IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chan v. Dhaliwal,*
2025 BCSC 220

Date: 20250212
Docket: S242357
Registry: New Westminster

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Between:

Kit Yee Anita Chan

Plaintiff

And

Daljit Singh Dhaliwal

Defendant

Before: The Honourable Justice Gottardi

Reasons for Judgment

Counsel for the Plaintiff:	F. Ju
Counsel for the Defendant:	K.S. Garcha P. Kuchar
Place and Dates of Trial:	New Westminster, B.C. September 23-27, 2024 October 1-4, 7 and 8, 2024
Place and Date of Judgment:	New Westminster, B.C. February 12, 2025

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I. OVERVIEW

[1] The present case involves a claim and counterclaim arising from the failure to complete a residential real estate transaction. The plaintiff, Kit Yee Anita Chan (the "plaintiff" or "Ms. Chan"), seeks judgment against the defendant, Daljit Singh Dhaliwal (the "defendant" or "Mr. Dhaliwal"), for specific performance of a contract of purchase and sale, dated June 1, 2021 (the "CPS"). The CPS was entered into between Ms. Chan and Mr. Dhaliwal for the purchase and sale of a property located at 7368 Barnet Road, Burnaby, BC (the "Barnet Property" or the "Property"). As a term of the CPS, the seller, Mr. Dhaliwal, agreed to install a platform chairlift between the garage and the basement level of the Property.

[2] The central issue in this case is whether the CPS is binding between Ms. Chan and Mr. Dhaliwal, such that the plaintiff is entitled to specific performance of the contract or damages in lieu. In particular, the primary question is whether the clause relating to the platform chairlift was too vague to be enforced. The plaintiff also seeks out-of-pocket damages arising from the defendant's breach of contract in addition to the equitable remedy they are seeking.

[3] The defendant raises unenforceability of the CPS due to ambiguity; non-performance by Ms. Chan of a fundamental term, and anticipatory breach. Waiver was raised by the defendant but not seriously advanced in oral argument.

[4] The defendant has also brought a counterclaim against Ms. Chan for breach of the CPS. They seek damages arising from loss of rental income.

II. ISSUES

[5] The following issues are raised in this action:

1. Were the terms of the CPS clear and unambiguous or were they too vague to be enforceable?

2. Did Mr. Dhaliwal breach a fundamental term of the CPS by failing to install a platform chairlift between the garage and the basement floor, entitling Ms. Chan to treat the contract as terminated?

3. Did the statements made by the real estate agent for Ms. Chan on the closing date amount to an anticipatory breach of the CPS, entitling the defendant to accept the plaintiff's purported repudiation several days later?

4. If the defendant breached a fundamental term of the contract, is Ms. Chan entitled to specific performance of the terms set out in the CPS?

5. If Mr. Dhaliwal is liable to the plaintiff, what damages arising from the breach were reasonably foreseeable?

6. If the defendant did not breach the CPS, is Ms. Chan liable for breach of contract as set out in the defendant's counterclaim?

III. BACKGROUND FACTS

[6] The trial of this matter unfolded over the course of 11 days. The plaintiff called three witnesses: Ms. Chan; her realtor, Isaac Cheung; and her partner, Niles Derzaph. The defendant called eight witnesses: Mr. Dhaliwal; his son-in-law, Harpreet Badesha; his daughter, Sukhjeet Badesha; his realtor, Jerry Wang; his notary, Garry Gracey; and three contractors, Anton Donets, Jason Green and Cam Pomeroy.

[7] While a fairly detailed recitation of the events leading up to the formation, and then execution of, the CPS is necessary to address the legal issues, what follows is not a complete accounting of all the evidence. While I have considered all of the evidence, I only reproduce those facts and findings that are necessary to resolve the legal issues advanced by the parties.

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A. Personal Circumstances of the Parties

[8] The personal circumstances of the parties can be set out in brief compass. The plaintiff, Ms. Chan, is 55 years old and is a flight attendant by trade. As part of her employment as a flight attendant, Ms. Chan is often away from home nine to 12 days per month, on average. In terms of her education, Ms. Chan attended high school in Hong Kong and later studied French in Switzerland. She later received a diploma in hotel management and worked for a period of time as an intern in a hotel. She later attended the University of Hawaii and completed a degree in science. In 1997, she emigrated to Canada with her parents and her two sisters. Her younger sister, Sophie, is employed full-time with the federal government.

[9] Prior to the sale of their house on Anzio Drive (the “Anzio Property”), Ms. Chan lived with her sister and her now 90-year-old mother, Winnie Ng. Ms. Chan explained that in recent years her mother has developed significant mobility issues including arthritis and requires assistance of mobility devices such as a wheelchair or walker. Ms. Chan also explained that her mother has early onset dementia. Ms. Chan testified that she has always wanted to be present and support her elderly mother in her old age. The plaintiff became emotional when describing her desire to facilitate a living environment for her mother that involved pride and dignity. The plaintiff explained that at the Anzio Property, she often required the assistance of a caregiver or her sister in order to get her mother up and down the stairs.

[10] The defendant is 66 years old and is now retired. Mr. Dhaliwal worked for 38 years as a building engineer and custodian for the Vancouver School Board. After his family immigrated to Canada, they settled in Burnaby. He built the first family home in 1994. In 2004, he built a second family residence.

[11] In 2015, Mr. Dhaliwal entered into a family building project with his daughter, Sukhjeet (“Suki”), and her husband, Harpreet Badesha (“Mr. Badesha”). The basic idea underlying the project was that Mr. Dhaliwal and his wife would provide the start-up capital to allow his daughter and her husband to purchase a piece of real

estate, tear down the existing house, and build a new house for the purpose of sale. In furtherance of this project Mr. Dhaliwal and Mr. Badesha formed a company called Aveya Homes. Mr. Dhaliwal and Mr. Badesha were the sole directors and shareholders of this company.

[12] In 2015, Mr. Dhaliwal, through his company, bought the Barnet Property. Mr. Dhaliwal and his wife took out a mortgage on their family residence to raise capital for this purchase. After buying the lot, Mr. Dhaliwal took out a construction mortgage against the value of the Barnet Property in order to finance the tear down and construction of a new home. Mr. Badesha was responsible for overseeing the construction of the house and managing all of the contractors and subcontractors. Suki looked after the finances, including collecting and paying all of the invoices for the construction work. Suki also acted as an informational liaison between Mr. Badesha and her parents.

[13] In 2017, the house at the Barnet Property was completed. The Property was listed for sale at various times over the course of the next couple years, but the Dhaliwal family did not receive any offers they found acceptable. After these unsuccessful attempts to sell the property, the family made the decision to rent out the Barnet Property. The Property was first rented to a group of international students who ultimately left the Property after eight or nine months. On February 1, 2020 the Barnet Property was rented out to Ronny Kadarishko and his family for two years until the lease terminated on January 31, 2022. The Property was rented for $5,000 per month. The Barnet Property was rented under these terms when the defendant chose to list the Property for sale once again in the spring of 2021.

[14] On April 30, 2021, Mr. Dhaliwal entered into a multiple listing contract with New Stream Realty Inc. (“New Stream”). Jerry Wang from New Stream was the realtor assigned to the defendant’s file. Mr. Dhaliwal testified that he did not personally have any dealings directly with Mr. Wang. Suki also testified that she did not have any direct dealings with Mr. Wang. Mr. Dhaliwal testified that, at all material times, Mr. Badesha was his authorized agent in relation to all business dealings

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involving the Barnet Property. The evidentiary record was clear that the only member of the seller's family who dealt with Mr. Wang was Mr. Badesha. Indeed, all the correspondence tendered as evidence at this trial between Mr. Wang and the seller's side were, in fact, texts and emails between himself and Mr. Badesha.

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B. Events Leading to the Sale of the Property

[15] The plaintiff described first learning about the Barnet Property through happenstance. She recalled getting a sales call from a real estate agent named Harman Bajwa. On that call, the plaintiff explained her mother's condition and that she was looking for a property with an elevator. Mr. Bajwa indicated that he would make a note of the plaintiff's interest in such a property and would reach out to her in the future should one come available.

[16] On May 6, 2021, Mr. Bajwa sent the plaintiff an email indicating that a property with an elevator had come on the market. On May 15, 2021, the plaintiff and Mr. Bajwa attended the Barnet Property for their first visit (the "First Showing").

[17] At the First Showing, Ms. Chan inquired with Mr. Wang about the potential of installing a platform lift on the shorter stairwell, which connects the garage and the basement (the "Stairwell"), so that Ms. Ng can access the property (the "Platform Lift"). Mr. Wang told her he would inquire with the seller.

[18] After the First Showing, Ms. Chan was interested in the Property and decided to retain her childhood friend and veteran realtor Mr. Isaac Cheung to represent her in further inquiries and negotiations for the Property. On or about May 22, 2021, she attended a further viewing of the Property with Mr. Cheung (the "Second Showing").

[19] After the Second Showing, on May 27, 2021, Ms. Chan decided to make an offer to purchase the Property (the "Initial Offer"). Mr. Cheung drafted the Initial Offer. Because of her concerns about Ms. Ng's mobility, she included a condition that the seller install the Platform Lift in the Stairwell. The condition in the Initial Offer was phrased as follows (the "Original Lift Clause"):

> ***PLATFORM CHAIR LIFT***

> The Seller agree, at their cost, to professionally install a fully functioning Platform Stairlift at the interior stairway between the basement and the garage before Completion Date. The Seller will consult and obtain the Buyer's final written approval regarding the make and model of the Platform Chair Lift before proceeding with the installation.

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[20] Along with the Initial Offer and the Original Lift Clause, Mr. Cheung sent Mr. Wang some pieces of supplemental information to assist with interpretation of a few specific clauses. In relation to the Original Lift Clause, Mr. Cheung sent the following information:

1. A cover email which, among other things, informs the defendant that “the deal breaker is 11 step stairway from garage to basement floor level, hence they are asking the seller to have a platform stairlift installed. (Please see attached photos sample).”

