IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mandl v. Fong,*
2024 BCSC 1190

Date: 20240704
Docket: S136678
Registry: Kelowna

Between:

Jeffrey Anton Mandl

Plaintiff

And

Wai Ming Fong, Xiao Li Liu and Navdeep Singh Mahli

Defendants

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Plaintiff:	L.D. Nykolaychuk
Counsel for the Defendants:	M.S. Shergill
Place and Date of Hearing:	Kelowna, B.C. May 29–31, 2024
Place and Date of Judgment:	Kelowna, B.C. July 4, 2024

Introduction

[1] The plaintiff and the defendants are parties to a contract of purchase and sale (the "Contract") of a residential property located on Ethel street in Kelowna, British Columbia (the "Property"). The plaintiff is the vendor of the Property and the defendants are the purchasers.

[2] The Contract established a purchase price of $1,115,000 and a completion date of May 31, 2022. At the defendants' request, the plaintiff agreed to extend the completion date to June 15, 2022 and then agreed to a further extension to July 18, 2022.

[3] The defendants failed to complete the purchase of the Property on July 18, 2022. The plaintiff treated the defendants' failure to complete the purchase as a repudiation of the Contract and subsequently sold the Property for significantly less than the purchase price. The plaintiff seeks damages in this action for breach of the Contract.

[4] The defendants allege that the plaintiff made fraudulent or negligent misrepresentations in the property disclosure statement ("PDS"). They also allege that they relied on those misrepresentations in agreeing to the terms of the Contract. Based on these allegations, the defendants filed a counterclaim against the plaintiff for rescission of the Contract and damages.

Nature of the Applications

[5] The plaintiff has two applications before the court for determination. Both applications are summary trial applications brought pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[6] One of the plaintiff's applications is for judgment against the defendants for breach of contract and the assessment of damages for that breach. The plaintiff's other application is for an order dismissing the defendants' counterclaim.

History of the Action

[7] The plaintiff commenced this action for damages on March 14, 2023. The notice of civil claim seeks damages for breach of contract.

[8] The defendant, Navdeep Singh Mahli, filed a response to civil claim on June 16, 2023, denying the existence of the Contract. In the alternative, Mr. Mahli alleges that, contrary to an express agreement, the plaintiff failed to extend the completion date. Further, Mr. Mahli's response alleges that the plaintiff did not suffer any damages.

[9] The defendants, Wai Ming Fong and Xiao Li Liu, filed a separate response to civil claim on June 16, 2023. The response of these defendants mirrors the response of Mr. Mahli.

[10] The plaintiff issued his first list of documents on July 14, 2023. He produced an amended list of documents on November 15, 2023, and a second amended list of documents on February 13, 2024.

[11] The plaintiff filed his notice of application for summary trial on November 15, 2023. The original hearing date for the application was during the week of January 22, 2024. However, the court adjourned the application on December 22, 2023.

[12] In early January 2024, with the consent of the defendants, the plaintiff rescheduled his application for summary trial for the week of March 25, 2024.

[13] The defendants examined the plaintiff for discovery on January 30, 2024.

[14] On March 19, 2024, the defendants received leave to file a counterclaim in the action.

[15] As a result of the defendants' counterclaim, the parties agreed to reschedule the plaintiff's summary trial application to the week of May 7, 2024, so that the plaintiff could file an application with respect to the counterclaim.

[16] On March 28, 2024, the plaintiff filed his response to counterclaim and a summary trial application to dismiss the defendants' counterclaim.

[17] On May 24, 2024, the day before the summary trial hearing, the defendants filed an amended counterclaim. The plaintiff initially took objection to the filing of the amended counterclaim, but later withdrew that objection.

Suitability for Summary Trial

[18] The defendants resist the plaintiff's applications on the basis that they are not suitable for determination by summary trial.

[19] Rule 9-7(11) of the *Rules* provides:

> **Adjournment or dismissal**
>
> (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that
>
> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or

> (ii) the summary trial application will not assist the efficient resolution of the proceeding.

