IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rahman v. Windermere Valley Property Management Ltd.,* 2025 BCSC 1221

Date: 20250627
Docket: S185869
Registry: Vancouver

Between:

Monie Rahman

Plaintiff

And

Windermere Valley Property Management Ltd. dba First choice Realty, Michael Douglas Warriner, Shawnna Marie Warriner, Justine Owen Brown, Stephanie Wanda Brown, Wade Ashley Huber, Jennifer Shirley Clara Farrel

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

The Plaintiff, appearing on her own behalf:	M. Rahman
Counsel for the Defendant Windermere Valley Property Management:	A. Peck
Place and Date of Trial/Hearing:	Vancouver, B.C. April 7–11, 2025
Place and Date of Judgment:	Vancouver, B.C. June 27, 2025

Table of Contents

I. OVERVIEW

[1] The defendant Windemere Valley Property Management Ltd. dba First Choice Realty ("First Choice" or the "Defendant") has filed two applications seeking to dismiss the plaintiff's claim. The first application, filed October 11, 2024, seeks to dismiss the claim by way of summary judgment pursuant to R. 9-6(5)(a) or (c) of the *Supreme Court Civil Rules*, or in the alternative, by way of summary trial under R. 9-7. First Choice's position is that the matter is suitable for summary determination, and that reviewing the pleadings and evidence reveals there is no genuine issue for trial. In the alternative, its position is that the Court is in a position to find the necessary facts to dismiss the claim, and it would not be unjust to do so.

[2] The plaintiff filed her response to that application on March 20, 2025. Her position is that the Defendant's application for summary judgment under R. 9-6 cannot succeed because the matter is not suitable for summary determination and genuine issues for trial exist. With regard to the application for summary trial under R. 9-7, her position is that this Court will be unable to find the necessary facts and it would be unjust to do so, based on the same reasons she argues it is unsuitable for summary determination.

[3] The Defendant's second application, filed March 25, 2025, seeks to dismiss the action because of the plaintiff's non-compliance with an order of the court pursuant to R. 22-7. Ms. Rahman filed an application and affidavit, both dated April 2, 2025, to adjourn the Defendant's R. 22-7 application.

[4] The claim involves Ms. Rahman's purchase of residential property located at 2136 Westside Park View in Invermere, British Columbia (the "Property"). She bought the Property with her husband, Shane Suman, but Mr. Suman is not a named plaintiff. The sale for that Properly completed on September 28, 2010.

[5] First Choice was Ms. Rahman's broker, and Eric Redeker was the managing broker of First Choice at all material times. Dave McGrath was Ms. Rahman's realtor with respect to finding rental accommodation in Radium Hot Springs in the summer

of 2010 before the Property was purchased. Neither Mr. McGrath nor Mr. Redeker are named individually, but they both filed affidavits upon which First Choice relies.

[6] Ms. Rahman seeks damages from First Choice for professional negligence, breach of contract, breach of fiduciary duty, and negligent or fraudulent misrepresentation.

[7] Ms. Rahman's allegations focus on the conduct of many of her neighbours throughout the time she lived at the Property, and a deer cull undertaken by Invermere. Her claim is primarily about what she asserts were First Choice's misrepresentations to her about the nature of the neighbourhood and the town, and that it owed her a duty to prevent the damage and distress she asserts were caused by her neighbours' behaviour and the town's wildlife policies. Specifically, she blames First Choice for having rented out or sold properties in the neighbourhood after she purchased the Property to persons who acted in a manner contrary to her stated preferences.

[8] As explained in this judgment, I find that the action must be dismissed pursuant to R. 9-6(5)(a) because it is manifestly clear that there is no genuine issue for trial. That is because the action was filed outside the applicable limitation period.

[9] In addition, I find the alleged negligent and fraudulent misrepresentations, even if they were made, were not statements about present or past facts and, therefore, those claims could not succeed. With regard to the claims in breach of contract, negligence and breach of fiduciary duty, I find that the pleadings fail to include material facts to support those causes of action.

[10] For all those reasons, I grant First Choice summary judgment dismissing the claim pursuant to R. 9-6 as there is no genuine issue for trial. For that reason, I find it unnecessary to conduct a summary trial pursuant to R. 9-7. However, I also find that the action could have been dismissed for Ms. Rahman's non-compliance with a court order pursuant to R. 22-7.

[11] Finally, this is one of the rare cases where special costs are warranted because of Ms. Rahman's pursuit of unfounded allegations of fraudulent misrepresentation and breach of fiduciary duty, as well as her conduct during the litigation.

II. PROCEDURAL HISTORY

[12] The original notice of civil claim was filed on May 18, 2018. It was amended on February 27, 2019, and further amended on February 28, 2024 (the "NOCC"). The matter is currently set for a nine-day trial commencing July 28, 2025.

[13] Ms. Rahman originally sued a number of defendants, but the claims against the other defendants have been resolved.

A. Court of Appeal Judgment

[14] This is the second application First Choice has brought for dismissal of the claim. In judgment indexed as *Rahman v. Windermere Valley Property Management Ltd.,* 2021 BCSC 118 [*Rahman BCSC*], Justice Gomery dismissed the claim on the basis that it was filed beyond the applicable limitation period. He concluded that it was clear to him that the action was statute-barred. He held that Ms. Rahman could not succeed in "establishing the running of time for her to bring an action against Frist Choice was postponed until May 18, 2012": at para. 62. Therefore, there was no triable issue, and the claim was dismissed pursuant to R. 9-6.

[15] The Court of Appeal overturned that decision in judgment indexed at 2022 BCCA 258 [*Rahman BCCA*]. The following paragraphs explain why:

> [14] The judge properly considered each of the specific misrepresentations that were particularized in the Amended Claim. He also considered the timing of when Ms. Rahman reasonably had the "means of knowledge" of these alleged misrepresentations. For ease of reference, I have repeated para. 31 of the Amended Claim:
>
> > 31. In order to induce the Plaintiff to purchase the Property, the Realtors made representations to the Plaintiff including, but not limited to:
> >
> > …
> >
> > (b) 2138 Westside was to be occupied by the Vendors, who were an elderly and retired couple without children, thus

> the Plaintiff did not need to worry about loud TVs, parties, music, and children in or around the Property;
>
> (c) the people that were purchasing properties in the Westside Development were the same as the Plaintiff in that they were people who wanted to get away from the noise and flurry of city life to find a rural, peaceful, and calm living environment; and,
>
> (d) the Westside Development and the town Invermere were deer friendly environment with clean air and in proximity to the natural landscape.

[15] Ms. Rahman does not challenge the judge's findings at paras. 56 and 57 of his reasons in relation to subparagraphs (b) and (d) of the Amended Claim respectively. She accepts that she knew before May 2012 that her neighbours, who resided at 2138 Westside, had moved away (subparagraph (b) of the Amended Claim). She similarly accepts that she was aware prior to May 2012 of a community movement to undertake a deer cull (subparagraph (d) of the Amended Claim).

[16] It is the judge's findings in relation to subparagraph (c) of the Amended Claim that give rise to difficulty. That subparagraph is directed to the fundamental character of the neighbourhood where Ms. Rahman purchased her home. She says she was told by the agents of First Choice that the residents in the Westside Development also sought a "rural, peaceful, and calm living environment."

[17] The source of the difficulty is the lack of consistency between aspects of Ms. Rahman's affidavit on the one hand, and the Amended Claim, Ms. Rahman's Application Response and what she told the judge at the hearing on the other hand. In particular, there is a lack of consistency between these statements and pleadings in relation to both when Ms. Rahman lived at the 2136 Property and her state of knowledge or awareness of various matters that are referred to in these two sources of information.

[18] The judge relied exclusively on Ms. Rahman's affidavit. The affidavit was the only sworn evidence before the judge. The judge properly observed that R. 9-6 applications are overwhelmingly determined on the basis of affidavit evidence. Ms. Rahman's affidavit, however, is the obvious work product of an unrepresented litigant. It is almost 250 paragraphs long. While I mean no disrespect to Ms. Rahman, the affidavit is rambling, disorganized and difficult to read. Much of the information it includes is irrelevant. Conversely, based on the Amended Claim and what Ms. Rahman told the judge in her in-court statements, the affidavit omits relevant and important facts.