2. A brochure containing the photo samples of the Platform Lift the plaintiff was seeking (the “Brochure”). The Brochure describes the device as a “Platform Lift” and is itself named “Platform stairlift 73…net.pdf”

[21] Mr. Wang testified that he presented the offer to the sellers. Mr. Wang, in his evidence, indicated that there was some discussion about the model of lift that was being sought by Ms. Chan. Mr. Wang testified that neither he nor Mr. Badesha knew the cost of the model depicted in the Brochure. According to Mr. Wang, during their walk-through of the Property at the Second Showing Ms. Chan had indicated that her mother would not be able to negotiate the Stairwell. Mr. Wang testified that this impediment was a result of Ms. Chan’s elderly mother being a “wheelchair person”.

[22] On May 28, 2021, the defendant counteroffered, asking for a more favourable sale price and revised the Lift Clause as follows (the “Revised Lift Clause”):

> ***PLATFORM CHAIR LIFT***
>
> The Seller agree, ~~at their cost~~, to pay, but limited to $15,000 (the buyer agree to pay the excess part) to professionally install a fully functioning Platform Stairlift at the interior stairway between the basement and the garage before Completion Date. The Seller will consult and obtain the Buyer’s final written approval regarding the make and model of the Platform Chair Lift before proceeding with the installation.

[23] The parties continue to exchange offers until they reached an agreement on June 1, 2021. There were no significant changes other than to the price, and the Revised List Clause is present in the accepted final CPS for the Property.

C. Events Leading up to Completion Date

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[24] The CPS was originally due to close at the end of October 2021, but was delayed several times, and ultimately to December 30, 2021. The plaintiff was having trouble selling the Anzio Property, and the funds from that sale were needed to complete the purchase of the Barnet Property. Both parties agreed to these extensions through a series of addendums, the most recent of which was executed August 31, 2021. The plaintiff entered into a contract to sell the Anzio Property on September 28, 2021. She then removed the subject to sale condition and paid the $100,000 deposit on the same day. Ms. Chan also issued a notice for the defendant to evict the tenant – Mr. Ronny Kadarishko – on the same day. Mr. Badesha, on behalf of the defendant, gave Mr. Kadarishko notice to vacate on the same day. As far as the parties were concerned at this point, the CPS was firm and binding.

[25] Mr. Badesha testified that he called a number of companies to inquire about the installation of a chairlift in October 2021. When asked in cross-examination if he had any record of these communications, he said he did not. Counsel for the plaintiff noted that this was in contrast to his subsequent communications with lift installation companies, which were well documented.

[26] On October 12, 2021, Mr. Cheung sent the following correspondence to Mr. Wang:

> Just to be clear, Whatever the model, the platform chairlift needs to accommodate and carry both the person and their wheelchair together. Thanks.

[27] Mr. Wang testified that he advised Mr. Badesha of this. Mr. Badesha testified Mr. Wang did not advise him of this. Regardless, no one on behalf of the seller indicated any surprise at this clarification from Mr. Cheung.

[28] On November 2, 2021, the defendant sought the plaintiff's approval to install a Bruno Elan Straight Stairlift, which is a chairlift without a platform feature that would accommodate a wheelchair – in satisfaction of the Revised Lift Clause. This proposal was rejected by Mr. Cheung, as it was not fit for Ms. Chan's purposes. Shortly thereafter, Mr. Cheung reiterated that the lift required a platform that could carry a wheelchair occupant, and re-emailed the Brochure to Mr. Wang. No one on the seller's side indicated any surprise or confusion at this clarification.

[29] Between November 2, 2021 and December 6, 2021, no one on behalf of Mr. Dhaliwal made any arrangements to have the Stairwell inspected or otherwise assessed for whether a Platform Lift could be installed. On examination, Mr. Badesha asserted this was because he was waiting for Garaventa Lift, a manufacturer and installer of home elevators and lifts, to provide their quote for the Platform Lift. This was notwithstanding the fact that he could have made inquiries of other companies while awaiting the quote from Garaventa Lift. Mr. Badesha further asserted that it was difficult to enter the house as the tenant, Mr. Kadarishko, was still living there. On cross-examination, Mr. Badesha acknowledged that, as the landlord, he had the right to enter the house with 24 hours written notice.

[30] On December 6, 2021, the plaintiff, her partner Niles Derzaph, Mr. Cheung, Mr. Badesha, and Mr. Wang attended a walkthrough at the Property together (the "Walkthrough"). There, the parties discussed various deficiencies in the Property. The parties also discussed the Platform Lift. The exact content of the discussion regarding the Platform Lift varied between the different witnesses' accounts, but the result of the discussion was that Mr. Badesha agreed to make further inquiries on how to install a Platform Lift in the Stairwell. The content of discussions at the Walkthrough were summarized in an email from Mr. Cheung to Mr. Wang on December 7, 2021.

[31] Between December 6th and December 27th, both parties worked to find a solution to install a Platform Lift. Various companies were contacted, but no solution materialized until late December.

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[32] On December 20, 2021, Mr. Cheung sought an extension of the closing date so the Revised Lift Clause could be fulfilled. Mr. Wang, on behalf of the defendant, refused the extension.

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[33] On December 23, 2021, Cam Pomeroy of Western Elevators advised Mr. Badesha of a Platform Lift that would fit in the Stairwell - the Savaria Delta Incline Platform Lift (the “Delta Lift”). The Stairwell landing needed to be modified to accommodate the Delta Lift. Mr. Badesha invited Mr. Jorge Sousa of Euromar Contracting to inspect the Stairwell and provide a quote for renovation (the “Euromar Renovation”). On December 27, 2021, Mr. Sousa produced his renovation quote, addressed to the plaintiff.

[34] Unfortunately, neither the Delta Lift nor the Euromar Renovation could be completed before the completion date. The Delta Lift had a lead time of 5-6 weeks, and Mr. Sousa could not begin work on the renovation until at least January 2022.

[35] On December 29, 2021, the eve of closing date, the plaintiff’s conveyancing lawyer, Mr. Edwin Chan, again asked for an extension to closing so the seller could complete the Revised Lift Clause. In this email, Mr. Chan confirmed and made clear that the plaintiff did not intend to terminate the CPS and wanted to complete the purchase of the Property.

D. Events on Completion Date and Shortly Thereafter

[36] On December 30, 2021, the final closing date agreed to by the parties, it was clear to all parties that no lift device, of any kind, had been installed at the Barnet Property.

[37] On the morning of December 30, 2021, Mr. Cheung sent an email to Mr. Wang at 4:57 AM on behalf of Ms. Chan. The email reads as follows:

> Hi Jerry,
>
> Thanks for the seller signed deficiencies list.
>
> Please see attached addendum. During the initial signing of the contract of purchase and sale, the buyer did not expect the extensive renovations needed, additional costs for the renovations and installation of the wheelchair

> platform left as she trusted the seller's expertise, assessment and budgeting upon signing. Also, she trusted the seller to complete the item by completion date. The credit amount is calculated from the quotations from Western elevator and contractor.
>
> The buyer is willing to sign off on the deficiencies list as per seller's edited comments. Hence the holdback
>
> The buyer will only proceed to complete once seller signs the addendum as is. The buyer's lawyer is awaiting for buyer's decision to proceed or not by 9 AM today (December 30, 2021).

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[38] Attached to the email was a proposed addendum to the CPS. According to the terms of the addendum, Ms. Chan was asking the seller to credit the buyer "$43,500 at the time of closing for the purpose of the renovation and installation of the wheelchair platform lift." Ms. Chan also sought a $5,000 holdback in relation to the outstanding deficiencies and their repair.

[39] Mr. Wang responded to Mr. Cheung's email later that morning at 9:47 AM. In the email, Mr. Wang states the following:

> The seller is currently seeking legal advice. The seller will agree $15,000 credit to the buyer for platform chair lift as per contract on completion, and will agree $5000 holdback for attached deficiencies list. But the seller is very clear that the buyer have to complete today or the buyer will be breaching contract.

[40] No addendum was attached to this email.

[41] Mr. Cheung wrote back to Mr. Wang in an email at 12:56 p.m. Attached to the email was a proposed addendum signed by Ms. Chan. The term proposed in the addendum read as follows:

> DEFICIENCIES HOLDBACK
>
> The seller agrees to repair the deficiencies for the above said property a long with the modification and installation of the Delta inclined wheelchair platform left as quoted by Western elevator ($22,750) and contracting quotation from Euromar Contracting ($20,750). The buyer and seller agree the attached quotations from Western elevator and Euromar Contracting Limited and it deficiencies list shall be incorporated into the contract. Both parties will sign, date and retain a copy. The buyer will holdback from the sale proceeds the amount of $55,000 until all the work on the quotations and the deficiencies list are completed. The holdback will be held in the buyer's legal representatives trust account. The seller agrees to complete the renovation that does not required ordered parts to be done no later than January 31, 2022. For the

> items that require parts to be ordered, the buyer and seller agree to provide enough time for it to be shipped and work to be done no later than February 28, 2022. In the event of the repairs are not completed by the date specified above the buyer's legal representative will release to the buyer the amount of the holdback equal to the value of the repairs that have not been completed and the remaining holdback, if any, will be released to the seller.

[42] Mr. Dhaliwal testified that at approximately 11:30 AM he attended at the office of his notary, Gary Gracey, in order to sign all of the documents necessary to complete the sale of the Barnet Property. Mr. Gracey testified that, from his perspective, Mr. Dhaliwal had signed and executed all of the necessary documentation to complete the sale. Mr. Gracey acknowledged, in cross-examination, that he had no personal knowledge of whether the substance of the terms of the contract had been completed by Mr. Dhaliwal.

