IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1261682 B.C. Ltd. v. 617436 B.C. Ltd.,* 2025 BCSC 1155

Date: 20250620
Docket: S219925
Registry: Vancouver

2025 BCSC 1155 (CanLII)

Between:

1261682 B.C. Ltd.

Plaintiff

And

617436 B.C. Ltd., Inderjit Singh Virk, by his litigation representative, Dilrajpartap Singh Virk, Re/Max Commercial Advantage, 411824 British Columbia Ltd., and Canada Road Holdings Ltd.

Defendants

And

1261682 B.C. Ltd., 411824 British Columbia Ltd., and 617436 B.C. Ltd.

Defendants by Way of Counterclaim

Before: The Honourable J. Walker

Reasons for Judgment

Counsel for the Plaintiff:	D. Penner J. Chohan
Counsel for the Defendant, 617436 B.C. Ltd.	J. Dawson R. LaPlante
Place and Date of Trial/Hearing:	Vancouver, B.C. March 24 -26, 2025
Place and Date of Judgment:	Vancouver, B.C. June 20, 2025

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Overview

[1] The defendant, 617436 B.C. Ltd. ("617") assigned its right to purchase a property to two different purchasers. The plaintiff, 1261682 B.C. Ltd. ("126") was one of the prospective purchasers and paid a deposit of $500,000 to 617 in accordance with the terms of an assignment agreement. 126 did not end up purchasing the property and in this action seeks the return of the $500,000 deposit. 617 argues that 126 breached the terms of the assignment agreement, therefore, 617 is entitled to the $500,000 deposit.

[2] 126 also sued the other prospective purchaser, the owner of the property, a real estate agency and Inderjit Singh Virk ("Mr. Virk") who was a director of 617. The parties settled the claims, except 126 maintained its claim for the $500,000 deposit against 617 and Mr. Virk.

[3] On the first day of trial, 126 advised that it was discontinuing its action against Mr. Virk and were seeking to have the claim against him dismissed. Therefore, the remaining claim is solely against 617. The issue to be decided is whether 126 has proven that 617 breached the terms of the assignment agreement and consequently entitled to the return of the $500,000 deposit.

Background

[4] On May 20, 2021, 617 entered into a Contract of Purchase and Sale to purchase a property located at 12160 103A Avenue, Surrey, British Columbia ("103A Property") from 411825 B.C. Ltd. ("411"). The purchase price was $15,000,000 and the closing date was in January 2022. The Contract of Purchase and Sale between 617 and 411 included the following clause:

> Assignment:
>
> The Seller hereby gives written consent to the Buyer for the right to assign this contract in whole or in part to any third party without further notice to the Seller; said assignment not to relieve the Buyer from his or her obligation to complete the terms and conditions of this contract should the assignee default. The Buyer additionally holds the right to change/add/remove parties from this contract at anytime before the completion date.

[5] On August 28, 2021, 617 entered into an agreement with Canada Road Holdings Ltd. ("Canada Road") whereby 617 assigned the right to purchase the 103A Property to Canada Road (the "Canada Road Assignment Agreement").

[6] On October 18, 2021, 617 entered into an agreement with 126 whereby 617 assigned 126 the right to purchase the 103A Property to 126 in exchange for 3.5 million (the "126 Assignment Agreement"). The 126 Assignment Agreement contained a number of terms, including:

> (1) **Assignment** - The Assignor [617] absolutely assigns, transfers, end sets over to the Assignee [126] all of the right, title, benefit, and interest of the Assignor in, to, and under the Purchase Contract and the Property.
>
> (2) **Assignment Fee and Deposit-** the Assignee shall pay direct to 617436 B.C. Ltd the sum of:
>
> upon the removal of all Condition Precedents $300,000.00 for the reimbursement of the Deposit paid by the Buyer as per the terms and conditions of the Purchase Contract together with the sum of $200,000.00 as partial Assignment Fee.
>
> A further $500,000.00 partial assignment fee within 20 days of the removal of all Condition Precedents,
>
> the balance of the Assignment fee in the amount of $2,800,000.00 concurrently upon the Completion Date as defined in the Purchase Contract.
>
> All monies paid pursuant to paragraph 2 shall be by way of certified cheque or bank draft or solicitor's trust cheque. Should the Assignee fail to pay any of the amounts specified in paragraph 2 within the times specified therein, this Assignment Agreement will be terminated, all rights to the Purchase Contract and the Property will revert back to the Assignor. In addition the Assignor will be entitled to keep all amounts paid by the Assignee hereunder as a genuine pre-estimate of damages and without limitation to any other claims the Assignee has or will have with respect to damages or other remedies under application.
>
> (3) **Assignor's Condition Precedent** – The Assignor's obligation to assign the Purchase Contract is subject to the Assignee making all payments pursuant to paragraph 2 of this Assignment.
>
> (3a) **Assignee's Condition Precedent** - This Assignment is subject to the Assignee conducting and being satisfied with a feasibility study of the subject lands within 2 days of acceptance of this agreement.

