

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yan v. Benbow Residences Inc.*,
2024 BCSC 1828

Date: 20241004
Docket: S1913204
Registry: Vancouver

Between:

Zihao Yan, also known as Tony Yan

Plaintiff

And

Benbow Residences Inc.

Defendant

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Plaintiff:

W. Simek
A. Chekh

No Other Appearances

Place and Dates of Hearing:

Port Coquitlam, B.C.
September 23 and 27, 2024

Place and Date of Ruling given to Parties
with Reasons to Follow:

Port Coquitlam, B.C.
October 4, 2024

Place and Date of Judgment:

Port Coquitlam, B.C.
October 4, 2024

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Background

[1] This case concerns a claim and counterclaim related to a failed real estate transaction with respect to a property located at 3151 Benbow Road, West Vancouver, British Columbia, V7T 1A2 (the “Property”).

[2] On or about October 12, 2018, the plaintiff, Zihao Yan, also known as Tony Yan, entered into a Contract of Purchase and Sale to purchase the Property from the defendant, Benbow Residences Inc. (the “Defendant”).

[3] Benbow Residences Inc. is a company incorporated under the laws of British Columbia which has a registered office at 200-100 Park Royal South, West Vancouver, British Columbia, V6E 4E6.

[4] Mr. Phil Garrow, the President and Director of Benbow Residences Inc., signed the Contract of Purchase and Sale on behalf of the Defendant, in his capacity as the principal of Benbow. Throughout this proceeding, Mr. Garrow acted as a representative for the Defendant. At all material times, Mr. Garrow was the principal of Benbow.

[5] On the closing date for the Property’s sale, Mr. Yan was ready, willing, and able to complete the transaction, while the Defendant was not.

[6] Mr. Yan paid a \$1,000,000 deposit, which, if the sale had successfully closed, would have formed part of the purchase price. Mr. Yan has filed a Notice of Civil Claim, which seeks, among other things, to have this deposit returned.

[7] The Defendant subsequently filed a counterclaim alleging that it was Mr. Yan who caused the purchase of the Property to fail, and therefore the Defendant is entitled to keep the deposit and receive additional damages.

[8] On Friday, 4 October, I provided my decision on this matter with written reasons to follow. These are those reasons.

Facts

[9] The first time Mr. Yan viewed the Property it was still under construction. Mr. Yan wanted to make an offer but required a longer closing time in order to arrange financing. Mr. Yan and the Defendant, through their respective realtors, therefore negotiated a Contract of Purchase and Sale (the “Contract”). The final Contract was in writing in the standard form promulgated by the British Columbia Real Estate Association and the Canadian Bar Association.

[10] In the Contract, dated October 10, 2018, Mr. Yan agreed to purchase the Property for \$5,380,000. The Contract stated that Mr. Yan would pay a deposit of \$1,000,000, and that this deposit would form part of the purchase price. The Contract listed the possession date as being November 15, 2018, and the completion date as October 30, 2019.

[11] On the completion date, the Contract required the Defendant to deliver title free and clear of charges, including any mortgages.

[12] The Contract also contained, *inter alia*, provisions:

- a) Respecting the payment of a deposit of \$1 million to the Defendant upon execution of an option to purchase;
- b) Respecting how the Defendant was to complete deficiencies and provide an occupancy permit;
- c) Stating that time was of the essence;
- d) Requiring the seller to provide clear title to the Property; and
- e) Requiring the parties to take such steps as are necessary to complete the transaction.

[13] The Contract was also subject to Mr. Yan obtaining an inspection. After obtaining an inspection report that found numerous deficiencies, an addendum to the Contract was signed by the parties on or about November 9, 2018 (the

“Deficiencies Addendum”). Per this Deficiencies Addendum, the Defendant agreed to fix a list of 43 deficiencies, in addition to finishing the main entrance gate, and installing the house number and mailbox.

[14] After the Contract and the Deficiencies Addendum were signed, Mr. Yan paid the \$1,000,000 deposit via a bank draft payable to the brokerage Royal Pacific Lions Gate Realty Ltd. On or about November 19, 2018, an option to purchase was registered on title to the Property and the \$1,000,000.00 deposit was released from the brokerage to the Defendant.

[15] On or about November 15, 2018, Mr. Yan took possession of the Property. Construction was ongoing at the time of possession.

[16] From December 2018 until late January 2019, Mr. Yan was in China. Mr. Yan had expected that the seller would remedy the deficiencies listed in the Addendum and complete the construction of the property while he was travelling.

[17] When Mr. Yan returned from China, not only were many of the deficiencies not fixed, but the Property was in a state of upheaval. For example, the driveway was dug up and was unusable, there was no working boiler to heat the pool and hot tub, the smart controls in the home did not work, the security system did not work, and the patio doors did not close.

[18] As a result, after returning from China in late January 2019, Mr. Yan resided most of the time at his father’s home and lived at the Property only part-time.

[19] A similar state of affairs continued until late October 2019.

[20] On October 29, 2019, one day prior to closing, Mr. Yan obtained a follow-up inspection report. This report uncovered that many of the deficiencies and construction items had not been completed. A term of the Contract was that all the work would be completed by the completion date of October 30, 2019.

Preparation for Closing on October 30, 2019

[21] On the completion date, having taken all necessary steps, Mr. Yan was ready, willing, and able to complete the transaction. Mr. Yan's preparations for closing included the following.