[43] Mr. Cheung sent a third signed addendum proposal to Mr. Wang on behalf of Ms. Chan at 2:16 p.m. on December 30, 2021. The proposed terms had changed once again. The terms read as follows:

> DEFICIENCIES HOLDBACK
>
> The seller agrees to repair the deficiencies for the above said property along with the modification and installation of the Delta Inclined Wheelchair Platform Lift as quoted by Western Elevator and contracting quotation from Euromar Contracting. The buyer and seller agree the attached quotations from Western elevator and your Euromar Contracting Ltd. and deficiencies list shall be incorporated into the contract. Both parties will sign, date and retain a copy. The buyer will holdback from the sale proceeds the amount of $25,000 (for the inclined platform lift chairlift $20,000 and deficiencies list $5000) until all the work on the quotations and the deficiencies list are completed. The holdback will be held in the buyer's legal representatives trust account. The seller agrees to complete the renovation that does not require ordered parts to be done no later than January 31, 2022. For the items that require parts to be ordered, the buyer and seller agree to provide enough time for it to be shipped and work to be done no later than February 28, 2022. In the event of the repairs are not completed by the date specified above the buyer's legal representative will release to the buyer the amount of the holdback equal to the value of the repairs that have not been completed and the remaining holdback, if any, will be released to the seller.
>
> The seller agree to oversee the execution and completion of the above items.
>
> SELLER CREDIT BUYER
>
> The seller agree to credit the buyer $15,000 at the time of closing for the purpose of the renovation and installation of the wheelchair platform lift.

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> All other terms and conditions remain the same, time is of the essence.

[44] Approximately half an hour later, at 2:45 p.m., Mr. Cheung sent an email to Mr. Wang attaching the very same addendum, with the very same proposed term, as was sent to the seller at 2:16 p.m. In the body of the email, Mr. Cheung communicated the following:

> Hi Jerry,
>
> This addendum is final for the buyer. They will not settle with a lower holdback amount.
>
> The buyer needs assurance that the work gets done as it is of utmost importance to them. Once the project is done, the seller will have the holdback money.
>
> Please help my client to have the assurance they need. I believe the seller can do that as my client is ready to walk.
>
> Thank you for your cooperation.

[45] At 3:06 PM on December 30, 2021 Mr. Cheung sent a further proposed addendum to Mr. Wang. It was signed by Ms. Chan. The language of the addendum proposed in this email was the same as the previous two proposed addenda, except that the paragraphs relating to a $15,000 credit had been removed.

[46] In response, Mr. Wang sent an email to Mr. Cheung at 3:40 p.m., setting out some proposed wording for an addendum to the CPS. The wording proposed by the defendant's real estate agent was as follows:

> The seller agree to credit the buyer $15,000 at the time of closing for the purpose of the renovation and installation of the wheelchair platform lift.
>
> The seller and the buyer agree that the buyer will holdback total $10,000 from the sale proceeds the amount. The holdback will be held in the buyer's legal representatives trust account. $5000 holdback is for the seller to oversee the Delta Inclined Wheelchair platform lift project as quoted by Western elevator and contracting quotation from Euromar contracting, and is refundable to the seller once the job is done the buyer agree to pay all the cost for platform wheelchair lift project another $5000 is for the deficiencies list. The seller agrees to complete the renovation that does not require ordered parts to be done no later than January 31, 2022. For the items that require parts to be ordered, the buyer and seller agree to provide enough time for it to be shipped and work to be done no later than February 28, 2022. In the event the repairs are not completed by the date specified above the buyer's legal representative will release to the buyer the amount of the holdback equal to

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> the value of the repairs that have not been completed and the remaining holdback, if any, will be released to the seller.
>
> All other terms and conditions remain the same, time is of the essence.

[47] Exactly five minutes later, at 3:45 p.m., Mr. Cheung sent Mr. Wang an email attaching a draft addendum that included a proposed term that was identical in language to the terms suggested by Mr. Wang in his email. The only note in the body of the email from Mr. Cheung was a request to "please have the seller sign first."

[48] In relation to this last email, Mr. Cheung testified that all of the previous proposed addenda had been signed by Ms. Chan. He felt, that as a sign of good faith, it was reasonable for them to ask that the seller sign this addendum first. Furthermore, the language of this final proposed addendum had been proposed by the seller's agent. Suki testified that both their notary and their agent, Mr. Wang, had advised them not to sign the addendum first as it would "reopen the contract". When pushed in cross-examination, Suki clarified that it was only the real estate agent, Mr. Wang, that had advised them not to sign the proposed addendum first.

[49] Ms. Chan and Mr. Cheung received no further response to their proposed addendum. At 8:28 p.m. that evening, Mr. Wang sent an email to Mr. Cheung that was non-responsive, stating "[A]ll deficiencies done, except microwave and oven and elevator parts on back order." No further emails were exchanged that day.

[50] The closing date came and went. The plaintiff did not tender the purchase price to the defendant. The defendant did not tender any title documents to the plaintiff.

[51] A week later, January 6, 2022, the defendant, through counsel, purported to accept the plaintiff's repudiation and terminated the contract. The plaintiff filed the present Notice of Civil Claim for specific performance a few weeks hence.

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E. Events from Completion Date to Trial

[52] When the CPS failed to complete, Ms. Chan testified that she was devastated. She had already sold her family's house and now had nowhere to go. She moved her family to the JW Marriott Parq Hotel in Vancouver (the "Marriott Parq"), a hotel she and her mother were familiar with from a previous stay, while she sought other accommodation.

[53] The stay at the Marriott Parq was expensive. Further, as Ms. Chan could not cook for her family during their stay at the Marriot Parq, she incurred expenses for her family's food. A number of receipts from UberEats and other restaurants were tendered into evidence. The total cost of the hotel was $100,586.60.

[54] Ms. Chan ultimately found a short-term rental at 1502-620 Cardero Street and then a long-term rental at 1701-620 Cardero Street in Coal Harbour. The monthly rent for the short-term rental was fixed at $8,350.00 and the plaintiff occupied that apartment for three months. The plaintiff was then able to negotiate a long-term lease in the same building, in unit 1701, for $6,700 per month. It was later reduced to $6,500 per month.

[55] Ms. Chan testified that as none of the temporary residence options could accommodate her and her family's belongings after the sale of the Anzio Property, she was forced to rent storage space at three separate facilities to store the belongings. Receipts for the storage facilities were tendered into evidence.

[56] Further, as the long-term rental was not furnished, Ms. Chan incurred costs to furnish the space. She testified that this step was necessary as her furniture would not easily fit within the apartment space. Ms. Chan bought several pieces of furniture from a second-hand store.

[57] Ms. Chan also claims expenses for food and food delivery services as she could not cook for her family during their stay at the Marriot Parq.

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[58] All of these expenses were paid by Ms. Chan. She used her credit card for the expenses, which was ultimately paid off with the proceeds of sale from the Anzio Property, which had been transferred to a joint account between Ms. Chan and Ms. Ng. The transfer was done through Ms. Chan's power of attorney over Ms. Ng and Ms. Ng was not told of the transfer. However, there is no evidence that any such expenses incurred were against Ms. Ng's best interest. At no time did Ms. Ng or other members of her family raise any concern about these expenses.

[59] At the outset of trial, the parties filed an agreed statement of fact that the current market value of the Barnet Property is $3,057,000.00.

IV. CERTAINTY OF THE CONTRACT TERMS

A. Interpretation of Contracts

[60] The courts have made it clear that one of the overarching principles of contractual interpretation is that the words of a contract should be understood so as to give effect to the agreement rather than to destroy it: see *Argo Ventures Inc. v. Choi*, 2019 BCSC 85 at para. 127 [*Argo*], citing *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd. et al.*, 2000 NSCA 95 at para. 81 [*Mitsui*], leave to appeal ref'd [2000] S.C.C.A. No. 526.

[61] The court's overriding concern is to determine the intentions of the parties and the scope of their understanding. This exercise involves reading the contract as a whole, giving the words of the contract their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract: *Sattva Capital Corp v. Creston Moly Corp*, 2014 SCC 53 at para. 47 [*Sattva*].

[62] To interpret the terms of a contract, the court may consider the surrounding circumstances. However, these must never be allowed to overwhelm the words of an agreement: *Sattva* at para. 57.

[63] The test for determining whether there has been a meeting of the minds is objective. The subjective understanding of a party is irrelevant. The question is

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whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract; it is whether a reasonable person in the situation of that party would have believed and understood that the other party was consenting to the identical term. If a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Berthin v. Berthin*, 2016 BCCA 104 at para. 46; *Panesar v. Sidhu*, 2022 BCCA 397 at para. 33; *Latif v. Nair*, 2024 BCSC 398 at para. 22.

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B. Is the Lift Clause too Vague to be Enforceable?

[64] The defendant's primary position is that the Revised Lift Clause is too vague to be enforceable. In other words, Mr. Dhaliwal says there was no "meeting of the minds." I disagree.

[65] In *Argo*, Justice Shergill set out the applicable legal principles when determining if a contractual term is too vague:

> [133] The law of offer and acceptance requires that the offer be certain and unambiguous: *Private Career Training Institutions Agency v. Prana Yoga Teacher College Inc.*, 2013 BCSC 17 at paras. 42-43.
>
> [134] Certainty will exist when the words of a contract are found by the court to be capable of being given a reasonably certain meaning: *Mitsui* at para. 82.
>
> [135] Courts will lean heavily against finding contracts void for uncertainty: *Berthin v. Berthin,* 2016 BCCA 104 at para. 47, citing *Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd*. (1996) 16 W.A.R. 396 (S.C., Full Court) at 399. An agreement will not fail for uncertainty simply because it may be difficult to interpret: *Mitsui* at para. 52.
>
> [136] However, where the original contract is incomplete because the essential provisions intended to govern the contractual relationship have not been settled or agreed upon, or the contract is too general or uncertain to be valid in itself, the contract can be found to be unenforceable: *Berthin* at para. 48 citing *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 19 D.L.R. (4th) 97 (Ont. C.A.) at 103-104.

[66] The defendant says that confusion arises from the language of the Revised Lift Clause, which uses two different phrases to describe the lift: "Platform Chair Lift" and "Platform Stairlift". In relation to the Brochure, they argue that the terminology

used there is that of “platform lift”. They also note that the word “wheelchair” was not mentioned in the Revised Lift Clause. The defendants also say that I can look to the surrounding circumstances at the time the CPS was entered into to support the argument that there was no meeting of the minds. In particular, the defendant says that the results of Mr. Badesha’s Google search of the terms “platform chairlift” and “platform stairlift” demonstrates that he understood the term to mean something different than what the plaintiff understood. In sum, the defendant argues that because the clause is vague and of central importance to the CPS, the entire agreement must fail on account of there being no *consensus ad idem*.

