SUPREME COURT OF NOVA SCOTIA

Citation: *Sharma v. Provident Holdings Limited*, 2023 NSSC 332

Date: 20231019
Docket: 518406
Registry: Halifax

Between:

Mary Sharma

Applicant

v.

Provident Holdings Limited

Respondent

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	October 3-4, 2023, in Halifax, Nova Scotia
Counsel:	Richard Norman and Matthew Hardie, for the Applicant James MacNeil, for the Respondent

By the Court:

Introduction

[1] On November 24, 2021, Mary Sharma [“Mary”] signed an Agreement of Purchase and Sale [“APS” or “the Agreement”] to buy Unit 20B Sailors Trail in Provident Holdings Limited [“Provident”] condominium development known as The Village at Fisherman’s Cove [“the Village”], Eastern Passage, Nova Scotia.

[2] The Closing date was to be on or before July 4, 2022. By that date, construction of the unit was complete. Mary had moved some newly purchased appliances into the Unit on or about July 6, 2022, pending the closing.

[3] By agreement, the Closing date was revised to October 14, 2022.

[4] On October 13, 2022 there was a pre-Closing inspection attended by Mary, her realtor Angela Forgeron [“Angela”] and Scott MacDonald [“Scott”] VP of Sales and Marketing for Provident.

[5] The inspection proceeded, and when Mary and Angela left the premises, they believed that the Closing would proceed as scheduled on October 14, 2022.

[6] Later that same day, Provident's legal counsel wrote to Mary's counsel to advise:

> Part D section 11 of the Agreement clearly indicates that the Purchaser will not enter the property without authorization and that termination by the Seller is a remedy if that occurs. Your client's behaviour this afternoon and earlier in the summer [August 8, 2022] is a breach of this section.
>
> My clients have determined that as a result of your client's behaviour they are within their rights to terminate the Agreement. We will not be closing tomorrow, or at all.
>
> [My underlining added]

[7] Consequently, by way of Application in Court, Mary has sued Provident for breach of contract.

[8] She seeks an order requiring specific performance of Provident's obligations arising from the Agreement of Purchase and Sale or, in the alternative, damages resulting from the breach of contract, and costs of the proceeding.

[9] Provident responds in its Notice of Contest that it "terminated [the APS] due to the Applicant's numerous breaches of the Agreement. Those breaches included, but are not limited to, the following:

1. entering the property while it was under construction;
2. physically assaulting a Provident representative at the walk-through;
3. using defamatory language against Provident; and
4. such other breaches that may become apparent (particulars of which will be provided prior to the hearing).

The issues

[10] The parties agree that there are three basic issues for this Court to determine:

1. Did Provident have cause to terminate the Agreement?
2. If so, is Mary entitled to specific performance of the contractual obligations?
3. If not, is Mary entitled to general and special damages (and if so, in what amount)?

[11] I conclude that Provident did **not** have good cause to terminate the Agreement. Therefore, Provident breached the Agreement.

[12] In general, the law presumes that damages will compensate Mary for this breach of contract.

[13] However, in this case, based on the facts and law, I am satisfied that that she is entitled to specific performance of the Agreement, and associated special damages and costs.

1 - Did Provident have cause to terminate the Agreement? It did not.

[14] Provident claims several bases for its termination of the Agreement:

a) Mary entering the property (August 8 and October 13, 2022), without Provident's permission and while prohibited by Part D Construction Clause (11) in the Contract;

b) Verbally and physically assaulting a Provident representative at the walk-through;

c) Using defamatory language against Provident; and

d) Such other breaches that may become apparent (particulars of which will be provided prior to the hearing).

a) entering the property without permission or authority

b) verbally and physically assaulting a Provident representative at the walk-through

[15] Regarding the claimed unauthorized entries onto the property, Provident's arguments may be summarized in part, as follows.

[16] It relies on a breach of **Part D, Construction**, Clause 11 of the APS, which states: [Bolding in the original]

> **Site Visitation**
>
> **The Purchaser agrees not to enter the property while under construction**. The Purchaser understands that unauthorized entry on the property prior to closing could result in this agreement being terminated by the Vendor and the deposit to remain with the Vendor. The Purchaser acknowledges that unauthorized entry on the property while it is under construction could result in fines and/or jail time if prosecuted to the full extent of the law.

[17] Scott stated at paras. 33-35 of his affidavit, that "[a]s indicated in paragraphs 51 - 58 of Ms. Sharma's affidavit, Ms. Sharma entered the property without authorization on August 8, 2022. … Ms. Sharma also entered the property a second

time without authorization. On October 13, 2022, counsel for Provident wrote to Ms. Sharma's lawyer to advise the sale was not proceeding."

[18] Firstly, let me address the language of the Agreement/contract.

[19] The evidence is that the Agreement was drafted by Provident. It is a template that they were using at the time and consists of 13 pages of "Builders Standard Agreement of Purchase and Sale" per Exhibit "A" of Scott's affidavit. The only modifications in Mary's case, are those that are handwritten.

[20] Provident decided to structure the Agreement using the following descriptors:[1]

Part A – Price and deposit

Part B – Terms and conditions

Part C – Financing and occupancy

Part D – Construction

Part E – Execution.

[21] Part C, clause (2) – **Possession by Purchaser** - (g) reads:

> Before occupation of the premises the Purchaser must complete a final inspection and complete an occupancy form. The form will note the deficiencies to be completed by the Vendor. Any deficiencies noted by the Purchaser subsequent to the

1 In Scott's affidavit page 9 of the 13-page agreement is missing. In Mary's affidavit all 13 pages are included.

> signing of the occupancy form will be dealt with by the Vendor as warranty items, if appropriate.[2]

[22] I am satisfied that the only outstanding matter to be completed after the October 13, 2022, walk-through, was the mechanics of the "Closing", which was scheduled for October 14, 2022. Scott had already handed the keys to the Unit to Mary's realtor Angela to hold in trust until the closing was completed.

[23] Generally, in the law it is understood that contracts contain terms that are either "conditions", "warranties" or "innominate (intermediate) terms".[3]

[24] In *Gulston v. Aldred*, 2011 BCCA 147, the court stated in relation to terms that would be considered "conditions":[4]

> *c. Is the Remediation Clause a Condition the Breach of Which Entitled the Appellant to Treat the Contract as at an End?*
>
> 46 The conclusion that the remediation clause was not a condition precedent does not end the analysis. Ms. Aldred has referred to the remediation clause as a "warranty" to

2 These documents are contained at Exhibit "O" of Mary's affidavit and were referenced during both their examinations. Scott's (as was Mary's) evidence was that the Certificate of Possession was digitally signed by both parties while they were inside the Unit at the completion of the walk-through on October 13, 2022.

3 See for example the comments in *Canadian Contractual Interpretation Law*, Second Edition, (Geoff Hall), 2012 Lexis-Nexis Canada at pages 133-138. As he states at page 133: "The classification is important because the remedy available for breach depends on how a particular term is classified. Breach of a condition entitles the non-breaching party to treat the contract as being at an end and excuses further performance by that party. Breach of warranty only gives right to claim damages. Breach of an innominate term can give rise to either remedy depending on the seriousness and consequences of the breach. The classification process is one of ordinary contractual interpretation in which a court seeks to determine the classification intended by the parties, looking to the words of the contract read contextually in light of the contract as a whole and the surrounding circumstances. A term is classified as a condition if its performance is fundamental to the contract while it is classified as a warranty if it is collateral to the main purpose of the contract…". [My underlining added]

4 See also for example the Court's reasons in *Swan Group Inc. v. Bishop*, 2013 ABCA 29.

distinguish it from a condition, the breach of which would entitle the injured party to treat the contract as at an end. Such a condition is also known as a "fundamental term". **To qualify as a fundamental term one must ask whether breach of the term would be "tantamount to the frustration of the contract".** In *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56, 16 B.C.L.R. (2d) 349 (B.C. C.A.). Mr. Justice Wallace observed at pages 63-4:

> The Supreme Court of Canada has set out the requirements for termination of a contract by fundamental breach in Thompson & Alix Ltd. v. B.F. Smith, [1933] S.C.R. 172, at 181, where Cannon J. cited with approval the House of Lords' statement in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 A.C. 434:
>
> > All their Lordships as well as the Lords Justices accepted the principle stated by Lord Coleridge in *Freeth v. Burr* (2) as the true test; or, as it was expressed in the words of Lord Selborne: **'You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an "absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind" and whether the other party may accept it as a reason for not performing his part.**
>
> And in *Bettini v. Gye* (1876), 1 Q.B.D. 183 at p. 188 it was said:
>
> > **One must 'see whether the particular stipulation goes to the root of the matter so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for'.**
>
> The same principle was expressed by Upton L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26, 64 in these words:
>
> > ... the question to be answered is, **does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated?** If yes, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.
>
> Other authorities have described the indicia of a fundamental breach in a variety of ways including:
>
> > "An intimation of an intention to abandon and altogether to refuse performance of the contract." *Freeth v. Burr* (1874) L.R. 9 C.P. 208, 213.

