# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Romfo et al v. 1216393 Ontario Inc., et al,***
2006 BCSC 1648

Date: 20061108
Docket: S060138
Registry: Vancouver

Between:

**John Allan Romfo, Mary Dianne Romfo,**
**Murray Fairweather, Doreen Fairweather,**
**Robert A. Cunningham, Josephine M.J. Cunningham,**
**Bruce Adams, Roxana Adams and**
**David Perrella**

Plaintiffs

And

**1216393 Ontario Inc.,**
**Tylon Steepe Development Corporation**
**and Dennis Kretschmer**

Defendants

- and -

Docket: S061941
Registry: Vancouver

Between:

**Julian Carlson and Carol Carlson**

Plaintiffs

And

**1216393 Ontario Inc. and**
**Tylon Steepe Development Corporation**

Defendants

- and -

Docket: S061514
Registry: Vancouver

Between:

**Gordon Frey and Suzan Shellian-Frey**

Plaintiffs

And

**Tylon Steepe Development Corporation**
**and 1216393 Ontario Inc.**

Defendants

- and -

Docket: S061513
Registry: Vancouver

Between:

**Kelly Royer and Maureen Royer**

Plaintiffs

And

**Tylon Steepe Development Corporation**
**and 1216393 Ontario Inc.**

Defendants

Before: The Honourable Mr. Justice Myers

**Reasons for Judgment**

| | |
|---|---|
| Counsel for the Plaintiffs: | F.G. Potts<br>C.D. Martin |
| Counsel for the Defendants: | J.B. Rotstein |
| Date and Place of Trial: | October 3, 4, 10, 11, 12, 13, 2006<br>Vancouver, B.C. |

**Introduction**

[1] This summary trial relates to real estate transactions which were not completed because of the admitted repudiation of the contracts by the defendant property developers. The substantive points in dispute relate to the remedies available to the plaintiff purchasers, in particular, whether they are entitled to claim an interest in the strata lots or to obtain an order for specific performance.

[2] The plaintiffs in these actions, seven couples and one individual, claim specific performance of contracts for the purchase of strata lots on Kalamalka Lake from the defendant developers. They filed certificates of pending litigation. In the alternative to specific performance they seek damages.

[3] The defendants apply under Rule 18A for a declaration that the plaintiffs are not entitled to certificates of pending litigation. While the defendants admit that they breached the contracts with the plaintiffs, they argue that the provisions of the contracts, which were all identical but for the closing dates, negate any right of the plaintiffs to maintain an interest in land, or to claim specific performance. They further argue that the plaintiffs lost any right they may have had to claim specific performance because they accepted the anticipatory breach of contract by the defendants. The defendants say that the only remedy to which the plaintiffs are entitled is the return of their

deposits.

[4] The plaintiffs argue that the defendants' motion is not suitable for determination by way of a Rule 18A application because the evidence is in conflict. As an alternative, they have also filed Rule 18A applications seeking a ruling that the contractual provisions relied on by the defendants are unenforceable.

[5] In response to the arguments of the defendants, the plaintiffs raise arguments of estoppel and fundamental breach and say that the clauses relied on by the defendants are penalty clauses and therefore unenforceable. In the event that I rule that they are not entitled to a certificate of pending litigation because of the contractual provision denying an interest in land, the plaintiffs say they are still entitled to specific performance and they seek an interlocutory injunction preventing the disposition of the strata lots. As a final alternative, should I not grant the injunction with respect to the lots, the plaintiffs seek an interlocutory order protecting the proceeds of sale of the lots, should they be sold.

**Issues**

[6] Apart from the overriding question of whether this matter is suitable for determination by way of a Rule 18A application, the following issues arise in these motions:

A. Can the plaintiffs maintain an action for specific performance or claim an interest in the strata lots? This in turn, involves a determination of the following questions:

(1) Are the plaintiffs precluded from obtaining specific performance because they commenced their actions prior to the time for completion of the transactions;

(2) Are two of the plaintiff couples precluded from obtaining specific performance because they cashed the cheques refunding their deposits;

(3) Do the terms of the contract prevent the plaintiffs from obtaining specific performance;

(4) If the answer to the previous question is in the affirmative, are the defendants disentitled from relying on the contractual provisions because:

(a) they have fundamentally breached the contract; or

(b) the contractual provisions are penalty clauses which should not be enforced.