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[67] While I do not dispute that the Revised Lift Clause was central to the agreement, I agree with the plaintiff that the Revised Lift Clause is not so vague as to be unenforceable. As noted in *Malhi v. Krahn*, 2009 BCCA 59 at para. 10, the evidence must be sufficient to permit the court to objectively discern from the factual matrix what the parties contemplated the relevant conditions to be. The following evidence, including the surrounding circumstances that were known to the parties at the time of entering into the contract, supports the finding that it was reasonably clear to the parties that a platform lift was required to transport the plaintiff’s mother and/or her wheelchair up the Stairwell:

1. Despite the use of two slightly different terms in the clause itself, both sets of terms reference the inclusion of a platform.

2. The Brochure, while referencing a “platform lift”, provides a precise definition of what a platform lift is; namely, a “fully powered device with an open cab designed to raise a wheelchair and its occupant in order to overcome a step or similar vertical barrier”.

3. The images in the Brochure depict a motorized device with a large platform which could easily accommodate an adult and other items.

4. The sellers were aware that Ms. Chan was seeking installation of a platform lift for the benefit of her elderly mother.

5. The sellers were aware that Ms. Chan's mother required the use of a wheelchair because they had been told by Mr. Wang that Ms. Chan's mother was "a wheelchair person". Mr. Badesha acknowledged that he would have discussed this fact with the realtor.

6. Despite the difference in terminology in the Revised Lift Clause, Mr. Badesha testified that he did not point out this discrepancy to the sellers or to his own realtor.

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[68] As set out above, the law is not concerned with the parties' subjective intentions, but rather their "manifested intentions" in the form of the "objective reasonable bystander" test: *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at para. 35, citing G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 15.

[69] From the perspective of an objective reasonable bystander, the parties' manifested intentions were to have a lift installed at the house consistent with the precise model depicted in the Brochure. Given the definition of a "platform lift" that was included within the Brochure, no reasonable person could have been mistaken about the nature of the lift sought.

[70] In fact, the only detail about the lift on which the sellers sought clarification was its cost. Mr. Wang testified that neither he nor Mr. Badesha knew what the lift depicted in the Brochure would cost, and they therefore sought to limit their liability for its installation at $15,000. His evidence on this point is corroborated by the fact that the only amendment to the Revised Lift Clause that the sellers proposed in their counteroffer was in relation to the divvying up of responsibilities for the cost of the installation. No clarification or confirmation was sought or made in relation to the description of the lift itself.

[71] Accordingly, having regard to all the evidence, I conclude that the Revised Lift Clause was not impermissibly vague. The evidence establishes that this condition is clearly capable of being given a reasonable meaning, particularly when one has

regard to the factual matrix and the parties' knowledge at the time of entering the CPS.

V. BREACH OF A FUNDAMENTAL TERM

[72] It is common ground that no lift was installed at the Property prior to the closing date. Accordingly, I find that the defendant was in breach of the Revised Lift Clause. I now turn to whether that breach was fundamental, such that it constituted a repudiation of the CPS.

[73] The plaintiff argues that by failing to install the platform lift as set out in the Revised Lift Clause, the defendant breached a fundamental term of the contract. The defendant submits that no breach has occurred because the Revised Lift Clause was not a condition of the CPS, but rather a warranty.

A. Legal Framework

[74] As noted in *Argo* at para. 165, breach of a fundamental term of a contract amounts to repudiation. Repudiation entitles the innocent party to elect whether to treat the contract as terminated and to sue, or to affirm the contract and demand further performance. A fundamental or repudiatory breach is a breach that goes to the root of the contract and substantially deprives the other party of what was bargained for: *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265 at para. 31.

[75] Breach of a condition, as opposed to a warranty, amounts to repudiation: *Liu v. Yuen et al.*, 2007 BCSC 302 at para. 34. Thus, the Court needs to determine if the Lift Clause was a condition or a warranty. Whether a term is a condition or a warranty will depend on the objective intention of the parties: *Liu* at para. 36.

B. Was the Failure to Install a Lift a Fundamental Breach of the Contract?

[76] The plaintiff contends the defendant's failure to perform the Revised Lift Clause is a fundamental breach. The defendant takes the position that the breach is not fundamental and did not relieve the plaintiff of the requirement of being ready,

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able, and willing to complete on the closing date. The defendant in this case advances the same argument that the defendant made in the *Liu* case, as follows:

> [38] The defendants rely heavily on ***Jorian***. They submit that the breach of the Wiring Term did not deprive the plaintiff of substantially the whole benefit of the contract. They submit that the plaintiff wanted the Property primarily because it was in a neighbourhood that was attractive to her and that regardless of any breach of the Wiring Term the plaintiff would still, upon closing, obtain the benefits of the Property, albeit with electrical deficiencies that could be repaired for a few thousand dollars. They submit that in view of the relatively nominal costs of remedying the electrical deficiencies when compared to the purchase price of $1,280,800, it cannot be credibly advanced that the Wiring Term was a fundamental promise going to "the root of the contract". They submit that the defendants' breach of the Wiring Term did not entitle the plaintiff to repudiate the contract.
>
> [emphasis added]

[77] Justice Goepel, in dismissing this argument, highlighted the importance of the wiring term to the buyer and found that the buyer would not have entered the contract but for the seller's promise to replace the antiquated wiring. He wrote as follows:

> [39] The defendants' submission, with respect, overlooks the importance of the Wiring Term to the plaintiff and the negotiations that led to its inclusion in the contract. The plaintiff made clear to the defendants that she was not prepared to purchase the Property unless the knob and tube wiring was removed. She had reason to believe that such wiring was dangerous and might prevent her from obtaining insurance. She was not prepared to purchase a home that contained such wiring, regardless of the limited costs of removing the wiring from the premises.
>
> [40] The plaintiff would not have entered into the contract unless the defendants agreed to remove the wiring. The defendants knew that the plaintiff would not remove the subject clause absent their agreement to remove the knob and tube wiring. The defendants failed to carry out the obligations which they had undertaken.
>
> [emphasis added]

[78] In the case at bar, the plaintiff was seeking a house in which her mother could move freely in her wheelchair. While the price, location and amenities made the house an attractive option, the evidence is clear that a lift had to be installed. When the offer was first sent, the plaintiff instructed her realtor to communicate to the defendant that the stairs and the lack of a lift was a "dealbreaker" for her. There was significant discussion about and negotiation around the Revised Lift Clause and

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around the cost of the lift. As in *Liu*, I find the plaintiff made clear to the defendant that for the transaction to proceed, a lift must be installed.

[79] The defendant also points to another term in the CPS, the occupancy certificate, which expressly states that that term is a "fundamental term". The defendants argue that this necessarily implies that the Revised Lift Clause was not fundamental. However, in *Williams v. Ron Will Management & Construction*, 2009 BCCA 543, our Court of Appeal found that:

> [15] Whether a breach is fundamental does not appear to depend upon any express terms of the contract. The determination of a fundamental breach is a teleological question not one that involves construction of the contract in the narrow, literal sense. The concept of fundamental breach seems to transcend the normal issues of contractual interpretation. It involves investigation of the underlying nature and purpose of the contract into which the parties have entered, and the respective benefits designed to be obtained or ensured by the agreement.
>
> [emphasis added]

[80] I agree with the plaintiff that the inclusion of the words "fundamental term" in another clause of the CPS does not, by implication, mean that no other term in the CPS could be considered a fundamental condition. The Revised Lift Clause is included in a section of the CPS with other subject conditions. The structure of the contract and its wording cannot be considered determinative in a narrow, literal sense in the case at bar.

[81] *Liu* applies directly to the present case. In the present case, from the outset, the defendant was informed that the Platform Lift was a "dealbreaker". I find that the plaintiff clearly would not have entered into the contract but for the Revised Lift Clause and had clearly made that fact known to the defendant. Under these circumstances, it is clear that the intention of the parties was that the Revised Lift Clause be fundamental.

[82] In addition to the importance of the lift, which I find was communicated clearly to the defendant by Ms. Chan, I also find that the practical realities of Ms. Ng's medical condition necessitated the centrality of the Lift Clause to the future use and enjoyment of the property. On the evidence, without the lift, the house would be

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completely inaccessible to Ms. Chan's mother. The steps leading to the front entrance were numerous and steep. The entrance at the back of the house was elevated and not wheelchair accessible. The only entrance to the home which the plaintiff's mother could use was the entrance through the garage. Thus, the house was unusable and inaccessible to Ms. Chan's mother without the Platform Lift.

[83] For the plaintiff, the benefit manifest in the Revised Lift Clause was owning a home that her family could live in together, including herself, her sister, and her elderly mother. The Revised Lift Clause went to the root of the contract for the plaintiff; without the Revised Lift Clause, her mother would not be able to access and utilize the Property.

[84] Based on the foregoing, I conclude that the breach of the Revised Lift Clause was a fundamental breach of the CPS. The Revised Lift Clause was a fundamental term, the breach of which deprived the plaintiff of the substantial whole of the bargain.

VI. ANTICIPATORY BREACH

[85] The defendant's fourth argument is that that the plaintiff anticipatorily repudiated the CPS on December 30, 2021, when Mr. Cheung delivered an addendum at 4:57 a.m. stating: "The buyer will only proceed to complete once seller signs the addendum as is. The buyer's lawyer is awaiting for the buyer's decision to proceed or not by 9:00 am today (December 30, 2021)."

[86] A further addendum and email sent by Mr. Cheung on December 30, 2021, at 2:45 p.m., stated: "I believe the Seller can do that as my client is ready to walk". The defendant argues that these statements either alone or in conjunction amount to an anticipatory breach of the CPS.

[87] The plaintiff's position is that at no time did she engage in conduct which amounted to a total rejection of the obligations of the contract. In the alternative, the plaintiff submits that any rejection was justified.

