COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Morden v. Pasternak,*
2023 BCCA 252

Date: 20230616
Docket: CA48236

Between:

Hilary (Kim) Morden

Appellant
(Defendant)

And

Artur Pasternak, Jadwiga Dobrowolski

Respondents
(Plaintiffs)

And

Gina Halinda, Brookside Realty Ltd.
d.b.a. Royal Lepage Brookside Realty

Respondents
(Third Parties)

And

Michael Morden

Respondent
(Fourth Party)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated March 16, 2022 (*Pasternak v. Morden*, 2022 BCSC 433, New Westminster Docket S184260).

Counsel for the Appellant:	C. Dennis, K.C. M.A.J. Ferreira
Counsel for the Respondents, Gina Halinda, Brookside Realty Ltd. d.b.a. Royal Lepage Brookside Realty:	S. Twining B.P. Piva

Place and Date of Hearing:	Vancouver, British Columbia May 18, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 16, 2023

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

Summary:

This appeal concerns a failed real estate transaction between the plaintiff vendors and appellant buyer. After delivering a signed contract and deposit cheque to her realtor, the appellant decided to abandon the purchase. The appellant admitted liability for the plaintiffs' damages resulting from the failed transaction, but sought indemnity from her real estate agent due to their failure to properly advise her about the risks of not proceeding with the deal. The trial judge found the respondent realtor's failures were not the cause of the appellant's loss, and dismissed her third party claim. The appellant argues the judge incorrectly drew an adverse inference based on a misapprehension about whether she had waived privilege over communications with a lawyer in the days surrounding the transaction. She says this error grounded the judge's causation analysis and was the basis for finding she possessed sufficient legal advice to avoid liability. The appellant also argues the judge erred in finding the vendors' decision to remarket their property did not amount to an acceptance of the appellant's repudiation, and that she could therefore still have performed her obligations until the vendors entered into a new contract of sale with another buyer. HELD: Appeal dismissed. The trial judge concluded that once the appellant and her husband had changed their mind about the purchase, they would not have completed the contract regardless of what was said to them or what legal advice they may have received. The judge's misapprehension of fact about the waiving of solicitor-client privilege was palpable but it was not, therefore, overriding. On the second ground of appeal, the onus of proving acceptance of a repudiation is on the party asserting it. The judge properly understood this and, considering all the circumstances, made no error in finding the defendant had failed to meet that onus.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises from a failed real estate transaction between the plaintiff vendors and the appellant buyer. The buyer, Ms. Morden, decided not to complete a binding contract for the purchase of a property. At trial, Ms. Morden admitted liability for the plaintiffs' damages resulting from her refusal to complete the purchase. However, she sought indemnity from her real estate agent and the real estate agency she worked with, Ms. Halinda and Brookside Realty Ltd (the respondent third parties), arguing she would not have incurred liability to the plaintiffs were it not for what the trial judge found were "significant failures" on the part of Ms. Halinda. The trial judge dismissed Ms. Morden's third party claim because he found that the deficiencies in Ms. Halinda's performance had not caused Ms. Morden's loss.

[2] Ms. Morden raises two grounds of appeal. First, she argues the judge incorrectly drew an adverse inference which, in turn, grounded the judge's causation

analysis and was the basis for his finding that the appellant possessed the legal advice she required to avoid liability. Second, she contends the trial judge erred in finding that it remained open to her to repair her breach by performing her obligations under the purchase agreement until the vendors entered into a new contract to sell the property.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] Prior to June 2016, Mr. and Ms. Morden had purchased more than 10 properties, some of which were rental homes and some for their personal use. They had engaged Ms. Halinda to assist them in purchasing a number of these properties. Mr. Morden would generally locate possible opportunities to purchase property, make decisions concerning those purchases and would communicate directly with realtors.

