

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cheung v. Lin*,  
2026 BCSC 596

Date: 20260402  
Docket: S225070  
Registry: Vancouver

Between:

**Katherine Cheung**

Plaintiff

And

**Hui Xue Lin, by her litigation representative, Tiffany Chen**

Defendant

Before: The Honourable Justice J. Hughes

## Reasons for Judgment

Counsel for the Plaintiff:

D. Dahlgren  
A. Leung

Counsel for the Defendant:

M. Drouillard  
B. Love

Place and Date of Hearing:

Vancouver, B.C.  
July 14-15, 2025 and  
September 29, 2025

Place and Date of Judgment:

Vancouver, B.C.  
April 2, 2026

**Table of Contents**

**OVERVIEW..... 3**

**FACTS..... 3**

    The contract of purchase and sale ..... 4

    The Flood & Emergency Repairs ..... 4

    Post-Flood communications between the parties ..... 10

    Condition of the Property on the Completion Date ..... 11

    Remediation of the Property ..... 13

    Defendant’s attempt to reset closing date ..... 16

    Eventual sale of the Property ..... 17

**ISSUES..... 18**

**ANALYSIS..... 19**

    Was the defendant in breach of her obligations under clause 8 of the Contract? 19

    Did the condition of the Property on the Possession Date amount to fundamental breach? ..... 21

    Was the plaintiff entitled to terminate the contract on account of the defendant’s breach of clause 8? ..... 27

**CONCLUSION..... 34**

**Overview**

[1] This is a claim for breach of contract in which the plaintiff, Katherine Cheung, and the defendant, Hui Xue Lin, each claim that the other breached a contract of purchase and sale entered into between them for the purchase of a residential property located at 7780 Eperson Road in Richmond, British Columbia (the “Property”).

[2] Approximately one week before the possession date, there was a water leak at the Property, which caused flooding and damage to the Property. The plaintiff did not complete the purchase of the Property. She claims that the defendant breached the contract of purchase and sale because the Property was not in substantially the same condition on the possession date as it was when viewed, and seeks return of her deposit.

[3] By way of counterclaim, the defendant asserts that it was the plaintiff who breached the contract of purchase and sale when she failed to complete the purchase. The defendant accepts that the Property was not in the same condition on the possession date as when viewed, but says that the plaintiff was not entitled to terminate the contract on that basis because the relevant clause was not a material term of the contract, and the extent of the damage to the Property did rise to the level of fundamental breach.

**Facts**

[4] The defendant, Ms. Lin, is deceased. Her daughter, Tiffany Chen, is acting as her litigation representative in this action.

[5] In early April 2022, Ms. Lin listed the Property for sale. Ms. Chen is a licensed real estate agent and represented her mother.

[6] At the time, the plaintiff was a university student who, with her parents’ help, was looking to purchase a residential property to live in. Ms. Cheung’s parents, Steven Cheung and Sze King Lo, lived near the Property and became aware that it was for sale.

[7] Mr. Cheung viewed the Property on April 9, 2022. At that time, the Property was vacant. Mr. Cheung observed it to be in generally good condition with no major visible defects. He consulted with the plaintiff and Ms. Lo and they decided that the plaintiff would submit an offer to purchase the Property. The plaintiff was also represented by a licensed real estate agent, Cheng-en (Brian) Chung.

[8] The plaintiff's offer to purchase the Property was above the listing price and subject-free. The defendant accepted the plaintiff's offer.

**The contract of purchase and sale**

[9] By contract of purchase and sale dated April 11, 2022 (the "Contract"), the plaintiff agreed to purchase, and the defendant agreed to sell, the Property for \$2,650,000. The Contract was in the standard form contract of purchase and sale for residential properties in British Columbia. The completion and possession dates were both June 15, 2022 ("Completion Date" or the "Possession Date"). A deposit of \$132,500 was required and was paid on April 12, 2022 (the "Deposit").

[10] Clause 8 of the Contract is central to this action. It provides:

8. VIEWED: The Property and all included items will be in substantially the same condition at the Possession Date as when viewed by the Buyer on April 9<sup>th</sup>, yr. 2022.

[11] The plaintiff claims that the defendant breached clause 8 of the Contract because, on account of the Flood, the Property was not in substantially the same condition on June 15, 2022 as it was on April 9, 2022.

**The Flood & Emergency Repairs**

[12] On June 6, 2022, Mr. Cheung and Mr. Chung were meeting at a neighbouring property. Following their meeting, they walked over to the Property. Mr. Cheung looked through the front window and noticed that the wood flooring appeared to be heaved, warped, and wet.

[13] Mr. Cheung asked Mr. Chung to contact Ms. Chen, which he did. In response, Mr. Chung received a call from Ms. Chen's assistant, Allan Liu. Mr. Chung says that he asked Mr. Liu to let them into the Property, but Mr. Liu advised that he was not available that day, June 6, 2022. Mr. Chung also sent Mr. Liu a text message on June 6, 2022 telling him that "Buyer would like to stop by with trades ppl on Wednesday June 8th morning @ 10am. Could you please kindly open the door for us? Thanks".

[14] Ms. Chen's evidence is that she was contacted by Mr. Liu on June 8, 2022, and he informed her that "he had received a phone call from the purchaser that there had been a leak at the Property". Either Mr. Liu did not tell Ms. Chen about the water issue at the Property until June 8, 2022, or Ms. Chen is mistaken about the date on which she was contacted by Mr. Liu because Mr. Chung's uncontradicted evidence is that he spoke with Mr. Liu by phone and told him about the leak on June 6, 2022.

[15] Mr. Liu is no longer Ms. Chen's assistant. There is no evidence from him before the court. Regardless, whether Ms. Chen learned about the water issues at the Property on June 6 or June 8 is not material to the issues to be determined on this summary trial.

[16] On the morning of June 8, 2022, the parties and their representatives, including Ms. Chen and Mr. Liu, attended at the Property, with a plumber and gasfitter, Adrian Simpson, and a building inspector, Jon Sheppard. Mr. Liu attended on behalf of Ms. Chen and the defendant.

[17] When he entered the Property on the morning of June 8, 2022, Mr. Cheung noticed that the interior was extremely hot and humid, "like a wet sauna". Evidence of ongoing and active water ingress was evident throughout the main floor of the home (the "Flood"). Mr. Cheung observed that "there was extremely hot water, saturated with mud and sand, bubbling up like a hot spring through the kitchen floor near the island". Mr. Cheung described the damage he observed as follows:

The wood floors on the bottom of the house were all saturated and warped, as were the bottom few inches of all the cabinets and drywall. There was a

hot tub far from the kitchen. It was all heaved up out of its enclosure and had taken tiles up with it. I looked around the exterior of the property, and Jon Sheppard pointed out that there was water running out from under the house along the foundation, and that the back yard grass was so full of water that it had stopped soaking in and had saturated the yard.