[20] The defendants submit that the issues in this action are not suitable for determination by summary trial because:

a) the allegations of fraudulent and negligent misrepresentation and the defendants' reliance on those misrepresentations make the issues in the action complex;

b) the defendants require further discovery in order to obtain the evidence they require for their counterclaim;

c) the credibility of the plaintiff is in issue; and

d) proceeding by summary trial could result in inconsistent findings of fact and would not assist the efficient resolution of the proceeding.

[21] In my view, there is nothing complex about the issues of fraudulent or negligent misrepresentation in this case. The only representations made by the plaintiff to the defendants are those representations contained in the PDS. Those representations are clearly set out in the document so there is no dispute about the nature of the representations made by the plaintiff. The only questions that arise are whether those representations were true and whether the defendants relied upon them to their detriment.

[22] These reasons for judgment will make it clear that the express terms of the Contract remove any complexity that may have existed on the issue of whether the defendants relied upon the representations in the PDS.

[23] With respect to the question of the plaintiff's credibility and the need for further discoveries, those issues do not make this action inappropriate for disposition by summary trial. The credibility of the plaintiff is not a significant issue in this action when considered in the context of the evidence presented by the parties. I find that I

can determine the factual issues in this case based on evidence that is largely undisputed.

[24] With respect to the need for further discovery, it is my view that further discoveries in this case will not reveal any evidence that will change the result. I reach this conclusion for the following reasons:

a) The findings of fact necessary to decide the issues in this action can be made on evidence that is largely undisputed;

b) Evidence with respect to whether the defendants relied upon the representations in the PDS is evidence that is uniquely within the knowledge of the defendants and not the plaintiff; and

c) If the defendants wished to challenge any of the plaintiff's evidence, they could have applied to cross-examine the plaintiff on his affidavit, but chose not to do so.

[25] With respect to the potential for inconsistent findings of fact, that potential does not arise in this case if both the application for judgment and the application to dismiss the counterclaim are decided in favour of the same party. The danger of inconsistent findings of fact will only arise if I grant one of the plaintiff's applications and dismiss the other. As will be seen in the balance of these reasons, the danger of inconsistent findings on these summary trial applications does not arise.

[26] Further, I find that the summary trial process in this action will efficiently and effectively result in a resolution of this proceeding in that these applications will finally dispose of all issues in the action.

[27] Rule 9-7(15) of the *Rules* provides:

> **Judgment**
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> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless

> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application…

[28] For the reasons that follow, I find that I am able, on the whole of the evidence before me, to find the facts necessary to decide the issues of fact or law in this case. Further, I am of the view that it would not be unjust to decide the issues on this application.

[29] Accordingly, both the plaintiff's application for judgment and his application to dismiss the counterclaim are suitable for disposition by summary trial.

The Contract

[30] The plaintiff listed the Property for sale pursuant to a listing agreement dated March 1, 2022. Based on the listing agreement, the listing agent was to list the Property from March 3, 2022 for a period of one year. The listing agreement established a listing price for the Property of $999,000.

[31] On the first day of the listing, March 3, 2022, the plaintiff received two offers to purchase the Property. One of those offers was the offer of the defendant, Navdeep Singh Mahli. The initial offer to purchase was for the sum of $1,113,000. After some further negotiation, the plaintiff and Mr. Mahli agreed upon a purchase price of $1,115,000.

[32] The date of the Contract is March 3, 2022. The plaintiff is the named vendor in the Contract. The defendant, Navdeep Singh Mahli, is the only purchaser named in the Contract. An addendum to the Contract dated March 11, 2022, added the other defendants, Wai Ming Fong and Xiao Li Liu, to the Contract. Wai Ming Fong and Xiao Li Liu concede that they are parties to the Contract as a result of the addendum of March 11, 2022.

[33] The Contract required a deposit of $30,000, which was paid by the defendants. The original completion date for the Contract was May 31, 2022.

