

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dhanesar v. Pandher*,
2026 BCCA 63

Date: 20260217
Docket: CA50509

Between:

Sandeep Kaur Dhanesar

Appellant
(Defendant)

And

Tejinder Pandher and Iqbal Pandher

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Fleming
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated
February 26, 2025 (*Pandher v. Dhanesar*, 2025 BCSC 316,
Abbotsford Docket S03014).

Counsel for the Appellant:

B. Kain
D.H. Griffith

Counsel for the Respondents:

S.C. Albert

Place and Date of Hearing:

Vancouver, British Columbia
October 20, 2025

Place and Date of Judgment:

Vancouver, British Columbia
February 17, 2026

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Justice Fleming

The Honourable Justice MacNaughton

Summary:

The transaction for the sale of a newly constructed residential property did not proceed after the sellers (respondents) failed to provide the buyer (appellant) with an unconditional occupancy certificate or evidence satisfactory to the buyer that construction was finished as required under the sale agreement. The sellers sued the buyer for damages. The trial judge awarded damages, finding the buyer's exercise of contractual discretion was unreasonable, unfair, and not exercised in good faith. The buyer appeals, alleging the judge erred in law in his approach to assessing the duty of good faith in the exercise of contractual discretion.

Held: Appeal allowed. The judge made two inter-related legal errors by articulating and applying the wrong legal principles to his interpretation of the contract and analysis of the duty of good faith. First, the judge erred by applying the duty of good faith in the exercise of contractual discretion as if it were a principle of contractual interpretation. The judge collapsed the two stages of analysis—contract interpretation and consideration of the duty of good faith—by relying on good faith to interpret the purpose and scope of the discretion under the clause at issue. Second, the judge erred in assuming the duty of good faith in this context favoured a standard of objective reasonableness. As the judge assessed the evidence according to the wrong legal framework, the factual findings cannot stand. A new trial is ordered.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] This appeal concerns the proper approach to assessing the duty of good faith in a party's exercise of contractual discretion under a contract for the purchase and sale of a residential property (the "Contract"). The appellant was the buyer, and the respondents were the sellers. The transaction collapsed after the appellant refused to complete the sale.

[2] The property in question was under construction at the time the parties entered into the Contract. The Contract required the respondents to provide the appellant with an unconditional occupancy certificate "or other evidence satisfactory to the Buyer that construction is finished" by the completion date. The respondents failed to deliver an unconditional occupancy certificate. The appellant refused to complete the Contract on the basis that the respondents had not by the completion date delivered to her this occupancy certificate or other evidence satisfactory to her that the construction was finished. The respondents then sued for damages and the appellant made a counterclaim for the return of her \$75,000 deposit.

[3] The trial judge found in favour of the respondents. He awarded them damages of approximately \$339,000, comprised primarily of the difference between the Contract price and the price for which the property was eventually resold. He dismissed the appellant’s counterclaim for the recovery of her deposit.

[4] The trial judge interpreted the phrase “or other evidence satisfactory to the Buyer” in the Contract to mean evidence satisfactory to a reasonable person “with all the subjective but reasonable standards” of the appellant. He reasoned that such an interpretation aligned with an “objective reasonableness” test for the good faith exercise of contractual discretion that he found was established by the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*]. The trial judge concluded the appellant’s exercise of discretion was unreasonable, unfair, and contrary to the requirements of good faith in light of the purpose of the discretion, and that she wrongly believed she had completely subjective discretion. In the trial judge’s assessment, the appellant focussed on the respondents’ failure to deliver an unconditional occupancy permit at the expense of considering other evidence demonstrating the construction work was complete.

[5] On appeal, the appellant contends that the trial judge erred in law in relying on the duty of good faith to interpret the contractual discretion and in applying the wrong test for the good faith exercise of contractual discretion. The respondents maintain that the trial judge did not make any errors in his interpretation of the Contract, and his interpretation is entitled to significant deference on appeal.

[6] For the reasons that follow, I am persuaded that the trial judge erred in law, as the appellant alleges. I would allow the appeal and order a new trial.

Background

[7] In January 2022, the respondents began to construct a four-bedroom, four-bathroom house on a bare-land strata property they owned in Abbotsford, B.C. (the “Property”). The respondents retained Titan Key Development Corporation (“Titan”)

as the general contractor. Gurvinder Kahlon is the principal operator and owner of Titan. Other houses within the subdivision were also under construction at the time.

[8] The appellant lived and worked in Houston, Texas. She had spent her teenage years in Abbotsford and was a Canadian citizen. Her sister and other relatives continued to live in Abbotsford and the appellant visited frequently.

The Contract

[9] On January 29, 2022, following negotiations, the appellant and the respondents entered the Contract. It provided that the respondents would construct the house and then transfer the Property and land to the appellant on the completion date of October 7, 2022, for a purchase price of \$1.515 million. The appellant paid a deposit of \$75,000.