[16] The Court of Appeal held the chambers judge erred in relying on the affidavit "without attaching significance to the fact that the affidavit appeared to be either incomplete or inconsistent with Ms. Rahman's other statements and materials, and

that Ms. Rahman was self-represented": at para. 35. Among other things, the Court of Appeal referred to courts' duty to self-represented litigants, citing *Charbonneau Estate v. Charbonneau,* 2021 BCCA 206 at para. 42, before continuing as follows:

> [32] These statements align with the guidance in *Pintea v. Johns*, 2017 SCC 23 where the Court endorsed the *Statement of Principles on Self-Represented Litigants and Accused Persons* (2006) authored by the Canadian Judicial Council: at para. 4. The Statement of Principles provides, among other things, at 4 that:
>
> > 1. Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.
> >
> > 2. Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> …
>
> [34] A trial judge has a duty to assist self-represented litigants in presenting their cases properly in order to provide a fair and impartial process and prevent unfair disadvantage to self-represented parties: *Burnaby (City) v. Oh*, 2011 BCCA 222 at paras. 35–36, leave to appeal to SCC ref'd, 34373 (8 December 2011), citing *Davids v. Davids*, [1999] O.J. No. 3930 at para. 36, 1999 CanLII 9289 (C.A.); *Williams v. Unrau Williams*, 2004 BCCA 577 at para. 27; *Morwald-Benevides v. Benevides*, 2019 BCCA 1023 at paras. 34–35. Of course, this duty is limited as it engages a delicate balance between the judge's duty to ensure a fair process and their duty to remain neutral both in appearance and reality: *Burnaby (City)* at paras. 35–36; *Child & Family Services of Winnipeg v. J.A. et al.*, 2004 MBCA 184 at paras. 32–35, leave to appeal to SCC ref'd, 30736 (30 June 2005).
>
> [Emphasis added.]

[17] At the same time, the Court of Appeal specifically found that the chambers judge was "not wrong to require evidence in sworn form before him", nor was he required to rely on the plaintiff's unsworn in-court statements: at paras. 41–42. Instead, the Court of Appeal concluded that the judge "had various options available to him that were consistent with R. 9-6 jurisprudence, that advanced the purposes of the Rules and that ensured that Ms. Rahman, as a self-represented litigant, was not unfairly disadvantaged because of her lack of legal training": at para. 42. The Court of Appeal outlines those options: adjourning the hearing to require Ms. Rahman to file further affidavit evidence; requiring Ms. Rahman to provide an affidavit following the hearing confirming her in-court statements; or having Ms. Rahman take the witness stand: at para. 43. In the Court of Appeal's view, none of those steps would

have prejudiced First Choice because "there was nothing further that First Choice could have said that was probative of Ms. Rahman's state of mind": at para. 43.

[18] Finally, the Court of Appeal cautioned Ms. Rahman:

> [47] I would conclude by observing that in *Beach Estate*, the Court commented that though the appellant had "largely prevailed on the application" the Court's reasons were "not to be taken to encourage the pursuit of this litigation." In *Beach Estate* the appellant was thought to "face very significant hurdles and undoubtedly future applications to strike or dismiss or a summary trial on the merits." I would echo these cautions in this case.

B. Subsequent Events

[19] After the Court of Appeal's decision, First Choice informed Ms. Rahman that it intended to bring another application for summary judgment and/or an application for summary trial. It sought Ms. Rahman's available dates. Ms. Rahman was opposed to proceeding with anything other than a full trial.

[20] Ms. Peck, counsel for First Choice, appropriately explained in written communication that Ms. Rahman would be free to argue at a hearing that the action was not suitable for any summary proceeding, and repeated that First Choice intended to set a hearing for its application.

[21] In her sixth affidavit dated October 7, 2024 (which was filed in support of her application to adjourn a five-day hearing that was to commence on November 4, 2024) as well as in her written material, Ms. Rahman stated that "[t]o prevent another summary trial by the defendant, [she] requested a Case Planning Conference [the "CPC"] on June 20, 2024", and she filed a case plan proposal seeking an order that the Court "reject" the proposed summary trial.

[22] In that same affidavit as well as in her written material and oral submissions at the hearing before me, Ms. Rahman repeatedly stated that the Associate Judge Bilawich, who presided at the CPC, "agreed with the plaintiff's position and denied the defendant's request to order a summary trial". That is not accurate. Instead, Associate Judge Bilawich explicitly stated there was no basis to preclude the Defendant from bringing an application for summary judgment or trial.

[23] In addition, Ms. Rahman was of the erroneous view that First Choice needed to leave to bring its application pursuant to R. 9-7(16). This is not correct because the application before Justice Gomery was not an application for summary trial under R. 9-7, but for summary judgment under R. 9-6.

[24] Ms. Rahman deposed in her sixth affidavit (and repeated in other written material) that she was in possession of "over 225 GB of data in the form of media files that are pictures and videos to support my case". At the CPC, Associate Judge Bilawich specifically cautioned Ms. Rahman that she could not expect to play a large volume of raw video during any hearing, whether it was a full trial or a summary proceeding. He informed her that she needed to edit the media considerably.

[25] First Choice advised Associate Judge Bilawich at the CPC that two days was a reasonable estimate for the hearing. Ms. Rahman insisted that she needed seven days for the summary trial. The current trial is set for nine days.

[26] Ultimately, First Choice set this hearing down for five days because it wanted to avoid the possibility of an adjournment based on Ms. Rahman's insistence that two days was insufficient.

[27] That hearing was set to begin on November 4, 2024. However, on the first day of the hearing, Ms. Rahman successfully applied for an adjournment. First Choice's application was reset for five days starting April 7, 2024, peremptory on Ms. Rahman. She was also ordered to file and serve additional materials by March 7, 2025.

C. Ms. Rahman's Evidence

[28] Ms. Rahman relied on three affidavits. One was her affidavit filed January 24, 2020; this is the same one she relied on before Justice Gomery, which the Court of Appeal aptly described as "rambling, disorganized and difficult to read", adding that "[m]uch of the information it includes is irrelevant" and "omits relevant and important facts": *Rahman BCCA* at para. 18. She also relied on her sixth affidavit, the relevant portions of which I have mentioned above.

[29] Ms. Rahman's only additional evidence was her seventh affidavit filed February 28, 2025, which stated:

> 4. The exhibit of this affidavit includes the list of media files and documents that I intend to present during the summary judgment/trial application hearing.
> 5. I have personal knowledge of each of the incidents depicted in the media files listed in the exhibit section.
> 6. The listed media files and other documents in the exhibit section are contained in two USB flash drives that I will submit or bring with me to the court during the summary judgment/trial hearing.

[30] The sole attachment to that affidavit is a three-and-a-half-page list of the names or identifiers of certain documents and media files, including affidavits, pleadings, and lists of documents ("Evidence List"). The attachment is not evidence, but a list of evidence Ms. Rahman wanted to rely on. However, she did not attach that evidence to her affidavit or produce it for this hearing.

[31] The media file descriptions on the Evidence List are virtually incomprehensible. As an example, this is one of the unnumbered paragraphs on the Evidence List:

> BROWNS LOD P1.001-P.017: [26 Videos] D20, Hammering1, Hammering2, Heat pump1, Heat pump2, JB Truck1, Justin Chasing Deer with truck, Justin Loud Machine 1, Justin Loud Machine, Justin ramp, Justin Truck 6am, Justin Truck Midnight, Justn [*sic*] Lawn Mow 8am, L5 (1), L5 (2), L16, L18, L22, L26, L28, March 30 2018 Morning Incident (7), March 30, 2018 Morning Incident (8), March 30 2018 Morning Incident (9), Snow Mobile, Stephanie Ramp, Throw stuff, [5 Photos] Drying muddy things on my fence, GV1, GV2, Storing stuff on my property, Throw stuff 1

[32] The USB flash drives referred to in para. 6 of her seventh affidavit could have been attached to her affidavit, but they were not. She claims she was told by court staff that she "could not" attach a USB flash drive. I find it difficult to accept that statement as USB flash drives are regularly filed as exhibits attached to affidavits in this Court.

[33] In any event, even if she genuinely believed she could not attach the USB flash drives to an affidavit, she did not send a copy to counsel for First Choice and

thus failed to comply with the court order to serve her material by March 7, 2025. She deposed that she would "submit or bring with [her] to the court" the USB flash drives for this hearing, but she attended the hearing remotely pursuant to a requisition filed in November 2024. She made no effort to have the USB flash drives delivered to the Court (or to opposing counsel) until I directed her to do so during the course of the hearing. Even then, she only supplied one copy.

