IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Romfo v. 1216393 Ontario Inc.,***
2007 BCSC 1375

Date: 20070914
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 C.D. Martin
Counsel for the Defendants:	J.B. Rotstein
Date and Place of Trial:	April 23 to May 17, 2007 June 4 to June 7 2007 Written submissions July 9, 2007 Vancouver, B.C.

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I. INTRODUCTION

[1] In 2002, the plaintiffs - seven couples and one individual - entered into agreements to purchase lots from the two corporate defendants (whom I will refer to as the "vendors") in a subdivision to be created at Kalamalka Lake. The subdivision was called Crystal Waters. It is approximately 30 km north of Kelowna.

[2] In 2005, shortly before the subdivision was registered, the vendors notified the plaintiffs that they were canceling the contracts.

[3] This lawsuit is the result.

[4] The value of the lots increased substantially between the time the contracts were signed and the time the contracts were cancelled. The value continued to increase through to the time of trial. The vendors have signed

contracts with others for the sale of the lots in question at higher prices than those agreed to by the plaintiffs. Those sales have not closed because of certificates of pending litigation filed by the plaintiffs.

[5] The central issue is whether the defendants can rely on a clause in the contracts which purports to limit the purchasers' sole remedy to the return of their deposits.

[6] The relevant terms of the agreement are set out below at para. 31.

A. The positions of the parties

[7] The plaintiffs seek specific performance, or in the alternative, damages. The plaintiffs also claim against Mr. Kretschmer, the principal of Tylon Steepe Development Corporation, for negligent misrepresentation.

[8] The defendants argue that the contracts are not enforceable because there was no mutuality of obligations. This was the subject of an amendment on the eve of trial.

[9] The defendants have an alternative argument. If there are enforceable contracts the defendants concede that the vendors breached them. However, they say that a clause in the contracts allows the plaintiffs no remedy other than the return of their deposits. I will at times refer to this clause - 1.2(b)(iii) - as the "deposit clause".

[10] In answer, the plaintiffs argue that the contracts are enforceable. They say that the deposit clause does not apply to an intentional breach, which is what occurred here.

[11] If the deposit clause does, on its proper interpretation, apply to the vendors' breach, the plaintiffs say it should not be enforced on the basis of the following alternative arguments:

(a) the vendors are estopped from relying on the clause, or from canceling the contract, because of the representations made by Mr. Kretschmer, and the use the plaintiffs were allowed to make of the land after the contracts were signed;

(b) the deposit clause is a limitation clause and the vendors fundamentally beached the contract. It would be unfair, or unconscionable, to allow the defendants to rely on the deposit clause. The plaintiffs rely on the same factors set out in the previous paragraph regarding their estoppel argument; or

(c) the deposit clause is a penalty clause.

[12] The plaintiffs' position is that they were all intentionally led down the garden path by Mr. Kretschmer. They say that his company, Tylon Steepe, needed their contracts in order to secure bank financing and to meet its commitments to 1216393 Ontario Inc. ("Ontario Inc.") with respect to the purchase of the Crystal Waters land. Once the contracts were no longer needed for that purpose, the vendors cancelled the contracts so that they could obtain a higher price. Mr. Kretschmer had that plan in mind at the same time he was making the representations referred to above.

B. The summary trial ruling

[13] In October 2006, the defendants applied to have the actions dismissed in whole or in part. The plaintiffs filed cross-motions for judgment. I ruled in favour of the plaintiffs with respect to two legal arguments made by the defendants, but held that the main issues could only be decided after a full trial. (See ***Romfo v. 1216393 Ontario Inc.***, 2006 BCSC 1648).

[14] What I did decide in my ruling was that the filing of this action prior to the time for performance did not constitute an acceptance by the plaintiffs of the vendors' repudiation of the contracts. I reached the same conclusion with respect to some of the plaintiffs cashing the cheques in which their deposits were refunded. Therefore, the plaintiffs are not precluded from claiming specific performance or an interest in the land because of the timing of the filing of their actions or the cashing of the cheques.

II. FACTS COMMON TO ALL THE PLAINTIFFS' CLAIMS

[15] The defendant, Mr. Kretschmer, has been in the construction and development business in Alberta for his whole working life.

[16] Mr. Kretschmer came across the Crystal Waters site in 1998 when he was looking for a lakefront site for himself. The site - 8.67 acres in size - had not yet been subdivided.

[17] Mr. Kretschmer learned that the site was owned by Ontario Inc. and he contacted the company's owner, Mr. Ho, to discuss purchasing it. It was agreed that Mr. Kretschmer would investigate how he and Ontario Inc. could develop the land.

[18] At some point in 2000, Mr. Kretschmer submitted a development permit application to the District of Lake Country on behalf of Ontario Inc.

[19] In May 2000 the District of Lake Country approved the development permit application, subject to a number of conditions. The delay in meeting these conditions and getting the subdivision plan registered was the major factual backdrop of this litigation.

[20] In July of 2001, Mr. Kretschmer began advertising the Crystal Waters development with signage around Kalamalka Lake.

[21] On April 15, 2002, Tylon Steepe and Mr. Kretschmer, entered into a written agreement with Ontario Inc. to purchase Crystal Waters. The terms which are germane to this litigation are:

(a) The purchase price was $2,150,000. It was to be paid in the following manner:

(i) Tylon Steepe was to pay Ontario Inc. 33% of the sale proceeds of the strata lots;

(ii) the balance would be payable on July 8, 2003.

(b) A condition precedent for the benefit of both parties was that by July 8, 2002, contracts of sale would be entered into for an aggregate value of $4,576,640. This represented 80% of the projected sales revenue for the project, namely $5,720,800.

(c) The agreement was also subject to a condition precedent in favour of Tylon Steepe that it would obtain all governmental approvals by July 9, 2002, and that it would obtain mortgage financing for the project. Tylon Steepe was entitled to encumber the property with one or more mortgages up to the sum of $3,500,000.

(d) Tylon Steepe was to develop, construct, market and sell the lots.

(e) A number of provisions gave Ontario Inc. a measure of control of the project. For example, it had to approve the mortgage documents, all sales contracts and the use of mortgage proceeds.

[22] Mr. Kretschmer was the person responsible for managing the project on behalf of the vendors. Mr. Stephen Law managed Mr. Ho's interests. The plaintiffs' dealings were exclusively with Mr. Kretschmer, they had no contact with Mr. Ho or Mr. Law.

[23] On July 31, 2002, the vendors issued a disclosure statement for the development, as required by the ***Real Estate Act***, R.S.B.C. 1996, c. 397.

[24] At the time the disclosure statement was issued, the subdivision had not yet been approved or registered. That did not occur until January 2006.

[25] The disclosure statement stated that the vendors were planning on challenging a number of the conditions required by the District for the development permit.

[26] All of the lots, whether waterfront or not, had exclusive use of an assigned boat slip.

[27] All of the purchasers, with the exception of the Freys and Royers, learned of Crystal Waters from seeing the signs placed by Mr. Kretschmer. The Freys and Royers knew Mr. Kretschmer. They operated a plumbing

contracting business in Edmonton and had done work for Mr. Kretschmer's company. He told them of Crystal Waters.

[28] The plaintiffs entered into agreements with the vendors for the purchase and sale of strata lots between November 29, 2002 and September 10, 2003. The purchasers all had discussions with Mr. Kretschmer leading up to the signing of the agreements.

[29] Tylon Steepe hoped to build homes for as many of the purchasers as possible. Any purchaser who did so would receive a discounted lot price.

[30] The agreement for the purchase and sale of the lots was written by the vendors. It was in the format of an offer, with attached terms, to be signed by the purchasers and presented to the vendors for acceptance by them.

[31] The following are the relevant terms of the agreement:

> 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.
>
> 2.2 Right to Cancel - Purchaser: In addition to the Purchaser's right to cancel this Agreement pursuant to clause 7.1, if by August 15, 2003 (the "Cancellation Option Date") (or if a later date results from the application of clause 5.3, then by such later date), the Strata Plan has not been deposited for registration in the Land Title Office, then the purchaser will have the right to cancel this Agreement by giving written notice to the Vendor not later than 30 days following the Cancellation Option Date. In which case, the Agreement will be cancelled effective as of the date of receipt of the notice by the Vendor and there will be no further obligations as between the Vendor and the Purchaser.
>
> 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*].

...

5.3 Delay: If the Vendor is delayed from depositing the Strata Plan for registration in the Land Title Office or performing any other obligations herein as a result of fire, explosion, or accident howsoever caused, act of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour, materials or equipment, flood, earthquake, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage of other casualty, climatic conditions, interference of the Purchaser, or any other event beyond the reasonable control of the Vendor (other than lack of money), then the date set forth in clauses 2.2 and 2.3 and any date by which the Vendor must perform such obligations under the Agreement will be extended for a period equivalent to such period of delay.

[emphasis added]

…

7.3 Representations and Survival: There are no representations, warranties, conditions or contracts or collateral representations, warranties, conditions or contracts, express or implied, statutory or otherwise, or applicable hereto (including, without limitation arising out of any marketing material such as sales brochures representative view sets, model displays, show room displays, photographs, illustrations or renderings provided to the Purchaser or made available to the Purchaser for viewing) other than those contained herein or in the Disclosure Statement, all of which will survive the Completion Date, registration of the Transfer and payment of the Purchase Price.

…

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.

[32] The cancellation option date of August 15, 2003 in clauses 2.2. and 2.3 was the same for all of the plaintiffs with three exceptions. For the Freys and Mr. Perrella it was October 20, 2003, and for the Adamses it was November 30, 2003.

[33] The defendants place no reliance on clause 2.3, in part because the latter part of it is unintelligible. The clause appears to be an amalgam of previous drafts.

[34] The defendants also do not rely on clause 5.3 to extend the time for the performance of their obligations, although that was not so at the outset of the case. They *do* rely on it for the purpose of their argument regarding mutuality of obligations, which I will detail below. The limited reliance placed by the defendants on this clause and clause 2.3 confined the scope of their document production.

[35] From the time the contracts were signed though to the time when the vendors terminated the contracts, the plaintiffs had continuing visits and telephone conversations with Mr. Kretschmer. These will be dealt with in depth later in these reasons.

[36] The plaintiffs were also allowed access to the development site. Some of them picnicked on the beach and some of them launched boats from the site. The beach was a public one, but the plaintiffs gained access to it from the Crystal Waters site with Mr. Kretschmer's authorization.

[37] On February 18, 2003, the vendors amended the disclosure statement to disclose their financing

arrangements with Canadian Western Bank. A term of the financing was that the loan would be repaid by October 15, 2003. Mr. Kretschmer testified that when applying for the loan he advised the Canadian Western Bank that the subdivision would be registered and the strata lots transferred by October 15, 2003.

[38] In April 2003, the vendors sued Randall Rose, the administrator of the District of Lake Country, alleging wrongful interference with contractual relations. Beyond commencing the action, no steps have been taken in the litigation.

[39] In December 2003, the vendors sued the District of Lake Country and a number of its officers or employees, including Mr. Rose, alleging abuse of public office, interference with economic relations and negligence. No steps have been taken in the litigation beyond the issuance of the writ.