[10] The Contract was based on a standard form contract prepared by the British Columbia Real Estate Association and the Canadian Bar Association. However, the appellant’s realtor inserted additional terms and conditions to reflect the fact that the house the appellant was purchasing was not yet built. One such provision, which is central to the issues on appeal, was contained within the “Terms and Conditions” in section 3:

SUBSTANTIAL COMPLETION

It is a fundamental term of this contract that the Seller must have finished all work, and delivered to the Buyer by the Completion Date, an unconditional Municipal/City/Regional District Occupancy Certificate or other evidence satisfactory to the Buyer that construction is finished.

(the “Substantial Completion Provision”)

[11] The Substantial Completion Provision was the only clause in the Contract that the parties labelled a “fundamental term”.

[12] Section 3 of the Contract provided that if the house “does not have occupancy or is not ready by September 27, 2022 then at the [buyer’s] sole discretion the buyer may extend completion for up to 90 days” (emphasis added).

[13] A final term of relevance to this appeal is the “Deficiency Walk Through & Hold Back” provision in s. 3. The parties agreed that the buyer, and an authorized technical representative of the seller, would together conduct a walk-through inspection of the Property no later than 14 days before the completion date for the purpose of identifying deficiencies to be remedied.

Events leading to the completion date

[14] To understand the issues on appeal, a review of events leading to the October 7, 2022, completion date is needed in relation to three issues: (1) the appellant’s late receipt of a property disclosure statement; (2) the delay in the scheduling of a deficiency walk-through; and (3) uncertainty regarding the respondents’ compliance with the Substantial Completion Provision.

The property disclosure statement

[15] The appellant applied for financing from the Canadian Imperial Bank of Commerce (“CIBC”). On September 27, 2022, CIBC conditionally approved financing subject to certain conditions including the receipt of a property disclosure statement.

[16] On October 3, 2022, the appellant requested the respondents provide her with a property disclosure statement; they did so on October 6. At trial, the parties agreed that: (1) the Contract did not require the respondents to provide a property disclosure statement; and (2) the appellant did not advise the respondents prior to October 7, 2022, that she required a property disclosure statement to finalize her financing.

[17] On October 19, 2022, CIBC issued the appellant’s final mortgage approval, once the conditions had been fulfilled.

[18] For reasons I will address later in this judgment, these events are relevant to the issue of remedy on appeal.

Scheduling the walk-through

[19] On September 27, 2022, the respondents' counsel, Ishpreet Rai, sent a letter to the appellant's counsel, Leighton Meyer, to request that closing documents be provided to him by October 5, 2022. Mr. Meyer responded by email on September 29, asking when the appellant would be able to complete the walk-through. The Terms and Conditions required the walk-through to be conducted no later than 14 days in advance of the completion date. Mr. Meyer noted that the delay in scheduling the walk-through had put the completion date beyond October 7, 2022.

[20] There is a factual dispute between the parties as to who was responsible for the ensuing delay in completing the walk-through. The dispute is captured in the following exchange of communications between counsel:

- a) In an October 3, 2022, email, Mr. Meyer stated that pictures of the Property taken by the appellant's realtor on October 3, 2022, showed that construction was not complete to the point that a walk-through was possible. The concerns Mr. Meyer identified included: the painting was incomplete; most of the flooring was covered with paper or drop cloths; numerous closet doors and windows remained uninstalled; and the Property needed to be professionally cleaned.
- b) In a responding letter sent on October 5, 2022, Mr. Rai took issue with Mr. Meyer's description of the deficiencies. He noted that the appellant had been provided with additional pictures on October 3 and 4, 2022, which showed that the construction was complete. Mr. Rai asserted that the appellant was solely responsible for the delay in scheduling a walk-through.
- c) In an email sent on October 7, 2022, Mr. Meyer disputes Mr. Rai's version of events and set out the steps that the appellant took to schedule the walk-through.

[21] The trial judge did not resolve the dispute between the parties over responsibility for the delay in the walk-through.

[22] The walk-through ultimately took place on the completion date of October 7, 2022. The appellant’s sister and nephew attended along with a licensed building inspector. The appellant remained in Texas.

The Substantial Completion Provision

[23] In addition to the delays in scheduling a walk-through of the Property, there was also ongoing uncertainty about the respondents’ compliance with the Substantial Completion Provision.

[24] On October 3, 2022, Mr. Meyer emailed Mr. Rai to inquire about whether the respondents had an occupancy permit and, if not, when they expected to obtain one. Mr. Rai did not respond to this inquiry. Mr. Rai’s letter of October 5, 2022, detailed his position that the appellant had delayed the walk-through. It did not address the occupancy permit.

