COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carlson v. Tylon Steepe Development Corp.,***
2008 BCCA 179

Date: 20080430
Docket: CA035469; CA035470; CA035471; CA035472;
CA035507; CA035508; CA035509; CA035510

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Between:

**Julian Carlson, Carol Carlson, Kelly Royer,
Maureen Royer, John Allan Romfo, Mary Dianne Romfo,
Murray Fairweather, Doreen Fairweather,
Robert A. Cunningham, Josephine M.J. Cunningham,
Bruce Adams, Roxana Adams, David Perrella,
Gordon Frey and Suzan Shellian-Frey**

Respondents
(Plaintiffs)

And

Tylon Steepe Development Corporation and 1216393 Ontario Inc.

Appellants
(Defendants)

- and -

Docket: CA035507; CA035508; CA035509; CA035510

Between:

**Kelly Royer, Maureen Royer, John Allan Romfo,
Mary Dianne Romfo, Murray Fairweather,
Doreen Fairweather, Robert A. Cunningham,
Josephine M.J. Cunningham, Bruce Adams, Roxana Adams,
David Perrella, Gordon Frey, Suzan Shellian-Frey, Julian Carlson
and Carol Carlson**

Appellants
(Plaintiffs)

And

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

Respondents
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie

The Honourable Madam Justice Saunders

J.B. Rotstein	Counsel for the Appellants (CA035469 to CA035472)
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F.G. Potts and C.D. Martin	Counsel for the Respondents (CA035469)
J.B. Rotstein	Counsel for D. Kretschmer (CA035507 to CA035510)
Place and Date of Hearing:	Vancouver, British Columbia 17 and 18 March 2008
Place and Date of Judgment:	Vancouver, British Columbia 30 April 2008

Written Reasons by:
The Honourable Mr. Justice Mackenzie

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This appeal is from orders for specific performance of contracts for purchase of lots in a subdivision at Kalamalka Lake, near Vernon, British Columbia. The trial judge's reasons may be found at 2007 BCSC 1375.

[2] The respondents, seven couples and one individual, entered into contracts of purchase and sale of strata lots in the subdivision known as Crystal Waters with the appellant vendors Tylon Steepe Development Corporation ("Tylon Steepe") and 1216393 Ontario Inc. ("Ontario Inc.") between 29 November 2002 and 10 September 2003.

[3] Shortly before the subdivision was registered in 2005, the vendors notified the purchasers that they would not complete the contracts. The market value of the lots had risen substantially in the interim and the vendors made agreements to sell the lots to others at higher prices. Those third party sales were suspended when the respondents filed certificates of pending litigation against the titles.

[4] Initially, the vendors relied on cancellation provisions in the contracts but they later abandoned that position. Shortly before trial, the vendors amended their pleadings to advance an argument that the contracts lacked mutuality of obligations and were not enforceable. Subject to the mutuality issue, the vendors conceded that they had breached their contractual obligations. They contended that clause 1.2(b)(iii) of the contracts ("the deposit clause") limited the purchasers' remedy to return of their deposits and precluded specific performance or any other remedy.

[5] The trial judge concluded that because of the conduct of the vendors' representative, Dennis Kretschmer, the deposit clause was unenforceable and he granted specific performance of all of the contracts. He relied on the doctrine of fundamental breach as explained by the Supreme Court of Canada in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321, and ***Guarantee Co. of North America v. Gordon Capital Corp***., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1. In the alternative, he concluded that some of the purchasers relied to their prejudice on representations made by Mr. Kretschmer that the sales would be completed and the vendors were estopped from asserting the deposit clause as a defence to specific performance with respect to those purchasers. The trial judge rejected the vendors' contention that the contracts were unenforceable

because they lacked mutuality of obligations.

Facts

[6] Ontario Inc. was the owner of a former campsite known as Crystal Waters, beside Kalamalka Lake, in the fall of 1998 when Mr. Kretschmer, the principal of Tylon Steepe, became aware of the property. Mr. Kretschmer met with Bernard Ho, the principal of Ontario Inc., to discuss the development of the property and the two agreed that Mr. Kretschmer would investigate potential development. Mr. Kretschmer obtained the approval for a development permit application, subject to certain conditions, from the District of Lake Country in 2000. Tylon Steepe and Mr. Kretschmer entered into an agreement with Ontario Inc. to purchase the property in April 2002. The purchase price was $2,150,000, payable from 33 percent of the sale proceeds of strata lots, and any balance of the price on 8 July 2003.