> "Do the acts and conduct of the party evince an intention no longer to be bound by the contract?" *General Billposting Co. v. Atkinson*, [1909] A.C. 118,120.
>
> "If the conduct of the employer amounts to a 'basic refusal to continue the servant on the agreed terms of the employment' then there is at once a wrongful dismissal and a repudiation of the contract;" *Re Rubel Bronze & Metal Company and Vos* (*supra*) p. 323.

The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract — thereby entitling the innocent party to be relieved from future performance. [Emphasis added.]

47 In *Ramrod Investments Ltd. v. Matsumoto Shipyards Ltd.* (1990), 47 B.C.L.R. (2d) 86 (B.C. C.A.) Mr. Justice Cumming approved the test for determining such a breach as follows:

> **The traditional test that has consistently been cited with approval and applied by the courts is that stated by Bowen, L.J. *Bentsen v. Taylor, Sons & Co*. [1893] 2 Q.B. 274 at 281 (C.A.):**
>
> > **There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.**

This test was endorsed by the English Court of Appeal in *Bunge* (Megaw L.J.'s judgment at p. 538). That judgment was expressly approved by Lord Wilberforce at p. 542 of his judgment in *Bunge*.

> It will be noted that the test to determine intent as enunciated by Bowen L.J. requires one to look not only at the words of the contract but at surrounding circumstances.
> . . .
>
> The traditional test, in my view, can be readily reconciled with the so-called "third category" approach put forward in Hong Kong Fir. **The approach which I believe to have been accepted by the authorities can be briefly summarized as follows: (1) the test enunciated by Bowen L.J. remains the**

> **starting point, (2) the surrounding circumstances referred to in that test must include the commercial setting, and (3) if it cannot be determined by these considerations whether the parties intended the obligation in question to be a warranty sounding only in damages or a condition, the breach of which would relieve the innocent party, then the basis for seeking out that intent should be, as put forward by Hong Fir, namely an assessment of the gravity of the event to which the breach gave rise.**

[My bolding added]

[25] I am satisfied that however classified, all material terms of the contract, save the execution and consequent provision of documents and funds on October 14, 2022, had been satisfied to the satisfaction of the parties when they left Unit 20B Sailors Trail after completing the Certificate of Possession on October 13, 2022.

[26] There was no term of the contract that had not been fulfilled which otherwise (than the claimed grounds herein – only Mary's conduct *vis-à-vis* Scott on October 13, 2022, at the walk-through, and the argued unauthorized entries on August 8 and October 13, 2022) could have been a basis for termination of the contract by Provident.

[27] Let me then revisit the wording of Clause 11 in **Part D – Construction:**

> **Site Visitation**
>
> **The Purchaser agrees not to enter the property while under construction**. The Purchaser understands that unauthorized entry on the property prior to closing could result in this agreement being terminated by the Vendor and the deposit to remain with the Vendor. *The Purchaser acknowledges that* **unauthorized entry on the property while it is under construction** could result in fines and/or jail time if prosecuted to the full extent of the law.

[Bolding in the original]

[28] Unit 20 B initially had a closing date of July 4, 2022. Construction was complete by that date.

[29] It could have been closed that day, but it did not close at that time only because Mary wanted to await the property being registered before taking occupancy. Therefore, the closing was put over to October 14, 2022.

[30] Firstly, I am satisfied that construction was complete at that time, and therefore on August 8 and October 13, 2022, construction remained complete, and Clause 11 of Part D - Construction did **not** apply.

[31] The parties intended this clause to keep purchasers from entering "the property" only until construction was completed.[5]

5 I do not accept Provident's argument that the following phrase [Part D clause (11)] was intended to apply to prevent a purchaser from approaching a completed Unit pending closing, after hours to view it: "The Purchaser understands that unauthorized entry **on the property** prior to closing could result in this agreement being terminated by the Vendor, and the deposit to remain with the Vendor." I am satisfied that the parties intended that purchasers, in the circumstances of Ms. Sharma, were permitted to drive by on roads/driveways once created and maintained for such purposes, (which there clearly were given the location of completed Units in the Condominium Project area), and view their property. I note there is no expressed definition of "the property" in the Agreement. However, its general tenor and particularly the wording in Part C Clause (2) **["**If the Unit forming part of the property is complete on or before the Closing Date and is ready for occupancy by the Purchaser (with an Occupancy Permit having been issued by the appropriate Municipal Authority) and the registration of the Condominium has not been completed, the Vendor may ask the Purchaser to go into occupancy of the Unit subject to the following…"**]** suggest an immaterial distinction between "the Unit" **[**referenced in the preamble to the Agreement as "lot number [20 B] (the "Unit") of the Village at Fisherman's Cove, Halifax County Condominium Corporation number 289 (the "Condominium Project") together with the undivided interest in the common elements appurtenant thereto and the limited common elements all in accordance with both the description and declaration which are to be submitted for acceptance for registration with the Registrar of Condominiums for the Province of Nova Scotia, and the said Unit being more particularly shown in the Unit layout attached hereto as Schedule "C"**]**" and "the property".

[32] Since July 5, 2022, Provident had permitted Mary, solely at Mary's risk, to store inside Unit 20B the newly purchased appliances for her intended move into the Unit on the July 4, 2022, Closing date.

[33] She did so - and they continuously remained there between July 5 and October 14, 2022.

[34] In the circumstances of this case, the parties did not intend that this Clause could be relied upon by Provident to terminate the Agreement on October 13, 2022, based on either individually or cumulatively the events of claimed trespass on August 8, 2022 and/or October 13, 2022.

[35] Alternatively, presuming Clause 11 could apply to the circumstances here on August 8 and October 13, 2022, I conclude based on the factual circumstances, that on neither occasion is Provident entitled to rely on Clause 11 to terminate the Agreement.

The August 8, 2022 Entry

[36] Let me briefly examine the circumstances of August 8, 2022, which Provident relies upon as an "unauthorized entry" contrary to Clause 11 of Part D.

[37] Mary in her affidavit and testimony before me provided a consistent narrative about that date, which I accept.

[38] In her Initial affidavit she stated:

> In the evening of August 8, 2022, my daughter and grandson were visiting from out of town. **I took them by the outside of the Sailors Trail Unit to show them where I would eventually be living. As we were standing outside, my grandson ran ahead and pulled on the door handle. The door opened and I realized that the Sailors Trail Unit was unlocked.** I asked my family to remain outside the unit while I investigated the issue.
>
> [My bolding and underlining added throughout]

[39] In her Rebuttal affidavit Mary stated:

> In response to paragraph 33 of Mr. MacDonald's affidavit which states that I could have called someone at Provident when I realized that the property was left open unlocked, first **I do not own a cell phone. My daughter also had left hers at home. Second, I did not have any direct phone numbers to Mr. McDonald or George Ford [site supervisor]. It was also after office hours**.