[5] On June 13, 2016, the plaintiffs listed their home in Maple Ridge, British Columbia (“the Property”). Mr. Morden first viewed the Property on June 18. He returned with Ms. Morden on June 19 and they decided to make an offer to purchase the Property. Ms. Halinda drafted a contract of purchase and sale which initially named both Mr. and Ms. Morden as purchasers. However, Mr. Morden was leaving for vacation in the days that followed and so his name was removed from the contract as he would not be present to sign documents. The Mordens nevertheless intended that Mr. Morden would be registered on title at the time the transaction completed and the proposed contract provided for that eventuality.

[6] Ms. Morden’s first offer to purchase the Property was for $920,000. It contemplated a $20,000 deposit and was presented to the plaintiffs’ realtor on June 20. The plaintiffs made a counteroffer, seeking a price of $935,000 with a deposit of $50,000, to which Ms. Morden agreed. Ms. Halinda delivered a fully executed contract to Ms. Morden on June 21, 2016 (the “Contract”) and Ms. Morden provided her with a $50,000 deposit cheque.

[7] On the evening of June 21, 2016, Mr. Morden decided to terminate the Contract. He communicated those instructions, by voicemail, to Ms. Halinda the next morning. He had previously deposited funds to their joint account for the deposit required by the Contract. However, he transferred funds out of that joint bank account before speaking to Ms. Halinda, thereby ensuring that if the deposit cheque was presented it would be returned with non-sufficient funds ("NSF").

[8] On June 22, the plaintiffs were informed by their realtor that Ms. Morden did not intend to complete the purchase of the Property. Over the following weekend, on June 25 and 26, 2016, the plaintiffs continued to offer the Property for sale at a price of $915,000. They received no offers and on June 30, 2016, they reduced the asking price to $850,000. By July 5, 2016, the plaintiffs had received three offers. They accepted the highest offer of $850,000 on the same day. That offer was subject to inspection by the prospective purchasers. After inspection, the prospective purchasers renegotiated the price and, on July 28, 2016, the plaintiffs accepted a reduced offer of $835,000 to complete the transaction.

[9] The plaintiffs claimed damages of $100,000, that being the difference between the Contract price of $935,000 and the eventual sale price at $835,000.

The Judge's Reasons

[10] The judge developed the background and history of the dispute. He described the parties' respective positions. A central focus of Ms. Morden's position at trial was that Mr. Morden was not her agent for the purchase of the Property and that Ms. Halinda had no authority to rely on his instructions. The judge dealt with this submission in considerable detail. He concluded that Mr. Morden had actual authority to act for Ms. Morden, that their acquisition of the Property was a joint purchase and that Ms. Morden intended for Mr. Morden to manage the transaction. The judge further found that Mr. Morden "[h]ad authority to make decisions and communicate those decisions to Ms. Halinda in their efforts to purchase the Property and then to repudiate their agreement…". The appellant does not question these findings.

[11] At trial, Ms. Morden argued the respondents owed her a fiduciary duty as well as a duty of care. The respondents accepted this but argued they had fulfilled their various obligations. The judge disagreed. He appears to have focused on the claim in negligence and found Ms. Halinda "displayed significant failures". He considered that "a reasonable realtor receiving instructions from a client to collapse the contract unilaterally would have provided basic advice concerning the impact of that decision on their legal rights and would have informed a client to immediately seek independent legal advice". The judge was ultimately "satisfied that Ms. Halinda and her real estate agency advised Mr. Morden to obtain independent legal advice about the strategy he could follow and the consequences stemming from his decision to collapse the transaction" but found that Ms. Halinda "did not clearly warn the Mordens in a timely way about the nature and extent of [the] risks [they faced] before communicating to the plaintiffs' agent". He concluded Ms. Halinda left the Mordens with a "false sense of security" about their circumstances and the consequences of their breach of contract and that the language she used in communicating with them about this issue "lacked the urgency and seriousness necessary to convey the level of risk they faced". The respondents accept these various findings.