[18] While at the Property on June 8, 2022, Mr. Cheung, Ms. Lo, and Mr. Chung took photographs and videos that show the Flood in an active state, the water damage being caused to the Property, and the condition of the Property at that time. It is patently obvious from the videos and photographs tendered by the plaintiff that there was a significant ongoing flood event at the Property on June 8, 2022.

[19] The flooding and damage visible in the photographs and videos includes: water flowing out from the concrete foundation and into the back yard; water visible in multiple locations on the interior main floor with pooling in some areas; a layer of what appears to be sand or dirt covered many of floor surfaces; hardwood flooring was warped, buckled and rippled in the living and family rooms; and tile flooring was cracked and dislodged in places, including around the hot tub, which also appeared to be dislodged from its surrounding structure. The visual evidence of the Flood is consistent with Mr. Cheung's evidence and with the Property having suffered a significant flooding event and resulting damage.

[20] Mr. Sheppard shut off the water, the boiler, and a number of circuit breakers that kept tripping. At approximately 12:00 p.m. on June 8, 2022, Ms. Chen engaged Paul Davis Restoration Company who attended at the Property at approximately 1:00 p.m. Paul Davis Restoration undertook emergency remediation services at the Property on June 8 and 9, 2022 to address the Flood, including water remediation and extraction and drying by way of dehumidifier.

[21] On June 9, 2022, Ms. Chen engaged Hongwei Song of Oliver Plumbing and Heating Ltd. to investigate the cause and location of the Flood and make the necessary repairs. Mr. Song testified that he effected repairs at the Property which consisted of cutting off the leaking hot water lines to the kitchen, capping one of them, and installing a new supply line to the kitchen and master bedroom. He also

removed portions of the ceiling to facilitate access to the supply lines. Mr. Song testified that he was able to fix the leak and turn the water and heating back on by the early morning hours of June 12, 2022. Mr. Song did not complete any additional work at the Property.

[22] The steps Mr. Song undertook in investigating the Flood are detailed in an investigation report he provided to Ms. Chen on June 13, 2022. Mr. Song's investigation report is brief, consisting of a short narrative followed by three photographs depicting the water damage at the Property. The narrative portion of Mr. Song's report was as follows:

Received emergency call for a flood house in Richmond BC. Address is 7780 Eperson Rd. Arrived on site, noticed that water main was shut off. House was equipped with poly-b piping and also used floor radiation heating.

Living room and rec room were hit hard. Water had warped the hardwood floor. Put water back on, about 30 minute later, water was appeared [sic] in the living room by the north side wall.

Shut down storage tank and cold water lines, and turned on boiler. In living room and rec room, adjust thermostats to call for heat. Waited for 30 minutes, no bubble or more water came from same location.

Shut down boiler and turn on storage tank and cold water lines, water was making bubbles at the same place and more water come out from floor.

As a result, I believed it was water lines leaking in the slab and needed to be repaired/replaced.

[emphasis added]

[23] Despite receiving Mr. Song's report on June 13, 2022, Ms. Chen did not provide it to the plaintiff. The plaintiff did not receive a copy of that report until it was disclosed in this litigation.

[24] The plaintiff did, however, receive inspection reports from the professionals Mr. Cheung had engaged—Mr. Simpson and Mr. Sheppard—who attended at the Property when the Flood was discovered on June 8, 2022.

[25] Mr. Simpson's plumbing inspection report set out his opinions about the cause and potential impacts of the Flood, and the investigation and remediation work required to address it. The parties agree that Mr. Simpson's June 8, 2022

report is admissible for the purpose of establishing what the plaintiff knew about the cause and extent of, and damage to the Property from the Flood at the material time, namely the week prior to the Closing Date (June 8 to 15, 2022).

[26] In his inspection report, Mr. Simpson opined that a major flood had occurred in the Property because of the in-floor radiant heating system and that there was “major water damage at heat which will cause mold growth”. He also indicated that the Property had suffered water damage to the flooring and drywall, and possible slab cracking and wash out under the slab. In terms of the work necessary to remediate the Property and render it habitable, Mr. Simpson said this:

Home at this time requires major work to be able to live in. Water damage to lower floor is excessive and not repairable via conventional means. Slab would have to be removed to re-pipe the main floor, boiler replacement and piping replacement to make this home safe and livable.

[27] Mr. Simpson concluded his report with the following:

Either way at this point there is no way that the house is liveable, it is going to be suffering from major contamination of mold within the next one to two weeks as the temperature increases locally this is going to cause mold spores to grow within the drywall behind the drywall and underneath all the laminate floor. The boiler has been red flagged by me as a gas contractor and it is not be [sic] ignited and not to be used until it is replaced as it's unsafe at this time the gas is also shut and notice has been submitted to Fortis and to Technical Safety BC.

As a rough guide, the floor/radiant piping replacement would be approx. \$155,000CDN and 2.5 to 3 month project. This would include installation of a new Tankless Combi boiler and repiping.

[28] Mr. Sheppard also provided the plaintiff with a property inspection report, which summarized the findings from his June 8, 2022 inspection. In terms of the structure, Mr. Sheppard made the following observations and recommendations:

Condition: Upon arrival it was determined that a leak was underway with water running out from under the back door threshold into the back yard. The exposed perimeter of exposed concrete foundation was wet to the touch as water seeped out from the building. The entire back yard was super-saturated from the leaking water. The hot tub appears to have been lifted 4-6 inches, tearing a tile off the tub platform during the process of movement. I turned the water and the breakers to the boiler off and informed the listing realtor and

client. We strongly recommend that a structural engineer and a geo-technical engineer review the conditions that the flood has created and make recommendations. There is a potential for undermining of the slab of the home, a potential for further movement and the potential for costly concealed damaged [sic].

Location: Throughout

Task: Further evaluation

Time: Immediate / Before subject removal

[29] Mr. Sheppard's report also noted the following issues with the Property post-Flood, most of which he characterized as potentially significant expenses:

- a) Floors: "Water damage. There has been a leak in the hydronic floor heating system that has flooded the first floor of the building. All wood flooring will require replacement, engage a restoration company to remove the damaged wood flooring and determine the scope of work to be completed. There are two areas that the tile flooring has cracked and consideration should be given to the replacement of these two floors along with the wood flooring replacement. There is a potential for concealed damages leading to costly repairs";
- b) Boiler: "Near end of normal life expectancy. Catastrophic failure of the heating system, unable to verify operation, engage a plumbing/heating contractor to repair the system";
- c) Electrical: "A number of breakers were tripped in the panel, water from the [F]lood may have contacted electrical components and caused a short that would trip the breakers. Engage an electrical contractor to review and determine the cause of the tripped breakers"; and
- d) Exterior stucco: "The hydronic heating system has leaked and flooded the bottom floor of the building. There has been water running under the bottom plate of the wall system. The exterior EFIS siding has a metal bottom edge that may rust, monitor and improve as required".

[30] Both individually and taken together, Mr. Sheppard and Mr. Simpson's inspections raise significant issues of concern for the plaintiff regarding the condition of the Property post-Flood.