[34] In addition to the usual terms of a contract of purchase and sale, the Contract included the following terms and conditions:

> 3. **TERMS AND CONDITIONS:** The purchase and sale of the Property includes the following terms and is subject to the following conditions:
> Unconditional Offer
> The buyer(s) waived their right to a “subject to financing” clause and are aware that their financial institution has not appraised the property and understand the possible ramifications of not including a “subject to financing” clause.
>
> The buyer(s) waived their right to a “professional inspection” (which includes but is not limited to a determination of the existence of any oil tanks on the property) and accepts the property ‘as is’ thereby relinquishing any claims of liability and responsibility against the seller(s), the seller(s) brokerages/representatives and the buyers representative/brokerages.
>
> The buyer(s) waived their right to obtaining and approving “fire property” insurance.
>
> The buyer(s) waived their right to a “property disclosure statement” and accepts the property ‘as is’ thereby relinquishing any claims of liability and responsibility against the seller(s), the seller(s) brokerages/representatives and the buyers representative/brokerages.

[35] The Contract also included a representation that the purchaser had not viewed the Property, and it also contained the following agreement with respect to representations and warranties at clause 18:

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

[36] It is common ground that the PDS for the Property was not incorporated into and did not form part of the Contract.

[37] Even though Mr. Mahli specifically waived the right to have a subject to financing clause in the Contract, after March 11, 2022, he began the process of

finalizing a mortgage for the purchase of the Property. In the process of finalizing the mortgage arrangements with the Royal Bank of Canada (the "Bank"), the Bank needed an appraisal to approve the mortgage. Mr. Mahli was advised by the Bank that the Bank's appraisal of the Property was significantly lower than the purchase price and, accordingly, the Bank would not finance the purchase.

[38] Mr. Mahli deposes that after the Bank refused to finance the purchase, he searched for other institutions to finance the Contract, without success.

[39] On March 26, 2022, Mr. Mahli's realtor, Jewan Brar, took three tradespeople to the Property for the purposes of an inspection. Mr. Brar deposes that a male, representing himself as the owner of the Property, told him that the air conditioning system on the Property was not working. Mr. Brar also deposes that during the inspection of the Property, he formed the opinion that the Property was not in a habitable state. However, Mr. Brar provides no details about how he arrived at that opinion.

[40] After the March 26, 2022, inspection of the Property by representatives of Mr. Mahli, Mr. Mahli sought and received a further extension of the completion date to June 15, 2022.

[41] The purchasers sought a second extension of the completion date on June 14, 2022. The plaintiff granted an extension on the condition that the defendants increase their non-refundable deposit by $20,000, and that both the original deposit and the additional deposit be released to the plaintiff. The defendants agreed to the terms for the extension of the completion date and the parties extended the completion date to July 18, 2022.

[42] At the end of June 2022, the defendants' realtor asked the plaintiff's realtor about the potential for a decrease in the purchase price which the plaintiff's realtor rejected.

[43] Further, on July 1, 2022, the defendants' realtor proposed that the plaintiff take back a mortgage of $150,000. In response to this suggestion, the plaintiff's

realtor requested details about the proposal, including whether there would be other security for the mortgage, but there is no evidence of any response.

[44] The defendants failed to tender the purchase price on the completion date of July 18, 2022. On July 19, 2022, counsel for the plaintiff advised the defendants' notary public that the failure to complete the Contract was a breach of the terms of the Contract, that the plaintiff accepted the defendants' repudiation of the Contract and that the plaintiff would be taking immediate steps to re-list the Property for sale.

[45] Absent the allegations of misrepresentations and based on the foregoing facts, which are not disputed, I find that the Contract was a binding agreement under which the defendants were required to purchase the Property for $1,115,000 on July 18, 2022. When the defendants failed to tender the purchase price on July 18, 2022, they were in breach of the Contract.