[22] On or about October 9, 2019, Mr. Yan received a commitment letter from the Bank of Montreal approving a mortgage of \$2,700,000. The remaining balance of the purchase was intended to be cash, obtained from the sale of Mr. Yan's investments.

[23] On October 28, 2019, Mr. Yan provided his conveyancing lawyer, Jason Wang of Vanguard Law Group, a bank draft in the amount of \$1,859,936.14. This amount was intended to cover the cash amount of the purchase price. Mr. Wang noted that there was a cash shortfall and Mr. Yan therefore provided a further bank draft for \$21,968.81 to fully finance the transaction.

[24] Mr. Yan obtained property insurance.

[25] Mr. Yan instructed his lawyers to take the necessary steps to complete the transaction. By cover letter, dated October 25, 2019, Mr. Wang sent closing documents to the Defendant's conveyancing lawyers. In this letter, Mr. Wang also set out the Defendant's requirement to discharge the four mortgages that were registered against the Property, provide an occupancy permit, and provide a survey certificate.

Inability to Close on October 30, 2019

[26] On October 30, 2019, Mr. Yan was fully prepared to complete the transaction. In contrast, the Defendant was not. The Defendant's conveyancing lawyer initially forwarded Mr. Wang's office an occupancy permit for an entirely different property. When this was brought to their attention, the Defendant's conveyancing lawyer then suggested that the correct occupancy permit must have already been provided.

[27] The evidence confirmed that the Defendant had not obtained an occupancy permit on the date of closing and would not obtain one until September 17, 2020, some 10 months after the completion date.

[28] Additionally, the Defendant was unable to provide clear title on the completion date or at any time thereafter. Clear title was an essential term of the contract, yet as of October 30, 2019, several mortgages remained registered against the Property

[29] On October 30, 2019, by letter from Mr. Yan's lawyer, Mr. Yan indicated that the Defendant had breached a fundamental term by not providing an occupancy permit and by failing to complete all the work by the closing day. Mr. Yan therefore accepted the Defendant's repudiation of the Contract and requested a return of his deposit. The deposit was not returned.

[30] On or about November 6, 2019, Mr. Yan was served with a foreclosure petition from Peoples Trust Company, initiating foreclosure proceedings against the Property

[31] On December 19, 2019, Peoples Trust Company obtained an order *nisi* of foreclosure and a judgment against the Defendant in the amount of \$1,660,683.91.

[32] On or after January 8, 2020, Mr. Yan was served with a second foreclosure petition, this time from Alamshar Financial Inc.

[33] On June 25, 2020, Alamshar Financial Inc. obtained judgement in the amount of \$2,496.619.17 plus interest as well as an order for the sale of the Property.

Position of the Plaintiff (Mr. Yan)

[34] It is Mr. Yan's position that:

- a) The Defendant breached the Contract by failing to provide an occupancy permit and to clear the title of financial encumbrances by the completion date.

- b) Mr. Yan was prepared to complete the purchase on the completion date and had secured the necessary funds and insurance to do so.
- c) Completing all work on the Property and providing an unconditional occupancy permit were both fundamental terms of the Contract.
- d) Providing clear title was a fundamental term of the Contract.
- e) Mr. Yan is entitled to an award of special costs due to the conduct of the Defendant. This conduct includes the Defendant's failure to appear at trial and the alleged repudiation of the contract.

[35] Mr. Yan is seeking the return of his \$1,000,000 deposit, costs, special costs, and to have the Defendant's counterclaim dismissed.

Issues

[36] The primary issue for determination is whether the Defendant repudiated their obligations under the Contract, and if so, whether Mr. Yan is entitled to the return of his deposit.

[37] Before addressing the primary issues, the court first considered the fact that the Defendant did not appear at trial. At the start of the trial, the court needed to examine the implications of proceeding in the Defendant's absence under Rule 12-5(76) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and determine how his absence impacted the assessment of the claims and defenses.

[38] I have therefore framed the issues before the Court as follows:

- a) What is the effect of the Defendant's absence from the trial?
- b) Is Mr. Yan entitled to the return of the \$1 million deposit paid under the Contract for the purchase of the Property? Answering this central issue is dependant on the resolution of the following sub-issues:

- i. Was it a fundamental term of the Contract that the Defendant complete all work and provide an occupancy permit?
 - ii. Was it a fundamental term of the Contract that the Defendant provide title free and clear of all encumbrances?
 - iii. Did the Defendant repudiate the contract by failing to provide an occupancy permit and clear title?
 - iv. Was Mr. Yan ready, willing, and able to complete the Contract?
 - v. Is Mr. Yan entitled to costs, including special costs?
- c) Given the Defendant's failure to appear, what should be done with the Defendant's Counterclaim?

What is the Effect of the Defendant's Absence from the Trial?

Relevant Facts

[39] The Defendant was absent for the duration of the trial. There is no indication before me that the Defendant either communicated any intention to attend or sought an adjournment. Based on court records and submissions from Mr. Yan's counsel I accept the following relevant facts:

- a) On or about June 7, 2021, Mr. Garrow was examined for discovery.
- b) Prior to this discovery, Mr. Yan's counsel made written request for documents on March 19, 2021, March 26, 2021, and April 23, 2021.
- c) After Mr. Garrow's discovery, Mr. Yan's counsel made a number of further requests for disclosure. Mr. Yan's counsel followed up on these requests on July 20, 2021, August 18, 2021, August 26, 2021, September 17, 2021, and November 25, 2021.