[31] The plaintiff testified that after she learned about the Flood, saw the water damage, and reviewed Mr. Simpson's and Mr. Sheppard's inspection reports, she did not want to purchase or live in the Property. The plaintiff was very concerned that her health might be negatively impacted by mould and poor air quality and did not want to undertake the cost and uncertainty of investigating, and remediating the water damage to the Property. Based on the knowledge she had at the time, the plaintiff did not consider the Property as it existed post-Flood to be in a liveable or satisfactory condition.

#### **Post-Flood communications between the parties**

[32] On June 10, 2022, the plaintiff's counsel wrote to the defendant's counsel to advise that because of the Flood and resulting damage to the Property, she would not be completing the purchase and requested return of the Deposit. The plaintiff took the position that the Property had been rendered unsuitable for human habitation by the Flood, was not presently in substantially the same condition as when viewed, and would not be in the necessary condition for some time given the nature and scope of the damage and required remediation. In support of her position, the plaintiff provided copies of Mr. Sheppard and Mr. Simpson's inspection reports for the defendant's consideration.

[33] Three days later, on June 13, 2022, the defendant's counsel responded by email. The defendant did not acknowledge the fact of the Flood and denied the plaintiff's assertions about the condition of the Property. The defendant took the position that the plaintiff was required to complete the purchase.

[34] The defendant did not engage with the observations and recommendations contained in Mr. Simpson and Mr. Sheppard's post-Flood inspection reports. The defendant did not provide any information to the plaintiff about what steps she was taking to investigate and remediate the water damage to the Property. Notably,

despite Mr. Song's report also being dated June 13, 2022, the defendant did not provide it to the plaintiff.

[35] It is uncontested that the only information that the defendant conveyed to the plaintiff about the repair and remediation work being done at the Property before the Completion Date was contained in a June 13, 2022 text message from Ms. Chen to Mr. Chung in which Ms. Chen said this:

Hi Brian, regarding 7780 Eperson, all pipes got fixed and we are doing flooring and dry walls in these couple days [sic].

[36] There is nothing in the defendant's counsel's June 13, 2022 letter or Ms. Chen's June 13, 2022 text message that would provide any comfort or assurance to the plaintiff that the defendant was taking the necessary and appropriate steps to investigate the cause of the Flood or remediate the Property. Other than the limited information contained in the June 13, 2022 text message, the defendant did not provide any other information about the nature or extent of investigations or repair work that had been done or was in progress, nor did she offer a holdback or to extend the completion date pending completion of remediation work.

[37] Thus as of the Closing Date, the plaintiff was a position where she had Mr. Simpson and Mr. Sheppard's inspection reports detailing significant and serious water damage to the Property, along with photographs and videos of the flooding and resulting damage to the Property as it existed on June 8, 2022, but the defendant was denying any significant damage to the Property and demanding she complete the purchase in the absence of any meaningful information about remediation work being undertaken.

[38] The plaintiff did not complete the purchase of the Property on the Completion Date.

**Condition of the Property on the Completion Date**

[39] While there is ample evidence of the condition of the Property on June 8, 2022, the record contains little evidence of the condition of the Property seven days

later, on the Closing Date. The defendant accepts that she has not adduced any evidence of what the Property looked like on June 15, 2022. However, she notes that Mr. Song included three photos in his June 12, 2022 report. I find those photos to be of little assistance because they only show the living and family rooms and depict the flooring in those rooms in the essentially the same water-damaged condition as on June 8, 2022.

[40] The defendant invites the Court to rely on photographs of the Property appended to a December 2022 appraisal as illustrative of the condition of the Property on June 15, 2022. I decline to do so. The preponderance of the evidence, including the defendant's own evidence, shows that the condition of the Property on June 15, 2022 was materially different than it was in December 2022.

[41] The only work that had been done at the Property as of the Closing Date was the emergency remediation work done by Paul Davis Restoration and the plumbing work done by Mr. Song to fix the leaking hot water lines. Thus, as of the Closing Date, the water ingress had been stopped and the Property dried out, but no work had been done to repair the damage caused by the Flood.

[42] At a minimum, leaving aside the other visible and potentially latent damage noted by Mr. Simpson and Mr. Sheppard in their inspection reports, it is undisputed that as of the Closing Date:

- a) the flooring in the family and living rooms was warped by water damage and had been pulled up in places and thus required replacement; and
- b) the drywall that Mr. Song had cut out to access the plumbing also needed to be repaired.

[43] There is no evidence that the defendant took any steps to investigate or address the structural and mould-related concerns raised in Mr. Simpson and Mr. Sheppard's inspection reports before or after the Completion Date.

### Remediation of the Property

[44] On June 20, 2022, Ms. Chen hired Gilbert Kan of Total Improvement Projects Inc. to fix the drywall and replace the damaged flooring. There is no explanation for why Mr. Kan was not engaged until June 20, 2022, when Mr. Song's work was apparently completed as of June 12, 2022 and Ms. Chen's June 13, 2022 text message indicated that the flooring and drywall would be done in the next "couple" of days.

[45] Mr. Kan testified that he did the following work at the Property, which was completed by June 28, 2022:

I removed the damaged floor and drywall and did some drying work with fans. Once the area was completely dry, I installed new drywall and patch and then painted and sanded the walls. I also removed and replaced the laminate flooring and underlay and replaced it with new laminate and underlay. The paint and new floor matched the paint and floor that was damaged, and matched the rest of the home.

[46] No additional repair or remediation work was done by the defendant. The defendant did not replace the boiler, and no work was done to the electrical system or to the radiant in-floor heating in the kitchen, family room or living room after the Flood.

[47] Despite Mr. Cheung and Mr. Sheppard's evidence and observations of the hot tub being lifted out of its enclosure and damage to the surrounding tile, the defendant did not do any repair work in the hot tub area. Ms. Chen simply denies any damage to the hot tub. She says that after Paul Davis Restoration completed the emergency remediation work, "the sauna tub settled back into its original position with the original tiles". I reject the inference in Ms. Chen's evidence that there was no damage to the hot tub or its surrounding tile because it is inconsistent with Mr. Cheung and Mr. Sheppard's testimony about the damage they observed to the hot tub and the photographic evidence of such damage. Ms. Chen's evidence that no repairs were needed because the hot tub "settled back into its original position" (emphasis added) also belies her evidence that there was no damage to the hot tub.

[48] Ms. Chen’s evidence about the condition of the hot tub is also demonstrative of what I find was a somewhat lackadaisical approach towards investigating the potential short- and long-term consequences of the Flood raised in Mr. Sheppard and Mr. Simpson’s inspection reports. Ms. Chen asserts that she is not aware of any additional work being done by the eventual purchaser of the Property on account of the Flood. In the absence of any evidence that Ms. Chen ever contacted the subsequent purchaser to make inquiries about the condition of the Property, I give no weight to Ms. Chen’s evidence to that effect. Ms. Chen is also not qualified to opine on whether the Flood caused mould issues in the Property and I thus give no weight to her bare assertion that “no mold was caused by the [Flood] or remediated at any time after the [Flood]”.

