

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Li v. Hu*,  
2024 BCSC 778

Date: 20240510  
Docket: S203507  
Registry: Vancouver

Between:

**Weiqin Li**

Plaintiff

And

**Wang Wei-Jen Hu a.k.a. Wei-Jen Wang and Lily Hui Hua Hsiao**

Defendants

Before: The Honourable Justice Iyer

## Reasons for Judgment

Counsel for Plaintiff:

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Counsel for Defendants:

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Place and Date of Trial:

Vancouver, B.C.  
December 4-8, 2023  
March 11 and 12, 2024

Place and Date of Judgment:

Vancouver, B.C.  
May 10, 2024

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**OVERVIEW**

[1] The plaintiff, Weiqin Li, and the defendant, Wang Wei-Jen Hu aka Wei-Jen Wang (“Ms. Wang”), were longstanding friends. In late 2017, Ms. Wang acquired an interest in a condominium unit that was being built by a developer in Vancouver. Ms. Li expressed an interest in the unit, and Ms. Wang said she would assign it to her. Ms. Li paid Ms. Wang some money for this purpose in March and June 2018. However, over the following months, the arrangement fell apart and the friendship ended acrimoniously. Ms. Li sued Ms. Wang to recover the money, saying that there was no agreement between herself and Ms. Wang. Ms. Wang denied Ms. Li’s entitlement to repayment and counterclaimed, seeking damages for breach of contract.

[2] The central issues in this case are whether there was an agreement between Ms. Li and Ms. Wang and what consequences flow from that determination. In order to identify the legal issues, it is necessary to review the pleadings, all of which were amended during the trial. As the alleged agreement was mostly oral, assessment of the credibility of the two main witnesses, and the reliability of their evidence, is crucial.

**UNDISPUTED FACTS**

[3] Ms. Li and Ms. Wang have families in Shanghai and have resided there. They have been friends for a very long time. In 2017, Ms. Wang was living in Shanghai and caring for her mother, who was very ill. Ms. Li was also in Shanghai and visited Ms. Wang and her mother. During a social visit in late 2017, Ms. Wang mentioned to Ms. Li that she had recently acquired a condominium unit in a development that was being built in Vancouver. I will refer to the unit as the “Pre-Sale Unit.” It is located at 202-458 West 63<sup>rd</sup> Avenue in Vancouver.

[4] The contract of purchase and sale for the Pre-Sale Unit, dated November 4, 2017, (“Pre-Sale Contract”) was between the developer, Marcon W63 Limited Partnership (“Developer”), as the vendor, and Ms. Wang’s nephew, Haw Wang, as the purchaser. Mr. Wang is the son of Lily Hui Hua Hsiao, the other defendant in this

action. The Pre-Sale Contract expressly gave Mr. Wang the right to assign the Pre-Sale Unit to Ms. Wang upon completion at no additional cost.

[5] Ms. Wang had asked Mr. Wang to make the purchase on her behalf and asked Ms. Hsiao to make the payments to the Developer stipulated in the Pre-Sale Contract because they were both in Vancouver and she was in China.

[6] When Ms. Li expressed interest in acquiring the Pre-Sale Unit, Ms. Wang offered to assign the Pre-Sale Contract to her without taking any assignment fee because they were friends. Ms. Li and Ms. Wang spoke about the terms of the assignment and exchanged WeChat messages. Ms. Wang created a WeChat group for herself, Ms. Li and Pansy Chen, a real estate agent who had previously acted for Ms. Wang and represented Mr. Wang in the Pre-Sale Contract. These conversations occurred in the first half of 2018.

[7] The Pre-Sale Contract required the purchaser to pay the Developer certain amounts, defined as “deposits”, by certain dates. Ms. Hsiao made three such payments to the Developer on or before March 4, 2018, totalling \$177,550.84. She made a further deposit of \$163,648.42 on June 15, 2018, all on Ms. Wang’s behalf.

[8] Ms. Li paid Ms. Wang \$177,550.84 on March 19, 2018 and \$163,648.42 on June 16, 2018 by transferring those amounts into Ms. Hsiao’s bank account. These payments fully reimbursed Ms. Hsiao for the amounts she had paid under the Pre-Sale Contract on Ms. Wang’s behalf.

[9] In August 2018, Ms. Li and her husband travelled to Vancouver. They visited the Developer’s presentation centre with Ms. Wang, Ms. Hsiao, Mr. Wang and Ms. Chen. They also attended some family gatherings with Ms. Wang’s daughter, Sandy Hu.