[7] The 126 Assignment Agreement also contained the following clause:

> (5) Representations and Warranties - The Assignor makes the following representations and warranties (which will survive the closing of the transaction contemplated by the Purchase Contract):

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> […]
>
> The Assignor has not previously assigned or otherwise transferred any of its rights under the Purchase Contract;
>
> The Assignor has full power and authority to assign the Purchase Contract to the Assignee in accordance with the terms of this Assignment;

[8] 126 claims that, at the time the 126 Assignment Agreement was executed, it was not aware that 617 had already assigned its right to purchase the 103A Property to Canada Road. 617 asserts that 126 was aware that there was another assignment.

[9] On October 20, 2021, 126 waived the condition precedent contained in section (3a) of the 126 Assignment Agreement and paid $500,000 to 617’s lawyer, Mr. Randhawa. On behalf of 617, Mr. Randhawa accepted the money and placed it into his law firm’s (KS Law) trust account. These funds remain in KS Law’s trust account.

[10] On October 22, 2021, 617 accepted an $800,000 deposit from Canada Road. This amount was due under the Canada Road Assignment Agreement. There is no evidence that 126 was aware of this deposit.

[11] On October 23, 2021, 126 became aware that 617 may have assigned the right to purchase the 103A Property to another party. What led 126 to become aware of the possibility of another assignment is not in evidence before me.

[12] On October 28, 2021, 126’s counsel wrote to Mr. Randhawa seeking clarification as to when the second payment under the 126 Assignment Agreement was due.

[13] On November 2, 2021, Mr. Randhawa advised that he was no longer acting for 617. On the same day, Mr. Dawson advised he was being retained as 617’s new counsel and to direct any inquires relating to 617 to his attention.

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[14] The 126 Assignment Agreement required 126 to make a second $500,000 payment to 617 by November 9, 2021. On November 9, 2021, 126 delivered a $500,000 trust cheque to 617's counsel, on the following conditions:

> The funds are delivered to you on the undertaking to hold the funds in your trust account and only release them to your client, 617, after you have provided the writer with a written acknowledgment signed by 617 confirming:
>
> That 617 intends to proceed with the assignment of its interest in the CPS to 126 in accordance with the Assignment Agreement; and
>
> That the representations and warranties in paragraph 5 of the Assignment Agreement are true and correct as of November 9, 2021.

[15] On November 12, 2021, Mr. Dawson returned the cheque to 126 and rejected the undertakings. Mr. Dawson's letter stated:

> Section 2(b) of the assignment agreement, dated October 18, 2021 (the "Assignment") required 1261682 B.C. Ltd. ("126") to pay the sum of $500,000 direct to 617436 B.C. Ltd. ("617").
>
> 126 deliberately departed from the terms of the Assignment. Payment was not made to 617 directly. Further, the payment was conditional.
>
> 126 has breached the Assignment. 617 accepts its repudiation. The Assignment is terminated.

[16] On November 15, 2021, 126 commenced this litigation.

[17] On November 30, 2021, 126 received a copy of the Canada Road Assignment Agreement from counsel for Canada Road, and a copy of a cheque showing that Canada Road had made a $800,000 payment to 617 on October 22, 2021.