[40] In February 2004 the vendors made arrangements with Burton Marine to supply boat lifts to the lot purchasers at what was considered by Mr. Kretschmer to be an advantageous price. Mr. Kretschmer sent an information package to the lot purchasers explaining the arrangement. The package contained an order form for the lift made out to Tylon Steepe. A 50% deposit was required for the order. Four of the plaintiff families - the Cunninghams, Fairweathers, Romfos and Carlsons - purchased boat lifts and installed them in the moorage sites assigned to their lots-to-be. After the vendors cancelled the contract, they refunded the moneys expended by the plaintiffs.

[41] In April 2004 the vendors filed a petition against the Minister of Transportation and Mike Reiley (the District's approving officer) with respect to the authority of the respondents to require improvements facilitating public access to the water. This has not proceeded to a hearing.

[42] The first contract terminated by the vendors was the Adamses' contract. This was done in a letter from the vendors' solicitors on July 16, 2004. The letter said, in part:

> In accordance with paragraph 2.3, this will confirm the Vendor has not been able to register the Strata Plan in the Land Title Office by reason of an act of the governmental authority in the area in which the land is situate which is beyond the reasonable control of the Vendor.
>
> The Vendor, therefore, is exercising its right to cancel this Agreement by giving your [*sic*] ten (10) days written notice. The Agreement will be cancelled effective as of the date of receipt of this notice. Thereafter, the Vendor has agreed to repay you all amounts paid under 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 you.

[43] As I indicated above, the cancellation option date for the Adamses' contract under clauses 2.2 and 2.3 was November 30, 2003. As I also noted above, the vendors do not say that the cancellation time was extended by virtue of clause 5.3. The cancellation was therefore too late. The defendants acknowledge that it was a nullity. The same applies with respect to the subsequent cancellations for all of the other plaintiffs.

[44] In cross-examination, Mr. Kretschmer said the real reason he terminated the Adamses' contract was because he learned that they were seeking to assign the contract. Mr. Kretschmer did not want any of the purchasers to speculate on their contracts.

[45] On November 1, 2004, Mr. Kretschmer, Tylon Steepe and Ontario Inc. amended their contract. The purchase price was increased by $1,000,000. A further term of the addendum was that Tylon Steepe and Mr. Kretschmer begin paying to Ontario Inc. $20,000 a month on account of the purchase price.

[46] On January 17, 2005, the Provincial Government issued a Certificate of Public Convenience and Necessity ("CPCN") to Kal Pine Water Utility Ltd. The CPCN was required for the construction of the water line to Crystal Waters.

[47] On February 1, 2005, the vendors applied for subdivision approval. Mr. Kretschmer testified that the application was complete and he expected it to be approved.

[48] In fact, the application was deficient as a number of matters remained outstanding. The water line had not been constructed and the development cost charges had not been provided to the District by the vendors. Mr. Kretschmer took the position that development cost charges ought to be based on 1998 land values.

[49] Mr. Reiley discussed the problems with the application with Mr. Kretschmer. He told Mr. Kretschmer that the vendors could correct the deficiencies. Mr. Kretschmer declined to do this and asked the District to put its position in writing.

[50] On April 1, 2005, the District issued a formal refusal of the vendors' application for subdivision approval, listing the above-mentioned outstanding matters.

[51] In mid-April 2005, Mr. Kretschmer and Mr. Ho met to discuss the District's refusal letter. Mr. Kretschmer's evidence is that they did not discuss terminating the contracts; rather, he says, they discussed "walking away from the development". I will return to this below at para. 200.

[52] On April 19, 2005, the vendors began to address correcting the deficiencies listed in the District's refusal letter by applying for a development variance permit. Mr. Kretschmer's evidence is that it was his intention to get subdivision approval after he received the refusal letter and that he was doing everything he could reach that goal.

[53] On May 17, 2005, the District approved the vendors' application for a development permit.

[54] On May 19, 2005, Mr. Law emailed Mr. Ho to advise him that all items in the refusal letter had been complied with except the water line. It was estimated that the water line would take two weeks to construct.

[55] Around this time, the vendors began discussions with the Prospera Credit Union about re-financing the project. Whether the vendors required additional financing to complete the water line was a point of contention.

[56] On May 19, 2005, Prospera provided Mr. Kretschmer with an expression of interest, which set out the financing it was willing to provide the vendors. This was a loan of $3,900,000. The term was six months. Repayment was to come from the net sale proceeds of the pre-sold lot sales.

[57] Although denied by Mr. Kretschmer, it appears clear to me that on May 24, 2005, the vendors defaulted on two loan payments to the Canadian Western Bank. The amount outstanding was $32,000.

[58] In May 2005 Mr. Kretschmer telephoned Mr. Romfo and advised him that the vendors were terminating his contract.

[59] On June 1, 2005, the Canadian Western Bank indicated that it was prepared to increase the vendors' loan by an additional $225,000, with a new maturity date of August 31, 2005. As a condition of the amendment, the vendors were required to provide an opinion stating that the sales contracts were still legally binding.

[60] On June 10, 2005, the vendors issued a further amended disclosure statement. Appended to it was a new form of contract, which was ultimately presented to some, but not all, of the purchasers, once the contracts were terminated.

[61] In June 2005, the vendors switched their financing to Prospera. On June 23, 2005, Prospera approved a loan for the vendors in the amount of $4,000,000. The loan included $134,000 for the water line and $335,000 for provincial and district fees. Repayment of the loan was to be "in full from the net sale proceeds of lot sales ... not later than December 31, 2005". A requirement of the loan was that the vendors would assign the purchase and sale agreements to Prospera as security.

[62] On July 6, 2005, Ontario Inc., Tylon Steepe and Mr. Kretschmer made a further addendum to their agreement. The amendment allowed Tylon Steepe and Mr. Kretschmer to increase the price of the strata lots.

[63] On August 15, 2005, Mr. Kretschmer emailed Mr. Ho and Mr. Law, and advised them that he was ready to re-submit the application for subdivision approval to the District.

[64] The vendors' solicitors wrote letters dated August 17 and 18, 2005, terminating the contracts with the plaintiffs other than the Adamses (whose contract had already terminated). However, as will be seen below, these letters were sent out considerably later. The letters were identical to the one sent to the Adamses, quoted above at para. 42.

[65] As I have said above, the defendants no longer rely on clauses 2.3 or 5.1 and say the cancellation letters were a nullity. In cross-examination, Mr. Kretschmer conceded that the reason the contracts were cancelled was that the vendors wanted more money for the lots, and Mr. Kretschmer wanted to have the exclusive right to build the purchasers' homes.

[66] With the exception of the Romfos, Adamses and Carlsons, the plaintiffs were offered the lots at higher prices and were given the revised agreement form that was appended to the June 10, 2006, further amended disclosure statement.

[67] Mr. Kretschmer stated that the new price was meant to represent an equal sharing of the increased value in the lot between the vendors and the plaintiffs. In other words, Mr. Kretschmer assumed a current market value and split the difference between it and the original contract price between the vendors and purchasers.

[68] With respect to the form of the new agreement, there were two main substantive changes, apart from the change in price. The first required purchasers to have Tylon Steepe build their homes. No price for construction was set out in the contract, nor was any formula to arrive at a price. The agreement required a purchaser to sell the lot back to the vendors at the original purchase price if the purchaser did not have Tylon Steepe build its home. The second change was that the lots could not be re-sold by the purchasers until after they had built on them.

[69] The revised agreements were presented to the plaintiffs as a take it or leave it proposition.

[70] On December 13, 2005, the subdivision plan was approved by the District.

[71] On January 16, 2006, the subdivision plan was registered in the Land Title Office.

[72] One factual issue which I have not determined is when the vendors made the decision to terminate the contracts. I will return to that below in section IV.B.

III. EVIDENCE AND FACTS WITH RESPECT TO THE INDIVIDUAL PLAINTIFFS

A. The Cunninghams

[73] The Cunninghams and the vendors signed the contract for the purchase and sale of lot 5 in November 2002. The purchase price was $318,700. The cancellation option date in clause 2 of their contract was August 15, 2003. The lot was a lakefront property.

[74] Shortly after the August 15, 2003, cancellation option date, Mr. Cunningham asked Mr. Kretschmer for an assurance that the vendors would not "collapse" the contract. According to Mr. Cunningham, Mr. Kretschmer replied:

> … we’re not going to collapse the contracts; we’re going to hang in there with you people. … I know everybody that’s coming down to the subdivision. We’ve got a great mix of people, and I look forward to having them as neighbours.

[75] Mr. Kretschmer denied having said that. As will be seen below, a number of other plaintiffs alleged that Mr. Kretschmer made similar statements to them. I will return to resolve this factual issue for all of the defendants in section IV.A below.

[76] At the same time, Mr. Cunningham advised Mr. Kretschmer that he was considering selling his home in Enderby. Mr. Kretschmer advised Mr. Cunningham that that was premature, because the subdivision had not yet been approved.

[77] At some point in 2003 - it is not clear whether it was in the same conversation outlined in the previous paragraphs - Mr. Kretschmer told Mr. Cunningham that the subdivision would be registered "fairly soon".

[78] Mr. Kretschmer does not deny that the 2003 conversation(s) took place, but denies that he told Mr. Cunningham that the vendors would not cancel his contract. (He made the same denial with respect to the other plaintiffs who gave evidence as to similar conversations with him).

[79] In June 2004, Mr. Cunningham says that he again asked Mr. Kretschmer whether the vendors would collapse his contract. He says that Mr. Kretschmer informed him that the subdivision had not yet been approved, but that the vendors would not collapse the contract. Mr. Cunningham said that he could not remember whether Mr. Kretschmer told him again at this point that it was premature to sell his home.

[80] In August of 2004, Mr. Cunningham inquired about the status of the development and Mr. Kretschmer told him that the subdivision would be approved and registered in September or October of 2004.

[81] The Cunninghams wanted to use the monies from the sale of their Enderby home to complete the purchase of the lot and the construction of a home on it. They signed an agreement to sell their home in August 2004, with a completion date in November 2004.

[82] In December of 2004, Mr. Cunningham discussed the purchase of a boat lift with Mr. Kretschmer. Mr. Cunningham expressed concern to Mr. Kretschmer that he was soliciting a $10,000 expenditure on a boat lift, and the subdivision had yet to be approved. Mr. Kretschmer told Mr. Cunningham that he should not worry about the money because the vendors were going to complete the contract and Mr. Cunningham would get lot 5.

[83] In October 2005, Mr. Kretschmer telephoned Mr. Cunningham to ask Mr. Cunningham and his wife to come for a meeting at his office. The meeting took place the following day. Mr. Kretschmer told the Cunninghams that he "had to mitigate because of his lawsuits against the District". He therefore, needed to raise the price of the lot to $625,000. Mr. Cunningham was both devastated and angry. He said he would have to get legal advice.

[84] In the late fall of 2005, Mr. Cunningham received the termination letter from the vendors' solicitor, Mr. Salloum. It was dated August 18, 2005. The letter had been sent to the wrong address. The content of the letter was identical to that received by the Adamses, quoted above.

