IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhao v. Purewal,*
2023 BCSC 1750

Date: 20231006
Docket: S163206
Registry: Vancouver

Between:

Wokun Zhao

Plaintiff

And:

**Amrik Purewal, Jisbinder Kaur Purewal,
Amrik Singh Purewal and Manvir Purewal**

Defendants

And:

**Harpal Singh Lehal, Sutton Group-West Coast Realty
and West Coast Realty Ltd.**

Third Parties

Before: The Honourable Justice Morley

Reasons for Judgment

Counsel for the Plaintiff Wokun Zhao:	A. M. Nathanson S. B. Hannigan
Counsel for Defendant Amrik Purewal:	C. Dennis, K.C. M.A.J. Ferreira
Counsel for Defendant Jisbinder Kaur Purewal:	P. Khaira
Place and Dates of Hearing:	Vancouver, B.C. September 11 - 14, 2023
Place and Date of Judgment:	Vancouver, B.C. October 6, 2023

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INTRODUCTION

[1] This application for summary trial arises out of a collapsed home sale in Surrey.

[2] On November 1, 2015, the plaintiff Wokun (Kirt) Zhao entered into a contract of purchase and sale (the "Contract") to buy 2668 143A Street in the Sunnyside Park neighbourhood (the "Property") from the defendants Amrik Purewal and Jisbinder Purewal. The transaction was to close March 28 of the following year for a purchase price of $2,780,000.

[3] Almost immediately, the Purewals had second thoughts. Their attempts to get out of the Contract started within a week of the original deal. I will have to address the legal implications of these attempts in the course of these reasons, in particular whether they successfully terminated the Contract before they were supposed to close it.

[4] Mr. Zhao consistently told the Purewals he expected them to complete the sale at the original purchase price. He made efforts to ensure the contract remained enforceable. Whether he was legally successful in doing so is also something I will have to deal with.

[5] When the date for closing came, Mr. Zhao sent the Purewals the purchase price and the closing documents. The Purewals did not respond and they did not convey title.

[6] A few weeks later, Mr. Zhao purchased an alternative, smaller, home. By that time, he says, the combination of rising house prices and his finite budget forced him to abandon the criteria for a home that had been important to him when he made the deal with the Purewals.

[7] Mr. Zhao says the Contract gave him the right to have title to the Property conveyed to him, a right he says he only gave up on July 19, 2016. He therefore asks for a damages award equal to the difference between the purchase price and

the market value of the Property on that date, or, alternatively, on March 28, the date of closing. The valuation date is of considerable practical importance because of the rapidly increasing housing prices at the time.

[8] The Purewals respond that they, too, just want the Contract enforced. They point to its Clause 2, which said that if Mr. Zhao failed to pay the deposit as required by the contract, the Purewals had the option to terminate. Mr. Zhao paid the deposit on time and in the proper amount. But because Clause 2 said the deposit had to be paid in the way of certified cheque or money order, and Mr. Zhao paid by bank draft, the Purewals say their option to terminate was triggered.

[9] No one appears to know why the deposit could not be paid by bank draft or why Mr. Zhao did not pay by certified cheque or money order. Indeed, no one made anything of this discrepancy until years into this litigation. But the Purewals say this does not matter. If they must be held to their bargain, so must Mr. Zhao. They say the Contract gave them the option to terminate and they exercised it. They may not have said (or even thought) they were terminating the Contract *because* of the form of the deposit, but they were very clear they wanted to terminate.

[10] If this argument fails, the Purewals admit they must pay the difference between the market value of the Property at the relevant time and the purchase price of $2,780,000. But they dispute both Mr. Zhao's valuation dates and his evidence of the true market value. They say he should have started looking for an alternative as soon as they made their desire to exit the Contract clear in November. At the latest, they say they should pay based on the closing date. Further, their appraisal expert disagrees with Mr. Zhao's expert about what that market price was. On the Purewals' calculations, Mr. Zhao suffered barely any loss at all.

[11] The issues I will have to decide, therefore, are the following:

a) Is it appropriate to determine the issues between Mr. Zhao and the Purewals in a summary trial? All parties agree that it is, but I must

decide that I am able on the evidence before me to find the facts necessary to decide the issues and that it would not be unjust to do so.

b) Did Mr. Zhao's use of a bank draft, rather than a certified cheque or money order, give the Purewals the option to terminate the Contract? This turns on whether I can interpret Clause 2 as permitting "substantial" as opposed to "strict" compliance with its terms.

c) If Clause 2 gave the Purewals the option to terminate, did they effectively exercise that option? A party seeking to exercise a right to terminate a contract must communicate its "election" unequivocally to the other party within a reasonable time. As a result, the answer to this turns on whether the Purewals' communications to Mr. Zhao met this standard.

d) Assuming there was a continuing contract of purchase and sale, what is the right date for valuing damages? The default presumption of the law is that this date is the date of closing (i.e., March 28, 2016), so this turns on whether Mr. Zhao can establish a legal basis for a later date or the Purewals an earlier one.

e) Finally, I must determine what the actual market value of the Property was on the correct valuation date. Since this can only be established by way of expert appraisal evidence, this turns on which of the contending experts who testified before me provided more persuasive reasons for their conclusions.

BACKGROUND FACTS

The Parties

[12] Mr. Zhao is a young professional with a wife and two sons. Mr. Zhao works for his family construction business in Guangzhou, China and spends time in both China and Canada throughout the year.

[13] Amrik and Jisbinder Purewal are the registered owners of the Property. Mr. Purewal worked in a lumber mill and engaged in property development. Mrs. Purewal is a school teacher. The Property was originally built by Mr. Purewal's property development company as part of a subdivision development and the Purewals decided to live in it.

The Property

[14] The Property is a 17,330 square foot residential lot located on a cul-de-sac in the suburban Sunnyside Park neighbourhood in South Surrey. The home has 8,278 square feet of living space, 5,278 of which is above ground and 3,000 of which is in in the basement. There are five principal bedrooms with ensuite bathrooms and a two-bedroom basement suite. There are also three laundry rooms, a media and games room, a spice kitchen (referred to by Mr. Zhao as a "wok kitchen"), and two garages, one attached and one detached. The home was recently built when the events relevant to this litigation occurred and it was agreed that the finishings and amenities on the ground floor (at least) were of a high quality.

Mr. Zhao Looks For a Five-Bedroom Home Near "Good Schools"

[15] Mr. Zhao and his wife, Shixin Mo (Grace) Zhao, decided to move to the Lower Mainland from Regina sometime in 2015. At the time, their two sons were living with Mr. Zhao's parents in China while the Zhaos completed their university education.

[16] A major motivation for buying a house in Canada was so their sons could receive a Canadian education. The Zhaos' oldest son would be ready to start kindergarten in September 2016 and so they planned to move their children to Canada in the summer of 2016, giving them time to acclimatize.

[17] Extended family was and is very important to the Zhaos. Mr. Zhao's parents were the primary caregivers for the children while the Zhaos were studying in Regina. Both Mr. Zhao and his wife are close with their parents and expected their parents would stay with them in their new home in Canada for extended periods.

[18] Mr. Zhao's budget for a new home was between $2 million and $3 million.

[19] In Fall 2015, Mr. Zhao retained Su-Yen (Sue) Chen of Sutton Group-West Coast Realty to help him find a home in the Lower Mainland. Mr. Zhao told Ms. Chen he had two main criteria for a prospective home. First, it had to be big enough to accommodate himself and his wife, their two children, and both his and his wife's parents. This specifically meant he wanted two ground-level bedrooms with ensuite bathrooms in addition to separate bedrooms for the children and a principal suite for himself and his wife. Second, the location had to be within the catchment area of what he considered to be good schools.

[20] Mr. Zhao focused on the Sunnyside/Elgin area of Surrey, which was an area that was then relatively new and developing because of recent rezoning. Mr. Zhao and his realtor checked the school catchment area and decided it was a good school catchment for his children.

Mr. Zhao and the Purewals Agree to the Purchase/Sale of the Property

[21] Ms. Chen showed Mr. Zhao an MLS listing for the Property in late October 2015. The asking price was $2,799,00. The Property fit Mr. Zhao's criteria. It was said to be a large, custom-built home with five principal bedrooms with ensuites, a two-bedroom basement suite and in the catchment area he had chosen. Mr. Zhao says he was "excited" to view the Property because it appeared to meet all of his requirements, and arranged to view it.

[22] Mr. Zhao, the Purewals and their respective realtors negotiated over purchase price and closing date. On November 1, 2015, they settled on a purchase price of $2,780,000. The Contract was executed by all parties at the Property.

The Contract of Purchase and Sale

[23] Under the Contract, Mr. Zhao agreed to pay the purchase price in return for title to the Property, with dates for closing of March 28, 2016 and for vacant possession of April 1.

[24] Clause 2 of the Contract addressed the payment of the deposit. It stated as follows (handwritten portions in italics; portions whose interpretation is in dispute underlined):

> **DEPOSIT:** A deposit of *$125,000*, which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows: *The Deposit will be paid within 24 hrs upon all the subjects being removed in the way of certificated cheque or money order*. All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section and will be delivered to *Sutton W. C. Realty In Trust* and held in trust in accordance with the provisions of the *Real Estate Services Act*. In the event the Buyer fails to pay the Deposit as required by the Contract, the Seller may, at the Seller's option, terminate the Contract.

[25] The reference to "certificated cheque" was a mistake: "certified cheque" was what was meant.

[26] Of more importance to the issues in this action is that certified cheque or money order were the *only* means provided by Clause 2 for paying the deposit. It is not clear why the parties excluded bank draft, cash or lawyer/notary/real estate brokerage trust cheque, all of which were acceptable to tender the purchase price under Clause 10. A bank draft, like a certified cheque and unlike an ordinary cheque, is financially backed by the issuing institution and thus insulates the payee from any risk of insufficient funds on the part of the payor: *Atlantic Potash Corp. v. HSBC Bank Canada*, 2013 ONSC 5014 at para. 23.