[49] Moreover, based on the defendant’s own evidence, there was unremediated water damage remaining at the Property as of late July or early August 2022. The defendant retained Glenn Duxbury of Duxbury and Associates to prepare an expert report dated October 7, 2022, in which he opines on the cause of the Flood and the nature and extent of resulting damage to the Property. The defendant relies on Mr. Duxbury’s report in support of her position that the condition of the Property on the Completion Date did not result in a fundamental breach of clause 8 of the Contract.

[50] For the reasons which I set out in further detail below, I give no weight to Mr. Duxbury’s opinions about the cause of the Flood or the nature and extent of the damage caused. That said, Mr. Duxbury visited the Property on two occasions—July 25 and August 2, 2022—and made certain observations about the condition of the Property on those dates. I accept this aspect of his evidence as fact evidence. Mr. Duxbury opined that neither of his site visits “indicated any damage or extreme distress beyond the interior water-affected finishes, some of which had been already dealt with ...” (emphasis added). Mr. Duxbury appends photographs at pages 9 to 11 of his report showing what the defendant accepted in her submissions was remaining water damage to baseboards and kitchen cabinetry. The damage to the Property caused by the Flood was thus still not fully remediated as of at least July 25, 2022, and potentially as late as August 3, 2022.

[51] However, I give Mr. Duxbury's opinions regarding the cause of the Flood and nature and extent of the resulting damage no weight. First, Mr. Duxbury only attended at the Property *after* Mr. Song and Mr. Kan completed their work, i.e. after the leak had been repaired, the flooring replaced, drywall repaired, and painting completed, and he was not provided with Mr. Simpson or Mr. Sheppard's complete inspection reports detailing the observations they made on June 8, 2022 of the active flooding.

[52] Second, Mr. Duxbury appears to rely entirely on and adopt Mr. Song's opinion about the cause of the Flood as his own. His report is also silent as to what investigations he personally undertook, beyond visually inspecting the Property, prior to forming his opinion.

[53] Third and most importantly, Mr. Duxbury was not given the videos of the Flood that were taken on June 8, 2022, and it appears that he was only provided with some of the photographs taken that day. It is difficult to understand how Mr. Duxbury can form a reliable opinion on the cause or mechanism of the Flood without that information. For example, he opines that "the flooding did not cause damage to the home's foundation, to any apparent extent" (emphasis added) and goes on to say that:

My opinion is, the flooding did not cause any significant wash-out, under the slab.

The reason for my opinion, is, the subject water was rising up and flooding the lower floor, to the point of then flowing outside, due its [sic] bulk volume. There was no sign of significant water-discharge under the floor. There was also no sign of wash-out evidence around the perimeter. This fact is again verified by [Mr. Song's] observations: ...

My perimeter observations around the dwelling also did not indicate any such wash-out condition which, given the rather flat lay of the land, should have been obvious.

[54] While Mr. Duxbury's opinion is limited in that he says there was no damage to the foundation to any "apparent" extent and no sign of "significant" water discharge under the floor, I conclude that I cannot give it any weight in face of the video evidence, which appears to show water actively flowing into the yard from

underneath the back door of the house, between the door and the concrete slab. Mr. Duxbury first visited the Property many weeks after the Flood and was not provided with the best evidence of what transpired. He also fails to explain what “wash-out evidence around the perimeter” he would have expected to, but did not, see at the Property six-weeks post-Flood, or which of Mr. Song’s observations he relied on in forming his opinion.

[55] Accordingly, I find that the extent of repair and remediation work done by the defendant following the Flood was as follows:

- a) Paul Davis Restoration conducted emergency services to address the leak, including water remediation and extraction and drying by way of dehumidifier on June 8 and 9, 2022;
- b) From June 9-12, 2022, Mr. Song determined that the cause was a leak in the water lines supplying hot water to the kitchen and upstairs, which he repaired by relacing those pipes; and
- c) From June 20-28, 2022 (post-Possession Date), Mr. Kan replaced the water-damaged flooring in the kitchen, living room and family room, damaged drywall, and repainted.

#### **Defendant’s attempt to reset closing date**

[56] On June 20, 2022, counsel for the defendant wrote to counsel for the plaintiff taking the position that it was open to the defendant to reset the completion date, and giving notice that they now expected the plaintiff to close on June 28, 2022. The defendant also took the following position regarding the nature and extent of the Flood damage:

We have reviewed your correspondence with Mr. Liu, our client’s conveyancer. Your client’s position that she was entitled to repudiate the contract is obviously without merit. Minor cosmetic damage caused by a flood does not come close to being a material term allowing your client to fail to complete, and there is no clause in the Contract that your client can point to that can be fairly construed as a material term in that regard.

[emphasis added]

[57] Notably, the defendant did not advise the plaintiff of what steps had been taken to repair and remediate the Property, or the cost incurred in doing so, to date.

[58] The plaintiff responded on June 22, 2022 and took issue with the defendant's attempt to re-set the closing date, noting that there was no longer any contract to be reinstated. The plaintiff also objected to the defendant's characterization of the damage as being merely "minor cosmetic damage" and outlined the steps she understood to be necessary to properly remediate the Property as set out in Mr. Simpson and Mr. Sheppard's inspection reports, copies of which were again enclosed. The plaintiff noted the numerous photos and videos of the damage and asserted that the defendant was engaged in "last-minute attempts ... to effect superficial repairs", which were still ongoing after the Completion Date.

[59] The plaintiff did not complete the purchase on the defendant's purported re-set closing date. Instead, she commenced this action on June 22, 2022, claiming return of the Deposit. On July 11, 2022, the defendant filed her counterclaim seeking specific performance of the Contract.

#### **Eventual sale of the Property**

[60] The defendant did not relist the Property for sale until October 17, 2022. Ms. Chen testified that the delay in relisting the Property was because they were hoping that this litigation would result in the Contract being enforced against Ms. Cheung. I find it difficult to accept Ms. Chen's evidence on this point when I consider it within the context of the evidence as a whole, and especially the plaintiff's repeated and express refusals to complete the purchase and filing this action to seek recovery of the Deposit in July 2022.

[61] The defendant did not receive any offers to purchase at the initial price of \$2,680,000 and accordingly, on November 9, 2022, she reduced the list price to \$2,380,000.00. On November 15, 2022, the defendant entered into a contract of purchase and sale for the Property with Yun Ling Wu for a purchase price of \$2,165,000.00. Mr. Wu's offer was the only one Ms. Lin received.

[62] On November 30, 2022, the defendant advised the plaintiff that the Property had been sold and that accordingly, she was no longer seeking specific performance of the Contract. The sale to Mr. Wu completed on January 12, 2023.

**Issues**

[63] The parties submit that this action is suitable for determination by way of summary trial. I agree. Considering the whole of the evidence in light of the applicable legal principles and the parties' submissions, I am able to find the facts necessary to decide the issues of fact and law that arise and that it would not be unjust to decide those issues on this application.