[10] Sometime between September 2018 and January 2019, Ms. Li decided not to proceed further with acquiring the Pre-Sale Unit. In November 2018, Ms. Hsiao informed Ms. Li that the third deposit would be due in December. There were some

communications about this. Ultimately, Ms. Li did not pay the third deposit. Ms. Hsiao paid it on Ms. Wang's behalf.

[11] On January 13, 2019, Ms. Li went to Ms. Wang's house in Shanghai. They had a heated argument, during which Ms. Li said unequivocally that she was not going to proceed with acquiring the Pre-Sale Unit and demanded that Ms. Wang return the money she had paid towards it. Ms. Wang insisted that Ms. Li had already committed to the purchase and refused to return any money to her. This event marked the end of the friendship. Ms. Li and Ms. Wang did not communicate again for about a year.

[12] Ms. Wang reimbursed Ms. Hsiao for the third deposit and, in late November 2019, Mr. Wang assigned the Pre-Sale Contract to Ms. Wang. Thereafter, Ms. Wang paid the rest of the purchase price and, when construction was completed, she moved into the Pre-Sale Unit. She continues to live there.

[13] In March 2020, when she commenced this action, Ms. Li filed a certificate of pending litigation ("CPL") on the Pre-Sale Unit. It remains on title.

### **THE PLEADINGS AND ISSUES THEY RAISE**

[14] In her initial notice of civil claim ("NOCC"), filed March 26, 2020, Ms. Li named Ms. Wang and Ms. Hsiao as defendants. She pleaded that Ms. Wang made fraudulent and negligent misrepresentations to her about the Pre-Sale Unit. The only specified misrepresentation is that Ms. Wang fraudulently represented that she could assign the Pre-Sale Contract to Ms. Li, when she did not have that right. Ms. Li pleaded that, as a result of the misrepresentation, she advanced money to Ms. Wang and/or Ms. Hsiao. The NOCC also asserted a constructive trust over the Pre-Sale Unit in Ms. Li's favour. Although not pleaded, it is common ground that the basis for this equitable remedy is unjust enrichment. Ms. Li sought aggravated and punitive damages as well as special costs.

[15] In their initial response to civil claim ("Response"), filed May 26, 2020, the defendants denied making any misrepresentations to Ms. Li. They pleaded that

Ms. Li knew that the Pre-Sale Contract was in Mr. Wang's name and that Ms. Wang had a right to have him assign it to her, which meant Ms. Wang could assign the contract to Ms. Li. Ms. Wang pleaded that she and Ms. Li had entered into a contract for Ms. Wang to assign the Pre-Sale Contract to Ms. Li ("Assignment Agreement"), which Ms. Li breached when she refused to pay the third deposit in December 2018.

[16] The defendants filed a counterclaim on May 26, 2020 ("Counterclaim") seeking forfeit of the money Ms. Li had advanced towards purchase of the Pre-Sale Unit, damages for breach of the Assignment Agreement and damages arising from the filing of the CPL.

[17] In her response to the counterclaim ("Response to CC"), filed June 20, 2022, Ms. Li denied the existence of the Assignment Agreement, characterizing the money she paid towards the Pre-Sale Contract as a "gesture of good faith" made in the context of ongoing negotiations.

[18] At the beginning of the trial on December 4, 2023, Ms. Li sought leave to file an amended NOCC ("ANOCC"), which I granted. In it, she discontinued all claims against Ms. Hsiao. She withdrew the fraudulent misrepresentation claim, maintaining her claims of negligent misrepresentation and unjust enrichment/constructive trust. She also withdrew the claims for aggravated and punitive damages.

[19] Consequential amendments to all of the other pleadings were filed during the course of the trial. At the end of the trial, I granted Ms. Li's application to further amend her ANOCC to add a claim that Ms. Wang repudiated the Assignment Agreement.

[20] As a result, the legal issues before me are:

- a) Did Ms. Wang negligently misrepresent to Ms. Li that she could assign the Pre-Sale Contract to her?
- b) Did the parties enter into the Assignment Agreement?

- c) Must Ms. Wang return the money Ms. Li advanced towards the purchase of the Pre-Sale Unit, or is she entitled to keep it?
- d) Is the successful party entitled to damages and, if so, in what amount?
- e) What costs orders are appropriate?

**CREDIBILITY AND RELIABILITY ASSESSMENT**

[21] Credibility and reliability are distinct concepts. Credibility is about whether a witness is telling the truth whereas reliability is about whether the witness is able to recall past events accurately. A witness may be credible but unreliable. A witness who is not credible is also not reliable: see *Bradshaw v. Stenner* 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296; *Kala v. Bahr*, 2024 BCSC 192 at para. 45.