B. Are the plaintiffs entitled to damages to be assessed, or are they limited to the return of their deposits?

[7] I have determined that I can decide issue A(1) because that is a pure point of law. I can decide issue A(2) because the facts are uncontested and it is a discrete issue. I cannot determine the other arguments for the reasons I state in the section dealing with the estoppel argument. Therefore the balance of the issues must be determined at a full trial.

**Factual background**

[8] The corporate defendants are the developers of a bare land strata project on Kalamalka Lake known as Crystal Waters. The defendant, Dennis Kretschmer is a director of Tylon Steepe Development Corporation, and was the individual in charge of the project for both corporate defendants ("Developers"). Mr. Kretschmer was added as a defendant after the actions were commenced. The plaintiffs claim against him for misrepresentation.

[9] All of the plaintiffs entered into contracts of purchase and sale with the Developers for strata lots at varying points in time between August 2002 and August 2003. They paid deposits which were held in trust by the Developers' solicitors.

[10] At the time the contacts were made, the strata plan had not yet been registered and the delay in registering the strata plan lies at the heart of this dispute.

[11] The relevant terms of the contract for the purposes of this dispute are:

1.2 Payment of the Deposit by the Vendor's Solicitor: In respect of the Deposit, the Vendor's solicitor (and for the purposes of this clause, Fraser and Company shall be considered the "Vendor's Solicitor" if it holds the Deposit):

...

(b) unless precluded by Court order, shall pay the Deposit:

…

(iii) to the Purchaser as liquidated damages and as the Purchaser's sole remedy without further recourse against the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Vendor's default hereunder; or

(iv) subject to clause 7.3 to the Vendor, without prejudice to any other right or remedy of the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Purchaser's default hereunder.

2.0 Completion of the Purchase and Sale

2.1 Completion Date: The completion of the purchase and sale of the Strata Lot will take place on the date (the "Completion Date") to be specified by the Vendor which is not less than 10 business days after the day the Vendor or the Vendor's Solicitor notifies the Purchaser or the Purchaser's Solicitor that the Strata Plan has been or, is expected to be fully registered in the Land Title Office prior to the Completion Date.

2.3 Right to Cancel - Vendor: If by August 15, 2003 (or if a later date results from the application of clause 5.3, then by such later date), the Vendor has not for any reason registered the Strata Plan in the Land Titles Office, the Vendor will have the right to cancel this Agreement by giving 10 business days written notice to the Purchaser or the Purchaser's Solicitor provided that such notice is given on or before August 15, 2003, in the case of cancellation of this Agreement pursuant to either clause 2.3(a), subject to clause 7.4, the Agreement will be cancelled effective as of the date of receipt of the notice by the Purchaser or the Purchaser's Solicitor, the Vendor will repay to the Purchaser all amounts paid hereunder the Deposit and any accrued interest thereon will be paid in accordance with clause 1.2 and there will be no further obligations as between the Vendor and the Purchaser [*sic*].

...

7.11 No Interest or Registration: The Purchaser acknowledges and agrees that the Purchaser:

(a) will not have any claim or interest in the Strata Lot, the Development or the Property until the Purchaser becomes the registered owner of the Strata Lot, and

(b) the Purchaser does not now have and will not have at any time hereafter notwithstanding any default of the Vendor, any right to register this Offer or the Agreement, or any part of or right contained in this Offer to the Agreement against the Strata Lot, the Development or the Property in the Land Title Office.

[12] Clause 2.3 appears to be an amalgam of previous drafts: the latter part of the clause does not make sense.

[13] Clause 5.3, referred to in clause 2.3, was a *force majeure* clause allowing the time for completion to be extended by the vendor. The listed *force majeure* factors included delays caused by governmental authority. The defendants placed no reliance on this clause.

[14] Beginning in August 2003, Mr. Kretschmer told the plaintiffs that the Developers were experiencing problems with the District of Lake County which led to delays in the approval and registration of the strata plan. In December 2004, the Developers commenced a legal action against the District of Lake County.

[15] In August 2005, the Developers wrote and advised the plaintiffs that, pursuant to clause 2.3 of the contract, the transaction would not be completed. Those notices were late, and therefore not in accordance with clause 2.3; the notices should have been delivered by August 15, 2003.