[27] Ms. Chen, in her affidavit over seven and a half years after the event, was able to confirm that the handwritten portions of Clause 2 were written by her, but does not recall why it was drafted so as to exclude bank drafts, noting that Sutton West Coast's general policy was that deposits should be in the form of a bank draft.

[28] Clause 3 of the Contract provided four conditions for the benefit of the buyer, all of which were to be removed on or before November 9, triggering the 24 hours for payment of the deposit.

The Purewals Early Indications of Desire to Get Out of the Sale and Mr. Zhao's Removal of Conditions

[29] The first indication Mr. Zhao and his agent had that the Purewals were not happy with the sale occurred four days after the Contract was executed. On November 5, Mr. Zhao, his father and Ms. Chen attended the Property for a home inspection. According to Ms. Chen, when Mr. Purewal came home, he was upset and threatened to kick the inspector off the property. Ms. Chen and Mr. Zhao decided to cut the inspection short.

[30] Later, Mr. Purewal told Ms. Chen that he wanted to cancel the Contract and that he would pay her if she could get Mr. Zhao to agree. Ms. Chen responded that Mr. Purewal should talk to his lawyer.

[31] After they left the Property, Mr. Zhao, his father, the inspector and Ms. Chen met in a nearby Tim Hortons to discuss the results of the home inspection. Ms. Chen told Mr. Zhao what Mr. Purewal had said. Ms. Chen added her interpretation, saying that, in her experience, sellers generally do not want to do repairs. She told Mr. Zhao that she took Mr. Purewal's comment as trying to put pressure on Mr. Zhao so he would not try to renegotiate the sale price to account for deficiencies or ask for any repairs. Based on this interpretation, Ms. Chen advised Mr. Zhao that if he wanted the Property he should take it "as is" and not ask for repairs.

[32] Mr. Zhao took this advice. The next day, he removed buyer's conditions ("subjects").

The Deposit Paid by Bank Draft

[33] Mr. Zhao purchased a $100,000 bank draft from HSBC Bank Canada, payable to Sutton W.G. Realty in trust. He gave it to Ms. Chen, who placed it in the Sutton brokerage mail slot on November 7.

[34] Ms. Chen emailed a copy of the bank deposit to Harpal Lehal, the Purewals' realtor, that evening, within the 24-hour deadline after "buyer's subjects" were

removed. Mr. Lehal forwarded the email attaching the copy to the Purewals. The image attached to the email disclosed that the form of the deposit was a bank draft.

[35] It is agreed both that at no point did Mr. Zhao pay the deposit by certified cheque or money order. It is also agreed that neither Mr. Lehal nor the Purewals raised any problem with the form of the deposit with Ms. Chen or Mr. Zhao. The issue only seems to have come up well into this litigation. The events that follow all occur without any reference to the bank draft.

The Purewals' Communication of Their Desire to Get Out of the Contract

[36] On November 17, 2015, Mr. Purewal sent Ms. Chen an email making it clear that the Purewals still wanted out of the Contract.

[37] Since the characterization of this email is central to the legal issues in this case, I set it out in full:

> Hi Sue, as you are aware from day one since we signed the papers to sell the house and I have sent you a previous message telling you that we cannot move out and are cancelling our sale. Many times we had told our realtor we do not want to sell our house any longer, but he continued to press us to show the house. My kids were out of town during our dealings and when they came back they were extremely upset and my grandsons were crying they do not want to go anywhere else. My wife is not happy and keeps on crying and her blood pressure keeps on rising. She does not want to move. Please take the deposit back and find another place for your buyers. We want them to find another place for themselves. They are a very nice family and I am sure they will find something for their lifestyle. If they have any concerns they can set up a meeting with us.
>
> Thanks, Amrik

[38] Ms. Chen forwarded the email to Mr. Lehal, Mr. Zhao, and her manager on November 19. Mr. Zhao told Ms. Chen that he would not agree to cancel the sale and was insisting on completion, a message Ms. Chen passed on to Mr. Lehal. Mr. Lehal did not respond immediately.

[39] Mr. Dennis argues that the November 17 email is clear notice that the Purewals were repudiating ("cancelling") the Contract. He argues further that it

constituted the exercise of their option to terminate as a result of Clause 2, even if they did not turn their mind to this at the time.

[40] Ms. Nathanson responds that the November 17 email is anything but unambiguous and certainly had nothing to do with terminating under Clause 2.

[41] Since the interpretation of the November 17 email is so central, I will take the time now to try to characterize what an objective observer aware of the context can actually take from the November 17 email.

[42] On receipt of the November 17 email, Mr. Zhao certainly knew that the Purewals wanted to cancel the sale. He knew they were asking him to take the deposit back and find an alternative property. Mr. Zhao did not suspect, and had no reason to suspect, that the Purewals were taking the position that they had a *right* to terminate, either as a result of Clause 2 or for any other reason.

[43] What is less clear from the November 17 email is whether the Purewals were communicating that they would not perform the Contract even if Mr. Zhao refused to agree to let them out.

[44] Mr. Dennis says, “The plaintiff admits that he was aware as of early to mid-November 2015 that the Purewals intended to terminate the Contract”: Written Submissions of Amrik Purewal, para. 75. However, this is not Mr. Zhao’s evidence before me. In examination for discovery, he said he knew Mr. Purewal “wanted to” and was “asking to” cancel the sale. But “wanting” and “asking” are not the same as “telling”. Mr. Zhao never says he understood Mr. Purewal to be expressing expressed a unilateral intention not to perform, and both the Purewals’ and Mr. Zhao’s subsequent communications and behaviour are consistent with uncertainty on this score.

[45] While the use of the present tense (“are cancelling”), read in isolation, could suggest a present intention not to perform the control at all – what the law would either call “unilateral anticipatory breach” or “acceptance of repudiation”, depending on whether it was made for cause or not – other elements of the communication

suggest otherwise. Indeed, the statement about "cancelling" is supposed to have *already been communicated* in the "previous message" given to Ms. Chen. But that message, according to Ms. Chen's undisputed evidence, was that Mr. Purewal would pay her if she would *persuade* Mr. Zhao to abandon the Contract. On November 5, Mr. Purewal assumed he would need Mr. Zhao's agreement, and improperly offered to pay Ms. Chen to help him get it. The November 17 email purports to put that message in writing, not to be a different message.

[46] The phrases "as you aware from day one" and a "previous message" suggest that Mr. Purewal is *reiterating* that nothing had changed (for him and his wife) since November 5 and was now putting the offer in writing. An objective observer, aware of the previous communication, certainly could interpret it this way. But on November 5, Ms. Chen had interpreted Mr. Purewal's statements as an expression that Mr. Purewal would be happy to see the sale collapse, not that he was unilaterally terminating. The reasonableness of Ms. Chen's interpretation has not been challenged.

[47] At the end of the email, Mr. Purewal proposes a meeting with Mr. Zhao and his family to discuss concerns. This could reasonably be seen as an invitation for further negotiations about what Mr. Zhao might require to agree to release the Purewals from their obligations under the Contract. The diplomatic tone, while not determinative, supports a reasonable inference that Mr. Purewal was once again asking to renegotiate, rather than communicating a settled commitment not to complete regardless of the legal consequences.

[48] The "renegotiation offer", as opposed to "notice of repudiation" interpretation of the November 17 email was given support by Mr. Lehal's follow-up email, sent on December 9, with the subject line "2668-143A St. Sale Release":

> Hello Sue,
>
> I know we have had a number of discussions in regards to the Seller <u>wanting to terminate</u> the sale of their property located at 2668-143A St. Surrey and after you have relayed that message to your Buyer, your Buyer is adamant on purchasing the subject property. However please note after the Seller receiving independent legal advice and having lengthy discussions with the

> family, the Seller has requested that I email you the Release for the sale of the subject property.
>
> Seller would greatly appreciate if you could talk to your Buyer and relay the Seller's request to terminate the sale and the Buyer is free to receive their Deposit back ... [Emphasis added.]

[49] Mr. Lehal's email attached an "Authorization to Release Trust Funds and Final General Release" executed by Mr. and Mrs. Purewal with a line for Mr. Zhao to sign.

[50] In my view, an objective observer would take the December 9 email from Mr. Lehal, and its attachment, as clarifying and making more precise what had been said on November 17. The December 9 email supports an inference that what the Purewals unambiguously communicated was a proposal to renegotiate, not anticipatory breach. The tone of Mr. Lehal's email and the word "request" leave open the interpretation that while the Purewals wanted out, they would complete if Mr. Zhao would not agree to release them.

[51] I accept both that the Purewals may have privately decided not to perform regardless of the consequences and that Mr. Zhao had some reason to fear or suspect that they would not. But they did not unambiguously communicated such an intention on November 17 or through their realtor on December 9.

[52] This ambiguity continued for months. At some point between the December 9 email and January 25, 2016, Ms. Chen met with Mr. Lehal. In this conversation, Mr. Lehal said the Purewals had made an unaccepted offer on another property, indicating that they were trying to complete. Mr. Lehal said the Purewals proposed to increase the selling price to $3 million and to postpone the completion date. Ms. Chen told him that was unacceptable and that Mr. Zhao was insisting on the purchase price and completion on March 28, 2016.

[53] On January 25, by email, Ms. Chen reiterated to Mr. Lehal that Mr. Zhao was insisting on the deal going through. The next day, Mr. Purewal emailed Mr. Lehal to say, "Let her know not goanna [sic.] happen" over Ms. Chen's forwarded email. If this had itself been forwarded to Ms. Chen or Mr. Zhao, it would have been a clear

indication that the Purewals would unilaterally terminate, but this does not appear to have happened.