[18] On February 23, 2023, 126 and Canada Road entered into a settlement agreement, whereby:

(a) Canada Road agreed to pay $4,000,000 to 126;

(b) 126 agreed to relinquish its claim to the 103A Property; and

(c) 126 agreed to file a consent dismissal order dismissing this action against Canada Road and 411

[19] Pursuant to the settlement agreement 126 executed the following release:

> **For good and valuable consideration,** the receipt and sufficiency of which is acknowledged, 1261682 B.C. LTD. (the **"Releasor")** hereby releases Canada Road Holdings Ltd., 617436 B.C. Ltd. **("617"),** RE/MAX Commercial Advantage and 411824 British Columbia Ltd. **("411**") (the **"Releasees")** from any and all actions, causes of action, claims, demands, costs and damages, including, without limitation, equitable remedies such as specific performance, which the Releasor has against the Releasees by reason of or relating to the Releasor's rights under an Assignment Agreement dated October 18, 2021 between the Releasor and 617 in respect of a contract of purchase and sale for the property owned by 411 located at 12160 103A Avenue, Surrey, BC and legally described as 002-383-586 LOT "B" BLOCK 2 SECTION 30 BLOCK 5 NORTH RANGE 2 WEST NEW WESTMINSTER DISTRICT PLAN 454 (the **"Property"),** including any claim by the Releasor for costs in legal proceedings commenced by the Releasor in BC Supreme Court No. S219925, Vancouver Registry, PROVIDED THAT the Releasor does not release 617 for its claim to be reimbursed the $500,000 deposit paid to 617 on or around October 20, 2021.
>
> (the “Release”)

[20] 617 argues that in the event that 126 is successful in this action, the release prevents an award of costs and pre-judgment interest.

<u>The Law</u>

[21] Contractual terms can be classified in several ways including as either fundamental terms, warranties, or representations. The classification of a contractual term as a fundamental term is a term that is essential to the contract, such that a breach deprives a party of substantially the whole benefit they intended to obtain when entering into the contract: *Liu v. Yuen, et al.*, 2007 BCSC 302 at paras. 36-37.

[22] Whether a contractual term is a fundamental term, as opposed to a warranty or representation, will depend on the intention of the parties: *Liu* at para. 36; *Chan v. Dhaliwal*, 2025 BCSC 220 at para. 75

[23] In considering the intention of the parties, the court will examine the language of the contract, as well as the surrounding circumstances present at the time of contracting, to determine whether the particular promise goes to the root of the contract: *Liu* at paras. 35-36.

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[24] The classification of a contractual term determines the remedy that flows from its breach. Where a party breaches a fundamental term, the breach is so serious that it undermines the thing bargained for; accordingly, the innocent party has the right to either affirm or repudiate the contract. This is explained in *Contura Building Corporation v. 0772551 Ltd.*, 2018 BCSC 466:

> [97] A breach of a fundamental term of a contract entitles a party to treat the contract as terminated. Where there has been a breach or non-performance of an essential term of the contract, the innocent party must either elect to accept the repudiation as bringing the contract to an end or to enforce the terms of the contract. A party has a reasonable period of time to decide whether to affirm the contract or accept the repudiation: *Brown v. Belleville (City)*, 2013 ONCA 148 at paras 42–48; *Dosanjh v. Liang*, 2015 BCCA 18 at paras 33–37
>
> [98] In *Urbacon Building Groups Corp. v. City of Guelph,* 2014 ONSC 3641 [*Urbacon*], the Court considered the question of a fundamental, substantial or material breach of a CCDC stipulated-price contract and stated the following principles at paras. 141 and 142:
>
> > (a) the ability to terminate a contract for a fundamental breach is an "exceptional remedy";
> >
> > (b) it is only available in circumstances where the breach is so serious that it goes to the root of the contract, in the sense that foundation of the contract has been undermined because the thing bargained for has not been provided for; and
> >
> > (c) where the acts or omissions complained of are not at law substantial or fundamental breaches, then the other contracting party has only a remedy in damages.

[25] Conversely, the breach of a warranty or representation does not permit the innocent party to repudiate the contract. This was clarified in *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, at 731:

> . . . A warranty is a term in a contract which does not go to the root of the agreement between the parties but simply expresses some lesser obligation, the failure to perform which can give rise to an action for damages, but never to the right to rescind or repudiate the contract: Fridman, *The Law of Contract in Canada* (1976), p. 285. An affirmation at the time of sale is a warranty provided it appears on the evidence to have been so intended: per Buller J. in *Paisley v. Freeman* [(1789), 3 T.R. 51 (K.B.D.)]. No special form of words is necessary.