- d) On July 19, 2023, in a filing with the court, the trial was set for September 23, 2024. In July of 2023, Mr. Garrow was represented by legal counsel, namely Mr. Holmes, and would have been aware of the trial dates.
- e) On April 12, 2024, Mr. Yan's counsel sent another follow up letter to Mr. Holmes requesting the outstanding documents. In reply, Mr. Holmes advised that he was no longer instructed by the Defendant.
- f) On April 18, 2024, on behalf of the Defendant, Mr. Holmes filed and served a Notice of Intention to Act in Person.
- g) The Defendant was represented by counsel from January 10, 2020, when the Response to Civil Claim was filed, until the filing of the Notice of Intention to Act in Person on April 18, 2024.
- h) On April 29, 2024, counsel for Mr. Yan wrote to Mr. Garrow, in his capacity as principal for the Defendant. Counsel for Mr. Yan once again requested the disclosure of documents.
- i) On May 9, 2024, Naomi Baker, an assistant to Mr. Yan's counsel, followed up with the Defendant and sought a response to the outstanding document requests.
- j) On May 9, 2024, Mr. Garrow, on behalf of the Defendant, acknowledged receipt of the communication and confirmed that he would be providing a response.
- k) On May 10, 2024, Mr. Garrow provided a written response to the outstanding requests. The response included very limited document production and was insufficient to satisfy the Defendant's disclosure obligations.
- l) On June 7, 2024, Associate Judge Nielsen ordered the Defendant to produce a list of all relevant documents in their possession and an affidavit verifying the Defendant's list of documents within 10 business days of the

order (the “Nielsen Order”). Associate Judge Nielsen also awarded costs to Mr. Yan for the application related to document production in any event of the cause.

- m) On June 10, 2024, Mr. Yan’s counsel served Mr. Garrow with the Nielsen Order.
- n) Mr. Garrow was required to comply with the order by June 24, 2024.
- o) On June 25, 2024, Ms. Baker followed up with Mr. Garrow regarding the list of documents and the affidavit verifying said list of documents.
- p) On June 27, 2024, Mr. Garrow served Mr. Yan’s counsel with an unfiled and unsigned affidavit stating in part that “[he has] not found any documents beyond those previously disclosed to the plaintiff.” Mr. Garrow further advised that “[he has] made arrangements to swear the enclosed tomorrow and will file the same in due course.”
- q) On July 18, 2024, Justice Shergill ordered the Defendant to comply with the order of Associate Judge Nielsen. Justice Shergill also ordered the Defendant to pay Mr. Yan special costs of the application forthwith.
- r) Mr. Yan’s counsel has advised that as of the trial date, the Defendant failed to produce any documents as ordered by the court, failed to serve an affidavit verifying his list of documents, and failed to pay costs connected with the production of documents applications.
- s) The Defendant did not provide or file a trial brief and did not appear at the trial management conference.

[40] Considering these facts, I turn my attention to the relevant legal analysis.

Legal Authority

[41] Rule 12-5(76) of the *Supreme Court Civil Rules*, states:

Failure of one party to appear at trial

(76) If a party is not in attendance when the trial of an action is called, the court may proceed with the trial, including hearing a counterclaim, in the absence of that party.

[42] This rule grants the court discretion to continue with the proceedings, in the absence of one party. Therefore, the presence of both parties is not an absolute requirement when adjudicating a matter. As outlined in *Laponder v. Birkich, 2017 BCSC 1888*, the decision to proceed in the absence of a party depends on various factors including pre-existing delays, the impact on the parties, and the reason for the absence.

[43] Further, Rule 12-5(77) stipulates that a judgment obtained in the absence of a party may be set aside, suggesting that while the court can proceed without one party, the absent party may have the opportunity to challenge the resulting decision if they later provide a valid reason for their absence.

Analysis of Issue

[44] In determining whether to proceed with the trial in the absence of the Defendant, I considered the Defendant’s involvement in the litigation to date, as set out above, in the context of the following key factors:

- a) Discretion to proceed with the trial in the absence of the Defendant.
Throughout the proceedings, Mr. Garrow – as the Defendant’s principal – has been acting on behalf of the Defendant. However, neither Mr. Garrow nor anyone else representing the Defendant appeared at trial. The Defendant was represented by legal counsel until April 2024, and Mr. Garrow has been personally involved in the litigation since that time. These factors indicate that the Defendant was therefore aware of the trial date set for September 23, 2024, and had ample opportunity to prepare. Despite multiple communications and orders to produce documents, the Defendant failed to comply fully and did not appear at the trial management conference or submit a trial brief. This pattern of non-

compliance and failure to engage justifies the court proceeding with the trial.

- b) Consideration of the reasons for the Defendant's absence. The Defendant's absence from the trial is not accompanied by any explanation or justification. The lack of a reasonable explanation for failing to attend trial or to follow through on court-ordered obligations indicates a disregard for the court process. The Defendant's non-attendance appears to be a continuation of his pattern of non-compliance rather than an isolated incident.
- c) Impact on the parties and proceedings. Mr. Yan has met all the filing deadlines and procedural requirements, and the trial date was established well in advance. Proceeding in the Defendant's absence is necessary to ensure the case is resolved efficiently and fairly, without further prejudice to Mr. Yan.
- d) Risk of the judgment being set aside under Rule 12-5(77). While the court may proceed without the Defendant, there is a risk that the Defendant could later seek to set aside the judgment obtained in his absence under Rule 12-5(77). However, given the Defendant's history of non-compliance, it is unlikely that the court would find a sufficient basis to set aside the judgment.
- e) Previous court orders and non-compliance. The Defendant's ongoing failure to comply with court orders, including those issued by Associate Judge Nielsen and Justice Shergill, highlights a disregard for the court's authority and the litigation process. Despite being ordered to produce documents and pay special costs, the Defendant has not complied and has provided only minimal and unsworn document production. This history of non-compliance supports the decision to proceed in his absence, as the Defendant has shown a consistent pattern of obstructing the legal process.