[22] Ms. Li and Ms. Wang were the principal witnesses. Ms. Wang also called Bud Eaton, a representative of the Developer, Ms. Chen, Ms. Hsiao, Mr. Wang and Ms. Hu. Ms. Li has not challenged the credibility of these additional witnesses.

[23] Mr. Eaton has no interest in this matter and spoke only about the Developer's process for pre-sale contracts, their assignment and transfer of ownership. The others testified about their knowledge of the friendship between Ms. Li and Ms. Wang, its ending and their interactions with Ms. Li and Ms. Wang during the relevant period. They gave their evidence in a straightforward manner, responding fully to the questions put to them. Their cross-examinations were very brief. I accept that these witnesses are credible and rely on their evidence.

[24] Turning to the main witnesses, Ms. Wang challenges Ms. Li's credibility. Curiously, Ms. Li's written submissions did not address Ms. Wang's credibility. When I asked Ms. Li's counsel about credibility, he suggested that Ms. Li's account of what occurred "makes sense." His submissions on Ms. Wang's credibility related to what he characterized as an unbelievable and a significantly inflated damages claim. They did not address her evidence on liability issues.

[25] Ms. Li was not a credible witness. Her answers were evasive and unresponsive, both on direct examination and on cross-examination. She was very argumentative in cross-examination, and I had to admonish her repeatedly to answer the question she was asked.

[26] Ms. Li's evidence at trial was inconsistent with her evidence on discovery on the key issue of whether she had entered into an agreement with Ms. Wang to acquire the Pre-Sale Unit. In her discovery, she admitted that she had an oral agreement with Ms. Wang. When confronted with that evidence on cross-examination, Ms. Li reluctantly admitted that she had agreed to accept the Pre-Sale Unit, but she then continued to argue that there was no agreement. At other times in her testimony, Ms. Li referred to Ms. Wang not living up to "her side of the bargain", implying they had some kind of agreement. Ms. Li's denial that she and Ms. Wang had an agreement is also inconsistent with her misrepresentation claims. In both the NOCC and ANOCC, she pleaded that Ms. Wang's misrepresentations induced her to enter into the Assignment Agreement.

[27] During cross-examination, Ms. Li also denied that she paid money to Ms. Hsiao in March and June 2018. That evidence is contrary to the facts pleaded in the NOCC and ANOCC. It is also contrary to the facts in the Agreed Statement of Facts entered as an exhibit at trial. Ms. Li disagreed with the "agreed" fact that Ms. Hsiao did not make any representations to Ms. Li and was not a party to any agreement between Ms. Li and Ms. Wang. However, Ms. Li discontinued her claim against Ms. Hsiao for those reasons.

[28] For these reasons, I do not rely on Ms. Li's evidence unless it is supported by other credible and reliable evidence or it is against her self-interest

[29] Turning to Ms. Wang, her evidence was internally consistent and clear. However, she did have difficulty recalling dates. For example, she was unable to specify a date on which the Assignment Agreement was concluded. This is consistent with her claim that it was primarily an oral agreement between good



friends and does not materially undermine her credibility. It was also apparent to me that there were some difficulties with language interpretation.

[30] While I agree with Ms. Li that Ms. Wang’s damages claim is inflated, it does not follow that I should reject her evidence completely. Her evidence on liability issues is credible in that it was internally consistent and consistent with other evidence. Ms. Wang’s imprecise recollection of dates goes to reliability, not credibility. I exercise more caution in assessing Ms. Wang’s evidence on her damages claims, as I explain in that part of my reasons for judgment.

**LIABILITY ISSUES**

[31] As I have identified, the three liability issues are whether Ms. Wang negligently misrepresented to Ms. Li that she could assign her the Pre-Sale Contract, whether the parties entered into the Assignment Agreement and whether Ms. Li is entitled to the return of the money she advanced to Ms. Wang towards purchase of the Pre-Sale Unit.

**Negligent Misrepresentation**

[32] Ms. Li did not address negligent misrepresentation in her closing submissions. Instead, she argued that there was no legally binding contract because its terms were so uncertain as to render it void or, if there was a legally binding contract, Ms. Wang repudiated it.

[33] As negligent misrepresentation was pleaded, I will address it briefly.

[34] The three pleaded representations are that (a) Ms. Wang owned the Pre-Sale Unit; (b) that she could assign the legal and beneficial interests in the Pre-Sale Unit to Ms. Li; and (c) that she would take all steps necessary to assign the Pre-Sale Unit to Ms. Li.