[12] The respondents advanced two further defences that ground the present appeal. First, they contended their negligence had not caused the appellant's loss and, in particular, that Mr. and Ms. Morden had no intention of completing the transaction to acquire the Property regardless of what legal or other advice they might have received. The judge agreed, concluding that "[n]otwithstanding Ms. Halinda's negligence, Mr. Morden was giving instructions to Ms. Halinda and he would not have considered completing the transaction regardless of the advice he received ... The absence of advice directly to Ms. Morden would not satisfy the but for test when it comes to establishing Ms. Halinda's failures as causing Ms. Morden's loss".

[13] The judge made a further finding that is central to this aspect of Ms. Morden's appeal. On June 27, Mr. Morden and Mr. Quinnell, the principal of Ms. Halinda's real estate agency, spoke. The judge found that Mr. Quinnell "recommended that

Mr. Morden speak to a lawyer". On June 28, Ms. Halinda emailed Mr. Morden confirming Mr. Quinnell's advice that Mr. Morden "speak to a lawyer ASAP". On June 28, Mr. and Ms. Morden met with a lawyer named Mr. Riddell.

[14] Throughout the proceedings, including during examinations for discovery and well into the trial, the Mordens claimed solicitor-client privilege over the advice they received from Mr. Riddell. During Mr. Morden's examination in chief he was asked a question that prompted an inquiry into whether he had waived that privilege. Following some discussion, counsel for Ms. Morden confirmed he had instructions to waive the privilege she had claimed throughout. Nevertheless, the judge found that "Mr. Morden's refusal to waive solicitor-client privilege concerning his meeting with Mr. Riddell leads me to infer that the advice he received would have been unhelpful to the defendant". The appellant now argues, as noted earlier, that this misapprehension anchored the judge's findings on causation.

[15] The second, and somewhat related, defence advanced by the respondents was based on the assertion that it remained open to Ms. Morden, between June 22 and July 5, 2016 when the Property resold, to remedy her breach of the Contract. The judge agreed, finding that Ms. Morden "could have remedied her default regarding the deposit until the plaintiffs had sold the Property avoiding any loss exposure to the plaintiffs".

Issues on Appeal

[16] The appellant contends the judge erred in two respects:

i. He made a palpable and overriding error of fact when he drew an adverse inference based on a misapprehension of the facts; and

ii. He made an error of law and fact in finding that the plaintiff vendors had not accepted the repudiation of the Contract until they resold the Property.

Issue 1: The judge misapprehended the evidence

[17] I have identified that the judge misapprehended the evidence when he drew an adverse inference from the Mordens' refusal to waive privilege over their communications with Mr. Riddell. This error appears in the following portion of the judge's reasons:

> [111] The Mordens chose not to call the lawyer Mr. Morden consulted as a witness. Mr. Morden received advice from a solicitor on June 28, 2016 and Ms. Halinda communicated with Mr. Morden on June 29, 2016, inquiring into his meeting with the solicitor the day before. The solicitor, Mr. Riddell did not testify at this trial and his advice was not reported through Mr. Morden. The third parties contend the court can draw an adverse inference from the defendant's failure to call Mr. Riddell to testify: see *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 at para. 86. It was explained that Mr. Riddell was no longer practicing law, but Mr. Morden's refusal to waive solicitor-client privilege concerning his meeting with Mr. Riddell leads me to infer that the advice he received would have been unhelpful to the defendant.

[18] It is common ground that the issue of waiver of privilege was dealt with at some length on the third day of trial, following Mr. Morden's evidence regarding communications with Mr. Riddell. Trial counsel for the Mordens conceded that Mr. Morden (and Ms. Morden) likely had waived privilege. The court then stood down while counsel sought instructions. When court resumed, counsel informed the court that he had "instructions to waive privilege over the file and disclose it". Disclosure of the file ensued.

[19] There is no question that the judge's error is palpable in the sense that it is obvious. The appellant argues the error is also overriding because "[t]he adverse inference was the basis for his finding that the Mordens already possessed all of the legal advice they needed to avoid liability. That, in turn, permitted the trial judge to conclude that the Mordens (inferred) informed decision not to complete the transaction broke the chain of causation between Ms. Halinda's negligence and Ms. Morden's loss. Accordingly, without the adverse inference, the false sense of security created by [Ms.] Halinda's breach remained operative".