[34] Despite Ms. Rahman's failure to properly adduce her own evidence for this hearing, First Choice — at its own time and expense — gathered as best it could the items in the Evidence List and included them in the application record. Those items comprise over 1,200 pages. Counsel for First Choice also copied the USB flash drive so it could be properly filed with the Court. Given the volume on the drive, that process took over a day.

[35] In order to try to bring some organization to her evidence, I asked Ms. Rahman to correlate the items on the Evidence List (especially the media files) to specific paragraphs in her first affidavit. I thank her for having done so. The list she created was marked as an exhibit for identification at the hearing.

D. Summary of the NOCC

[36] The Defendant's written submissions helpfully and accurately summarized the important aspects of the NOCC, including the claims made, the specific misrepresentations alleged, and how the plaintiff claims she learned that the representations made were allegedly false. I reproduce those passage below.

> 7. The Plaintiff pleads, at paragraph 22 of Part 1 of the [NOCC], that First Choice owed her the following duties:
>
> a) to act in the best interests of the Plaintiff;
>
> b) to provide undivided loyalty to the Plaintiff by protecting [her] negotiating position at all times, and disclosing to [her] all known facts which may affect or influence [her] decisions with respect to the purchase of a home;
>
> c) use reasonable care and skill in performing all assigned duties;
>
> d) to advise the Plaintiff to seek independent professional advice on matters outside of First Choice, Mr. McGrath and Mr. Redeker's expertise;

e) to honestly and promptly disclose to the Plaintiff all the known facts and circumstances regarding the prospective properties;

f) to not make representations regarding a prospective property to the Plaintiff fraudulently, negligently or recklessly not knowing whether the representations were true and accurate;

g) to seek and obey the instructions of the Plaintiff; and

h) to exercise reasonable care, skill and diligence in their dealings with the Plaintiff in respect to the purchase of a home.

8. Paragraph 31 of Part 1 of the [NOCC] sets out the specific misrepresentations alleged by the plaintiff:

In order to induce the Plaintiff to purchase the Property, the Realtors made representations to the Plaintiff including, but not limited to:

a) that they were knowledgeable about Invermere having been long-time residents of Invermere for 26 and 10 years, respectively;

b) 2138 Westside was to be occupied by the Vendors, who were an elderly and retired couple without children, thus the Plaintiff did not need to worry about loud TVs, parties, music, and children in or around the Property;

c) the people that were purchasing properties in the Westside Development were the same as the Plaintiff in that they were people who wanted to get away from the noise and flurry of city life to find a rural, peaceful, and calm living environment; and

d) the Westside Development and the town of Invermere were deer friendly environments with clean air and in proximity to the natural landscape.

9. Paragraph 34 of Part 1 of the [NOCC] sets out when and how the Plaintiff learned that the alleged misrepresentations were false:

a) Contrary to the Misrepresentations made by the Realtors, after the Plaintiff moved into the Property they [*sic*] learned, among other things, the following:

b) the Vendors are the owners of a land development company by the name of Rocky Mountain Land Co. Ltd. who owned multiple lots in the Westside Development;

c) the Vendors were actively working with the Realtor Defendants to sell lots and develop the neighborhood into a suburban residential area;

d) the Plaintiff later learned that the Vendors had plans to build a gas station in the Westside Development;

e) First Choice Realty was in the business of routinely renting out the homes in the Westside Development to transient individuals and families with multiple children, pets and vehicles;

f) from the summer of 2011 to November 2011, First Choice Realty rented 2134 Westside to a family that routinely smoked cigarettes and

marijuana on their front porch with smoke penetrating into the Property;

g) after November 2011, 2134 Westside was occupied by successive families until the property was purchased by the Brown Defendants in or around 2014;

h) in or around November 2011, the Vendors moved out of 2138 Westside;

i) between November 2011 to November 2016, 2138 Westside was occupied by three successive families before it was purchased by the Huber and Farrel Defendants in November 2016; and

j) the Westside Development and Invermere had a sizable population that was in favour of culling deer, including Mr. McGrath and the Vendors as proponents.

E. Chronology

[37] The Defendant's submission also sets out a helpful chronology of significant events. Ms. Rahman did not dispute the timing of the described events, or the events themselves, but she disagreed with First Choice about what inferences can be drawn from them, and what significance they have to legal claims in dispute. I reproduce the chronology below:

a) Summer of 2010 – The Plaintiff meets Mr. Redeker and Mr. McGrath in her search to purchase a property in Invermere, BC.

b) August 28, 2010 – Date the Contract and Purchase and Sale for the Property is made.

c) September 28, 2010 – Property sale completes. First Choice says any duties owed by First Choice, Mr. Redeker and Mr. McGrath to the Plaintiff regarding the Property end at that time.

d) July 2011 – Latest date the Plaintiff moves into the Property full time.

e) The Plaintiff discovers "issues" with the neighbourhood in or around August 2011 when her former neighbour Chad Wentworth and his family (the "Wentworth Family") moved into 2134 Westside Park View ("2134 ").

f) September 20, 2011 – Email from Plaintiff's husband to a third party expressing concerns regarding the Property, their neighbours and indicating an intention to commence legal proceedings against Mr. McGrath and Mr. Redeker.

g) November 2011 – Plaintiff and her husband demand the Wentworth Family be evicted. The Plaintiff understood First Choice was responsible for renting out 2134 to the Wentworth Family, and she and her husband were contemplating legal action against First Choice as a result at that time.

h) May 18, 2018 – Plaintiff files her Notice of Civil Claim.

i) December 2020 – First Choice files and serves Affidavit #2 of E. Redeker in support of an application to strike and, or alternatively, dismiss the Plaintiff's claims under Rules 9-5, 9-6 and 9-7 of the Rules of Court. Other defendants filed Rule 9-7 dismissal applications.

j) January 14, 2021 – The Plaintiff successfully applies to adjourn summary trial applications by all then-defendants on the basis that examinations for discovery have not been conducted and she has not had the opportunity to cross-examine the defendants' affiants.

k) January 14-15, 2021 – First Choice proceeds alone with an application to strike and, or alternatively, dismiss the Plaintiff's claim under Rules 9-5 and 9-6.

l) January 27, 2021 – the court issues reasons granting First Choice's application under Rule 9-6 on limitations grounds.

m) January-February 2021 – the Plaintiff engages counsel and files a notice of appeal of First Choice's successful dismissal.

n) Around March 2021 – The Plaintiff settles her claims against all defendants but First Choice.

o) July 25, 2022 – the Court of Appeal overturns the decision on Rule 9-6 on the basis that the chambers judge had not provided sufficient assistance to the Plaintiff to allow her to fairly present her case.

p) January 10, 2024 – The Plaintiff examines Mr. Redeker for discovery.

[38] To this chronology, I add that Ms. Rahman was examined for discovery on November 10, 2023.

III. THE LIMITATION DEFENCE

[39] This claim is governed by the former *Limitation Act*, R.S.B.C. 1996, c. 266 [*Former Act*]. Pursuant to s. 3(5) of the *Former Act*, any action not specifically provided for in another section of the *Former Act* must be brought within six years after the date on which the right to do so arose, absent some claim for postponement. None of the claims in the NOCC are mentioned elsewhere in the *Former Act*, so the applicable limitation period is six years.

[40] The conditions for postponement were set out in ss. 6(4)–(5) of the *Former Act* as follows:

> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that

> a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interest and taking the person's circumstances into account, to be able to bring an action.
>
> (5) For the purpose of subsection (4),
>
> > (a) "**appropriate advice**", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
> >
> > (b) "**facts**" include
> >
> > > (i) the existence of a duty owed to the plaintiff by the defendant, and
> > >
> > > (ii) that a breach of a duty caused injury, damage or loss to the plaintiff.