[25] Mr. Kahlon—the respondents’ general contractor—contacted the City of Abbotsford (the “City”) to arrange for final inspection of the Property. On October 6, 2022, the City provided Mr. Kahlon with an inspection slip indicating that the application had been “rejected” and that reinspection was required (the “Inspection Slip”). The stated reasons for the rejection were the need for a final retaining wall and the planting of a tree “as per covenant”. The Inspection Slip stated it was “OK to apply for provisional, [manager’s] approval required”.

[26] On October 6, 2022, Mr. Kahlon applied for and received approval for provisional occupancy. The City provided him with another slip indicating provisional occupancy of the Property was permitted with “Final by 6th April 2023” (the “Provisional Occupancy Slip”). Unlike the Inspection Slip, the Provisional Occupancy Slip did not contain information about why the final inspection on October 6, 2022, had resulted in a rejection.

[27] On the afternoon of October 6, 2022, Mr. Kahlon emailed the Provisional Occupancy Slip to the respondents, stating “Please see attached final. Congratulations”. Mr. Kahlon did not inform the respondents that the final building inspection had been rejected, did not send them the Inspection Slip, and did not explain the reasons why only provisional occupancy had been approved. The respondents assumed the document Mr. Kahlon send them was a final permit because he referred to the attachment as being “final”.

[28] The respondents did not immediately share the Provisional Occupancy Slip with the appellant. In the meantime, the appellant learned from the City’s website that the final inspection had been rejected and only provisional occupancy was granted.

[29] Mr. Rai forwarded the Provisional Occupancy Slip to Mr. Meyer on the afternoon of October 7 by way of an email that simply stated: “Please find attached occupancy permit”. Neither the respondents nor Mr. Rai explained to the appellant at this time why the final inspection was rejected and only a provisional occupancy was permitted.

[30] The purchase did not complete on October 7, 2022.

Events after the completion date

[31] On October 12, 2022, the respondents’ litigation counsel (Ms. Albert) wrote to Mr. Meyer, setting out the respondents’ position that the appellant was in breach of the Contract. With respect to the Substantial Completion Provision, Ms. Albert stated that the respondents had, by the completion date, finished all work and delivered an unconditional occupancy certificate or other evidence satisfactory to the buyer that construction was finished. Ms. Albert indicated that absent a compromise between the parties to complete the sale by October 14, 2022, the respondents intended to retain the appellant’s deposit and sue for damages.

[32] On October 13, 2022, Mr. Meyer responded, stating that the respondents had not provided an unconditional occupancy permit, but only an approval for provisional

occupancy. He noted that the respondents never explained why only provisional occupancy was approved. Mr. Meyers stated that without an unconditional occupancy permit, the appellant was entitled to refuse to complete the purchase. Mr. Meyer requested the return of the appellant's deposit.

[33] On October 17, 2022, the respondents filed their notice of civil claim. The appellant filed a response to civil claim on December 9, 2022, and a counterclaim on December 12, 2022.

[34] At the end of May 2023, the respondents sold the Property to a new buyer for \$1.190 million.

The trial judgment: 2025 BCSC 316 (“RFJ”)

[35] The trial judge began his analysis by assessing the credibility and reliability of the witnesses. The appellant and the respondent Mr. Pandher testified at trial. The other witnesses were Mr. Kahlon, Tejinder Dhillon (an inspection manager employed by the City), and Vikramjit Singh Toor (the appellant's mortgage advisor at CIBC). The trial judge stated that he had no concerns about the credibility or the reliability of the witnesses generally. He noted Mr. Pandher and the appellant both had an obvious interest in the outcome of the proceeding. However, they did not appear to exaggerate, minimize or modify their testimony to favour their own interest.

Interpretation of the Substantial Completion Provision

[36] The trial judge then addressed the proper interpretation of the Substantial Completion Provision. There was no dispute that the respondents had not delivered an unconditional occupancy certificate to the appellant by the completion date. The dispute focussed on the interpretation and meaning of the phrase “or other evidence satisfactory to the Buyer”. The respondents argued the phrase should be interpreted to require the Buyer to act in an objectively reasonable manner in deciding whether the evidence was satisfactory. The appellant contended that what mattered was the Buyer's subjective assessment of the sufficiency of the evidence.

[37] The trial judge found that the underlying purpose of the discretion granted by the Substantial Completion Provision was “to ensure that the [appellant] got what she bargained for—a property with a substantially completed house”: at para. 31.

[38] To interpret the meaning of the phrase “satisfactory to the Buyer”, the trial judge looked to case law for guidance. He relied on this Court’s judgment in *Griffin v. Martens*, 27 B.C.L.R. (2d) 152, 1988 CanLII 2852 (C.A.), which interpreted the phrase “satisfactory financing” to mean “satisfactory to a reasonable person with all the subjective but reasonable standards of a particular purchaser”: RFJ at para. 39. *Griffin* set out four possible interpretations of the phrase “satisfactory financing”, the fourth of which was “satisfactory to the particular purchaser with all his quirks and prejudices, but acting honestly”. In rejecting this fourth alternative, the Court in *Griffin* stated that if such a meaning had been intended, the contract would have stated “financing satisfactory to him”: *Griffin* at 154.