Determination of Issue

[45] After considering the relevant facts and law, I decided to proceed with the trial in the Defendant’s absence, as permitted by Rule 12-5(76). The Defendant’s lack of attendance at the trial, despite being aware of the date and his obligations, coupled with a history of non-compliance and failure to engage meaningfully in the litigation, justifies the court’s decision to move forward without him.

[46] If the Defendant later seeks to set aside the judgment, he will need to provide a compelling explanation for his absence and demonstrate that his previous conduct was not indicative of an intention to abandon his defense.

Was it a Fundamental Term of the Contract that the Defendant Complete All Work and Provide an Occupancy Permit?

Relevant Facts

[47] The Contract stipulates the following:

2. DEPOSIT: A deposit of \$1,000,000 which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows: see Terms and Conditions [...]

3. TERMS AND CONDITIONS: The purchase and sale of the Property includes the following terms and is subject to the following conditions:

[...]

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

A deposit of \$1,000,000.00 in this transaction to be paid by way of bank draft to brokerage Royal Pacific Lions Gate Realty in two business days upon subject removal. The brokerage shall release the deposit within five business days to the Seller or Seller’s lawyer after the Seller providing a duly executed Option, without further direction from the Seller and the Buyer and without need for a court order. All deposits to be non-refundable and forfeited to the Seller in case of breach of this contract of Purchase and Sale by the buyer.”

[...]

Subject to the Buyer obtaining and approving:

[...]

*An Inspection Report (buyer's expense)

*Title Search with related documentation if required by the Buyer

[Emphasis in original.]

[48] The Contract required the Defendant seller, Benbow Residences Inc., to complete all work and provide an unconditional occupancy permit by the completion date on October 30, 2019. This requirement was explicitly stated in the Contract and then reiterated in the Deficiencies Addendum, which outlined 43 specific deficiencies that the Defendant agreed to remediate.

[49] Mr. Yan communicated the importance of these terms before finalizing the contract and emphasized that the resolution of the deficiencies and the provision of an occupancy permit were critical to his ability to occupy and enjoy the property as a residence.

[50] Despite taking possession of the property on or about November 15, 2018, Mr. Yan encountered ongoing issues that rendered the property uninhabitable. For example, neither the heating system nor the control smart home system were fully operational. This prevented the use of basic amenities such as heating and security.

[51] The Defendant also failed to obtain and deliver an unconditional occupancy permit by the completion date. Instead, the Defendant provided a permit related to a different property.

Legal Authority

[52] A fundamental term of a contract is one that goes to the root of the agreement. Its breach therefore deprives the non-breaching party of substantially the whole benefit of the contract. The concept of a fundamental breach is well-established in Canadian contract law. In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] SCJ No. 60 [*Guarantee Co. of North America*], the Supreme Court of Canada ("SCC) defined a fundamental breach as a failure to perform obligations under the contract that substantially deprives the other party of the intended benefits.

[53] Furthermore, the SCC in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, emphasized that contractual terms must be interpreted within the context of the entire agreement, considering the commercial purpose and factual matrix known to the parties at the time of contracting.

Analysis of Issue

[54] To determine whether the requirement to complete all work and provide an occupancy permit was a fundamental term, the court must assess the language of the contract and the significance of this obligation in the overall context of the agreement. The contract explicitly stated and the parties agreed that the Defendant was to complete all work and provide an unconditional occupancy permit by the completion date. This requirement was not a minor or ancillary condition but a primary obligation that directly impacted Mr. Yan's ability to take possession of a habitable property.

[55] The factual matrix also includes the Deficiencies Addendum, which itemized specific issues that needed to be addressed before the completion date. Remediating these deficiencies was critical to the Property's functionality and safety.

[56] The failure to complete all the construction, combined with the lack of an occupancy permit, rendered the property unsuitable for its intended residential use. These breaches fundamentally deprived Mr. Yan of the benefits he expected under the contract, specifically the use and enjoyment of a newly constructed residential home.

[57] The deprivation of the core benefit of the Contract supports the conclusion that the requirement to complete all work and provide an occupancy permit was a fundamental term. If these obligations are not considered to be fundamental, Mr. Yan would be forced to accept a property that is uninhabitable and non-compliant with municipal regulations. This would be commercially unreasonable.

Determination of Issue

[58] Based on the relevant facts and legal principles, it is clear that the Defendant's obligation to complete all work and provide an unconditional occupancy permit were fundamental terms of the Contract. The language of the Contract, the Deficiencies Addendum, and the essential nature of these obligations indicate that these terms went to the root of the agreement. The Defendant's failure to meet these obligations deprived Mr. Yan of substantially the whole benefit of the Contract.

[59] Consequently, the Defendant's failure to complete all work and provide an occupancy permit by the completion date constitutes a fundamental breach, entitling Mr. Yan to seek remedies, including the return of his deposit, and the termination of the Contract.

Was it a Fundamental Term of the Contract that the Defendant Provide Title Free and Clear of all Encumbrances?