[7] The appellants issued a disclosure statement in July 2002, and offered the strata lots for sale. The respondents entered into purchase and sale agreements for strata lots with the appellants between 29 November 2002 and 10 September 2003. Mr. Kretschmer had the conduct of the development and sales process and the communications with the respondents exclusively at all material times.

[8] In February 2003, the appellants amended the disclosure statement to disclose financing arrangements with Canadian Western Bank. The terms included a representation as to the sales contracts and a commitment that the loan would be repaid from the sales proceeds of pre-sold lots by 15 October 2003. Mr. Kretschmer advised the bank that the subdivision would be registered and the sales completed by that date. The respondents were also told by Mr. Kretschmer that the subdivision would be registered by October/November 2003.

[9] Between April 2003 and April 2004, the appellants started three actions against the District of Lake Country and its employees alleging improprieties in the subdivision approval process but no steps were taken in these actions beyond issuing the writs.

[10] Each strata lot was assigned a boat slip in a Crystal Waters marina and the appellants started marketing boat lifts to lot purchasers at these slips in February 2004.

[11] The appellants terminated the contract with the Adams respondents after a dispute over the Adamses trying to assign their contract to purchase to third parties at a higher price. The Adamses refused an offer from Mr. Kretschmer to buy back the contract at the original price and the appellants' solicitor then sent a termination letter.

[12] The trial judge found that Mr. Kretschmer and the vendors made the decision to terminate the contracts sometime between July and November 2004. Several respondents purchased boat lifts through Mr. Kretschmer in November and December 2004, in ignorance of that decision.

[13] Mr. Kretschmer, Tylon Steepe and Ontario Inc. amended their agreement to increase the purchase price by $1,000,000 on 1 November 2004.

[14] The appellants applied for subdivision approval on 1 February 2005, but the application was refused on 1 April 2005, because of outstanding deficiencies. Between April and June 2005, the appellants obtained new financing from Prospera Credit Union and proceeded with construction of a water line that was a condition of District approval.

[15] On 18 July 2005, Mr. Kretschmer testified at a property tax assessment appeal hearing that the appellants were not going to cancel the contracts with the respondents because many of the purchasers had suffered from delay in the completion of the subdivision.

[16] Later in 2005, the appellants sent letters to the respondents (other than the Adams respondents) purporting to cancel the contracts. This litigation followed.

[17] The appellants contend that the terms of the contracts limit the respondents' remedy on breach to return of

their deposits with interest. The appellants rely on clauses 1.2(b)(iii) and 7.11 of the contracts. They read:

> 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;
>
> […]
>
> 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 [or] the Agreement, against the Strata Lot, the Development or the Property in the Land Title Office.

[18] The respondents advanced claims against Mr. Kretschmer for negligent misrepresentation as an alternative to the remedy of specific performance.

[19] Between the time the contracts were entered into in 2002 and 2003, and when they were terminated in August 2005, Mr. Kretschmer consistently reassured the respondents that the subdivision would be registered and the contracts would be completed. The trial judge found Mr. Kretschmer not to be a credible witness and he accepted the evidence of the respondents over the testimony of Mr. Kretschmer where there was a conflict. Mr. Ho was not called as a witness.

[20] The issues on appeal turn primarily on the effect of the deposit clause. Clause 7.11 is an ancillary provision that will be addressed briefly later in these reasons.

The Trial Judge's Reasons

[21] There was no dispute before the trial judge that the vendors' breach of the contracts was fundamental. As the trial judge put it (at para. 303): "There can be nothing more fundamental in a contact to convey land than the vendor refusing to convey it."