[20] The appellant relies on the following portions of the judge's reasons in support of this submission:

> [113] … I accept that after Mr. Morden's meeting with Mr. Riddell, he would have received fulsome advice concerning his and Ms. Morden's options in regard to the real estate contract…
>
> …
>
> [124] Nevertheless, Mr. Morden did obtain legal advice on June 28, 2016. In my view, at that time, Mr. Morden would have been in possession of all of the advice necessary to address this question…
>
> …
>
> [130] … In the but for analysis, the following factors persuade me that Ms. Morden would not have avoided responsibility for the plaintiff's damages because, *inter alia*, of the following factors:
>
> …
>
> c) Mr. Morden had a subsequent conversation with Mr. Riddell, during which he would likely have received advice that would have protected Ms. Morden. Ms. Halinda had sent information to Mr. Riddell.
>
> [Emphasis added.]

[21] The appellant further contends that the trial judge's reasoning was speculative as the trial judge had earlier said:

> [109] There is no evidence concerning the advice received by Mr. Morden from the solicitor, nor whether that information had been communicated to Ms. Morden.

[22] Notwithstanding this finding, the appellant contends that the trial judge, relying on the adverse inference he had drawn, found that Mr. Morden "would have received fulsome advice", that he "would have been in possession of all of the advice necessary", and that he "would likely have received advice that would have protected Ms. Morden".

[23] The respondents accept the judge misapprehended the evidence about whether the Mordens had waived solicitor-client privilege over their communications with their solicitor. They contend, however, that the evidence at trial and the inferences that could be drawn from that evidence supported the judge's conclusions about the content of the advice Mr. Morden received from Mr. Riddell.

[24] Alternatively, the respondents argue the judge found that Mr. Morden had no intention of performing the Contract regardless of what legal or other advice he

received. As such, Ms. Halinda's early failure to recommend the Mordens get legal advice or her failure to bring home the seriousness of their intended breach of the Contract did not cause the Mordens' loss.

[25] The parties agree, and the judge correctly identified, that causation is a necessary element of an action in negligence. Simply put, a defendant's negligence, without more, does not make out the cause of action. Instead, a defendant's negligent conduct must cause the plaintiff's loss. The onus lies with the plaintiff to establish causation on a balance of probabilities and on a "but for" basis: A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, ON: LexisNexis Butterworths, 2006) at 115–116; *Clements v. Clements*, 2012 SCC 32 at paras. 8–11.

[26] In my view, the respondent's alternative submission is a full answer to this first ground of appeal.

[27] That submission is based on different pieces of evidence, including that Mr. and Ms. Morden had a reasonably serious disagreement on the evening of June 21 when Mr. Morden insisted that he did not want to purchase the Property. It includes Mr. Morden instructing Ms. Halinda to cancel the Contract and then removing funds from their joint account so the deposit check would be returned NSF, all before he ever spoke to Ms. Halinda.

[28] It includes Ms. Halinda sending Mr. Morden the following email on June 28:

> Had a meeting with Bob [Quinnell] this afternoon. He says you really should contact a lawyer ASAP. I have emailed you the file so you can forward to your lawyer. Bob thinks the cost could be as much as 100K if they push. Might be in your interest to move forward with it. Do some updating and sell while the market is still moving up. In that case I would waive my side of the commission. You would still pay the selling side.
>
> [Emphasis added.]