[40] Mary continued in her Initial affidavit:

> **I looked for George, the site supervisor for Provident, but it was after work hours**. After looking around the area, I could not find anyone on site from Provident. **Because the house was unlocked and unattended, with $6000 of my appliances inside, I entered the Sailors Trail Unit to lock the Unit**. I left through a self-locking window to ensure that the premises were secured. **Once I got home, I immediately wrote to Ms. Forgeron to report that the Sailors Trail Unit was unlocked and that I went inside to secure the premises. I asked her to report this to Provident and their counsel.** Attached as Exhibit "I" is a copy of my communications. **I also wrote directly to Provident as well as their lawyer, Ms. Randall about the matter.** I felt the situation was an emergency which required immediate attention. Attached as exhibit "J" is a copy of my communications to Provident and their lawyer Ms. Randall. **I did not receive any further correspondence from Provident about this issue or my entrance into the Sailors Trail Unit**.

> [My bolding and underlining added]

[41] Provident did not "respond" until **after** the Pre-Closing Inspection was completed on October 13, 2022.

[42] Its counsel, Lauren Randall, wrote an October 13, 2022, email at 5:36 pm to Ms. Sharma's counsel in which she stated:

> I understand that there was a confrontation today at the scheduled walk-through between our clients. **Your client was both verbally and physically aggressive towards my client's representative Scott MacDonald**… As a result, Mr. MacDonald advised her that she could not proceed with the walk-through until she was calm and reasonable. **She then proceeded to push him out of the way and enter without permission, trespassing on the property. Additionally, she emailed me directly earlier in the summer advising of a previous trespass she committed on the property**.… **Your client's behaviour this afternoon and earlier in the summer is in breach of this section [Part D Clause 11].** My clients… are within their rights to terminate the Agreement. **We will not be closing tomorrow, or at all**."
>
> [My bolding added]

[43] Furthermore, if Clause 11 of Part D applies, and I accept at its highest what Provident says Mary did on August 8, 2022, and October 13, 2022, I am satisfied that the parties did not intend such conduct to fall within the meaning of Clause 11, given that it permitted Provident the ultimate response - termination of an agreement for which there was otherwise no basis.

[44] Clause 11 should be characterized as "innominate" in nature, as Geoff Hall described it in his text *Canadian Contractual Interpretation Law*.

[45] Therein, he commented that "breach of an innominate term can give rise to either remedy [damages/termination of an agreement] depending on the seriousness and consequences of the breach." (p. 133).

[46] In my view, Mary's entry into the Unit on August 8, 2022, was justifiable and reasonable.

[47] Although not necessary to my foregoing conclusion, I could also additionally rely upon the judicial maxim *de minimis non curat lex* (commonly translated as "the law does not concern itself with trifles").[6]

[48] It was certainly not a matter that was so "fundamental", that the parties would have intended it to be capable of leading to termination of the Agreement (either on its own or cumulatively with the other grounds Provident relies upon).

[49] Scott's Discovery examination put before the Court by Mary:

> Q. And you were aware of it [Ms. Sharma's entrance into the property in August 2022]. Did Provident send in a notice, or advise Ms. Sharma that it intended to terminate the contract based on her actions?
>
> A. I don't believe… I wouldn't have had the authority to make a call to terminate the contract at that point. I'm not sure our owner [John Greenough] or our COO [Heather Stubbert] who would've had that authority, was aware of the entrance at that point in time… I would've had to have told them, and I didn't.
>
> …

6 See for example Justice Bastarache's reasons for the Court in *Sail Labrador Ltd. v. Challenge One*, [1999] 1 S.C.R. 265 at para. 75.

Q. So **why didn't you tell them?**

A. **It wasn't you know it wasn't the sort of thing – it wasn't a theft issue. It was – it was – we give people the benefit of the doubt. We don't want to terminate a contract**. We want to get it to completion, it wasn't – it wasn't an urgent priority.

Q. Provident was prepared to continue on with the agreement and close in October 2022?

A. That's correct.

[50] Lastly, I note that Provident's view of the seriousness of Mary's entry into the Unit on August 8, 2022, may be objectively assessed by it having taken no objection thereto, until after Scott agreed to, and did, complete the pre-Closing inspection with Mary on October 13, 2022, immediately after which he co-signed with Mary, the Certificate of Possession.

[51] Mary also argued that effectively Provident had waived its rights to take action against Mary for this entry or alternatively was estopped from relying upon the events of August 8, 2022, as a basis for termination of the Agreement.

[52] Provident argued before me that estoppel/waiver/laches had not been pleaded, and therefore Mary is precluded from relying upon such an argument, regardless of its merits otherwise.[7]

7 See for example para. 31 of its Brief. I note that Provident does not deny that such an argument can be made in proper circumstances - namely that a court can conclude that a party who is shown to have "affirmed" the contract afterwards, and in spite of a breach of that contract by the other party, cannot later rely on that breach to the prejudice of the other party's contractual rights.

[53] I see the matter differently.

[54] Mary cited *Gulston v. Aldred*, 2010 BCSC 241, in support of her position.

There, the Court discussed the legal principles in issue:

> **52** Where a party unequivocally affirms a contract, whether by words or conduct, or circumstances would make it unjust, inequitable, or unfair for that party to resile from the contract, he or she will be estopped from doing so. **In *Litwin Construction (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88 (B.C. C.A.), at 97-98, the Court of Appeal approved of the following statement on the law of estoppel from the English Court of Appeal in *Eaves v. Eaves* (1939), [1940] Ch. 109 (Eng. C.A.):**
>
> > It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal. The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error.
> >
> > [Citations omitted.]
>
> **53** The Court approved the following statement of principle on the law of waiver and estoppel (at 99):
>
> > ... [H]as the party...affirmed the contract unequivocally by his words or conduct in circumstances making it unfair or unjust for him now to resile from that contract?
> >
> > ..."Unfair or unjust" means "producing a result contrary to a sound sense of the equities, rights and conduct of the parties".
> >
> > **Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases.** The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. **If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.**
>
> **54 In *Bowen v. O'Brian Financial Corp.* (1991), 62 B.C.L.R. (2d) 328 (B.C. C.A.), the Court of Appeal reaffirmed its approach to the law on waiver and estoppel. At paras. 26-27, Mr. Justice Wood (writing for the Court) said the following:**

> [26] As I read the authorities, and in particular those relied upon by this Court when formulating the modern doctrine in *Litwin v. Kiss*, there is no requirement that the conduct, which was relied upon by the person who seeks to raise an estoppel, have been intentionally designed to induce that reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen. The conduct relied upon may, in fact, be a failure to act in circumstances which gave rise to an inference upon which the reliance is founded.
>
> [27] As to the requirement that the reliance be based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the person who seeks to rely on it. **The issue is not so much whether the reliance was based on unequivocal conduct, as it is whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it.**

At para. 30, he continued as follows:

> [30] **...[T]he modern doctrine of estoppel was adopted by this Court in *Litwin v. Kiss.* The hallmark of that doctrine is its flexibility**. It defies a single definition and resists imprisonment in any specific formulation. ...[I]ntention was not essential to the trial judge's conclusions in that case, nor to this court's endorsement of those conclusions. Nor, in my view, was it essential to those conclusions that the affirmation of the contracts in those cases resulted from the positive acts described by the trial judge, although the fact that there were such positive acts undoubtedly made the result in those cases all the more obvious.

55 This approach — the modern doctrine of estoppel — was cited with approval by Madam Justice Saunders (as she then was) in *Novam Development Ltd. v. Hutchins* (1992), 25 R.P.R. (2d) 76 (B.C. S.C.). In that case, Saunders J. found the defendant purchaser estopped from relying on the plaintiff vendor's failure to follow the statutory requirements set out in the *Real Estate Act* (requiring a disclosure statement to be provided to the purchaser before entering into the purchase agreement). However, the purchaser sought to rely on the vendor's alleged failure to follow the statute as a means to render the contract unenforceable only after he had signed the purchase agreement and negotiated two separate delays of the closing date. After reviewing the approach set out in the *Litwin Construction* cases, she said the following of the purchaser's actions at para. 15:

> [15] **The issue here is whether it is unjust or unfair for Mr. Hutchins to rely on the statutory non-compliance. Although Mr. Hutchins only became aware of the provisions in the *Real Estate Act* at the end of November,1990, other factors must also be considered. First in these is the significant passage of time from the time he "tied up" the property in February until he tried to unloose it in November**. During that time he had tried to sell it and Novam Development Ltd.