[39] Despite the difference in language, the trial judge found the Substantial Completion Provision should be interpreted in the same way as the “satisfactory financing” provision at issue in *Griffin*. He gave two reasons for this conclusion. First, he relied on the common law duty of good faith to guide the interpretive process:

[34] In my view, although the wording in the CPS and in the fourth alternative in *Griffin* are similar, an interpretation consistent with “satisfactory to the particular purchaser with all his quirks and prejudices, but acting honestly” should be rejected here too, because it does not align as well with the development of the common law of good faith in contractual performance discretion as an interpretation which accounts for objective reasonableness.

[Emphasis added.]

[40] Second, the trial judge noted that the Terms and Conditions included a term permitting the buyer to extend completion at their “sole discretion” if the house was not ready for occupancy by September 27, 2022. As the words “sole discretion” did not appear in the Substantial Completion Provision, the trial judge reasoned that the exercise of discretion in this provision must be based on something other than the buyer’s sole discretion.

[41] Therefore, the trial judge concluded that the buyer's discretion under the Substantial Completion Provision was intended to allow, "as an alternative to an unconditional occupancy certificate, for other evidence, satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished": RFJ at para. 40.

Good faith in the exercise of contractual discretion

[42] The trial judge next addressed the question of whether the appellant exercised her discretion under the Substantial Completion Provision reasonably and in good faith. He cited and summarized the principles emerging from *Wastech* with respect to a contracting party's duty to exercise contractual discretion in good faith.

[43] The trial judge listed the "other evidence" the appellant had by the completion date to satisfy her that construction was complete. The other evidence included: the house itself; a provisional occupancy permit; numerous photos and videos; and feedback from her realtor, sister, an appraiser and a home inspector. The trial judge stated:

[50] I find that by the completion date the [respondents] had provided the [appellant] with other evidence satisfactory to a reasonable person with all the subjective but reasonable standards of the [appellant] that the work and construction was finished. She had also received this evidence from other sources.

[51] I find that a reasonable person with all the subjective but reasonable standards of the [appellant] would: a) recognize the importance of meeting their contractual obligations in accordance with the law; b) consider the factual matrix; and c) draw a conclusion that the construction was finished from the other evidence provided by the plaintiffs and others...

[44] The trial judge noted the only outstanding work as of the completion date was minor, and of a type typically identified through a deficiency walk-through. He referenced Mr. Kahlon's evidence that the remaining work carried out after the completion date cost only \$1,000. The trial judge concluded from this evidence that "not only did it appear that the work had been finished, it had in fact been finished": RFJ at para. 53. The trial judge also found support for this conclusion in Mr. Dhillon's evidence:

[54] ...[Mr. Dhillon] provided evidence about the City’s process for granting building permits, occupancy permits and provisional occupancy permits. He testified that as of October 6, 2022, when a final building permit inspection was conducted, there were no remaining life safety items and the home was complete. His evidence was that the only reason the property did not receive a final occupancy certificate on October 6, 2022, was the building official still had to sign off on an already-constructed retaining wall; and a tree which was already on the property still had to be planted (which occurred on the completion date). He testified that from the fact of a provisional occupancy permit being issued, it is “reasonable to say the house is complete” and confirmed that the City required no additional work inside the house.

[45] I pause to observe that the trial judge does not explain how Mr. Dhillon’s and Mr. Kahlon’s knowledge of the significance of provisional occupancy and the scope of the remaining work could be imputed to the appellant.

[46] The trial judge found that in exercising her discretion under the Substantial Completion Provision, the appellant relied primarily on the fact that she did not receive an unconditional occupancy certificate. In his view, this focus prevented the appellant from considering the “other evidence” provided by the respondents to demonstrate that the construction was finished. The trial judge stated:

[63] The [appellant’s] assertion that she could not assess the evidence provided by the [respondents] without knowing what the problems were with the property is not credible. She had access to professional advisors, including her lawyer, her realtor, an appraiser and a licensed home inspector. She also had access to photos and videos, and the feedback of her sister and her nephew, both of whom were present on the walkthrough. If she had questions, she could have asked for answers.

[47] The trial judge concluded that the appellant did not exercise her discretion in a manner connected with the purposes for which it was granted because she “wrongly believed she had completely subjective discretion”: RFJ at para. 65. In fact, the trial judge held that the purpose of the clause was to allow, as an alternative, for other evidence “satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished”: RFJ at para. 66. The trial judge therefore found the appellant’s exercise of discretion was unreasonable, unfair, and contrary to the requirements of good faith.