[54] In early March, Stella Yan, Mr. Zhao's conveyancing solicitor, advised him that the Purewals had submitted a transfer to the Land Title Office in favour of their son, Manvir. Mr. Zhao reasonably interpreted this as an attempt to thwart completion of the Property and filed a caveat on March 3. The caveat cost him $4,278.

[55] At this point, Mr. Zhao had very solid reasons to believe that the Purewals had no intention of going through with the completion, but they had not communicated this, directly or indirectly, to him.

[56] On March 11, Ms. Yan, as Mr. Zhao's conveyancing solicitor, sent closing documents to Greg van Popta, who was listed on the November 23 conveyancing report as the Purewals' lawyer. Mr. van Popta wrote back within the week to confirm that he was not representing the Purewals in the matter. As a result, Ms. Yan sent the conveyancing documents by email to Mr. Lehal and by registered mail to the Purewals on March 23.

[57] Neither Mr. Lehal nor the Purewals responded.

[58] On the completion date, Ms. Yan sent the Purewals the package of conveyancing documents and tendered the purchase price in accordance with Clause 10 of the Contract.

[59] She received no response. The Property was not conveyed. The Purewals remained on title.

Mr. Zhao's Response to the Failure to Complete

[60] After the Purewals refused to complete, Mr. Zhao's response took two tracks: first, he brought this proceeding as a legal challenge to the Purewals' failure to complete and, second, he started looking for another home.

[61] On April 11, 2016, Mr. Zhao filed the original Notice of Civil Claim in this action. In it, he asked for "specific performance", i.e., a court order that the Purewals complete the sale by conveying the Property to him. At this stage, Mr. Zhao asked for monetary compensation ("damages") only as an alternative.

[62] At the same time, Mr. Zhao asked Ms. Chen to help him find another property. He says that as a result of the increase in housing prices between November and April, he was no longer able to afford something similar to the Property. He says he made one offer on a property of similar size that month, but it was rejected because it was too low.

[63] On April 18, a week into this litigation and less than three weeks after the Purewals' failure to complete, Mr. Zhao entered into a new contract of purchase and sale for a property located at 3382-155th Street in Surrey (the "Morgan Creek Property"). The purchase price for the Morgan Creek Property was $2,280,000, half a million dollars less than what Mr. Zhao had been willing to pay for the Property. The Morgan Creek Property did not have the same features Mr. Zhao was looking for in the fall of 2015. It only had three bedrooms and the house was smaller and older than the Property.

[64] On July 19, 2016, Mr. Zhao's litigation lawyer wrote to the lawyers representing the Purewals stating that Mr. Zhao now accepted the Purewals' repudiation of the Contract, subject to his claim for damages. This date is significant because Mr. Zhao argues I should use it instead of the completion date of March 28 to evaluate damages and the housing market continued to appreciate rapidly during those four months.

[65] Mr. Zhao's deposit was returned in the fall of 2016, so does not form part of the damages claimed here. Mr. Zhao's conveyancing fees for the failed purchase of the Property were $3,555 and for the Morgan Creek Property were $2,597.

ANALYSIS

Appropriateness for Summary Trial

[66] This matter comes before me as an application by Mr. Zhao for summary trial of his claim against the Purewals. All parties agree this is appropriate.

[67] Rule 9-7(15)(a) of the *Supreme Court Civil Rules* allows me to grant judgment, on the hearing of a summary trial application, unless I am unable to find the facts necessary to decide the issues or am of the opinion that it would be unjust to decide the issues in a summary trial. The factors to be considered in making these determinations are set out in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-32.

[68] I am satisfied that I can find the necessary facts in a summary trial. To the extent liability turns on factual issues, these are issues of the interpretation of written or email communications, or occasionally of verbal conversations that were recorded contemporaneously and which are not relied on for the truth of their contents. Whether the Property was sufficiently “unique” to justify Mr. Zhao in pursuing a specific performance remedy until July 2016 does not turn on credibility either: the Purewals do not dispute that he was sincere in the criteria for purchase he deposes to, and only question whether these are sufficient to meet the relevant legal test.

[69] The principal factual issues in damage assessment concern the market value of the Property at the various proposed dates of valuation. While these definitely do require me to assess the contending experts’ opinions, I had the benefit of robust cross-examination of both of them.

[70] The justice of proceeding by way of summary trial is evident. This litigation has unfortunately taken over seven years to get this far. The parties set a number of trial dates and it is only by proceeding by way of summary trial that they have been able to get the issues before a court.

[71] I have no concerns that deciding the issues between Mr. Zhao and the Purewals will lead to the dangers associated with “litigation by slices” as a result of the third party claim. If I find for the Purewals, the third party claim goes away. Even

if I find for Mr. Zhao and assess damages, this will at least mean the Purewals and the third parties will know how much is at stake between them. The third parties were given notice of the summary trial and do not object to its proceeding.

Liability

[72] The claim is for breach of contract. While the Purewals cannot dispute that they failed to deliver the Property as the Contract required, they argue that, by that time, there was no longer a contract to breach. They say Mr. Zhao's failure to pay the deposit by certified cheque or money order gave them the right to terminate and that their communications and actions on and after November 17 must be interpreted as exercising that right.

[73] The issue of liability, therefore can be divided into two sub-issues:

a) Did the fact Mr. Zhao paid the deposit by bank draft, as opposed to certified cheque or money order, give the Purewals the option to terminate?

b) Assuming an option to terminate arose, did the Purewals effectively exercise it?

Did the Use of a Bank Draft as Deposit Give the Purewals the Option to Terminate?

[74] The Purewals have a straightforward argument as to why they had the option to terminate the Contract. Clause 2 gave an option to the Seller to terminate in the event the buyer fails to pay the deposit "as required by this Contract". Clause 2 only allows payment of the deposit by certified cheque or money order. Since Mr. Zhao, the buyer, admits he did not pay by certified cheque or money order, the Purewals, as sellers, acquired the option to terminate. Any other conclusion, Mr. Dennis argues, would require the court to illicitly rewrite the parties' bargain.

[75] Mr. Zhao admits he paid the Deposit by way of a bank draft, but says this was not a "repudiation" or "fundamental breach" of the Contract and therefore the Purewals had no right to terminate. He argues that he paid the correct amount, at

the correct time, to the correct party, and that the deposit was held by the brokerage until six months after this claim was commenced. There is no evidence that the Purewals experienced any loss whatsoever as a result of the deposit being paid by bank draft, or even that they cared. Ms. Nathanson says that to put any weight on the form of the deposit as a bank draft instead of certified cheque or money order "puts form over substance."

[76] In my view, this is unresponsive to the Purewals' argument. If the parties decide to put form over substance, they are entitled to do so. The benefit of relying on "form" is that it promotes legal certainty, although possibly at the cost of consequences that are disproportionate to the actual harm done. The point is that the balance between form and substance is up to the parties to decide.

[77] The "materiality" of the breach will often be relevant if a party is arguing for an *implicit* right to terminate the contract. The modern tendency is to think of labelling a term in a contract as a "condition" (i.e., one that generates a right to terminate on default) as the conclusion of the analysis, rather than a premise. The real issue in "breach of condition" cases is whether the breach of that term "amounts to" repudiation of the contract by the promisor or deprives the promisee of substantially the whole benefit of the contract. On this modern analysis, "technical" non-compliance with a term that might in other circumstances be a "condition" will generally not be enough to establish "repudiatory breach." In such a situation, "substantial" compliance with the "condition" will be enough to avoid termination.

[78] But the Purewals are not seeking the assistance of the general law independent of the words of the Contract. They do not allege that the form of the deposit would be considered a "condition" by the common law or that they were deprived of substantially the whole benefit of the contract. Their case rests entirely on the existence of an *express* termination clause.

[79] Assuming that the parties can agree to such a clause, the only question is how that clause should be interpreted. If, on a proper interpretation, the option to

terminate arises on any failure to pay the deposit as required, whether technical or substantial, then an option to terminate arose.

[80] The task of interpretation is to find the meaning intended by the parties as expressed in the agreement: *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.*, 1997 101 B.C.A.C. 62, 1997 CanLII 4085. The words in a contract must be given their ordinary meaning, in light of the contract as a whole and consistent with the surrounding circumstances known to the parties at the time of formation: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

[81] The express termination clause could have restricted the option to terminate to if the buyer "substantially" failed to pay the deposit. It could have said the option arose if the buyer failed to pay the "amount" of the deposit or to pay on time. It could have provided that the seller could terminate if a failure of the buyer in relation to the deposit caused the seller loss. It did none of these things. Instead, it provided that the option to terminate arises if the buyer fails to pay the deposit "as required by the Contract."

[82] This is a "bright line" rule: any non-performance of this particular promise is sufficient to give the promisee the option to terminate. It has the benefits of a bright line rule in certainty and the downsides in potentially disproportionate application.

[83] Whether this bright line rule is wise is not for me to decide. It is what the parties agreed to. The default rule of contract law is that the parties are entitled to agree to the terms they wish, and the court will give effect to them: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 85 (Binnie J., dissenting on other grounds). While freedom of contract is not absolute, none of the exceptions apply here.

[84] Ms. Nathanson points out that there are a number of cases in British Columbia in which there is a reference to plaintiffs in collapsed home sale cases being "relieved" from the "strict fulfillment" of deposit terms where it would be inequitable to deny a remedy to the purchaser: *Kaler v. Scales*, 2009 BCSC 457 at

para. 89; *Khullar v. Lee*, 2011 BCSC 1648 at para. 91; *0915406 B.C. Ltd. v. 0834618 B.C. Ltd.*, 2013 BCSC 1099 at para. 69. However, none of these cases were about whether an option to terminate *arose* under the contract when a deposit was not paid properly; all were about whether the seller successfully *exercised* it.