> could not sell it. He affirmed the contract by listing his interest in the contract for sale, by paying the second portion of the deposit several months after the contract was agreed and by requesting and receiving an extension of the closing date. **Only after the time for extension of the November 26, 1990 closing date, did Mr. Hutchins advise he was not buying the property as agreed. He represented by conduct that he intended to complete the transaction. In doing so he deprived Novam Development Ltd. of the opportunity to market the unit until the real estate market had fallen substantially. In these circumstances it would be unfair or unjust for Mr. Hutchins to resile from the contract,** as he sought to do in December, 1990. Accordingly**, I find that he is estopped from relying upon s. 62 of the *Real Estate Act* and the non-compliance with the statutory requirements established by s. 50(7) of that Act.**
>
> **56** It was not until August 19, 2008 that Mr. Shore informed counsel for Ms. Aldred that Mr. Gulston did not intend to complete the purchase of the Property. This was long after Mr. Gulston had work done on the Property by Digger Dick's and another contractor throughout the month of May 2008 and as late a July 2008 and long after he (through his counsel) asserted his interest in the Property and intention to complete the Contract.
>
> 57 **I find that Mr. Gulston breached the Contract by failing to complete by August 29, 2008, and that based on his affirmation of the Contract he is estopped from relying on any breach by Ms. Gulston in failing to obtain the certificate by May 29, 2008.** He effectively tied up the Property from March 2, 2008 to August 19, 2008 by requesting extensions of the closing date; he represented, by his conduct, that he intended to complete the Contract.

[55] Let me briefly examine Provident’s general statement that such matters must be expressly pleaded, by examining our Civil Procedure Rules [“CPR”].

[56] Firstly, Mary is the Applicant making a “claim”.

[57] She is arguing that there was no breach of the contract by her, that could give rise to Provident’s consequent termination of the Agreement - but rather that Provident breached the Agreement by terminating it on October 13, 2022.

[58] Nova Scotia's CPR 38.06 is applicable to Applications ("in Chambers" and "in Court"):

> **Pleading grounds in an Application**
>
> The following rules of pleading apply to a Statement of Grounds or Notice of Contest in an Application, and they are further to the rules of pleading provided in Rule 5.02 to 5.04, 5.07, and 5.08, of Rule 5 - Application:
>
> (a) **the grounds must be stated in such a way that the relevance of each statement in an affidavit filed, or to be filed, by the party is apparent**;
>
> (b) a description of a person must not contain more personal information than is necessary to identify the person and show the person's relationship to a claim or ground of contest.
>
> [My bolding added]

[59] Nova Scotia's CPR 38.07 also has relevance to Applications:

> **Claiming a remedy in an action or application, including declaratory judgement**
>
> (1) A statement of claim, an *ex parte* application, and a notice of application must state the remedy the party seeks from the court, except that a claim for costs is presumed.
>
> (2) A statement of defence, or contest, need not claim a dismissal of the action, counterclaim, cross-claim, third party claim, or application, and a claim for costs is presumed. …

[60] The purpose of a claimant's pleadings is to give fair notice to other parties, of what are the core claim(s) and remedies sought.

[61] Mary's pleadings serve that purpose.

[62] In her pleadings Mary stated:[8]

> **8**. Following [Provident's October 13, 2022] decision to unilaterally terminate the Agreement on the basis of [Mary's] complaint about the crack [in the concrete in the garage floor], [on October 13, 2022] **Provident's counsel subsequently wrote to [Mary's] representative to say that [she] had improperly entered the building in August 2022. This allegation was an after-the-fact justification for [Provident's] decision to terminate the Agreement and is without any merit whatsoever. [Mary] denies that she ever improperly was present in the property or that [Provident] had any legitimate basis to terminate the Agreement**.

[63] In its pleadings, Provident stated:

> (4) With respect to ground #6 of the Notice of Application, **Provident states that the Applicant trespassed on the property in advance of the scheduled walk-through, on numerous occasions**.… The Applicant arrived at the closing walk-through in a very aggressive manner and acted completely unprofessionally on this occasion, she again trespassed on the property. Provident states that **the acts of trespass were clear breaches in the Agreement of Purchase and Sale**. …
>
> …
>
> (6) **With respect to grounds #8 through 10 of the Notice of Application**, Provident states that **the Agreement was terminated due to the Applicant's numerous breaches of the Agreement. Those breaches included, but are not limited to the following:**
>
> a. **Entering the property while it was under construction;**
>
> b. physically assaulting a Provident representative at the walk-through;
>
> c. using defamatory language against Provident; and
>
> d. **and such other breaches that may become apparent** (particulars of which will be provided prior to the hearing)

8 I bear in mind that the pleadings were filed on Monday October 17, 2022, and the events of Thursday, October 13, 2022, took place in the afternoon. This quick filing alerted Provident to the seriousness with which Mary considered the situation.

[64] Provident was not taken by surprise that Mary argued that after her entrance into the premises on August 8, 2022, they had:

(1) "affirmed" the Agreement in spite of, or "waived", the August 8, 2022 purported trespass as a basis for termination; or

(2) were precluded in October 2022, from relying upon her entry into the Unit on August 8, 2022, because of Provident's not taking action to terminate the Agreement at or about August 8, 2022, or some time not unreasonably long thereafter (lâches); or

(3) they were estopped from doing so.

[65] No jurisprudential authority was presented for Provident's position that if waiver/estoppel/laches is not expressly pleaded by Mary, therefore it cannot be relied upon as an argument and factual circumstances by her.[9]

[66] However characterized, whether as estoppel/lâches/waiver/affirmation, the underlying legal strata is based on equitable principles and considerations.

9 Moreover, Provident was not taken by surprise by Mary's position that it had waived/affirmed or was estopped from relying upon its strict rights to terminate the Agreement based on the August 8, 2022 entry into the premises by Mary. Mary's pleading made it clear that "This allegation was **an after-the-fact justification** for [Provident's] decision to terminate the Agreement and is without any merit whatsoever." Provident was likely on notice about this when it filed its pleadings on November 7, 2022, but certainly aware after it had received Mary's affidavits filed on March 6, 2023, and April 3, 2023, and her Brief filed September 6. 2023 - before Provident's Brief was filed September 19, 2023. In her initial affidavit, she stated at paragraph 58: "I did not receive any further correspondence from Provident about this issue or my entrance into the Sailors Trail Unit."

[67] That being the case, the Court must examine the fairness or not, (from the perspective of both the Applicant and Respondent) that would arise by permitting Mary to argue such equitable principles to address Provident's purported reliance on the August 8, 2022, entry into the property by Mary as a basis for termination of the Agreement 2 months later - on the eve of the Closing date.

[68] There is no injustice by permitting Mary to introduce evidence of the fact of Provident's raising no objection, and taking no action against Mary in relation, to her August 8, 2022, entry into the property - until October 13, 2022, shortly after the pre-Closing inspection.

[69] Even if it could be successfully argued that "estoppel" should be pleaded in such circumstances, in the present case there was no unfairness to Provident thereby, and this argument fails.

[70] Returning to the facts of the case regarding Mary's entrance into the premises on August 8, 2022, I note:

1. Regarding August 8, 2022, Provident's Counsel had been notified in writing by Mary on August 9, 2022, regarding the August 8, 2022, entry into Unit 20B (Exhibit "J" to Mary's affidavit).

2. Scott was also then aware according to his Discovery evidence filed as Exhibit 2 at trial:

> Question – So back to August 2021[sic] your lawyer at the time was aware of Ms. Sharma's entrance into the property in August 2022. Right?
>
> Answer – 2022, Yeah, I believe so.
>
> Question – And you are aware of it. Did Provident send any notice, or advised Ms. Sharma that they intended to terminate the contract based on her actions?
>
> Answer – I didn't, I don't believe. I'm not sure are owners – so I wouldn't have had the authority to make a call to terminate the contract at that point. …
>
> …
>
> Question – So why didn't you tell them [the COO and owner of Provident, Heather Stubbert and John Greenough??]
>
> Answer – It wasn't – you know it wasn't the sort of thing – it was the theft issue. It was – we give people the benefit of the doubt. We don't want to terminate a contract. We want to get it to completion - it wasn't an urgent priority.
>
> Question – Provident was prepared to continue on with the agreement and close in October of 2022?
>
> Answer – That's correct…. It was about a week coordinating the closing walk-through with her agent Angela.… I showed up the date of the 13th to complete the walk-through and close the following day with every intent to."

