonable care, but he is also deemed to possess reasonable skill, thus as real estate brokers hold themselves out to the

public as being experts in property valuation and sale, they must display the qualities which are generally associated with their calling and in offering advice and information must use due care.

[107] It is clear that there is an implied duty of care between a realtor and a client to possess reasonable skill related to property valuation and sales. A realtor is to exercise the skill of a reasonably prudent realtor in the circumstances.

[108] Mr. Justice Willcock also addressed the legal test for establishing a broader duty of care between a real estate agent and a client:

[41] One who seeks to impose a broader duty, for example, a duty to make specific enquiries on behalf of a purchaser or to warn of particular risks of a transaction, bears the evidentiary burden of establishing the nature and extent of that duty. For example, the allegation made by the plaintiff in *Summit Staging Ltd.* that the agent ought to have done a market analysis was dismissed because no evidence was adduced with respect to what was customarily required of the agent: see para. 46 and the cases cited therein, as well as the similar decision in *Phelan*.

[42] Similarly the plaintiffs' case against their realtors in *Perrault v. North Vancouver (District)*, 2010 BCSC 382, was dismissed because the plaintiff's allegation that the realtors had not verified accuracy [*sic*] the information disclosed by the sellers for completeness was not supported by evidence of the existence of the duty of care alleged. The Court held at para. 19:

The difficulty with this submission of the plaintiffs is that there is no evidence before me as to what information is usual or customary for brokers to verify. Put another way, is searching the Municipal Planning Department or the Public Library for notices or claims issued by a public body over two decades earlier a usual or customary step taken by a reasonable and prudent realtor?

[Emphasis added in *Beacock*.]

[93] Ravi and Ms. Kaur submit that the inquiries to discover the Unregistered Right of Way constitute "specific enquiries on behalf of a purchaser" which fall outside of the "common experience" category. Hence, expert evidence is required.

[94] In this regard, the realtors point to two separate, and undisputed facts:

- a) It was 236BC Ltd.'s notary who discovered the Unregistered Right of Way.
- b) The Contract of Purchase and Sale provided that the plaintiff:

- i. was responsible for determining allowable land-use provisions;
- ii. was advised to check if the Property is on the Heritage registry or the Archaeological registry, confirm zoning & future zoning with the city, do a lot survey, and confirm whether the property is in a flood plain or a peat bog area; and
- iii. was advised that the real estate licensees are not qualified to give legal, accounting or tax advice, and that any questions regarding legal documents, including charges registered against title should be answered by independent legal counsel.

[95] The realtors submit that the discovery of the Unregistered Right of Way fell outside of their duty of care. Further, there is no evidence that their services fell below a particular standard of care. In short, Baljit's evidence does not address this issue.

[96] In response to the realtors' submissions on the need for expert evidence, counsel for Baljit submits that this is an area where Baljit should be permitted some time (*i.e.*, before the trial) to obtain expert evidence on the scope of the duty and standard of care of a real estate agent. Baljit submits that it would be unfair and premature to decide this claim on a summary basis. In sur-rebuttal to that submission, Ravi and Ms. Kaur note that the trial is scheduled for July 8, 2024, and all pretrial procedures have been conducted. Hence, there is nothing premature about this application. The law is clear that a party must come to a summary trial prepared to put their best foot forward.

[97] On a separate issue, Ravi and Ms. Kaur submit that there is no evidence that the Unregistered Right of Way would (or will) have any impact on the development potential of the Property. They submit the right of way may have no effect because it is not registered. Further, the only "evidence" put forward by Baljit is the inadmissible hearsay (or double hearsay) of the "builders". Hence, there is no evidence that the development potential of the Property is limited.

[98] In response to this submission, Baljit submits that this is another area where he will be obtaining expert evidence in time for trial. Ravi and Ms. Kaur, again in sur-rebuttal, note that Baljit says that he decided to back out of the Contract of Purchase and Sale based on the Unregistered Right of Way, and yet, deep into this litigation, he still has not obtained any expert advice on the legal implications of the document. Again, they submit that Baljit had an obligation to establish that fact on the summary trial.

[99] In a separate submission, Ravi and Ms. Kaur submit that Baljit's counterclaim has no chance of success. They submit that, framed as a counterclaim (as opposed to a third-party notice), Baljit has no claim against them for the damages pursued by the plaintiff. They rely on the reasoning of Justice Kirchner in *Kaltenegger v. Cao*, 2022 BCSC 2203 at paras. 238–245. In that case, the vendor of land (Mr. Kaltenegger) sued the purchaser (the defendant Ms. Cao) for backing out of a contract to purchase land. Ms. Cao brought a separate action (heard at the same time) against her realtor, Mr. Liu.