[85] If authority is needed for the proposition that a seller can exercise the option to terminate provided by the contract when the deposit is not paid "as required", then it is supplied by *Germain v. Kapchinsky*, 2006 BCSC 530.

[86] *Germain* was another collapsed home sale case and the deposit clause contained the same standard language about the seller's option to terminate in the event the buyer failed to pay the deposit "as required by this Contract": *Germain* at para. 8. The purchaser attempted to pay the deposit with personal cheques from third parties: *Germain* at para. 13. Mr. Justice Barrow held that the contract required payment by certified cheque, bank draft, cash or lawyer/notary's trust cheque. The seller objected to the fact that the deposit was paid with personal cheques not in the name of the buyer and immediately elected to treat the contract as terminated on this ground. Barrow J. upheld the election and dismissed the plaintiff's action.

[87] *Germain* was subsequently overruled on the question of whether the requirements for tender of the purchase price also applied to the deposit: *Hundley v. Garnier*, 2012 BCCA 199. As a result, in retrospect, we can say that the plaintiff in *Germain* was not actually in breach and therefore the option to terminate did not really arise. But that does not change the fact that it is authority for the proposition that a failure in the form of the deposit gives rise to an option to terminate under the same express termination clause at issue in this litigation.

[88] Ms. Nathanson argues that there is a significant practical difference between personal cheques – particularly from unknown third parties – and a bank draft from HSBC Canada. This may well be true, but it is a consideration for the parties in drafting the deposit requirements, not for a court in interpreting them. From that perspective, this case is an easier one than *Germain*, because the parties here

specified how the deposit could be paid, whereas in *Germain* this was inferred from how they provided for tendering the purchase price.

Did the Purewals Effectively Exercise Their Right to Terminate as a Result of the Form of the Deposit?

[89] However, the *existence* of an option to terminate because of the form of the deposit is only half the story. The Purewals must also establish that they effectively exercised that option.

[90] The critical principle here is the doctrine of "election". This doctrine says that a party with the legal power to terminate a contract – whether under the general law or, as here, as a result of an express termination clause – must unambiguously communicate that they intend to exercise that option and must do so in a reasonable time: *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, [1955] S.C.R. 398 at p. 413. The onus of establishing that the terminating party made and communicated this election is on the terminating party, in this case the Purewals: *Ginter v. Chapman*, (1967), 60 W.W.R. 385 (B.C.C.A.) at p. 392, aff'd, [1968] S.C.R. 560.

[91] If the Purewals or their agent had responded to Ms. Chen's email enclosing the bank draft by saying, "You have not provided the deposit as a certified cheque or money order as required by Clause 2 and we are therefore exercising our option to terminate the Contract", then this case would be indistinguishable from *Germain* and the termination would relieve the Purewals from any need to perform the Contract in March. They would have exercised their option with a clear election.

[92] This case is a more difficult one because nothing so clear was communicated. To be sure, while a message this express and clear would have been sufficient, it is not necessary. There are no "magic words" by which the election to terminate must be communicated. In the appropriate case, conduct alone can make it clear that the promisee has elected to terminate by accepting the promisor's repudiation: *American National Red Cross v. Geddes Brothers* (1920), 61 S.C.R. 143 at 145. I must therefore determine whether what was said, in the actual context, meets the standard of a clear election in a reasonable time.

[93] The critical communication in this case is Mr. Purewal's November 17 email, since the subsequent communications are either even more ambiguous or occur beyond what can be considered to be a reasonable time to terminate.

[94] Mr. Dennis says the November 17 email was an election to terminate the contract and effectively brought it to an end. In his view, it does not matter that Mr. Purewal did not identify the deposit payment as a default or, indeed, that he identified no default at all.

[95] Ms. Nathanson, for Mr. Zhao, argues that, at minimum, the party electing to terminate must communicate that they are doing so for cause, even if they are permitted to get the cause wrong.

[96] In my view of the cases, the test is less clear cut than either party suggests. Just as the amount of time that is "reasonable" depends on the context, so too with the content of the communication. As I read the cases, the following principles apply:

a) The election must, at minimum, be unambiguous that the terminating party views the contract at an end in the sense that it is unilaterally refusing any further performance and puts the other party to its legal remedies. While it is certainly preferable that cause be alleged and that specific cause be identified, this is not a pre-requisite for an effective election.

b) If the election is (objectively interpreted) ambiguous or wrong about the cause, then the terminating party is presumed to have the right to "shift grounds" up to trial.

c) However, if the ambiguity or error about cause leads the non-terminating party to change its position to its detriment, this presumption no longer holds.

d) If an error or ambiguity in the election has caused the non-terminating party to change its position, the court must decide whether upholding

> termination on the changed grounds is fair and reasonable, taking into account commercial reality. This inevitably involves balancing the legitimate interests of the terminating party in flexibly being able to advance causes for termination with the legitimate interests of the terminated party in timely notice of what is at stake so that it can arrange its affairs accordingly.

[97] The general proposition is that if a contracting party gives an incorrect *reason* for termination when communicating its election, it does not lose the right to terminate if it can subsequently identify a correct justification, regardless of whether it was aware of this justification at the time of the election: *Taylor v. Oakes* (1922),127 L.T. 267 (C.A.) at p. 269. While ideally a non-defaulting party that wants to ensure the contract is terminated should, as soon as possible, indicate that it views the contract as at an end and why, innocent promisees will not usually be held to such a high standard. This is in recognition of the reality that the understanding of reasons for termination will evolve between the moment of acceptance of repudiation and trial. It would often be quite unfair to restrict the terminating party to the causes it originally communicated. The principle in *Taylor v. Oakes* is clearly part of the common law in Canada: *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 174–175, Cromwell J. (concurring).

[98] For example, an employer who fires a non-unionized employee for one reason (or no reason) will usually be allowed to rely on a different reason at trial as cause for dismissal. Or, as in *Potter*, an employee claiming constructive dismissal may rely on breaches of the employment contract by the employer that they did not communicate or know about at the time. As a result, the mere fact that the deposit issue was discovered during the course of the litigation would not necessarily deprive the Purewals of the right to rely on it.

[99] But while there is a presumption that “after-discovered” cause may be used to justify termination even though it was not communicated at the time of termination,

this presumption can be rebutted. As Justice Cromwell recognizes in his concurrence in *Potter*, there are exceptions to the rule in *Taylor v. Oakes*.

[100] The first is that if the default justifying termination was one the breaching party could have "put right" if they had received notice at the time termination was communicated, then the election of the wrong reason is irrevocable: *Glencore Grain Rotterdam BV v. Lebanese Organisation for International Commerce*, [1997] 4 All E.R. 514 (C.A.) at pp. 526-7. This exception would not apply in this case, however, because by November 17, it was already too late for Mr. Zhao to pay the deposit by certified cheque instead of bank draft.

[101] A second recognized exception arises when different express termination clauses lead to different procedures or remedies for the parties. In that case, if the terminating party relies on the wrong cause, then its election is irrevocable with respect to other causes that the contract prescribes different procedures or remedies for: *Dalkia Utilities Services Plc v. Celtech International Ltd.*, [2006] EWHC 63 (Comm), 1 Lloyd's Rep 599 at paras. 143-144 (same notice cannot elect termination under different grounds if there are different consequences provided for by the contract).

[102] This second exception arises, for example, when an express contractual provision provides for different remedies than would common law acceptance of repudiatory breach. In that case, it could be unfair for the terminating party who elected the express contractual remedies to later say they were accepting repudiatory breach. This is potentially relevant to the question of whether it matters that the Purewals asserted *any* breach at all, since clearly the remedies available to Mr. Zhao on a unilateral repudiation (expectation damages or, possibly specific performance) would not be available if there was a contractual cause for termination. Mr. Zhao would have been, but was not, on notice that obtaining damages or specific performance would depend on his refuting that cause.

[103] The most general exception to the principle in *Taylor v. Oakes* is when the communication by the terminating party of an incorrect cause has resulted in

detrimental reliance in the counter-party and therefore relying on some different cause would be commercially unreasonable and unfair: *Panchaud Frères S.A. v. Etablissements General Grain Company (the "African Night")*, [1969] EWCA Civ J1106-2, [1970] 1 Lloyd's Rep. 53 (Eng. C.A.). In *Panchaud Frères*, the buyers purported to terminate a contract for sale of corn on the basis of quality. In fact, there was no problem with the quality. However, the shipment *was* late and the buyers would have had a right to terminate on this ground. While recognizing the principle in *Taylor v. Oakes*, Lord Denning, for the English Court of Appeal, did not allow the buyers to rely on the late shipment because they were on notice of the late delivery and accepted the shipping documents anyway.

[104] While recognizing that this did not, strictly speaking, constitute "waiver" of the ground of late delivery, Lord Denning called it a case of "estoppel by conduct." Lord Justice Winn, in concurrence, agreed both that waiver did not strictly apply and that the buyers could not shift their grounds for refusal. He preferred to rest this on the "inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct" or, more concisely, the "criterion of fair conduct".

[105] I should note that in the *Glencore* case, on similar facts to those in *Panchaud Frères*, Lord Justice Evans of the English Court of Appeal held that *Panchaud Frères* should not be followed to the extent it relied on a "separate doctrine" other than the principles of estoppel and waiver, which in turn requires an unequivocal representation by one party that is acted upon by the other: *Glencore* at pp. 529-531. On his view, there should be no broad exception to the principle that any (or no) reason given in the original election can be changed right up to trial – unless other doctrines such as estoppel apply in all their contemporary rigour.

[106] In my view, however, in this respect, *Glencore* does not represent the law as it currently is in British Columbia. The principle in this jurisdiction is that the terminating party can presumptively change grounds for termination, but if there has been reliance by the other party, then the court must consider what is reasonable

and fair, based on considerations of commercial reasonableness and fairness. It is not necessary for the purportedly terminated party to demonstrate the elements of promissory estoppel if it would generally not be fair and reasonable to allow the termination on the after-discovered grounds. In other words, the law in British Columbia is closer to *Panchaud Frères* than to *Glencore*.