[85] At some point in time after receiving this letter - but still in the late fall - the Cunninghams received a letter from Mr. Kretschmer dated August 25, 2005. This letter was addressed to the correct address. The letter contained a new disclosure statement and stated in part, that:

> For a limited time period of one week from when you receive this package, we are offering you a substantially discounted pricing (from current market value) for the lot that you are interested in. We have enclosed a new offer to purchase agreement with the discount lot pricing filled in. Please read the disclosure statement and the agreement thoroughly. If your intention is to accept this offer then execute the agreements and return all the agreements to our Kelowna office listed above within a week of receiving this package.

The purchase price was $625,000. The agreement contained the obligation of the Cunninghams to use Tylon Steepe as the builder, as referred to above.

[86] After the Cunninghams received the letter, Mr. Cunningham had some discussions with Mr. Kretschmer regarding the possibility of purchasing other lots. Mr. Kretschmer told him there were lots that other purchasers had "walked away from". Mr. Cunningham hoped he might be able to purchase one of those at the price that was originally offered to those individuals. Although he did not say, presumably Mr. Cunningham was referring to the new and increased price of the lots because he expressed an interest in the lot that Mr. Fairweather had contracted to buy. That was a less expensive lot than the one the Cunninghams had contracted for, since the Fairweather lot was not a waterfront property.

[87] Mr. Cunningham looked at the lot and then telephoned the Fairweathers to verify they were walking away from it. Mr. Fairweather said that was not the case. Mr. Cunningham then telephoned Mr. Kretschmer and told him he did not want the lot.

[88] Mr. Cunningham said that if he had known that the vendors were going to cancel his contract he would not have sold their Enderby home and would have looked for alternative properties on Kalamalka Lake. The Cunninghams say they cannot afford similar waterfront property because of the increase in market prices.

[89] The value of lot 5 as at February 14, 2007 was $1,230,000.

B. The Fairweathers

[90] The Fairweathers and the vendors signed the contract for the purchase and sale of lot 22 in November 2002. The Fairweathers obtained legal advice before signing the contract. The cancellation option date in clause 2 of their contract was August 15, 2003. The purchase price was $214,700.

[91] Mr. Fairweather and Mr. Kretschmer became friends because of their mutual love of water-skiing. They had frequent discussions about the difficulties Mr. Kretschmer was having with the District. Mr. Fairweather attended at

least one of the meetings of the District with Mr. Kretschmer.

[92] In March of 2003, Mr. Fairweather telephoned Mr. Kretschmer and inquired about the status of the subdivision. Mr. Kretschmer told Mr. Fairweather they would be building homes on the subdivision by the fall. Mr. Kretschmer told Mr. Fairweather that once the subdivision approval was received things would move quickly and that, pursuant to the contract, Mr. Fairweather would need to have his funds available to complete the sale.

[93] The following day, Mr. Fairweather called Mr. Kretschmer again and advised him that he was considering selling his home on Lake Okanogan in order to finance the purchase of the Crystal Waters lot. He asked Mr. Kretschmer about the vendors' intent with respect to the August 15, 2003, cancellation date. Mr. Fairweather said Mr. Kretschmer replied:

> … we're not going to enact that clause at all. He said, we like everybody there; I've hand-picked everyone, and we're going through with the project.

Mr. Fairweather says that Mr. Kretschmer told him that it was "somewhat premature" to sell his home, because Mr. Kretschmer did not yet have a lot to sell.

[94] In August 2003, Mr. Fairweather advised Mr. Kretschmer that he had no offers on his Lake Okanogan home and inquired about the status of the development and whether the vendors would cancel the contracts. Mr. Kretschmer told Mr. Fairweather that the contract would not be cancelled.

[95] On August 23, 2003, Mr. Fairweather received an offer on the Okanogan Lake house and had a second conversation with Mr. Kretschmer. In that conversation, Mr. Kretschmer confirmed that the subdivision would be completed and building should commence in October-November 2003.

[96] Mr. Kretschmer's evidence regarding his conversations with Mr. Fairweather about the sale of the Fairweathers' home is unclear. He did say that he had a conversation in spring 2003 with Mr. Fairweather where Mr. Fairweather informed him that he would be selling his Vernon home at some point in time. He says he made no comment on the timing.

[97] Mr. Kretschmer also testified that he discussed the topic with Mr. Fairweather sometime around September 2003. He says he told Mr. Fairweather:

> Do you think this is not premature, because I can't supply you with a lot. So if you're looking to build on Crystal Waters right away, you know, I can't supply you with the lot -- lot to do that. So, you know, I have to give you the same answer I gave the Romfos: as the developer, I'm telling you that it's probably a premature decision, but the decision is yours to make on your own.

[98] The Fairweathers accepted the offer to sell their home with a completion date of October 2003.

[99] Following the sale of their home, the Fairweathers consulted with Mr. Kretschmer about the design and construction of a home on lot 22.

[100] In October of 2004, Mr. Fairweather discussed the purchase of a boat lift with Mr. Kretschmer. Mr. Kretschmer assured Mr. Fairweather that he was going to get lot 22, and, as a result, the Fairweathers purchased the boat lift.

[101] Mr. Fairweather testified that in fall of 2004 Mr. Kretschmer told him that Mr. Kretschmer was getting pressure from Mr. Ho to cancel all the contracts. Mr. Kretschmer told Mr. Fairweather that he would not allow the contracts to be cancelled.

[102] In May 2005, Mr. Kretschmer again told Mr. Fairweather that Mr. Ho was pressuring him to collapse all the contracts. Mr. Fairweather says that Mr. Kretschmer assured Mr. Fairweather that his contract would not be cancelled.

[103] In early June 2005, Mr. Fairweather met Mr. Kretschmer on the site. Mr. Kretschmer told him the vendors had made the decision to terminate all of the contracts and increase the prices.

[104] Near the end of June 2005, Mr. Kretschmer met with Mr. Fairweather and told him the increased price would be $274,900. He asked Mr. Fairweather to make up his mind within a couple of weeks.

[105] Some weeks later the Fairweathers decided to pay the increased price and telephoned Mr. Kretschmer to arrange for him to come to their house so they could sign a new contract. Mr. Fairweather's assumption was that the new contract would be the same as the original one, save for the increased price.

[106] Mr. Kretschmer came by the Fairweathers' house with the new agreement. Mr. Fairweather read through it and to his dismay noted the clauses requiring the lot to be built on before it could be sold and the requirement to use Tylon Steepe as the builder. He expressed his concern to Mr. Kretschmer, and said he would have to consider his options.

[107] The Fairweathers chose not sign the new agreement. They received a letter of cancellation from Mr. Salloum, and in December 2005 their deposit was returned to them.

[108] The Fairweathers said that if they had known that the vendors were going to cancel their contract they would not have sold their Okanogan Lake home and would have looked for an alternative property to purchase. They are now living in a modular home they purchased. It is on leased land in an area nearby Crystal Waters. They cannot afford property either similar to the one they sold, or similar to the one they contracted to buy, because of the increase in prices.

[109] Mr. Kretschmer denies that he ever told Mr. Fairweather that his contract would not be cancelled.

[110] The value of the lot the Fairweathers were to buy was $500,000 as at February 14, 2007.

C. The Romfos

[111] The Romfos and the vendors signed the contract for the purchase and sale of lot 2 in November 2002. The cancellation option date in clause 2 of their contract was August 15, 2003. The purchase price for the lot was $294,700. It was a waterfront lot.

[112] The Romfos received legal advice before signing the contract.

[113] In August of 2003, Mr. Romfo met with Mr. Kretschmer and advised him that he was contemplating selling his Vernon home. Mr. Romfo asked Mr. Kretschmer if the vendors were going to cancel his contract. Mr. Romfo says that Mr. Kretschmer told him that the vendors were not going to cancel his contract, and that they would be "pounding nails" in the fall of 2003. Mr. Kretschmer denies that he said that. He said he told Mr. Romfo that if Mr. Romfo was expecting to get a lot and start building right away it was premature to sell his house. Mr. Romfo denies that.

[114] The Romfos received an offer to purchase their Vernon home and accepted it on August 26, 2003, for a completion date of January 29, 2004.

[115] After the sale of their home, the Romfos moved into a rental home. The Romfos put the sale proceeds of the Vernon home into a short-term investment so that the money would be available for the construction of their new home.

[116] Following the signing of the agreement, the Romfos had meetings with Mr. Kretschmer about the design and construction of the home. Mr. Kretschmer prepared line drawings of the home.

[117] In November 2004, Mr. Romfo purchased a boat lift. Mr. Romfo had expressed his concern about the expenditure. He says Mr. Kretschmer replied that if the subdivision was not approved Mr. Romfo would own a boat lift.

[118] In March 2005, Mr. Kretschmer told Mr. Romfo that he was receiving pressure from Mr. Ho to cancel the contracts, but Mr. Kretschmer assured Mr. Romfo that the vendors would not do that.

[119] In May 2005, Mr Kretschmer telephoned Mr. Romfo and told him that the vendors were cancelling their contract with him.

[120] A termination letter followed in August 2005, followed by the return of the Romfos' deposit and the money paid for the boat lift. The Romfos' were not given the opportunity to acquire the lot at a higher price.

[121] The Romfos' evidence was that if they had known that the vendors were going to cancel their contract they

would not have sold their Vernon home and would have looked for alternative properties. They are now out of the market for similar properties because of the increase in land prices.

[122] The value of lot 2 as at February 14, 2007 was $1,090,000.

D. The Carlsons

[123] The Carlsons' offer to purchase lot 7 was accepted by the vendors on January 2003. The cancellation option date in clause 2 of their contract was August 15, 2003. The purchase price for this waterfront lot was $315,700.

[124] The Carlsons obtained legal advice prior to signing the agreement. They were told, amongst other things, that if the vendors failed to comply with their legal obligations, clause 1.2(b)(iii) of the agreement, the deposit clause, limited their rights to the return of their deposit.

[125] In January 2003, Mr. Kretschmer advised Mr. Carlson that construction of homes on Crystal Waters would begin in the summer of 2003, and that he should have his cash available in order to complete the purchase of lot 7. Mr. Carlson kept his cash liquid rather than investing it in a building project with his brother.

[126] In December 2004, Mr. Carlson purchased a boat lift. Mr. Carlson was not told that he would get his money back if the subdivision did not occur.

[127] In December 2004, or early January 2005, Mr. Kretschmer told Mr. Carlson that the subdivision would be registered in short order and that Mr. Carlson should have his funds ready to close on lot 7.

[128] On May 28, 2005, Mr. Kretschmer telephoned Mr. Carlson and told him he was concerned about the delays that the vendors had experienced. He said that the vendors were $1,000,000 in the hole and were trying to come up with ways to make that up. Mr. Carlson says that Mr. Kretschmer told him that the vendors could cancel the contracts, but he was not going to let that happen because the purchasers had held on so long; the vendors were trying to come up with a way of raising funds. Contradictorily, Mr. Kretschmer went on to say that the vendors were considering cancelling the contracts and asking the purchasers to sign new contracts at increased prices. The new price would be arrived at by splitting the difference between the original contract price and the current lot values between the parties and the vendors.

