

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lal v. Grewal*,  
2024 BCCA 149

Date: 20240419  
Docket: CA47506

Between:

**Baljit Kaur Lal**

Appellant  
(Defendant)

And

**Gagandeep Grewal**

Respondent  
(Plaintiff)

Before: The Honourable Mr. Justice Harris  
The Honourable Justice Griffin  
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated  
May 4, 2021 (*Grewal v. Lal*, 2021 BCSC 844, Chilliwack Docket S30771).

Counsel for the Appellant: D.M. Klassen

Counsel for the Respondent: P.D. Loewen

Place and Date of Hearing: Vancouver, British Columbia  
April 12, 2024

Place and Date of Judgment: Vancouver, British Columbia  
April 19, 2024

**Written Reasons by:**  
The Honourable Justice Griffin

**Concurred in by:**  
The Honourable Mr. Justice Harris  
The Honourable Madam Justice Horsman

**Summary:**

*A residential real estate transaction did not complete on the date set for closing in 2016. The purchaser sued for specific performance, or in the alternative, damages. The seller defended on the basis that the contract was unenforceable. By the time of trial, the purchaser had purchased a substitute property and sought only damages. The trial judge found that neither party complied with the time of the essence clause at closing, and the contract remained alive at trial. The judge ordered that a new completion date be set. The seller appealed.*

*Held: Appeal allowed.*

*The judge did not err in finding that neither party was ready, willing and able to close at the time set for completion of the contract and that this continued the contract until it was terminated. However, by her response to civil claim, the seller repudiated the contract. The purchaser accepted this repudiation by the time of trial, electing damages. The judge was in error to in effect order specific performance in these circumstances, especially more than five years after the original failed closing date. The judge's order is set aside, and the assessment of damages arising from the seller's breach of contract is remitted to the trial court.*

**Reasons for Judgment of the Honourable Justice Griffin:****Introduction**

[1] This case has to do with a contract of purchase and sale of a residential property, in which neither party took the steps necessary to complete the deal on the closing date in March 2016. The purchaser, Mrs. Grewal, then sued for specific performance, claiming breach of contract. The seller, Mrs. Lal, responded that the contract was unenforceable.

[2] Mrs. Grewal later purchased a replacement property and sought only damages at trial.

[3] In reasons for judgment dated May 4, 2021, the judge held that the contract continued to be in force up to and including trial, and ordered that a new date be settled. This was a remedy nobody sought.

[4] Mrs. Lal appeals from the trial decision.

### Analysis

[5] Mrs. Lal appeals on the basis that the judge erred in his approach to the time is of the essence clause, in finding that Mrs. Lal was not ready, willing and able to close at the time set for closing. She further submits that the judge erred in his remedy. I will address these grounds in turn.

#### **Did the judge err in finding Mrs. Lal was not ready, willing and able to close?**

[6] The parties entered into a contract of purchase and sale whereby the appellant Mrs. Lal agreed to sell her residential property to the respondent Mrs. Grewal. The closing date was extended to March 26, 2016, a Saturday of the Easter weekend, by way of an addendum signed by Mrs. Lal's husband who was acting on her behalf.

[7] There was a time of the essence clause in the contract. The contract also provided that the sale would be completed "at the appropriate Land Title Office".

[8] The purchaser bore all the costs of the conveyance. It is now accepted that this meant that Mrs. Grewal was to complete the transfer documents for Mrs. Lal's signature.

[9] The judge concluded that the Land Title Office was the place of closing, it would not be open for business on a Saturday, Easter Monday was a statutory holiday, and by operation of s. 25(2) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, that meant that the closing date was the first business day after March 26, 2016, which was Tuesday, March 29, 2016.

[10] Mrs. Grewal did not put her solicitor in funds until March 30, 2016.

[11] The judge found Mrs. Lal in default by "failing to make herself available to sign the Form A [transfer] on or before March 29": para. 139. In particular, the judge found:

[139] It seems to me that if one party to a real estate transaction conducts themselves in a way that makes it practically impossible for the other to

complete its obligations, then it would be unjust or inequitable to allow either party to insist on compliance with the time of the essence term. In this case, the defendant [Mrs. Lal] failed to make herself available to sign the Form A on or before March 29. It was the plaintiff's obligation to prepare this document and the plaintiff's failure to deliver the transfer documents to the defendant at her home made it impossible for the defendants to sign the documents before March 29. However, the defendant did not attend at the land title office on March 29, nor at the solicitor's office before, and cannot rely on the time of the essence clause in the agreement because she failed to sign the documents at the LTO.