On appeal

[48] On appeal, the appellant contends that the trial judge erred in law in his identification and articulation of the standard of good faith in the exercise of contractual discretion by conflating two distinct concepts: (1) a “reasonable person” test; and (2) the standard of reasonableness as it applies to the duty of good faith in contract. The appellant maintains that it is only the latter concept of reasonableness that applies in this case, and this concept of reasonableness does not equate to a reasonable person test. Instead, reasonableness as an aspect of the duty of good faith in the exercise of contractual discretion requires only that a party exercise discretion in a manner consistent with the purpose for which the discretion was conferred.

[49] The respondents dispute that the trial judge committed any legal error. They say that the appellant is challenging the trial judge’s findings of fact, or at best his findings of mixed fact and law, in the absence of any demonstration of palpable and overriding error.

Standard of review

[50] The application of principles of contractual interpretation to the words of a contract is treated as a question of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50 [*Sattva*]. As a result, a trial judge’s interpretation of a contract is generally reviewable on the deferential standard of palpable and overriding error: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 21 [*Ledcor*].

[51] However, the non-deferential correctness standard of review applies to extricable questions of law that arise in the interpretation process: *Sattva* at para. 53; *Ledcor* at para. 21. Legal errors in contractual interpretation may include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor”: *Sattva* at para. 53.

Analysis

[52] In this case, the appellant does not allege that the trial judge made palpable and overriding errors of fact. The narrow issue on appeal is whether the trial judge made an extricable error of law in contractual interpretation by applying incorrect principles. To assess this ground of appeal, it is necessary to begin with a review of the relevant law.

***Bhasin*: good faith contractual performance as an organizing principle**

[53] In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognized an organizing principle of good faith in Canadian contract law. The principle is “that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”: *Bhasin* at para. 63.

[54] As explained by Justice Cromwell, writing for the Court in *Bhasin*, an organizing principle is not a free-standing rule, but rather “a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations...It is a standard that helps to understand and develop the law in a coherent and principled way”: *Bhasin* at para. 64. The organizing principle of good faith manifests itself in existing doctrines that impose, in some situations or relationships, a duty of “honest, candid, forthright or reasonable contractual performance”: *Bhasin* at para. 66. *Bhasin* suggests that claims of good faith will generally not succeed if they do not fall within the existing categories; however, the list is not closed: *Bhasin* at para. 66.

[55] In *Bhasin*, Cromwell J. identified three existing situations in which a duty of good faith contractual performance had been found to exist: (1) where the parties must cooperate in order to achieve the objectives of the contract; (2) where one party exercises discretionary power under the contract; and (3) where one party seeks to evade contractual duties: *Bhasin* at para. 47, citing John D. McCamus, *The Law of Contracts*, 2nd ed., (Toronto: Irwin Law, 2012) at 840–856. As the facts of *Bhasin* did not fall within any of these situations, the question for the Court was whether a new duty ought to be recognized within the broad umbrella of the

organizing principle of good faith contractual performance. In concluding that it should, Cromwell J. defined the new duty as one of “honesty in contractual performance”:

[73] ...This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance.

[56] The duty of honest performance is imposed as a matter of general contract law doctrine rather than by implication or interpretation of contractual terms. As such, parties are “not free to exclude it”: *Bhasin* at para. 75; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 84.

***Wastech*: the duty of good faith in the exercise of contractual discretion**

[57] The duty to exercise contractual discretion in good faith is one of the three existing situations identified in *Bhasin* in which a duty of good faith performance had been found to exist. After *Bhasin*, this duty can be seen as falling under the umbrella of the organizing principle of good faith.

[58] In its subsequent decision in *Wastech*, the Court addressed the content of the duty of good faith in the exercise of contractual discretion. At issue in *Wastech* was a contract between a waste disposal and transportation company (“Wastech”) and the statutory corporation responsible for administration of waste disposal in Metro Vancouver (“Metro”). The contract contemplated that Wastech would remove and transport waste to three disposal facilities. Wastech was paid different rates depending on which facility waste was directed to, with higher rates paid for waste that was directed to a facility that was further away. Metro was granted “absolute discretion” under the contract to direct the allocation of waste. In 2011, Metro exercised its discretion to reallocate waste to a disposal facility that was closer, resulting in Wastech failing to meet its profit target. Wastech alleged that Metro exercised its contractual discretion in bad faith.

[59] Justice Kasirer, writing for the majority in *Wastech*, noted that it had not been necessary in *Bhasin* to define the contours of the existing duty of good faith in the exercise of contractual discretion. However, this question was squarely before the Court in *Wastech*. The appellant *Wastech* maintained that the standard of good faith was one of “reasonableness”, arguing that it would be unreasonable for a contracting party to exercise discretion in a manner that denied the other party the substantial benefits it legitimately expected to derive from the contract. Justice Kasirer rejected this approach:

[61] In my respectful view, *Wastech*’s position contains two closely related flaws. First, it overstates the meaning of “reasonableness” in this context. Second, its submission rests on the further erroneous proposition that determining whether a party’s exercise of discretion resulted in the “substantial nullification” or “evisceration” of the benefit or objective of the contract is a correct method of assessing whether that party exercised its discretion in accordance with the requirements of the good faith duty at issue.
...