[129] In the third week of August 2005, the Carlsons were on the Crystal Waters property and met Mr. Kretschmer. He told them that the vendors had made the decision to cancel the contracts. When they returned home a cancellation letter, dated August 17, 2005, was waiting for them. The deposit and boat lift payments were returned to the Carlsons later. Unlike many of the other plaintiffs, they were not offered the option to acquire the lot at a higher price.

[130] The Carlsons' evidence was that if they had known that the vendors were going to cancel their contract they would have bought another lot on Kalamalka Lake, not purchased the boat lift, and would have invested their monies (which were being held to complete their purchase) differently.

[131] The value of lot 7 as at February 14, 2007 was $1,235,000.

E. The Royers

[132] The Royers and the vendors signed the contract for the purchase and sale of lot 1, a waterfront lot, in November 2002. The price was $245,700. The cancellation option date in clause 2 of their contract was August 15, 2003.

[133] In August 2003, Mr. Kretschmer advised the Royers that the subdivision would be registered in September or October 2003. Mr. Kretschmer reminded the Royers that once the subdivision was registered they would have 10 days to pay the balance of the purchase price.

[134] In April 2004, the Royers considered purchasing a new home in Edmonton, but elected not to because they needed the money they would have spent to do so, to complete the purchase of lot 1.

[135] In August or September 2004, Mr. Kretschmer advised the Royers that the strata plan would be registered shortly and that they should get their financing in order to complete the purchase of lot 1. The Royers arranged financing with the Alberta Treasury Branch. They incurred a $150 cost. Mr. Kretschmer assisted them in obtaining the financing by providing them with an appraisal report.

[136] In May 2005, the Royers met with Mr. Kretschmer at a restaurant in Kelowna. Mr. Kretschmer referred to the difficulties he was having with the District, but he said he expected the subdivision would be registered in three to four weeks.

[137] Mrs. Royer testified that at that meeting Mr. Kretschmer assured them that their contract would not be cancelled. She did not give that evidence in her discovery when asked to exhaust her memory of the meeting.

[138] Mr. Royer said that at the May 2005 meeting, the assurance given by Mr. Kretschmer was that the registration of the subdivision would take place. In his mind that was an assurance that the vendors would complete his contract once the subdivision was registered.

[139] In June 2005 Mr. Kretschmer and Mr. Royer spoke on the telephone. Mr. Kretschmer told Mr. Royer that Mr. Ho wanted to cancel the contract. Mr. Royer said that Mr. Kretschmer assured him he had nothing to worry about.

[140] On August 24, 2005, Mr. Kretschmer telephoned Mr. Royer and informed him the vendors were cancelling the contract. Mr. Kretschmer said that the Royers might be able to buy another lot, lot 20, for a price around $276,000. Lot 20 was not on the waterfront. It was left that Mr. Kretschmer would send an information package to Mr. Royer.

[141] In September 2005 the Royers received a letter from Mr. Kretschmer with a new contract for lot 1 for a revised price of $598,700. As with the Cunninghams, the vendors requested a response within a week. Neither party followed up on the discussion regarding the possible purchase of lot 20.

[142] The Royers replied through their lawyer rejecting the offer and stating that they expected the vendors to convey the lot at the original price.

[143] The Royers received a letter dated October 6, 2005, terminating their contract.

[144] The Royers' evidence was that if they had known that the vendors were going to cancel their contract they might have purchased another home in Edmonton or invested their money differently. They may have looked for alternative recreational property.

[145] The value of lot 1 as at February 14, 2007 is $1,010,000.

F. David Perrella

[146] Mr. Perrella's contract for the purchase of lot 14 was executed in August 2003. It was not a waterfront lot. The price was $208,700. The cancellation option date in clause 2 of Mr. Perrella's contract was October 20, 2003.

[147] Prior to signing the contract, Mr. Perrella was told that the expected date for the completion of the subdivision was October 2003.

[148] As the cancellation option date approached in October 2003, Mr. Perrella spoke to Mr. Kretschmer to inquire about the development's status. He did this because if it appeared that the project was not going to go ahead, he would have exercised his right to terminate the contract and looked at alternative recreational property.

[149] Mr. Kretschmer told him that he thought the subdivision would be registered soon, but there would be a bit of a delay beyond the October 30, 2003, date. He said he was planning on sending letters to the purchasers informing them of the delay. This was not done.

[150] In February 2004, Mr. Perrella again inquired about the status of the development. Mr. Kretschmer assured Mr. Perrella that the subdivision would be registered in two to three weeks.

[151] In the summer of 2004, Mr. Perrella met Mr. Kretschmer at the Crystal Waters site. At the meeting, Mr. Kretschmer advised Mr. Perrella that the vendors had the right to cancel all the contracts. However, he went on to

say that the vendors were only going to cancel the contract of a particular purchaser who was trying to sell their lot. (That turned out to be the Adamses). Mr. Kretschmer admits that the conversation took place, but again denies that he discussed cancellation of Mr. Perrella's contract.

[152] Some time in August 2005, Mr. Kretschmer telephoned Mr. Perrella and advised him that the vendors had decided to terminate the contract and offer the lot to him at an increased price.

[153] On September 14, 2005, Mr. Perrella received a package containing the letter of termination, dated August 18, 2005, and the letter attaching the revised form of contract, dated August 31, 2005. The new price was $252,700.

[154] Mr. Perrella telephoned Mr. Kretschmer and told him he could not sign the new offer both because of the price and the revised terms.

[155] Mr. Perrella's deposit was returned to him.

[156] Mr. Perrella testified that if he had known that the vendors were going to cancel his contract he would have looked for an alternative lakefront property with the intention of purchasing, but he acknowledged that was primarily related to the time around the October 2003 cancellation option date.

[157] The value of lot 14 as at February 14, 2007 is $450,000.

G.The Freys

[158] The Freys' offer to purchase lot 11, a non-waterfront property, was accepted by the vendors on July 8, 2003. The price was $139,700. The cancellation option date in clause 2 of the Frey contract was October 20, 2003.

[159] Ms. Shellian-Frey testified that she had several telephone conversations with Mr. Kretschmer in which she raised the issue of the status of the subdivision. These conversations took place when Mr. Kretschmer called to speak to her husband. (As mentioned above, the Freys and the Royers owned a plumbing business, which did work for Mr. Kretschmer's construction company in Alberta). She could not remember the dates of the conversations. She said Mr. Kretschmer consistently said that the District was causing delays, but that the subdivision would be registered "pretty soon", and that they should have their money ready in order to complete.

[160] Mr. Frey testified to similar conversations with Mr. Kretschmer, also on unspecified dates, where Mr. Kretschmer said words to the effect that the approval of the subdivision was around the corner.

[161] Shortly after executing the contract, the Freys had their home appraised to secure financing with the Alberta Treasury Branch for the purpose of taking out a mortgage to finance the purchase of their lot and the construction of a home on it.

[162] The Freys do not say that Mr Kretschmer represented that the vendors would not cancel their contract.

[163] Mr. Kretschmer did not give the Freys any advance notification of the cancellation, which came in a letter from the vendors' solicitor. Although that letter was dated August 18, 2005, the Freys did not receive it until September or October, 2005.

[164] Shortly after that, the Freys received a letter from Tylon Steepe offering them lot 11 at an increased price of $184,700. The revised contract was enclosed. They declined to sign it, and their lawyers wrote to the vendors stating that they expected them to live up to the terms of their contract and convey the lot at the original price.

[165] The Freys testified that had they not signed the contract for Crystal Waters and thought throughout that the purchase would be completed, they would have actively looked for and hopefully purchased property elsewhere.

[166] The value of lot 11 as at February 14, 2007 is $310,000.

H. The Adamses

[167] The Adamses entered into their contract with the vendors for the purchase of lot 33 on September 10,

2003. Lot 33 was not on the waterfront. The price was $172,700. The cancellation option date in their contract was November 30, 2003.

[168] At the time the contract was entered into, Mr. Kretschmer told the Adamses that the subdivision would be registered in October 2003, and that the construction of homes could begin in the spring of 2004.

[169] The Adamses had a number of discussions with Mr. Kretschmer about the construction of their home on lot 33. Mrs. Adams advised Mr. Kretschmer that they were considering speculating on a piece of property in Oyama in order to raise funds for the construction of their home on Crystal Waters. Mr. Kretschmer said the timing sounded fine.

[170] In June 2004, the Adamses realized that the price of real estate was rising and that the subdivision had been delayed. They decided to attempt to assign their contract and they advertised the lot on the internet. Mr Adams told Mr. Kretschmer that he and his wife wanted to sell their interest in the lot. Mr. Kretschmer offered to buy the contract back for the original price, which Mr. Adams refused. Mr. Kretschmer was displeased at the Adamses trying to make a profit on the contract and decided to cancel their contract.

[171] On July 15, 2004, the vendors' solicitor wrote to the Adamses terminating their contract. The letter is fully set out above at para. 42.

[172] The Adamses said that if they had known that Mr. Kretschmer was going to cancel their contract, they would have purchased an alternative property on Kalamalka Lake or other waterfront property. However, in July 2003 they had sold another piece of waterfront property they owned and it is noteworthy that the lot they bought at Crystal Waters was not on the waterfront. Further, in 2004 the Adamses bought another lot across the street from the water.

[173] The value of lot 33 as at February 14, 2007 was $350,000.

IV. CREDIBILITY AND FACTUAL FINDINGS

[174] I turn now to the two factual matters which I said above that I would return to. The first is whether Mr. Kretschmer told the Cunninghams, Fairweathers, Romfos, Carlsons, Royers and Mr. Perrella that he would not cancel their contracts as they say he did. The second is when the vendors made the determination to cancel the contracts. It is convenient to do that now before returning to an examination of the plaintiffs' claims on an individual basis.

A. Did Mr. Kretschmer tell the Cunninghams, Fairweathers, Romfos, Carlsons, Royers and Mr. Perrella that the vendors would not collapse or cancel the contracts?

[175] I will deal first with the issue of whether or not Mr. Kretschmer told the Cunninghams, Fairweathers, Romfos, Carlsons, Royers and Mr. Perrella that he would not collapse or cancel the contracts.

[176] For reasons that follow, I accept the plaintiffs' evidence on this point and do not accept Mr. Kretschmer's denial.

[177] I start by noting that it is understandable that the purchasers would be extraordinarily anxious as to the status of the subdivision process since the disclosure statement made it clear that the vendors were having a dispute with the District regarding the necessary approvals.

[178] It is perfectly logical that the plaintiffs would also seek an assurance that their contracts would not be terminated under clauses 2.2 and 5.3. It is one thing for the plaintiffs to understand and accept that there might be a delay in the District or other governmental authority granting the necessary approvals for the subdivision, or the possibility that no approval would be forthcoming at <u>any</u> time. It is quite another for them to accept the risk that the vendors could terminate the contract and simply return their deposits as a result of a delayed registration.

[179] Mr. Kretschmer does not deny that he was asked by the plaintiffs on many occasions as to the progress of the development and when they could start building their homes. He also does not deny that he was told by several of the plaintiffs that they were contemplating selling their homes.

[180] The fact that all of them "hung in there" (to use Mr. Kretschmer's terminology) until their contracts were terminated is consistent with Mr. Kretschmer having given the assurances the plaintiffs allege.