3. Scott and Mary were both present to witness the events on October 13, 2022. Mary pleaded that:

> In the lead up to the Closing Date, [Provident] signalled on numerous occasions that it was seeking to escape its obligations pursuant to the Agreement.… Following [Provident's] decision to unilaterally terminate the Agreement on the basis of Ms. Sharma's complaint about the crack, [Provident's] counsel subsequently wrote to [Mary's] representative to say that [Mary] had improperly entered the building in August 2022. [Mary] denies that she ever improperly was present in the property or that [Provident] had any legitimate basis to terminate the Agreement.

[71] As indicated above, I find that Mary's actions on August 8, 2022, in relation to her entry of Unit 20 B were justifiable and reasonable.

[72] Provident's reliance on that incident as a basis for terminating the Agreement is entirely without merit - whether seen in isolation or cumulatively with the other evidence that I accept.

The October 13, 2022 - Pre-Closing Inspection

[73] Provident relies on several reasons rooted in Mary's attendance at the Unit that day for their termination of the Agreement:[10]

> 1-Unauthorized Entry to the property;
>
> 2-Physically assaulting a Provident representative at the walk-through;
>
> 3-**Using defamatory language against Provident** - I understood this to be a reference to Mr. MacDonald's evidence that Mary stated upon her arrival at the unit that day: "You people are like dealing with the fucking Mafia". In her affidavit Mary stated: "I do not recall whether I used the "f"-word when I interacted with Mr. MacDonald." At the hearing, she allowed that she was quite upset when she arrived and did not dispute that it was possible that she said this. This latter ground - comparing Provident to "the Mafia", and even if one were to include Mary's references to her intention to sue Provident for what she considered the deficiencies in the Unit - was not emphasized in argument by Provident; and for good reason. It is entirely without merit. **Neither on its own nor cumulatively in addition to the other grounds relied upon by Provident could this have been a material factor in justifying termination of the Agreement.**

10 I note that its pleadings include the following reasons: that **Mary trespassed on the property** on August 8 and October 13, 2022; that she was **verbally abusive and physically pushed Scott MacDonald** on October 13; that she "**stated her intention to sue Provident**. Provident took this communication as another breach of contract and treated it as a repudiation of the contract." Scott MacDonald's testimony elaborated on these bases for the purported termination of the Agreement. Let me say briefly that **Mary's statements that she would "sue Provident"** [in Small Claims Court] for what she believed were deficiencies regarding the Unit (for example - the crack in the garage concrete floor; the size of the patio; the direction of the ceramic tile flooring in the foyer; the colour of the grout on the kitchen backsplash - see also Scott's affidavit at para. 30) **are not, as Provident argues, another breach of contract by Mary. Those statements standing alone or together with the other evidence I accept, do not even come close to establishing that Mary repudiated the Agreement, or justifying Provident's purported termination of the Agreement**.

[74] Let me next examine the circumstances of the claimed physical assault, verbal abuse and unauthorized entry to the property on October 13, 2022.

[75] Three persons were present: **Scott MacDonald, Mary Sharma and Angela Forgeron**. They each filed affidavits and testified.

[76] I have had to assess their willingness to speak the truth as they honestly believe it to be (sometimes referred to as their truthfulness or honesty) and their reliability - which is in relation to the objective accuracy of their testimony, as I recognize even an honest witness may inadvertently give unreliable evidence.

[77] I considered, *inter alia*, each of:

- their capacities to observe what went on;
- their condition when they made their observations;
- how long they had to make those observations;
- their ability to recall what they observed, and their ability to communicate what they observed;
- whether their evidence regarding what they believed they observed, changed over time;
- whether their evidence has internal consistency – that is, when seen as a whole, is the evidence of the witness consistent throughout or contradictory?

- the compatibility of their evidence with the other evidence I accept in the case - whether given by witnesses, documentary or otherwise?

[78] While I bear in mind that **Mary** is not a dis-interested witness, as she is a party in this litigation, I was impressed by her testimony.

[79] I found her to be credible based on the content of her testimony as well as her demeanour.

[80] She was prepared to concede unflattering facts and evidence prejudicial to her own position; she did not appear to embellish evidence so as to unduly favour her own position, and her evidence had a "ring of truth" to it, and "made sense" when viewed in the context of all the circumstances.

[81] Angela could also be considered to be not an entirely dis-interested witness insofar as she has a strong professional association with Mary's interests. However, I had no hesitation in finding her to be credible.[11]

[82] **Angela's evidence** about the events of October 13, 2022, was not the subject of much scrutiny at trial. Therefore, I am largely left with her affidavit evidence, which I accept as credible.

11 I keep in mind that the parties here had the opportunity to discover the witnesses in advance of the trial and may have taken such opportunity, which would provide the opposing parties with even greater opportunity to scrutinize the potential evidence of those witnesses at the hearing.

[83] Therein she stated:

> On October 13, 2022, I arrived at the Sailors Trail Unit in my own vehicle. Mr. MacDonald has already parked near the property. Ms. Sharma arrived in her own vehicle. Both Ms. Sharma and Mr. MacDonald quickly exited their vehicles. I could not hear, but they both appeared frustrated. **As I approached, I overheard Mr. MacDonald state that the pre-closing walk-through was over. I saw both Ms. Sharma and Mr. MacDonald reach for the door handle at approximately the same time.** I asked to speak to Ms. Sharma. Mr. MacDonald did not lock the Unit, so we went inside. Mr. MacDonald remained outside. Inside, I discussed Ms. Sharma's options with her for a couple of minutes. Ms. Sharma indicated to me that she would like to complete the pre-Closing walk-through. **Mr. MacDonald on his own accord then entered and said he changed his mind, and that the pre-closing walk-through would proceed**.… After about 15 minutes, Ms. Sharma and I completed our walk-through and went outside. Mr. MacDonald locked the door and gave me the key. I understood that I would keep possession of the key until I heard from Mr. David Morrison, Ms. Sharma's lawyer for the transaction, that I was able to release the key to Ms. Sharma. After Mr. MacDonald left, Ms. Sharma told me she was upset about the crack in the garage but was happy to have the sale completed. Ms. Sharma told me she has tenants waiting to hear from her about when they could move in. **After I went back to my car, I had a missed call from Mr. MacDonald. I called him back and he indicated he was frustrated with Ms. Sharma and that Provident would not want someone like Ms. Sharma living in their community, since she is not a good fit.… Later that same day, I again heard from Mr. MacDonald who confirmed that Provident was cancelling the closing**.[12]

[84] I conclude that Angela arrived at the location shortly after Scott and Mary became upset with each other.

[85] Importantly however, Angela was there when the claimed unlawful entry by Mary into the premises occurred.

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12 Ms. Forgeron also provided a supplemental affidavit which was intended to be in the nature of "expert" evidence. I ruled that the evidence she was to give as an expert, which was data collected (listing agreements that were publicly available and relevant to the circumstances of this litigation) by her, could be introduced by her based on her being a fact witness - see e.*g. R. v. Rayner*, 2000 NSCA 143, paras. 18-22 per Saunders JA; and *R. v. Kwok*, 2023 ONCA 458, at paras. 35-38. She was referred to this information repeatedly, and in particular as well by counsel for Provident. She did also give testimony relevant to the litigation which was not expressly provided in her affidavits.