[60] Justice Kasirer observed that the Court in *Bhasin* concluded that in some circumstances, good faith may require “reasonable” contractual performance. This was consistent with pre-*Bhasin* case authority holding that discretionary contractual powers must be exercised reasonably. Justice Kasirer explained what is meant by reasonableness in this context:

[68] I think it best to note at the outset that I do not refer to reasonableness in an administrative law sense. Rather, I agree with Professor McCamus’ view that reasonableness for this good faith duty is understood by reference to purpose: “. . . where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred” ((2020), at p. 937).

[69] Thus, beyond the requirement of honest performance, to determine whether a party failed in its duty to exercise discretionary power in good faith, one must ask the following question: was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion? If so, the party has not exercised the contractual power in good faith.

[Emphasis added.]

[61] Where the discretion is exercised in a manner consistent with its purpose, “that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place”: *Wastech* at para. 70. In this sense, the concept of reasonableness respects the terms of the parties’ own bargain by restricting court intervention other than where parties have exercised their discretion in a manner that is unconnected to the purpose for the discretion:

[71] ...It is this principle that constrains contractual discretion and, accordingly, fixes the proper limits for judicial review of the exercise of the power. Importantly, it is not what a court sees as fair according to its view of what is the proper exercise of the discretion. Instead, drawing on the purpose set by the parties, the measure of fairness is what is reasonable according to the parties’ own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can then intervene, for example, where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties.

[Emphasis added.]

[62] The purpose for the grant of discretion may, in some cases, be clear in the text of the discretionary clause itself. In other circumstances, the purpose must be understood by reading the clause in the context of the contract as a whole:

[76] With this approach in mind, I stress that what a court considers unreasonable is highly context-specific, and ultimately “depend[s] upon the intention of the parties as disclosed by their contract” (*Greenberg*, at p. 762; see also *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105, at paras. 63-65; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 312-13). Demonstrating a breach will necessarily centre on an exercise of contractual interpretation. It is in properly interpreting the contract and the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

[Emphasis added.]

[63] Relying on the reasoning from *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, 1985 CanLII 1975 (C.A.), Kasirer J. also observed that, generally speaking, a distinction can be drawn between: (1) contractual discretion that is “readily susceptible of objective measurement”; and (2) contractual discretion in which the matter to be decided is not susceptible to objective measurement:

[77] ...For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement — e.g., matters relating to “operative fitness, structural completion, mechanical utility or marketability” — the range of reasonable outcomes will be relatively smaller (*Greenberg*, at p. 762). For contracts that grant discretionary power “in which the matter to be decided or approved is not readily susceptible [to] objective measurement — [including] matters involving taste, sensibility, personal compatibility or judgment of the party” exercising the discretionary power — the range of reasonable outcomes will be relatively larger (*Greenberg*, at p. 761). I emphasize, however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

[64] Returning to the parties’ arguments on appeal, Kasirer J. concluded that “substantial nullification” or “evisceration” of contractual benefits may be relevant to the analysis, but it is not a necessary prerequisite to finding a party exercised contractual discretion in bad faith: *Wastech* at paras. 82–85. Instead, what must be shown is that the exercise of discretion is capricious or arbitrary because it is unconnected to the purpose for which the discretion was granted and therefore is outside the range of behaviour contemplated by the parties.

[65] Justice Kasirer further concluded that the source of the duty to exercise contractual discretion in good faith is not an implied term of the contract but rather a general doctrine of contract law. As with the duty of honest contractual performance identified in *Bhasin*, the duty of good faith in the exercise of contractual discretion operates in every contract regardless of the parties’ intentions. The minimum constraints imposed by the duty interfere very little with the parties’ freedom of contract because parties will rarely expect contractual discretion to be exercised for purposes unrelated to the grant of the discretion. Furthermore:

[93] ... the content of the duty is guided by the will of the parties as expressed in their contract. Rather than interfering with the objectives of the contracting parties or imposing duties on them beyond their reasonable contemplation, this duty merely requires that parties operate within the scope of discretion defined by their own purposes for which they freely negotiated its grant. Holding the parties to this standard will generally be consistent with, not an unanticipated departure from, their freely negotiated bargain. Recognizing a general duty of contract law here will therefore interfere very little with that freedom.

[Emphasis added.]

[66] On the facts of *Wastech*, the Court held the purpose of granting Metro absolute discretion was to allow it to structure waste disposal in an efficient and cost-effective manner given the operational variability the parties foresaw. Metro's exercise of discretion was within a range of conduct contemplated by the cause and therefore was not in bad faith.