[35] Ms. Wang did not represent that she owned the Pre-Sale Unit, she was quite clear that she had acquired an interest in it under the Pre-Sale Contract. In the pre-sale of developments, the developer owns all of the units until all of the payments have been made and the development has been constructed. On cross-examination,

Ms. Li admitted that she knew this. Similarly, Ms. Wang did not represent that she had a legal interest in the Pre-Sale Unit because the parties knew that only the Developer had a legal interest in the Pre-Sale Unit prior to completion. Ms. Wang's commitment to take all steps necessary to assign the Pre-Sale Contract to Ms. Li was a promise, which is a statement as to future intention, not a representation, which is a statement of fact: *Fraser Valley Credit Union v. Siba*, 2001 BCSC 744 at para. 23.

[36] Therefore, Ms. Li's claim in negligent misrepresentation fails.

### **Existence of a Contract**

[37] A contract comes into existence where, from an objective perspective, the parties intended to contract and agreed to the essential terms. Put another way, there must be acceptance of an offer that objectively manifests a mutual intention to be legally bound: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at paras. 35-36.

[38] The evidence establishes that Ms. Li expressed her interest in buying property in Vancouver to Ms. Wang in late 2017. Ms. Wang told her about the Pre-Sale Unit and sent Ms. Li pictures of it. When Ms. Li said she wanted to acquire it, Ms. Wang offered to assign it to her at no additional charge. Ms. Li confirmed that she wanted to acquire the Pre-Sale Unit in her WeChat message to Ms. Wang on February 26, 2018:

Regarding your property in Vancouver, my family and I still think it is suitable for us, so we still want it. Hope you will have a smooth negotiation with the developer to your satisfaction. Thank you very much as well for always keeping us in mind.

[39] Upon Ms. Wang's request, Ms. Chen set out various payment schedules in a WeChat message that was sent to Ms. Li. The options varied depending on when the Developer consented to the assignment: after payment of the second deposit in June 2018, after payment of the third deposit in December 2018 or after completion. Ms. Chen also confirmed that she would not be charging any commission of her own on the assignment from Ms. Wang to Ms. Li.

[40] Ms. Li responded by WeChat on March 2, 2018, saying that she was agreeable to all options. She asked when it would be a good time to go through the assignment procedure and how she should pay the deposit.

[41] On March 19, 2018, Ms. Li paid Ms. Wang \$177,550.84 (by deposit into Ms. Hsiao's bank account), reimbursing Ms. Wang for the down payment and first deposit required under the Pre-Sale Contract. Ms. Li made a second payment of \$163,648.42 on June 16, 2018, representing the amount of the second deposit. Prior to making the second payment, Ms. Li received a copy of the Pre-Sale Contract.

[42] Ms. Wang submits that the parties entered into the Assignment Agreement on March 2, 2018, when Ms. Li agreed to pay for the Pre-Sale Unit. She says that, by making the March and June payments, among other things, Ms. Li acted consistently with having entered into the Assignment Agreement.

[43] Ms. Li argues that no contract was ever formed. She says that her message on March 2, 2018, simply indicated that she had the ability to pay on any scenario but did not commit her to do so. She had not received the Pre-Sale Contract at that point or seen the Pre-Sale Unit. Further, she says the parties did not know if or when the Developer would consent to the assignment.

[44] Ms. Li denies that her payments in March and June established a binding contract, pointing to her evidence that, because of her longstanding friendship with Ms. Wang, she advanced the money voluntarily so that Ms. Wang would not have to do so.

[45] Ms. Li submits that the parties intended to formalize their agreement in a written document and, in any event, she and Ms. Wang never agreed on essential terms. She says the missing terms were:

...when the assignment would take place, when the payments were due, the parties to the assignment agreement [and] the terms of the presale contract to be assigned.

[46] It is trite law that a contract does not have to be written to be binding: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 323, 326-328; see also *Sojka v. Sojka*, 2023 BCCA 446 at para. 15.

[47] Ms. Li's reliance on cases where the parties have signified an intention to express their agreement in a formal written document is of no assistance here. The evidence does not establish that these parties had that intention.

[48] Determining the essential terms of a contract is a fact-specific inquiry: *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416 at para. 262. The evidence shows that neither Ms. Li nor Ms. Wang considered the date of assignment to be important. They knew that the timing was in the hands of the Developer, and there is no evidence that they were uncertain about whether consent would occur. Similarly, the parties did not express any uncertainty about when payments had to be made or about other terms of the Pre-Sale Contract. The evidence satisfies me that it is more likely than not that Ms. Li paid the substantial deposits in March and June 2018 because she and Ms. Wang had concluded the Assignment Agreement that obliged her to make those payments.