[140] I am satisfied that neither party in this case met their obligations to complete this purchase and sale in accordance with the terms of the Contract. Most importantly, the place for completing the Contract was at the LTO and neither party attended. It would have been a simple enough matter for the plaintiff, who had already prepared a transfer form for the defendant's signature, to have attended at the LTO and obtained the defendant's signature to the transfer title; she could have paid the purchase price in accordance with the terms of the contract and received the signed transfer from the plaintiff. In my view, both parties were in essential default and the contract continued with either party retaining the option to reset time of the essence.

[Emphasis added.]

[12] Mrs. Lal submits that the judge correctly found that it was not her fault for failing to sign the transfer document before March 29 because it was not delivered to her. She says this means she cannot be faulted for any failure to sign the transfer document as at the closing date of March 26. Mrs. Lal objects to the judge's finding that the closing date was by, operation of law, March 29, 2016. She says that electronic filings can be made at the Land Title Office on a Saturday. She says the judge erred in finding her in default for not attending at the Land Title Office to sign the transfer document. Not only does she say no evidence was called on that point, she suggests her personal attendance at the Land Title Office was not required in the age of electronic filings.

[13] In my view, Mrs. Lal's arguments miss the point of the judge's conclusion that she did not attend at the Land Title Office.

[14] If Mrs. Lal were to rely on the time is of the essence clause as a basis for claiming that Mrs. Grewal breached her obligations and as a defence to enforcement

of the contract, Mrs. Lal had to show she was ready, willing and able to close on time.

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

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

[17] I note that Mrs. Lal's position on appeal is that since the judge did not rely on the clear title obligation, it is not open to the Court to rely on this evidence on appeal. In my view, there is no prejudice to Mrs. Lal in referring to this evidence, as she cannot be taken by surprise by it and it cannot be said she was denied an opportunity to respond to it.

[18] Mrs. Lal agreed in cross-examination that she did not hire a lawyer or notary or inquire what might be required of her to transfer the property. In neither direct examination nor re-examination did her lawyer ask her questions to draw out evidence that she had in fact taken some steps towards closing. Her evidence at trial was quite clear; she did nothing in support of the closing because she thought the deal had died in February 2016. At that time, she was contesting her knowledge of the extension of the closing date to March 26.

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

[20] These authorities rely on the earlier Ontario Court of Appeal case of *King v. Urban & Country Transport Ltd.* (1974), 1 O.R. (2d) 449, 1973 CanLII 740 (C.A.) in which Justice Arnup held at 455:

I think it is sufficiently established that a “time of the essence” provision, and non-compliance with it by a plaintiff, can be set up as a defence only by a party who was himself ready, willing able to close on the agreed date. The line of cases supporting this view includes *Foster v. Anderson* (1908), 16 O.L.R. 565; affirmed, without reasons, (1909) 42 S.C.R. 251; *Consolidated Press Ltd. v. Gibson et al.*, [1933] O.R. 458 (C.A.), [1933] 3 D.L.R. 64; *Thomson Groceries Ltd. v. Scott, supra*, and *Shaw & Shaw v. Holmes and Holmes*, [1952] O.W.N. 267 (C.A.), [1952] 2 D.L.R. 330. The exception is the case of the defendant who was precluded by the plaintiff's earlier default from being able to carry out his obligations. Such a defendant is not really in default at all.

There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; LeBel, J., quoted from and followed them in *Watts v. Strezos*, [1955] O.R. 615, [1955] 4 D.L.R. 126 (S.C.). If applied literally, they cannot be reconciled with cases holding that the contract still subsists if neither party is ready to close, and in my view cannot be applied at all in such cases.