Property Disclosure Statement

[46] As part of the listing process, the plaintiff signed a PDS on March 1, 2022. The PDS contains a series of answers to very specific questions listed in the document. A PDS does not contain any general representations with respect to the condition of the Property. However, it includes representations with respect to specific aspects of the building.

[47] The defendant, Mr. Mahli, deposes that he received a copy of the PDS on March 1, 2022 from his realtor.

[48] Even though the Contract specifically waived the delivery of a PDS and does not specifically incorporate the PDS into the Contract, Mr. Mahli deposes that he relied on the contents of the PDS.

Allegations of Fraudulent and Negligent Misrepresentations

[49] The defendants claim rescission of the Contract on the basis that the plaintiff made fraudulent or negligent misrepresentations that induced them into the Contract. The only representations upon which the defendants could have relied are

the representations made by the plaintiff in the PDS. Other than the information in the PDS, the defendants received no additional information from the plaintiff.

[50] The representations in the PDS that are potentially relevant to this action are as follows:

Questions in the PDS:	**Response:**
Are you aware of any structural problems with any of the buildings?	No
Are you aware of any problems with the heating and/or central air conditioning system?	No
Are you aware of any moisture and/or water problems in the walls, basement or crawl space?	No
Are you aware if any damage due to wind, fire or water?	No
Are you aware of any roof leakage or unrepaired roof damage? (Age of roof if known:_____ years)	No
Are you aware of any problems with the electrical or gas system?	No
Are you aware of any problems with the plumbing system?	No

[51] In support of the defendants' position on the misrepresentations, Mr. Mahli makes the following statements that relate to the misrepresentation claims:

a) "I was happy to see that the Property Disclosure Statement showed that the Ethel property was in very good condition";

b) "I was also pleased that the listing stated that it was owner-occupied as I assumed that a property owner would take good care of their own property";

c) "On the Property Disclosure Statement, Mr. Mandl stated that there were no issues with the house on the Ethel property";

d) “Based on the Property Disclosure Statement, and the fact that Mr. Mandl had owned and lived on the Ethel property, I was comfortable making a subject-free offer to purchase the Ethel property”; and

e) “Based on the Property Disclosure Statement, I assumed that the Ethel property was in good condition, but I understood that it would most likely need minor repairs and renovations.”

[52] The first question is whether the representations in the PDS were untrue. The evidence of the plaintiff is that the responses he provided in the PDS were accurate when he completed the document. In particular, the plaintiff deposes that he was not aware of:

a) any structural problems with the building;

b) any problems with the heating and/or central air conditioning system;

c) any roof leakage or unrepaired roof damage; or

d) any problems with the plumbing system.

[53] The defendants did not tender any evidence from the tradespeople who inspected the Property to establish that the representations in the PDS were untrue.

[54] The defendants’ realtor, Mr. Brar, deposes that when he attended on the Property, the owner represented to him that the air conditioning system was not working.

[55] The plaintiff denies that he made such a comment. The plaintiff deposes that one of the tradespeople attending at the Property with Mr. Brar commented that the air conditioning unit looked old. The plaintiff responded by agreeing that it was old, but that it had been working in the previous year of 2021. The plaintiff also deposes that when he used the air conditioning during the summer of 2021, it was in working condition. He had not yet used the air conditioning in 2022 when he completed the PDS.

[56] The defendants also allege that the plaintiff must have known that there was roof leakage or unrepaired roof damage when he completed the PDS because he had the roof replaced after the defendants failed to complete on the Contract, but before the Property was re-sold.

[57] The plaintiff deposes that he had no knowledge of roof leakage or unrepaired roof damage when he signed the PDS. However, he acknowledges that the roof was old. When he received a home inspection report from a prospective purchaser after he re-listed the Property for sale, the plaintiff decided to make repairs to the roof and air conditioning system in order to secure a better selling price for the Property.