[86] I accept that, as she put it:

> As I approached, I overheard Mr. MacDonald state that the pre-closing walk-through was over. I saw both Ms. Sharma and Mr. MacDonald reach for the door handle at approximately the same time. I asked to speak to Ms. Sharma. Mr. MacDonald did not lock the unit, so we went inside. Mr. MacDonald remained outside. Inside I discussed Ms. Sharma's options with her for a couple of minutes. Ms. Sharma indicated to me that she would like to complete the pre-closing walk-through. Mr. MacDonald on his own accord then entered and said he changed his mind and that the pre-closing walk-through would proceed."
>
> [My underlining added]

[87] **Mary** stated in her affidavit:

> 65 Upon arriving, I was already upset that I would have to make several changes to the Sailors Trail Unit at my own expense…I was frustrated because I thought that I would be purchasing a 'turnkey' unit, but now felt that I was faced with a number of issues to address.
>
> …
>
> 68 As we were standing out front of the Sailors Trail Unit, Mr. MacDonald told me he was cancelling the sale of the Sailors Trail unit and that we would not be completing the Closing inspection.
>
> 69 Mr. MacDonald threatened to throw my appliances to the curb if they were not removed by 5 pm.
>
> 70 I recall stating 'we are not cancelling anything' and **I walked into the Sailors Trail unit past Mr. MacDonald.**
>
> …
>
> 73 After a few minutes, Mr. MacDonald came back into the Unit and asked of everyone was calmed down and if we were ready to complete the closing walk-through.

[88] In cross-examination, Mary stated that she believed "he had overstepped his authority [in cancelling the pre-Closing inspection walk-through] and while she

was grabbing for the doorknob to enter the premises “he got in my way to prevent me from entering”.

[89] She elaborated that the door was wide open at that time, and: “I thought I was in my legal rights to go inside the property… He could not change the contract… He was in violation of the contract.”

[90] I accept Mary’s evidence referenced above.

[91] Let me explain why I prefer Mary’s evidence to that of Scott’s where they differ.

[92] Both Scott and Mary agree they had never spoken, and never met before October 13, 2022.

[93] In his affidavit at paragraphs 18-20 Scott stated:

> Ms. Sharma was extremely difficult to deal with and was consistently dissatisfied with the property. Throughout the course of the sale process, Ms. Sharma made complaints relating to the direction of the tile, the size of the outdoor balcony, grout colouring and cracks in the concrete.
>
> **During her interactions with Provident employees**, including myself, she was often **verbally** and sometimes **physically** abusive.
>
> [My emphases added.]

[94] In his testimony he repeatedly characterized Mary's behaviours toward Provident as a "pattern" of "unreasonableness", and on another occasion as "a pattern of being dissatisfied… We don't want unhappy people in the community".

[95] He elaborated that on October 13, Mary was "so aggressive, so combative"; and that he "had been cursed at… [and] threatened to be sued"… "the anger she directed at me… I was angry". He added: "she was behaving like a lunatic".

[96] Regarding August 8, 2022, although it was not in his affidavit, and he was not expressly asked this, he added that: "she could have been injured getting out the window"; thereby suggesting that it was a serious breach of the contract which could justify termination.

[97] Regarding Mary's attempting to enter the premises after he had declared the pre-Closing inspection cancelled, he stated "I cannot believe someone would behave that way".

[98] These paragraphs/references to his testimony are examples of Scott's overt hyperbole, or inadmissible hearsay, evidence which I conclude was deliberately

stated in such manner by him, in order to advance the interests of Provident, and thereby his own interests.[13]

[99] Objectively speaking, Mary was not "extremely" difficult to deal with, given the evidence presented to me.

[100] Other than arguably on October 13, 2022, Mary was not at any other time shown to be "verbally and sometimes physically abusive" to anyone - yet Scott said she was "often" so "during her interactions with Provident employees, including myself".

[101] Notably, although he claimed that he had the authority on behalf of Provident to cancel the pre-Closing inspection, he agreed that he did not have the authority to terminate the Agreement.

[102] I asked him to describe specifically what happened, regarding Mary's movement towards the door, after he cancelled the pre-Closing inspection.

13 Such inconsistency with the evidence that I heard also found its way into the Notice of Contest filed by Provident. At para. 7, we find: ["With respect to grounds number 8 through 10 of the Notice of Application, Provident states the agreement was terminated due to the applicant's numerous breaches of the agreement. Those breaches included, but are not limited to, the following: … b) physically assaulting a Provident representative at the walk-through". As Angela stated, and I accept: "I saw both Ms. Sharma and Mr. MacDonald reach for the door handle at approximately the same time." Asserting that this is an assault, is akin to "making a mountain out of a mole hill". Moreover, it is entirely unclear on a balance of probabilities whether there even was an "assault"; and whether it was Scott who assaulted Mary or Mary who assaulted Scott..

[103] **Scott stated**:

> Mary had arrived, "followed quickly" by Angela. He and Mary were approximately 10 feet from the entry door when Mary "forced her way past me. I went to close the door – I reached across and partly closed it – Mary forced past me. My left hand was on the handle closing it – Mary rushed past me from behind on my left side – made physical contact with my left side – I let go of the handle – she passes to my left and goes in."[14]

[104] I am satisfied more likely than not, that Mary and Scott reached for the handle of the opened door at approximately the same time, and that Scott "let go of the handle" so as to allow Mary to go inside (as she stated: "I walked into the Sailors Trail Unit past Mr. MacDonald. Mr. MacDonald walked away and remained outside. Ms. Forgeron and I remained inside where she coached me and told me it was important for us to complete the sale today and that we could determine a remedy for the deficiencies later. After a few minutes, Mr. MacDonald came back into the Unit and asked… if we were ready to complete the closing walk-through.").

[105] I am satisfied that Scott let go of the handle, not because of the physical size and strength of Mary pushing her way through, but rather that he did so in an acquiescing manner.

14 I am relying on my handwritten notes, and only the quoted portions are verbatim accounts. However I am satisfied the general tenor of the evidence is consistent with what a transcription thereof would demonstrate.

[106] This is consistent with the fact that from my observations of them in court, I estimate that Scott is likely 5’10” in height; he appears to be in his late 30s and fit (which I infer he was at the time as well) - whereas Mary was at the time of the swearing of her affidavit, 75 years old, and presented in Court as a physically slight individual (which I infer she also was on October 13, 2022).

[107] To the extent that Mary incidentally brushed against Scott, it was in a minor and incidental manner. No injury would have been occasioned thereby to Scott - and he did not claim there was any injury.

Conclusion regarding whether there was a breach of the Agreement by Provident

[108] My findings of fact herein, when viewed in relation to Provident’s claims of a breach or breaches of terms of the Agreement by Mary, cause me to conclude, more likely than not that, there was/were no such breach or breaches of the Agreement, and even if so, individually or collectively they could not have justified Provident’s termination of the Agreement.

[109] Provident breached the terms of the Agreement by refusing to attend and participate in the Closing set to take place on October 14th 2022.[15]

[110] Therefore, I next turn to the issue of remedy.

Why I conclude that specific performance should be ordered here

[111] Both parties cited Justice Norton's decision in *Wang v. Lambie Construction Inc.*, 2022 NSSC 51, which sets out the generally applicable principles:

> 23 Canadian law is settled that for the remedy of specific performance to be available as it relates to land, the land in question must be "unique". The burden is on the party seeking

15 Provident's counsel raised a new argument orally in submissions. He suggested that there was no evidence that Mary had tendered the monies to close the sale on October 14, 2022, and therefore she may be seen to have accepted the Agreement was at an end on October 13, 2022. Mary's counsel rightly noted that this was not expressly raised by Provident in the pleadings, affidavits, testimony, or briefs. In that respect, Mary did not have fair notice of this argument, and consequently did not intend to address it before the Court and did not do so until it was raised in submissions by Provident's counsel. On that basis, I would reject Provident's argument. In addition, I note that in any event, I accept, as Mary stated: "To purchase the Sailors Trail Unit, I sold a triplex that I owned in Dartmouth… around June 28-29, 2022, so that I would have funds available for the July 4 closing date of the Sailors Trail Unit (para. 20); and "I understood that at this point, the money would be transferred from our respective lawyers' offices once completed, Ms. Forgeron would give me the keys for possession of the property. Although I was frustrated with some of the deficiencies, ultimately, I was excited to finally take possession of the Sailors Trail Unit" (paras. 77-78). I am satisfied that Mary was and remained so (after Provident unilaterally terminated the Agreement on October 13, 2022), ready, willing and able to close the Agreement of Purchase and Sale with the payment of monies by her to Provident as required on October 14, 2022. That she did not tender them is immaterial in the circumstances of this case, as I find Provident clearly understood that Mary was insisting upon continuing performance by Provident of its obligations under the Agreement, and at no time was there a scintilla of evidence that she accepted Provident's purported termination of the Agreement. See for example, Justice Charney's reasons in *Sivasubramaniam v. Mohammad*, 2018 ONSC 3073 (affirmed 2019 ONCA 242): "67 Significantly, **the applicant did not demand a return of his deposit, which also indicates a continued intention to enforce the terms of the APS.** In Justice Perell's article "Common Law Damages, Specific Performance and Equitable Compensation in an Abortive Contract for the Sale of Land: A Synopsis" (2011), 37 Advocates Quarterly 408, he writes as follows (at 413): **A purchaser who demands the return of his or her deposit is electing to end the contract and will not have a claim for specific performance.** See also: R.J. Sharpe, *Injunctions and Specific Performance* 2nd ed. (Toronto: Canada Law Book, 2015) at para. 10.700: It has been held that if the promisee asks the promisor for restitution of benefits conferred, usually the return of his deposit, an election for that relief has been made, the contractual obligation of the promisor is at an end and specific performance is no longer available to the promise."