[16] Each of the plaintiffs provided evidence of meetings and conversations with Mr. Kretschmer which took place at various points in time both before and after signing the contracts. I will deal with this later in these Reasons.

[17] In November 2005 the Developers' solicitor returned the deposits to the plaintiffs. The plaintiffs reacted to this differently, which will also be set out later in these Reasons.

[18] The subdivision plan was registered in the Land Title Office on January 16, 2006.

[19] In October 2005 a caveat was filed by the Carlsons, who filed an action in November 2005. Further legal proceedings were launched individually by the other plaintiffs after that, and all of them have filed certificates of pending litigation.

**Can the plaintiffs maintain a claim for specific performance or claim an interest in the strata lots?**

[20] The defendants argue that the plaintiffs cannot obtain an order for specific performance for three reasons:

(a) By starting their actions before the time for completion of the transactions, the plaintiffs have elected to accept the defendants' repudiation of the contract rather than keep the contract alive. They are therefore limited to a return of their deposits pursuant to clause 1.2(b)(iii), or at best a claim for damages.

(b) A similar argument is made with respect to two of the plaintiffs who cashed the returned deposit cheques, the Adams and the Romfos. The defendants say that by cashing the cheques, those plaintiffs accepted the defendants' repudiation of the contract and are limited to a claim for damages.

(c) The clear wording of clauses 7.11 and 1.2(b)(iii) limits the plaintiffs remedy to a return of their deposits and precludes them from claiming an interest in the land. ***Land Title Act***, R.S.B.C. 1996, c. 250 s. 215(1)(a) requires a party to a proceeding to claim an interest in land in order to file a certificate of pending litigation. Therefore, the defendants argue, the certificate of pending litigation should be cancelled.

[21] This argument in turn engages the plaintiffs' arguments that the clauses should not be enforced.

[22] I will deal with each of these arguments in turn.

**The commencement of the actions before the time for completion**

[23] I have summarized the defendants' argument on this issue above.

[24] The defendants' argument equates the filing of an action - in this case one claiming specific performance and, in the alternative, damages - with the making of an election to accept a repudiation and an election of the remedy of damages. The courts, however, have not been that formalistic.

[25] The Supreme Court of Canada dealt with this issue in ***Kloepfer Wholesale Hardware and Automotive Co. v. Roy***, [1952] 2 S.C.R. 465, 3 D.L.R. 705, in which precisely the same argument was made, and rejected, on the basis of similar facts to the case at bar. After referring to the argument of the defendant, Kerwin J., on behalf of himself, Estey and Fauteux JJ. stated at para. 2:

> No authority has been cited for the proposition advanced on behalf of the appellant and we find it untenable. It is settled that an action may be brought upon an anticipatory repudiation of a contract (Fry on *Specific Performance*, 6th ed. para. 1062), and in paragraph 1311 of Williston on *Contracts* it is said:

> But would a court, it may be asked, grant specific performance on January 1, of the contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.

With that statement we agree.

[26] Locke J., with whom Cartwright J. concurred, stated in the last paragraph of the judgment:

> ... Whether or not the defendant's attitude would have justified the respondent in bringing an action claiming an injunction to restrain any such dealing with the property, it is, in my opinion, clear that he was entitled immediately to bring an action for a declaration as to the nature of his interest and for a decree that the contract be specifically performed and to file a lis pendens against the title to the property to prevent any dealing with it, unless subject to his interest. …

[27] Locke J. referred to the ability of a plaintiff to file a certificate of pending litigation. Section 215(1)(a) of the ***Land Title Act*** requires an action to be filed before a certificate of pending litigation can be filed. (Although a caveat can be filed before an action is filed, it only endures for 60 days). If the defendants' argument were correct, a plaintiff would have to wait until the completion date to file a certificate of pending litigation. That would fly in the face of the ***Act*** and make no commercial sense. By that time the land might have been sold or encumbered.

[28] In support of their argument the defendants rely primarily on the Court of Appeal's decision in ***Morrison-Knudsen Co. of Canada v. British Columbia Hydro and Power Authority*** (1978), 85 D.L.R. (3d) 186, [1978] 4 W.W.R. 193 (B.C.C.A.). In that case, after a fundamental breach by the defendant, the plaintiff continued to carry on construction work through to the completion of the project. The plaintiff contractor then sought *quantum meruit*. The Court of Appeal held that by continuing to complete the work the contractor had elected to keep the contract alive. It could therefore not claim a remedy which was outside the scope of the contract, such as *quantum meruit*.