[100] Justice Kirchner found that Mr. Liu was negligent, in part, because he failed to advise Ms. Cao about the actual boundaries of the property she was purchasing. However, Kirchner J. found that Ms. Cao could not establish that she suffered any damage because of Mr. Liu's negligence. He ruled that, in order to establish her damages, Ms. Cao would have to have completed the conveyance of the land. She would then own land that was worth less than she thought it was worth based upon Mr. Liu's advice. She could then sue Mr. Liu for the difference in value based on her alleged overpayment. Justice Kirchner wrote:

[240] Ms. Cao argues that but for Mr. Liu's negligence, she would not have agreed to purchase 917 Pacific and she would not have been placed in the position of being sued by Mr. Kaltenegger. In that case, she says, she would have suffered no loss or damage.

[241] However, the damage Mr. Kaltenegger suffered, for which Ms. Cao must now compensate him, was not caused by Mr. Liu's acts or omissions. It was caused by Ms. Cao refusal to complete her binding contract with Mr. Kaltenegger against Mr. Liu's advice.

[242] Mr. Liu's negligence did not entitle Ms. Cao to break her contract with Mr. Kaltenegger. In this regard I reject Ms. Cao's reply submission that she

“properly did not complete” her contract with Mr. Kaltenegger because of Mr. Liu’s negligence. Mr. Kaltenegger is an innocent party and there is nothing “proper” about Ms. Cao breaking her contract with him because of her own agent’s negligence. She was bound to complete that contract and, had she done so, she would be entitled to sue Mr. Liu for whatever damages flowed from her now owning a piece of property for which she believes she overpaid and is not the full property she thought she was buying.

[101] Ravi and Ms. Kaur submit that the facts and reasoning in *Kaltenegger* are “on all-fours” with this case. Having improperly backed out of the Contract of Purchase and Sale, Baljit cannot now claim that the realtors’ negligence caused the damage that he suffered. If he had a claim against the realtors, he should have completed the deal and sued for the difference in value.

[102] I note, for the sake of completeness, that Baljit’s counterclaim also alleges that Ravi and Ms. Kaur were in breach of their contractual and fiduciary duties to Baljit. The counterclaim also alleges a breach of trust. Ravi and Ms. Kaur do not deny that they owed contractual and fiduciary duties to Baljit, but they say that there is no evidence that they breached any such duties.

Finding on Suitability – Counterclaim Against Realtors

[103] In my opinion, Ravi and Ms. Kaur have established that the counterclaim against them is suitable for summary determination. In stating that, I find that Baljit has failed to establish that the summary trial on the counterclaim against the realtors is not suitable. I exercise my discretion to allow the matter to be decided by way of summary trial.

[104] It follows that I dismiss the counterclaim against the realtors. In that regard:

- a) I accept the realtors’ submission that there is no evidence that would establish that the discovery of the Unregistered Right of Way falls within the “common duty of care” that is implied from the realtor-client relationship.
- b) I further accept the realtors’ submission that the available evidence suggests that the discovery of unregistered rights of way fell outside the

common duty of care. Specifically, the Contract of Purchase and Sale reserved certain duties to lawyers and notaries. It was Mr. Jagpal's notary who discovered the Unregistered Right of Way.

- c) Hence, there is no evidence that the duty existed. Further, there is no evidence of the standard of care that might apply. Hence, if I were to assume that the duty existed, there is no evidence that the work of Ravi and Ms. Kaur fell below the requisite standard.

[105] Put another way, on the evidence presented, I am unable to determine whether the discovery of an unregistered right of way would fall within the common duty of care of a realtor. The available evidence suggests the opposite conclusion. By definition, that means that Baljit has failed to establish the existence of an element of his claim against the realtors. Hence, although there is a dispute on the evidence (as to what Baljit advised his realtors), there is no dispute on the state of the evidence at this summary trial. Baljit has tendered no evidence on two essential elements of his claim. As a result, his counterclaim must be dismissed.

[106] If I should be mistaken on the issue of liability, then I note that I also accept the submission of the realtors in respect of Baljit's failure to establish damages.

[107] I accept that the reasoning in *Kaltenegger* would apply to these facts:

- a) Baljit backed out of the Contract of Purchase and Sale with Mr. Gupta.
- b) Mr. Gupta is entitled to damages for that decision.
- c) The realtors are not responsible for the damages suffered by Mr. Gupta for backing out of the transaction.
- d) If Baljit had a claim against his realtors, he was required to complete the transaction with Mr. Gupta and then sue his realtors for the difference in the value between the property they told him he was getting, and the Property he obtained.