[49] In the context of their longstanding friendship, Ms. Li's unequivocal statement on March 2, 2018, that she wanted the property and was agreeable to any payment terms created a binding agreement. The essential terms were the identity of the parties, identification of the Pre-Sale Unit as the property and the purchase price. Ms. Li's reimbursement of Ms. Hsiao for the March and June deposits is subsequent conduct that supports the conclusion that the parties objectively intended to enter into a binding contract: *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 50.

[50] If I am wrong in that conclusion, I find that a binding agreement was concluded no later than June 16, 2018, when Ms. Li made a second payment of \$163,648.42. By that point, she had received the Pre-Sale Contract and knew all of its terms, including that Ms. Wang had a right to have Mr. Wang assign the Pre-Sale Unit to her so she could assign it to Ms. Li. She also knew the payment dates. Her

payment of the second deposit after receipt of all this information constitutes acceptance.

### **Return of Money Advanced by Ms. Li**

[51] Ms. Li seeks to impose a constructive trust over the Pre-Sale Unit to secure the return of money she paid towards its acquisition on the basis that Ms. Wang was unjustly enriched by the money Ms. Li paid to her. Ms. Li did not advance this argument in her closing submissions.

[52] Even disregarding the fundamental flaws in her pleading of this claim, Ms. Li's argument cannot succeed. As I have found, the payments Ms. Li made to Ms. Wang through Ms. Hsiao were made pursuant to the Assignment Agreement in exchange for Ms. Wang assigning the Pre-Sale Contract to Ms. Li. The Assignment Agreement provides the juristic reason for Ms. Wang's enrichment and Ms. Li's corresponding deprivation. As there was no unjust enrichment, no remedy, whether constructive trust or otherwise, is justified.

[53] At the conclusion of the trial, Ms. Li sought leave to further amend the ANOCC to add a new claim that Ms. Wang repudiated the Assignment Agreement by failing to assign the Pre-Sale Contract to Ms. Li before the third deposit was due in December 2018, thereby entitling Ms. Li to return of the \$340,188 she had paid Ms. Wang. I granted the amendment.

[54] Repudiation of a contract occurs when a party breaches a contract in a way that substantially defeats its objective. In his concurring judgment in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, Cromwell J. summarized the applicable principles as follows:

[144] The term repudiation refers to the situation in which a breach of contract by one party gives rise to the right of the other party to terminate the contract and pursue the available remedies for the breach: J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 676-78. This occurs when one party actually breaches the contract in some very important respect and is said to thereby repudiate the contract. If the other party "accepts" the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which

may vary depending on whether that party has accepted the repudiation or affirmed the contract.

[145] There is a wealth of learning about the types of breach that constitute repudiation. Without getting into the details, we may say in brief that a breach is a repudiation of the contract if it is a breach of a contractual condition or of some other sufficiently important term of the contract so that there is a substantial failure of performance: S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at para 590; McCamus, at pp. 676-77.

[55] Where one party repudiates, the other party may accept the repudiation, bringing the contract to an end. Acceptance may be communicated but can also be inferred from the circumstances: *Kaur v. Bajwa*, 2020 BCCA 310 at paras. 32, 35-36. Alternatively, the innocent party may choose to affirm the contract, in which case it continues.

[56] The differences between the payment options set out in Ms. Chen's March 2, 2018, WeChat message are the timing of the assignments and when they occur in relation to the deposits required by the Pre-Sale Contract. The message reads:

#202-458 63RD AVE

Total Price: \$1,625,900

1<sup>st</sup> Deposit (10% of total price): \$162,590 - - Paid

2<sup>nd</sup> Deposit (10% of total price): \$162,590 - - To be paid

3<sup>rd</sup> Deposit (5% of total price): \$81,295 - - To be paid

Assign Now:

1. 1<sup>st</sup> Deposit Paid \$162,590

2. Renovation Fee Paid  $\$9621.79 \times 1.05 = \$10,102.88$

3. Assignment Fee  $\$1,625,900 \times 1.05 \times 3\% = \$51,215.85$

Payment to be made by the buyer  $1+2+3 = \$223,908.73$

Assign After the 2<sup>nd</sup> deposit is paid

1. 1<sup>st</sup> Deposit Paid \$162,590

2. Renovation Fee Paid  $\$9621.79 \times 1.05 = \$10,102.88$

3. 2<sup>nd</sup> Deposit \$162,590

4. Assignment Fee  $\$1,625,900 \times 1.05 \times 3\% = \$51,215.85$

5. Payment to be made by the buyer  $1+2+3+4 = \$386,498.73$

Assign after the 3<sup>rd</sup> deposit is paid

1. 1<sup>st</sup> Deposit Paid \$162,590
  2. Renovation Fee Paid  $\$9621.79 \times 1.05 = \$10,102.88$
  3. 2<sup>nd</sup> Deposit \$162,590
  4. 3<sup>rd</sup> Deposit \$81,295
  5. Assignment Fee  $\$1,625,900 \times 1.05 \times 3\% = \$51,215.85$
- Payment to be made by the buyer  $1+2+3+4+5 = \$467,793.73$

Payment to be made after Completion

1. Property Price \$1,625,900
  2. Renovation Fee Paid  $\$9621.79 \times 1.05 = \$10,102.88$
  3. GST  $\$1,625,900 \times 5\% = \$81,295$
  4. PPT  $\$200,000 \times 1\% + \$1,425,900 \times 2\% = \$30,518$
- Payment to be made by the buyer  $1+2+3+4 = \$1,747,815.88$

[57] Ms. Wang took screen shots of Ms. Chen's messages and forwarded them to Ms. Li. As I have noted, Ms. Li responded at 9:38AM on March 2, 2018, saying:

Wei Jen: Got your information. I can pay assignment fees according to any one of the three proposals as long as it is convenient to you. When to go through the assignment procedure? We need a good time. How to pay the deposit(s) to you?

[Emphasis added.]

[58] I agree with Ms. Li that these options imply that the assignment will be made within the period before the next option arises. If this was a term of the Assignment Agreement, to succeed in her repudiation claim, Ms. Li would have to establish that assigning the Pre-Sale Unit to her before the December 2018 deposit was due went to the heart of the parties' agreement. The evidence does not support that finding.

[59] The purpose and benefit of the Assignment Agreement was for Ms. Li to acquire the Pre-Sale Unit by Ms. Wang assigning the Pre-Sale Contract to her. The evidence demonstrates that the timing of the assignment was unimportant. Ms. Li messaged Ms. Wang and Ms. Chen on March 2, 2018, to say she was content with all of the options Ms. Chen had presented. This included assignment occurring after completion. Ms. Li testified that she knew the timing of the assignment was not

confirmed, and she knew it would be close to completion. She did not testify that the timing was important to her.

[60] Mr. Desruisseaux cross-examined Ms. Wang at great length, trying to elicit evidence from her that the assignment had to occur before the third deposit was due. He was unsuccessful. Ms. Wang repeatedly referred to the parties' mutual understanding, as conveyed to them by Ms. Chen, that the Developer's consent was required for the assignment from Ms. Wang to Ms. Li to occur, which would not happen until closer to completion of the development.

[61] Even if assignment before the due date of the third deposit was a term of the Assignment Agreement, it was not a term sufficiently material that its breach could constitute repudiation. A breach does not justify repudiation where the party received substantially what they bargained for: *Cornerview Farms Ltd. v. Friesen*, 2018 BCSC 2060 at para. 267, aff'd 2020 BCCA 2.

[62] I note that Ms. Li testified that she told Ms. Wang in September 2018, before the third deposit was due, that she no longer wanted the Pre-Sale Unit. Although Ms. Wang disputes this, if Ms. Li were to be believed, this could constitute anticipatory repudiation of the Assignment Agreement, which Ms. Wang accepted when she paid the third deposit in December 2018.

[63] I conclude that Ms. Wang did not repudiate the Assignment Agreement. Ms. Li is not entitled to return of the money she advanced on that basis.

[64] I now turn to Ms. Ms. Wang's claim that she is entitled to keep the \$340,188 Ms. Li paid toward the Pre-Sale Unit, even though the assignment did not occur and Ms. Wang acquired the Pre-Sale Unit.

[65] Where a purchaser makes partial payments towards the purchase of property, including through an assignment agreement, but then repudiates the contract, the vendor is entitled to keep those payment upon acceptance of the repudiation: *Stene v. White Castle Ventures Inc.*, 2022 BCCA 29 at para. 60. In *Stene*, the trial judge had characterised the contract as essentially an assignment of



the right to develop the land: 2020 BCSC 1134 at para. 123. See also *Kaur*, which concerned repudiation of a failed assignment for purchase of a pre-sale condominium.

[66] In November 2018, Ms. Hsiao told Ms. Li that the Developer had requested payment of the third deposit. Ms. Hsiao followed up with Ms. Li, but Ms. Li did not advance the funds. Instead, she told Ms. Hsiao that she wanted to talk to Ms. Wang. Ms. Hsiao ended up paying the third deposit in order to avoid defaulting on the Pre-Sale Contract.

