

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Pandher v. Dhanesar*,  
2025 BCSC 316

Date: 20250226  
Docket: S03014  
Registry: Abbotsford

Between:

**Tejinder Pandher and Iqbal Pandher**

Plaintiffs

And

**Sandeep Kaur Dhanesar**

Defendant

Before: The Honourable Justice B. Smith

**Reasons for Judgment**

Counsel for the Plaintiffs:

S.C. Albert

Counsel for the Defendant:

D.H. Griffith

Place and Date of Trial:

Abbotsford, B.C.  
March 26–28 and May 29, 2024

Place and Date of Judgment:

Abbotsford, B.C.  
February 26, 2025

**Introduction**

[1] This case raises the issue of what is the correct interpretation of a substantial completion provision in a contract of purchase and sale involving residential real estate. More specifically, it raises the question of whether the defendant purchaser exercised the discretion granted by the provision reasonably and in good faith.

**Background**

[2] In January 2022, the plaintiffs were building a four-bedroom, four-bathroom house on a bare-land-strata property which they owned in Abbotsford. They had a builder doing the construction. The property was one of 38 such properties located in a new gated subdivision. Other houses within the same development were also under construction.

[3] Neither the plaintiffs nor the defendant is professionally employed constructing houses. The plaintiffs live in Abbotsford. Mr. Pandher is a truck driver. Mrs. Pandher is a mortgage broker. The defendant lives in Houston, Texas. She is a medical doctor and works at a hospital as a senior medical physicist.

[4] At some point, the defendant became interested in purchasing the property and began negotiations with the plaintiffs.

[5] On January 29, 2022, the plaintiffs and the defendant entered into a contract of purchase and sale for the property (the “CPS”). The price was \$1,515,000. The defendant paid a \$75,000 deposit.

[6] Completion was scheduled for October 7, 2022. Possession was scheduled for October 8, 2022.

[7] The defendant did not complete on the completion date. The plaintiffs sued for damages. The plaintiffs eventually sold the property to another buyer for a lower amount.

[8] The CPS was not a typical contract for purchase and sale of a residential property, because the house was not yet built. Rather, it was an agreement by the

plaintiffs to build the house and then transfer it and the land to the defendant on the completion date in exchange for payment of the agreed price.

[9] The CPS was drafted on the standard residential real estate form, but the defendant's realtor inserted additional terms and conditions, including the substantial completion provision referred to in the introduction to these reasons.

[10] The plaintiffs say they met the requirements of the substantial completion provision. The defendant disagrees.

[11] On October 6, 2022, the day before the completion date, the plaintiffs received a yellow slip of paper from the City of Abbotsford entitled "Building Review", which provided that provisional occupancy was granted as of that date, with final occupancy to be granted on April 6, 2023. Their builder, Mr. Gurv Kahlon, emailed this document to them. It appears the plaintiffs believed this document was a final occupancy permit, or to use the language of the substantial completion provision, "an unconditional Municipal/City/Regional District Occupancy Certificate", as Mr. Kahlon's email referred to the attachment as being "final". The plaintiffs' then lawyer, Mr. Rai, sent the document to the defendant's then lawyer, Mr. Meyer, in response to his request that the plaintiffs provide to the defendant an occupancy permit.

[12] After some scheduling issues involving the defendant's sister and the defendant's home inspector, and the stage of completion of the work, the defendant eventually arranged for a walkthrough inspection to occur on October 7, 2022, the completion date. The defendant's sister and nephew attended the walkthrough inspection along with a licenced building inspector.

[13] As noted, the defendant did not complete on the completion date.

[14] In email correspondence between Mr. Rai and Mr. Meyer in the days that followed, they each accused the others' clients of having delayed the walkthrough, which was supposed to have occurred 14 days before the completion date. This email correspondence also discussed the occupancy permit and provides a clear

timeline of events, which counsel agree are admissible for narrative but not truth of contents:

a) On September 27, 2022, Mr. Rai faxed a letter to Mr. Meyer's law firm, advising that the plaintiffs had an appointment for signing on October 5, 2022.

b) On September 29, 2022, Mr. Meyer emailed Mr. Rai:

Further to your unsigned correspondence faxed to our office on September 27, 2022, please advise when our client will be able to complete the walkthrough of the property pursuant to the contract of purchase and sale. The walkthrough is to be done 14 days prior to completion which now puts the completion date beyond the originally contemplated completion date of October 7, 2022.

c) On September 30, 2022, Mr. Rai responded to Mr. Meyer:

I believe both realtors and the builder have been in touch with respect to the walkthrough over the last few weeks. I'm advised the walkthrough has not occurred solely due to your client delaying the matter. Please advise when we can expect vendor documents.

d) On October 3, 2022, Mr. Meyer wrote back to Mr. Rai and provided a list of remaining defects that needed to be resolved prior to the walkthrough occurring. Mr. Meyer also enquired as to the status of the occupancy permit: "Can you please advise whether it is that your client has an occupancy permit and when they expect to obtain one?"

e) On October 5, 2022, Mr. Rai emailed a letter to Mr. Meyer in which he reiterated that the defendant had delayed the walkthrough. Mr. Rai did not mention the outstanding occupancy permit. While the letter was "without prejudice", the parties agree it is admissible for narrative as it was not issued for settlement purposes and does not fall within the scope of settlement privilege.

f) On October 7, 2022, Mr. Meyer emailed Mr. Rai. The email, which is lengthy, details the steps the defendant took to schedule the walkthrough, which she

- adopted as her evidence in direct examination. The email also contained another demand for the production of the occupancy permit, and asserted that the plaintiffs had breached the CPS by not producing it.
- g) That same day, Mr. Rai wrote back to Mr. Meyer attaching the provisional occupancy document which had been issued the previous day. It is undisputed that this document is not a final occupancy permit, either within the meaning of the City of Abbotsford Building Bylaw or the substantial completion provision.
- h) On October 13, 2022, Mr. Meyer sent a letter to Mr. Rai and to Ms. Albert, the plaintiffs' current counsel, stating the defendant's position that the provisional occupancy slip was not an unconditional occupancy permit. In this letter, Mr. Meyer stated that due to the failure of the plaintiffs to deliver the occupancy permit in accordance with the substantial completion provision, the defendant was "free to treat the Contract as voidable which they did and consequently refused to complete the purchase of the Property". As with Mr. Rai's letter of October 5, 2022, while this letter is marked "without prejudice", the parties agree that it is admissible for narrative.

[15] The plaintiffs refused to return the deposit and commenced the present action seeking damages for breach of contract. They did not seek an order for specific performance. Instead, they sold the property to another buyer.

**Assessments of Credibility and Reliability**

[16] The court's fact-finding role requires assessments of credibility and reliability.

[17] The assessment of a witness's credibility and the reliability of their evidence requires me to consider factors such as: the witness's ability and opportunity to observe events; the firmness of their memory; their ability to resist the influence of interest to modify their recollection; whether their evidence harmonizes with independent evidence that has been accepted; whether they change their testimony in direct and cross-examination; whether their testimony seems unreasonable,

impossible or unlikely; whether they have a motive to lie; and their demeanour generally: *Bradshaw v. Stenner*, 2010 BCSC 1398; aff'd 2012 BCCA 296.

[18] Credibility assessments may not be purely intellectual and may involve factors that are difficult to verbalize: *R. v. R.E.M.*, 2008 SCC 51 at para. 49. They must not be based on emotional evaluations, stereotypes, guesswork, or impermissible reasoning, but grounded in reason and made as objectively as possible: *R.C.T. v. A.K.T.*, 2023 BCSC 654 at para. 11. I may believe some, all, or none of a witness's evidence: *R. v. B.T.*, 2020 BCSC 1185 at para. 42.

[19] I must be cautious when considering demeanour, because I have no baseline for assessment, and courtrooms can be unfamiliar and intimidating environments, to which people react differently: *B.T.* at para. 43.

[20] I keep these general principles in mind as I consider the evidence.

[21] I did not have any concerns about either the credibility or the reliability of the witnesses at trial. They all gave detailed evidence, much of which was supported by the evidence of other witnesses or independent evidence. None were shaken in cross-examination.

[22] The plaintiff, Iqbal Pandher, and the defendant, Sandeep Kaur Dhanesar, both testified. While they both have an obvious interest in the outcome, I did not get the sense that either exaggerated, minimized, or otherwise modified their testimony in order to favour their interest. They were responsive to the questions asked and did not appear to be attempting to control the narrative. I found the evidence of Mr. Khalon and Mr. Dhillon very helpful and accept their evidence without any reservation.