[26] In order for an innocent party to affirm a contract, following the breach of a fundamental term, the innocent party must have knowledge of the underlying facts

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that give rise to their right to choose to make such an election. A party will not be held to have affirmed a contract unless there is clear evidence that they intended to to do so: *Dosanjh v. Liang*, 2015 BCCA 18 at para. 35; *Lin v. Hong Kong Expo Holdings Ltd.*, 2024 BCSC 1314 at paras. 47-48.

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[27] Contracting parties are also generally required to perform their contractual duties honestly. This organizing principle of good faith was explained in *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847:

> [283] In *Bhasin v. Hrynew*, 2014 SCC 71, the Court recognized a "general duty of honesty in contractual performance", under which the parties to a contract must not "lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para. 73. This duty is not to be regarded as an implied contractual term. It is, rather, a "general" contractual duty that establishes a "minimum standard" of honesty in relation to the performance of the contract: *Bhasin* at para. 74.
>
> [284] The duty of honest performance is not to be equated with a duty of fiduciary loyalty. Thus, a contracting party has "no general duty to subordinate his or her interest to that of the other party": *Bhasin* at para. 86.
>
> [285] Nor does the duty of honest performance go so far as to create positive disclosure obligations. Nevertheless, the absence of such a positive obligation does not mean there is no obligation to correct a false impression created by a party's own conduct: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 38. The duty goes further than merely protecting against outright lies. It also protects against half-truths, omissions, and even silence in some cases, although the circumstances in which one contracting party will be found to mislead another are "highly fact specific": *C.M. Callow* at para. 91.

The Position of the Parties

[28] 126's position is that it did not breach the 126 Assignment Agreement and is entitled to the return of the $500,000 deposit. 126 argues that 617 was in breach of the 126 Assignment Agreement at the outset because 617's representations and warranties were false, and these representations and warranties were fundamental to the agreement. At the time 126 attempted to make the second payment to 617, it may have been aware of a possibility that 617 had entered into another assignment agreement, but it did not know it to be the case. Their attempt to make the second payment was not an affirmation of the contract because it did not know that 617's representations and warranties were false.

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[29] In the alternative, 126 asserts that 617 engaged in fraudulent or negligent misrepresentations, and 126 is entitled to damages in the amount of $500,000. 126 does not seek any additional damages flowing from the alleged misrepresentations.

[30] 617 argues that 126 breached the 126 Assignment Agreement when 126 attempted to pay the second payment to 617's lawyer, instead of to 617 directly, and by attempting to attach conditions to the payment. 617 asserts that 126 breached fundamental terms of the contract and 617 was therefore entitled to repudiate the 126 Assignment Agreement. 617 submits that 126 knew about the other assignment when it entered into the 126 Assignment Agreement, or at very least 126 knew about it when it attempted to make the second payment. As a result, 617 is entitled to retain the $500,000 deposit.

Issue

[31] The overarching issue in this case is whether 126 is entitled to the return of the $500,000 deposit or whether 617 is entitled to keep the deposit. To answer this question, I must determine which party breached the 126 Assignment Agreement, and the consequences that flow from the breach.

[32] In my view, the court must first consider whether the "Representations and Warranties" clauses in the 126 Assignment Agreement were fundamental terms. If the clauses were fundamental terms, then the false statements contained in the clause would constitute a breach that would entitle 126 to either affirm or repudiate the 126 Assignment Agreement.

[33] If the clauses were fundamental terms, then I must consider whether 126's actions affirmed the 126 Assignment Agreement. This requires me to consider whether 126 had sufficient knowledge of the false representations and warranties to affirm the contract.

[34] Lastly, I will address whether 126 breached the 126 Assignment Agreement, and if so, whether the alleged breach entitled 617 to accept the repudiation, terminate the contract, and retain the $500,000 deposit.

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Analysis

The impact of the false representations and warranties

[35] In the "Representations and Warranties" section of the 126 Assignment Agreement, 617 stated that it had "not previously assigned or otherwise transferred any of its rights under the Purchase Contract" and that it "had the full power and authority to assign the Purchase Contract to the Assignees". The Representations and Warranties also included a temporal element, namely:

> (5) **Representations and Warranties** - The Assignor makes the following representations and warranties (which will survive the closing of the transaction contemplated by the Purchase Contract)

[36] In these clauses, 617 assured 126 that, at the time of contracting, and at all times until the close of the transaction, it would be true that 617 had not assigned or otherwise transferred its rights to the 103A Property and that it had the full power and authority to assign the rights to purchase the 103A Property to 126.