[107] For example, in *De Wit v. Walker*, 2013 BCSC 629, District Registrar Cameron relied on *Panchaud Frères* to reject an argument by a solicitor that she could withdraw services because of past failures by the client to replenish the solicitor's retainer. While the retainer agreement provided for a right to terminate for failure to keep the retainer replenished as requested, the past acts were not part of the reasons given in the notice to withdraw. It is not at all clear to me that the same result would arise under an estoppel analysis.

[108] While not referred to by name, the principle in *Panchaud Frères* also helps explain the deposit cases relied on by the plaintiff in this case.

[109] In *Kaler*, Cohen J. ruled that the seller did not effectively terminate, despite the fact that the buyer was in breach of the deposit clause, because the seller did not give "notice to the plaintiff that he was in default by failing to pay the additional deposit into his lawyer's trust account (or for that matter that he was in default for failing to pay the additional deposit directly to the defendant by the due date, which is what he pled)": *Kaler*, para. 84. In *Kaler*, the election failed to be effective because it relied on a "*ground* of default that was not open to the defendant" (emphasis added).

[110] In *Kaler*, Cohen J. effectively applied an exception to the rule in *Taylor v. Oakes*. It is difficult to see words or conduct by the seller in *Kaler* that would amount to promissory estoppel. Instead, Cohen J. applied the broader considerations of fairness and reasonableness that characterize the *Panchaud Frères* line of cases, giving considerable weight to the buyer's quick repair of his default of his obligations concerning the deposit under the oral agreement.

[111] In *Germain*, where an election was found, Barrow J. held that some alteration in the grounds for termination would not affect the innocent party's position, but he did not accept it would have been sufficient to give no reason at all. He considered the election to be effective when the plaintiff rejected the deposit on the grounds the personal cheques were in the name of third parties, even though, on the Court's analysis, the breach was that they were personal cheques at all, not who endorsed them. On his view, "there is no obligation on an innocent party to identify the basis upon which performance is wanting", so long as the terminating party asserts "*that the other party is in breach of the terms of the contract*": *Germain*, at para. 38 (emphasis added). *Germain* suggests that if the terminating party failed to allege *any* breach, the election would not be effective.

[112] I note that in the *Germain* case there was no prejudice to the buyer in the way the seller characterized the default in the election to terminate. On Barrow J.'s assumptions about what performance of the deposit consisted of, it was perfectly within the seller's rights to accept a personal cheque endorsed by the buyer, but not from anyone else.

[113] In *Khullar*, one of the grounds for enforcing the contract of purchase and sale was that "the vendors never elected to terminate the agreed contract *because of non compliance* of the [buyers] regarding the deposit monies payment": *Khullar* at para. 93 (emphasis added). This statement supports the principle that the election should contain notice that a default has occurred and the nature of the non-compliance.

[114] In *0915406 B.C. Ltd.*, Fisher J. held that the seller had failed to elect termination because he "gave no indication to [the buyer] that he considered the payment of the deposit in trust on July 2, 2011 to be a breach of contract, and all of the parties carried on with the expectation that the contract would proceed in the normal course": *0915406 B.C. Ltd.* at para. 67. While the failure to claim a default may not have been critical to the result in the case, but it supports the point that election should identify the breach.

[115] *Kaler* (at para. 85), *Khullar* (at para. 91) and *0915406 B.C. Ltd.* (at para. 69) all hold, in the alternative, that they would not have "enforced" the contractual requirements of the deposit on "equitable grounds", although each also hold that no effective election of termination was made, although specific equitable doctrines such as estoppel are not invoked. These references support a "commercial reasonableness and fairness" interpretation of the exception to shifting grounds for termination.

[116] These cases are consistent with the proposition that failure to identify the breach correctly will not necessarily be fatal to the effectiveness of the termination, and with the principle that the onus is on the party that in fact defaulted to establish some prejudice to a shift of grounds. But they are not consistent with a stricter rule that it does not matter what grounds (if any) are originally asserted, unless the elements of proprietary estoppel be established, even if it would generally be unfair and unreasonable to allow the after-discovered cause to be asserted.

[117] No Canadian case definitively preferring *Glencore* to *Panchaud Frères* has been cited to me and I am unable to find one. In his concurring judgment in *Potter*, Cromwell J. mentions *Glencore*, but only for the principle that it is possible to defend an acceptance of repudiatory breach on grounds that were not known at the time, while noting that this principle has exceptions.

[118] The ultimate issue in deciding whether the actual notice given was sufficient to constitute an election to terminate on a specific ground then is whether it is fair and reasonable for a party to rely on grounds that were not communicated at the time, in light of both subsequent reliance by the party that wants the contract to continue *and* the potential prejudice to the terminating party if it cannot raise valid grounds for termination. This is inevitably a balancing exercise.

[119] In my view, this does not detract from commercial certainty: a terminating party can always safely terminate if it has cause and is clear and timely in communicating that cause. Commercial certainty also weighs in favour of parties performing contracts, unless they clearly communicate why they are not doing so.

One way or the other uncertainty of some kind is inevitable if the notice is unclear – and in such cases, uncertainty about the result is simply the price that must be paid for the law to correspond to reasonable commercial expectations where the parties' own actions and communications are ambiguous. While it may be unfair to require a technical adherence to the original communication of the election when more has been learned in the meantime, it will also sometimes be unfair to the party that continued with the contract to require them to meet a completely different case many years after the fact. The requirement of a timely and unambiguous election by the terminating party must have the function of creating fair notice, a function that should be evaluated without excess technicality.

[120] Applying these principles, I conclude that the Purewals did not effectively communicate their election to Mr. Zhao and therefore did not exercise the option to terminate that Clause 2 gave them.

[121] First, the election was not unambiguous that the Purewals were unilaterally refusing any further performance and putting Mr. Zhao to his legal remedies. The present tense statements about "cancelling our sale" are rendered ambiguous by the rest of the email. Viewed as a whole, the message can be read equally well as a plea for Mr. Zhao to agree to take his deposit back, release the Purewals from their obligations, and find an alternative. This interpretation is reinforced both by Ms. Chen's interpretation of Mr. Purewal's verbal statements on November 5 and by the proposal from Mr. Lehal on December 9 – which is clearly a "request" for a mutual release, as well as by the continued dealings in the following months.

[122] At bare minimum, an option to terminate can only be exercised if the terminating party conveys unambiguously to the terminated party that the contract is being terminated. It is not enough to express a desire that the counter-party would release the party later claiming to have terminated from its obligation to perform.

[123] Even if the November 17 email could be considered to be unambiguous notice of an intention by the Purewals not to perform, it did not notify Mr. Zhao that the Purewals were asserting any cause to terminate the Contract, let alone point to

the use of the bank draft as that basis. The Purewals are not just seeking to shift grounds for termination but also to shift to assert *any* ground for termination.

[124] This may sometimes be sufficient. Indeed, as the party not in default, the Purewals benefit from a presumption that it would be fair and reasonable for them to shift their grounds for termination, but that presumption has been rebutted here.

[125] If the Purewals had raised the deposit as an issue, or even just alleged that they had cause to terminate the Contract, Mr. Zhao's response might well have been completely different. He presumably would have had to consider what the use of a bank draft implied for his refusal to renegotiate the Contract or find an alternative home. I find that it is a reasonable inference that Mr. Zhao detrimentally relied on his understanding that cause for termination was not in issue.

[126] Given this change of Mr. Zhao's position, I must consider whether it is fair and reasonable in the context for the Purewals to advance this ground now. In this inquiry, unlike in the interpretation of Clause 2, the lack of any loss to the Purewals as a result of the breach they are now relying on is relevant. It is more likely to be fair to raise new grounds after the fact if those grounds involve a real loss to the innocent party. That is not the case here.

[127] It is also more likely to be fair and reasonable to shift grounds if the grounds arise from knowledge obtained later. But all the relevant facts about the deposit and the contractual requirements about how to pay it were known to the Purewals by November 7. They and their agent simply accepted the payment of the deposit without comment. The only reasonable inference is that they knew the deposit was by bank draft and gave this no importance at all. This is a very different situation than in *Potter*, where the innocent party sought to rely on an unknown ground of clear importance to the relationship between the parties.

[128] I agree with the Purewals that if they had effectively terminated the Contract based on the form of the deposit, it would not matter what their motives were for the termination. In that sense, it would not have mattered how important the deposit was

to them. But in this case, it was the Purewals' objective behaviour, rather than an inquiry into their psychology, which shows they placed no importance on the form of the deposit. This becomes relevant in the balancing exercise. While there would be prejudice to Mr. Zhao if a completely new issue is injected into the termination of the Contract many years later, I find no prejudice to the Purewals if they are not allowed to allege a ground that they ignored at the time, apparently because of its lack of significance.

[129] Since the Purewals did not effectively elect to terminate the Contract, it remained in force and they thus became liable to Mr. Zhao when they did not convey the Property as promised.

Damages

[130] The major head of damages is the difference between the market value of the Property at the appropriate valuation date and the actual purchase price. Because market value of residential real estate in South Surrey was climbing rapidly in 2015–2016, it matters very much what that valuation date is.

[131] The parties agree that the *default* valuation date is the date the Contract was supposed to complete, although the courts have authority to vary that date where appropriate: *Wroth v. Tyler*, [1973] 1 All E.R. 897 (Ch. D.) at p. 918, adopted in *Ansdell v. Crowther* (1984), 34 R.P.R. (B.C.C.A.) at para. 28; *Mavretic v. Bowman*, [1993] 4 W.W.R. 329 (B.C.C.A.) at para. 8; *Dosanjh v. Liang*, 2015 BCCA 18 at para. 55.