[22] The trial judge quoted passages from the reasons of both Dickson C.J.C. and Wilson J. in ***Hunter Engineering***, setting out their differing formulations of the appropriate test, and noted that the view of Dickson C.J.C. focussed on the facts at the time when the contract was entered into, whereas Wilson J. emphasized events subsequent to the formation of the contract. He referred to ***Guarantee***, where the Supreme Court of Canada summarized the two views as whether enforcing the term in issue would be unconscionable (as *per* Dickson C.J.C.) or unfair, unreasonable, or otherwise contrary to public policy (as *per* Wilson J.). He noted that Weiler J.A., in ***Shelanu Inc. v. Print Three Franchising Corp.*** (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577 (C.A.), considered the two approaches to have little difference in result, and that Dillon J., in ***Tercon Contractors Ltd. v. British Columbia***, 2006 BCSC 499, 53 B.C.L.R. (4th) 138, applied both. (The judgment in ***Tercon*** was later reversed by this Court (2007 BCCA 592) on the ground that the exclusion clause in issue, properly interpreted, was intended to cover all breaches, including fundamental breaches; however, the Court did not depart from the views expressed in the earlier cases as to the application of the fundamental breach doctrine.)

[23] The trial judge summarized his conclusions (at paras. 309 to 313):

> [309] I have found that the vendors decided to terminate the plaintiffs' contracts some time between July and November 2004. In spite of knowing of the plaintiffs' expectations, Mr. Kretschmer did not - with the exception of the Adamses - inform them of the decision until, depending on the family, the summer or fall of 2005.
>
> [310] Throughout, Mr. Kretschmer gave constant assurances that the subdivision would be registered soon.
>
> [311] Mr. Kretschmer knew that the market was rising.
>
> [312] The plaintiffs who were given the option to purchase the lots at a higher price were presented with a replacement contract that was virtually impossible for them to have signed. As I have noted above, it required them to use Tylon Steepe as their builder, but had no terms as to cost or any formula to arrive at a cost.
>
> [313] I conclude that it would be unfair and unreasonable to enforce clause 1.2(b)(iii) with respect to all of the plaintiffs.

The Parties' Positions on Appeal

[24] The appellants accept that their repudiation of the contracts was fundamental. The appellants' primary position is that the respondents, having elected to affirm the contracts rather than accept the repudiation, are required to affirm the whole of the contracts, including s. 1.2(b)(iii) and s. 7.11, and they cannot overcome the effect of those sections of the contracts through fundamental breach.

[25] In the court below, the respondents contended that the application of the deposit clause, properly interpreted, was limited to unintentional breaches of contract and did not extend to intentional breaches. The trial judge rejected that submission. He concluded that the appellants' only obligations under the contracts were to use good faith and reasonable efforts to effect the subdivision, and to convey the lots once the subdivision was registered; the deposit clause would have little application if it were limited to unintentional breaches. I agree with that conclusion, subject to the issues related to fundamental breach.

Fundamental Breach

[26] There are two approaches to the fundamental breach analysis. The first is the construction approach — does the deposit clause, properly interpreted, apply to a termination of the contracts in the circumstances? The second approach is to accept that a literal application of the deposit clause would apply to all terminations, however motivated, but the court will not give effect to the clause where to do so would be unconscionable. The opinions in ***Hunter Engineering*** are divided as to the correct approach, and ***Guarantee*** does not resolve the question beyond observing that either approach should lead to the same result in most cases. In both ***Hunter Engineering*** and ***Guarantee***, the impugned clauses prevailed on both approaches.

[27] The construction approach invites the court to consider the intention of the parties at the time the contracts were made. If the parties had put their minds to the circumstances in which these contracts were terminated through breach, would they have intended the deposit clause to apply? In the instant case, those circumstances were the deception created and maintained by Mr. Kretschmer on behalf of the vendors that the contracts would be completed, when in reality it was the vendors' intention to continue the contracts only for so long as it was in their interest to do so to maintain their financing and further the development approval process, and then to repudiate the contracts once they were no longer useful, leaving the purchasers with no remedy other than the return of their deposits. Framing the question in terms of these circumstances answers itself. It is inconceivable that the parties would have intended that the deposit clause should protect the vendors from the consequences of deliberate deception of the purchasers in the strategy followed by Mr. Kretschmer.

[28] On the alternate theory of unconscionability, Mr. Kretschmer's deception was clearly unconscionable and

equally precludes the appellants from relying on the deposit clause. This is not a case where the vendors faced financial exigencies which caused them to repudiate the contracts. Their motivation was simply to take advantage of a rising market by reselling the lots to third parties at substantially higher prices.