[29] It also includes the following excerpt from the examination for discovery of Mr. Morden which, in turn, grounded an important finding made by the judge:

> [130] If I were to accept Ms. Morden's assertion that she did not receive a copy of the Contract nor a recommendation to obtain legal advice, I would have in any event concluded that her exposure to the plaintiffs for damages was not caused by Ms. Halinda's actions. In the but for analysis, the following factors persuade me that Ms. Morden would not have avoided responsibility for the plaintiff's damages because, *inter alia*, of the following factors:
>
> …
>
> d) Mr. Morden's testimony at trial and his examination for discovery evidence, concerning the possibility of completing the transaction after they made the decision to collapse the Contract, are telling. He was firm and unwavering; there were no circumstances under which he would have considered completing the contract with or without legal advice. He said:
>
> Q: And you didn't backtrack on the decision even after getting legal advice.
>
> A: I've already answered that. Is the – when I collapsed the deal with Gina [Halinda] – when I gave her direction that morning, that was the end of it. There was no change ever in the decision.
>
> Q: Even after you spoke with the lawyer?
>
> A: Never. I've already said that. I've said it three times. Never. Never change my mind one time. Didn't want the house.
>
> Q: Did you and Kim consider going through with the purchase and just reselling it?
>
> A: No
>
> Q: – so that the plaintiff wouldn't –
>
> A: No. I remember that there was a suggestion somewhere that came to us to do that. And it was, like, not even a consideration.
>
> Q: Not a consideration for you or Kim?
>
> A: No. No. The decision was made.
>
> Q: That consideration of buying – – going through with the purchase and reselling, that – you didn't consider that, even after speaking with lawyers?
>
> A: No.
>
> [Emphasis added.]

[30] I accept that aspects of the judge's analysis were tainted by his having misapprehended whether the Mordens had waived the privilege attached to the legal advice they received from Mr. Riddell and the various inferences he thereafter drew. Nevertheless, I am satisfied that, on a reading of the reasons as a whole, the judge

made numerous findings that were divorced from and independent of that misapprehension.

[31] The judge's finding that the Mordens had no intention of completing the Contract regardless of what was said to them or what legal advice they received was expressed repeatedly (for example, at para. 130 quoted above). The judge also said:

> [95] I note that Ms. Morden never told Ms. Halinda that she did not want to cancel the Contract and wanted to keep the deal in place. I find this was because she knew Mr. Morden had decided, with her concurrence, that they would not purchase the Property in any event of the risks…
>
> …
>
> [125] Ms. Morden also confirmed that at one stage Ms. Halinda recommended that she proceed to purchase the Property, but she declined this suggestion because was left with a feeling there were already threats of lawsuits, problems with the deposit cheque, and things were a mess. One of the reasons Ms. Morden did not consider purchasing the property after June 22 was her belief that the plaintiffs would not suffer any losses when reselling the property to someone else. I did not accept the Mordens' explanation that they were unclear about the status of their transaction after the deposit cheque had become NSF.
>
> …
>
> [137] Notwithstanding Ms. Halinda's negligence, Mr. Morden was giving instructions to Ms. Halinda and he would not have considered completing the transaction regardless of the advice he received…
>
> …
>
> [139] However, I am satisfied that whatever flaws or shortcomings existed in the advice given by the third parties, nothing about the Mordens' decision-making would have changed based on that advice.
>
> …
>
> [141] The Mordens were familiar with real estate transactions and the concepts of "collapsed deals"' they knew about the importance of "subject to inspection clauses" and knew legal advice could be important. I accept that Ms. Morden and Mr. Morden had been informed that they could have paid the deposit monies and kept the Contract alive. However, it is clear that Mr. Morden never entertained the option to keep the Contract alive and complete the transaction; for him, the deal was dead and he was not prepared to take any steps to ameliorate the situation.
>
> …
>
> [144] On the question of causation, it is clear to me the Mordens would have never contemplated completing this transaction and would never reconsider this decision.

> [145] Overall, I am satisfied that any shortcomings in advice given or not given by Ms. Halinda to the Mordens had no impact on their decision to abandon the purchase of the plaintiffs' Property. Ms. Morden's obligation to compensate the plaintiffs for their losses would have crystallized regardless of Ms. Halinda's actions and negligence.