[132] While many of the authorities refer to the "date of breach", in *Wroth* it is said that this is normally a reference to the date of performance, rather than the date of an unaccepted anticipatory breach. Counsel agreed that it is the date of performance, i.e. March 28, 2016, that is the presumptive date.

[133] That date is, however, the alternative position for both Mr. Zhao and the Purewals. Each argues that the presumption has been rebutted on the facts of this case, but in opposite directions. Mr. Zhao argues that because the Property was

"unique", he was entitled to pursue specific performance and therefore the evaluation date should be July 19, 2016, when he gave up this remedy and elected "damages in lieu". The Purewals argue it should be November 17, 2015 when, they say, Mr. Zhao was on notice that the Purewals did not intend to complete the Contract and therefore he should have "mitigated" by looking for a different home.

[134] For the reasons that follow, I am not persuaded by either party that I should depart from the presumptive date of March 28, 2016.

The Purewals Have Not Established a Breach of the Duty to Mitigate

[135] First, I conclude that the Purewals have not established a valuation date *earlier* than the date of performance.

[136] If the Contract had been performed, Mr. Zhao would have received the Property on March 28, 2016 and it would have had the value it had then. Since he did not in fact obtain an alternative earlier, then his *actual* loss because the Contract was not performed is (at minimum) the difference between the March 28, 2016 value and the purchase price.

[137] To be sure, actual loss will not always be the correct measure of damages in a breach of contract case. A significant exception to the principle that the plaintiff in a breach of contract case is entitled to be put in the position they would have been in had the contract been fulfilled is the "duty to mitigate": *British Westinghouse Electric and Manufacturing Company v. Underground Electric Railways Company of London Limited*, [1912] A.C. 673 (H.L.) at p. 689.

[138] Under this principle, damages are reduced to the extent that they were unnecessarily increased by a failure of the plaintiff to take reasonable steps to mitigate them. The standard is to take steps which an ordinarily reasonable and prudent person would take in the course of their own business. The onus is therefore on the defendant to show that there was a more reasonable course of action that would have reduced the loss. If a party states its intention to breach well in advance of the performance date, it is at least arguable that the innocent party should limit

their losses by finding a substitute property and that failure to do so should reduce damages accordingly. The way to accomplish this reduction is to adjust the valuation date to the date when mitigation ought to have been accomplished.

[139] A duty to mitigate only arises when repudiatory breach is clearly communicated. As I have concluded that the Purewals were ambiguous about what they would do if Mr. Zhao did not allow them out of the Contract, it was reasonable for Mr. Zhao to hope that they would ultimately complete, an expectation that was reinforced by the statements by the Purewals' realtor in January that they were looking for substitute properties.

[140] As long as Mr. Zhao could expect the Purewals to complete if he insisted on his rights under the Contract, he could not reasonably be expected to mitigate by buying a substitute property.

[141] Even if I am wrong about that, if Mr. Zhao can establish he had a "fair, real and substantial justification" for a claim to specific performance of the Property up to the performance date, then he can insulate himself from the claim that he should have mitigated by procuring an alternative property earlier than he in fact did: *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633 at p. 668, approved in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 22.

[142] At one time, it was thought that land, unlike chattels, was inherently unique, such that specific performance was the default remedy for failure to close a contract for purchase and sale of land. However, in 1996, the Supreme Court of Canada established that real property is not *inherently* unique. Specific performance should not be granted as a matter of course absent evidence that the property is "unique to the extent that its substitute would not be readily available": *Semelhago* at para. 22.

[143] Since *Semelhago*, a fair, reasonable and substantial claim for specific performance may be an answer to an argument that the plaintiff should have mitigated by purchasing an alternative, but whether this claim is reasonable must be

understood “in light of *Semelhago*”: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at para. 38.

[144] There are three questions to consider in assessing whether specific performance is the appropriate remedy (or, equivalently, whether the property is “unique”):

> (1) Is there evidence that the land is especially suitable for the purchaser?
>
> (2) Is there evidence that a “substitute” is not “readily available”?
>
> (3) Are damages “comparatively inadequate” to do justice?

Serebrennikov v. Sawyer’s Landing Investments 1 Ltd., 2010 BCSC 1276 at para. 29.

[145] Mr. Zhao provided evidence that the Property was particularly suitable for his needs. He was looking for a home for his family that could accommodate both sets of parents who would be coming for extended visits, was close to good schools for his children and was in his preferred neighbourhood. The Property met these specific criteria and was within his budget. It had other desirable features, including that it was recently constructed, that it backed onto a “greenbelt”, and that it had a wok/spice kitchen, a media and games room, air conditioning, and two garages.

[146] Features such as location, price, amenities nearby, physical size, layout, number of bedrooms, proximity to schools and to extended family and the ability to accommodate extended family members at one time have all been found to be the kinds of criteria that can support a finding of “uniqueness”: *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350 at paras 24, 29; *Rozon v. Dolmat*, 2017 BCSC 2156 at paras. 8–9; *Sihota v. Soo*, 2010 BCSC 886 at paras. 59–62; *Jassal v. Garcha*, 2017 BCSC 600 at paras. 32–34; *Taberner v. Ernest & Twins Development Inc.*, 2001 BCSC 367 at para. 6.

[147] I find that there is evidence that the Property was especially suitable for Mr. Zhao.

[148] The second question is whether a substitute property was "readily available." This question should be treated in a nuanced way, since it is a question of degree. At one end of the spectrum are consumer goods available at multiple retail outlets or securities trading on public markets: essentially identical substitutes are available virtually immediately to anyone with the purchase price. These items are clearly "readily available" and specific performance would never be ordered. At the other end are the truly unique items found in textbook examples, such as the "rare paintings" referred to in *Semelhago* at para. 14. These are not available at any price or effort and so presumably specific performance would be available, subject to the equitable defences.

[149] Residential real estate is usually between these two extremes. It is therefore a matter of judgment whether, under particular market conditions and given the needs of the purchaser, a substitute is readily available.

[150] Showing that a substitute was not "readily available" does not require demonstrating a "complete absence of comparable properties": *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.J.) at para. 57, quoted approvingly in *Serebrennikov* at para. 26. At the same time, the plaintiff must meet the onus of tendering evidence that comparable properties were not readily available and the mere existence of a somewhat uncertain and time-consuming search would not be sufficient either.

[151] In my view, both the global and particularized evidence supports the conclusion that comparable properties were not "readily available" in South Surrey between November 2015 and April 2016, even though it does not establish a "complete absence" of such properties.

[152] In determining whether substitute properties are "readily available", it is appropriate to look at market conditions: *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52 at para. 74. Larry Dybvig, the appraisal expert retained by Mr. Zhao, provided evidence that relators define a "seller's market" as one where the sales to active listings ratio is 20% or higher. The ratio for 2015 in the South

Surrey/White Rock area was 31%, increasing to 53% in 2016, suggesting a market that moved very strongly in favour of the seller.

[153] This is backed up by the particular evidence in this case. Mr. Zhao deposed that when he was looking for a comparable property in April 2016, he was unable to find one and instead settled for the Morgan Creek Property. This search was short because of Mr. Zhao's need to settle his family, but it is supportive of the statistical evidence.

[154] In addition, in communications with his realtor in November and December 2015 that were not known to Mr. Zhao, but are in the record, Mr. Purewal stated that he was "looking at MLS all the time" and complained he could not find a comparable property for less than $3 million.

[155] The Purewals point to the existence of comparable properties employed by the expert appraisers between November 2015 and April 2016. In my view, this just negates the proposition that there was a "complete absence of comparable properties" and is compatible with comparable houses not being "readily available" as that term is understood in the jurisprudence.

[156] The final element in the analysis is whether damages would have been "comparatively inadequate" to do justice at the relevant time. More precisely, because what we are dealing with here is a mitigation defence, the issue is whether Mr. Zhao would have had a fair, real and substantial justification for the claim that the best way to avoid loss would have been for the Purewals to be required to convey the Property, such that his actual course of action was reasonable by comparison with a hypothetical search for an alternative property.

[157] It is at this stage that buyers seeking commercial or income properties are often held not to have a fair, real and substantial justification for specific performance, since, for them, even substantial search costs and delay are ultimately just issues of profitability, which can therefore be compensated for with money. However, Mr. Zhao was seeking a residential property for his own family, so money

would not necessarily be full compensation. This supports a claim for specific performance was a reasonable mitigation strategy if the Purewals did not complete.

[158] In my view, Mr. Zhao acted reasonably in the circumstances and it would be unjust to assess damages in November 2015. He had a deal, and part of the deal was that he was protected from the risk of the market going up between November and the end of March. The standard of mitigation is what a reasonable person would do in their ordinary course of business. There was some criticism of Mr. Zhao for going to China – where he earns his living – during this period instead of searching for an alternative property in the Lower Mainland. But if the Contract had been performed, Mr. Zhao would have had plenty of time to go to China and then settle his family in Canada in the Spring of 2016. This time was part of what he obtained by agreeing to the Contract. Expecting him to forego going to China in order to search for a new home would go beyond the requirements of the "duty to mitigate", which is only to do what a reasonable and prudent person would do in their ordinary course of business.

[159] Finally, in judging the reasonableness of Mr. Zhao's response, it is important not to use hindsight. We now know that the market for detached homes in South Surrey/White Rock would go up dramatically between the beginning of November 2015 and the end of March 2016, although even with hindsight the experts disagree about by how much. But that knowledge was not available to Mr. Zhao at the time and he had every reason to rely on the fact that he had locked in a price until March. It cannot be used to establish that it was unreasonable to pursue his livelihood in China.

[160] My conclusion that Mr. Zhao acted reasonably is supported by the fact that when the Purewals failed to close, he took timely steps to pursue *both* an action for specific performance *and* purchase of a substitute property.