Relevant Facts

[60] The Contract contained the following standard terms:

9. TITLE: Free and clear of all encumbrances except subsisting conditions, restrictions exceptions and reservations, including royalties, contained in the original grant or contained in any other grant of disposition from the Crown, registered or pending restrictive covenants and right-of-way in favour of utilities and public authorities, existing tenancies set out in Section 5, if any, and except as otherwise set out herein.

[...]

12. TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions of Section 28 of the *Real Estate Services Act*, on account of damages, without prejudice to the Seller's other remedies.

[Emphasis in original.]

[61] The Contract included a provision requiring the Defendant to provide title free and clear of all encumbrances. Specifically, the Contract stipulated that the Defendant must deliver title unencumbered by financial charges, except for certain permitted exceptions. On the completion date of October 30, 2019, the Defendant failed to deliver clear title. Instead, there were multiple existing mortgages and liens registered against the property, including mortgages held by Alamshar Financial Inc. and Peoples Trust Company.

[62] Efforts by Mr. Yan's conveyancing lawyer to obtain necessary discharges from the Defendant's lawyer were unsuccessful. The Defendant acknowledged that it was not in a position to obtain the required discharges by the completion date, citing issues with communication and documentation from Alamshar Financial Inc.

[63] Consequently, the Defendant could not provide clear title, preventing the transaction from closing as agreed.

Legal Authority

[64] The requirement to provide clear title has long been recognized as a fundamental term in real estate contracts, as it ensures that the buyer receives what they bargained for: ownership of the property without the risk of outstanding claims or encumbrances.

[65] This principle is supported by *Gross v. Cottier*, 71 B.C.L.R. (2d) 1, 1992 CanLII 1055 (B.C. C.A.), which emphasized that providing clear title is a mutually dependent obligation which coincided with the buyer's duty to pay the purchase price. If a seller cannot deliver clear title as he had covenanted, the buyer is not obligated to complete the transaction and may be entitled to terminate the contract and seek remedies.

Analysis of Issue

[66] The question of whether the obligation to provide clear title is a fundamental term hinges on whether the failure to fulfill this term deprives Mr. Yan of substantially the whole benefit of the Contract. Here, the Contract explicitly required the

Defendant to clear all financial encumbrances on title by the completion date. This obligation is central to the Contract because Mr. Yan's ability to obtain full, unencumbered ownership of the Property is contingent upon receiving clear title.

[67] The presence of multiple third-party mortgages and liens on the Property at the time of completion exposed Mr. Yan to legal risk, including potential foreclosure and disputes with creditors. The risk was not speculative as foreclosure proceedings related to those mortgages did subsequently materialize.

[68] Mr. Yan had arranged for financing and was prepared to complete the purchase but could not proceed because, among other issues, the title was not clear. The Defendant's failure to deliver on this critical term made it impossible for Mr. Yan to acquire the property free of third-party claims. The lack of clear title therefore undermined the entire purpose of the transaction.

[69] In this case, the Defendant's inability to provide clear title was not a temporary issue that could be resolved with a short extension or additional communication. The problem persisted despite multiple follow-ups, indicating the Defendant's fundamental inability or unwillingness to perform the contractual obligation. The continued presence of encumbrances at the time of trial, combined with the initiation of foreclosure proceedings against the Property, further demonstrates that the Defendant's breach was not minor or technical, but a significant failure that deprived Mr. Yan of the intended benefit of the Contract.

[70] The principle from *Gross* applies directly here: when a seller fails to deliver clear title, the buyer is not required to complete the purchase and may be entitled to terminate the contract and seek remedies. The Defendant's breach of this fundamental term entitled Mr. Yan to terminate the agreement and recover his deposit.

Determination of Issue

[71] It is clear from the relevant facts and legal authorities that the obligation to provide a clear title free of all encumbrances was a fundamental term of the

Contract. The Contract explicitly required the Defendant to deliver unencumbered title and the failure to do so prevented Mr. Yan from completing the transaction as intended. This failure was not incidental, but instead went to the root of the agreement and deprived Mr. Yan of the primary benefit of the contract. The primary benefit being unencumbered ownership of the Property intended to be Mr. Yan's residential home.

[72] The Defendant's inability to comply, despite repeated requests, constitutes a fundamental breach of the Contract. Mr. Yan is not required to tender performance in the face of the Defendant's repudiation. Accordingly, Mr. Yan was justified in terminating the agreement.

Did the Defendant Repudiate the Contract by Failing to Provide an Occupancy Permit and Clear Title?

Relevant Facts

[73] As already summarized above, the Contract expressly stated that the Defendant was to provide an unconditional occupancy permit and clear title, free of all financial encumbrances by the completion date of October 30, 2019. Having found these terms to be fundamental terms of the contract, I next assessed the conduct of the Defendant.

[74] On the completion date, the Defendant failed to provide an occupancy permit, despite repeated follow-ups from Mr. Yan's counsel, and instead sent a permit related to a different property.

[75] Furthermore, the Defendant failed to discharge several encumbrances on the Property's title, including a significant mortgage held by Alamshar Financial Inc.

[76] At no point on October 30, 2019, did the Defendant provide the required mortgage discharges to the buyer's lawyer.

[77] The state of encumbrances registered on title to the Property became clearer when Benbow filed a response to the Alamshar Financial Inc. foreclosure proceeding:

25. As a term of the May 2019 Agreement, Alamshar agreed to facilitate the orderly sale of the Benbow Property, notwithstanding that the fifth mortgage charge it obtained thereby would not be fully paid out, including by discharging both its third and fifth place mortgage charges registered against title to the Benbow Property.