[58] The onus of proof on a summary trial application remains on the party asserting the affirmative of an issue to prove it on a balance of probabilities: *Gichuru* v. *Pallai,* 2013 BCCA 60 at para. 35 and *Miura* v. *Miura,* 1992 CarswellBC 113, at paras. 13–14. In the context of this case, the defendants have the burden to prove that the representations in the PDS were untrue and that they relied on those representations when they entered into the Contract with the plaintiff.

[59] In my view, the evidence tendered in these applications does not establish, on a balance of probabilities, that any of the representations in the PDS were untrue. However, it is not necessary to decide this question because the issue of whether the defendants relied on the representations will determine the outcome of the applications.

Reliance

Claims in Contract

[60] The success or failure of both of the plaintiff's applications depend upon whether the defendants relied upon the representations in the PDS in accepting the terms of the Contract. If the defendants relied on the representations in the PDS and if those representations induced them into the Contract, then the Contract will be rescinded. However, if the defendants cannot establish that they relied on the

representations, they are in breach of the Contract and liable to the plaintiff for damages.

[61] The defendants cannot rely upon the representations in the PDS as the basis for their claims of fraudulent or negligent misrepresentation under the Contract. Pursuant to the terms of the Contract, the defendants expressly waived their right to rely on the representations in the PDS and accepted the Property “as is”. By doing so, the Contract expressly provides that the defendants relinquished any claims of liability and responsibility against the plaintiff.

[62] Further, the defendants did not incorporate the PDS into the Contract and, as such, the PDS cannot form part of the representations, warranties or promises underlying formation of the Contract.

[63] The defendants submit that the Contract term waiving the defendants’ right to a PDS does not refer to the PDS signed by the plaintiff on March 1, 2022. The defendants argue that the waiver refers to PDS documents that the plaintiff may disclose in the future. In my view, such an interpretation is inconsistent with the terms of the Contract and with the wording of the waiver clause. The defendants’ waiver of the right to a PDS and, based on that waiver, their acceptance of the Property on an “as is” basis, indicates that the defendants are waiving their right to rely upon any PDS, including the PDS signed by the plaintiff on March 1, 2022.

[64] Further, the Contract does not contemplate the delivery of any future PDS. The Contract does not include a condition that the plaintiff deliver another PDS or that the Contract is subject to the delivery of another PDS. Without such a condition, it is inconsistent with the Contract to interpret the waiver of the right to a PDS in the way the defendants urge upon me. Therefore, I cannot accept the defendants’ submission on the effect of the waiver.

Claims in Tort

[65] The defendants submit that even if the PDS does not form part of the Contract, they may still rely upon the representations contained in it to form the basis

of a claim in tort for fraudulent or negligent misrepresentation. In support of this proposition, the defendants rely upon *413255 B.C. Ltd. v. Jesson*, 2006 BCSC 1070.

[66] In *413255 B.C. Ltd.,* Justice Gerow considered the effect of a clause identical to clause 18 of the Contract in which the parties agreed that:

> There are no representations, warranties, guarantees, promises or agreements other than those set out in this contract and the representations contained in the property disclosure statement if attached, all of which will survive the completion of the sale.

[67] Justice Gerow held that there was no evidence that the parties explicitly incorporated the disclosure statement into the contract of purchase and sale and, as a result, concluded that the purchaser's claim for breach of contract based on a failure to disclose defects in the building must fail.

[68] However, later in the decision, Gerow J. held that the fact that the parties had entered into a contract does not take away the right to sue in tort. However, the contract may limit the scope of the tort duty or may negate tort liability entirely. At para. 37 of the reasons, Gerow J. held:

> [37] The fact that the parties have entered into a contract does not take away the right to sue in tort, but the contract may, by limiting the scope of the tort duty or waiving the right to sue in tort, limit or negate tort liability. A party may sue in both contract and in tort except where the contract indicates the parties intended to limit or negate the right to sue in tort: *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

[69] In my view, the defendants expressed their intention to exclude their right to sue in tort for any misrepresentations in the PDS by waiving their right to receive a PDS, accepting the Property "as is", and specifically relinquishing any claims of liability and responsibility against the seller.