[161] I am therefore not persuaded by the Purewals that I should change the default valuation date to November 17, 2015 on the grounds that Mr. Zhao had a duty to find a substitute property at that time.

Mr. Zhao Could Not Bring a Claim for Specific Performance After April 18, 2016

[162] On the other hand, I am equally unpersuaded by Mr. Zhao's arguments that the default valuation date of March 28, 2016 should be postponed to a *later* time.

[163] Mr. Zhao's preferred date of July 19, 2016 is based on the remedy of "damages in lieu of specific performance." The basis for this is the brief period between 1858 – when courts of equity were given the power to award damages in substitution for specific performance in England, a change incorporated into the law of British Columbia – and 1879 when the courts of common law and equity were merged. Under the two-decade-long jurisdiction to award damages in lieu of specific performances, the measure of compensation was to put the claimant for specific performance in the same position they would have been in had such an order been granted. Since an order for specific performance will normally come after the promisor defaults, this can be different from the general measure of expectation damages, which is to put the promisee in the same position they would have been in if the contract had been performed when it was supposed to be.

[164] But damages in lieu of specific performance are only available if the party seeking them could seek a remedy of specific performance up to the time they elect for damages instead. This is the fundamental flaw in Mr. Zhao's argument.

[165] As of April 18, when he entered into a contract of purchase and sale for the Morgan Creek Property, Mr. Zhao was no longer able to perform the Contract himself, at least without breaching the contract he had with the seller of the Morgan Creek Property. Mr. Zhao deposed that his maximum budget was $3 million, so he could not have purchased both houses. I have no evidence that he would have breached the Morgan Creek Property contract and, in any event, equity presumes that what ought to be done will be done. He therefore could no longer seek specific performance.

[166] Months before July 19, therefore, Mr. Zhao was no longer in a position to pursue a claim for specific performance and therefore was not entitled to elect for

damages in lieu thereof. That date is not available to him and would instead provide for overcompensation.

[167] Another, compatible, way of putting the same point is that as of April 18, 2016, Mr. Zhao had already mitigated against exposure to the increase in property values in his chosen neighbourhood of South Surrey. Once a party has *actually* mitigated, that sets a limit to the loss. It no longer matters whether pursuing specific performance *would have been* a reasonable mitigation strategy, and I therefore do not have to consider that issue.

[168] Since there is no difference, on the evidence before me, between a valuation date of March 28 and April 18, I will use the former. With that date, Mr. Zhao is entitled to precisely the protection against changes in the real estate market that he bargained for at the time of the Contract, no more and no less.

Appraisal Evidence and Amount of Damages

[169] Since I am not persuaded that I should depart from the default date of promised performance for valuation, the basis for Mr. Zhao's loss is the difference between the agreed upon purchase price of $2,780,000 and the market value of the Property on March 28, 2016.

[170] Mr. Zhao submitted reports from Larry Dybvig, a professional appraiser, who assessed the value as of March 28, 2016 at $3,150,000, which is $370,000 more than contracted for in November. By contrast, Peter Figures, the professional appraiser called by the Purewals, valued the Property on that day at $2,790,000, just $10,000 more than the purchase price.

[171] Because that market value was the subject of disputed expert evidence, I must attempt to resolve the dispute, recognizing that the onus is on Mr. Zhao on a balance of probabilities to establish the extent of his damages.

[172] Market valuation of an asset is necessary because we cannot directly observe a purchase/sale between a willing buyer and a willing seller at the time we

are interested in. It is necessary therefore to use one of three methods (or perhaps a combination of them):

a) *Income Approach*. This involves calculating the expected income (or imputed income) that can be derived from an asset and making a present value calculation for that income stream at the relevant date.

b) *Cost Approach*. This involves calculating what it would cost to produce the asset at the relevant time.

c) *Direct Comparison*. This involves finding transactions occurring around the same time, making adjustments based on factors that give those other assets greater or lesser market value, and assessing the value of the asset based on the adjusted range of comparables.

[173] Both Mr. Dybvig and Mr. Figures agreed that the direct comparison approach is the best way to value the Property. The income approach does not work for owner-occupied real estate, because market values do not reflect income or imputed income. They also agreed that a cost approach for the buildings and other improvements plus the value of the unimproved land can only be supportive of the conclusion under the direct comparison approach.

[174] They further agreed that the results of the direct comparison approach depend on the comparable properties that are chosen, the adjustments made and the choice of where to put the subject property on the range that results after the comparable properties are adjusted. All of these steps involve experience and judgment and therefore some degree of subjectivity and risk of selection bias. In my analysis of the approaches that Mr. Dybvig and Mr. Figures have taken, I have tried to prefer an analysis rooted in objective sources of information because such sources are less prone to selection bias. However, reliance on judgment and experience – and the corresponding risk of subjectivity and selection bias – cannot be eliminated altogether.

[175] There is no question that Mr. Dybvig is a more experienced real estate appraiser than Mr. Figures. Mr. Dybvig has been a member in good standing with the Appraisal Institute of Canada since 1978 and became a fellow in 2021. He has completed some 4,000 ICI appraisals and appraisal reviews and has been a frequent expert witness in a number of courts and tribunals, including this Court. Without going into his CV in detail, it clearly shows him to be a leader in his profession. Mr. Figures is significantly less experienced: at the time he wrote the report in this proceeding, he was a candidate member of the Appraisal Institute of Canada.

[176] That is of course no criticism of Mr. Figures and it would be dangerous to place too much reliance on differences in length of experience. But since appraisal inevitably involves the use of judgment and experience, it counts in favour of giving greater weight to Mr. Dybvig's evidence, especially on such points.

[177] Moreover, while Mr. Dybvig *has* more experience, his report generally *relies* on judgment and experience *less*. In particular, he used more comparables, which makes his opinion more robust, and on the critical issue of the time adjustment attributable to appreciation in the market, his analysis is based on more objective data than is the case for Mr. Figures. While both must rely on judgment and experience on other issues, in my view, Mr. Dybvig does this in a more transparent way.

[178] I do consider it important to consider the degree to which the underlying data is objective and the conclusions are robust. Mr. Dybvig's analysis of the Property's value on October 30, 2015 and March 28, 2016 relies on 10 comparables, while Mr. Figures' analysis of its value on the relevant date uses five. Two of the comparables are the same.

[179] Mr. Figures stated that there is a trade off in the number of comparables: the more that are used, the more robust the analysis is to idiosyncratic or random factors and the influence of the appraiser's subjective choice of comparables is (at least somewhat) diminished. On the other hand, one would expect that additional

comparables will be less similar to the subject property than a smaller number would be. Mr. Dybvig pointed out that with 10 comparables, it was possible to do some statistical analysis. Mr. Figures ultimately agreed in cross-examination that, all other things being equal, more comparables leads to a more robust analysis. It also diminishes the role of selection, which is inevitably subjective. In my view, the use of more comparables strengthens Mr. Dybvig's analysis relative to that of Mr. Figures.

[180] Since the market was rising, a very important adjustment factor in this case is for time of sale. The two experts used different methods for calculating this important parameter in their analysis. Mr. Dybvig used the statistics maintained by the Fraser Valley Real Estate Board ("FVREB"), which showed a 3.2% increase (uncompounded) per month from August 2015 to April 2016 for detached homes in the White Rock/South Surrey region. Recognizing that different sectors of the market might appreciate at different rates, he compared this value to a linear regression of his own comparables graphed against month of sale. This resulted in an almost identical number for a monthly average of 3.17% (also uncompounded). He concluded from this calculation that there was no evidence of a significant deviation between the rate of appreciation for detached homes in South Surrey/White Rock generally and for homes comparable to the Property and it was therefore appropriate to use the FVREB benchmark.

[181] Counsel criticized this analysis on the basis that the "R-squared" value was "only" 0.278, which, as Mr. Dybvig noted, means that about 72% of the variation in prices in his sample is attributable to factors other than time of sale. Mr. Dybvig responded to this point in cross-examination by saying the correlation is one that "he can work with." I see no reason to dismiss the analysis that the general benchmark is a good basis for time adjustment in light of the similar slope for the comparable samples.

[182] Mr. Figures based his time-adjustment on selected resales of the same house during the time period. Mr. Dybvig criticized this method as depending on the appraiser's selection and being subject to idiosyncrasies of the resales. While I do

not say that resales are never a good basis for a time adjustment, I agree with Mr. Dybvig that the method he used is both more objective and derives from a more robust data set.

[183] With the exception of a time adjustment factor, Mr. Dybvig did not use *quantitative* adjustment factors for differences between the comparables and the Property. Instead, his method was to list differences qualitatively, set "higher" and "lower" bounds and then use his judgment to place the subject property within that range. He rejected simple averaging as "too crude."

[184] By contrast, Mr. Figures used quantitative adjustments for neighbourhood, lot size, age/condition, livable floor area, number of bathrooms, basement size, parking and "extras" including "quality/design". Mr. Dybvig considered many of these factors as well, but just in assessing where in the range the Property should lie.

[185] Ms. Khaira argued that Mr. Figures' method was more "objective" because it was more quantitative. I disagree that this is necessarily the case. It depends on the basis for the quantitative adjustments. On cross-examination, it became clear that this depended very much on judgment and experience. For example, Mr. Figures gave a $250,000 and $200,000 negative adjustment for "quality/design" based on what he considered the superior quality of 13955 35A Avenue and 13928 35AZ Avenue, the two comparables that both appraisers used in their analysis. On cross-examination, Mr. Figures agreed that he did this based on a comparison of the MLS listings for the comparables with his visit of the subject Property. As he ultimately agreed, MLS listings will never give as critical a perspective on a property as a site visit, and the comparison is between apples and oranges.