[32] In my view, the judge's misapprehension of whether the Mordens had waived the privilege attached to the legal advice they received did not impermissibly inform his causation analysis and I would not accede to this ground of appeal.

Issue 2: Did the judge err in finding that the plaintiffs (vendors) had not accepted the repudiation of the Contract until they resold the Property?

[33] The second ground of appeal has several components. The appellant contends the judge erred in law by failing to assess whether the vendors accepted Ms. Morden's repudiation in light of all the circumstances. She emphasizes that the vendors began to remarket the Property and their evidence indicated they understood the Contract was "dead".

[34] She further asserts the trial judge erred in concluding both that the vendors' remarketing of the Property could not amount to an acceptance of Ms. Morden's repudiation and that the acceptance of a repudiation must always be communicated.

[35] The onus of proving acceptance of a repudiation is on the party asserting it, in this case, the appellant. Further, a trial judge's finding as to whether an innocent party has accepted a repudiation is a finding of fact requiring the appellant to establish a palpable and overriding error: *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 55; *Ginter v. Chapman*, (1967), 60 W.W.R. 385 (B.C.C.A.) at para. 17, [1967] CarswellBC 63, aff'd [1968] S.C.R. 560.

[36] The general legal framework that underlies this ground of appeal is straightforward and was explained in *Dosanjh v. Liang*, 2015 BCCA 18, a decision the judge referred to:

> [33] The trial judge summarized the general law with respect to a party's right to accept a repudiation of a contract at para. 50 of her judgment:
>
> > The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred

> to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philps* (1992), 1992 CanLII 570 (BC CA), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows:
>
> - A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
> - If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.
> - If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.
> - If the innocent party wishes to accept the repudiation, he or she must make his or her election known.
>
> Once made, the election is irrevocable.
>
> …
>
> [36] The judge then cited *Yukong Line Ltd. of Korea v. Rendsburg Investments Corporation of Liberia*, [1996] 2 Lloyd's Rep. 604. She also referred to the following passage from *Abraham v. Coblenz Holdings Ltd.*, 2013 BCCA 512:
>
> > [28] In my view, an innocent party is not required to communicate its acceptance of a repudiation immediately. An innocent party must have a reasonable opportunity to assess the circumstances it finds itself in, to assess its options, and to explore the possibility of resolving the situation. That is particularly so where, as here, the tenants had invested a substantial amount of money in the premises and were not willing to walk away without trying to negotiate a workable arrangement. What matters is whether, in all of the circumstances, the tenants acted reasonably in communicating their course of action so as not to prejudice the other party by inducing it to act as if its repudiation of the agreement had not been accepted: *Allen v. Robles*, [1969] 3 All E.R. 154 (C.A.).

[37] The general rule, as noted above, is that the innocent party must communicate its election to the repudiating party: John D. McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 735. This rule is not inflexible and there are limited instances where an innocent party's election can be inferred from the factual circumstances: *Brown* at paras. 46–47, citing *American National Red Cross v. Geddes Bros.* (1920), 61 S.C.R. 143 at 145.

[38] The judge, after referring to *Dosanjh* and its admonition that an innocent party need not make its election immediately and may be given a reasonable time to decide whether to affirm or repudiate a contract, said:

> [62] In this case, the first issue to be resolved is whether, and if so when, the plaintiffs accepted the defendant's repudiation of the Contract. Until that moment, the defendant could, if she wished, have paid the deposit and completed the purchase of the Property without incident.
>
> [63] The defendant argues that the plaintiffs "clearly accepted the repudiation" when they re-listed the Property and sued for damages. She contends that the breach entitling the plaintiffs to accept repudiation was the failure to pay the deposit.
>
> [64] The plaintiffs testified that once the deposit cheque had bounced, they understood the defendant had refused to buy the property; however, they say if the defendant had pursued buying the Property, the plaintiffs might have sold the Property to them. The plaintiffs never communicated to the defendant that they accepted her repudiation of the Contract, nor did they trigger the termination clause arising from non-payment of the deposit. This clause read:
>
> > In the event the buyer fails to pay the deposit as required by this contract, the seller may, at the seller's option, terminate this contract.
>
> [65] The plaintiffs did not consider the Contract as "at an end". They held an open house during the week of July 25-26, which the defendant contends was "likely" a communication that they accepted her repudiation. I reject the defendant's assertion on this point. The plaintiffs did not communicate their acceptance of the defendant's repudiation of the agreement, and an unaccepted repudiation does not end a contract: see *Dosanjh* at para. 33; *Norfolk v. Aikens*, [1989] B.C.J. No. 2256, 1989 CanLII 245 (B.C.C.A.) at page 26.
>
> [66] The plaintiffs were entitled to withhold communication of an acceptance of the repudiation for a reasonable period of time to assess the circumstances they found themselves in: see *Dosanjh* at paras. 36-37.
>
> [67] In the circumstances of this case, although the purchaser breached the Contract, it was not until the sellers entered into a new contract to sell the Property that their actions could be interpreted as acceptance of the repudiation: *E. & B. Mortgages Ltd. v. Skrivanos* (1980), 118 D.L.R. (3d) 139, 1980 CanLII 262 (B.C.S.C.) paras. 8-12. Simply marketing the property does not amount to an acceptance of repudiation, even when a buyer is specifically informed of the marketing efforts by the innocent vendor: see *Hydes v. Shaer*, [1992] B.C.W.L.D. 2295, 1992 CanLII 258 (B.C.S.C.) at paras. 48-54.
>
> [68] I find that the defendant could have acted to repair her breach by replacing the deposit cheque and performing the balance of her obligations under the Contract until such time as the seller entered into the new contract to sell the Property or head elected to terminate the contract due to the defendant's failure to pay the deposit on time. In this period, the absence of

> communication from the plaintiff to the defendant that they accepted her repudiation of the Contract meant the Contract was still alive and defendant was able to save the transaction. I find the plaintiffs did not accept the defendant's repudiation until they entered into a binding contract to sell the Property.

[39] Earlier the judge had also said:

> [43] The plaintiffs also said that if the defendant had offered to pay the deposit before they accepted the second offer, they might have completed the transaction at the higher price.
>
> [44] The plaintiffs never communicated their acceptance of the defendant's repudiation of the agreement to the defendant. Moreover, the plaintiffs' pleadings included an assertion that they were ready, willing, and able to complete the Contract at all times; this assertion has been admitted by the defendant in the response to civil claim.
>
> [45] As will be explained in these reasons, I find that the plaintiffs' acceptance of the defendant's repudiation of the Contract occurred by July 5, 2016, when they entered into the binding contract of purchase and sale with a new buyer.

[40] Between these two portions of the judge's reasons it is apparent that he correctly understood the question before him (para. 62). He understood and accepted the plaintiffs' evidence that they remained open to selling the Property to the appellant (paras. 43, 64 and 67), a proposition that was consistent with the language of the Contract as well as the pleading they advanced in support of their claim (paras. 44 and 64). He rejected, as a fact, the assertion that the open house held by the plaintiffs communicated they had accepted the appellant's repudiation (paras. 44 and 65). He further found, as a fact, that "in the circumstances of this case" it was reasonable for the vendors to take some time to assess their circumstances (paras. 66-67).

[41] I do not consider the vendors' evidence that they believed their deal with the appellant was "dead" and that they remained open to the appellant returning to the table to be inconsistent. The first assertion merely communicates the vendors' belief, as a practical matter, of what the appellant's repudiation likely meant. The second and more probative or important evidence confirmed they remained open to completing the Contract with the appellant.

[42] Further, read as a whole and in context, I do not understand the judge to have concluded that remarketing a property can never constitute acceptance, by a vendor, of a defaulting purchaser's repudiation. Rather, the judge found "in the circumstances of this case" remarketing the Property did not constitute such acceptance.

[43] I would not accede to this ground of appeal.

Disposition

[44] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Fitch"