A. Legal Principles

1. Summary Judgment

[41] Rule 9-6(5) sets out the court's options when hearing an application under 9-6(4):

> (5) On hearing an application under subrule (2) or (4), the court,
>
> > (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
> >
> > (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
> >
> > (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
> >
> > (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[42] First Choice relies on both R. 9-6(5)(a) and (c). The distinction between those rules was summarized by Madam Justice Russell in *Edgar v. the British Columbia Institute of Technology*, 2015 BCSC 710:

> [9] On application for summary dismissal under Rule 9-6, evidence is not only admissible, but may be required. The analysis under Rule 9-6(5)(a) is concerned with whether, based on all the material, the claim is so factually without merit that it is manifestly clear that there is no genuine issue to be tried. If the court reaches that conclusion, it must dismiss the claim; there is no discretion. Alternatively, under Rule 9-6(5)(c), the court may consider whether, by answering a straightforward legal question, it could dispose of the claim. If the court is so satisfied, it has the discretion to dismiss the claim.

[43] For the purpose of this rule, no genuine issue exists where it is manifestly clear or beyond doubt that the claiming party is bound to lose. The policy underlying this rule is the idea that it is essential to the proper operation of the justice system that cases with no chance of success are weeded out at an early stage: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 10.

[44] Rule 9-6 allows for summary determination of a claim even when there are disputed facts in the pleadings that can be decided based on the evidence: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 paras. 35–36.

[45] It is also important to note that someone defending against an application for summary judgment must put their best foot forward with respect to the existence or non-existence of a material issue to be tried, which requires evidence: *Rahman BCCA* at para. 9, quoting with approval Justice Gomery's judgment in *Rahman BCSC* at para. 10; see also *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32.

2. Commencement and Postponement of a Limitation Period

[46] In *Rahman BCCA* at para. 11, the Court of Appeal noted that Justice Gomery correctly identified the appropriate test for postponement of a limitation period: *Rahman BCSC* at paras. 47–48, citing *Ounjian v. St Paul's Hospital*, 2002 BCSC 104 at para. 21; see also *Lorette v. Thorson Health Centre*, 2008 BCSC 552 at para. 71:

a) the identity of the defendant is known to the plaintiff;

b) the plaintiff has certain facts within her means of knowledge, including the facts set out in s. 6(5)(b)—the existence of a duty owed to the plaintiff by the defendant, and that a breach of a duty caused injury, damage or loss;

c) a reasonable person, knowing those facts and having taken the appropriate advice, a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success; and

d) a reasonable person, knowing those facts and having taken the appropriate advice, a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her interest and taking her circumstances into account, to be able to bring an action.

[47] In *Gadsby v. B.C. (Attorney General)* (15 June 2017), Vancouver S1610729 (B.C.S.C.), Justice Groves stated that the failure to meet a limitation period under the applicable deadline provided for in the legislation would satisfy a court that there is no genuine issue for trial justifying summary judgment under R. 9-6: at para. 37. As stated in *Kendall v. Bouchard*, 2020 BCSC 727, a claim may be suitable to be dismissed on the basis of a limitation period if there is sufficient and adequate evidence on the record to determine the appropriate limitation period and its expiry: at paras. 27–29.

[48] Justice Watchuk in *Bell v. Ries and Wigmore,* 2016 BCSC 309 at paras. 75–77, set out some principles that are directly applicable to this case, including:

a) whether a claim is barred by a limitation period is not a matter of discretion; it turns on whether the claims fall within the statute: citing *Grayson v. Canada Safeway Limited,* [1981] 2 W.W.R. 321 at 323,1980 CanLII 3065 (B.C.C.A.);

b) a cause of action arises in negligence on the date that the breach of duty occurs, not at the time that it was or ought to have been discovered: citing *Bera v. Marr*, 27 D.L.R. (4th) 161 at 170, 1986 CanLII 173 (B.C.C.A.);

c) the extent of the loss to the plaintiff need not be known for the cause of action to accrue; it accrues once some damage has occurred, the

tortfeasor has been identified even if the extent of the damage or type of damage is unknown: citing *Craig v. Insurance Corporation of British Columbia*, 2005 BCCA 275, which adopted *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 14, 1997 CanLII 325.

B. Relevant Evidence

[49] As noted earlier, First Choice took it upon itself to do its best to ensure that the material that Ms. Rahman wanted to present to the Court was included in the application record. The overwhelming majority of that material is unhelpful and irrelevant to the legal issues. Because of that, I will not summarize or review that material; I will focus on evidence that is relevant to the issues.

[50] With regard to First Choice's limitation defence, I find the following are the relevant facts:

a) Westside Park (where the Property is located) was a new development in 2010. The homes were quite close together, about 15 feet apart. It was obvious that car traffic would need to pass by the Property to reach other homes in the development.

b) There were families with children living in houses near the Property before Ms. Rahman moved in.

c) Ms. Rahman first met Mr. Redeker in the summer of 2010 when he assisted her to find rental accommodation in Radium Hot Springs.

d) Mr. Redeker had no role in Ms. Rahman's purchase of the Property.

e) In August 2010, Mr. McGrath was an independent contractor licensed to work with First Choice as a real estate agent. He acted for Ms. Rahman with respect to the purchase of the Property. His business association with First Choice ended in 2017.

f) While living in the rental property in Radium Hot Springs, Ms. Rahman found the neighbours to be disruptive to the point that she could no longer live there. She relocated to a hotel in Calgary soon after moving into the rental property.

g) After being shown the Property but before it was purchased, Ms. Rahman had seen a newspaper article regarding a proposed deer cull in Invermere.

h) Although she deposed at para. 17 of her first affidavit that she "slowly started to find out that [she was] misled and told misleading information about the house, the neighbourhood and the environment as a whole town", a holistic assessment of all the evidence (including the material listed in her Evidence List) clearly establishes that awareness had become firm very soon after July 2011.

i) A family (the "Wentworths") moved into a house neighbouring the Property in early August 2011. Ms. Rahman deposed she recalled August 6, 2011, was a "very loud day" because the Wentworths "were playing music very loudly with continuous smoking, screaming kids running around as well as adults talking very loudly among themselves … as if they were having a party that lasted late into the night".

j) Ms. Rahman left for Edmonton on August 7, 2011, and came back three weeks later and was "shocked" because of the lights and noise coming from the Wentworths' home. She "immediately realized that this family of renters had turned into a nightmare for [her]".

k) At her examination for discovery, Ms. Rahman confirmed that she first discovered issues with the neighbourhood in or around August 2011 when the Wentworth family moved into the neighbourhood. She also confirmed that she had significant problems with that family.

l) On Ms. Rahman's behalf, her husband raised these issues in emails and went so far as to threaten legal action against First Choice and demand that the Wentworth family be evicted. Ms. Rahman confirmed at her discovery those emails were sent no later than November 2011.

m) In one of the emails sent to Mr. McGrath and Mr. Redeker dated September 12, 2011, Ms. Rahman's husband wrote that the situation with their neighbours had "reached a point where we are no longer able to live our day to day normal life". The email lists the reasons he made that statement. He also wrote that "[t]his is not the kind of environment we had in mind when we decided to live in Invermere" and that he and Ms. Rahman "were left with no other choises [*sic*] but to seek every possible avenues including seeking legal remedies against all parties responsible for creating this situation".

n) In another email Ms. Rahman's husband sent to Mr. McGrath and Mr. Redeker dated November 4, 2011, he wrote that they had suffered "mental/physical anguish as a result" of the rental to the Wentworths. He added that their experience with the Wentworths "has taught us that since thse [*sic*] houses are within very close proximity of one another, the activities of the residence of one house can adversely affect the living conditions of the other … [and w]e will be severely affected by anyone" living in neighbouring properties who are "loud, party people, with loud and unruly children, smokers, too many members in the family, loud cars or trucks etc." He demanded First Choice give notice of the Rahman's views to future renters or buyers, and "[i]f any residents are of this nature, we would have no choice but to seek legal remedies against them" but also "[i]n the case of renting these properties, the responsibility would go to the First Choice Realty and the owner of the property as well".

o) At her examination for discovery, Ms. Rahman confirmed that although her husband wrote the emails, she was aware of and agreed with their content.

p) Other facts confirmed at her discovery relevant to her awareness of the character of the neighbourhood included:

i. she was first aware that First Choice was in the business of routinely renting out homes in the Westside development to transient individuals and families with multiple children, pets and vehicles when she started living at the Property;

ii. she lived at the Property full time between July 2011 and at least early February 2012. This is consistent with her first affidavit where she deposed that she started living in the Property “on a more permanent basis” in July 2011;

iii. she saw First Choice showing homes in the area to purchasers and/or tenants by no later than November 2011; and,

iv. in June 2011, she was aware of a family living close by other than the Wentworths who were loud and disruptive.