[29] The defendants say the plaintiffs here did the opposite of what the plaintiffs did in ***Morrison-Knudsen***: the plaintiffs accepted the repudiation of the contract and cannot therefore claim a remedy under the contract, namely specific performance. The simple answer to that is the point I have made above: the filing of an action for specific performance before the time for performance is not tantamount to accepting an anticipatory breach or repudiation of the contract. It might be that the immediate filing of an action for damages alone, in the face of an anticipatory breach, amounts to an acceptance of the other party's repudiation of the contract. But that does not apply to an action for specific performance, and certainly not one for the sale of land. I therefore see no inconsistency with the principle enunciated in ***Morrison-Knudsen*** and the ***Kloepfer*** decision.

[30] I conclude, therefore, that the filing of the actions do not preclude the ability of the plaintiffs to obtain an order for specific performance.

[31] I emphasize that this part of my Judgment does not address the defendants' arguments based on the wording of the contracts, in particular, whether the contracts allow them to claim an interest in the land. That is a separate issue which I address later.

**The cashing of the deposits**

[32] As noted above, all of the plaintiffs received refunds of their deposits by way of cheques from the Developers' solicitor.

[33] With two exceptions, all of the plaintiffs either returned the cheques or deposited them into a lawyer's trust account. However, two of the plaintiff couples, the Romfos and the Adams, cashed the cheques.

[34] The defendants argue that cashing the cheques amounts to an acceptance of the defendants' repudiation of the contracts, thereby disentitling those plaintiffs from seeking specific performance.

[35] The defendants' argument does not take into account the circumstances in which the cheques were cashed. The argument seems to assume that it is a rule of law that the cashing of a retuned deposit cheque must be taken

as an election to accept a repudiation of a contract.

[36] With respect, as with the defendants' prior argument, this position is overly formulaic. The issue is not determined by the on - off switch of whether a cheque has been cashed. Rather, it is a matter of ascertaining what the cashing of the cheques communicated. As with any other contract, that is to be determined on an objective standard and in the context of the surrounding circumstances.

[37] That approach was applied by Saunders J. of the Ontario High Court in ***Turchet v. Adeo Excavating & Grading Ltd.***, [1982] O.J. No. 1098 (Ont. H.C.). The issue in that case was the same as the one at bar, namely, whether cashing the cheque represented an election to accept the defendant's wrongful repudiation of a contract and thereby disentitled the plaintiff from suing for specific performance. The court stated at paras. 8 and 9:

> The issue to be decided however is whether the plaintiff by his action of cashing the cheque indicated to the defendant an intention to treat the contract as at an end. In *Canada Egg Products Ltd. v. Canadian Doughnut Co. Ltd.,* [1955] 3 D.L.R. 1 (S.C.C.), Mr. Justice Locke said at p.14:
>
> > While an election to treat a contract as at an end is not complete until notice of such election is given to the other party and until such notification the latter is entitled to treat the contract as subsisting and insist upon carrying out its terms, no particular manner of communicating such election is required.
>
> Conversely, if the action of a party indicates an intention to treat the contract as terminated, the other party is free to act on the basis that it has been terminated and may, for example, dispose of the property to a third party. The issue can be seen as an issue in the nature of estoppel. Di Castri in *Law of Vendor and Purchaser*, 2nd ed., (1976), at p.593 states:
>
> > It would seem that under the modern view, before an election will be held to have been made, all the elements of an estoppel must be present. The doctrine of election is based on estoppel and, when applicable, operates only when the party asserting it has been injured.

[38] A similar analysis has been applied to a closely related issue, namely, whether the cashing of a cheque marked "final payment" or "paid in full" amounted to accord and satisfaction: see ***Tennant v. Greyhound Lines of Canada Ltd.*** (1988), 22 C.C.E.L. 299, 11 A.C.W.S. (3d) 262 (B.C.S.C.) and the cases cited in that judgment.

[39] Turning to the circumstances of the case at bar, I will first deal with the Adams. They were advised by letter on July 15, 2004, that the defendants were canceling the agreement. On July 21, 2004, Mr. Adams replied stating:

> We still want our transaction for lot #33 to go through. ... It is my understanding that title will be registered very soon.
>
> Based on promises made throughout this past year we believe that our agreement is valid and enforceable. If the Vendor persists in pursuing cancellation of our agreement then you will be hearing from our lawyer.