[181] The purchase of the boat lifts by the Cunninghams, Fairweathers and Romfos in October and November 2004 - a date well past the specified cancellation option dates in clause 2.2 - is also consistent with Mr. Kretschmer having given the plaintiffs an assurance that the contract would not be cancelled.

[182] I find that Mr. Kretschmer's evidence was not credible in other important areas of his testimony. For example:

(a) he denied that work was halted on the water line in May 2005 due to there being no room left on the line of credit with which to finance it. That was clearly contradicted by the documents.

(b) He stated that a representative of Canadian Western Bank suggested that he cancel the contracts with the plaintiffs in order to realize a higher price. That was again contradicted by a document.

(c) It was put to him that the $1,000,000 increase in Tylon Steepe's purchase price from Mr. Ho in November 2004 increased his costs by that amount. He denied that suggestion with an incomprehensible answer.

[183] The defendants' document production also detracts from Mr. Kretschmer's credibility, as I will explain.

[184] Document production was a contentious issue throughout this litigation, which was case-managed by me. It remained so through to the end of trial.

[185] The defendants originally relied on their ability to extend the cancellation option date by invoking clause 5.2 on the basis of governmental delay. When faced with a motion to produce all of the documents surrounding the vendors' dealings with the District, the defendants abandoned this portion of their defence and took the position that these documents were no longer relevant. On that basis I declined to order their production. However, at trial Mr. Kretschmer adduced nine documents concerning his dealings with the District. These were culled by Mr. Kretschmer himself from some 28 boxes of documents, in what he acknowledged was an effort to bolster the defendants' case.

[186] Further, the defendants had been ordered to produce all documents concerning the dealings between Tylon Steepe, Ontario Inc., Mr. Ho and Mr. Law. Virtually no such documents were produced.

[187] Mr. Kretschmer testified that there was very little correspondence between the defendants. I do not accept that. This transaction was of substantial magnitude, it spanned several years, and endured substantial delay and difficulty. The principles and agents of the vendors were geographically separated: Mr. Kretschmer was in Alberta and British Columbia, Mr. Ho was in Ontario and Mr. Law was in Ontario. That there could only exist a hand-full of emails and three contractual documents is difficult to believe.

[188] Mr. Kretschmer attempted to partially explain this by saying that his work computer crashed at the end of 2004 or beginning of 2005 and that any emails on that computer were lost. Of course that does not explain the lack of production of emails from that point in time forward. Further, he said he used a number of computers for his emails, including one at home. Yet he said he did not check them for relevant documents.

[189] Mr. Kretschmer said he did not keep, or "not always keep" a day-timer. I do not find that credible.

[190] I therefore accept the evidence of the Cunninghams, Fairweathers, Romfos, Carlsons and Mr. Perrella with respect to this issue.

[191] With respect to the Royers, I think Mrs. Royer was mistaken - I do not say she was intentionally untruthful - when she said that Mr. Kretschmer told her and her husband in May 2005 that he would not cancel the contract. She did not allude to that in her discovery evidence, and her husband did not say that. However, I do accept that Mr. Kretschmer assured Mr. Royer that he would not allow the contract to be cancelled when they spoke in June 2005.

B. When did the vendors decide to terminate the contracts?

[192] I turn now to address the issue of when the defendants made the decision to terminate the contracts with the plaintiffs.

[193] The plaintiffs argue that although Mr. Kretschmer decided to cancel the contracts earlier, he did not act on that decision because he needed the existing contracts in place for the Canadian Western Bank and Prospera Credit Union. The contract with Prospera provided that the agreements were to be assigned as security. With respect to the Canadian Western Bank, Mr. Kretschmer testified that he could not cancel the contracts without their consent. Once the subdivision was approved along with new financing, Mr. Kretschmer and the vendors were in a position to cancel the contracts. Before that he could not rock the apple cart.

[194] Mr. Kretschmer's evidence was that he, Mr. Ho and Mr. Law first started discussing the possible termination of the contracts in July 2005 and made the decision in August 2005.

[195] Once again, I do not accept Mr. Kretschmer's evidence on this point, for the following reasons.

[196] Mr. Kretschmer had legal advice at least as early as July 2004 that the vendors had the right to terminate with supposed impunity. The vendors relied on that advice in terminating the Adamses' contract in July 2004. By that point in time, the project was substantially delayed from its projected completion date of summer 2003.

[197] On November 1, 2004, Tylon Steepe agreed to increase the price to Mr. Ho by $1,000,000.

[198] Mr. Kretschmer denied that that increased Tylon Steepe's cost by a million dollars. He said that the increase was off-set by a decrease in the price of two lots that he was to purchase. Yet he could not give a straight answer as to the precise purchase price of those lots and the prices he did come up with did not total $1,000,000.

[199] By at least May 2005, the project was running into serious difficulties with its line of credit with the Canadian Western Bank and the vendors changed financial institutions to the Prospera Credit Union.

[200] In the face of all the above, Mr. Kretschmer says that after they received the refusal letter from the District on April 1, 2005, he and Mr. Ho considered abandoning the whole project and selling it, but did not discuss the possible termination of the contracts. That is not credible.

[201] The June 2005 amended disclosure statement included the new form of contract. When it was put to Mr. Kretschmer that that was inconsistent with his evidence that the decision to terminate was only made in July 2005, he replied that the new form of contract was only included in the disclosure statement because he and Mr. Ho were only contemplating canceling the existing contracts. I do not find that to be credible.

[202] It is noteworthy that neither Mr. Ho nor Mr. Law was called as a witness. Both of them could have given direct evidence on this issue, as well as many others. I think I am entitled to draw an adverse inference from this.

[203] The comments I made in the previous section regarding Mr. Kretschmer's credibility are also applicable here.

[204] I think that there is force to the plaintiffs' submissions set out at the outset of this section.

[205] I find that Mr. Kretschmer and the vendors made the decision to terminate the contracts some time between July 2004 (when they first had legal advice they could do so) and November 2004 (when Tylon Steepe's purchase price had increased by $1,000,000).

V. IS THE CONTRACT VOID OR UNENFORCEABLE DUE TO LACK OF MUTUALITY?

[206] As their main submission, the defendants argue that there was no mutuality of obligations in the agreement between the parties. This is so, they say, because up to the time the vendors sent out the notices of cancellation, the plaintiffs could have elected to terminate the agreement under clause 2.2. The vendors had no obligation because of the deposit clause. There being no enforceable obligations on either side, there was therefore no contract.

[207] The defendants' argument, and the context in which it is made, takes some explaining.

[208] This argument was the subject of an amendment on the eve of trial. The amendment was by consent on certain terms. Before continuing to summarize the defendants' argument I need to explain those terms because it

limits the use the defendants can make of clause 5.2.

[209] I mentioned earlier (at para. 185) that originally the defendants relied on delay caused by government action and clause 5.2. When faced with a document production motion with respect to the vendors' dealings with the District, the defendants amended their defence to remove this plea. The defendants' document production and the scope of the examinations for discovery were based on the premise that the issue of whether the vendors made reasonable efforts to obtain the subdivision approvals was irrelevant because they admitted they were in breach of the agreement.

[210] But, as will be explained below, the vendors' lack of mutuality argument depends, in part, on clause 5.2. Therefore, the amendment was allowed on the basis that the defendants could rely on the fact that clause 5.2 was in the contract, but that it was not properly invoked. In other words, it was to be assumed that the vendors did not make reasonable efforts to effect the subdivision.

[211] It was also to be assumed that Mr. Kretschmer's representations to the vendors that the subdivision registration was delayed because of difficulties with the District had no factual foundation. To use the terminology of counsel for the defendant in his submissions regarding the amendment, it was to be assumed that Mr. Kretschmer's representations to the defendants with respect to governmental delay were "a pack of lies". (The following sub-paragraph (b) will, I hope, make it clear why the defendants want to make this limited use of clause 5.2).

[212] The defendants' argument that the plaintiffs could have elected not to complete the agreement at the time the notices of cancellation were sent by the vendors is based on the following reasoning:

(a) Clause 2.2 allowed the purchasers to cancel the agreement if the strata plan had not been deposited by the cancellation option date.

(b) At the time the defendants' notice of termination was sent, the specified option date of August 15, 2002 had come and gone. Nevertheless, under clause 5.3 that date was extended if the inability to register the strata plan was due to governmental action. The defendants do not rely on the reality of whether or not the delay in registration was due to governmental action; as I said above, they could not do so. Rather, they rely on the purchasers' *belief* that that was the reason for the delay. That belief was induced by the representations of Mr. Kretschmer. To quote from the defendants' argument:

> Why belief? Because if the purchasers were always told by the vendors that the cause of the delay was due to events beyond their control, then, even if the vendors were untruthful about the delay, they could not resile from that specific position.

(c) Finally, the vendors say that clause 2.2 gave the purchasers:

> … an unfettered right to cancel the transactions without cause, up to a certain defined stage in the development process (which under s.5.3, had not yet been reached when the vendors sent cancellation letters). There are no obligations of "good faith" or "reasonable effort" or other restrictions on the exercise of those rights.

[213] With respect to the vendors' side of the equation, the defendants say that the they have no obligations because clause 1.2(b)(iii), the deposit clause, deprives the purchasers of any remedy for the breach.

[214] The defendants rely on two decisions of Taylor J., ***Black Gavin & Co. Ltd. v. Cheung et al.*** (1980), 20 B.C.L.R. 21 (S.C.), and ***Murray McDermid Holding Ltd. v. Thater*** (1982), 42 B.C.L.R. 119 (S.C.). Those cases involved interim agreements for the purchase of land in which there were clauses to the effect that the agreements were subject to the approval of the buyer. In ***Black Gavin***, Taylor J stated at p.25:

> … A document signed by both parties, in which one says to the other "you may buy on these terms if you like the property" and the other says he will if he does, is not, I think, an agreement subject to a condition precedent, or an agreement at all. It remains an offer by the proposed vendor to the proposed purchaser, and nothing more, until the proposed purchaser says that he does indeed

> approve of the property.
>
> I would add that while the transaction may have the appearance of an option, it cannot be a true option if given neither under seal nor for consideration. There was no seal in the present instance, and the "deposit" money could not be consideration. The intended vendor was entitled to the deposit either as part payment, in the event of sale, or by forfeiture, in the event of default in completion; but there could be neither sale nor obligation to complete unless and until the intended purchaser said: "I approve". The only effect in law which could be given to the so called "interim agreement" is as a bare offer by Mr. Cheung to the intended purchaser, Mr. Bewza, to sell to him on the terms mentioned if Mr. Bewza should indicate later that he wished to buy.

[215] In my view, the contract here is different than that considered by Taylor J. and the defendants' argument falls on its interpretation of the contracts, with which I do not agree.

[216] Clause 2.2 states in part:

> … if by August 15, 2003 (the Cancellation Option Date) (or if a later date results from the application of clause 5.3, then by such later date), the Strata Plan has not been deposited for a registration in the Land Title Office, then the Purchaser will have the right to cancel this Agreement …

I think it is clear from that wording that - putting aside the operation of clause 5.3 for the moment - the plaintiffs could not cancel until August 15, 2003, and only then if the subdivision was not registered.