- e) It further follows that Baljit would have to establish that the Unregistered Right of Way had a negative impact on the value of the Property. He has failed to adduce any evidence on that issue.

[108] It follows that the counterclaim against the realtors must be dismissed.

Baljit's Counterclaim Against the Plaintiff

[109] The plaintiff also seeks the dismissal of the counterclaim against it. Baljit counterclaimed against the plaintiff for the return of his Deposit. As noted above a cheque for \$75,000 was paid.

[110] Baljit's counterclaim must fail for the same reasons that I have set out above, plus an additional reason.

[111] As noted above, on December 31, 2021, Baljit sought an extension of the completion date. Mr. Gupta agreed on the condition that the Deposit would be released to Mr. Gupta. Baljit agreed to that term (see para. 25(l) above). Hence, Baljit has no claim to the Deposit.

[112] I note that the plaintiff argues that the Deposit cheque was not written by Baljit. I do not need to address that issue.

[113] I dismiss Baljit's counterclaim against the plaintiff.

The Plaintiff's Claim Against 236BC Ltd.

[114] The plaintiff also claims that he is entitled to judgment against 236BC Ltd. which was the assignee of the Contract of Purchase and Sale.

[115] The plaintiff acknowledges that the general force of the law is against him on this issue. In the ordinary course, there is no privity of contract between the original vendor and the assignee. However, the plaintiff submits that the facts of this case distinguish it from the majority of cases.

[116] The plaintiff relies on wording found in the decision in *Wanson (Bristol) Development Ltd. v. Sahba*, 2018 BCCA 260. In that case, the vendor (Wanson) sold a “pre-build” condo to Mr. Bloor. Mr. Bloor then assigned that contract to Ms. Sahba. In the assignment agreement, Ms. Sahba agreed to indemnify Mr. Bloor for any damages. Ms. Sahba then failed to close on the condo. Wanson sued and obtained a judgment against Mr. Bloor. Mr. Bloor sought to pursue Ms. Sahba on the basis of the indemnity agreement. He then assigned his right of action to Wanson. Hence, Wanson (vendor) sued Ms. Sahba (assignee), but Wanson had stepped into the shoes of Mr. Bloor. Wanson was successful at trial. Ms. Sahba appealed. The question arose during the appeal whether Wanson could have sued Ms. Sahba directly. Justice Bennett wrote (for the court):

[41] During the hearing of the appeal, questions arose regarding whether Wanson could have or should have sued Ms. Sahba directly. In my view, it could not.

[42] Assignments do not create privity of contract between the vendor (Wanson) and the assignee (Ms. Sahba) in the absence of an express agreement providing for Ms. Sahba’s liability under the Contract: Victor Di Castri, *The Law of Vendor and Purchaser: The Law and Practice Relating to Contracts for Sale of Land in the Common Law Provinces of Canada*, loose-leaf (Toronto: Thompson Reuters, 1988) at 491.

[43] In this case, the Purchase Agreement was between Wanson and Mr. Bloor, and the Assignment was between Mr. Bloor and Ms. Sahba. Further, s. 7.1 of the Purchase Agreement obviated the need for Wanson to be concerned with an assignee’s failure to complete the purchase, as s. 7.1 ensures Mr. Bloor retained his own responsibility to perform.

[117] In the present case, Mr. Gupta says that the exception discussed by Justice Bennett in para. 42 applies. He points to the wording of the assignment from Baljit to 236BC Ltd. It provides, in clause 4.8, that 236BC Ltd. as assignee, agrees to “observe and perform all of the obligations of the original buyer under the Contract”. The plaintiff submits that this provision satisfies the requirement, described in *Wanson*, for an express agreement providing for (236BC Ltd.’s) liability under the contract.

[118] From a procedural standpoint, I note that the plaintiff’s notice of application raised the issue of 236BC Ltd.’s contractual obligations, including the *Wanson*

decision. As noted above, Baljit and 236BC Ltd. are represented by the same counsel. However, the defence offered no specific answer to this position on behalf of 236BC Ltd.

[119] Baljit and 236BC Ltd. filed their application response, and it includes a “Legal Basis” that falls into three broad categories. The three broad categories are:

- a) Mr. Gupta misrepresented the Property;
- b) the realtors were negligent; and
- c) the matter is not suitable for summary trial.

[120] None of those arguments include a position that assists 236BC Ltd.