[67] Ms. Wang was away from Shanghai for some time. When she returned, Ms. Li arranged to meet her at her home on January 13, 2019. Ms. Wang testified that Ms. Li told her unequivocally that she did not want to acquire the Pre-Sale Unit and demanded that Ms. Wang return the money she had paid towards it. Ms. Wang was not willing to do so, saying that she was entitled to keep the money. They had a heated argument, after which Ms. Li left.

[68] After Ms. Li left, the two did not communicate for just over a year. Ms. Li made no further payments towards the Pre-Sale Unit. Ms. Wang complied with the terms of the Pre-Sale Contract, and Mr. Wang executed the assignment to her in late November 2019. Ms. Wang closed on the Pre-Sale Unit around that time.

[69] Ms. Wang submits that Ms. Li anticipatorily repudiated the Assignment Agreement on January 13, 2019, when she told Ms. Wang unequivocally that she would not complete the purchase of the Pre-Sale Unit and demanded her money back. Ms. Wang says that she unequivocally accepted the repudiation by refusing to return the money Ms. Li had paid towards the purchase.

[70] In *Kaur*, the Court of Appeal referred to para. 149 of *Potter*, quoted above, and then set out the principles governing anticipatory repudiation as follows:

[14] In *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, the Ontario Court of Appeal similarly described the various legal requirements that underlie an anticipatory repudiation at paras. 41-52. In particular, the Court confirmed that a "repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract",

that "the test for anticipatory repudiation is an objective one", that "in objectively construing the purported breaching party's intention, the surrounding circumstances must be considered", that "a finding of anticipatory repudiation is reserved for cases in which the conduct at issue can be said to be serious", and that "before an anticipated breach of contract can be characterized as an anticipatory repudiation, the breach must deprive the innocent party of substantially the whole benefit of the contract": at paras. 42, 45, 46, and 50.

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

[71] Applying those principles, I find that Ms. Li did anticipatorily repudiate the Assignment Agreement. Assessed objectively, she communicated to Ms. Wang that she was unwilling to acquire the Pre-Sale Unit and considered that Ms. Wang was obliged to return the money she had paid towards its purchase. Ms. Li's refusal went to the very heart of the Assignment Agreement, as its sole purpose was to transfer the right to acquire the Pre-Sale Unit from Ms. Wang to Ms. Li.

[72] I find that Ms. Wang unequivocally accepted Ms. Li's repudiation on the spot by refusing to return the money. Assessed objectively, it was abundantly clear by the time Ms. Li left Ms. Wang's home that the Assignment Agreement was at an end. It follows from this that Ms. Wang was entitled to retain the \$340,188 Ms. Li had advanced as a deposit towards the purchase price.

[73] In summary, on the liability issues, I dismiss Ms. Li's claims of negligent misrepresentation and unjust enrichment/constructive trust. I conclude that Ms. Wang did not repudiate the Assignment Agreement; instead, Ms. Li repudiated the agreement. Ms. Wang's acceptance of Ms. Li's repudiation means that Ms. Wang is entitled to retain the money Ms. Li had paid towards the Pre-Sale Unit.

### **DAMAGES**

[74] In addition to retaining the money advanced by Ms. Li, Ms. Wang seeks damages for Ms. Li's breach of the Assignment Agreement. Ms. Wang claims a total of \$233,749, consisting of the following:

In this case, Ms. Wang could not re-sell the Property, as intended, because Ms. Li placed a CPL on title preventing any subsequent sale. Accordingly, and in addition to the forfeiture of the Deposit, Ms. Li's breach of contract caused Ms. Wang to suffer the following carrying costs:

- a) Mortgage interest in the amount of \$144,009.27
- b) Strata Fees in the amount of \$33,886.73
- c) Property taxes in the amount of \$19,185.21;
- d) Home insurance premiums in the amount of \$5,450.00; and
- e) Loss of investment inters [sic] on the additional \$200,000 she had to pay towards the purchase price on closing, which amounts to \$31,218.10.

[75] Ms. Wang could not sell the Pre-Sale Unit because Ms. Li had placed a CPL on title. However, rather than renting it, she chose to move into it herself. She testified that she did not want to move in because she much preferred living in the family home elsewhere in Vancouver. She explained that she did not want to rent the unit because of difficulties posed by the pandemic and the risks of difficult tenants. She felt she had to move in because the unit needed to be occupied. She also said she was uncertain about whether she could rent it out in light of the lawsuit.