[217] Clause 5.3 extends that time due to delay caused by, *inter alia*, act of government. But the same principle applies: the purchasers have no right to cancel until the extended date has passed. Until then, they are bound.

[218] Therefore, contrary to what the defendants say, the purchasers could not cancel the contract at their own whim or discretion. At the time the vendors sent the notices of cancellation, the purchasers did have an obligation under the contract.

[219] Turning to the vendors, they are obliged to make reasonable efforts to effect the subdivision: ***Dynamic Transport Ltd. v. O.K. Detailing Ltd.***, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19. The deposit clause, clause 1.2(b)(iii), is a remedy clause. It does not detract from the vendors' obligation.

[220] The reasoning of the Court of Appeal in ***Wiebe v. Bobsien*** (1985), 64 B.C.L.R. 295, 20 D.L.R. (4th) 475 (C.A.), is applicable here. Seaton J.A., in reasons concurred in by Carrothers J.A., said at pp.297-298:

> We were referred to *Black Gavin & Co. Ltd. v. Cheung et al* (1980), 20 B.C.L.R. 21 (S.C.), and to *Murray McDermid Hldg Ltd. v. Thater* (1983), 42 B.C.L.R. 119 (S.C). I agree with Bouck, J. that those are cases in which the purchaser only promised that he would buy the vendor's house if he decided that he wished to. No contract is created in such cases. The purchasers made no promise that could constitute consideration for the vendor's promise. There was no intention to make binding contracts.
>
> This is not such a case. The parties intended this to be a binding contract and the court should not be quick to release them from their promises.
>
> I agree with the trial judge's conclusion that the plaintiff was obliged to use his best efforts to sell his own home, and that if he was able to sell he was bound to buy the defendant's house. The plaintiff's promise was adequate consideration for the defendant's promise.
>
> [emphasis added]

[221] In the case at bar, at the time of the defendants' breach, there were existing obligations on both sides and the parties intended that there be, and believed that there was, a binding contract. All the parties acted as if there was a binding agreement. The vendors went to the extent of providing a legal opinion to the Canadian Western Bank that the agreements were legally binding as at June 1, 2005.

[222] Finally, I note that it would fly in the face of the caution expressed by the Court of Appeal in the above

underlined passage to allow the vendors to succeed in their argument when it is premised on a state of mind of the purchasers (a false belief), which only arose out of what I am to assume were the lies of the vendors.

VI. DOES CLAUSE 1.2(B)(III) APPLY TO A DELIBERATE OR INTENTIONAL BREACH?

[223] The plaintiffs say that the word "default" in clause 1.2(b)(iii) does not encompass an intentional or deliberate breach. They further argue - and the defendants do not contest this - that the vendors' breach was deliberate; they simply decided not to convey the lots because they could get a higher price.

[224] Although stated in the context of fundamental breach, Lord Wilberforce's words in ***Photo Production Ltd. v. Securicor Transport Ltd.***, [1980] A.C. 827 at 846 (H.L.) are apt here:

> … These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. …

[225] There are two main obligations of the vendors under the contract. The first of these is to act in good faith and make reasonable efforts to effect the subdivision (see ***Dynamic Transport***). The second is to convey the lots once the subdivision is registered. A failure to perform either of those obligations would be a breach of contract. Both failures would be intentional. It is therefore hard to see any scope for clause 1.2(b)(iii) if it were limited to unintentional breaches.

[226] The plaintiff's rely on ***Demir v. Neil*****,** [1996] B.C.J. 3153 (C.A.). That case also involved the sale of a lot in a subdivision to be created. The contract provided that if the sale was not completed due to the "fault" of the vendor, the vendor's liability would be limited to the sum of $40,000. After the subdivision was registered the vendor refused to convey the lot. It was held that the limitation clause did not apply because there was no fault of the vendor because their breach was deliberate. The plaintiffs argue that "fault" and "default" mean the same thing so that I am bound to follow ***Demir***.

[227] I do not agree. The trial judge - whose reasons were adopted by the Court of Appeal - specifically drew a distinction between "fault" and "default". He said: "There is no issue of any fault, the issue is one of default". In the case at bar, default is the word used in the deposit clause.

[228] In my view, clause 1.2(b)(iii) applies to both intentional and unintentional breaches. Both are "defaults".

VII. IS THE DEPOSIT CLAUSE A PENALTY CLAUSE?

[229] The plaintiffs argue that clause 1.2(b)(iii) is a penalty clause and ought not to be enforced. Their argument that it is a limitation clause and should not be enforced because of the vendors' fundamental breach of contract is made in the alternative.

[230] Whether logical or not, the law applies a different analysis to a limitation clause on the one hand, and a stipulated remedy clause (i.e., a liquidated damage clause or penalty clause) on the other hand.

[231] A stipulated remedy clause sets out the amount of damages which the breaching party has to pay to the innocent party. If the sum is a genuine pre-estimate of damages, the clause is a liquidated damage clause and it will be enforced. If the sum is not a pre-estimate of damages, then it will be deemed to be a penalty clause, and not enforced. Generally, the innocent party seeks to enforce the remedy clause and the breaching party seeks to avoid its application.

[232] The situation is reversed here. The vendors have breached the contracts and seek to enforce the deposit clause to limit their liability. The purchasers seek to avoid the clause.

[233] It appears to me that clause 1.2(b)(iii) is a limitation clause. Accordingly, the plaintiffs are left with only two arguments that would avoid the effect of clause 1.2(b)(iii): estoppel or fundamental breach.

[234] If incorrect on this and clause 1.2(b)(iii) should be analyzed as a stipulated remedy clause, then I conclude

that it is a penalty. The clause provides the purchasers no damages at all since it merely gives them back their own money. It cannot therefore be a pre-estimate of damages.

VIII. ESTOPPEL

[235] The plaintiffs rely on both proprietary and promissory estoppel in order to avoid the hurdle imposed by clause 1.2(b)(iii).

A. Proprietary Estoppel Principles

[236] Surprisingly, there are relatively few cases dealing with proprietary estoppel in British Columbia and Canada as whole. The law is more developed in England.

[237] The last decision of our Court of Appeal dealing with proprietary estoppel was ***Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.***, 2003 BCCA 197, 12 B.C.L.R. (4th) 46. In that case, Levine J.A., with Prowse J.A. concurring, at para. 40, quoted the following passage from Lord Denning M.R.'s judgment in ***Crabb v. Arun District Council***, [1975] 3 All E.R. 865 at 871 (C.A.), as setting out the basis for proprietary estoppel:

> The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel". They spoke of it as "raising an equity". If I may expand that, Lord Cairns said in *Hughes v. Metropolitan Railway Co* [(1877) 2 App Cas 439 at 448, [1874-1880] All E.R. Rep 187 at 191]: "...it is the first principle upon which all Courts of Equity proceed..." that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which will preclude him from insisting on his strict legal rights? ... Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. ...
>
> [Emphasis added by Levine J.A.]

[238] Levine J.A. also noted, at para. 41, that in ***Crabb***, Scarman L.J. quoted with approval a five part test set out by Fry J. in ***Willmott v. Barber*** (1880), 15 Ch. D. 96 at 105 (Eng. Ch. Div.) as follows:

> … In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. Lastly [if I may digress, this is the important element as far as this appeal is concerned], the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

[239] Newbury J.A. concurred in the result but took a different tack. She noted that Fry J.'s five-part test has been superseded by a broader test. At para. 64, she quoted from *Halsbury's* (4th ed., vol. 16):

> The more recent cases raise the question whether it is essential to find all the five tests literally applicable and satisfied in any particular case. The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for

> the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories.
>
> [Emphasis added by Newbury J.A.].

[240] Although Levine J.A. applied the ***Willmott*** factors, she did not say she disagreed with the general approach taken by Newbury J.A.

[241] The English Court of Appeal has affirmed a more general approach in a decision handed down very recently. In ***Scottish & Newcastle Plc v Lancashire Mortgage Corporation Ltd***, [2007] EWCA Civ 684 (05 July 2007), Mummery L.J. stated at paras. 44-45:

> The leading authorities on proprietary estoppel relate to the expectation of creating or acquiring rights and interests in land. As explained in *Snell's Equity* (31st) at p275 et seq elaborating on the formulation by Oliver J in *Taylors Fashions Limited v. Liverpool Victoria Trustees Company Limited***,** [1982] 1 QB 133 the doctrine covers a variety of circumstances, in which the courts will compel effect to be given to acquiescence by one party in the known expectation of the other party that he has or will have a proprietary right or interest where the other party has acted to his detriment on that basis.
>
> There is no single formula exhaustively identifying all the elements of proprietary estoppel or all the circumstances in which it is capable of applying. In many cases the emphasis is on the constraining effect on the party who has encouraged another party to act to his detriment in a mistaken expectation relating to property rights. In other cases there is acquiescence in standing by and not objecting to the conduct of the other party, while knowing of the belief or expectation in which the other party has acted.

[242] It is also worth noting that the different categories of estoppel overlap and are based on the same underlying principles of equity. As noted by Oliver J. in ***Taylors***

Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd., [1982] 1 QB 133 at 153, [1981] 1 All E.R. 897 (Ch. D.) with respect to ***Crabb***:

> The particularly interesting features of the case in the context of the present dispute are, first, the virtual equation of promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of the same principle and secondly the very broad approach of both Lord Denning M.R. and Scarman L.J., both of whom emphasized the flexibility of the equitable doctrine. …

[243] The common basis for the different types of estoppel was also highlighted by Oliver J. in the following passage at pp.151-152:

> Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*, L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial-requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

This passage was cited with approval by the Court of Appeal in ***B & A Bobcat and Excavating Ltd. v. Sangha et***

al., 1999 BCCA 49 at para. 14.

[244] That said, one factor that has been consistently required by the courts for proprietary estoppel is a detrimental reliance by the party seeking to set up the estoppel. Whether that is seen as a stand-alone test or as part of the broader equitable or unconscionability inquiry does not matter.

[245] Proprietary estoppel is not limited to situations where improvements have been made to one of the parties' lands. Thus, in ***Scottish & Newcastle Plc.***, the Court of Appeal found an estoppel in a contest over priority of charges arising out of the advancing of funds to a pub owner by a mortgagee on the one hand, and brewery on the other. In ***Yeoman's Row Management Limited v Cobbe***, [2006] EWCA Civ 1139 (31 July 2006), the plaintiff succeeded on the basis of proprietary estoppel because he had done substantial work in obtaining approvals for the development of a property, which he had been led to expect he could purchase.

[246] Unlike promissory estoppel, proprietary estoppel can be used to found a cause of action; it can be used as a sword.

B. Promissory Estoppel Principles

[247] The Supreme Court of Canada stated the requirements for promissory estoppel in ***Maracle v. Travelers Indemnity Co. of Canada***, [1991] 2 S.C.R. 50 at 57, 80 D.L.R. (4th) 652:

> … The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p.615:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

[248] The representation must be unambiguous but may be inferred from the circumstances: ***Engineered Homes Ltd. v. Mason***, [1983] 1 S.C.R. 641, 146 D.L.R. (3d) 577.

[249] As the above quote indicates, and as with proprietary estoppel, the party raising the estoppel must have acted on the other's representation to his own detriment.