**Issues**

[23] The issues for the court to decide are:

- a) the proper construction of the substantial completion provision;

- b) whether the defendant exercised the discretion granted by the substantial completion provision reasonably and in good faith;
- c) if necessary, the appropriate remedy;
- d) if necessary, the appropriate amount of damages.

**Issue #1: What is the proper construction of the substantial completion provision?**

[24] The basic principles of contractual interpretation require that a contract be read as a whole, assigning words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract, otherwise known as the factual matrix. This process does not include adding terms which contradict or change the underlying meaning of the contract.

**The Contract of Purchase and Sale**

[25] The CPS was based on a standard form contract of purchase and sale as prepared by the British Columbia Real Estate Association (“BCREA”) and the Canadian Bar Association (“CBA”). It was composed of 14 pages of text. While the CPS was based on the standard BCREA/CBA contract of purchase and sale, it also had some other specific terms, one of which is at the heart of the dispute here, specifically, under section 3 “Terms and Conditions”:

**Substantial Completion**

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

(the “Substantial Completion Provision”)

[26] It is undisputed that the Substantial Completion Provision was a fundamental term of the CPS and grants discretion to the defendant.

[27] It is also undisputed that the plaintiffs did not provide an unconditional occupancy permit.

[28] The parties disagree on the meaning of the phrase “or other evidence satisfactory to the Buyer” in the Substantial Completion Provision.

[29] The plaintiffs urge an objective interpretation. They say it would be unreasonable to interpret the phrase as being dependent on the defendant’s subjective determination on the completion date about whether construction was substantially complete. They say such an interpretation would not align either with what the parties knew and understood at the time they entered into the CPS, or what they were fundamentally contracting for.

[30] The defendant says the Substantial Completion Provision merely states and requires that the evidence be “satisfactory to the Buyer”. According to the defendant, this means that she, at her option, could choose to accept evidence in lieu of an occupancy certificate, provided that it satisfied her. She says this is the plain meaning of the Substantial Completion Provision.

[31] In my view, the underlying purpose of the discretion granted by the Substantial Completion Provision was to ensure that the defendant got what she bargained for – a property with a substantially completed house. I reach this conclusion for several reasons.

- It is consistent with the appropriate approach to contractual interpretation. The Substantial Completion Provision cannot be interpreted in isolation. There were two other important provisions in the CPS through which the defendant could satisfy herself that all work and construction had been finished under the Substantial Completion Provision: the Deficiency Walk Through and Hold Back; and Access provisions.
- It accords with a plain reading of the title and wording of the Substantial Completion Provision. It is a “substantial completion” provision. It refers to “work” and “construction” being “finished”.
- It accords with what a reasonable person in the shoes of either of the parties would have expected.

- It allows for a scenario in which all work and construction had been finished but, for whatever reason, an unconditional occupancy permit had not been issued. In such circumstances, the defendant could still be satisfied that there was substantial completion, notwithstanding that the unconditional occupancy permit had not issued.
- It accounts for practical reality. As Mr. Bob Dhillon, the City of Abbotsford's Manager of Building Inspections testified, provisional occupancy permits enable people to move in even when a final occupancy permit has not yet been issued.

[32] The defendant says there have been no reported Canadian cases interpreting the meaning of the phrase “or other evidence satisfactory to the buyer that construction is finished” in the context of what she describes as an “occupancy permit clause”. While it may be accurate, the word “satisfactory” has received judicial consideration in the context of the meaning of a subject clause in an interim agreement for the sale of land.

[33] In *Griffin v. Martens*, 1988 CanLII 2852 (B.C.C.A), the Court interpreted the phrase “satisfactory financing” to mean “satisfactory to a reasonable person with all the subjective but reasonable standards of the particular purchaser”. The Court considered but rejected an interpretation of “satisfactory to the particular purchaser with all his quirks and prejudices, but acting honestly” on the basis that:

[8] The fourth alternative should be ruled out because such a meaning could have been expressed as “financing satisfactory to him”, that is, to the purchaser, and that meaning turns the interim agreement into an option. There is no mutuality of intention to support that contention.