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A. Legal Framework

[88] The parties referred to the principles concerning anticipatory breaches of real estate contracts set out in *Grewal v. Lal*, 2021 BCSC 844 at para. 99, rev'd on other grounds 2024 BCCA 149, where Justice Armstrong, at para. 99, cited the following passage from *Douse v. Mascioli* (1997), 72 A.C.W.S. (3d) 88, 34 OTC 196 (Ont. Ct. Gen Div.):

> 14 [G.H.L. Fridman, *The Law of Contract*, 3d ed. (Toronto: Carswell, 1994) at 600] indicates that anticipatory breach occurs when, "a party, by express language or conduct, as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due." Fridman goes on to cite three elements that must be found before an anticipatory breach is established:
>
> > 1. conduct which amounts to a total rejection of the obligations of the contract;
> > 2. lack of justification for such conduct; and
> > 3. acceptance of the repudiation by the innocent party.
>
> If these elements exist then the innocent party may be freed from his obligations under the contract, and may pursue a remedy. On the issue of what sort of conduct amounts to a repudiation. Fridman [at 601] says that it must be of a serious nature and that repudiation is not lightly to be inferred from a party's conduct.

[89] Justice Armstrong went on to cite our Court of Appeal on the subject of anticipatory breaches and, in particular, its consideration of a recent case from the Supreme Court of Canada:

> [100] More recently, in *Kaur v. Bajwa*, 2020 BCCA 310 [*Kaur*] the Court of Appeal discussed the principles concerning anticipatory breaches with reference to the Supreme Court of Canada in *Potter v. New Brunswick Legal Aid Services Commission,* 2015 SCC 10 at paras.139 – 40.
>
> [101] In *Kaur*, the Court quoted from *Potter*:
>
> > [13] In *Potter*, Mr. Justice Cromwell said:
> >
> > > [149] The final point of terminology is concerned with "anticipatory" breach. An anticipatory breach "occurs when one party manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in the future": [John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012)] at p. 689; see also A. Swan, with the assistance of J. Adamski, *Canadian Contract Law* (2nd ed. 2009), at

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> §7.89. When the anticipated future non-observance relates to important terms of the contract or shows an intention not to be bound in the future, the anticipatory breach gives rise to anticipatory repudiation. The focus in such cases is on what the party's words and/or conduct say about future performance of the contract. For example, there will be an anticipatory repudiation if the words and conduct evince an intention to breach a term of the contract which, if actually breached, would constitute repudiation of the contract.
>
> [14] In *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, the Ontario Court of Appeal similarly described the various legal requirements that underlie an anticipatory repudiation at paras. 41–52. In particular, the Court confirmed that a "repudiation occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract", that "the test for anticipatory repudiation is an objective one", that "in objectively construing the purported breaching party's intention, the surrounding circumstances must be considered", that "a finding of anticipatory repudiation is reserved for cases in which the conduct at issue can be said to be serious", and that "before an anticipated breach of contract can be characterized as an anticipatory repudiation, the breach must deprive the innocent party of substantially the whole benefit of the contract": at paras. 42, 45, 46, and 50.
>
> [15] In [*Kuo v. Kuo*, 2017 BCCA 245] at para. 40, this Court noted that "regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation". See also *Marcotte v. Marcotte*, 2018 BCCA 362 at paras. 45–49.
>
> [Emphasis added.]

B. Did the Plaintiff Repudiate the Contract or Anticipatorily Breach the Contract?

[90] In this case, I must decide if the plaintiff's behaviour amounted to a total rejection of her obligations or a clear and unequivocal repudiation of the CPS. First, as I have already found, by the time the purported addendums and communications were sent, the defendant was already in breach by failing to discharge its obligations under the Revised Lift Clause. As I have concluded that the breach was fundamental, the plaintiff was excused from her performance and there is no agreement left to anticipatorily repudiate. This would constitute justification for the two covering emails, attaching proposed addendums over the course of the day.

[91] Second, even if I am incorrect and the defendant's breach of the Revised Lift Clause is not fundamental, his allegation of anticipatory repudiation must

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nevertheless fail. Taking into account all of the evidence and surrounding circumstances, I reject the proposition that these statements, made by Ms. Chan's realtor on the scheduled completion date amount to a "clear and unequivocal" repudiation of the contract. These messages were clearly attempts by the plaintiff to salvage the transaction in light of the now apparent failure on the part of the defendant to install the Platform Lift. Mr. Cheung testified that these statements were not intended to repudiate the contract on behalf of the plaintiff, but rather were 'negotiating' tactics in an effort to get a response from the seller.

[92] Further, the messages also denote that the plaintiff was ready to proceed if certain concessions were made. Both of the messages relied upon by the defendant to signify early termination of the contract were followed by further efforts on the part of the plaintiff to complete the purchase. Indeed, I heard evidence of other communications from the plaintiff to the defendant's notary, Mr. Gracey, throughout the day to arrange completion. Considering all the evidence, it seems clear that the plaintiff was ready to complete on a moment's notice had the defendant's default been addressed. At no point did the plaintiff's conveyancer indicate to Mr. Gracey that they would walk away from the deal. Nor did the plaintiff seek a return of the deposit she paid.

[93] Considering all of the surrounding circumstances, it is clear that the plaintiff's intention was, at most, a refusal to complete *until the Revised Lift Clause had been complied with* or an alternative plan put in place – it was *not* an intention to walk away from the deal. As such, it is not a clear or an unequivocal refusal to perform and not sufficient to constitute anticipatory breach.

C. Did Either Party Repudiate the Contract?

[94] As I have already found, it is my view that the seller was in breach of the contract by failing to install the Platform Lift on the Property. I have found that the Revised Lift Clause went to the root of the contract and, as such, the defendant's breach of the Revised Lift Clause was a fundamental breach which relieved Ms. Chan of her obligation to close on December 30.

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[95] If I am wrong that the Revised Lift Clause was a fundamental term and that the defendant had fundamentally breached the contract by failing to install the Platform Lift, I am still of the view that it was the defendant who repudiated the contract.

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[96] I preface my analysis of this alternative argument with my findings of fact in relation to the days and weeks leading up to the December 30th closing date:

1. In December, the parties were continuing to make efforts to find the appropriate model of lift and a qualified tradesperson to do the renovations necessary to install the lift;

2. By December 27, the parties had a quote for the correct model of lift and a quote for the renovation work that had to be done prior to the lift being installed;

3. Due to the time of year and the approaching closing date, the renovation work could not be completed prior to closing;

4. Ms. Chan still wanted to purchase the Property, but wanted to ensure that the defendant would install the lift before transferring funds;

5. On December 29, 2021, Ms. Chan sought a further extension of the completion date to allow the defendant to complete its obligation under the CPS; and

6. The defendant refused the request for an extension of the closing date.

[97] In relation to the events that transpired on the closing date, I make the following findings of fact:

1. The plaintiff sent several signed addendums to the defendant in an effort to salvage the transaction and extend the time for the completion of the contract into the new year;

2. The consecutive addendums that were sent included a diminishing amount of credits or holdbacks, as one might expect in an ongoing negotiation;

3. The defendant engaged in this negotiation exercise by sending draft language for an addendum that they were prepared to accept;

4. As the prior proposed addenda had been signed first by the plaintiff, Mr. Cheung asked Mr. Wang to have the defendant sign first as a sign of “good faith”;

5. Mr. Wang advised the defendant not to sign first, as doing so would “re-open the contract”;

6. On the advice of Mr. Wang, the defendant did not sign the addendum;

7. The defendant did not respond to the addendum, which they themselves had proposed, after it was sent back to them by the plaintiff;

8. The defendant sent the plaintiff a message about the deficiencies list being largely complete at 8:28 p.m. that evening;

9. No further messages were exchanged between the parties on December 30, 2021; and

10. A week later, on January 6, 2022, the defendant arranged for a lawyer to send a letter to the plaintiff in which the defendant purported to accept the plaintiff’s repudiation and terminated the contract.

[98] I find that under the terms of the contract, as signed on June 1, 2021, the defendant was obliged to install a Platform Lift by the completion date. This obligation was not discharged by any subsequent events. It is accepted by all parties that the defendant failed to install the Platform Lift by the completion date. I find that due to the defendant’s failure, the plaintiff refused to complete the purchase on the closing date. I also find that the plaintiff made efforts to amend the contract in order to give the defendant more time to complete his obligation under the contract. This

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was demonstrated both by the plaintiff's attempt to extend the completion date and by the proposed addendums. I also find that the defendant sought to treat the contract as terminated four business days after the closing date had passed.

[99] In other words, the plaintiff, faced with a non-fundamental breach of the CPS, refused to complete on time. Notably, the plaintiff did not refuse performance entirely. Rather, it is clear from the evidence that she was ready, able, and willing to perform so long as the Revised Lift Clause was addressed in some capacity by the defendant – either by a holdback, an extension, a credit, or by the installation of the Platform Lift itself. The plaintiff was actively accommodating the defendant and attempting to find a resolution in haste before closing. The defendant, despite their own breach, fundamental or otherwise, relied on the time is of the essence clause and insisted the plaintiff complete on time.

[100] I find that it is neither reasonable nor equitable for the defendant to seek strict application of the time is of the essence clause when they in fact were the party who was in breach of the contract. Our Court of Appeal in *Toor v. Dhillon*, 2020 BCCA 137 at para. 50 stated clearly that the "party who is not prepared to perform an agreement cannot rely on the "time of the essence" clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract".

[101] The ongoing communications and negotiations between the parties on December 30th clearly show that Ms. Chan was not seeking to renege her contractual obligations completely, nor would she have been justified in law to do so. However, given the defendant's non-compliance with the Revised Lift Clause, she was relieved from the requirement to comply strictly with the time requirements in the contract: *Toor* at para. 51. It was reasonable for Ms. Chan to assume that the negotiations would continue after the closing date had passed, and that a new closing date would be set: *Toor* at para. 83.

[102] As such, I do not find that by failing to complete on December 30, 2021, that the plaintiff had repudiated the agreement. Indeed, I agree with the plaintiff that it was the defendant who repudiated the CPS on January 6, 2022 when his lawyer

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sent a letter to Ms. Chan purporting to accept their repudiation and to keep their deposit.