[40] The Developers' solicitor sent the Adams a cheque refunding their deposit of $17,270 plus interest on August 10, 2004. That cheque was never cashed and on December 1, 2004, a second letter accompanied by another cheque was sent. This time Mr. Adams did cash it, but he noted on it that it was "cashed under protest".

[41] The Adams commenced their legal action together with the Romfos on January 9, 2006, and filed a certificate of pending litigation against the property on January 11, 2006.

[42] Turning to the Romfos, in a May 2005 telephone conversation, Mr. Kretschmer told Mr. Romfo that his contract would be canceled. Mr. Romfo says that he advised Mr. Kretschmer that he and his wife had a binding contract and that they expected the developers to complete the transaction.

[43] On August 18, 2005, the defendants sent the Romfos the same letter that was sent to the Adams.

[44] On November 17, 2005, the defendants' solicitor sent a cheque to the Romfos returning their deposit. The Romfos marked the cheque "cashed under protest" and deposited it.

[45] As noted above, the Romfos' action was joined with that of the Adams' and commenced on January 9, 2006. The Romfos filed a certificate of pending litigation the following day.

[46] Both the Adams and the Romfos cashed their cheques under protest. They made it clear to Mr. Kretschmer that their position was that the contract remained open. Therefore the cashing of the cheques cannot reasonably be taken to have amounted to an acceptance of the Developers' repudiation.

[47] In terms of estoppel, which was alluded to in the Di Castri passage quoted in ***Turchet***, there is no evidence that Mr. Kretschmer took the cashing of the cheques as an indication that the plaintiffs were giving up their rights to specific performance, or of any detrimental reliance by the defendants of a change in their position.

[48] Whether the matter is considered as one of estoppel or of contractual notification, I conclude that the defendants' submission on this point must fail. Cashing the cheques does not preclude the Adams or the Romfos from pursuing an action for specific performance.

**Do clauses 7.11 and 1.2(b)(iii) preclude the plaintiffs' claim to an interest in land or the remedy of specific performance?**

[49] The defendants argue that the plain meaning of these clauses is that the plaintiffs can have no claim with respect to the land itself (7.11) and that the plaintiffs' only remedy is a return of their deposits (1.2(b)(iii)).

[50] The primary position of the plaintiffs is that both of these provisions are penalty clauses, and therefore unenforceable. In the alternative, the plaintiffs say that these clauses are exemption clauses and should not be enforced because the defendants have fundamentally breached the contracts. Whether they are penalty clauses or exemption clauses, the plaintiffs claim that the Developers are estopped from relying on them. I will deal first with estoppel.

***Estoppel***

[51] It is the arguments relating to estoppel that engage evidence which is largely in conflict. The plaintiffs allege a number of representations that are denied by the defendants. The evidence of the purchase of the boat lifts is not disputed, but there is some conflict with respect to the discussions that took place between Mr. Kretschmer and the various plaintiffs with respect to the boat lifts.

[52] I will first summarise the evidence relevant to the estoppel arguments, and then deal with the arguments of the parties.

**The representations**

[53] All of the plaintiffs swore affidavits. Many relate similar evidence. I will deal with only the alleged post-contractual representations. Rather than deal with each of these discretely, I think it sufficient for the present purposes to characterize the nature of the representations the plaintiffs say were made:

(a) The Fairweathers and the Romfos say that Mr. Kretschmer told them they could begin building their homes in the fall of 2003.

(b) The Fairweathers, Cunninghams, Romfos, and Mr. Perella say that Mr. Kretchsmer told them he was not going to "collapse" the deals in spite of the delays experienced with respect to registering the strata plan.

(c) The Carlsons say that Mr. Kretschmer encouraged them to proceed with plans for their house.

(d) The Freys and Adams say that they discussed construction plans with Mr. Kretschmer.

(e) The Cunninghams, Carlsons, Royers, Adams, Freys and Mr. Perella say that Mr. Kretschmer advised them that the strata plan would soon be registered with the Land Title Office.

(f) The Carlsons and Royers say they were told by Mr. Kretschmer that they should hang on to their

funds because the transactions would close in the near future.