[121] The evidence is undisputed that up until the June 20, 2022 closing date, neither Mr. Gupta nor the realtors were aware of 236BC Ltd.’s involvement. There is no allegation that Mr. Gupta made any representation to 236BC Ltd. Further, the realtors were not retained by 236BC Ltd. The realtors’ only duties were owed to Baljit.

[122] Hence, the application response does not join the issue with the plaintiff’s arguments regarding the liability of 236 BC Ltd. Further, the defendants did not address this issue in their oral submissions at the hearing.

[123] Hence, the question for me is whether the carve-out, as discussed by Justice Bennett in *Wanson*, applies to this case: Did the assignment agreement create a privity of contract between Mr. Gupta and 236BC Ltd.?

[124] In my opinion, it did not, and the carve-out that the plaintiff seeks to rely upon does not apply to these facts.

[125] As noted the plaintiff relies on the Court of Appeal’s decision in *Wanson*. The plaintiff argues that the assignment agreement provides that 236BC Ltd. will perform all of the obligations of Baljit under the original Contract of Purchase and Sale. The

plaintiff points to para. 42 of *Wanson* and submits that, in this case, there is “an express agreement providing for [236BC Ltd.]’s liability under the Contract”. Hence, the plaintiff says that the law supports the direct liability of the assignee on these facts.

[126] To begin, I note that the cited paragraph is, by definition, *obiter*. It addresses a situation that did not exist. *Wanson* sued Ms. Sahba after taking an assignment of Mr. Bloor’s claim against her. Justice Bennett was addressing a hypothetical scenario.

[127] Next, in my opinion, with the greatest of respect, para. 42 of *Wanson* is somewhat ambiguous in its use of the term “the Contract”. The plaintiff’s submission is that “Contract” means the assignment agreement. In my opinion, that is not a proper interpretation of the language of para. 42.

[128] By my reading of *Wanson*, the word “Contract” is not a defined term in the reasons of either the trial judge or the Court of Appeal.

[129] However, a full reading of the case discloses that the use of the word “Contract” in para. 42, in fact, refers to the original sale agreement. I say that because:

- a) at para. 9 of *Wanson*, the Court of Appeal discusses clause 7.1 of the original purchase agreement;
- b) at para. 21, the Court refers to Mr. Bloor’s obligations “under s.7.1 of the Contract”. In the context of that discussion, the Court is clearly referring to the original agreement between vendor and purchaser (*i.e.*, not the assignment);
- c) then, at para. 42, the Court again uses the word “Contract”; and
- d) finally, at para. 43, the Court again refers to “s. 7.1 of the Purchase Agreement”.

[130] In that context, the word “Contract” must mean the original purchase contract (not the assignment).

[131] Thus, I turn to the Contract of Purchase and Sale to determine whether any nexus could arise in that document. There is an assignment provision in the Contract of Purchase and Sale. The parties (Mr. Gupta and Baljit) agreed that Baljit was entitled to assign the contract. However, that term is clear that the name of the assignee must be added or substituted to the Contract of Purchase and Sale. As noted, the vendor had no knowledge of the assignment or of 236 BC Ltd.

[132] Thus, in my opinion, the Court of Appeal, by using the word “Contract” in para. 42, meant to say that the assignee of a contract would only become liable to the original vendor when the assignee signs on to the original contract. 236BC Ltd. did not sign the Contract of Purchase and Sale.

[133] I find support for this proposition in the Di Castri text that is cited in para. 42 of *Wanson*. In Victor Di Castri, *The Law of Vendor and Purchaser: The Law and Practice Relating to Contracts for Sale of Land in the Common Law Provinces of Canada*, vol 2 (Toronto: Thompson Reuters, 2023) at 13:32, the text states:

The true assignment creates privity of estate, but not privity of contract between the vendor and the assignee. The latter, *vis-à-vis* his assignor, becomes primarily liable for the price with the assignor as surety. But the assignee, apart from an express agreement, incurs no personal liability to the vendor.

[134] In this case, there was never any privity between Mr. Gupta and 236BC Ltd. In my opinion, no agreement between Baljit and 236BC Ltd. could create privity between Mr. Gupta and 236BC Ltd. without Mr. Gupta’s knowledge.

[135] It follows that, although 236BC Ltd. made no submissions on this issue, I find that the plaintiff has failed to establish his case against 236BC Ltd. I exercise my discretion in favour of proceeding on the claim against 236BC Ltd. on a summary basis, and I dismiss that claim.

Damages

[136] For the reasons set out below, I also exercise my discretion not to assess damages in a summary fashion.