Essentially, I think Mr. Laidlaw is taking the principle expressed in *Mills v. Haywood* (1877), 6 Ch. D. 196, and followed in the *Shaw and Shaw* case, *supra*. [at p. 270 O.W.N., p. 334 D.L.R.]: “Time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself ready, desirous, prompt and eager to carry out his agreement ...” and is seeking to turn it into the proposition that a plaintiff cannot get specific performance at all unless he has shown himself ready, desirous, etc. The very principle I have quoted is the one which defeats his argument, for the converse of the principle is equally true, viz., time may not be insisted upon as of the essence of the agreement by a litigant who has shown himself not to be ready, desirous, etc.

[Emphasis added.]

[21] Mrs. Lal argues that she fits within the exception noted in the passage of *King*, above, in that she was precluded by Mrs. Grewal’s earlier default from carrying out her own obligations and therefore she was not in default at all. In other words, because Mrs. Grewal did not provide her with a Form A transfer to sign, Mrs. Lal says she cannot be in default for failing to sign it. I am of the view that the analysis in *Shaw Industries* defeats this argument.

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

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

[24] In the present case, the facts found by the judge as to Mrs. Lal’s conduct, were very similar to those involving the seller in *Shaw Industries*. Mrs. Lal at a

minimum had an obligation to make herself available, in some way, to sign the transfer and she did not do so. She cannot stay silent, do nothing, and then argue that the time of the essence clause was an essential clause.

[25] Nor do I accept that the judge erred in inferring that the closing was to take place at the Land Title Office and that Mrs. Lal did not make herself available there. The contract stated that it would complete at the appropriate Land Title Office. While it is ordinary practice to make alternate arrangements, Mrs. Lal did not make any alternate arrangements. She was a witness at trial and did not testify that she went to the Land Title Office or did something else to make herself available to sign the transfer on March 26 or 29 or some other date. Again, the import of her evidence was that she felt the deal had expired in February, 2016.

[26] The judge's findings on the circumstances of the contract's completion and the failure of both parties in meeting their obligations, are findings of fact, reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

[27] I see no reason to interfere with the judge's finding that by doing nothing towards the completion of the deal, Mrs. Lal cannot rely on Mrs. Grewal's failure to complete on time as constituting a repudiation and a defence to enforcement of the contract.

**Did the judge err in his remedy of treating the contract as still alive?**

[28] After the closing date passed, Mrs. Grewal commenced her action for specific performance on April 1, 2016. The claim acted as notice that Mrs. Grewal wished to complete and was affirming the contract, much as in *Basra v. Carhoun* (1993), 82 B.C.L.R. (2d) 71, 1993 CanLII 1435 (C.A.) at para. 29.

[29] After receiving Mrs. Grewal's notice of civil claim, Mrs. Lal had an opportunity to agree that the contract was alive and to set a new closing date, and thereby avoid being found in breach of contract. Mrs. Lal did not do so.



[30] Instead, Mrs. Lal disclaimed the authenticity and enforceability of the contract in her response to civil claim filed April 22, 2016. In her response she stated that she had no intention of selling her property.

[31] As explained in *Domicile Developments* at 307, a party who terminates the transaction without having set a new closing date will breach or repudiate the agreement. It was clear from the content of Mrs. Lal's response to civil claim that she was repudiating the contract.

[32] In September 2017, Mrs. Grewal purchased an alternate residential property.

[33] The trial began in December 2019 but did not complete. The continuation of the trial was interrupted by the pandemic and other delays, but continued in February 2021.

[34] Through counsel, Mrs. Grewal advised the trial judge in her opening submission that she was no longer seeking specific performance although she still claimed damages. It was on the claim for damages that the submissions were somewhat murky. Counsel for Mrs. Grewal stated that the new home purchase by Mrs. Grewal was "in the same locality" and satisfied the "unique" qualities, and so that was the reason she was not seeking specific performance. However, counsel submitted that she was seeking "damages in lieu of specific performance, or alternatively damages for breach of contract".

[35] In closing submissions, the judge questioned Mrs. Grewal's counsel as to whether Mrs. Grewal had accepted the repudiation of the contract, and counsel advised that she had at least by the trial date but he would have to reflect on whether it was earlier. Counsel for Mrs. Grewal confirmed that she was not seeking specific performance because she had purchased a new home. He argued that damages should be measured as the difference between the purchase price of the Lal home, and the higher purchase price of the home Mrs. Grewal ultimately purchased in 2017.