Discussion

[67] Before returning to the trial judgment in this case, I will summarize the relevant principles I take from the Supreme Court of Canada's judgment in *Wastech*:

- a) The duty to exercise contractual discretion in good faith is not based on implied terms in the contract but rather is a general doctrine of contract law that operates in all cases irrespective of the parties' intentions: at para. 91.
- b) Contractual discretion must be exercised reasonably, which in this context means in a manner connected to the purposes for which discretion was conferred: at para. 63.
- c) To determine the range of good faith behaviour, it is first necessary to interpret the contract—in accordance with the ordinary principles of contractual interpretation—and to determine those purposes: at paras. 70–72.
- d) In a contractual context, the choices available to a party exercising discretion are ascertained principally by reference to the contract, which is the “first source of justice between the parties”: at para. 75.
- e) Where the discretion is exercised in a manner consistent with its purpose, that exercise may be characterized as reasonable according to the parties' own bargain: at para. 71.
- f) Where discretion is exercised for an improper purpose—that is ulterior or extraneous to their intentions—then it is exercised in bad faith: at para. 75.

- g) This general duty of good faith in exercising discretion interferes very little with freedom of contract because: (1) contracting parties will rarely expect discretion to be exercised in a manner unconnected to the purposes for which it was conferred; and (2) the content of the duty is guided by the will of the parties: at paras. 92–93.

[68] It was common ground in this case that the words in the Substantial Completion Provision “or other evidence satisfactory to the Buyer that construction is finished” gave the appellant the discretion to decide whether she was satisfied with the other evidence that the construction was completed. The source of dispute was how the duty of good faith applied in this context and whether the duty was breached.

Did the trial judge make an extricable error of law?

[69] The appellant contends that the trial judge made an error of law in his interpretation and application of the principles established in *Wastech*. I am persuaded that the trial judge made two interrelated legal errors that justify appellate intervention in this case.

[70] First, the trial judge erred in law in applying the duty of good faith in the exercise of contractual discretion as if it were a principle of contractual interpretation rather than a general doctrine of common law. As *Wastech* makes clear, the Contract was the primary source of the parties’ obligations. The first step for the trial judge was to interpret the purposes of the discretion conferred on the appellant under the Substantial Completion Provision through the usual process of contractual interpretation. Once the purposes of conferring the discretion were identified, the duty of good faith would then operate to constrain the exercise of discretion by requiring its exercise to be connected to those purposes.

[71] The trial judge essentially collapsed the two stages of the analysis—contract interpretation and consideration of the duty of good faith. He relied on the common law doctrine of good faith to interpret the purpose and scope of the appellant’s discretion under the Substantial Completion Provision rather than viewing good faith

as a constraint on how the appellant could exercise her discretion. The trial judge rejected the appellant's argument that the phrase "or other evidence satisfactory to the Buyer" should be interpreted as conferring subjective discretion. He did so, at least in part, because he found it did not align as well with the common law duty of good faith as an interpretation "that accounts for objective reasonableness": RFJ at para. 34. However, the common law duty of good faith in the exercise of contractual discretion is not a principle of contractual interpretation. The duty does not dictate the terms of the parties' bargain; rather it acts as a "minimum constraint" on the exercise of discretion once the terms of the bargain have been ascertained.

[72] Relatedly, the trial judge made a second error of law in assuming that the duty of good faith in this context favours a standard of objective reasonableness. This is an incorrect reading of *Wastech*. The concept of "reasonableness" under the duty of good faith in the exercise of contractual discretion is not a reasonable person test.

[73] Notably, the clause in *Wastech* gave "absolute discretion" to Metro in allocating waste. The Court did not reinterpret the clause to impose a "reasonable person" standard on Metro in order to create an alignment with the common law duty of good faith. Instead, the Court held that the discretion—even though couched in absolute terms—was not untrammelled and could not be exercised in a manner unrelated to the purposes for its conferral. To that end, Kasirer J. noted that "when contracting parties confer a discretionary power, even without any apparent constraining criteria or conditions, courts have long recognized that the 'natural inference' is that they intend some minimum constraints on the exercise of the discretion": *Wastech* at para. 92. Those minimum constraints include the assumption or expectation that parties will not exercise discretion in a manner unconnected to the purposes for which it is granted.

[74] "Reasonableness" under this doctrine is measured against the purposes of the contractual provision. The task before the judge here was to interpret the Contract, and the purpose of the discretion given to the appellant in the Substantial

Completion Clause, and then to assess whether her exercise of discretion was reasonable. These are separate analyses.

[75] In my view, the trial judge erred in law in that he identified and applied the wrong legal principles to his interpretation of the Contract and his analysis of the duty of good faith in the exercise of contractual discretion. The trial judge erred in his identification of the content of the duty of good faith, and in his reliance on an incorrect conception of the duty of good faith to interpret the parties' bargain.