26. Particulars of the terms, express or implied, of the May 2019 Agreement include the following:

...

b. Alamshar would facilitate the orderly sale of the Benbow Property, which had a firm sale contract completing on October 30, 2019, including discharging all of its security held against the property on payment from the proceeds of sale of such sums as were available therefrom after paying prior encumbrances.

...

29. Further, as the October 30, 2019 completion date for the sale of the Benbow Property to Mr. Yan approached, the lawyers for Benbow sought discharge information (customarily provided by mortgagees) from Alamshar concerning the mortgage charges it held. Alamshar was obliged by the May 2019 Agreement to provide this information and facilitate the closing.

30. In breach of its obligations, Alamshar wrongfully delayed responding and when it did respond, did so falsely and inaccurately, and hindered both the closing and the position of Benbow as concerns the contract of purchase and sale with Mr. Yan.

[78] Despite the Defendant's knowledge of their contractual obligations, the Defendant did not take the necessary proactive steps to remedy these deficiencies. The Defendant's failure to fulfil the fundamental conditions of the Contract resulted in Mr. Yan being unable to complete the transaction as agreed. Mr. Yan, who was ready and able to complete the purchase, accepted the Defendant's actions as a repudiation of the Contract, and demanded the return of his \$1 million deposit.

Legal Authority

[79] Repudiation occurs when one party, by words or conduct, demonstrates an intention not to be bound by a contract. Repudiation can also occur when a party demonstrates that they are unable to perform their essential contractual obligations. This principle was outlined in *Guarantee Co. of North America*, when the SCC held that a repudiation can arise from either a refusal or an inability to perform a fundamental term of a contract.

[80] Further, in *Dosanjh v. Liang*, 2015 BCCA 18, the British Columbia Court of Appeal (“BCCA”) explained that repudiation allows the non-breaching party to elect to accept the repudiation, terminate the contract, and claim damages. The non-breaching party is not required to perform their obligations if the other party has repudiated the contract.

Analysis of Issue

[81] Mr. Yan contends that the Defendant’s failure to provide both an occupancy permit and a clear title constituted a repudiation of the Contract as these failures deprived Mr. Yan of substantially the whole benefit of the Contract, making the Property unsuitable for its intended use as a residential home.

[82] To establish repudiation, the Defendant’s actions must indicate either an intention not to perform an essential obligation or an inability to perform an essential obligation.

[83] In this case, the Defendant was unable to provide an occupancy permit on the completion date and failed to provide clear title. This demonstrates a fundamental inability to fulfill essential obligations of the Contract.

[84] The provision of an occupancy permit is essential because it is needed to legally authorize Mr. Yan to occupy the property. Without it, the Property was not fit for habitation, and Mr. Yan would risk legal repercussions from municipal authorities for occupying a non-compliant structure.

[85] Similarly, a clear title was crucial, as it ensured that Mr. Yan would receive the property free from the risk of foreclosure or claims from creditors. The presence of encumbrances, particularly the unresolved mortgage with Alamshar Financial Inc., exposed Mr. Yan to significant financial and legal risks.

[86] The Defendant’s actions, or lack thereof, prevented Mr. Yan from obtaining the fundamental benefit of the Contract.

Determination of Issue

[87] Based on the relevant facts and legal authorities, the Defendant’s failure to provide an unconditional occupancy permit and a clear title by the completion date constituted a repudiation of the Contract. These were fundamental terms that went to the root of the agreement, and the Defendant’s inability or unwillingness to perform these obligations deprived Mr. Yan of substantially the whole benefit of the Contract.

[88] Mr. Yan was therefore justified in accepting the Defendant’s repudiation and terminating the Contract. Mr. Yan is also entitled to remedies caused by the Defendant’s repudiation, including a return of the \$1 million deposit and any additional damages arising from the breach.

Was Mr. Yan Ready, Willing, and Able to Complete the Contract?

Relevant Facts

[89] Mr. Yan demonstrated his readiness, willingness, and ability to complete the purchase of the Property on the completion date.

[90] Prior to this date, Mr. Yan took several steps to ensure he could fulfill his contractual obligations. He secured financing through a mortgage approval from the Bank of Montreal for \$2.7 million at a fixed interest rate, arranged property insurance to be effective as of the completion date, and deposited the necessary funds into his conveyancing lawyer’s trust account.

[91] On October 28, 2019, Mr. Yan provided his lawyer with a bank draft for \$1,859,936.14, representing the cash portion of the purchase price.

[92] Furthermore, when Mr. Wang realized there was a small shortfall in the cash amount required, Mr. Yan promptly provided an additional bank draft for \$21,968.81 to cover the discrepancy.

[93] These actions indicate that Mr. Yan was financially prepared and committed to completing the transaction. Mr. Yan’s lawyer also communicated with the Defendant’s lawyer in anticipation of receiving the closing documents.

[94] Despite these efforts, the transaction did not complete due to the Defendant’s failure to provide an unconditional occupancy permit and a clear title.

Legal Authority

[95] In real estate transactions, the principle of readiness, willingness, and ability to complete is essential. A party is considered ready, willing, and able to complete the contract if they have the necessary financial resources and have taken all reasonable steps to perform their obligations under the contract.