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

[35] I disagree with the defendant that the Substantial Completion Provision is an “occupancy permit clause”. In my view, the Substantial Completion Provision has two components: the first concerns an unconditional occupancy permit; the second “or other evidence satisfactory to the Buyer”.

[36] Finally, it is a principle of contractual interpretation that using different words in different portions of the same text presumes that the drafter intended different meanings.

[37] The CPS, under the heading “Terms and Conditions” included an option to purchase provision:

***Option to Purchase***

[...]

If the home does not have occupancy or is not ready by September 27, 2022 then at the buyers sole discretion the buyer may extend completion for up to 90 days.

[38] This provision refers to the buyer’s “sole discretion”. These words do not appear in the Substantial Completion Provision. It is presumed this must have been intentional. I conclude from this that the discretion in the Substantial Completion Provision is something other than “sole discretion”. The defendant or her agent drafted the CPS. The fact that she did not use the words “sole discretion” in the Substantial Completion Provision should be given meaning. I find that the proper meaning is that the parties did not intend for the defendant to have “sole discretion” under the Substantial Completion Provision to determine that construction was not finished.

[39] The phrase “or other evidence satisfactory to the Buyer” in the Substantial Completion Provision should be interpreted consistent with “satisfactory to a reasonable person with all the subjective but reasonable standards of the particular purchaser”. Specifically, the phrase should be interpreted as “or other evidence satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer that construction is finished”. What is satisfactory must be assessed

subjectively and objectively. While the subjective standards of the buyer form part of the consideration, they must be objectively reasonable.

[40] I find that:

- the Substantial Completion Provision granted the defendant discretion;
- the underlying purpose of the discretion was to allow, as an alternative to an unconditional occupancy certificate, for other evidence, satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished.

**Issue #2: Did the defendant exercise the discretion granted by the Substantial Completion Provision reasonably and in good faith?**

[41] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*], a majority of the Court held that where a party to a contract exercises its discretion in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct is unreasonable and amounts to a breach of the duty to exercise contractual discretionary powers in good faith.

[42] As explained in *Wastech*:

- The duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract.
- The duty to exercise contractual discretion in good faith is breached only where the discretion is exercised unreasonably, namely, in a manner unconnected to the purposes for which it was granted in the contract.
- Where the discretion is exercised in a manner connected to the purposes for which it was granted in the contract, its exercise may be characterized as reasonable in light of the agreement the parties bargained for.

- Where the discretion is not exercised in a manner connected to the purposes for which it was granted in the contract, its exercise of discretion is unreasonable in light of the agreement the parties bargained for and may be characterized as unfair and contrary to the requirements of good faith.
- The measure of fairness is what is reasonable according to the agreement the parties bargained for, not what a court sees as fit according to its own view of the proper exercise of the discretion.
- Courts can intervene where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties; however, their role is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective.
- Courts must only ensure the parties have not exercised their discretion in ways unconnected to the purposes for which they granted that power. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole – the first source of justice between the parties.
- What a court considers reasonable is highly context-specific, and ultimately depends upon the intention of the parties as disclosed by their contract.
- Generally, however, for contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement, the range of reasonable outcomes will be relatively smaller.
- For contracts that grant discretionary power in which the matter to be decided or approved is not readily susceptible to objective measurement, the range of reasonable outcomes will be relatively larger.
- It is in properly interpreting the contract for the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

### The Factual Matrix

[43] The factual matrix is the background facts both parties must clearly have been taken to have known and to have in mind when they composed the written text of their agreement and at the time the contract was executed: *Tang v. Zhang*, 2013 BCCA 52, at para. 16.

[44] Here the factual matrix of surrounding circumstances known to the parties at the time of formation of the CPS included that:

- the property was located in a new gated subdivision comprising 38 properties, in a nice area of Abbotsford;
- the house on the property was already under construction, and framing was underway;
- construction of the house at neighbouring unit 18 was a week or so ahead of the house, while construction of the house at neighbouring unit 20 had not yet started;
- other houses within the same development were also under construction at the same time;
- the defendant initiated contact with the plaintiffs to see if they would sell;
- the property market was climbing;
- the defendant and her realtor discussed the additional provisions in the CPS in detail;
- the parties understood that the house would be built to the standards of the B.C. Building Code standards and would comply with the City of Abbotsford Building Bylaw;
- the house would have a 2, 5, 10-year home warranty, as required for all new homes in British Columbia; and

- the plaintiffs had hired a builder to build the house.