[70] Accordingly, I find that the defendants cannot maintain a claim, in contract or in tort, that they relied upon the representations in the PDS or that they were induced into the Contract by them.

[71] The defendants' allegations that they relied upon misrepresentations in the PDS and that they were induced into the Contract by them are not sustainable as a defence to the breach of contract claim, or as the basis for the counterclaim.

[72] Accordingly, I dismiss the defendants' counterclaim. The plaintiff will have damages for breach of contract in the amount that I will assess below.

Damages

[73] Justice Kirchner, in *Kaltenegger* v. *Cao,* 2022 BCSC 2203, set out the legal principles for assessing damages in cases in which a purchaser is in breach of a contract for the purchase and sale of real property. I have summarized those legal principles as follows:

a) As far as money can do so, the vendor is to be placed in the same position as the vendor would have been in had the purchaser performed the contract: Di Castri's *The Law of Vendor and Purchaser,* 3rd ed, Vol. 2, Ch. 17 ("Di Castri");

b) Recoverable damages must be reasonably foreseeable: Di Castri;

c) The measure of damages is generally the difference between the contract price and the re-sale price together with any actual costs incurred by the vendor as a result of the breach: Di Castri;

d) Absent a re-sale of the property, the measure of damages is the difference between the contract price and the market value of the property at the date of the breach which is usually the completion date: Di Castri;

e) The vendor must take reasonable steps to mitigate damages: Di Castri;

f) Any deposits paid by the purchaser must be taken into account: Di Castri;

g) While damages are usually assessed as at the date of the breach, the court has a discretion to choose a different date that would arrive at a more just result: *Kaltenegger* at para. 147 citing *Ranisavljevic* v. *Sathasivam,* 2020 BCSC 413 at para. 114;

h) In the case of real estate in a falling market, assessing damages as at the date of the breach may not fairly compensate the vendor who makes reasonable efforts to re-sell the property: *Kaltenegger* at para. 147;

i) In a falling market the court should award the vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the purchaser's breach of contract: *Cassidy* v. *Smith,* 2008 BCSC 1778, at para.29; and

j) What constitutes a reasonable time after the date of the breach will depend on the reasonableness of the vendor's actions in trying to sell the property: *Kaltenegger* at para. 148.

[74] After the defendants failed to complete the Contract on July 18, 2022, the plaintiff re-listed the Property for sale. The Property was sold on November 18, 2022, with a completion date of January 5, 2023. The sale price for the Property was $740,000.

[75] Unfortunately, by the time the plaintiff re-listed the Property, the real estate market had slowed. The defendants' real estate appraiser, Chris Roworth, confirms the existence of a falling real estate market in the spring and summer of 2022. In his report dated January 24, 2024, Chris Roworth shows sale price trends for residential properties in the Central Okanagan between January 2019 and July 2023. Those trends show a sharp increase in sale prices from the end of 2021 to the early part of 2022. This is the period in which the plaintiff sold the Property to the defendants.

[76] The prices then sharply drop from early 2022 to the summer of 2022. There appears to be a slight upward trend to the prices for a short time in the summer of 2022, but the general trend continues downward until 2023.

[77] The slowing real estate market affected the re-sale of the Property. The original re-listing price was $949,000. The plaintiff reduced the listing price to $899,000 on August 11, 2022.

[78] The plaintiff received an offer to purchase the Property for $800,000 with conditions on August 17, 2022. The plaintiff made a counter-offer to accept $879,000. However, the prospective purchaser did not accept the counter-offer.

[79] On August 21, 2022, the plaintiff received an offer to purchase for $850,000 conditional upon an acceptable home inspection. The plaintiff accepted the offer but the prospective purchaser did not remove the conditions after obtaining a home inspection. The home inspection indicated that the roof was leaking and needed replacement.