[37] There is no dispute that these assurances were false at the time the parties entered into the 126 Assignment Agreement, and at all material times thereafter. The question is whether these assurances went to the root of the agreement, such that they were fundamental terms of the contract.

[38] In my view, these assurances went to the root of the contract. 126 bargained for the exclusive right to purchase the 103A Property. From the language of the 126 Assignment Agreement, it is clear that this exclusive right was important to 126 and that the parties intended the assurances contained in the "Representations and Warranties" section of the agreement to protect 126 from the risk that 617 may have previously transferred the right to purchase the 103A Property to another party.

[39] While 617 provided these assurances to 126, they were not true. At the time the 126 Assignment Agreement was entered into, 617 had already agreed to sell the exclusive right to purchase the 103A Property to Canada Road. 617's inability to assign the exclusive right to purchase the 103A Property to 126 deprived 126 of the very thing it bargained for and undermined the reason for the contract's existence.

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[40] Representation and Warranty clauses are designed to enable contracting parties to allocate risk as they see fit and courts should not intervene in the parties' risk allocation decisions: *0759594 B.C. Ltd. v. 568295 British Columbia Ltd.*, 2013 BCCA 381 at para. 41; *Greater Vancouver Water District v. North American Pipe & Steel Ltd.*, 2012 BCCA 337 at para. 34.

[41] Accordingly, I find that although those statements were contained in the "Representations and Warranties" section of the agreement, those statements went to the root of the 126 Assignment Agreement, and therefore were fundamental terms. The statements were untrue and 617's falsehood constituted a breach of the 126 Assignment Agreement and if 126 knew this, 126 had the option to either affirm or repudiate the contract.

Did 126 affirm the contract?

[42] 617 argues that 126 had knowledge of the Canada Road Assignment Agreement when 126 paid the first deposit due under the 126 Assignment Agreement on October 20, 2021. They submit that this is what motivated 126 to make the payment to counsel for 617 instead of to 617 directly as required by the 126 Assignment Agreement. When 126 paid the deposit, 126 affirmed the contract, even though they knew that there was another assignment.

[43] As an aside, 617 submits that 126's failure to pay the first deposit directly to 617 was a breach of a fundamental term of the 126 Assignment Agreement; nevertheless, 617 affirmed the contract by accepting payment. 617 was then entitled to insist that 126 comply strictly with the terms of the 126 Assignment Agreement, including insisting that the second payment be made directly to 617.

[44] On November 9, 2021, when 126 attempted to make the second payment to 617's lawyer, 617 asserts that there was no doubt that 126 had knowledge that 617 had also assigned the Purchase Contract to someone else. 617 asserts the fact that 126 delivered payment to counsel, and attempted to attach conditions to it, demonstrates 126's knowledge of another assignment.

[45] I am unable to agree with 617's submissions. In order to affirm a contractual breach, the innocent party must have sufficient knowledge of the details of the breach so that they can decide to either affirm the contract or accept the repudiation.

[46] In my view, the evidence establishes that 126 did not know that there was a second assignment on October 20, 2021 or on November 9, 2021. I find that by the time the second payment was due, 126 was only aware of the possibility of a second assignment, but that it did not know with certainty that another assignment existed, nor did it know the details of the second assignment.

[47] Evidence about 126's state of knowledge was primarily tendered though Mr. Harcharan Singh Gill a director of 126. Mr. Gill swore an affidavit that was tendered at trial. Mr. Gill deposed that the first time he learned that 617 may have entered into another assignment agreement was on or around October 23, 2021.

[48] Mr. Gill was cross-examined on his affidavit and it was suggested to him that on October 20, 2021, prior to making the first $500,000 payment, 126 was aware that 617 had entered into another assignment agreement but still made the first payment. Mr. Gill firmly denied this suggestion.

[49] Mr. Gill was cross-examined on some of the answers he provided in his examination for discovery where he appeared to acknowledge that the October 20, 2021 payment was made to a lawyer instead of to 617 directly was because 126 had knowledge of another assignment. However, in cross-examination, Mr. Gill explained that he was referring to the second payment, which was made to 617's counsel, because by then 126 was aware of the possibility that there was another assignment. He was clear that 126 did not know about the other assignment on October 20, 2021.