[45] The question is: did the defendant exercise her discretion in a manner that was not connected to the underlying purpose of the discretion granted by the CPS? If yes, the defendant exercised her discretion unreasonably, and her conduct was a breach of the duty to exercise contractual discretionary powers in good faith.

[46] To answer this question, I begin by considering the “other evidence” that construction was finished which the defendant had on the completion date.

### **The Other Evidence**

[47] By the completion date, the “other evidence” that the construction was finished which had been provided by the plaintiffs was:

- A structure on the property: The structure was a newly constructed house. It had foundations, walls (painted), floors (finished), ceilings (painted), windows (installed with glazing), a roof, trim, plumbing, electrical, HVAC, cabinetry (installed), appliances, a garage and a driveway.
- A provisional occupancy permit: A provisional occupancy permit is only provided in circumstances where: the building is self-contained; the plumbing, electrical and heating work are completed and accepted by the Building Official; all fire and life safety items are completed and accepted by the Building Official; the building envelope items are completed and accepted by the Building Official; it is approved in writing by the Fire Chief (for commercial/multi-unit dwellings); and the necessary payments have been made (City of Abbotsford Building Bylaw, ss. 101 and 102). Documentary evidence of communications between the defendant and her realtor on September 29, 2022, established that this information would have been available to her had she checked the City’s website.
- Photos: The defendant received photos from the plaintiffs on October 3 and 4, 2022, which must have satisfied her that the house was then sufficiently

complete for a walkthrough inspection, because she began trying to schedule one, but due to scheduling issues with her sister and the home inspector she had hired, it did not take place until the completion date. Documentary evidence of communications between the defendant and her realtor on September 29, 2022, show the defendant communicated to her realtor “Can you check if the house is completely done first and then we do a walk [through]”.

[48] But that is not all. The defendant also had “other evidence” that construction was finished from other sources:

- Photos and videos from her realtor and sister. Although the defendant could have inspected the house personally, she did not. She only attended once, in July 2022. Her realtor attended in person on September 20, 25, 28, 30, 2022; and October 6 and 7, 2022. On each of those occasions he also sent her photos or videos. Her sister also sent her photos or videos.
- Feedback from her realtor, her sister, an appraiser, a home inspector. For example, after the walkthrough, the defendant’s realtor reported to the defendant: “went good very minor things”.
- The results of an appraisal. The defendant knew an appraiser had done an appraisal for the purpose of her application for bank financing. The written appraisal report is comprehensive. There is no evidence the appraiser raised any concerns about the house.

[49] I have found that the underlying purpose of the discretion was to allow, as an alternative to an unconditional occupancy certificate, for other evidence, satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished.

[50] I find that by the completion date the plaintiffs had provided the defendant with other evidence satisfactory to a reasonable person with all the subjective but

reasonable standards of the defendant that the work and construction was finished. She had also received this evidence from other sources.

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

- the structure on the property;
- the provisional occupancy permit;
- the photos from the plaintiffs;
- the photos or videos from her realtor and from her sister;
- the feedback from her realtor, her sister, an appraiser and a home inspector; and
- the appraisal results.

[52] To any such reasonable person with all the subjective but reasonable standards of the defendant, it would have been obvious that on the completion date construction was finished, notwithstanding that some minor touch-up work and landscaping was still being done, and the appliances needed to be plugged in.

[53] The only things which remained to be done were minor, and of the sort which is typically identified during a deficiencies walkthrough. Mr. Kahlon's evidence was that after the completion date, approximately \$1,000 worth of work on the house was completed, and that work related to fixing deficiencies in work was already done. What I conclude from this is that as of the completion date, not only did it appear that the work had been finished, it had in fact been finished. The work done after the completion date was to remedy minor deficiencies of work finished as of the completion date.