[64] It is undisputed that the Property was not in the same condition on the Possession Date as it was viewed on April 9, 2022. The plaintiff says that the Property was not in "substantially the same condition" as required by clause 8, and that this was a material term of the Contract such that she was entitled to terminate it upon the defendant's breach. Alternatively, the plaintiff says that the condition of the Property on the Possession Date amounted to a fundamental breach entitling her to terminate the Contract even if clause 8 was not a material term.

[65] The defendant asserts that clause 8 was not a material term of the Contract and denies any fundamental breach thereof. In the defendant's submission, the plaintiff anticipatorily breached the Contract by refusing to complete the purchase on the Completion Date.

[66] The issues I must determine are therefore:

- a) whether the condition of the Property on the Possession Date amounted to a fundamental breach of the Contract; and if not, then
- b) whether clause 8 was a material term of the Contract such that the plaintiff was entitled to terminate absent fundamental breach.

[67] For the reasons set out below, I find that the Property was not in substantially the same condition on the Possession Date as when viewed, and that its condition

on the Possession Date amounted to a fundamental breach of the Contract. I also conclude that clause 8 was a material term of the Contract. The plaintiff was therefore entitled to treat the Contract as at an end, was not obliged to purchase the Property, and is entitled to return of the Deposit.

### **Analysis**

[68] As noted above, both parties assert that the other breached the Contract. The plaintiff relies on a body of caselaw from this jurisdiction and others, which she says supports the proposition that the defendant's failure to deliver the Property in substantially the same condition as when viewed, in breach of clause 8 of the Contract, entitled her to terminate it. The plaintiff says that clause 8 of the standard form contract of purchase and sale is a material term or condition, breach of which entitled her to terminate the Contract.

[69] The defendant says the plaintiff's authorities must be approached cautiously and that unlike other jurisdictions, in British Columbia, clause 8 is not a material term or condition. Accordingly, unless fundamental breach is proven, breach of clause 8 does not entitle a purchaser to terminate the contract; they must complete the purchase and sue for damages. In the defendant's submission, the condition of the Property on the Possession Date did not amount to fundamental breach and thus, it was the plaintiff who breached the Contract when she failed to complete the purchase.

### **Was the defendant in breach of her obligations under clause 8 of the Contract?**

[70] Pursuant to clause 8 of the Contract, the Property was to be in "substantially the same condition on the Possession Date as when viewed" on April 9, 2022. The defendant accepted that the Property was not in the *same* condition and did not strenuously dispute that it was not in *substantially* the same condition on the Possession Date as it was when viewed on April 9, 2022.

[71] This is consistent with the preponderance of the evidence, which clearly demonstrates that the Property was not in substantially the same condition on June

15, 2022 as it was on April 9, 2022 because of the Flood, which caused significant water damage throughout the main floor of the Property. While the leak itself was fixed as of June 12, 2022—three days before the Possession Date—the Property remained an active construction site with ongoing remediation work throughout the main floor on the Possession Date.

[72] In *Morrison v. Mar Lado Enterprises Inc.*, 2001 BCSC 1032, the question of whether a property was in “substantially the same condition” was considered in circumstances where 11 trees were cut down on a “heavily treed” property. The Court concluded that this was “sufficient enough to constitute a substantial change in the condition of the property” as of the possession date, and consequently, the seller’s estate was liable for the failure to deliver the property in “substantially the same condition” as when viewed: para. 43. The damage to the Property in the present case is, in my view, far more substantial than that in *Morrison*.

[73] Similarly, in *Pordell v. Crowther*, 2020 ONSC 1635, the Court found that a residential property had suffered “substantial damage” from fire in circumstances where there was damage to walls, floors and windows; the repairs took approximately one month to complete; and cost approximately \$19,000 (1-2% of the purchase price): paras. 72-73. The Court noted that the concept of “substantial damage’ is not merely a numbers game” and that the quality, character and consequences of the damage must also be considered (at para. 74), concluding as follows:

[75] In this case, the fact that the cost of the repairs was small in relation to the purchase price is not a basis on which to find that the damage was not “substantial”. A fire occurred in a house in which the plaintiff was proposing to invest \$1.6 million. It caused considerable damage and could not be repaired in a day or two. The extent of the damage could only be speculated by the experts after the fact based on limited information, though with more information than was provided to [the plaintiff], and the experts disagreed.

[74] Similarly, the monetary cost to the defendant to effect the repairs she did to the Property—approximately \$20,000—was relatively minor in comparison to the purchase price, this does not negate the substantial nature of the damage. And

moreover, there was disagreement between the professionals about nature and extent of investigations and required remediation. In any event, even the repairs that were effected—which I find were more minimal in nature than Mr. Simpson’s inspection report suggested might be necessary—could not be completed in a manner of days.

[75] In the circumstances, I am satisfied that the plaintiff has established that the defendant was unable to deliver the Property in substantially the same condition on the Possession Date as when viewed and thus breached clause 8 of the Contract.

**Did the condition of the Property on the Possession Date amount to fundamental breach?**

[76] Not every breach of contract will constitute repudiation of the agreement; there must be a breach of a contractual condition or another sufficiently important term that amounts to a substantial failure of performance: *Epix Developments Ltd. v. Bonnis Development Union Street Limited Partnership*, 2025 BCSC 805 at para. 103, citing *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 144-145. A breach will be repudiatory—a fundamental breach—if it deprives the innocent party of substantially the whole benefit of the contract: *Marcotte v. Marcotte*, 2018 BCCA 362 at para. 44; see also *Pakistan-Canada Assn. Inc. No. S0007016 v. Great Light Healing Ministries Int’l: City of Faith*, 2024 BCSC 1711 [*Pakistan-Canada*] at paras. 46 and 49.

[77] Whether there has been a repudiation of a contract is determined objectively: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 1999 CanLII 664 at para. 40.

[78] The consequences of repudiation were summarized in *Epix* as follows:

[104] Where one party repudiates a contract, the innocent party has two options: accept the repudiation (terminating the contract) and pursue remedies for the breach, or affirm the contract, which remains alive in all respects for both parties: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 33–34. In other words, termination does not automatically follow repudiation. To terminate the contract, the innocent party must either communicate its acceptance of the repudiation to the repudiating party, or provide notice of

termination, within a reasonable time: *Kaur v. Bajwa*, 2020 BCCA 310 at paras. 26, 28–29; *Conwest Contracting Ltd. v. Crown and Mountain Creations Ltd.*, 2021 BCSC 2116 at para. 209. When faced with a repudiation, the opposing party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept a repudiation; this can include time to assess the circumstances, consider the options and explore possibilities to resolve the situation: *Dosanjh* at paras. 23, 36-37.

[79] Where a repudiation is clearly accepted, the contract is terminated and both parties are released from their obligations. However, if the innocent party elects to affirm the contract, the contract continues and the parties remain bound by their contractual obligations: *Epix* at para. 105.

[80] It is undisputed that the onus is on the plaintiff to prove that the condition of the Property on the Possession Date constituted a fundamental breach of the Contract and that the relevant date for assessing the condition of the Property is the Possession Date.