[50] I acknowledge that by looking at two questions and two answers from Mr. Gill's examination for discovery in isolation, provides some support for 617's position that on October 20, 2021, 126 had knowledge of another assignment. However, in my view, when the surrounding questions and answers are considered

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along with the remainder of Mr. Gill's evidence, his trial testimony was not inconsistent with his examination for discovery evidence. I accept Mr. Gill's evidence at trial that 126 did not know about the other assignment on October 20, 2021.

[51] In relation to the second payment, it was suggested to Mr. Gill in cross-examination that by that time, 126 knew about the Canada Road Assignment Agreement, which is why the payment was made conditional. Again, Mr. Gill denied that he had knowledge of the assignment, but he acknowledged that he was aware that it was possible, which is why 126's counsel made the payment to 617's counsel.

[52] I accept Mr. Gill's evidence that 126 did not know about the Canada Road Assignment Agreement on November 9, 2021. 126 suspected that there might be another assignment, but did not have actual knowledge of it.

[53] Mr. Gill's evidence is consistent with the other evidence before me, specifically the correspondence between counsel at the material times, which does not support 617's contention that 126 knew about another assignment.

[54] The conditions attached to the second payment show that 126 wanted to purchase the 103A Property, as contracted, but that it was concerned that it might not be able to. 126's decision to attach conditions that affirm the original agreement is not consistent with 126 having knowledge that 617 had already sold the right to purchase the 103A property and was therefore unable to complete the 126 Assignment Agreement, as originally contracted.

[55] A court will not find that an innocent party has affirmed a contract in the absence of clear evidence leading it to that conclusion: *Dosanjh* at para. 35.

[56] The evidence does not support a finding that 126 intended to affirm the 126 Assignment Agreement. Instead, I find that 126 did not have knowledge of the Canada Road Assignment Agreement until after 617 declined to accept 126's second payment. As 126 did not know that 617's representations and warranties were false at the time it tendered either of the deposits, their actions cannot be interpreted as an affirmation.

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[57] Not only is there insufficient evidence to find that 126 had knowledge of 617's breach, its request that 617 confirm its intention to perform the 126 Assignment Agreement, as contracted, is also inconsistent with affirmation.

[58] Accordingly, I find that 126 did not affirm 617's breach of the 126 Assignment Agreement.

Did 126 repudiate the contract?

[59] 617 argues that since 126 knew about the second assignment, 126 affirmed the 126 Assignment Agreement by tendering payment, 126's second payment concurrently affirmed and repudiated the agreement. 617 maintains that 126's attempt to make the second payment to 617's lawyer, rather then to 617 "directly", and attaching conditions to the payment were breaches of fundamental terms of the 126 Assignment Agreement. As a result, 617 asserts that it was entitled to accept 126's repudiation, terminate the 126 Assignment Agreement, and retain the deposit.

[60] I have already found that 126 did not know that 617 had breached the terms of the 126 Assignment Agreement until after 617 refused to accept the second payment; however, 617 also argues that even if 126 had no knowledge of the second assignment, that 126 nevertheless repudiated the contract by paying the deposit to 617's counsel and by making the payment conditional.

[61] I have also found that 617 breached the contract at the time it was entered into by falsely assuring 126 that it had not entered into any other assignment agreements. While 126 was not aware of this breach, at that point in time, 126 had the right to terminate the agreement and sue for damages. I decline to find that 126's actions repudiated a contract which had already been repudiated by 617's misrepresentations.

[62] 126 took steps to honour its contractual obligations by making the second payment on time, despite having concerns about whether 617 had misrepresented their ability to assign the Purchase Contract to 126. I am unable to find that 126's attempt to perform its contractual obligations constitutes a repudiation of the

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contract, especially in light of 617's ongoing breach, and the Supreme Court of Canada's recognition of the general duty of honesty in contractual performance.

[63] 617 breached both the 126 Assignment Agreement and its duty of honest performance. 617 provided critical assurances to 126 that from the outset, it knew were untrue. It then obfuscated its dishonesty by asserting that 126 breached the terms of the 126 Assignment Agreement. When 126 made the second payment on November 9, 2021, 617 did not respond in any way until after the deadline for the second payment had elapsed.

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[64] In my view, 617's actions were transparent attempts to shift the blame onto the innocent party to disguise its own dishonesty. It was in 617's interest to find a way out of the 126 Assignment Agreement given that two days after 126 made the first payment, 617 accepted $800,000 from Canada Road. It was also in 617's interest to assert that 126 was the breaching party, so that it could retain the initial $500,000 deposit paid by 126.