C. Analysis

[51] As noted, a fundamental feature throughout Ms. Rahman’s claim is the assertion that First Choice is liable for misrepresenting to her the characteristics of the neighbourhood either before or when she purchased the Property.

[52] Both parties and this Court have the benefit of the Court of Appeal’s judgment, which specifically identified gaps in Ms. Rahman’s evidence relevant to the postponement of the applicable limitation period. In addition, this Court has the benefit of more evidence than was before Justice Gomery because, among other things, Ms. Rahman was examined for discovery on November 10, 2023.

[53] The Court of Appeal viewed the record as incomplete as it related to Ms. Rahman’s allegation that she "slowly started to find out that [she was] misled", and the apparent inconsistency about where she was living before and after July

2011. The Court of Appeal saw those gaps and/or inconsistencies as directly relevant to Ms. Rahman's state of knowledge of the possible existence of her claim.

[54] I am satisfied that those gaps have been resolved in the record before me.

[55] First Choice contends that the limitation period began to run no later than November 2011, which would mean that the limitation period expired in November 2017. Since the NOCC was filed after that time on May 18, 2018, First Choice submits that the claim is statute barred.

[56] I find the evidence clearly supports this position.

[57] Ms. Rahman admits that she lived in the Property full time between July 2011 and January 2012. However, in her written material she downplays the evidence about her complaints about the Wentworth family. She submits her confirmation that she had problems with them did not mean that she had discovered issues with "the neighbourhood". She argues in her response to application that she believed her issues with the Wentworths were a one-off problem and she "did not get a chance to assess the neighbourhood at that period because she was so tied up dealing with the Wentworth family issues."

[58] That submission is not evidence. But even if she had made that statement in an affidavit (and I pause to note she had every opportunity to do so), it would not be sufficient to postpone the limitation period. Such a statement would confirm that Ms. Rahman had some information about the neighbourhood, even if she claimed to have been too distracted to correctly interpret it. That does not meet the postponement test in the circumstances.

[59] Moreover, that position is contradicted by objective and contemporaneous evidence, including the September and November emails referred to above. In those emails sent to Mr. McGrath and Mr. Redeker — the contents of which Ms. Rahman was aware — specifically put First Choice on notice that the Rahmans would take legal action against First Choice for disruptions due to unruly neighbours.

[60] Moreover, I do not accept the notion that the disruptions caused by the Wentworths "distracted" her as to the character of the neighbourhood. That is because the complaints she and her husband raised about the Wentworths are identical to the general complaints they had with the nature of the neighbourhood.

[61] I find that Ms. Rahman's statement in her response that she did "not get a chance" to assess the neighbourhood does not genuinely reflect the views she held in the fall of 2011. I emphasize that her statement in the response is not evidence, and as such, this does not represent an inconsistency or gap in the evidence. In my view, the statement in her response is most probably the result of her minimizing her awareness of the conditions in the neighbourhood in 2011. I prefer and place more weight on the emails, which provide objective, clear, and contemporaneous evidence about her state of mind in late 2011.

[62] Even if I had accepted Ms. Rahman's submission that she was "distracted" by the Wentworth family issues to the degree that she was unaware of her potential claim against First Choice (a finding I do not make), the issues she had with that family match what she claims in NOCC were the misrepresentations. First Choice submits that viewed in that way, the evidence about what happened between September 2011 and November 2011, amounts to an acknowledgement of by Ms. Rahman of "some damage" even if the full extent or specific type of damage might not have been known at that point: *Bell* at para. 77. That is sufficient to trigger the start of the limitation period.

[63] I agree. Combined with the explicit threat to start legal action against First Choice for that specific "damage", I conclude that all four conditions identified above in para. 46 as to what constitutes a postponement were present in the fall of 2011. Therefore, the limitation period began to run no later than November 4, 2011, and expired in November 2017. The NOCC was filed out of time.

[64] For those reasons, I am satisfied that there can be no genuine issue for trial and the claim must be dismissed pursuant to R. 9-6(5)(a).

IV. GENUINE LEGAL ISSUE FOR TRIAL

[65] I also conclude that independent of the limitation defence, the NOCC has no reasonable prospect of success because there is no genuine legal issue to be tried. That conclusion provides an additional basis why the NOCC ought to be dismissed pursuant to R. 9-6.

[66] I will address each cause of action separately.

A. Negligent Misrepresentation

[67] I recently summarized the legal principles regarding a claim of negligent misrepresentation in *Hainan Dehong Real Estate Development Corporation v. 0952130 B.C. Ltd*., 2024 BCSC 2362 [*Hainan*]:

> [324] The parties agree that the test to establish negligent misrepresentation is set out in, among others, *Maple Leaf Foods* at para. 32; *International Culinary Institute of Canada, Inc. v. Grant Thornton LLP,* 2010 BCSC 541 at para. 24; and *Normak Investment ltd. v. Belciug*, 2015 BCSC 700 at para. 85.
> …
> [325] To succeed in a claim of negligent misrepresentation, a plaintiff must prove:
>
> a) The defendant owes a duty of care to the plaintiff based on a special relationship;
>
> b) The defendant made a false or misleading statement of fact to the plaintiff, and did so negligently;
>
> c) The plaintiff reasonably relied on the false or misleading representation; and,
>
> d) The plaintiff suffered a loss arising from its reliance on the false or misleading representation.
>
> [326] It is settled law that actional misrepresentation must pertain to a matter of past or existing fact: *PD Management Ltd. v. Chemposite Inc.,* 2006 BCCA 489 at paras. 12–14.
>
> [327] In addition, negligent misrepresentation may not be made out where the defendant merely acted as an intermediary, such as in *Hamilton v. 1214125 Ontario Ltd.*, 2008 CanLII 27815 at para. 48, where a client understood the defendant was only passing on information for which he had no direct knowledge.

[68] First Choice submits that the misrepresentations as pleaded cannot succeed because none of them deal with present or past facts and are, therefore, not actionable.

[69] I agree.

[70] For convenience, I reproduce here the alleged misrepresentations from Part 1, para. 31 of the NOCC (see also above para. 36):

> a) that [Mr. McGrath and/or Mr. Redeker] were knowledgeable about Invermere having been long-time residents of Invermere for 26 and 10 years, respectively;
>
> b) 2138 Westside was to be occupied by the Vendors, who were an elderly and retired couple without children, thus [Ms. Rahman] did not need to worry about loud TVs, parties, music, and children in or around the Property;
>
> c) the people that were purchasing properties in the Westside Development were the same as [Ms. Rahman] in that they were people who wanted to get away from the noise and flurry of city life to find a rural, peaceful, and calm living environment; and
>
> d) the Westside Development and the town [of] Invermere were deer friendly environment with clean air and in proximity to the natural landscape.

[71] None of the representations can succeed. Misrepresentation (a) is a present factual statement, but Ms. Rahman has not pleaded that the statement is untrue. Furthermore, First Choice relies on Mr. Redeker's affidavit in which he deposed that the fact is true. Misrepresentation (b) speaks to who was to occupy 2138 Westside Park View in the future and is, therefore, not actionable. Misrepresentation (c) speaks to who would be purchasing properties in the neighbourhood, another forward-looking statement.

[72] Misrepresentation (d) includes three components. First Choice submits that the two components regarding clean air and proximity to the nature were true. I agree. Subsequent complaints about the "air" were not about the neighbourhood or the town, but smoke emanating from neighbours.

[73] With regard to the third component regarding a deer friendly environment, Ms. Rahman has presented no evidence to show that the representation was untrue at that time it was alleged to have been made (*i.e*., before she purchased the Property).

[74] In any event, Ms. Rahman admitted in her first affidavit that she was aware of a possible deer cull before she purchased the Property. Ms. Rahman argues in her response to application that even though she previously learned about the proposed deer cull, she believed it would not happen because it did not have public support. She claims this is what was told to her by First Choice.

[75] Even if Mr. McGrath and/or Mr. Redeker made the statements attributed to them at that time about the mayor's or town's attitude towards the deer cull (which they deny), that would amount at most to them acting as an intermediary between the town and Ms. Rahman, which is not actionable.

[76] In any event, the representation only became untrue 12–18 months after she moved into the Property.