**The Boat Lifts**

[54] Each strata lot was to have a designated boat slip at the community's moorage facility. The Developers had a license from the province of British Columbia for the moorage facility and the strata lot owners were to obtain a sub-license from the Developers. Should they wish, the owners could install floating boat lifts in their assigned slips.

[55] Mr. Kretschmer made arrangements for people who signed contracts of purchase to buy floating boat lifts from the Developers. He obtained a favorable price from a particular manufacturer and wanted to pass that on to the purchasers, but the favorable pricing could only be obtained from the manufacturer for a limited time.

[56] A number of the plaintiffs took advantage of this offer and purchased and installed the lifts. The arrangements were made through, and payment made to, the Developers. Mr. Kletshmer says no profit was made by the Developers.

[57] After the contracts were cancelled by the Developers, they refunded the boat lift payments to some of the plaintiffs. Some of these plaintiffs returned the cheques and some of them cashed them. With respect to the plaintiffs who either returned their cheques or never received them, the Developers are willing to pay them for the boat lifts or provide them the opportunity to remove them.

**Reliance of the Plaintiffs**

[58] Three of the plaintiffs say that they sold their homes in anticipation of moving to Crystal Waters based on the representations made by Mr. Kretschmer and the purchase of the boat lifts. The balance of the plaintiffs say that had they not been led down the garden path by the Developers, they would have bought alternate property. Some of them say that they are now precluded from buying lakefront property because of a rising market.

**The position of the parties on the estoppel issue**

[59] The plaintiffs say that the representations made by Mr. Kretschmer result in the defendants being estopped from relying on clause 7.11 and 1.2(b)(iii), and from taking the position that the plaintiffs cannot claim an interest in land. The purchase and installation of the boat lifts, the plaintiffs say, is inconsistent with the plaintiffs not being able to claim an interest in the land and amounts to proprietary estoppel. They say this issue cannot be determined by way of an Rule 18A application.

[60] The defendants say that even if I accept the evidence given by the plaintiffs, it cannot amount to estoppel by representation or proprietary estoppel. The defendants say that the representations amount to no more than an expression of intent to complete the contracts, and that this cannot give rise to an estoppel. They argue that the plaintiffs are using estoppel as a sword and not a shield. With respect to the boat lifts, the defendants argue that since the lifts were installed on common property, proprietary estoppel cannot arise.

**Suitability of this issue for determination by a Rule 18A application**

[61] It is my view that the estoppel issues should not be dealt with on a Rule 18A application.

[62] First, there is a direct conflict in the evidence with respect to the representations made by the defendants, including discussions relating to the boat lifts.

[63] Second, as I outline in the next section dealing with fundamental breach, I conclude that this matter must go to trial to determine if the plaintiffs can claim damages, and if so, the assessment of those damages. There is also the claim in misrepresentation made against Mr. Kretschmer personally which will go to trial.

[64] Third, the conduct of the defendants relied on by the plaintiffs in support of their estoppel arguments is also

relevant to the issue of fundamental breach, as I outline below, and the claim against Mr. Kretschmer.

[65] Fourth, I am not convinced that the plaintiffs' arguments are so devoid of merit that I should dismiss them without hearing the full evidence.

[66] The Court of Appeal has stated in several decisions that this court should not allow Rule 18A to be used for "litigating in slices": ***Hobbs v. Robertson*** (2002), 172 B.C.A.C. 282, 2002 BCCA 381; ***British Columbia (Attorney General) v. Perry Ridge Water Users Assn.*** (2003), B.C.A.C. 121, 2003 BCCA 275; and ***Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*** (2002), 164 B.C.A.C. 300, 2002 BCCA 138.

[67] Litigating in this manner is particularly problematic in this case because of the risk that a judgment in this Rule 18A application could be based on facts which turn out to be incomplete, or different than those found at the trial held on the other issues.

[68] I am cognizant of the fact that each of the plaintiffs' claims stands on its own, so that it might be possible to dismiss some of the claims for specific performance but not others. I have considered the evidence in that light but still reach the same conclusion.

[69] I am also alert to the fact that land is being tied up by the certificates of pending litigation. However, I think that this can at least be partially offset by directing an early trial date. I understand that the parties are nearly ready for a trial. I will be the trial judge and having heard the arguments on all the issues in this Rule 18A application should speed up the trial itself.