[29] As I understand the appellants' submission, they do not directly challenge the trial judge's conclusion that enforcement of the deposit clause would be unfair, unreasonable, or unconscionable, depending on how the test is formulated. Rather, they contend that the deposit clause cannot be severed from the balance of the contracts for the purposes of the fundamental breach analysis, and that if the deposit clause falls, the whole contract falls with it, and the remedy of specific performance is unavailable. The appellants rely on ***Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority (No. 2)***, [1978]4 W.W.R. 193, 85 D.L.R. (3d) 186 (B.C.C.A.), where this Court, in a *per curiam* judgment, stated this proposition (at p. 246 (W.W.R.), p. 228 (D.L.R.)):

> An election by the innocent party to keep a contract alive after a fundamental breach is not an election between alternative remedies but an election between inconsistent rights. Either the contract is still there and the rights are under it, or the contract is rescinded because of an accepted repudiation and very different rights have come into being.

[30] On the facts of ***Morrison-Knudsen***, the Court reversed a judgment that there had been a fundamental breach by B.C. Hydro of a contract on a large hydro-electric project, as the plaintiff contractor had completed the contract and had a remedy for damages under the terms of the contract. An alternative claim in *quantum meruit* was not available because there had not been a repudiation of the contract which the plaintiff had accepted before completion. The Court noted (at para. 168) that it would not be "unfair or inequitable or unjust" to hold the contractor to the terms of the contract. The Court was not addressing the enforcement of an exclusion or limitation clause analogous to the deposit clause here, and I do not think the proposition stated in that case can be extended to preclude reliance on the balance of a contract to support a remedy of specific performance where an exclusion clause is unenforceable because of a fundamental breach. In my view, ***Morrison-Knudsen*** does not assist the appellants. Similarly, ***Norfolk v. Aikens*** (1989), 41 B.C.L.R. (2d) 145, 64 D.L.R. (4th) 1 (C.A.), and ***Bridgesoft Systems Corp. v. British Columbia***, 2000 BCCA 313, 74 B.C.L.R. (3d) 212, cited for the same proposition as ***Morrison-Knudsen***, were not fundamental breach cases involving exclusion clauses. The context of both ***Hunter Engineering*** and ***Guarantee*** necessarily implies that if the plaintiffs had succeeded in overcoming the exclusion and limitation clauses through fundamental breach, they could have founded a remedy on the balance of the contracts.

[31] Limiting the availability of specific performance, as submitted by the appellants, would allow them to achieve indirectly the objective which they cannot achieve directly as a result of the unenforceability of the deposit clause. There is no compelling reason to so limit the court's ability to grant relief from an unfair or unconscionable reliance on the deposit clause. In both ***Hunter Engineering*** and ***Guarantee***, the appellants failed because enforcement of the exclusion and limitation clauses in issue was not found to be unfair or unconscionable.

[32] In addition to the deposit clause, the appellants also contend that clause 7.11 stands in the way of an order for specific performance. The trial judge did not directly address clause 7.11. In my view, clause 7.11 is intended to prevent registration of the contracts against title in the Land Title Office but it does not preclude an order for specific performance or registration of title to strata lots in the names of the respondents consequent to specific performance.

[33] In my view, there was no error in the trial judge's application of fundamental breach to support his order for specific performance.

Mutual Enforceability

[34] Finally, the appellants contend that the contracts are unenforceable because of an absence of mutual obligations. An enforceable contract requires binding obligations of both parties: ***Black Gavin & Co. Ltd. v. Cheung et al.*** (1980), 20 B.C.L.R. 21 (S.C.); and ***Murray McDermid Holdings Ltd. v. Thater*** (1982), 42 B.C.L.R. 119 (S.C.). The appellants submit that the effect of the deposit clause is that the vendors' only obligation on refusal

to complete is return of the deposit which would be required independently of the contracts as the result of a total failure of consideration for the deposit. The appellants concede that there are no Canadian cases that support this novel proposition but they rely on ***Busman v. Beeren & Barry Investments, LLC***, 69 Va. Cir. 375, 2005 WL 3476681 (Vir. Cir. Ct., 2005). In that case, a clause, in a property purchase contract limiting the purchaser's remedy to return of the deposit in the event of the vendor's default, was held to preclude the vendor from claiming damages on the purchaser's default because it eliminated any enforceable obligation on the part of the vendor. The Court noted that there was no obligation to pay interest on the deposit which would have been sufficient consideration to create an enforceable obligation. As the contracts here require payment of interest on the deposits, ***Busman*** is distinguishable on that narrow ground.