[65] I find that 617's assertion that 126 repudiated the 126 Assignment Agreement is unsupported by either the facts or the law. 617's conduct was a breach of its duty of good faith performance and served only to exacerbate its initial dishonesty. In sum, I find that 126 did not repudiate the 126 Assignment Agreement

Conclusion

[66] Given the foregoing, I find that 126 has proven that 617 breached the 126 Assignment Agreement and is not entitled to retain the $500,000 deposit.

[67] I order that the deposit be returned to 126.

Negligent and Fraudulent Misrepresentation

[68] In the alternative, 126 maintains that there is sufficient evidence to prove that 617 committed negligent or fraudulent misrepresentation. However, as 126 does not seek any damages beyond the return of the deposit, and since I have found that the

126 is entitled to the return of the deposit on other grounds, I decline to consider 126's alternative arguments.

Costs

The Release

[69] 617 argues that the Release 126 executed when it settled it's claims against the other defendants prevents 126 from obtaining costs and pre-judgment interest from 617. Although 617 was not a party to the settlement agreement, 126 acknowledges that 617 is entitled to the benefit of the Release. 617 argues that based on the terms of the Release, 126 agreed to limit its claim to a total of $500,000. The release includes the following:

> . . . any claim by the Releasor [126] for costs in legal proceedings commenced by the Releasor in BC Supreme Court No. S219925, Vancouver Registry, PROVIDED THAT the Releasor does not release 617 for its claim to be reimbursed the $500,000 deposit paid to 617 on or around October 20, 2021.

[70] In my view, the Release does not prevent 126 from obtaining costs or interest in their action against 617. As drafted, the intention of the Release was to prevent 126 from claiming any costs against the parties who it discontinued against at the time the settlement agreement was executed. The purpose of the carve out was to allow 126 to pursue its claim set out in their notice of claim against 617 for the $500,000 deposit. In their notice of claim, 126 sought costs and prejudgment interest. Therefore, costs and interest are included in its claim.

[71] I find that the Release does not preclude 126 from seeking costs or interest against 617, where the costs were incurred as part of the claim for the $500,000. I also find that 126 is entitled to pre-judgement interest.

Special costs

[72] In accordance with Rule 14-1(9) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, costs are generally awarded to the successful party, at Scale B. However, 126 submits that 617's conduct warrants an award of special costs.

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[73] An award of special costs is an exercise of the court's discretion: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 51. Special costs are designed to be both compensatory and disciplinary: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 9.

[74] A court should exercise restraint in awarding special costs, and the party seeking special costs must demonstrate exceptional circumstances that would justify an order of special costs: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.

[75] In *Gichuru v. Smith*, 2014 BCCA 414, para. 78, the Court set out the test for special costs from the earlier case of *Garcia v. Crestbrook Forest Industries Ltd.,* 1994 CanLII 2670 (BC CA), 119 DLR (4th) 740 at para. 17, in the following terms:

> ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[76] Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate: *Smithies* at paras. 133-134.

[77] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 11, rev'd on other grounds in 2012 BCCA 77, Justice P. Walker set out some of the circumstances that might lead to an order for special costs, including:

> a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> d) where a party made the resolution of an issue far more difficult than it should have been;

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> e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> g) where a party brings a proceeding for an improper motive;
>
> h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> i) where a party pursues claims frivolously or without foundation.

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[78] 126 submits that 617's actions warrant an award of special costs because the facts give rise to an inference that 617 intended to perpetrate a fraud, attempted to avoid its contractual obligations and breached its duty of good faith performance by selling the same right to purchase the property to two different parties. At very least, 617 insisted that 126 make the second payment despite knowing that the Canada Road Assignment was going ahead. 126 further argues that 617 pleaded defences which had no merit.

[79] In my view, 126 has not established the exceptional circumstances needed to justify an award of special costs. Neither 617's breach of the 126 Assignment Agreement, nor its breach of its duty of good faith performance, are sufficient to justify an award of special costs as pre-litigation conduct is not considered in the special costs analysis.

[80] Furthermore, I would not characterize the defences pleaded by 617 as meritless, reckless, frivolous or bound to fail. To a large degree, the resolution of this case turned on my factual findings relating to when 126 knew about the Canada Road Assignment Agreement. In light of the circumstances, including Mr.Gill's examination for discovery, I find that was a triable issue.