[80] In order to make the Property more attractive on the market, the plaintiff replaced the roof on or about September 12, 2022, for the cost of $20,118.

[81] The plaintiff reduced the listing price to $874,900 on September 27, 2022.

[82] The plaintiff replaced the air conditioning system on October 1, 2022 and then reduced the price again on October 25, 2022, to $799,000.

[83] A prospective purchaser made an offer on the Property on November 9, 2022, for the purchase price of $700,000 subject to conditions. After some negotiation, the plaintiff accepted a price of $730,000 but the prospective purchaser did not remove the conditions.

[84] The plaintiff received another offer on November 16, 2022 for $730,000. However, the prospective purchaser did not accept the plaintiff's counter-offer of $748,000.

[85] The plaintiff was eventually able to secure a sale of the Property for the sale price of $740,000. The sale completed on January 5, 2023.

[86] When the defendants failed to complete the Contract, the plaintiff found himself in a real estate market that was falling sharply. In this circumstance, I find that the assessment of the plaintiff's damages as at the date of the breach would not fairly compensate the plaintiff and would be unjust.

[87] The plaintiff made reasonable efforts to re-sell the Property by:

a) Reducing the listing price multiple times to generate interest in the Property;

b) Making repairs to the Property to enhance its marketability;

c) Trying to maximize his recovery by negotiating for higher sale prices; and

d) Accepting offers to purchase for higher prices than the eventual sale price that did not result in an unconditional agreement.

[88] On these facts, I find that the appropriate date on which to assess the plaintiff's damages is the completion date on the re-sale of the Property of January 5, 2023.

[89] The damages are measured by the difference between the Contract price of $1,115,000 and the re-sale price of $740,000.

[90] In addition, the plaintiff has incurred costs that flow from the defendants' breach and that were reasonably foreseeable. Those costs are:

a) Legal fees for preparing closing documents for the original sale of the Property to the defendants;

b) Electricity and natural gas costs between July 18, 2022 and January 5, 2023;

c) Pro-rated property taxes for the period July 18, 2022 to January 5, 2023;

d) Interest costs for the mortgage on the Property from July 18, 2022 to January 5, 2023.

[91] The plaintiff also claims the costs he incurred to replace the roof and the air conditioning system on the Property. I am not convinced that these costs were reasonably foreseeable. However, I am prepared to award these costs to the plaintiff as costs incurred to mitigate his damages.

[92] Plaintiffs who take steps to mitigate their loss may recover, as damages, the expenses incurred in taking those steps provided that the expenses are reasonable and were incurred in an attempt to mitigate damages: *Cellular Baby Cell Phones Accessories Specialists Ltd.* v. *Fido Solutions Inc.,* 2017 BCCA 50, at para. 74, citing *Southcott Estates Inc.* v. *Toronto Catholic District School Board,* [2012] 2 S.C.R. 675. The expenses incurred in a reasonable attempt to mitigate damages are recoverable even if the attempt to mitigate is unsuccessful: *Cellular Baby Cell Phones Accessories Specialists Ltd.*, at para. 78.

[93] The plaintiff replaced the roof and the air conditioning system on the Property to enhance the value of the Property and thereby reduce the damages payable by the defendants. It is unclear whether the repairs actually increased the value of the Property because of the impact of the falling market. However, the plaintiff undertook the repairs for that purpose and are recoverable by the plaintiff.

[94] The defendants submit that the plaintiff failed to take reasonable steps to mitigate his damages. The defendants' position is that the plaintiff should have mitigated his loss by:

a) re-negotiating the terms of the Contract with the defendants; or

b) retaining the Property until the real estate market corrected itself and property prices increased.