[36] Counsel for Mrs. Lal argued that if there was liability, which was denied, at best damages would be for breach of contract as at the date of the failed closing, March 26 or March 29.

[37] In reasons for judgment dated May 4, 2021, more than five years after the deal collapsed, the trial judge found that the contract remained alive up to and including trial since both sides had waived the time of the essence clause by not tendering or calling on the other to complete. The judge ordered that the parties could set a new completion date.

[38] Neither party had sought this remedy.

[39] The parties subsequently appeared before the judge to settle the order. The judge ordered that the closing date would be 21 days after disposition of this appeal.

[40] In my view, the judge was in error in the remedy he ordered.

[41] The judge failed to appreciate the significance of the fact that by the time of trial, Mrs. Grewal had purchased another residential property, and had advised the court that she was no longer seeking specific performance. The judge's order was a form of specific performance in that it treated the contract as still alive and enforceable.

[42] The exceptional remedy of specific performance requires evidence that a property is unique to the extent that its substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 22, 1996 CanLII 209. Clearly a substitute property had been found.

[43] Furthermore, even if a contract subsists and a new date can be fixed for completion, either by one of the parties or by the court, that new date must be reasonable: *Toor* at paras. 76–79 citing *Shaw Industries* at para. 18.

[44] Thus, even if keeping the contract alive was an available remedy, and Mrs. Grewal had not made the concessions she did, I have difficulty agreeing that it

would be reasonable to fix a new date for closing more than five years after the original closing date failed, especially considering the volatility of real estate prices.

[45] In my view, what the trial judge ought to have done is focus on Mrs. Grewal's claim for damages, in light of the legal implications of Mrs. Lal's response to civil claim.

[46] When Mrs. Lal filed her response to civil claim she made it clear that she repudiated the contract. This gave Mrs. Grewal certain choices, as explained in *Semelhago*:

[15] Moreover, the claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered. In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement. As is elaborated in *McGregor on Damages* (13th ed. 1972), at p. 149:

Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages . . . .

Thus, the claim for specific performance can be seen as reviving the contract to the extent that the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered. In this way, a claim for specific performance has the effect of postponing the date of breach.

[Emphasis added.]

[47] As she was entitled to do, Mrs. Grewal kept her options open in her notice of civil claim, seeking either specific performance, damages in lieu of specific performance, or alternatively, damages for breach of contract. But ultimately Mrs. Grewal elected not to pursue specific performance. She purchased a replacement property. She could no longer argue that the property was unique.

[48] The judge erred in failing to recognize that by Mrs. Grewal's actions in finding a substitute property and electing damages at trial, Mrs. Grewal was no longer choosing to treat the contract as alive nor was she entitled to do so. She was, instead, accepting Mrs. Lal's repudiation of the contract. This meant that Mrs. Grewal's only option was to seek damages for breach of contract.

[49] The judge should have assessed those damages for breach of contract based on the evidence at trial. The judge erred in treating the contract as alive.

[50] It is not this Court's role to assess the damages nor have the parties asked us to do so. To the extent it assists the parties, however, it is appropriate for us to give guidance on the date of the breach of contract.

[51] Since neither party was ready, willing, and able to close, the date of breach was not the date of the failed closing. Further, the date of the breach was not the date when Mrs. Grewal found a substitute property, or the date of trial. Those may have been the dates that Mrs. Grewal accepted Mrs. Lal's repudiation of the contract, and communicated the same respectively. However, the date of Mrs. Lal's breach of contract was the date she filed her response to civil claim, repudiating the contract, which was on April 22, 2016.

### **Disposition**

[52] I would set aside the judge's order.

[53] I would order that Mrs. Grewal be entitled to judgment as against Mrs. Lal, with damages for breach of contract to be assessed as of the date of the breach, namely as of April 22, 2016.

[54] I would remit the damages assessment to the trial court.

“The Honourable Justice Griffin”

I AGREE:

“The Honourable Mr. Justice Harris”

I AGREE:

“The Honourable Madam Justice Horsman”