[81] Given my conclusion that the Property was not in “substantially the same” condition on the Possession Date as it was when viewed, the pertinent question is whether the change in its condition was sufficiently significant to deprive the plaintiff of substantially the whole benefit of the contract such that it rises to the level of a fundamental, or repudiatory, breach of the Contract by the defendant. The plaintiff asserts that it was.

[82] The defendant says that there was no fundamental breach because the remaining damage to the Property as of June 15, 2022, was “merely cosmetic”. In her submission, the only remaining remediation work was to replace the water-damaged floors, replace the damaged and removed drywall, and repaint and accordingly, the Property was still usable for its intended residential purpose.

[83] As a starting point, I find that the purpose of the Contract was the conveyance from the defendant to the plaintiff of a residential property that was fit for use as such. Put differently, the benefit the plaintiff was to obtain was a residential property that she could move into and live in on the Possession Date. There is no other purpose for the Contract beyond conveyance of the Property in substantially the

same condition as when the plaintiff agreed to purchase it. The plaintiff did not intend or agree to purchase a water-damaged property that was still undergoing remediation work.

[84] In this respect, the present circumstances are different from those in the authorities relied on by the defendant. For example, *Pakistan-Canada* involved an ongoing commercial tenancy agreement, the purpose of which was found to be to provide exclusive use of the leased premises in exchange for payment of rent: para. 55. The tenant committed a serious breach of its lease agreement by making alterations to the leased property without permits thereby exposing the landlord to liability. Nonetheless, the Court concluded that the commercial purpose of the lease agreement was still being fulfilled because the landlord was still being paid the rent that it bargained for: paras. 54-55.

[85] The present circumstances are fundamentally different from those in *Pakistan-Canada* because there is no ongoing commercial tenancy or other contractual relationship between the parties, or any purpose for the agreement beyond conveyance of the Property from the defendant to the plaintiff. The sole purpose of the Contract was the purchase of the Property in substantially the same condition as when the Contract was entered into. Because of the Flood, the defendant could not perform her primary obligation under the Contract: to convey to the plaintiff a residential property that was ready for use as such.

[86] The defendant also relies on *Gambouras v. Swan*, [1994] B.C.J. No. 309, 1994 CanLII 1267 (B.C.S.C.), which involved a contract for purchase and sale of a property containing an old farmhouse that was damaged by fire. The purchase agreement in *Gambouras* contained the same terms as clause 8 of the Contract. The Court considered whether the contract was frustrated—not fundamentally breached—on account of the fire damage to the farmhouse and concluded that it was not, because, *inter alia*, the purchaser never intended to live in the house. Rather, the Court concluded that “The main purpose ... of the purchasers buying the property and taking over the subdivision application was to subdivide in order to

build their new home. The farmhouse, after a brief rental period, and then to be made available to their children, was an ancillary consideration”: para. 35.

[87] *Gambouras* is distinguishable on two fronts. First, it addresses the issue of frustration, not fundamental breach. These are two separate legal concepts. In *Gambouras* the seller argued the contract had been frustrated by the fire in circumstances where it was advantageous to it for the purchaser *not* to have the option to affirm the contract, which the purchaser had done. In the present case, the defendant does not argue frustration. Indeed, her position and counterclaim is predicated on the Contract remaining in effect.

[88] Second, from a factual perspective, the main purpose of the purchase agreement in *Gambouras* was for the purchaser to take over an existing subdivision application and build a new home. The purchaser never intended to live in the fire-damaged farmhouse; it was merely “an ancillary consideration”: para. 35. Here, the plaintiff intended to purchase the Property and live in it as her residence; purchasing a residential property that she could move into and live in was the main, not ancillary, purpose of the Contract.

[89] Considering the preponderance of the evidence in light of the purpose of the Contract, I am satisfied that the condition of the Property on the Possession Date amounted to a fundamental breach of the Contract. In my view, the plaintiff was deprived of substantially the whole benefit she was intended to receive under the Contract because of the Flood damage to the Property, much of which remained un-investigated and un-remediated as of the Possession Date. My reasons for so concluding are twofold.

[90] First, the nature and extent of the visible—patent—damage caused by the Flood was significant. While the source of the water ingress had been fixed by the Possession Date, the damage detailed in Mr. Simpson and Mr. Sheppard’s reports and visual evidence of the flooding establishes significant water damage to the Property that remained largely un-remediated as of the Possession Date.

[91] The photographs taken closest in time to the Possession Date are those appended to Mr. Song's report show that the family and living room flooring remain significantly water damaged as of June 12, 2022. Further, when considered in conjunction with the narrative portions of Mr. Song's report, it appears that additional damage had been caused in repairing the leak, namely removal of the drywall in multiple locations.

[92] It is also unclear whether the remaining remediation work was in fact primarily limited to the family and living rooms as the defendant suggests. The photographic and video evidence, taken together with Mr. Simpson and Mr. Sheppard's observations, suggest that there was additional water damage to the Property beyond the flooring and drywall that the defendant's evidence does not address in terms of remediation.

[93] Moreover, the Property remained a construction site on the Possession Date. The flooring replacement, drywall and paint repairs were not completed until June 28, 2022, at the earliest. Additional unrepaired water damage—as noted by Mr. Duxbury—also remained as of late July or early August. Given the nature of the damage, lack of investigation beyond immediate and obvious steps, and the extent of the remaining repairs, I find that the main areas of the main floor of the Property were effectively unusable on the Possession Date.

[94] Second, the defendant's position that the remaining damages was "merely cosmetic" ignores the concerns raised by the plaintiff about the risk of latent defects arising post-Flood, including potential structural slab damage and mould growth. Despite being provided with copies of Mr. Sheppard and Mr. Simpson's inspection reports detailing their observations and outlining the potential latent issues arising from the Flood, the defendant did not engage with or address those potential risks in any meaningful way. Apart from the scant information conveyed in Ms. Chen's June 13, 2022 text message, the defendant did nothing to advise the plaintiff of the steps she was taking to remediate the damage and address the issues raised by Mr. Simpson and Mr. Sheppard. Instead, her counsel's correspondence refused to

acknowledge the fact of the Flood, denied the plaintiff's assertions about the condition of the Property, and insisted that the plaintiff was required to complete the purchase.

[95] Post-Flood, the Property carried with it the potential future risk of latent defects arising because of the water damage. The nature, extent, cost and sufficiency of repairs effected as of the Possession Date were also largely unknown to the plaintiff on account of the defendant's failure to communicate with the plaintiff about the repairs that had were being undertaken. The defendant also did nothing to attempt to address or alleviate the plaintiff's concerns resulting from Mr. Simpson and Mr. Sheppard's inspection reports.