[77] Furthermore, Ms. Rahman's misunderstanding about the reality of the deer cull that eventually did occur is not First Choice's responsibility, even if it had made any representation regarding existing public support for a deer cull at the material time (which it denies).

[78] I acknowledge that in her submissions, Ms. Rahman's position is that the pleaded misrepresentations are "present" statements, but with respect that submission is a mischaracterization of both the clear and implied meaning of those statements.

[79] However, even if she was correct that the statements could be characterized as present or past facts, she pleaded that the misrepresentations were made <u>before</u> she entered into the contract to purchase the Property on August 28, 2010. That would mean that the limitation period commenced before August 2010, again, defeating her claim.

[80] I also agree with First Choice that this claim fails because Ms. Rahman's purported reliance on the alleged misrepresentations was not reasonable. I base that conclusion on the evidence adduced by First Choice, including photographic evidence of the close proximity of the houses, descriptions of the neighbourhood by other residents and an aerial view of the development's layout. That evidence makes it clear that noises made by neighbours were obviously going to be heard on the Property. This is something I also find that Ms. Rahman observed while viewing the Property before the purchase.

[81] I also find that given the characteristics of the neighbourhood, it is unreasonable for any person to believe no children would live there or that there would be no traffic noise. In my view, those noises were inevitable given the composition and features of the development. Ms. Rahman's claim to be unaware of those features of the neighbourhood is not only unsupportable, it is unreasonable to the point of defying belief.

[82] Ms. Rahman also argued for the first time in her written materials that First Choice is liable for misrepresentation by failing to disclose a pre-existing relationship it had with the vendor of the Property, Barry Brown-John. That allegation is not pleaded, and therefore that argument ought not to have been made.

[83] In any event, First Choice denies the alleged pre-existing professional relationship and that denial is supported by its affidavit evidence. There is no first-hand evidence contradicting that denial. Ms. Rahman's submission on this point is based on her own speculation. The claim could not have succeeded even if it was properly raised.

[84] In addition to the preceding reasons why I conclude the claims in negligent misrepresentation cannot succeed, I also note that before the Court of Appeal, Ms. Rahman did not challenge the dismissal of her claims with respect to misrepresentations (b) and (d): see *Rahman BCCA* at para. 15. It is not clear to me that it was open to her to resile from that position. In any event, I find it is beyond doubt that those claims are bound to fail for the reasons already mentioned.

B. Fraudulent Misrepresentation

[85] The test for fraudulent misrepresentation is set out in *Ban v. Keleher*, 2017 BCSC 1132 at para. 16. To succeed, Ms. Rahman must prove:

a) First Choice made a representation of fact to her;

b) the representation was false;

c) First Choice knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;

d) First Choice intended for Ms. Rahman to act upon the representation; and

e) Ms. Rahman was induced to enter into the contract in reliance upon that representation to her detriment.

[86] Fraud is a serious allegation, which requires clear and convincing proof of each element. That includes clear evidence as to the alleged fraudster's intention: *Anderson v. British Columba Securities Commission,* 2004 BCCA 7 at para. 29.

[87] The NOCC fails to plead any form of actual knowledge, recklessness, or intentional misleading by First Choice with respect to the fraudulent misrepresentation claim. Nor was there any evidence produced as to First Choice's actual knowledge about the falsity of any alleged representation.

[88] Beyond those problems, as with negligent misrepresentation, fraudulent misrepresentation is only actionable for statements of present or past facts, not future events. Therefore, for all the reasons explained in the preceding section of this judgment, I find this claim has no chance of success.

[89] Ms. Rahman suggested that First Choice knowingly sold and leased homes near the Property to people they knew she would have an issue with to earn more commissions as people moved away from unpleasant living situations more quickly

than they may otherwise have done. Not only is that proposition devoid of evidence, it amounts to nothing more that speculation.

[90] Given all those factors, there is no genuine issue for trial based on the allegations of fraudulent misrepresentation.

C. Claims in Breach of Contract, Negligence and Breach of Fiduciary Duty

[91] I agree with First Choice that the NOCC fails to set out the material facts necessary to support the claims in professional negligence, breach of contract or breach of fiduciary duty.

[92] First Choice acted for Ms. Rahman in the summer and fall of 2010, and at no time after that. Any established duty of First Choice — whether a duty of care or a contractual or fiduciary duty or otherwise — ceased to exist upon completion of Ms. Rahman's purchase of the Property on September 28, 2010: *Baillie v. Charman*, [1991] B.C.J. No. 38 at paras. 29–30, 1991 CanLII 2364 (S.C.). The NOCC fails to allege any factual or legal basis for any ongoing duty. As such, these claims cannot succeed at trial.

[93] More specifically, the NOCC does not plead: (i) any ongoing contractual relationship between Ms. Rahman and First Choice; (ii) the breach of any such contractual terms; or (iii) any loss resulting from any such breach. Nor is there any indication in the pleadings or evidence relied upon by Ms. Rahman to establish a basis upon which First Choice could be said to have owed an ongoing duty to Ms. Rahman after the completion of her purchase of the Property.

[94] The failure to plead material facts to support a cause of action is fatal and cannot be remedied by producing evidence at trial: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at paras. 11, 35.

[95] For all those reasons, these claims are also clearly bound to fail.

D. Novel Duty of Care

[96] First Choice acknowledges that it is theoretically possible for Ms. Rahman to have pleaded a continuing claim against First Choice in negligence after September 28, 2010, if she had asserted a "novel" duty of care.

[97] Contrary to Ms. Rahman's submissions, First Choice does not deny that it and Mr. McGrath owed a duty of care to her while acting as her brokerage and agent in the purchase of the Property. However, it denies owing any ongoing duties after the deal for the Property closed. Its position is that after September 28, 2010, Ms. Rahman was simply a member of the public vis-à-vis any obligations owed to her by First Choice: *Gadsby v. British Columbia (Attorney General)*, 2019 BCSC 1596 at para. 93 [*Gadsby 2*]; *Burke v. Watson & Barnard (A Firm)*, 2016 BCCA 439 at para. 43. Thus, any continuing duty of care in negligence can only be assessed in that context — as a duty owed to a member of the public.

[98] The burden is on Ms. Rahman to identify that duty, and she has not done so: *Burke* at para. 16 (the first question of law is whether a duty of care exists); *Beacock v. Moreno*, 2019 BCSC 955 at paras. 106–108, 111, citing *Brown v. Douglas*, 2010 BCSC 1059 at paras. 35, 38–42, rev'd on other grounds 2011 BCCA 521 (the claimant that seeks to impose a broader duty of care bears the burden of establishing, through evidence, the nature and extent on that duty). I agree with First Choice that there is no established category of duty of care that applies here — between a property management company or real estate agent brokerage and a member of the community in which they operate.

[99] Whether a duty of care exists is a question of law. Establishing a novel duty of care requires the application of the *Anns/Cooper* test. A claimant must show, among other things, both that: (i) the injury in question was reasonably foreseeable; and (ii) there was sufficient proximity between the plaintiff and the defendant such that a duty was owed. Only if those hurdles are cleared, would a *prima facie* duty of care be established, and only then, would the burden shift to the defendant to establish

residual policy considerations that negate the imposition of a duty of care: *McCormick v. Plambeck,* 2022 BCCA 219 at paras. 11, 17; *Burke* at para. 16.

[100] What is foreseeable is an objective test. Where a claim "fails to advance facts that reveal the necessary relational proximity to establish a duty of care" it cannot succeed: *Burke* at para. 77; see also *McCormick* at para. 29; *Gadsby 2* at paras. 93–96.

[101] It is not entirely clear from the pleadings, the voluminous material relied upon by Ms. Rahman or her written material, what precise loss and damage that she allegedly suffered. Ms. Rahman made repeated references to a number of health conditions that pre-existed and, in fact, prompted her move to Invermere.

[102] Viewing her claim generously, there are three categories of potential loss and damage. The first appears to be some renovation costs, but those have not been quantified or substantiated in the evidence, nor causally linked in the pleadings or evidence to First Choice's conduct.

[103] The second is her reaction and dismay at the deer cull. There is no dispute that the deer cull was carried out by the town of Invermere and there is no suggestion in the pleadings or evidence as to how that could possibly be linked to anything First Choice did or said.