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

[55] The defendant's evidence on direct was that she was not satisfied with receiving provisional occupancy, especially as the plaintiffs did not communicate to her the reasons why the final inspection had "failed" on October 6, 2022 (the City form refers to it as having been "rejected"). She also testified that she was not satisfied from the walkthrough or other evidence provided by the plaintiffs that construction was complete, because she believed the plaintiffs were not being transparent with her, and she had not received any information about why the City did not grant an occupancy permit on October 6, 2022. In effect, she says, she could not assess the evidence provided by the plaintiffs without knowing what the problems were with the property, and therefore instructed her lawyer to advise the plaintiffs' lawyer that the sale would not complete.

[56] The defendant testified that she insisted on having the Substantial Completion Provision included in the CPS because it was important to her to receive an unconditional occupancy permit. She did not explain why the phrase "or other evidence satisfactory to the Buyer" was included in the Substantial Completion Provision of the CPS.

[57] The evidence establishes that the defendant relied primarily on the fact that she did not receive an unconditional occupancy permit.

[58] This conclusion is supported by documentary evidence. For example, the October 13, 2022, letter from her then counsel to the plaintiffs' then counsel where he writes:

The Contract clearly states that it is a fundamental term of the Contract that your client provides an UNCONDITIONAL Occupancy Permit. You must also then be aware that your client did NOT provide one...

Without an Unconditional Occupancy Permit our client was free to treat the Contract as voidable which they did and consequently refused to complete the purchase of the Property...

There is nothing in this clause that relates to the fundamental term of the Contract that was breached, being the failure to provide an Unconditional Occupancy Permit.

[59] The above letter makes clear that as far as the defendant was concerned, the only issue, and the only basis for her failure to complete, was the failure of the plaintiffs to provide an unconditional occupancy permit. There is no reference to any other reason.

[60] Documentary evidence also supports the conclusion that the defendant did not consider "other evidence" on the completion date because she had already determined she would not be completing on October 7, 2022, and was solely focused on an unconditional occupancy permit.

[61] For example:

- on October 4, 2022, she informed her mortgage broker that she would be pushing the [closing or completion] date; and
- on October 6, 2022, in response to her realtor pointing out that she was contractually obligated to complete on the following day, she informed him she could not because the plaintiffs did not provide "occupancy" by September 27, 2022, and that her bank was "on hold" because it had not received a disclosure statement.

[62] Because she had received an unconditional occupancy permit, the defendant was not focussed on what she should have been focussed on: the “other evidence” provided by the plaintiffs that the work and construction was finished.

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

[64] I have already found that the underlying purpose of the discretion in the Substantial Completion Provision was to allow, as an alternative to an unconditional occupancy certificate, for other evidence, satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished.

[65] I find the defendant did not exercise her discretion in a manner connected to the purposes for which it was granted. She wrongly believed she had completely subjective discretion.

[66] I find the defendant’s exercise of discretion was unreasonable in light of the underlying purpose for which it was granted – to allow, as an alternative to an unconditional occupancy certificate, for other evidence, satisfactory to a reasonable person with all the subjective but reasonable standards of the buyer, that construction was finished. Being unreasonable, it is correctly characterized as unfair and contrary to the requirements of good faith.

[67] I turn now to the question of remedy.

**Issue #3: What is the Appropriate Remedy?**

[68] Where one party is ready, willing and able to complete on the completion date, and the other party is not, the party who is not is in breach. The innocent party has options: a) it may waive time being of the essence and set a new completion

date, thus insisting on specific performance; or b) it may accept the repudiation and treat the contract as being at an end, which allows it to sue for damages.

[69] I find the plaintiffs were ready, willing and able to complete on the completion date.

[70] The plaintiffs were not in breach on the completion date. They insisted on completion and the defendant refused to complete. They accepted the defendant's repudiation by suing for damages and selling the property to another buyer. The plaintiffs are therefore entitled to their damages.

**Issue #4: What are the plaintiffs' damages**

[71] The defendant does not take issue with the plaintiffs' efforts at mitigation or their claimed damages.

**Law**

[72] Damages for breach of contract should place the plaintiffs in the monetary position that they would have been in had the defendant not breached the contract: *Abramowich v. Azima Developments Ltd.*, 1993 CanLII 1443 (B.C.C.A.) [*Azima*].