[95] In support of their position that the plaintiff should have re-negotiated the Contract with them, the defendants rely on *Mackenzie* v. *Dougherty,* 2017 BCSC 931. In *Mackenzie,* Justice Schultes referred to the Ontario Court of Appeal decision in *Glenarda Developments Ltd.* v. *Pinheiro*, 1998 CarswellOnt 4667, in which the Court pointed out that reasonable steps in mitigation "may include an obligation to accept a subsequent offer from a defaulting party." However, Schultes J. did not apply the comment of the Court of Appeal in *Glenarda.* At para. 46, Schultes J. held:

> [46] Finally, while there probably are situations in which accepting an offer from the defaulting purchaser is the most reasonable course of action for a vendor, this is not one of them. Absent some indication that no other buyers

> would be available within the essential timeframe, there was nothing unreasonable about the plaintiffs not wishing to have further involvement with a person who had decided that his valid contract with them was ultimately less important than his after-the-fact financial misgivings.

[96] Similarly, in this case I find that there was nothing unreasonable in the plaintiff not wishing to have further dealings with the defendants.

[97] Further, the Court of Appeal in *Hargreaves* v. *Brar,* 2010 BCCA 489, considered the issue of mitigation in a failed real estate transaction. In that case the respondent agreed to pay $845,000 for the property with a completion date of November 13, 2008. The purchaser failed to complete the purchase on the completion date. When the appellant re-listed the property, the respondent offered to purchase the property for $845,000 with a completion date of December 8 2008. The appellant refused the offer, sold the property for $670,000, and sued the respondent for the difference.

[98] In response to the trial judge's suggestion that the appellant could have pursued the respondent's offer to purchase the home for $845,000, the Court of Appeal held, at para. 18:

> The respondent, however, was in breach of the contract of purchase and sale. At no time did she produce any evidence that she was taking any steps to arrange financing so that she would be able to complete under a new contract at the end of December or on any other date. Nor did she pursue the suggestion that she increase the deposit, offer proof of her financial wherewithal, or offer security over other property, to demonstrate her ability to complete under a new contract. The appellant had no obligation to accommodate the respondent to relieve her from her breach of contract. The appellant's only obligation was to take reasonable steps to mitigate her loss.

[99] In this case, the defendants argue that the plaintiff failed to mitigate his loss by refusing one of the following proposals from the defendants:

a) To extend the completion date;

b) To accept a reduction of $50,000 on the purchase price; or

c) Accept a vendor takeback mortgage of 150,000.

[100] However, the defendants did not supply any information that they would be able to complete under these proposed conditions. As stated in *Hargreaves,* the plaintiff had no obligation to accommodate the defendants to relieve them from their breach of contract.

[101] I also find it unreasonable to require the plaintiff to retain the Property until the market recovered and real estate prices increased. If the market would increase and, if so, when, are questions that no one could answer without the benefit of hindsight. In the meantime, the plaintiff would be required to delay any plans he had for the sale proceeds and would incur the cost of maintaining the Property and paying the mortgage.

[102] In these circumstances, I find that the plaintiff satisfied his obligation to mitigate his loss by taking the steps to re-sell the Property outlined earlier in these reasons.

[103] Accordingly, I assess the plaintiff's damages as follows:

Loss on re-sale of the Property ($1,115,000 - $740,000)	$375,000.00
Legal fees for closing documents on original Contract	$1,879.00
Electricity and Gas fees from July 18, 2022 to January 5, 2023	$1,044.12
Pro-rated share of property taxes	$1,081.33
Interest paid on the Property mortgage	$4,094.16
Repair costs for roof and air conditioner	$29,822.15
Subtotal	**$412,920.76**
Less Deposit paid	($50,000.00)
Damages awarded	**$362,920.76**

Conclusion

[104] The plaintiff will have judgment against the defendants in the amount of $362,920.76.

Costs

[105] The parties have leave to make written submissions on the issue of costs if they cannot agree.

[106] The plaintiff will file his costs submissions and deliver a copy to the defendants within 14 days of these reasons. The defendants will file their costs submissions and deliver a copy to the plaintiff within 14 days of receiving the plaintiff's submissions. The plaintiff will file and deliver any reply submissions within seven days thereafter.

"D.K. Hori J."

HORI J.