specific performance to establish that it is a remedy that is appropriate. *Doucette v Giannoulis,* 2006 NSSC 166, at para. 35.

24 The leading case on specific performance is the Supreme Court of Canada decision in *Semelhago v Paramadevan*, [1996] 2 S.C.R. 415, where the court rejected the earlier jurisprudence that all real estate was unique. Justice Sopinka, writing for the majority of the court said at paras. 20-22:

> 20 ... While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
>
> 21 It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240):
>
> > **Courts of Equity decree the specific performance of contracts**, not upon any distinction between realty and personalty, but **because damages at law may not, in the particular case, afford a complete remedy.** Thus, **a Court of Equity decrees performance of a contract for land**, not because of the real nature of the land, but **because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.**
>
> 22 Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief. See *Roberto v. Bumb*, [1943] O.R. 299 (C.A.), at p. 311; *Kloepfer Wholesale Hardware and Automotive Co. v. Roy*, [1952] 2 S.C.R. 465; *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427, at p. 438. Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, the Newfoundland Court of Appeal (per Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:
>
> > The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for

> investment or re-sale purposes only. He had sold the first two almost immediately at a profit and intended to do the same with the remainder. **It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.**

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Sea Oil & General Corp*) [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

> **Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.**

[Emphasis added]

25 **It is important to underscore that the uniqueness of real property goes to the characteristics of the land itself**, not transactions involving it. In *United Gulf Developments Ltd. v. Iskandar*, 2003 NSCA 83, Justice Saunders considered the issue in the context of a motion to stay the decision of the decision of the trial judge dismissing a claim for specific performance. At paras. 22 and 23 Justice Saunders stated:

> [22] When I pressed Mr. Moreira during argument to explain why his clients' property was "unique" such that the remedy of specific performance could be said to meet the requirements expressed by Sopinka, J. in ***Semelhago***, I was informed that what makes these appellants' "claim" "peculiar" and "out of the ordinary" is that it represents "a very specific business opportunity" negotiated by the parties in a "complicated" share/purchase agreement. This, in counsel's submission, amounted to a very unique business opportunity and this "uniqueness of the subject matter of the transaction" ought to warrant specific performance protection.

[23] With respect, I cannot agree. **The inquiry as to the availability and suitability of a remedy of specific performance must be directed at the property itself and not to the terms of the transaction surrounding it, or the profit that might be derived from its successful completion**. By all accounts the parties on both sides of this dispute are seasoned and successful business people, hardly neophytes in commercial transactions. The construction, acquisition and operation of condominium properties is no longer special or rare in this province. Any on-looker can see the explosion of such developments throughout the metropolitan area.

[Emphasis Added]

26 This analysis has been repeatedly followed by Nova Scotia jurisprudence. In *Doucette, supra,* Justice Boudreau stated:

> [36] I can state unequivocally that specific performance is not appropriate in this case and that damages are an adequate remedy. The condominium unit in question is not unique, as argued by Mr. Doucette.The testimony of witnesses revealed that there are literally dozens of such units for sale in the south end of Halifax. Granted, there are differences in style and appearance, but they essentially have the same accommodations and services...
>
> [37] **It should also be kept in mind that specific performance is an exceptional equitable remedy, and this discretionary remedy should not be lightly employed by the court. ...**

27 In *Hilchie v. Waterton Condominiums Inc.*, 2011 NSSC 489, reversed on other grounds, **Justice Stewart wrote of the onus on the party claiming specific performance to demonstrate uniqueness at para. 49:**

> [49] In examining the actual findings in the seminal Supreme Court of Canada decision *Semelhago v. Paramedevan*, [1996] 2 S.C.R.415, Roscoe, J.A. highlighted that; 1) it is no longer appropriate to assume that specific performance is always the suitable remedy for a breach of contract for the sale of land; 2) that **specific performance should not be granted as a matter of course; 3) there is need for evidence that the property is unique to the extent that its substitute would not be readily available**. (*United Gulf Developments Ltd. v. Iskardar*, 2004 NSCA 35, leave to appeal denied [2004] S.C.C.A. No. 172 @ para. 16 and 17).
>
> [50] **Post *Semelhago*, specific performance is an appropriate remedy where a piece of real estate is "unique" in the sense that it has a quality or qualities that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere and a substitute property is not readily available and where damages would not afford the purchaser an adequate remedy** (*Coulin v. Minhas*, [2009] A.J. No. 74(para. 43)); *United Gulf Developments Ltd., supra* @ para. 17, referencing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, [2001] O.J. No. 4397 @ para. 49-60)). The relevant inquiries are as to whether the property is "unique" as elaborated in the case law and whether damages are an adequate remedy.
>
> [51] In this instance, the Purchasers led no evidence of the uniqueness of the property and its intrinsic value to them. Nothing was submitted to substantiate any such claim. They did not demonstrate that the property has characteristics or distinctive features that make an award of damages inadequate for them. Granted the burden is not to prove a negative and demonstrate the complete absence of comparable properties (*John E. Dodge Holdings Ltd., supra* @ 57 and 60); but, evidence is required to substantiate their position. Certainly, as of hearing, Saberi's evidence reveals

> **substitute property is readily available in the general vicinity** of the Northwest Arm. Within Tower One alone, some 80 units with marginal differences from one to the other remain unsold. There is nothing to suggest otherwise **as of the time of the breach**. The Purchasers failed to discharge the onus with respect to specific performance of the contract. It is a remedy not available in the circumstances. The Purchasers' remedy lies in an award of damages for breach of the contract.

[My bolding added]

[112] I recognize that the burden is upon Mary to establish that damages at law would not afford a "complete" (the language in the older jurisprudence) or "adequate" (the language in the more recent jurisprudence) remedy to her, and that specific performance is an exceptional equitable remedy, which must be assessed as at or about the time of the breach of contract by Provident.

[113] I found Mary's evidence in relation to this issue to be credible and compelling.

[114] In her Initial affidavit, she stated:

> I presently live at 1844 Shore Rd. in Eastern Passage… I have owned this property since 2003 and have lived there since 2009. I am 75 years old. My home at 1844 Shore Road is three stories. I am responsible for all aspects of maintenance of the home including lawn maintenance and snow clearance. My son lives in Halifax and works in Dartmouth. In the Spring of 2021, I began to look for a house with fewer stairs in the Eastern Passage area to eventually downsize from my current home. The plan was that my son would move into my current home once I downsized, and we would live within walking distance to one another.
>
> …

In the Fall of 2021, my realtor Angela Forgeron contacted me about an opportunity to purchase a single level home in the Eastern Passage area. I became interested in this opportunity, because I felt it would be a good fit for me when I could no longer handle the stairs or maintenance of my current home. These homes are called the Village at Fisherman's Cove.… On November 24, 2021, I purchased 20B Sailors Trail located in Eastern Passage within the Village at Fisherman's Cove development. I bought the Sailors Trail Unit pre-construction… The move-in date would be July 4, 2022.…

I did not have a specified date for when I would move into the Sailors Trail Unit. The plan was to move in once I was unable to continue living in my current home. The Sailors Trail Unit is one level and is accessible for people who cannot live in a home with stairs. It also has an attached garage. I understood that the condo fees of the Sailors Trail Unit includes maintenance of exterior elements, including snow clearing and lawn maintenance. The Sailors Trail Unit is within a 10 to 15 minute walk to my home where my son will live, and allows me to continue living in Eastern Passage.