Remedy

[76] The parties are at odds regarding the appropriate remedy if this Court finds that the trial judge's analysis reflects any legal error.

[77] The appellant argues that this Court has the necessary factual record to substitute its own orders for that of the trial judge. The appellant seeks orders allowing the appeal, setting aside the trial judgment, dismissing the respondents' claim, and ordering the return of the appellant's deposit. The appellant argues that the trial judge accepted she was a credible and reliable witness and found her exercise of discretion was driven by genuine concern about the state of the construction. The appellant says that once the trial judge's legal error in imposing a "reasonable person" test is corrected, a finding that she exercised her discretion in good faith necessarily follows.

[78] While not conceding that the trial judge made any legal error, the respondents argue that, regardless, his factual findings are dispositive of the issues raised on appeal. Alternatively, the respondents say that the appropriate remedy is to remit the matter back to the trial court given the contested evidence regarding the appellant's purpose in failing to complete.

[79] The respondents rely on the trial judge's findings that: (1) due to the appellant's preoccupation with receiving the final occupancy certificate, she was not focused on other evidence that might have satisfied her that construction was complete; and (2) the appellant's assertion that she could not assess the other

evidence without an explanation of why the Property had not passed final inspection was “not credible” given that she could have sought more information from her professional advisors: RFJ at para. 63. The respondents argue these findings reflect that the trial judge determined that the appellant’s exercise of discretion was not connected to the purpose for its conferral, which is the test urged by the appellant.

[80] In my view, it is not possible to isolate the trial judge’s factual findings from the legal errors I have identified. The trial judge assessed the evidence in this case according to the wrong legal standard. He assessed the duty of good faith by asking whether the appellant’s refusal to complete was consistent with how “a reasonable person with all the subjective but reasonable standards of the buyer” would behave. For the reasons I have stated, the trial judge erred in law in the framework of analysis he adopted. Since the trial judge applied the wrong legal framework, his factual findings cannot stand.

[81] I also observe that the trial judge’s analysis of the evidence as it relates to the appellant’s concerns about the lack of an unconditional occupancy certificate is not tied to the provisions of the Contract. It may be recalled that the Substantial Completion Provision required the respondents to “deliver” satisfactory evidence to the appellant by the completion date that the construction had completed. The trial judge does not identify the source of the appellant’s obligation to make inquiries of her professional advisors and others in order to gather evidence that was not provided to her by the respondents. He also does not explain the basis on which knowledge could be imputed to the appellant—such as the eventual costs of the remedial work—in relation to events that occurred after the completion date. To the extent that the trial judge’s findings are based on his conception of what would be expected of a reasonable person, his findings reflect the legal errors I have found.

[82] The remaining question is whether the appropriate remedy is for this Court to substitute its own decision or to remit the matter for a new trial.

[83] I am not persuaded that it is feasible or in the interests of justice for this Court to conduct a fresh assessment of the evidence in this case and to grant the orders

sought by the appellant: *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 135. This Court would have to make original findings of fact on at least two contested issues: (1) the proper interpretation of the Substantial Completion Provision; and (2) whether the appellant acted from a genuine concern about the state of construction when she refused to close.

[84] On the latter point, the respondents argue— as they did at trial—that there is a basis in the evidence to infer that the appellant relied on the Substantial Completion Provision as a pretext to terminate the Contract for other reasons, particularly to avoid a loss due to declining property values. Although the appellant denies that she relied on the Substantial Completion Provision for an ulterior or improper purpose, she acknowledges that if she did so, this would be a breach of the duty of good faith. The trial judge did not address this issue and resolving it would require findings on contested evidence. Among other things, there is a contentious question about whether the appellant could have closed on the completion date when she had not received final approval for financing from CIBC. As I understand the respondents’ argument, they say that the appellant was not in a position to close on the completion date, and this supports an inference that she had no genuine intention to complete the purchase for reasons unrelated to the Substantial Completion Provision.

[85] The appellant emphasizes that the trial judge made a general finding that her evidence was credible and reliable. However, the respondents point out that the trial judge also found that the appellant’s specific evidence about the reasons why she was not satisfied that construction was complete was not credible. The trial judge’s credibility findings are not sufficiently clear that they would determine the respondents’ theory of an improper purpose. Put another way, it is not clear what finding the trial judge would have made on the allegation of an improper purpose if he had realized he had to address it. This type of evidentiary contest should not be resolved in the first instance by this Court on an appeal.

Disposition

[86] I would allow the appeal, set aside the trial judgment, and order a new trial.

“The Honourable Madam Justice Horsman”

I AGREE:

“The Honourable Justice Fleming”

I AGREE:

“The Honourable Justice MacNaughton”