***Fundamental Breach***

[70] The plaintiffs argue that no effect should be given to the clauses because the defendants have fundamentally breached the contracts.

[71] The defendants have admitted they are in breach and have not contested that the failure to complete a real estate transaction is a fundamental breach.

[72] I have doubts as to whether the plaintiffs can succeed in a claim for specific performance while in the same breath they seek to avoid clause 1.2(b)(iii) because of fundamental breach. But I need not decide that here because the issue of fundamental breach *is* relevant to the alternate claim for damages. If clause 1.2(b)(iii) is not enforced against the plaintiffs then they can maintain a claim for damages; if it is enforced then they are limited to the return of their deposits.

[73] The existence of a fundamental breach does not automatically result in the court refusing to enforce an exemption or limitation of liability clause. Rather, that depends on the circumstances of the case.

[74] The Supreme Court of Canada in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [1989] 1 S.C.R. 426 rejected the "rule of law approach" or "traditional view" which automatically resulted in the court's refusal to enforce a limitation or exclusion clause in the face of a fundamental breach. However, the court was split on the precise approach to be taken to fundamental breach. The different views were expressed by Dickson C.J. who delivered a judgment on behalf of himself and La Forest J.

> 51. I have had the advantage of reading the reasons for judgment prepared by my colleague, Justice Wilson, in this appeal and I agree with her disposition of the liability of Allis-Chalmers. In my view, the warranty clauses in the Allis-Chalmers contract effectively excluded liability for defective gearboxes after the warranty period expired. With respect, I disagree, however, with Wilson J.'s approach to the doctrine of fundamental breach. I am inclined to adopt the course charted by the House of Lords in *Photo Production Ltd. v. Securicor Transport Ltd.,* [1980] A.C. 827, and to treat fundamental breach as a matter of contract construction. I do not favour, as suggested by Wilson J., requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck, and I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable.

[75] In ***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423 at para. 64, the Supreme Court of Canada applied both lines of analysis from ***Hunter Engineering*** and examined whether enforcing the contractual term in question would lead to a result that was "unconscionable, as per Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy as per Wilson J".

[76] Recently, Dillon J. of this court applied both approaches in ***Tercon Contractors Ltd. v. British Columbia***, 2006 BCSC 499:

> 149. Given this conclusion, it may not be necessary to address the enforceability of the exclusion clause. However, reason not to enforce the clause exists in the circumstances here. According to the approach in *Guarantee* and *Hunter*, whether the exclusion clause survives fundamental breaches depends on whether the result is unconscionable or unfair, unreasonable, or contrary to public policy (see also *Shelanu*). While it has been suggested that there may be no real difference between these approaches and both are to be used sparingly, it appears that fairness and reasonableness can be assessed at the time of the breach and not just at the time the contract is concluded (*Hunter* at 510-511; *MacKay* at paras. 12-14; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.* (2004), 245 D.L.R. (4th) 650, [2005] 7 W.W.R. 419, 2004 ABCA 309 at para. 51). A party should not be allowed to commit a fundamental breach sure in the knowledge that no liability can attend to it and the court should not be used to enforce a bargain that a party has repudiated (*Hunter* at 509-510). While unconscionability is usually considered in situations of unequal bargaining power, there can be situations of equal bargaining power that still give rise to an unconscionable result (*Hunter* at 515-516).

[77] No matter which of these approaches is followed, the conduct of the parties needs to be assessed in determining the effect of a fundamental breach. And that is so whether or not the plaintiffs can maintain a claim for specific performance, because it is relevant to their alternate claim for damages. In this case that conduct includes the same representations relied by the plaintiffs in support of their estoppel argument.

[78] Given the conflicting evidence, the conduct of the defendants must be dealt with at a full trial.

[79] In view of my rulings on these issues, it is not necessary to deal with the other issues which can await the trial.

**Conclusion**

[80] The plaintiffs are not precluded from claiming specific performance or an interest in the strata lots as a result of commencing their actions prior to the closing date, or cashing the cheques refunding their deposits.

[81] The remaining issues must be dealt with at trial. I direct that the trial be heard at the earliest possible date and request the parties to schedule a case management conference in front of me to set a timetable and to discuss any remaining pre-trial issues.

"E. Myers, J."
The Honourable Mr. Justice E. Myers