… My plan upon possession of the Sailors Trail Unit was to rent the property. Therefore, I would continue to generate rental income from the Sailors Trail Unit until a time when I personally moved into the property.

…

Another attraction about the purchase of the Sailors Trail Unit was the opportunity to be involved in certain design specifications. On April 8, 2022, I met with Angie Rose who is the interior designer with Provident to discuss these design specifications. At the meeting, I decided certain design aspects such as the countertops, black splash, ceramic tiles in the foyer, kitchen, ensuite bathroom and the main bathroom. I was also able to choose the type of flooring for the main living areas. I specified that the kitchen backsplash should use a light grey grout… I specified that the hot water heater should be placed inside the Unit.

…

After Provident canceled the Agreement, [Angela] would send me listings of Provident's other Sailors Trail developments. These similar properties are listed for over $100,000 more than what I paid under the Agreement. Attached as Exhibit "R" is a copy of these listings.

I also continued to look at other listings in the Eastern Passage area, however none of these properties suit my needs.… The only property which meets my requirements is the Sailors Trail Unit because of the property being one level, maintenance of exterior elements, layout, proximity to my son, and location in Eastern Passage… The nearest similar retirement community is in Enfield. Attached as Exhibit "S" is a copy of the email [Angela] sent me.

[My bolding added]

[115] Next, I will briefly comment on Mary's testimony, Angela's and then Scott's affidavit and testimony.

[116] The thrust of Mary's evidence was not materially shaken in her cross-examination.

[117] She confirmed that her plan was always to initially rent the property, with the thought that "it was going to be my eventual home".

[118] She elaborated with that in mind, she chose this particular unit, in part because it was within her budget, was a "new build", one level (no stairs) in Eastern Passage, and the other attributes I have referred to earlier, as well as it had a "southern exposure" such that the sunlight would favourably splash across the Unit.

[119] She was also able to have a heat pump as the main source of energy, the hot water heater moved into the Unit, and she was intent on having a middle Unit wedged between two others, as she felt this would reduce the energy requirements for her eventual home.

[120] Angela confirmed that, after the Agreement with Provident was terminated, Mary had requested her to keep abreast of any other suitable alternative single level homes in the Eastern passage area, and Angela did so.

[121] Based on Mary's specifications, as Angela stated, she "sent [Mary] all sales listings for one floor units" in the Village at Fisherman's Cove, and that "these four are what I would have sent to Ms. Sharma".[16]

[122] However, Angela added: "Mary's was the only one available at the time that was facing [with a southern exposure]."

[123] I accept that Mary honestly and reasonably concluded as Angela expressly put it: "that is the only unit she wanted"; and that there was no one-level condominium with the package of attributes that mattered to Mary readily available at the time of Provident's breach of the Agreement (Oct. 13, 2022).[17]

16 See Exhibit "B" to Angela's supplemental affidavit; and Exhibit "R" to Mary's Initial affidavit.
17 I also accept Angela's factual evidence that from para. 49 of her Initial affidavit: "The only 1 Level Homes in Eastern passage are those at the Village at Fisherman's Cove. Attached as Exhibit "C" is a letter outlining real estate in Eastern Passage area that would suit Ms. Sharma's needs… There are no other homes which are equivalent in the area… The nearest 1 Level developments are located in Falmouth or Stewiacke. However, these homes are freehold and not part of the condominium corporation… there are no equivalent homes for Ms. Sharma to purchase in the Eastern Passage area."

[124] Even insofar as several of the other similar Provident properties that were or might have been then available/would become available, I accept that they were sufficiently different from 20B Sailors Trail and likely unavailable in any event.

[125] Scott himself testified that on or about October 13, 2022, there were no other substitute properties available for Mary at the Village at Fisherman's Cove.[18]

18 Let me briefly address Provident's argument, that Mary had an obligation to mitigate her damages, (and Provident would say, even to protect the viability of her claim for specific performance) by purchasing an alternate property instead of 20B Sailors Trail. Given these circumstances, I conclude that it is not reasonable or required that Mary mitigate her damages by purchasing an alternate property, where she claims specific performance in relation to Unit 20B Sailors Trail. I am satisfied that Mary had a "**fair, real, and substantial justification for his [her] claim to performance"** by Provident. I find helpful the reasons of the majority in ***Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51**: "Mitigation - General Principles **23 This Court in *Asamera Oil Corp. v. Seal Oil & General Corp*.**, 1978 CanLII 16 (SCC), [1979] 1 S.C.R. 633, **cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673, at p. 689:** '**The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.**' **24** In *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." **As a general rule, a plaintiff will not be able to recover for those losses which he could have avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible** (*Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324; *Asamera*; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30). **25** On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1992), 13 *Advocates' Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, 1993 CanLII 3025 (FCA), [1994] 2 F.C. 279, at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." **Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case."** In ***Semelhago v Parmadevan*, [1996] 2 SCR 415** the Court commented on the availability of Specific Performance: '**21 It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty**. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. **The common law recognized that the distinction might not be valid when the land had no peculiar or special value.** In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach, V.C., stated (at p. 240): '**Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance**

[126] Moreover, Scott was emphatic in his testimony, that after the pre-Closing inspection on October 13, 2022, Provident would never sell any Unit in Fisherman's Village to Mary after her ongoing dissatisfaction and ultimately his experience with her at the pre-Closing inspection of Unit 20B Sailors Trail.

[127] Mary is entitled to specific performance of the Agreement of Purchase and Sale within a reasonable period of time.

[128] I expect counsel for the parties to come to a mutually acceptable position respecting the mechanics of achieving this outcome, and to present an Order for my signature to effect same.

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of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. 22 **Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief.** See *Roberto v. Bumb*, [1943] O.R. 299 (C.A.), at p. 311; *Roy v. Kloepfer Wholesale Hardware and Automotive Co.*, [1952] 2 S.C.R. 465; *Nepean Carleton Developments Ltd. v. Hope* (1976), [1978] 1 S.C.R. 427, at p. 438. **Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land.** In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, the Newfoundland Court of Appeal (*per* Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.**Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Baud Corp., N.V. v. Brook, (*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp)* [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated: Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.** A similar position has been taken by the British Columbia Supreme Court in *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547, at p. 551." [My bolding added]

Conclusion

[129] Provident breached the Agreement of Purchase and Sale which was scheduled to close on October 14, 2022.

[130] I order specific performance of that Agreement, together with special damages in the amount of $360 for Mary having to remove her appliances from the Sailors Trail Unit after October 13, 2022.[19]

[131] I direct that Counsel file their written submissions on costs (maximum 10 pages) within 20 days of the release of this decision.

Rosinski, J.

19 I accept that Mary intended initially to rent the Unit to third parties, and in anticipation thereof advertised the Unit as being for rent and that she "had several inquiries in response to my posting. I intended to rent the property for $1975 per month thereby generating 15,000 a year on rental income." (para. 61 affidavit) None of the emails attached to her affidavit as Exhibit "M" reference the rental amount that these parties were offered or may have been prepared to pay on a monthly basis. That is the extent of the evidence regarding what Mary could have received for monthly rental revenue. In Scott's affidavit he states at para. 36: "Provident is currently leasing the property on a one-year term in order to mitigate its potential losses while this matter is being resolved. The lease is from May 1, 2023 to April 30, 2024." He was not asked what monthly rental is being received by Provident or what is their net income dollar amount from the rental. There is therefore no reliable independent evidence that Mary could have received $1975 per month between November 1, 2022, and the present day.; nor is there evidence of what her expenses would have been associated with the rental such that the Court could calculate a net income loss (including deduction for income tax payments required possibly) as a result of Provident's breach of the Agreement. Therefore, I am unable to order as damages any amount for that loss claimed by Mary.