[186] In the end, Mr. Figures had to rely on his experience and judgment to defend this sizeable adjustment. Mr. Dybvig, based on his own experience and judgment, took a very different view of the relative quality of the respective houses and how that should affect where the Property lies within the time-adjusted range. This illustrates that using numbers can give the appearance of objectivity, but whether that appearance is justified depends on what is behind the numbers. In both cases, it

is judgment based in their experience. I did not find Mr. Figures' explanations of his very substantial adjustments (adjustments that account for most of the difference in the analysis of the two properties both appraisers used as comparators) for quality to be persuasive.

[187] In his report, Mr. Dybvig erroneously identified the Property as being in the Elgin Chantrell neighbourhood of South Surrey when in fact it is in the Sunnyside neighbourhood. On cross-examination, he admitted the error, but said the neighbourhoods are equivalent, based on a subsequent analysis of recent sales that is not before me. Mr. Figures, on the other hand, estimated that the difference in neighbourhood was worth $50,000 in value. This was also based on judgment and experience.

[188] A real problem with Mr. Figures' report is that it gives no consideration to the Contract, the actual agreement of purchase and sale that is the subject of this litigation. In the Contract, an arms-length uncompelled buyer (Mr. Zhao) and uncompelled sellers (the Purewals) agreed on a purchase price of $2,780,000 for the very property that is being evaluated. Mr. Dybvig considered the Contract, and has an analysis of the market value for October 30, 2015 that gives a market value of $2,750,000. Mr. Figures' explanation for his failure to mention the Contract – that he treated the collapsed sale that is the subject of this litigation as an "expired listing" – was unpersuasive, since an actual agreement of purchase and sale, unlike an expired listing, provides market evidence of what a willing buyer would pay and what a willing seller would accept.

[189] Mr. Dybvig was challenged about the weight he gave to the "green belt" adjoining the Property, on the basis that it was a right-of-way, rather than a park and that part of the back of the Property backed onto another residential lot. I am unable to give weight to this challenge, however, since both the MLS listing and another expert appraiser retained by the Purewals also referred to the "green belt". It seems plausible to me based on common sense that some green space between the

Property and other residences in the back would be of value, and Mr. Dybvig addressed this issue in cross-examination.

[190] Finally, I am entitled to consider how the experts' conclusions fit with the rest of the evidence before me. Mr. Figures' conclusion that the Property was worth only marginally more at the end of March than what the parties agreed to at the beginning of November implies either that there was no significant increase in property values in the intervening five months (which is inconsistent with what both experts said and with the objective data compiled by the FVREB) or that the purchase price was a significant overpayment. While that is *possible*, it seems unlikely in light of the relative experience of the parties, especially Mr. Purewal, in the real estate market. It is also difficult to square with the Purewals' desire to get out of the sale and Mr. Zhao's insistence on sticking with it. I note that Mr. Figures did not address this issue at all, even to provide an explanation, and that this failure was not explained plausibly in cross-examination or at all in his report.

[191] For these reasons, I generally prefer Mr. Dybvig's report where it differs with the report of Mr. Figures. The one exception is the adjustment for neighbourhood. Mr. Dybvig's report is admittedly deficient in identifying the wrong neighbourhood for the location of the Property. Mr. Dybvig's reference to an analysis of the two neighbourhoods in cross-examination does not, in my view, meet the plaintiff's burden of proof to establish damages. I accept, as the best evidence before me, Mr. Figures' adjustment of $50,000 to reflect the difference between the market value of properties in the Sunnyside Park area (like the Property) and those in the neighbourhoods in which the comparables were located.

[192] I therefore assess the true market value of the Property as of March 28, 2016 at $3,100,000, which is $50,000 less than Mr. Dybvig's conclusion, representing an adjustment for neighbourhood. This implies that the lost value attributable to the Purewals' breach of contract was $320,000.

Other Damage Issues

[193] Mr. Purewal argues that any award of damages ought to be reduced by the amount of property transfer tax that would have been payable had the plaintiff purchased the Property. Mr. Dennis conceded that there was no authority for this deduction, despite the numerous reported cases of collapsed sales, but he argued that it is correct as a matter of principle.

[194] My understanding of Mr. Dennis' argument is that since the point of compensatory damages is to put the plaintiff in the position they would have been if the breach of contract had not occurred, it is necessary to deduct payments that would have been made if the contract had been performed. Since Mr. Zhao would have had to pay property transfer tax if he had purchased the Property, this should be deducted.

[195] To unravel this point, it is necessary to consider what the theory of compensation is when we assess expectation damages in a collapsed sale. As Professor Waddams explains, the loss that is being compensated for is loss of the *value* the purchaser would have obtained had the contract been performed: S.W. Waddams, *The Law of Damages* (loose-leaf ed.), para. 1:30:

> [T]he buyer would have been wealthier if the seller had delivered, and it is plain that in some cases this is the dominant theory. Where, for example, the buyer does not in fact procure a substitute or procures one on favourable terms, he is still entitled to damages measured by the value the property would have had to him if delivered.

[196] Where the loss is the value of a property, the correct comparison is the value that the plaintiff would have received if the contract had been performed with the purchase price. It does not matter what taxes would be paid on the sale: those taxes might be the same (or higher) on alternative uses of the purchase price. But this is irrelevant to the loss.

[197] For example, in this case, the loss is the same whether Mr. Zhao decided to get a substitute of equivalent quality at a higher price, or, as in fact happened, a substitute at the same or lower price of lower quality. It would be the same in the

case of a buyer who decided to retain the purchase money and rent instead. That is because it is the loss of value, measured as market value, that is the measure of damages.

[198] If Mr. Zhao had decided (or been able) to buy an equivalent substitute at a higher price, he would have had to pay more in property transfer tax. But this would not be recoverable, because it would not be part of his loss, which would be confined to the loss of the market value of the property he would have obtained if the Contract had been performed.

[199] As Professor Waddams goes on to discuss, this theory of damages is similar to that found in tort cases where property has been destroyed or damaged. It does not matter whether that property was acquired as a gift or was, on the contrary, purchased at above market prices. It also does not matter whether a substitute is purchased, except when the cost of substitution is used to benchmark value – and then it is not the plaintiff's actual cost, but what it would cost a reasonable person making that acquisition on the market.

[200] Once this is understood, the property transfer tax is irrelevant. If Mr. Zhao had acquired the Property, he would have had to pay it. But if he wanted to buy something else at the same price, he would have had to pay the same amount. If he bought something at a lower price or higher price, or nothing at all, the amount of property transfer tax he would actually pay would vary, but it makes no difference to the valuation of his loss as a result of the non-performance of the Contract. The damage is the loss of value and the property transfer tax is a tax on a transaction.

[201] Mr. Zhao is entitled to be compensated for expenses he had to engage in twice because of the Purewals' breach. Mr. Zhao had to pay twice for conveyancing fees. Since the fees for the Morgan Creek property are the ones he would not have had to pay if the Purewals had performed their part of the Contract, he is entitled to damages for those fees, which amounted to $2,597.

[202] To damages compensating Mr. Zhao for his loss of the value of the Property at the time of completion must be added $4,278 for the cost of filing a caveat to prevent the Purewals from conveying the Property to their son.

[203] The total for damages is $320,000 + $4,278 + $2,597 = $326,875. While these losses occurred at slightly different times, it is convenient to assess pre- and post-judgment interest based on the completion date of March 28, 2016 for all of them.

Summary of Analysis

[204] Mr. Zhao and the Purewals entered into the Contract on November 1, 2015. Mr. Zhao promised to pay $2,780,000 and the Purewals promised to convey the Property on March 28, 2016. The Purewals did not convey the Property and are therefore in breach of contract.

[205] It is no defence for the Purewals that Mr. Zhao paid the $100,000 deposit by bank draft, rather than, as the Contract required, certified cheque of money order. While this deficiency gave the Purewals the option to terminate under the Contract, they did not exercise it. Their communications were ambiguous about whether they were even unilaterally terminating and certainly gave no hint that the reason was the deposit, or even that they had any cause at all. The deposit issue was only raised many years later. In light of Mr. Zhao's reasonable detrimental reliance on the failure to raise the issue at the time, I would not consider it fair and reasonable for it to be a basis for termination (and therefore an excuse for reneging on the Contract) now.

[206] The presumptive date for valuing the Property for purposes of assessing damages is the date of closing, March 28, 2016. Neither party has persuaded me that there is a legal reason to change this date. Mr. Zhao's claim for "damages in lieu of specific performance" into July 2016 is defeated by the fact that he was no longer ready, willing and able to perform the Contract once he purchased a substitute home. The Purewals' claim that Mr. Zhao did not reasonably mitigate is not established either. He had reason to hope the Purewals would complete and reason

to pursue specific performance if they did not. The fair date of assessment is the performance date.

[207] I generally prefer Mr. Zhao's expert appraiser, Mr. Dybvig, over the appraiser called by the Purewals, Mr. Figures. Mr. Dybvig is both more experienced and used more objective and robust sources of data to determine a range of comparables and an adjustment for time. The exception is with respect to location, where I prefer Mr. Figures' adjustment. I therefore award damages based on Mr. Dybvig's assessment as of March 28, 2016, but with that adjustment. Taking into account some incidental expenses made necessary by the Purewals' breach, that leads to expectation damages in the amount of $326,875.

ORDER

[208] I therefore grant judgment for the plaintiff Wokun Zhao against the defendants Amrik Purewal and Jisbinder Kaur Purewal jointly and severally in the amount of $326,875, plus interest as determined under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[209] I declare that pre-judgment interest shall be calculated from March 28, 2016 to the date of these reasons for judgment.

[210] The parties have leave to request a further hearing from me on the issue of costs no later than 28 days after the date of these reasons for judgment. If the parties do not request a further hearing by that time and do not otherwise agree on the amount of costs, costs shall follow the event and may be assessed as party and party costs at Scale B.

"J. G. Morley, J."
The Honourable Justice Morley