[73] Where the market value of the property declined between the date of the defendant's breach and the resale of the property, the plaintiff's damages is the difference between the resale price and the contract price. The defendant admits this, and has agreed that the plaintiffs would be entitled to the difference between the price she had agreed to pay, and the price at which the property was sold to the new buyers.

[74] In *Azima*, at para. 30, the Court considered other out-of-pocket expenses and allowed the vendor to claim the property taxes and legal fees on the second sale as damages. The Court denied additional "maintenance of the property" and "administrative costs" because the Court was not satisfied that those were justifiable. The Court also denied the claimed 15% interest, because there was no evidence justifying such a rate or its method of calculation, but did allow a lesser amount.

[75] In *Kaltenegger v. Cao*, 2022 BCSC 2203, at para. 176, the Court denied bridge financing and the costs of maintaining the property because they were not in the parties' reasonable contemplation and were too remote. That was the case because Mr. Kaltenegger bound himself to the purchase of his next property after Ms. Cao's breach.

[76] In *Hassel v. Khoshgoo*, 2010 BCSC 233 [*Hassel*], at paras 35–39, various additional expenses incurred as a result of the defendant's breach were allowed, including: a real estate commission paid due to the resale; mortgage charges because of a delay in obtaining the money from the sale of their home which was a direct result of the defendant's breach; and additional water, sewer, insurance and property taxes which were also a direct result of the defendant's breach. The only additional expenses claimed that were not allowed were BC Ferries tickets and newspaper advertisements, along with an oil tank search, which the court said were not necessary and attributable to the breach of contract.

[77] The above-noted cases demonstrate that, in the real estate context, out-of-pocket expenses incurred by an innocent party as a result of the breach of a contract of purchase and sale may be awarded as damages provided they are justifiable and within the reasonable contemplation of the parties.

### **Analysis**

[78] There is no dispute that the plaintiffs incurred the expenses they are claiming, but I must be satisfied that they are reasonable in the circumstances and were foreseeable.

[79] Regarding realtor commissions, it is reasonably foreseeable that the plaintiffs would decide to use a different realtor upon the collapse of the first sale, and that they would have to pay them a commission for any subsequent sale.

[80] Regarding additional mortgage interest, the defendant knew the plaintiffs were not living at the property. It is reasonably foreseeable that the plaintiffs would

continue to pay the additional mortgage interest, as is the fact that it was a variable interest rate mortgage and that interest rates were increasing.

[81] Regarding strata fees, the defendant knew the property was a strata. It is reasonably foreseeable that the plaintiffs were required to pay strata fees and would continue to do so. The amounts were reasonable, and in any event directed by the strata and out of the plaintiffs' control.

[82] Regarding additional insurance and utility payments, the same analysis applies. These expenses were reasonably foreseeable, and were necessary. The evidence establishes that the plaintiffs did what they could to minimize utility expenses.

[83] Finally, regarding Home Warranty, BC Housing, and Land Owner Transparency Registry Fees, as previously noted, the house was a new construction and thus carried mandatory home warranty coverage and required a BC Housing licence. The evidence establishes that these needed to be renewed in May 2023, which was reasonably foreseeable.

[84] The deposit is to be offset against the amount of damages received by the plaintiffs: *Hassel*, at para. 38.

[85] The plaintiffs' total damages are as follows:

<b>Item</b>	<b>Amount</b>
Difference between contract and resale price (\$1,515,000 – \$1,190,000)	\$325,000
Additional legal fees	\$750
Additional property taxes	\$1,786
Additional real estate commission on resale	\$34,912.50
Additional mortgage interest	\$44,219.01

Additional strata payments	\$1,427.81
Additional home insurance payments	\$1,674.25
Additional utility payments	\$1,840.21
Pacific Home Warranty renewal	\$1,575
BC Housing Licence renewal	\$500
Land Owner Transparency Fee	\$417.29
<b>Subtotal</b>	<b>\$414,102.07</b>
Less deposit	\$75,000
<b>Total</b>	<b>\$339,102.07</b>

### Costs

[86] The plaintiffs have been completely successful, and ordinarily I would simply make the usual costs order in their favour. However, the defendant has requested that she be provided with an opportunity to make submissions on costs, either orally or in writing.

[87] The parties have leave to make written submissions on costs within 30 days of the date of these reasons for judgment.

“B. Smith J.”

B. SMITH J.