[250] With respect to reliance and causation, the English Court of Appeal has said in ***Steria Ltd & Ors v. Ronald Hutchison & Ors***, [2006] EWCA Civ 1551 (24 November 2006) at para. 117:

> In order to succeed in a claim based on estoppel, it is probably not necessary for a claimant to satisfy what is known in a somewhat different area of the law as the "but for" test. In other words, in the present case, it does not appear to me that Mr. Hutchison has to show that, if the representation in question had not been made, he would not have joined the Scheme. He merely has to show that the representation was a significant factor which he took into account when deciding whether to join the Scheme. …

Although this was said in relation to promissory estoppel, I cannot see any reason why the same principle ought not to be applied to proprietary estoppel.

[251] Promissory estoppel may not be used as a sword i.e., as a foundation for a cause of action. The defendants say that that is the case here. This is a convenient place to deal with that argument.

[252] The fact that it is the plaintiffs who raise the estoppel cannot be a determining factor as to whether they are using estoppel as a basis for their claim. As was said in Spencer Bower, *The Law Relating to Estoppel by*
th

Representation, 4 ed. by Feltham, Hochberg and Leech (West Sussex: Tottel Publishing Ltd., 2007) 2004 at p.502:

> There is no clear authority for the proposition that that a party may rely on a promissory estoppel not only as a defendant but also as a claimant but there is no reason why a claimant should not also be entitled to do so and to suggest otherwise seems to be excessively formalistic.

[253] I have already found that clause 1.2(b)(iii) is a limitation of liability clause. As such it is relied on by the vendors in their defence. It is in answer to that that the plaintiffs make their estoppel argument. That does not amount to using estoppel as a basis for a cause of action.

C. Application of the above principles

[254] As is apparent from the above, there is a great deal of similarity between proprietary estoppel and promissory estoppel. In my analysis which follows, I apply both. Given that the subject matter of the alleged estoppel involves a term in a contract for the sale of land, it is not surprising that the same result is reached applying both types of estoppel.

[255] Each plaintiff's claim must stand on its own and the facts with respect to each plaintiff, or plaintiff family, must be considered carefully. The words of Mummery L.J, in ***Scottish & Newcastle Plc***., at para. 23 bear repeating here:

> … It is not enough for [the plaintiff] simply to assert to the court, as if it were sitting under a palm tree on a legal and evidential desert island, that it would be unfair for [the defendant] to rely on their statutory right to priority.

[256] I will address the estoppel issue family by family.

1. The Cunninghams

[257] I accept Mr. Cunningham's versions of the facts, which I set out above.

[258] As I have stated, Mr. Cunningham received assurances from Mr. Kretschmer that his contract would not be cancelled on two occasions; one shortly after the August 15, 2003, cancellation option date, and the other in June 2004.

[259] The Cunninghams argue that they relied on Mr. Kretschmer's assurances to their detriment and that the assurance, coupled with the reliance, is sufficient to found an estoppel.

[260] Mr. Kretschmer's statement was intended to reassure Mr. Cunningham, as well as the other plaintiffs to whom it was made, that the lots would be conveyed to them once subdivision approval was obtained. Mr. Kretschmer did not want them to cancel the contracts. His assurance was reinforced by his further statements regarding the anticipated registration of the subdivision and by the vendors' arrangement for the purchase of the boat lift.

[261] Assuming detrimental reliance, I think that would be sufficient to estop the defendants from relying on the clauses that give the vendors the right to terminate the contract if the subdivision registration is delayed, namely clauses 2.3 and 5.3. It would be, to paraphrase the words of Oliver J. in ***Taylors Fashions***, unconscionable for the defendants to be permitted to deny that which they have allowed or encouraged the plaintiffs to assume to their detriment. I think the result would be the same applying the principles of promissory and proprietary estoppel.

[262] But the defendants do not rely on those clauses. They rely on the deposit clause, 1.2(b)(iii). Are the defendants estopped from relying on that provision?

[263] I think that question must be answered in the affirmative. It would give the plaintiffs no comfort at all to have the assurance from Mr. Kretschmer that he would not cancel the contracts if he could resile from it and only give them back their deposits. It would be artificial and unrealistic to interpret his reassurance as going to clauses 2.3 and 5.3, but not 1.2(b)(iii).

[264] The defendants argue that Mr. Kretschmer's assurance that the vendors would not cancel the contracts was an expression of future intent only and as such, cannot form the basis for promissory or proprietary estoppel.

[265] I do not agree with that proposition. As the above cited cases illustrate, both proprietary and promissory estoppel can be founded on a representation that a person does not intend to rely on his strict legal rights. That is a statement of intent. Whether it is a statement of current intent or future intent, or both, does not matter. The essence of estoppel is an expectation of one party that has been encouraged by the party sought to be estopped. The cases do not support the proposition that that expectation cannot be created by a statement of intent. The words of Mummery L.J., in ***Yeoman's Row*** at para. 52, although used in a different context, are apt here:

> … The essence of proprietary estoppel is unconscionable conduct in inducing or encouraging another to believe that he will obtain an interest in, or right over, the defendant's property. The particular means by which he will acquire the interest (via a formal exchange of contracts, by a transfer or some other means) are irrelevant so long as the assurance made by the defendant is not too vague or uncertain to give rise to an expectation or to be made effective in practice. …

[266] As I noted above, Mr. Kretschmer says he told Mr. Cunningham in 2003 that it would be premature to sell his home then because Mr. Kretschmer did not yet have a lot to sell. Mr. Cunningham denied that. I have accepted Mr. Cunningham's version of events. However, even if Mr. Kretschmer's did say that to Mr. Cunningham, I do not think it neutralizes Mr. Kretschmer's assurance that the vendors would not cancel the contract. Mr. Kretschmer's caution about selling the house went to timing: it was premature to sell at that point because there was no lot *then*. Given Mr. Kretschmer's statement that the contract would not be cancelled, the Cunninghams were entitled to assume that the lot would be conveyed once the subdivision was registered. (Of course, if the subdivision was never registered in spite of the reasonable efforts of the vendors, then the risk of selling their house would be for the Cunningham's to bear).

[267] Further, the Cunninghams did not sell their home until approximately a year after first discussing it with Mr. Kretschmer in 2003. They sold their home after Mr. Kretschmer told them in August 2004 that he expected the subdivision to be approved and registered by September or October of that year.

[268] That leads to the question of reliance. Mr. Cunningham was asked the following question in direct: "if Mr. Kretschmer had told you that he intended to collapse the contracts, would you have done anything differently?" Mr. Cunningham responded that he would not have sold his home in Enderby and that he would have looked for other lakefront property.

[269] While the form of the question is more appropriate to a case based on a duty to disclose rather than one founded on a representation, I think it is clear that if Mr. Kretschmer had not told the Cunninghams that he would not cancel their contract, the Cunninghams would not have sold their home. Similarly, they would have looked for alternate property had they not been given the assurance by Mr. Kretschmer.

[270] I find that the defendants are estopped from relying on clause 1.2(b)(iii) as against the Cunninghams.

2. The Fairweathers

[271] I accept the evidence of Mr. Fairweather as set out above. This includes his denial that Mr. Kretschmer told him in the August 2003 conversation that it would be premature to sell his home.

[272] The facts relating to the Fairweathers are virtually identical to those relating to the Cunninghams. Having been told by Mr. Kretschmer that the vendors would not cancel the contracts they sold their home and did not look for other property.

[273] I conclude that the vendors are estopped from relying on clause 1.2(b)(iii) as against the Fairweathers.

3. The Romfos

[274] I accept the evidence of the Romfos as set out above, including that Mr. Kretschmer did not tell them it

would be premature to sell their home in August 2003.

[275] Even if Mr. Kretschmer did say that the sale of the Romfos' home would be premature, it was, on his version, qualified by the words " … if you are expecting to get a lot and start building right away". For reasons similar to that stated above regarding the Cunninghams, I do not consider that to undercut Mr. Kretschmer's representation that the contracts would not be cancelled.

[276] While the Romfos had legal advice before signing the contract, I do not think that detracts from their estoppel argument, because the argument does not hinge on any of the parties being ignorant of their legal rights or the meaning of the contract.

[277] I think the Romfos' case is factually similar to that of the Cunnninghams' and I conclude that the vendors are estopped from relying on clause 1.2(b)(iii) as against them.

4. The Carlsons

[278] The upshot of the conversation between Mr. Carlson and Mr. Kretschmer on May 28, 2005, was that the vendors were considering canceling the contracts and demanding more money from the plaintiffs. Prior to that - unlike the Cunninghams, Fairweathers and Romfos - the Carlsons were not told by Mr. Kretschmer that he would not cancel their contract.

[279] The Carlsons did not testify that they were led to believe, or even that they did believe, that the vendors would not exercise their contractual rights of termination.

[280] In the absence of that evidence, I do not think the purchase of the boat lift is sufficient in and of itself to form the basis for a proprietary estoppel. The expenditure was relatively minor and the moneys for it have now been refunded, although the cheque was initially sent to the wrong address.

[281] I do not think that the statement of Mr. Kretschmer that he expected the subdivision to be registered shortly can be taken to be a representation that the vendors would not cancel the contract no matter when the subdivision was registered. I therefore do not think it gives rise to an estoppel, whether proprietary or promissory.

5. The Royers

[282] I have found above that Mr. Kretschmer did not assure the Royers that he would not cancel their contract at their meeting in May 2005. He did, however, say words to that effect in June 2005.

[283] The Royers say that they would have looked for alternative recreational property had they not been told that their contract would not be cancelled. However, I think that the proximity of the June 2005 representation to the date at which Mr. Kretschmer told Mr. Royer of the decision to terminate in August is too close to create a sufficient detrimental reliance in the absence of evidence of a specific missed opportunity or other act of reliance during that time period.

[284] I therefore conclude that the vendors are not estopped from relying on clause 1.2(b)(iii) as against the Royers.

6. Mr. Perrella

[285] Mr. Perrella was assured by Mr. Kretschmer in the summer of 2004 that his contract would not be cancelled.

[286] Mr. Perrella says that had he been told that his contract was to be cancelled he would have looked for alternate recreational property. However, the timing of that was primarily related to the October 2003 period. Of course, anything that Mr. Perrella did or did not do in 2003 cannot be based on the 2004 representation.

[287] I do not think that Mr. Perrella has demonstrated detrimental reliance and therefore, he cannot succeed on this issue.

7. The Freys and the Adamses

[288] The Freys and the Adamses received no assurance from Mr. Kretschmer that the contract would not be cancelled. In my view they cannot succeed on the estoppel issue.

D. Consequence of the finding of estoppel in favour of the Romfos, Cunninghams and Fairweathers

[289] If proprietary estoppel has been found, the court must fashion a remedy so that the "equity can be satisfied": ***Plimmer v. Wellington*** (1884), 9 App. Cas. 699 at 714 and ***Trewethey-Edge*** at para. 54.

[290] As fully discussed by Simon Gardiner, in “The Remedial Discretion in Proprietary Estoppel” (1999) 115 LQR 438, generally, but not always, the relief will be fashioned to meet the expectation interest of the plaintiff. This will be done by awarding him *in specie* the interest that was assured to him by the defendant.