[103] In support of their argument on this point, the plaintiff relies on *1050438 B.C. Ltd. v. Penguin Enterprises Ltd*, 2019 BCSC 2138 [*Penguin*]. *Penguin*, as stated by the plaintiff, stands for the following propositions:

1. Firstly, where the seller has non-fundamentally breached the CPS on closing date, the seller is himself not ready, willing, or able to close and is therefore no longer entitled to rely on the time is of the essence clause or to force the buyer to close on time: *Penguin* at paras 66–79; see also *Lal v. Grewal*, 2024 BCCA 149 [*Lal BCCA*] at paras. 18–19.

2. Secondly, under the above circumstances, where the buyer refuses to close on the closing date, the contract continues to subsist and time is no longer of the essence. At that point, either party could give notice to set a new completion date: *Penguin* at para. 87; see also *Lal BCCA* at para. 19.

3. Thirdly, under the above circumstances, if the seller terminates the contract before the buyer could set a new completion date, the seller would have "jumped the gun" and would have himself been in breach of the CPS: *Penguin* at para. 79; see also *Shaw Industries Ltd. v. Greenland Enterprises Ltd.*, 1991 CanLII 3955 (B.C.C.A.) at para. 3, 79 D.L.R. (4th) 641.

[104] In *Penguin*, the buyer and seller of the North Vancouver Hotel executed a contract of purchase and sale. The seller was ready, willing and able to close on the closing date, save for it not having provided an environmental report to the buyer. The buyer refused to complete on the closing date on that basis. The seller terminated the contract shortly thereafter, stating that the buyer failed to complete on the completion date.

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[105] In assessing the events leading up to and on the closing date, Justice Brundrett found that "the Seller was not ready, willing and able to close on [completion date] because he had failed to provide the stage 2 environmental report and this obligation was not waived by subsequent events". The seller in *Penguin* was also insisting that time was of the essence in relation to the buyer's failure to close. On that issue, Brundrett J. reiterated that a pre-condition to a litigant insisting upon time being of the essence of the agreement is that the litigant not be in default: at para 78. Justice Brundrett went on to find that:

> [79] … the Seller cannot complain of the wrongdoing of the Buyer when he was in default under the contract. To borrow words from Shaw Industries, the Seller jumped the gun by terminating the contract.
>
> [emphasis added]

Justice Brundrett found in favour of the buyer, and also held that the seller had breached its duty to act in good faith.

[106] I find that the circumstances in the present case are quite similar to those set out in *Penguin*. As in *Penguin*, the defendant insists on time being of the essence notwithstanding the fact that he was himself in default. Given the back and forth discussions around the future installation of the lift that took place on December 30, 2021, a new closing date should have been established. As in *Penguin*, I find that the defendant "jumped the gun" by terminating the contract on January 6, 2022.

VII. REMEDY

A. Specific Performance

[107] The primary award for breach of contract is generally monetary damages. Specific performance is a discretionary remedy, supplementary to the common law remedy of damages: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada, 2011) at 739. Specific performance is only available as a remedy where monetary compensation is inadequate: *Chan v. Chadha Construction,* 2000 BCCA 198 at para. 10.

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[108] Historically, it was commonplace for specific performance to be granted as a remedy in the context of contract disputes involving real property. However, the modern approach favours damages, rather than specific performance, as a remedy for breach of contracts involving real property. In *Semelhago v. Paramadevan*, 1996 CanLII 209 (S.C.C.), [1996] 2 S.C.R. 415 at para. 22, Justice Sopinka notes the exceptional nature of specific performance as a remedy when land is in issue:

> 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.

[109] In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 52 [*Youyi*], Justice Newbury considered the effect of *Semelhago* and *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, on the remedy of specific performance and the circumstances in which it will be granted:

> […] In my respectful view, the Supreme Court merely recognized in those cases that in light of the advent of condominiums and other forms of interest in land, the uniqueness of real estate should no longer be presumed. As I read the two cases, the Supreme Court has not signalled that specific performance is 'on the way out' or that contracting parties should no longer expect to be held to their bargains.

[110] In *Youyi* at para. 56, the Court of Appeal held that courts should not apply a "presumption of replaceability" when determining whether damages will provide an appropriate remedy, or whether specific performance is warranted. Justice Newbury relied on the following passage from *Raymond v. Anderson,* 2011 SKCA 58, wherein the Saskatchewan Court of Appeal held:

> [14] *Semelhago* does not, however, stand for the proposition that the presumption of uniqueness has been supplanted by a presumption of replaceability. . . . The only change wrought by *Semelhago* is in the approach of the courts to determining the appropriate remedy; judges must no longer presume the inadequacy of damages as a remedy whenever real property is involved. But, this assessment is not a search for uniqueness. Rather, it is appropriate to characterize a judge's assessment in cases of this nature as an inquiry into whether, in the circumstances, damages would be an inadequate remedy.
>
> [Emphasis added.]

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[111] In fashioning an appropriate remedy, the court should examine the specific plaintiff and property in each case: *Youyi* at para. 57. This is a fact-dependent inquiry.

[112] In *Ali v. 656527 B.C. Ltd.,* 2004 BCCA 350, Justice Lowry noted that in cases involving residential properties, there are often a combination of factors that subjectively and objectively make a property unique:

> [29] In my view it is particularly significant that what the purchasers seek to acquire is not the subject of a commercial venture; it is to be their home. It is a house as opposed to one of many suites in a high-rise building, or one unit in a row of similar townhouses. That is not to say that such homes could not be unique, but a house will often have characteristics, if only in appearance, that tend to be unique. It may be that only one aspect of a home will render it unique to a prospective purchaser in the sense that it is unlikely that a substitute will be readily available, but it is more likely that a number of features, viewed in combination, will do so. The determination can be based on both objective factors and the subjective considerations of the purchaser seeking the equitable relief.
>
> [emphasis added]

[113] Uniqueness is a matter of proof and the onus lies on the party seeking the remedy. However, a plaintiff is not required to prove a negative and demonstrate the complete absence of comparable properties: *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* 2001 CanLII 28012 (O.N.S.C.), 56 O.R. (3d) 341 (S.C.), aff'd 2003 CanLII 52131 (ON CA), 63 O.R. (3d) 304 (C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 145 [*Dodge*]. In *Dodge*, Justice Lax made it clear that subjective uniqueness is to be considered from the point of view of the plaintiff at the time of contracting:

> [59] There is both a subjective and objective aspect to uniqueness. While it is difficult to be precise about this, it strikes me that normally, the subjective aspect will be less significant in commercial transactions and more significant in residential purchases, unless the motivation in the latter case is principally to earn profit. In terms of the subjective aspect, the court should examine this from the point of view of the plaintiff at the time of contracting. In some cases, there may be a single feature of the property that is significant, but where there are a number of factors, the property should be viewed as a whole. The court will determine objectively whether the plaintiff has demonstrated that the property has characteristics that make an award of damages inadequate for that particular plaintiff. Obviously, investment properties are candidates for damages and not specific performance.

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> [60] It is important to keep in mind that uniqueness does not mean singularity. It means that the property has a quality (or qualities) that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere. To put this another way, the plaintiff must show that the property has distinctive features that make an award of damages inadequate. The plaintiff need not show that the property is incomparable.
>
> [emphasis added]

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[114] While the factors or characteristics that make a property unique are important, the more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties: *Youyi* at para. 45, citing *Dodge* at para. 55.

[115] Therefore, I must consider all of the evidence with respect to this particular plaintiff and this particular property, including the subjective and objective uniqueness of the Barnet Property, and determine whether specific performance rather than damages better serves justice between the parties.

1. Is Specific Performance Available as a Remedy to the Plaintiff?

[116] In direct, Ms. Chan described the features of the Property which made it unique. Those included: proximity to her friends and family; proximity to the Simon Fraser University community; a rental suite, or "mortgage-helper"; a modern look and design; a view of the water; and an elevator that spans three floors and which would allow her mother to live at the Property, as she is in a wheelchair and unable to navigate stairs. Additionally, the Property was meant to have the Platform Lift installed in the Stairwell, and the plaintiff submitted that this addition would also contribute to the uniqueness of the Property.

[117] The specific features of a property are important, but the court must also consider evidence about the availability of substitute properties. In this case, Ms. Chan testified that she had been interested in and looking for a suitable residence with an elevator but that such properties were rare, in the price range the plaintiff could afford. Indeed, it was only when Mr. Bajwa found a property with an elevator in that area that Ms. Chan decided to take a look at it.

[118] In arguing against uniqueness, the defendant placed no evidence of comparable properties before the court. While I appreciate that it is the purchaser seeking specific performance that must prove that the property is unique to the extent that a substitute would not be readily available, she has given viva voce evidence of those facts. In the face of that evidence, Ms. Chan was not meaningfully challenged on this point in cross-examination.

[119] Instead, the defendant places great emphasis on one email sent on May 24, 2021, by Mr. Cheung to the plaintiff. In the email, Mr. Cheung states that “similar homes in North Burnaby” have been selling closer to $2.6 million. I do not place much weight on this one line from the realtor’s email. It is clear that the realtor is simply trying to give his client a sense of the comparative prices of similar sized homes in the area. The message does not purport to provide a detailed consideration of all of the unique features of the Property that Ms. Chan enumerated in her evidence.

[120] The defendant also argues that the plaintiffs ought to have adduced more evidence to establish that there was a dearth of suitable and similar properties. As the Court of Appeal noted in *Aulakh v. Nahal,* 2019 BCCA 57 at para. 21, the critical issue is not whether the property in question “had an objectively unique feature”, but rather, whether that feature was subjectively important to the plaintiff. There can be no question on the evidence that the presence of an elevator and a properly installed lift device was subjectively important to the plaintiff and that this importance was communicated to the defendant prior to formation of the contract.

[121] Ms. Chan testified that she had tasked Mr. Bajwa with finding a residential property with an elevator and that the Barnet Property was the only option he was able to bring to her attention. The defendant led no evidence that would challenge Ms. Chan’s testimony on this point.

[122] It is trite to say that each case turns on its own facts. While the plaintiff’s evidence could have been better developed, I am satisfied that the plaintiff has proven that she looked for and was unable to find other properties in the Burnaby

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area that met the specific criteria they were looking for, in a price range they could afford. Absent any evidence from the defendant about suitable alternative properties, I find the plaintiff has proven on a balance of probabilities that there were none.