[96] In *Toor v. Dhillon*, 2020 BCCA 137 [*“Toor”*], the BCCA affirmed at para. 49 that “only a party who is ready to perform can rely upon a ‘time is of the essence’ clause to terminate the contract for the other party’s non-compliance with the provision.” This principle means that a party must not only be financially capable but must also have taken active steps to ensure they can complete the transaction as stipulated in the agreement.

Analysis of Issue

[97] The facts indicate that not only had Mr. Yan secured the necessary financing, but he also arranged property insurance, and provided the requisite funds to his conveyancing lawyer in advance of the completion date. These active steps demonstrate that Mr. Yan had both the financial capacity and the intent to complete the purchase.

[98] Furthermore, Mr. Yan demonstrated a proactive approach to ensuring that the transaction could proceed as planned. For example, he quickly provided an additional bank draft to remedy the minor cash shortfall. Mr. Yan’s lawyer also made timely requests to the Defendant’s lawyer in an attempt to secure the necessary closing documents including the occupancy permit and title discharges.

[99] Mr. Yan's actions are consistent with the requirements outlined in *Toor*, where readiness, willingness, and ability are measured by the party's ability to perform their contractual obligations and their proactive efforts to do so.

[100] In this case, Mr. Yan's preparedness to complete the purchase was only thwarted by the Defendant's failure to meet their obligations. Mr. Yan's inability to complete the transaction was not due to any fault or lack of preparation on his part but was directly caused by the Defendant's repudiation of the Contract.

[101] The Defendant's failure to provide an occupancy permit and clear title created conditions that prevented Mr. Yan from proceeding with the completion. Under these circumstances, Mr. Yan cannot be held responsible for the non-completion of the transaction. Consequently, a buyer who is ready, willing, and able to complete is not required to tender performance if the seller's breach makes it impossible to do so.

Determination of Issue

[102] Based on the relevant facts and legal principles, Mr. Yan demonstrated financial capacity, took all necessary steps to prepare for completion, and through his own lawyer, he actively engaged with the Defendant's lawyer to finalize the transaction. The failure to complete the contract was solely due to the Defendant's breach, not Mr. Yan's lack of readiness or willingness.

[103] Mr. Yan's readiness to complete, combined with the Defendant's inability to provide an occupancy permit and clear title, supports the conclusion that Mr. Yan is entitled to the return of his deposit and to any other appropriate remedies.

Is Mr. Yan Entitled to Costs, including Special Costs?

Relevant Facts

[104] Throughout the litigation process, the Defendant has consistently failed to comply with court orders and procedural obligations, causing delays and additional legal expenses for Mr. Yan.

[105] Despite being represented by counsel until April 2024, the Defendant ignored numerous document disclosure requests, including requests made on July 20, 2021, August 18, 2021, August 26, 2021, September 17, 2021, and November 25, 2021.

[106] After the Defendant's counsel withdrew in April 2024, Mr. Garrow, acting on behalf of the Defendant, continued to disregard both requests for disclosure and court orders for disclosure.

[107] Notably, Mr. Garrow also failed to comply with Associate Judge Nielsen's Order dated June 7, 2024, which mandated that the Defendant produce a verified list of documents and a sworn affidavit within 10 business days. The Defendant did not comply.

[108] A subsequent order issued by Justice Shergill on July 18, 2024, reaffirmed the Defendant's obligation to provide these documents and she awarded special costs to Mr. Yan. The Defendant still did not comply.

[109] In addition to persistent non-compliance, the Defendant also failed to attend key court dates, including the trial management conference and the trial itself. The Defendant's actions and inactions have necessitated additional applications and increased costs for Mr. Yan.

Legal Authority

[110] The general rule is that costs are awarded to the successful party and are assessed as party and party costs in accordance with Appendix B of the Rules 14-1(1) and 14-(9).

[111] Under Rule 14-1(3) of the *Supreme Court Civil Rules*, a party may be awarded costs on a standard basis or on a higher scale if circumstances warrant. Special costs are often awarded because of misconduct or an abuse of process by the opposing party. They are discretionary and may be awarded by the court where there is conduct on the part of a litigant that is deserving of the court's rebuke or,

alternatively, where a litigant engaged in conduct that unnecessarily lengthened the proceedings and led to the other party engaging in unnecessary work.

[112] The seminal test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 (C.A.), where Lambert J.A., after an extensive review of the authorities, concluded:

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

[113] More recently, in *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284, the Court of Appeal stated:

[53] Special costs are usually awarded when one party has engaged in reprehensible conduct: *Young v. Young*, [1993] 4 S.C.R. 3 at 134. While a special cost award provides a greater degree of indemnity against its actual legal expenses, in the ordinary course “[s]pecial costs are not compensatory; they are punitive”: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56. They are typically awarded to address conduct in the course of the litigation that is deserving of censure and rebuke: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106, leave to appeal ref’d [2012] S.C.C.A. No. 120.

[114] In short, the Court must, exercise restraint in awarding special costs and the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order.

[115] The term “reprehensible”, is not easily defined, but it encompasses scandalous or outrageous conduct, as well as “milder forms of misconduct” that are

deserving of reproof or rebuke. *Garcia* at para. 17. The milder forms are the most difficult to assess.

[116] Nevertheless, special costs allow a court to substantially indemnify a successful party which is particularly important where one party has to incur excessive costs as a result of the other party's misconduct. Every case will turn on its own facts.

Analysis of Issue

[117] The Defendant has engaged in behavior that significantly disrupted the proceedings and increased Mr. Yan's legal expenses. These behaviours included failing to comply with discovery obligations, ignoring multiple court orders, and failing to attend critical court events such as the trial management conference and the trial itself.