[96] The defendant correctly notes that many of the decisions in this jurisdiction that have considered clause 8, do not engage with the issue of whether the condition of the property on the possession date rose to the level of fundamental breach. This is because in most of the instances cited by the defendant, the purchasers elected to complete the contract and sue for damages. *Gill v. Zhang*, 2016 BCSC 1464 and *1906303 B.C. Ltd. v. Park*, 2021 BCSC 960 [*Park BCSC*], rev'd in part *Park v. 1906303 B.C. Ltd.*, 2023 BCCA 78 [*Park BCCA*], are illustrative. That was not the case here. Once the plaintiff learned about the Flood and its potential impacts on the Property, she communicated her intention not to proceed with the purchase by way of her counsel's letter of June 10, 2022. At no point thereafter did she affirm the Contract. The defendant's breach of clause 8 then crystallized on the Possession Date.

[97] Significantly, in my view, the defendant was unable to point to any instance where this Court has required an unwilling purchaser to complete the purchase of a residential property where the property was not in substantially the same condition on the possession date as when viewed. *Chaston v. Este*, 2014 BCSC 20 is the only case that the parties were able to locate that is on point and, as discussed above, the Court came to the opposite conclusion.

[98] In short, the defendant says that other than the “merely cosmetic” remaining work, the plaintiff would have received substantially what she bargained for on the Possession Date notwithstanding the Flood. I disagree. The plaintiff contracted to purchase a residential property without any known history of water damage that she could move into and live in. What the defendant was in a position to convey on the Possession Date was a residential property that had suffered water damage and was undergoing remediation following a significant flood event, which had not yet been fully investigated or remediated.

[99] In my view, the condition of the Property on the Possession Date deprived the plaintiff of substantially the whole of the benefit of the Contract. I therefore conclude that the plaintiff has established that the condition of the Property post-Flood, including as of the Possession Date, amounted to a fundamental, or repudiatory, breach of the Contract which entitled the plaintiff to terminate it. The plaintiff was not required to complete the purchase of a home that had recently been damaged by a significant flood event that occurred only days before closing, and which remained under active remediation.

**Was the plaintiff entitled to terminate the contract on account of the defendant’s breach of clause 8?**

[100] Even if the condition of the Property on the Possession Date did not amount to a fundamental breach of the Contract, I would nonetheless find that clause 8 was a material term, and thus the defendant’s breach thereof entitled the plaintiff to terminate the Contract.

[101] The defendant asserts that clause 8 is merely an innominate term or a warranty—not a material term—of the Contract and thus absent a fundamental breach of that clause, the plaintiff was not entitled to terminate the Contract. The defendant relies primarily on two decisions in support of her position.

[102] First, the defendant asserts that this Court characterized clause 8 as an innominate term in *Chaston*. In my view, this assertion is not supported by a careful review of *Chaston*. *Chaston* involved a purchaser who refused to complete the

purchase of an apartment when substantial water damage and mould issues were discovered after she entered into the contract, but before the closing date. On the possession date, the apartment was actively undergoing remediation and work was not expected to be completed for weeks. In those circumstances, the Court concluded that the purchaser was entitled to terminate the contract and return of the deposit.

[103] The defendant relies on para. 85 of *Chaston* where the Court cites an excerpt from *Baker v. Warshawski*, 2010 ABQB 219, in which the Alberta Court described a similar clause to clause 8 as an “innominate term”. This Court commented that the clause at issue in *Baker* was “similar to clause 8 in this case”. The defendant says that that comment amounts to a finding that clause 8 is an innominate term. I disagree. *Chaston* goes no further than what it says: that the clause in *Baker* was “similar” to clause 8. It does not consider whether that clause was innominate or material, and the comment in para. 85 does not form part of the *ratio decidendi* of the case. Indeed, the result in *Chaston* suggests that clause 8 was a material term as the Court held that the plaintiff was entitled to terminate the contract on account of the defendant having breached clause 8.

[104] The defendant’s submission also overlooks the outcome in *Baker*. Despite characterizing the term in issue as “innominate”, the Court nonetheless found that the plaintiff was entitled to terminate the contract as a result of its breach:

[75] I find that as a result of the breach of the innominate term that the property be in substantially the same condition at closing as it was when the contract was accepted, Ms. Baker was entitled to treat the contract at an end and claim restitution of her deposit.

[emphasis added]

[105] Second, the defendant relies on *Park BCCA*, where clause 8 was described in summary form as a “warranty clause”. In *Park BCCA*, the purchaser sought damages for breach of contract from the seller in the context of the purchase and sale of a residential property for development purposes. The contract contained the same clauses 8 and 16 as the Contract. The property was unoccupied and a few

days before the completion date, was badly damaged by vandalism and the house rendered uninhabitable. The plaintiff elected to complete the purchase and sue for damages. This Court concluded that the contract was breached because the defendant was unable to deliver the property in substantially the same condition as when viewed: *Park BCSC* at para. 54.

[106] The seller appealed on the issue of damages; the trial judge's finding that the seller breached clause 8 was not in issue on appeal. In describing the background for the appeal, *Park BCCA* referred to clause 8 as a warranty:

[7] The Contract was prepared on the standard form of the BC Real Estate Association and the Canadian Bar Association (BC Branch). It included a warranty clause to the effect that the Property and all included items would be in substantially the same condition on the possession date as when viewed by the buyer. The date of viewing by the buyer is not specified and was in dispute, but the trial judge found that Mr. Sidhu had viewed the Property in mid-November 2016, prior to removing the subjects clause. The trial judge found that at that time, the House was in fair condition, with worn carpeting, some water damage, and a shower that did not work. Under the terms of the Contract, the warranty clause survived the completion of the Contract. The judge concluded that the warranty clause was effective, a conclusion open to the judge in the circumstances.

[Emphasis added.]

[107] The statement characterizing clause 8 as a warranty clause in *Park BCCA* provides background to the issues on appeal, but forms no part of the *ratio decidendi* of the decision. It does not represent a considered analysis of the nature of clause 8; that issue was not considered or determined by either the trial or appellate courts.

[108] I am not persuaded that clause 8 is either a warranty or innominate term such that the plaintiff was not entitled to terminate the Contract absent a fundamental breach. To the contrary, I find that a common thread running through the jurisprudence of this Court, and in other jurisdictions, is that at least in the context of purchase agreements for residential properties, clause 8 is a material term and thus a purchaser is entitled to terminate a contract where the seller is unable to deliver

the property in substantially the same condition on the possession date as when viewed by the purchaser.

[109] *Chaston* provides the clearest application of this principle in circumstances akin to the present context. Of the numerous authorities cited by the parties, *Chaston* is the only decision of this Court that involved a similar factual context to the case at bar.

[110] As noted above, *Chaston* involved the purchase of an apartment in a building that had suffered water ingress and was undergoing remediation work to the building envelope. The contract of purchase and sale in *Chaston* contained the same clauses as those found in clauses 8 and 16 of the Contract. The purchaser knew about the water ingress issues, but understood that there had not been any significant water damage or mould/fungal growth in the unit she was purchasing. She was told that work on her suite was expected to be completed by May 2012, and thus set the completion date for July 30, 2012.