[76] Ms. Li challenges Ms. Wang's claim for damages. She says that Ms. Wang was under an obligation to mitigate her damages and failed to do so. Ms. Li points to the fact that Ms. Wang purchased another condominium in Vancouver with her daughter, Ms. Hu, that they rent out. Ms. Li says that that this shows that Ms. Wang could have rented the Pre-Sale Unit if she really did not want to live in it.

[77] A victim of a breach cannot recover losses that could have been avoided by taking reasonable steps subsequent to the breach: *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 331, 1975 CanLII 15 (S.C.C.). Had Ms. Wang rented the Pre-Sale Unit and lived for free at her family home, as she had been doing for years before purchasing the unit, she would have not incurred the damages she is now seeking to recover. It was not reasonable for Ms. Wang to assume that the lawsuit prevented her from renting the unit without taking any step to verify it. There is no evidence that the pandemic would have adversely affected Ms. Wang's ability to rent the unit.

[78] Ms. Wang has not established that the costs she claims in relation to mortgage interest, strata fees, property taxes, home insurance premiums and loss of interest on investment income were not recoverable by her from the rental income she could have received.

[79] Ms. Wang also seeks damages for abuse of process and special costs.

[80] Ms. Wang alleges that Ms. Li filed the CPL against the Pre-Sale Unit with a collateral purpose, knowing that she had no interest in the land, and this conduct amounts to an abuse of process. Ms. Wang says that Ms. Li knew that Ms. Wang wanted to sell the unit, so Ms. Li filed the CPL as a bargaining tool to extract payment for financial gain.

[81] I do not agree that the CPL was filed for an improper purpose giving rise to damages for abuse of process. Although Ms. Li's claim had little chance of success and the pleading was woefully inadequate, the unjust enrichment/constructive trust claim was not completely baseless. Ms. Li said the parties never had a contract and she made payments towards the purchase price voluntarily. The sale had completed by the time Ms. Li filed the NOCC, and Ms. Wang owned the property. From Ms. Li's perspective, and consistent with her evidence, she made large payments and ultimately received no material benefit.

[82] This is unlike the situation in *Feng et al v. Chan and Woo*, 2007 BCSC 251, where the Court found an abuse of process after Mr. Chan filed a CPL despite knowing he had no claim in law or equity. In *601 Main Partnership v. Centura Building Systems (2013) Ltd.*, 2024 BCCA 76, our Court of Appeal recently cited *Feng*, saying:

[128] ... the alleged abuse of process consisted of the wrongful filing of a certificate of pending litigation by a party who knew he had no claim in law or at equity to do so. D. Smith J. (as she then was) held that the filing of a certificate founded upon a misleading allegation amounted to an abuse of process.

[83] In *Corazzin v. Donovan*, [1993] B.C.W.L.D. 1564, CanLII 2755 (B.C.S.C.), Justice Selbie stated at 10:

Evidence that a lien claimant used the law for improper purposes must be firm and unequivocal in my view before lien privileges, when found wanting, should be subject to claims of exemplary damages

[Emphasis added.]

[84] There is no firm and unequivocal evidence that Ms. Li knew she had no claim in law or equity to the land or was using the CPL improperly as a bargaining tool. Ms. Wang is not entitled to damages for abuse of process.

### **COSTS**

[85] Special costs have been awarded against a party who has improperly, and without adequate basis, alleged fraud: *Imbamar S.A. v. Coutinho & Ferrostaal GmbH*, 2015 BCSC 2218 at para. 27; In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 7, the Court reviewed the authorities as follows:

[23] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 [FANUC], at para. 7, Justice S.K. Ballance observed that unsuccessful allegations of fraud made frivolously or without foundation will also attract special costs.

[7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.

[86] Abandoning a claim of fraud on the eve of trial is not an excuse: *Dunn v. Baird Estate*, 2022 BCSC 498 at paras. 61-65.

[87] Special costs are warranted here. The pleading of fraud in the NOCC was insufficient on its face. Ms. Li did not have evidence of fraud by either defendant, and had no claim at all against Ms. Hsiao. Ms. Li's conduct of this litigation meets the very high bar for an award of special costs.

**CONCLUSION**

[88] In conclusion, I dismiss the plaintiff's claim. The defendant's counterclaim is granted in part. Ms. Wang is entitled to retain the money Ms. Li paid towards purchase of the Pre-Sale Unit. She is not entitled to damages because she failed to mitigate. Ms. Wang and Ms. Hsiao are entitled to special costs.

"Iyer J."