[123] The plaintiff is seeking specific performance of the whole of the CPS, meaning that the defendant would still be required to install the Platform Lift, along with completing the sale of the Property. The defendant argues that the Platform Lift is not currently installed, and that the uniqueness of the Property ought to be assessed as it currently exists, rather than on the outcome of future renovations or improvements. Based on the plaintiff's submissions on specific performance, she is in fact seeking a property that will have the Platform Lift installed. However, even if the Property ought to be assessed as it currently stands, the subjective considerations of the purchaser can be considered: *Ali* at para. 29. The uniqueness analysis is not so narrow as to exclude consideration of the plaintiff's subjective interests in the Property and the circumstances of the underlying transaction, which in this case would include the Revised Lift Clause, the importance of it to the plaintiff, and her expectation that the Property would be completely accessible for her mother: *Lucas v. 1858793 Ontario Inc.,* 2021 ONCA 52 at paras. 71–73.

[124] Having found that the Barnet Property is unique, and that there were not suitable substitute properties available to the plaintiff, I find that damages would not do justice between the parties and that this is an appropriate case to award specific performance to the plaintiffs.

2. What Does Specific Performance Entail in this Particular Case?

[125] The plaintiff seeks specific performance of the contract as signed on June 1, 2021. While there were later amendments extending the date of closing, the Revised Lift Clause as it existed on June 1, 2021 remained unchanged at the date of closing, namely December 30, 2021. As such, if performance of that specific contract is ordered, the defendant would be required to install the Delta Lift after the identified renovations were done. For the following reasons, I find that the most reasonable

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and equitable solution in all the circumstances is for the defendant to transfer the Property without the Delta Lift being installed.

[126] Specific performance may be ordered for only part of a contract, rather than the contract as a whole: *Kochar v. Gadhri Holdings Ltd.*, 2019 BCSC 1704 at para. 27. Where the part of the contract that is to be specifically performed is severable from the whole, relief for this severable part alone is available. While the Court must consider and aim to foster the reasonable expectations of the parties, these must be measured against the impact of the relief: *Kochar* at para. 28. In this case, the expectations of the parties when the CPS was signed are tempered by the current circumstances of a longstanding litigation and a three-year period of uncertainty. To order that the defendants must still install the Platform Lift would be inappropriate where other options, such as a credit off the purchase price, are readily available. Further, the jurisprudence has made it clear that courts should exercise caution where they are being asked to make an order that would require the court itself to step into the shoes of a supervisor of ongoing construction: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257 at paras. 63–64.

[127] While Mr. Sousa at Euromar Contracting may have been available to do the renovation work in January of 2022, it is unknown when he might be available to do the work in the future. Arrangements will also have to be made in relation to ordering the Delta Lift from Western Elevators. This matter needs to be resolved once and for all, in the interests of both parties. Specific performance is an equitable remedy and allows this court to craft a remedy that is both fair and reasonable in all the circumstances. The plaintiff is now aware of the precise device that is needed and where to get it. She is also aware of a contractor that can do the necessary work and knows how much it will cost, adjusting for inflation. I find that, at this point in time, the plaintiff is best situated to oversee and supervise the installation of the lift that she is seeking. Specific performance in this case is most reasonably and appropriately characterized as specific performance of the purchase and sale of the Property as per the CPS, without the requirement that the Revised Lift Clause also be performed.

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3. Is the Plaintiff Ready, Willing, and Able to Pay the Purchase Price?

[128] In order to be successful in a claim for specific performance, a plaintiff must plead and prove that they are ready, willing, and able to complete the transaction. Where a plaintiff seeking specific performance is not able to show that they are ready, willing, and able to complete the purchase, they are in essential default and cannot succeed in an action for specific performance: *0915406 B.C. Ltd. v. 0834618 B.C. Ltd.*, 2013 BCSC 1099 at para. 86.

[129] The requirement for a plaintiff seeking specific performance to show their willingness and ability to perform on the contractual closing date does not apply when the defendant is unwilling or unable to perform. In such a case, the relevant date for that determination is not the completion date but a date to be set by the parties or ordered by the court: *Toor* at paras. 82–88.

[130] The defendant submits that the plaintiff has not met the evidentiary burden of proving that she is presently ready, willing, and able to complete the purchase of the Barnet Property.

[131] The plaintiff argues that subject to the Lift Clause being addressed, she was ready, willing, and able to complete the purchase of the Barnet Property. Ms. Chan's uncontroverted testimony was that she had money in trust and documents signed in preparation for closing. While the balance of the money was from the sale proceeds of the Anzio Property under Ms. Ng's name, the plaintiff had power of attorney and explicit consent from Ms. Ng to apply the proceeds to the purchase.

[132] Actual tender of the document and purchase price is not necessary to prove readiness, willingness, or ability to complete when the other party has made it clear that it will not complete: see *Toor* at para. 52. In the present case, the plaintiff did not tender the documents or the purchase price but she was not required to because the defendant had made it clear it would not perform the CPS according to its terms on the completion date. As Justice Hunter stated in *Toor*:

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> [87] For these reasons, in my opinion the trial judge was correct to conclude that the Purchasers were not disentitled from obtaining specific performance by the fact that they were not ready to close on July 30, in light of the fact that the Vendors were in default of their obligations on that date. The Contract subsists and the Purchasers are entitled to set down a date for completion of the agreement.
>
> [emphasis added]

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[133] The plaintiffs' evidence on their present readiness, willingness, and ability to complete the purchase of the Barnet Property was not well-developed. Ms. Chan was asked only a single question on this point at the end of her direct examination, which was whether her family remained interested in purchasing the Barnet Property. She answered in the affirmative.

[134] Counsel for the defendant did not cross-examine Ms. Chan about the plaintiffs' readiness, willingness, and ability to complete at any time other than the date of the completion of the contract. Not a single question was asked of Ms. Chan on cross-examination about her present financial circumstances or her ability to complete the purchase, nor was her assertion that she and her family were still interested in purchasing the Barnet Property challenged in any way.

[135] While it would have been helpful if the plaintiff's evidence were more complete, I must decide the case on the evidentiary record before me. The question, given my other findings in this case, is whether the evidence establishes that the plaintiff will be ready, willing and able to close on the dates set for closing by this court? I am able to find, on a balance of probabilities, that the plaintiff will be ready, willing, and able to complete the purchase of the Barnet Property at the time of completion. No evidence has been put before me to suggest that their financial circumstances have changed in any way, and Ms. Chan has testified that she still wishes to purchase the Barnet Property.

[136] On a balance of probabilities, I find that the plaintiff remains ready, willing, and able to complete the purchase of the Barnet Property as of the time of trial.

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VIII. DAMAGES

[137] The plaintiff, in addition to seeking specific performance, seeks compensation for out-of-pocket expenses she incurred for substitute accommodation, furniture, storage, and food in the amount of $333,941.18. The defendant says that these claims are unreasonable and are limited by the principles of causation, remoteness and privity of contract.

A. Legal Framework

[138] Damages for breach of contract are designed to put the wronged party in the position that they would have been had the contract been performed properly. This principle of damages can be traced all the way back to *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, at 151:

> "Damages should be such as may fairly and reasonably be considered either arising naturally … from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."
>
> [emphasis added]

[139] In *Real Organics & Naturals House Ltd. v. Canadian Phytopharmaceuticals Corporation*, 2024 BCSC 1303, Justice Veenstra summarized the law of damages as it applies in the context of breach of contract:

> [274] ... Damages for breach of contract aim to put the plaintiff in the position they would have been in had the wrong not been done. That in turn requires an assessment of what the plaintiff's position would have been had the defendant fulfilled its side of the bargain. As noted in *Water's Edge Resort Ltd. v. Canada (Attorney General)*, 2015 BCCA 319 at paras. 39-40:
>
> > [39] … [W]hereas in tort, damages are generally intended to place the plaintiff in the position he or she would have been in had the wrong not been committed (i.e., 'reliance' damages), damages in contract are generally intended to place the innocent party in the position he or she would have occupied had the contract been carried out by both parties (i.e., 'expectation' damages). (See H.D. Pitch and R.M. Snyder, *Damages for Breach of Contract* (looseleaf) at 1-1; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co*. 1991 CanLII 27 (SCC), [1991] 3 S.C.R. 3 at 14; *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30 at para. 27.) Pitch and Snyder observe:

> > The difference between these two tests is significant. In a contract action, the court considers what benefits the plaintiff would have achieved had the contract been carried out. In a tort action the court considers what losses the plaintiff would have avoided had the incident not occurred. Thus, in a sale of goods action, the court awards the plaintiff the profit that would have been earned had the transaction been completed. In a personal injury action the court attempts to compensate the plaintiff for injuries and losses. Fuller and Perdue [see (1936-7) 46 Yale L.J. 52 at 373] the authors of the leading article on the subject of the quantification of damages for breach of contract, have explained that the reason the courts have awarded the "loss of bargain" as damages is to encourage contracting parties to carry out their obligations, by making it prohibitively expensive, if they fail to carry out those obligations. As they explained:
> >
> > > [It] encourages people to perform their side of a bargain thereby upholding the working of the market economy … if parties could only recover their reliance interest (expenses) there would be no incentive to perform – in fact, this principle encourages people to enter into contract. [At §1.1; footnotes omitted.]
>
> [40] In contract, the test is in my view most conveniently enunciated as an 'even if' one: would a purchaser of widgets have been unable to sell them 'even if' the products had complied with the specifications in the contract? Would a disgruntled client of a broker have suffered the losses he claims 'even if' the broker had sold his securities when instructed? The task of resolving this type of question is inherently more uncertain than the task before the court in most tort cases. Still, it may be possible to express the test as a 'but for' one even in contract: would the purchaser of widgets have made the profits it claims 'but for' the failure of the defendant to meet the specifications? Or, in the case at bar, would Water's Edge still have its interest in the Lease 'but for' the assumed breach of the *Bhasin* duties by the Ministry?