[111] Prior to removing subjects, the purchaser made further inquiries to confirm if any mould had been found in the unit and had an inspection conducted. No moisture or mould was detected. When she removed the subjects to the contract, the purchaser understood that there was not a substantial mould problem and that the suite had not suffered material water damage. However, when the purchaser visited the apartment in mid-June 2012, she discovered evidence of serious water damage and mould issues: para. 36. The purchaser requested access to the unit again in mid-July 2012 to see the state of the repairs before it was covered up, but the buyer refused further access: paras. 38-39.

[112] Work at the unit was still underway on the completion date and not expected to be finished until mid-August. Like the case at bar, the purchaser in *Chaston* took the position that absent some evidence that the work was complete, the apartment was not in substantially the same condition as when viewed and thus, the seller was unable to meet its obligations under the contract of purchase and sale. In response, the seller took the position that the apartment was in habitable condition and ready

for the buyer to take possession. In response, the buyer confirmed that she would not be completing: paras. 47-49.

[113] The Court held that the property was “plainly” not in substantially the same condition as when viewed and that the buyer was thus in breach of clause 8, reasoning as follows:

[82] It follows then that the [sellers] were not in a position to insist on completion by [the buyers] when they themselves were not in a position to deliver possession of the property in the condition required. In my view, the sellers were not “ready, willing, and able” to complete the sale on the closing date due to their inability to meet the criterion contained in clause 8 of the contract.

[114] The Court found that the seller’s breach of clause 8 was substantial with respect to the livability of the apartment, particularly in relation to the mould issue and the health concerns it raised for the buyer. The seller was found to have breached clause 8 of the purchase agreement and the buyer was thus entitled to terminate the contract: paras. 86, 88-89.

[115] It is also notable that the Court in *Chaston* rejected the same argument that the defendant advances here, namely that the extent of the remaining work was not sufficiently serious to entitle the buyer to terminate the contract:

[83] The [sellers] argue that none of the pending “touch up” work entitled the [buyers] to fail to complete. The obligation to deliver possession in substantially the same condition did not arise until the possession date, the day after the completion date. The [sellers] argue the [buyers] were required to complete the purchase and then, if they chose, bring an action for damages if they felt that clause 8 had not been complied with.

[84] Common sense prevents me from acceding to this argument. Using the same analogy of a dozen eggs, this would be akin to insisting the buyer purchase the eggs, sight unseen, and sue for damages later if the carton contains broken eggs.

[116] In *Chaston*, the apartment was in the midst of active construction on the closing date, with unfinished installation, pieces of drywall missing, a window and door were missing, and sections of baseboard trim missing: paras. 76-77. The work required to remediate was still “weeks” away from completion: para. 86. Likewise,

the Property remained an active construction site on the Possession Date. Sections of the flooring had been torn up, the balance of the wood flooring was water-damaged and required replacement; and as of late July or early August, there was remaining water damage to baseboards and kitchen cabinetry. Compounding the problem, the defendant refused to engage with the plaintiff's documented concerns about the nature and extent of water damage to the Property or provide the plaintiff with information about what steps she had taken to investigate and address the damage.

[117] In my view, the present circumstances are similar to those in *Chaston* and the same result ought to follow. I therefore reject the defendant's contention that clause 8 was not a material term such that the plaintiff was required to complete the purchase and sue for damages after taking possession of the Property. Applying the analogy used in *Chaston* to the present facts, requiring the plaintiff to complete would be akin to insisting that a buyer purchase a carton of eggs knowing that it contains broken eggs, but without any information about what steps, if any, the seller had taken to repair or replace the eggs, and then sue for damages later if the carton still contained broken eggs or the eggs had not been properly fixed or replaced.

[118] The reasoning and result in *Chaston* are equally apposite in the present case. As described above, as of the Possession Date, the leak had been fixed, but the Property remained Flood-damaged and remediation work was ongoing. The defendant was thus unable to convey the Property to the plaintiff in substantially the same condition as when viewed and was thus breached of clause 8 of the Contract. Because of the condition of the Property, the defendant was not ready, willing, or most notably *able*, to complete the sale on the Closing Date. Given that the defendant was unable to perform her obligations under the Contract, she was in no position to insist that the plaintiff perform by purchasing the Flood-damaged Property: *Gill* at para. 92.

[119] The defendant attempts to distinguish the plaintiff's authorities from other jurisdictions by asserting that termination was permitted because the clauses in

issue in those cases, though similarly worded to clause 8 of the Contract, were material terms while that is not the case for clause 8 in BC. I do not find this submission persuasive. The clauses in issue in *Pordell* and *Tsui v. Zhuoqi*, 2021 ONSC 5421, dealt with insurance and risk and provided an express right to the buyer to terminate in the event of “substantial damage” to the property. Likewise, the clause in issue in *Cassie v. Bazilewich*, 2007 MBQB 277 and *Cattell v. Lazar*, 2024 SKKB 163, expressly provided for termination at the buyer’s option in the event of substantial damage to the property. The right to terminate in those instances thus arose from the express language of the contract, not because the clauses were found to be material terms. Indeed, given the express wording of those particular clauses, it was unnecessary to consider the nature of the term in issue or whether the breach was fundamental.

[120] In light of the foregoing, I am satisfied that clause 8 is a material term of the Contract and the plaintiff was entitled to terminate consequent on the defendant’s breach thereof. A purchaser of a residential property that is not in substantially the same condition on the possession date as when viewed is entitled to terminate the contract of purchase and sale without needing to establish fundamental breach. As noted in *Gill*, if a property is not in “substantially the same condition” on the possession date as when viewed, the buyer has the option of either terminating the purchase agreement or completing the purchase and suing for damages: para. 87.

[121] In my view, a contrary finding would have the effect of imposing a different agreement on the buyer than that which they bargained for. The present circumstances are illustrative of the materiality of clause 8 in the context of the purchase and sale of residential properties. The plaintiff agreed to purchase a residential property for personal use that while dated, was habitable and not known to have experienced water damage. What the defendant purported to convey was a property that had recently experienced a significant flood event, was still undergoing remediation work to significant portions of the main floor, and which now carried with it the risk of potential latent defects—including structural slab damage and mould

growth that had not, to the plaintiff's knowledge been investigated or addressed—and corresponding need for additional remediation at an unknown cost.

[122] I therefore conclude that clause 8 was a material term of the Contract and that consequent on the defendant's breach of that clause, the plaintiff was entitled to terminate the agreement and is also entitled to return of the Deposit.

**Conclusion**

[123] In the result, I find that the condition of the Property on the Possession Date amounted to a fundamental breach of the Contract by the defendant. Additionally, clause 8 is a material term of the Contract, which the defendant breached because the Property was not in substantially the same condition on the Possession Date as when viewed. The plaintiff was therefore entitled to terminate the Contract on either basis and is entitled to return of the Deposit.

[124] The plaintiff's summary trial application is granted. Judgment is granted in her favour in the amount of the Deposit, plus accrued interest.

[125] The defendant's counterclaim is dismissed.

[126] The plaintiff is entitled to her costs of this action, at Scale B. If the parties wish to speak to costs-related matters, they are to submit a request to appear before me to do so within 30 days.

“Hughes J.”