[81] Lastly, there is nothing before me to suggest that 617 engaged in reprehensible conduct during the litigation nor any evidence that it unnecessarily complicated the issues before the court. On the contrary, 617 cooperated with 126 to simplify the evidentiary issues at trial.

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[82] Accordingly, I decline to order special costs. As the successful party, 126 is entitled to its costs against 617 at Scale B.

Mr. Virk's costs application

[83] On the first day of trial, 126 informed the court that it was discontinuing its action against the defendant Mr. Virk. As a result, Mr. Virk submits that he is a successful party and presumptively entitled to his costs under Rule 14-1(9) of the *Supreme Court Civil Rules*. Mr. Virk submits that he should be awarded special costs because 126's allegations of fraud against him were unsubstantiated, and 126 knew that.

[84] The general rule that applies to costs following a discontinuance is set out in Rule 9-8 of the *Supreme Court Civil Rules*, which reads as follows:

> **Discontinuance after action set for trial**
>
> (2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.
>
> **Costs and default procedure on discontinuance or withdrawal**
>
> 4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing his or her response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.

[85] As Justice Grauer noted in *DLC Holdings Corp. v. Payne*, 2021 BCCA 31, paras. 61 and 62 ("*DLC*"), Rule 9-8 provides certainty, encourages appropriate assessment of the situation, and discourages continuation of doubtful cases. The plaintiff should have certainty as to the consequences of a discontinuation, including the fact that they will have to pay the ordinary costs of the defendant.

[86] In *DLC*, Justice Grauer, at paras. 62-65 determined that a court does not have jurisdiction to award special costs under Rule 14-1 following a discontinuance. A court is limited to awarding costs at a normal scale.

[87] As noted, it was not until the first day of this trial that 126 advised that it was discontinuing its claim against Mr. Virk. Mr. Virk's counsel, who is also counsel for 617, advised that he was made aware of 126's decision the previous day. That being said, 126 did not, and to my knowledge has not, filed a notice of discontinuance. Instead, 126 invites me to dismiss the claim against Mr. Virk.

[88] Given the holding in *DLC*, it is questionable whether I have jurisdiction to award special costs against 126; however, even if I did, I would decline to do so. In my view, Mr. Virk has not established exceptional circumstances warranting a special costs award.

[89] Special costs may be ordered where one party to an action maliciously or recklessly alleges without foundation that the opposing party has engaged in fraudulent behaviour; however not every case involving an unproven allegation of fraud will result in an order for special costs: *Chase v. Philcox*, 2021 BCSC 576 at paras. 21-23; *Roussy v. Savage*, 2020 BCSC 487 at paras. 17-21.

[90] Mr. Virk argues that 126 never had an intention to proceed with its baseless and egregious fraud claims against Mr. Virk. Mr. Virk further says that 126 maintained a position that was recklessly indifferent to the truth and the sworn evidence which confirmed the absence of any fraudulent intent on Mr. Virk's part.

[91] Based on the evidence before me, I am unable to conclude that 126's claims of fraud against Mr. Virk were reckless or unfounded. After all, on behalf of 617, Mr. Virk caused 617 to enter into two assignment agreements for the same property. While 126 ultimately decided not to proceed with their fraud and negligent misrepresentation claims against Mr. Virk, I am unable to conclude that proceeding with their claim until the first day of trial was reprehensible conduct, worthy of rebuke.

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[92] In accordance with Rule 9-8, Mr. Virk is entitled to his costs at Scale B.

Conclusion

[93] 126 has proven that 617 breached the terms of the 126 Assignment Agreement and is therefore entitled to the return the $500,000 deposit paid to 617's then lawyer on October 20, 2021. 126 is entitled to a declaration that the $500,000 is held in trust for the benefit of 126.

[94] Accordingly, I order that KS Law pay the $500,000 to 126.

[95] In accordance with s. 1(1) of the *Court Order Interest Act*, RSBC 1996, c. 79, I order prejudgment interest at the Registrar's rate on $500,000 commencing on October 20, 2021, the date 126's cause of action arose.

[96] 126 is entitled to costs at Scale B.

[97] 126's claims against the defendant, Inderjit Singh Virk are dismissed by consent.

[98] Inderjit Singh Virk is entitled to his costs at Scale B.

"J. Walker, J."

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