[104] The third is the emotional and health-related distress caused by loud and disruptive neighbours. However, Ms. Rahman has not pled nor adduced evidence to demonstrate any causative link between what she says those disruptions caused her to suffer, and First Choice's actions.

[105] Even if those problems could be overcome, I cannot see how it would be reasonably foreseeable that First Choice's provision of services to future clients would cause injury, loss or damage to Ms. Rahman.

[106] It is also difficult to conceive how any reasonable person would understand the following to fall within the duty or responsibility of a property broker or real estate agent that a

person hired: (i) the manner in which subsequent clients who hire that broker or agent intend to, or do, use properties they purchase or rent; and, (ii) conflicts that arise because of those uses. Nor would it be reasonably foreseeable that any such future conflicts would escalate to the extent they did on the facts of this case.

[107] The proximity analysis focuses on the relationship between the parties. I agree with First Choice that there was insufficient proximity between it and Ms. Rahman once their agency relationship ended. I am not satisfied that there is any evidence that First Choice explicitly or inferentially assumed responsibility to protect Ms. Rahman's interests when acting for other clients in the neighbourhood: *Burke* at para. 72.

[108] There may have been one or two occasion when Mr. McGrath and Mr. Redeker agreed to "look into something" when Ms. Rahman or her husband complained, but those actions were clearly done explicitly as favours, and not out of any continuing professional relationship.

[109] In any event, even if such an interaction could amount to the creation of some type of relationship (which I explicitly find it does not), no reasonable interpretation of that relationship would transform single transactions into a commitment to an ongoing relationship. Furthermore, the evidence contradicts that claim. Emails contained in the record reveal that First Choice generally told Ms. Rahman and her husband that the issues and disputes they were having were for them to manage on their own without First Choice's involvement.

[110] For all those reasons, it is not possible on the pleadings, the evidence, or any submissions made by Ms. Rahman for there to be a *prima facie* duty of care. Accordingly, even if Ms. Rahman had appropriately pleaded the existence of a novel duty of care or addressed proximity, there is no basis for a genuine issue to be heard in a trial, and the matter can be dismissed by way of summary judgment.

E. Conclusion

[111] For all those reasons, even if I had not dismissed the claim on the basis of it being filed out of time, I find Ms. Rahman's pleadings, the evidence on the record (including material relied upon by Ms. Rahman that was not properly adduced by her), and her written material and oral submissions all fall far short of raising a genuine issue for trial.

[112] Accordingly, the claim is dismissed pursuant to R. 9-6(5)(a).

V. APPLICATION TO DISMISS CLAIM FOR NON-COMPLIANCE

[113] On May 8, 2024, Associate Judge Robinson ordered Ms. Rahman to pay special costs in any event of the cause, forthwith, in the amount of $3,500 for entering an order that misstated what the Court ordered. Ms. Rahman attended the application when that special costs order was pronounced. The special costs order was entered on February 20, 2025, and it was served on Ms. Rahman on March 5, 2025.

[114] Despite requests from the Defendant's counsel on September 10, September 13, and October 7 in 2024, as well as February 12 and March 5 in 2025 that Ms. Rahman pay those costs, she has not done so and did not respond to counsel about those requests. Counsel on at least two occasions when requesting payment of special costs advised the plaintiff that nonpayment could possibly result in dismissal of her claim.

[115] First Choice's summary judgment application was originally set to be heard for five days commencing November 4, 2024. However, the Court granted Ms. Rahman's application for an adjournment, which was brought on the first day of the hearing. In doing so, the Court ordered Ms. Rahman to pay the costs thrown away in any event of the cause. She was also required to serve any additional materials in response to First Choice's application no later than March 7, 2025. She failed to comply with both conditions.

[116] In her application for an adjournment of this application and supporting affidavit, Ms. Rahman repeats the procedural history of the litigation. Ms. Rahman also relies on the affidavit she filed seeking an adjournment of the November 4, 2024 hearing.

[117] Her position is that she had inadequate time to prepare and submit a response to this application because of her health issues and her status as a self-represented litigant.

A. Legal Principles

[118] Rule 22-7(2) provides:

> **Powers of court**
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
>
> (a) set aside a proceeding, either wholly or in part,
>
> (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
>
> (c) allow an amendment to be made under Rule 6-1,
>
> (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
>
> (e) make any other order it considers will further the object of these Supreme Court Civil Rules.

[119] Ms. Rahman cites three cases, only one of which is relevant to her request for an adjournment. In *Wright v. Sun Life Assurance Company of Canada*, 2014 BCSC 2621 at para. 4, Madam Justice Adair stated that an adjournment of a trial is a discretionary matter, and that discretion must be exercised judicially in accordance with the interests of justice. That is a sound principle of law.

[120] Where it is established that a party has failed to comply with the *Rules* or the terms of a court order, that party bears the burden of proving a lawful excuse for that non-compliance: *Balaj v. Xiaogang,* 2012 BCSC 231 at para. 36. A lawful excuse is one that is worthy of acceptance by the court, exercising its discretion judicially: *United Furniture Warehouse LP v. 551148 B.C. Ltd*., 2007 BCSC 1252 at para. 24.

[121] While a self-represented litigant is not held to the same standard as counsel with regard to compliance with the *Rules* or court orders, the self-represented litigant cannot simply ignore those responsibilities with impunity: *Breberin v. Santos*, 2013 BCSC 560 at para. 61. Moreover, the non-compliant party's defaults should be viewed in the context of the claim from its inception because that may impact the seriousness of the default: *Breberin* at para. 62.

B. Analysis

[122] Since I have already determined that the action must be dismissed pursuant to R. 9-6(5)(a), it is not strictly necessary to rule on the Defendant's R. 22-7 application. However, for the sake of completeness, I will address this issue.

[123] I agree with First Choice that the facts in this case justify dismissal of the claim.

[124] Ms. Rahman has not complied with Associate Judge Robinson's special costs order, nor has she responded to the numerous requests from the Defendant's counsel that she do so over the span of six months. She was specifically put on notice that failure to comply could result in dismissal of her claim.

[125] I add that the special costs order followed from what was egregious behaviour by Ms. Rahman. Special costs were awarded because Ms. Rahman entered an order that misstated what the Court actually pronounced. As Associate Judge Robinson wrote in *Rahman v. Windemere Valley Property Management Ltd.*, 2024 BCSC 946 (unreported):

> [4] … In the meantime, the plaintiff, quite improperly, took it upon herself to draft a version of the order that clearly did not reflect the terms as pronounced by Master Schwartz. Specifically, the order filed by the plaintiff which was accepted for filing by the registry omitted the provisions which dispensed with her signature, and stated that the signature of the defendant was dispend with and eliminated the order requiring the plaintiff to pay costs at Scale B.
>
> [5] The plaintiff on this application today offered a number of explanations for her actions, none of which were satisfactory. Predominantly she argues, that she had to file in order to see the claim go ahead. She also pointed out that she is a lay litigant who is not familiar with the process. She attributed

> her actions to being confused and impatient, and also to the apparent delay of counsel for the defendant in filing the order.
>
> …
>
> [10] With respect to costs, the plaintiff was adamant that her conduct was not reprehensible and not reserving of rebuke. In that respect, I could not disagree more strongly. The actions of the plaintiff here go to the very heart of our system. The order that was filed is tantamount to a fraud. [It is] clearly an abuse of process. It was done for personal benefit. It was deceptive not only on the defendant, but also on the court[.] "Reprehensible" is perhaps not a strong enough word to express the outrage of the court in the circumstances, but I use that word because it is familiar to the authorities.

[126] The conduct that attracted special costs is concerning because, before me, Ms. Rahman repeatedly misstated what happened at the CPC before Associate Judge Bilawich. Despite being corrected by the Court, she continued to make that misstatement.

[127] Ms. Rahman relies on her status as a self-represented litigant, combined with her assertion of health issues, to justify the adjournment. She claims that she could not prepare a response at the same time as preparing for the summary judgment application.

[128] Ms. Rahman has avoided addressing the sole and simple issue raised by this application: why has she not paid the special costs ordered against her?

[129] All Ms. Rahman had to do was to explain why she had not paid the special costs. Her explanation would either amount to a lawful excuse, or it would not. I do not accept that preparing to present to the Court the reason for her inaction would have taken a significant amount of time away from her preparation for this hearing.