[137] The plaintiff seeks damages of \$301,285.01. I explain the elements that comprise that figure below.

[138] First, the plaintiff says that, after the collapse of the sale to Baljit, he took reasonable steps to market the Property. He has been unable to attract another buyer. He submits that a reasonable period to market the Property was three months. He then obtained an appraisal of the Property.

[139] The plaintiff tendered the Retrospective Narrative Appraisal of the Property prepared by Ms. Kate M. Ficek of Grover, Elliott & Co. Ltd. The appraisal was conducted as of September 20, 2022 (three months post-June 20, 2022). The defendants took no issue with the qualifications of the appraiser or the introduction of the report.

[140] Ms. Ficek opined that the value of the Property as of September 20, 2022, was \$1,620,000.

[141] On that basis, the plaintiff claims damages of \$280,000, which is the difference between the \$1,900,000 sale price and the September 20, 2022 appraisal value.

[142] The plaintiff also seeks:

- a) \$24,750 representing the additional mortgage payments of \$4,125 per month for six months from July–December 2022.
- b) \$55,000 representing the additional mortgage payments of \$5,500 per month for 10 months from January–October 2023.
- c) \$5,720.71 representing half of the property taxes for 2022.

d) \$10,814.30 representing the full property taxes for 2023.

[143] The total of these amounts is \$376,285.01. From that figure, the plaintiff deducts the Deposit paid by Baljit (\$75,000). On that basis, the plaintiff arrives at \$301,285.01.

[144] The defendants put forward no argument regarding the assessment of damages.

[145] In my opinion, however, the plaintiff's calculation of the damages is deficient.

[146] I note that the appraisal of Ms. Ficek indicates that, as of October 21, 2023, when she inspected the Property, the 13 motel units on the Property were rented to long-term tenants. Hence, since June 20, 2022, the plaintiff has received income from the Property that he would not have received if he had sold the Property.

[147] I note that the "Orders Sought" section of the plaintiff's notice of application does not seek a summary assessment of the damages. It only seeks:

- a) a declaration that Baljit and 236BC Ltd. are in breach of the Contract of Purchase and Sale;
- b) judgment for breach of contract;
- c) dismissal of the counterclaim;
- d) interest and costs.

[148] The body of the notice of application, under the heading "Calculation of Damages", describes several legal principles relating to the assessment of damages in this type of case. However, there is no written argument setting out the specific calculation that the plaintiff put forward at the summary trial. Put another way, the plaintiff provided no notice of the actual calculations that would be used in arguing for a summary determination

[149] I have no evidence of the amount of rent received by Mr. Gupta. However, the plaintiff claims damages for the expenses he has incurred since June 20, 2022, without accounting for the income he has earned in the same period. I return to the guidance of the Court of Appeal from both *Inspiration Management and Gichuru* (*supra*). I find it would be unjust to assess the plaintiff's damages on a summary basis at this point.

[150] However, in my opinion, it would also be unfair to force the plaintiff through a full trial on damages. In my opinion, it is an issue that, if properly addressed, should be able to be concluded in chambers. That, of course, will require proper responsive materials from the remaining defendant.

[151] Hence, although I am exercising my discretion and disallowing the summary assessment of the plaintiff's damages, I will direct that the plaintiff is entitled to bring the assessment of the claim for damages back on a summary basis.

[152] For the sake of the judicial economy, I will seize myself of the remaining issues.

Summary

[153] It follows from my reasons above that:

- a) I exercise my discretion to allow the following issues to be decided by summary trial:
 - i. Liability of Baljit to Mr. Gupta in contract;
 - ii. Liability of Mr. Gupta to Baljit in the counterclaim;
 - iii. Liability of the realtor defendants to Baljit in the counterclaim.
 - iv. Liability of 236BC Ltd. to the plaintiff.
- b) I exercise my discretion, and I do not allow the following issues to be decided by summary trial:

- i. Assessment of damages.
- c) I grant the declaration sought by the plaintiff in paragraph 1 of the notice of application, as it relates to Mr. Baljit Singh Gill being in breach of the Contract of Purchase and Sale. I do not grant the declaration as it relates to 236BC Ltd.
- d) I dismiss Baljit's counterclaim for the return of the Deposit.
- e) I dismiss Baljit's counterclaim against the realtors.
- f) I dismiss the plaintiff's claim against 236BC Ltd.

[154] The matter has not been completed as between plaintiff and Baljit, so I make no final order as to costs in that respect. However, the real estate agents are entitled to their costs of defending the counterclaim.

"A. Ross J."