[140] In order to recover damages for breach of contract, a plaintiff must establish two things. First, they must prove on a balance of probabilities that the defendant's breach of contract caused the damages claimed. Second, they must establish that the damages are not too remote, that is, that the damages represent a type of loss which was reasonably foreseeable to the defendant when the contract was made: see: *Houweling Nurseries Ltd. v. Fisons Western Corporation*, 1988 CanLII 186 (BC CA) at p. 6; *Quick Pass Master Tutorial School Ltd. v. Zhao*, 2022 BCSC 1846 at para. 89.

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[141] Damages are "reasonably foreseeable" in contract if (i) they arise fairly, reasonably and naturally as a result of the breach of contract, or (ii) they were within the reasonable contemplation of the parties at the time of contract formation.

B. What is the Quantum of Damages the Plaintiff is Entitled to?

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[142] The defendant argues that the losses claimed by the plaintiff were not "reasonably foreseeable" because he did not know that the plaintiff's adult sister and their elderly mother resided with her at the Anzio Property. The defendant also argues that it was not reasonable for the plaintiff to stay at the Parq Hotel in downtown Vancouver for six months, renting two rooms, paying over $100,000 for the duration of her stay. The defendant also notes that some of the claims for food include costs that were incurred to feed the plaintiff's adult sister and her partner, Mr. Derzaph, neither of whom are parties in this litigation. Further, the defendant complains that the plaintiff's damages are not itemized as to who incurred what expenses during that period.

[143] For her part, the plaintiff acknowledged in her written submissions that there should be some deductions from the pure out-of-pocket amount claimed, being 333,941.18. The suggestion was as follows:

> In the present case, the Plaintiff has incurred expenses for accommodation, furniture, storage, and food in the amount of $333,941.18. All of these expenses, subject to reasonable deduction on account of mortgage interest and foregone grocery expenses, are directly caused by the defendant's failure to comply with the Lift Clause and unilateral, unjustified termination of contract.
>
> While no evidence is available on suitable deductions, the court is required to do the best it can to assess damages. The Plaintiff proposes a gross deduction of $33,941.18 and seeks compensatory damages in the amount of $300,000.00.

[144] I also take note of the recent comments of the Court of Appeal in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189, about the trier's duty to do its best to quantify damages, even where they cannot be assessed with certainty:

> [62] … The law has long recognized that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for a breach of contract. In *Chaplin v. Hicks*, [1911] 2 K.B.

786 (C.A.), which I would note was also a loss of opportunity claim, in an oft-quoted passage, Fletcher Moulton L.J. at 795 said:

> … where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.
>
> [emphasis added]

[145] I cannot agree with the defendant that these losses do not arise naturally from the breach of the contract. Whether or not the defendant was aware of the exact number of family members that were going to be living at the Property or not, they knew the plaintiff was selling the Anzio Property and was seeking to purchase the Barnet Property and its full-size house. If nothing else, the defendant was aware that the house needed to accommodate the plaintiff's elderly mother. Regardless, the plaintiff contracted to buy a large, multi-bedroom, multi-bathroom house, which they have not received. It would have been reasonable to expect the plaintiff to rent a house as a replacement property, let alone an apartment or condo. The parties knew the plaintiff would be selling the Anzio Property in order to purchase the Barnet Property – indeed, the CPS was conditional on it. The expenses related to accommodation and storage all flow from the fact that she sold her family's residence and had no new home into which they could move.

[146] I am troubled by the plaintiff's decision to move her family to a downtown hotel and to stay there for six months before finding a longer-term solution. The defendant, however, did not plead failure to mitigate, nor did he seek to amend his pleadings in this regard. However, even if he had done so, the onus to prove failure to mitigate is on the defendant. Mitigation is a question of fact. In the present case the defendant called no evidence about the average rates of other hotels in Vancouver, or of those in Burnaby near the Barnet Property. Nor did the defendant provide any evidence relating to more affordable long-term rental options in Vancouver or Burnaby. Finally, the plaintiff was not seriously challenged regarding her decision to stay at the Parq Hotel or to rent an apartment in Coal Harbour. As such, the only evidence before me is the actual costs the plaintiff incurred. These

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costs were incurred by the plaintiff making a series of decisions after the failed completion of the CPS, decisions she would not have had to make if not for the defendant's failure to fulfil his obligations under the CPS.

[147] I find that the type of damages sought are, for the most part, appropriate and flow directly from the breach of contract. The only remaining question is what quantum of damages is reasonable in the circumstances.

[148] The plaintiff, in her written submissions, summarized the out-of-pocket expenses they were claiming as follows:

Heading	**Amount**
Room charges at JW Marriott Parq Vancouver	$100,586.60
Monthly rent at 620 Cardero Street	$194,650.00
Monthly rent at Storguard Richmond	$7,116.92
Monthly rent at Lucky Box/Canstore Rentals	$10,232.50
Monthly rent at Public Storage – Rupert Street Vancouver	$8,904.72
Furniture from Revamp Staging	$7,501.23
Ubereats Orders	$4,484.53
January 2022 takeout	$464.68
Grand total	**$333,941.18**

[149] As stated above, the plaintiff invited this Court to make adjustments to this amount to account for the fact that mortgage interest would have had to have been paid by the plaintiff had the contract closed. Further, it is also clear that the plaintiff would have had to purchase food for herself and her family in any event, regardless of where she was living.

[150] In terms of accommodations, I find that that it was reasonable for the plaintiff to check her family into a hotel in the face of the CPS not being completed. Leaving aside whether there were more reasonable hotel options available to her, I find that it was reasonable for the plaintiff to stay in a hotel for 60 days while searching for a substitute accommodation. Relying on the plaintiff's evidence about the costs of the rooms for January and February 2022, the overall cost of staying at the Parq Hotel for those months would be $30,089.56. It follows that I find that it is reasonable and fair for the plaintiff to be compensated for the cost of a long-term rental in which to

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live until the conclusion of the legal proceedings. While the cost of the rental in Coal Harbour may be on the high end, I note that the plaintiff would have been well within her rights to rent a whole house as a replacement for what she had intended to buy. The cost of that type of rental in the Vancouver market would surely match or exceed the amount of her rental apartment. I find that a fair amount for a long-term rental will be fixed at the amount that was ultimately settled on by the plaintiff for unit #1701, namely $6,500 per month. I find that the plaintiff is entitled to a payment amount based on $6,500 per month, beginning in March 2022 and continuing until March 2025. I calculate that amount to be $234,000.

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[151] In sum, the total accommodation costs would be $264,089.56. In her written submissions, the plaintiff suggested an adjustment for mortgage interest would be appropriate, although they proposed no evidence about what that adjustment should be other that to suggest that I subtract $33,941.18 from the total. In the spirit of *Ojanen*, and doing my best to calculate damages in the absence of evidentiary certainty, I find that an overall reduction to this amount should be in line with that suggested by the plaintiff – a reduction of approximately 10%. That amount would be $237,680.56.

[152] In terms of the food costs, I do not believe that it is reasonable to require the defendant to pay for all of the food costs claimed by the plaintiff. It is unclear how often the food was being ordered and supplied for persons outside of the plaintiff's immediate family. Further, and more importantly, the plaintiff would have incurred food costs wherever she lived. For the two months that I have found the plaintiff was reasonably staying at a hotel, I will allow for a cost of $25 per day for delivery charges. For eight weeks of time at that rate, the appropriate food charge is $1,400.

[153] In terms of the out-of-pocket costs related to the storage of the plaintiff's possessions from the Anzio Property and the temporary replacement furniture purchased for the Coal Harbour apartment, I find those charges to be fair and reasonably flowing from the breach.

[154] Accordingly, the revised total of costs which I deem to be fair and reasonable in the circumstances are as follows:

Heading	Amount
Room charges at JW Marriott Parq Vancouver (Jan/Feb ’22)	$30,089.56
Monthly rent at 620 Cardero Street	$234,000.00
- 10% Adjustment ($26,409)	-$26,409.00
Monthly rent at Lucky Box/Canstore Rentals	$10,232.50
Monthly rent at Public Storage – Rupert Street Vancouver	$8,904.72
Furniture from Revamp Staging	$7,501.23
Uber Eats Orders	$1,400.00
Monthly rent at Storguard Richmond	$7,116.92
Grand total	**$272,835.93**

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IX. Counter-Claim

[155] The defendant advanced two counterclaims. Firstly, they claim that Ms. Chan breached the contract by refusing to complete it on time. Secondly, they claim that the plaintiff’s registration of the CPL is an abuse of process. This argument was not advanced in oral argument.

[156] As I have found that the Revised Lift Clause was a fundamental term of the contract, and that the plaintiff has not breached the CPS, it follows that the first counterclaim must fail. I have further addressed that, even if I am in error that the Revised Lift Clause was a fundamental term, the defendant cannot seek strict reliance on the time is of the essence clause when the defendant himself was in breach of the CPS at the time of closing, and therefore himself unable to complete.

[157] In relation to the abuse of process claim, given that I have found that specific performance is an appropriate remedy, it is implicit in that finding that there was and is an interest in land. Further, this same argument was addressed in a prior interlocutory application in this litigation, two months before the defendant filed the counterclaim. That ruling holds that the Notice of Civil Claim disclosed an interest in land and that the CPL was maintainable: *Chan v. Dhaliwal*, 2022 BCSC 571 at para

9. As such, I agree with the plaintiff that the abuse of process claim, as advanced, is *res judicata* and must also fail on that basis.

X. CONCLUSION and COSTS

[158] I grant the following orders:

1. The new completion date for the CPS is May 22, 2025, or an earlier date agreed upon by the parties in writing or ordered by the Court.

2. The plaintiff may set off the $15,000, which amounts to the portion of the installation of a lift that the defendant was responsible for under the contract, against the purchase price. The plaintiff may also set off the damage award of $272,835.93 (plus pre-judgment interest) against the purchase price, leaving a total purchase price of $1,992,164.07 (less any pre-judgment interest and 90 days of post-judgment interest.)

3. The plaintiff may apply to extend the completion date for the sale of the Barnet Property pursuant to the contract on reasonable notice to the defendant if she needs more time to organize financing;

4. The parties may apply for such further orders as may be necessary to complete the sale and conveyance of the lands to the plaintiff;

5. Subject to the parties wishing to make submissions on costs, I award costs of the proceedings to the plaintiff as the successful party at Scale B.

“Gottardi J.”

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