[35] The trial judge rejected the appellants' submission on mutuality, noting that the parties believed there was a binding agreement and acted on that belief to the extent that the appellants provided a legal opinion to the Canadian Western Bank that the contracts were legally binding, as of 1 June 2005. In my view, the deposit clause did not destroy the mutuality of the parties' obligations under the contracts and I agree with the trial judge that there is no merit in the appellants' submission on lack of mutuality.

[36] In the result, I am of the opinion that there are no grounds to disturb the order for specific performance in favour of all respondents. It is therefore unnecessary to address the estoppel issues or revisit the alternative claims against Mr. Kretschmer personally for negligent misrepresentation.

Costs of Real-Time Transcripts

[37] The appellants raise a costs issue if the appeal is otherwise unsuccessful. In supplemental reasons (indexed as 2007 BCSC 1772), the trial judge ordered that the appellants pay the respondents the expense of transcripts of real-time reporting of the evidence at trial. He rejected the claim for real-time reporting expense for pre-trial motions. The appellants contend that the trial judge failed to apply the correct test in awarding the real-time reporting expense at trial and his order should be set aside.

[38] The trial judge observed that real-time reporting has been regarded as a luxury for the benefit of counsel in some cases, but he did not think it so in the present case, because the respondents gave their evidence in rapid sequence, and it was a legitimate benefit to respondents' counsel and to the court, to compare the various versions of the evidence as the trial progressed.

[39] The appellants note that the trial involved 19 days of testimony from 17 witnesses followed by four days of oral argument after an 18 day break. Final written submissions were filed after a further interval. The appellants contend that comparisons between the "versions" of the various respondents were incidental as there were no allegations of joint representations to any group of the respondents, and the contentious aspect of the individual respondents' evidence was the conflict between their individual testimony and that of Mr. Kretschmer, who did not start his testimony until the 13th day of trial. There was no need to order transcripts on an expedited real-time basis.

[40] The general proposition on taxable disbursements is to be found in the reasons of McFarlane J.A. in ***Van Daele v. Van Daele*** (1983), 56 B.C.L.R. 178 (C.A.), at 180:

> The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred.

[41] In ***Roesner v. Roesner*** (1997), 32 B.C.L.R. (3d) 289 (S.C.), Registrar Wellburn followed ***Jamieson v. Jamieson*** (1980), 22 B.C.L.R. 11 (S.C. Chambers), and refused to allow a claim for trial transcripts. She observed (at para. 21):

> In my experience, trial transcripts are rarely claimed on a bill of costs except when there has been

> some significant controversy as to the evidence of a particular witness or where there has been a direction made by the trial judge which counsel need to have clarified. In those instances a portion of the transcript only is ordered.

[42] In my view, those observations apply with additional force to real-time transcripts.

[43] The respondents rely on ***C.(I.R.) v. C.(S.)***, 2005 BCSC 1640, 53 B.C.L.R. (4th) 339, aff'd 2006 BCCA 428, 57 B.C.L.R. (4th) 37, where a disbursement for real-time reporting was allowed. Madam Justice Boyd observed (at para. 27):

> I agree that in many cases, the ordering of real time reporting is a sheer luxury and ought not to be considered a necessity. However here, the real time reporting was of particular importance, since the outcome turned on a precise and extensive cross examination of each of the plaintiffs and a comparison of their individual accounts with those of the psychologist and each other. In my view, while counsel's longhand or computer trial notes of witnesses, other than the plaintiffs, were likely sufficient (particularly with two defence counsel in attendance), the ordering of real time reporting of each of the plaintiffs was indeed justifiable. The defendant will be entitled to real time reporting of the plaintiffs' evidence.

[44] Madam Justice Boyd's reasons highlight the exceptional nature of the circumstances in which a disbursement for real-time reporting is justified. She allowed only real-time reporting of particular witnesses whose precise evidence required close and careful comparison with other evidence. The circumstances in the case at bar did not meet that high standard of necessity. In my view, the trial judge erred in principle in allowing the cost of real-time reporting of the trial evidence and I would allow the appeal from that award.

[45] Otherwise, I would dismiss the appeal. As the respondents have been substantially successful, they should have the costs of the appeal.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Madam Justice Saunders"