[118] The Defendant's non-compliance has forced Mr. Yan to make repeated applications in an attempt to compel document disclosure. On July 18, 2024, Justice Shergill awarded Mr. Yan special costs for one such application. Thereby indicating that the court has already found the Defendant's conduct to be deserving of rebuke.

Determination of Issue

[119] In my view, the Defendant's repeated failure to comply with court orders, despite receiving clear instructions and multiple opportunities to do so, demonstrates a consistent disregard for the court's authority that is deserving of rebuke. This behavior not only prejudiced Mr. Yan but also burdened the court system by necessitating repeated judicial intervention to enforce basic procedural requirements. Given the Defendant's history of non-compliance and the negative impact on Mr. Yan, an award of special costs is appropriate both to deter similar conduct and to compensate Mr. Yan for the additional expenses incurred due to the Defendant's misconduct.

[120] I recognize that Justice Shergill has already assessed some of the Defendant's non-compliance as a basis for her special cost order. This is something that will need to be assessed by the Registrar in the final compilation of costs.

Given the Defendant's Failure to Appear, What Should be Done With the Defendant's Counterclaim?

Relevant Facts

[121] The Defendant did not appear at trial nor did anyone acting on the Defendant's behalf. The Defendant's President and Director, Mr. Garrow, was aware of the trial dates but did not attend.

[122] This lack of participation is part of a larger trend of the Defendant failing to meaningfully participate in these proceedings.

[123] Despite being represented by counsel until April 2024, the Defendant failed to comply with several procedural and disclosure obligations and failed to abide by court orders. The Defendant failed to respond to multiple communications from Mr. Yan's counsel, including requests for outstanding documents and requests to adhere to court orders.

[124] The Defendant also failed to attend the trial management conference and did not submit a trial brief. These actions indicate a lack of intention to prosecute the counterclaim.

[125] Due to the Defendant's absence at trial, and the lack of written submissions, the Defendant's counterclaim, which sought damages against Mr. Yan for allegedly failing to complete the purchase of the Property, was not supported by any evidence.

Relevant Law

[126] Rule 12-5(76) of the *Supreme Court Civil Rules*, states that "If a party is not in attendance when the trial of an action is called, the court may proceed with the trial, including hearing a counterclaim, in the absence of that party."

[127] Therefore, if the party who filed a counterclaim does not appear at trial, the court may consider dismissing the counterclaim due to the lack of prosecution or failure to present evidence to support it. In deciding to dismiss a claim, the court must balance the interests of the absent party with the rights of the party in attendance.

Analysis of the Issue

[128] The issue is whether the Defendant's counterclaim should be dismissed due to a failure to appear at trial and a lack of participation in the litigation. The Defendant's absence at trial and the repeated failure to comply with procedural and disclosure obligations demonstrate an abandonment of the counterclaim.

[129] The Defendant did not present any evidence or arguments in support of the counterclaim. Without any evidence to substantiate these claims, the counterclaim lacks a legal basis. Mr. Yan, on the other hand, has provided comprehensive evidence and arguments to support his claim.

[130] Under Rule 12-5(76), the court has the discretion to dismiss the counterclaim due to this non-participation. In this case, dismissing the counterclaim would be consistent with the principles of procedural fairness and judicial efficiency, ensuring that Mr. Yan is not prejudiced by having to defend against a claim that the Defendant has effectively abandoned. Mr. Yan has already incurred additional costs and delays due to the Defendant's conduct, and it would be unjust to prolong the proceedings further.

Determination of Issue

[131] Based on the Defendant's failure to attend trial and their lack of participation in the litigation, I hereby dismiss the counterclaim. The Defendant has demonstrated a clear abandonment of their legal action by failing to present any evidence, comply with court orders, or engage in the trial process.

Conclusion

[132] The uncontradicted evidence before me establishes that on the completion date of October 30, 2019:

- a) Mr. Yan was ready, willing and able to complete the purchase of the Property;
- b) the Defendant was not ready, willing, and able to complete the sale due to the following reasons:
 - i. The Defendant had not finished all required work or remedied all the listed deficiencies.
 - ii. The Property did not have an occupancy permit.
 - iii. The Defendant did not discharge one or more mortgages that were registered against title to the Property.
- c) The foregoing were, individually and collectively, a repudiation of the Contract.
- d) This repudiation was accepted by Mr. Yan.

[133] I am thus satisfied that Mr. Yan has proven on a balance of probabilities that the Defendant failed to comply with their obligations under the Contract of Purchase and Sale for the sale of the Property located at 3151 Benbow Road in West Vancouver.

[134] In the result, I find that the Defendant, Benbow Residences Inc., is liable to Mr. Yan in the amount of \$1,000,000. The Defendant must return the \$1,000,000 deposit made by Mr. Yan as part of the failed purchase of the Property.

Disposition

[135] For these reasons, I make the following orders:

- a) I declare that the Defendant breached and repudiated the Contract of Purchase and Sale entered into on or about October 10, 2018;
- b) I declare that as between the parties, Mr. Yan is entitled to recover the \$1,000,000 deposit that he paid, as well as interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
- c) I declare that Mr. Yan is entitled to special costs. The quantum of special costs is to be determined at a hearing before the Registrar.
- d) In the event of difficulty in recovering the \$1,000,000, Mr. Yan may apply for such further relief as is necessary on notice to the Defendant; and
- e) The Defendant's counterclaim is dismissed.

"The Honourable Madam Justice Sukstorf"