[130] I have reached the unfortunate conclusion that Ms. Rahman proffers her status as a self-represented litigant and her health issues to avoid the consequences of her own conduct. I do not make that comment lightly, but it is supported on the record. This conclusion is also based on my discussion and analysis below at paras. 149 - 152 regarding Ms. Rahman's conduct in this litigation.

[131] Therefore, in addition to my conclusion to dismiss her claim under R. 9-6(5), I also dismiss her claim pursuant to R. 22-7.

VI. SPECIAL COSTS

[132] First Choice seeks special costs.

[133] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible": *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8.

[134] Special costs may be ordered where a party makes improper allegations of fraudulent misrepresentation or breach of fiduciary duty. Such allegations must be based on something more than belief and speculation. Where the reputation of a professional is “falsely assailed, the court’s reproof should be felt”: *Mayer* at paras. 11, 16–17.

[135] First Choice submits that Ms. Rahman made serious and unfounded allegations of breach of fiduciary duty and fraud against professionals. Because of that, its position is that Ms. Rahman’s conduct should be chastised and special costs ought to be awarded in its favour.

[136] I am aware that special costs are meant to be awarded rarely, and that this Court should take special care when asked to award them against a self-represented litigant. I find this is one of those rare cases where the self-represented litigant should be rebuked for her conduct, and therefore I award special costs in favour of First Choice.

[137] I do so for several reasons.

[138] First, I agree that the unfounded allegations of fraudulent misrepresentation could justify a special costs award. However, I would not have awarded special

costs on that basis alone. In my view, it is those unfounded allegations combined with the following factors that justify special costs.

[139] Those additional factors include Ms. Rahman's unexplained non-compliance with Associate Judge Robinson's special costs award, her failure to pay costs thrown away, and her continual misstatement about what happened at the CPC. All constitute conduct deserving of rebuke.

[140] I also find Ms. Rahman's failure to comply with the court order to file and serve the additional material she wanted to rely on at the hearing is conduct deserving of rebuke. As noted, when the hearing was adjourned in November 2024, she was ordered to file and serve all her material by March 7, 2025. Not only did she miss that deadline for filing her affidavit, she never filed the material that she wanted to rely on (as listed in Evidence List). When considered together with the following circumstances, I find there is a reasonable basis to conclude that her failure to file and serve her material may have been designed to elicit an adjournment: her last-minute application for an adjournment of the November 2024 hearing; her candid admission that she set down a CPC for the purpose of preventing a summary determination; her insistence that she needed seven days to present her case; and, her continual reference in the hearing before me that she objected to the summary proceeding.

[141] In my view, the preceding factors viewed together justify an order for special costs. However, I also find other factors provide further support for awarding special costs in the unique circumstances of this case.

[142] First, I confirm again I am mindful and have been guided by the Court of Appeal's articulation of this Court's duties to self-represented litigants in *Rahman BCCA* at paras. 31–34.

[143] In addition, I repeat comments I made in *Hainan*:

> [373] I am mindful of the fundamental duty of this Court to ensure a fair trial, a duty heightened when a party is self-represented. However, a trial that is fair must be fair from the perspective of all litigants. I adopt and rely

> on *M.P.W. v. City of Victoria*, 2019 BCSC 1448, where this Court states its vigilance to ensure fairness to self-represented litigants includes granting to them a margin of leniency, but "does not relieve them of an obligation to comply with the Rules or order made by the Court".
>
> See also *Foster v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development),* 2024 BCSC 2408 at para. 10

[144] There is nothing inconsistent in the foregoing with the Court of Appeal's comments in *Rahman BCCA*. Nor do I interpret anything said by the Court of Appeal as limiting or detracting from this Court's control of its process in order to best ensure the "just, speedy and inexpensive determination of every proceeding on its merits": R. 1-3(1).

[145] This Court's exercise of its inherent jurisdiction and discretion are vital mechanisms through which it conducts cases while aiming to achieve the object of the *Rules*. Importantly, however, that jurisdiction and discretion must co-exist with this Court's institutional duty to the public to provide timely access to the Court for all litigants by allocating scarce court resources fairly, reasonably and responsibly.

[146] Unfortunately, this case is an illustration where, despite efforts by the Court and counsel for the Defendant to achieve an efficient and reasonable use of court resources, that goal was not met.

[147] In *Rahman BCCA*, the Court of Appeal referred to the duties on this Court to ensure a fair process so as not to disadvantage a self-represented litigant, noting that the "duty is limited as it engages a delicate balance between the judge's duty to ensure a fair process and their duty to remain neutral both in appearance and reality": at para. 34. It concluded that the chambers judge erred in not exercising one of the options available to allow Ms. Rahman to rectify inconsistencies and gaps amongst her affidavit, pleadings, written material, and oral submissions. The Court of Appeal stated that doing so would "not have prejudiced First Choice because there was nothing further that First Choice could have said that was probative of Ms. Rahman's state of mind": at para. 43. The Court of Appeal also stated that the deficiency in Ms. Rahman's materials was "easily rectified": at para. 42.

[148] Regrettably, the predictions that Ms. Rahman's evidentiary gaps would be "easily rectified" without prejudice to First Choice have not been borne out by what happened subsequent to the Court of Appeal judgment.

[149] Despite having just over two and a half years from when the Court of Appeal commented on the state of her evidence, Ms. Rahman was unable to remedy the significant and material gaps in her evidence. I am satisfied she had ample time and every opportunity to do so. She did file an additional affidavit that should have addressed the concerns identified by the Court of Appeal.

[150] It did not. The affidavit is skeletal and merely provides a list of evidence she wanted to introduce at a full trial. However, Ms. Rahman did not even produce that evidence for the hearing. It was only through First Choice's efforts and expense that her material was put before the Court. Even then, the material was disorganized, and the overwhelming majority of it was irrelevant to the material issues.

[151] During the hearing, I gave Ms. Rahman numerous and specific directions about the presentation of her case. These directions were designed to assist her to streamline her presentation in order to focus her on addressing the legal issues she had to answer.

[152] One example was when I directed her to identify and describe a large body of material in the record by topic, rather than going through each item in minute and unnecessary detail. It was obvious that most, if not all, of that material had dubious relevance. However, when I identified a concern about relevance or admissibility, Ms. Rahman would insist that she was entitled to refer to all the material. She often became agitated and argumentative and accused the Court of being unfair by limiting her ability to present her case. She frequently expressed dissatisfaction that she had to answer a summary proceeding rather than a full trial and repeated the meritless point that First Choice had improperly set the application down for hearing.

[153] First Choice had a right to have its application heard. It spent extra time and money to ensure that Ms. Rahman's evidence was properly before the Court. This

was no small feat. First Choice made those efforts to assist the Court, despite the obvious and serious admissibility problems with the overwhelming bulk of Ms. Rahman's material.

[154] I specifically commend Ms. Peck for exceeding her ethical duty as an officer of the Court to assist in ensuring a fair hearing for a self-represented litigant. She treated Ms. Rahman with the utmost fairness, respect and courtesy. Ms. Peck's conduct was the primary reason that Ms. Rahman suffered no unfair disadvantage as a self-represented litigant.

[155] However, Ms. Peck's efforts came at the expense of First Choice. I find that First Choice has been prejudiced by the time, effort, and money it had to expend to ensure that its application was heard by this Court. Those efforts were necessary because of Ms. Rahman's non-compliance with the *Rules* and court order, her failure to heed both the advice from both the Court of Appeal and Associate Judge Bilawich about how to prepare for this hearing.

[156] For all those reasons, special costs are awarded in favour of First Choice.

VII. CONCLUSIONS

[157] Both of First Choice's applications are allowed. I dismiss the claim against First Choice because:

a) I conclude that there is no genuine issue for trial because Ms. Rahman's claim is statute-barred under the *Former Act*. As such, I dismiss the claim in pursuant to R. 9-6(5)(a).

b) I also conclude that even if the claim was not statute-barred, it is without merit based on the pleadings, and there is no genuine issue to be tried. I dismiss the claim on that basis as well under R. 9-6(5)(a).

c) In any event, I also find that the claim must be dismissed under R. 22-7(2) for Ms. Rahman's non-compliance with the special costs order of Associate Judge Robinson made on May 8, 2024.

d) I order Ms. Rahman to pay special costs to First Choice.

"Sharma J."