[291] In my view this is an appropriate case in which to fashion a remedy based on the plaintiffs’ expectation interests, namely, that the lots would be conveyed to them upon the registration of the subdivision. Therefore, the defendants should not be allowed to rely on clause 1.2(b)(iii). I note that the defendants did not argue that some other relief would be more appropriate.

[292] Relief for promissory estoppel often appears to be self-defining in that a party is prevented from relying on the legal right on which it represented it would not rely. As a result, the expectation interest of the person relying on the estoppel is met.

[293] While the court does have the discretion to fashion other results, in my view, the same result should flow from the application of the doctrine of promissory estoppel as with proprietary estoppel. Once again, the defendants did not argue otherwise.

IX. FUNDAMENTAL BREACH

[294] As an alternative to their penalty clause argument, which I ruled on above, the plaintiffs rely on the doctrine of fundamental breach in order to avoid the application of clause 1.2(b)(iii).

[295] 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, 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 difference in the approaches was expressed by Dickson C.J.C. who delivered a judgment on behalf of himself and La Forest J. He stated at pp.455-456:

> 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.

[296] Wilson J.’s judgment was delivered on behalf of herself and L’Heureux-Dubé J. At pp.510-511, she stated:

> … I fully agree with the commentators that the balance which the courts reach will be made much clearer if we do not clothe our reasoning "in the guise of interpretation". Exclusion clauses do not

> automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. Whether the courts address this narrowly in terms of fairness as between the parties (and I believe this has been a source of confusion, the parties being, in the absence of inequality of bargaining power, the best judges of what is fair as between themselves) or on the broader policy basis of the need for the courts (apart from the interests of the parties) to balance conflicting values inherent in our contract law (the approach which I prefer), I believe the result will be the same since the question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause?

[297] McIntyre J. did not find it necessary to deal with the concept of fundamental breach.

[298] The approach of Dickson C.J.C. focuses on the facts at the time the contract was entered into. Wilson J.'s approach concentrates on events subsequent to the formation of the contract.

[299] In ***Guarantee Co. of North America v. Gordon Capital Corp.***, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 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.".

[300] In ***Shelanu Inc. v. Print Three Franchising Corp.*** (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577 (Ont. C.A.), Weiler J.A. interpreted ***Guarantee*** as in turn interpreting the approaches in ***Hunter Engineering*** as having little distinction.

[301] Dillon J. applied both approaches from ***Hunter Engineering*** in ***Tercon Contractors Ltd. v. British Columbia***, 2006 BCSC 499, 53 B.C.L.R. (4th) 138.

[302] I conclude that it is open to a court to apply either of the approaches from ***Hunter Engineering***.

[303] I do not think it is disputed by the defendants that the breach committed by them is a fundamental one. There can be nothing more fundamental in a contract to convey land than the vendor refusing to convey it.

[304] I have already held that clause 1.2(b)(iii) is worded so as to cover an intentional breach. For the same reasons, I think it is also broadly enough drafted to cover a fundamental breach.

[305] Would enforcing the clause be unconscionable, unfair, unreasonable or contrary to public policy? The plaintiffs have not argued that the agreements were unconscionable, which is something to be determined on the facts that existed at the time the contract was entered into. Nor was public policy argued. The real question, therefore, is whether the enforcement of clause 1.2(b)(iii) would be unfair or unreasonable.

[306] While all the circumstances must be looked at, a major factor is the statements made by Mr. Kretschmer to the plaintiffs which I have canvassed above. However, I do not think that the statements need rise to the level required to found an estoppel. Another major factor is the reliance placed by the plaintiffs on those statements but, similarly, I do not think reliance is to be as strictly construed as it is with estoppel. In other words, it appears to me that in determining whether the clause should be enforced as part of the fundamental breach analysis, a broader, less restrictive approach is to be employed.

[307] I have found that Mr. Kretschmer told the Cunninghams, Fairweathers and Romfos that the vendors would not cancel their contracts, and that they relied on this to their detriment. I held that they are entitled to raise an estoppel with respect to the application of clause 1.2(b)(iii). These facts yield the same result applying a fundamental breach analysis, in that in those circumstances it would clearly be unfair and unreasonable to allow the vendors to rely on the clause.

[308] What of the other plaintiffs? Mr. Kretschmer knew very well that they expected to get their lots when the subdivision was registered. On July 18, 2005, Mr. Kretschmer testified at an assessment appeal hearing with

respect to the Crystal Waters property:

> Q Okay. And you have a lot of sale agreements that are in 2002 or 2003 before the rapidly rising market, correct?
>
> A Correct.
>
> Q You talked about how some of your offerees, purchasers, may become frustrated and walk away. If they do that's going to be a benefit to the Appellant because you'll probably be able to market it for a significantly higher price, correct?
>
> A If we can ever sell them, yes.
>
> Q So from the Appellant's point of view, the completion of this subdivision or not, it may be better off to delay completion until as many purchasers walk away as possible, correct?
>
> A Incorrect. We - we have - in our Offer to Purchase there was a date on the Offer to Purchases for completion of the subdivision. We had that ability a long time ago to walk away from those sales agreements, but we construe ourselves as a moralist - moral type of development, developer, and these individuals have suffered, not quite as much as we did, but certainly they have suffered. Some of them have sold their homes with hope to - to be on this development. Some of them, you know, have - have not purchased elsewhere because they were thinking they were going to be able to get in this development. So we have chosen to - to work with these people and view it - so we - you know, right now we don't know where it is at.

[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.

X. REMEDY

[314] All of the plaintiffs want the lots they contracted to buy. They want specific performance. Their claim for damages is made in the alternative.

A. Specific Performance

[315] In determining whether the plaintiffs are entitled to specific performance, there are two issues which need to be addressed:

(a) Are the properties unique?

(b) Is a decree of specific performance inconsistent with fundamental breach?

1. Uniqueness

[316] Specific performance cannot be granted "absent evidence that the property is unique to the extent that its

th

substitute would not be readily available": ***Semelhago v. Paramadevan***, [1996] 2 S.C.R. 415, 136 D.L.R. (4) 1 at para. 22.

[317] It is doubtful whether this hurdle exists for the three families who are entitled to succeed on the basis of proprietary estoppel. This is so because, as I have held above, the remedy to which they are entitled is based on their expectation interest. Once that conclusion has been reached, that is the end of the matter and an order for specific performance would follow. (If I am wrong in that, the following analysis regarding the remaining plaintiffs would apply.)

[318] The other plaintiffs are not in that position because they are only entitled to succeed on the basis of a fundamental breach of contract. That does not import its own remedy.

[319] Kalamalka Lake was described in an appraisal report:

> Kalamalka Lake has retained a high level of water quality and is recognized throughout British Columbia and by visitors from neighbouring Provinces and States as one of the most attractive lakes in British Columbia and Canada. The unique characteristics of Kalamalka Lake with sparkling blue and turquoise waters in the spring, summer and fall seasons are features uncommon to any other lake in the Okanogan region. Although Kalamalka Lake should have an extremely high capability to support recreational activities, summer usage is relatively limited as compared to comparable bodies of water. This limited recreational usage provides for a more peaceful and quiet waterfront location than other, busier and more utilized bodies of water in the region.

[320] The appraisal report also points to several site-specific features that make the property unique:

- level, low bank frontage for the waterfront lots;
- close proximity to both the City of Vernon and the City of Kelowna via Highway 97;
- the non-waterfront lots have views and riparian rights to access the beach;
- the exclusive boat moorage slip assigned to each lot.

[321] The defendants did not file any expert reports. Beyond Mr. Kretschmer referring to one or two other developments in the area, there was no challenge to the opinion of the appraiser, or the views expressed by the plaintiffs, that the property was unique.

[322] In my view the plaintiffs have more than met their burden of showing that the properties are unique.

2. Is a decree of specific performance inconsistent with a finding of fundamental breach?

[323] A number of plaintiffs were not successful on the estoppel issue. Their claim to specific performance must rest on their successful fundamental breach argument.

[324] The defendants argue that the plaintiffs cannot rely on fundamental breach in order to avoid the application of the deposit clause and at the same time seek to enforce the contractual performance of the defendants by a decree of specific performance. They argue that these remedies are inconsistent.

[325] Although counsel have not been able to find any direct authority on this issue, for the reasons that follow, it is my conclusion that the plaintiffs can rely on fundamental breach and obtain specific performance.

[326] The rule of law approach to fundamental breach, which has now been superseded in both England and Canada, was described by Lord Diplock in ***Photo Production*** at p.847 as follows:

> The "rule of law" theory which the Court of Appeal has adopted in the last decade to defeat exclusion clauses is at first sight attractive in the simplicity of its logic. A fundamental breach is one which entitles the party not in default to elect to terminate the contract. Upon his doing so the contract comes to an end. The exclusion clause is part of the contract, so it comes to an end too; the party in default can no longer rely on it. …

[327] On that theory, there might be a logical inconsistency in allowing a party to allege fundamental breach and claim specific performance at the same time. Indeed that was the view of Lord Diplock who went on to say in the balance of the paragraph quoted above:

> This reasoning can be extended without undue strain to cases where the party entitled to elect to terminate the contract does not become aware of the breach until some time after it occurred; his election to terminate the contract could not implausibly be treated as exercisable *nunc pro tunc.* But even the superficial logic of the reasoning is shattered when it is applied, as it was in *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.,* [1976] 1 Lloyd's Rep. 14, to cases where, despite the "fundamental breach", the party not in default elects to maintain the contract in being.

The ***Wathes*** case was one in which specific performance was ordered.

[328] But, as discussed above, the doctrine of fundamental breach has now been completely changed in Canada. (It has been changed in England as well, but not in the same manner). What was described by Lord Diplock as the underlying rationale for the rule of law approach was essentially a legal fiction, and it has been done away with.

[329] Yet there still is something left to the doctrine of fundamental breach. On the reasoning of Wilson J., the purpose of determining whether a fundamental breach has occurred is not that it brings the contract to an end, thereby also bringing the exemption or limitation clauses contained within it to an end or rendering them inapplicable. Rather, a fundamental breach serves as a threshold for the ability of a court to refuse to enforce an exemption clause on the basis of unfairness or unreasonableness. As Wilson J. stated at p.515 of ***Hunter Engineering***, fundamental breach "marks off the boundaries of tolerable conduct". Absent a breach that is serious enough to be fundamental, the exemption clause must be enforced according to its terms.

[330] I therefore see no reason why, for the purposes of avoiding a limitation clause, a party should not be entitled to rely on a fundamental breach which has not been accepted by it and at the same time obtain specific performance.

[331] As I hope is clear from the prior paragraph, I do not think this has anything to do with the obligation of the party who is the victim of fundamental breach to elect whether to accept the other's repudiation and thereby bring the contract to an end, or to keep the contract alive and to continue to perform. In the case at bar, the plaintiffs did not accept the vendors' repudiation.

B. Damages

[332] While evidence as to damages was led, in their arguments the parties concentrated exclusively on the claim to specific performance. In its written argument the plaintiffs said that they were content to address the issue of damages after I rule on liability and specific performance. I accept that suggestion. This includes both the plaintiffs' claims to damages as an alternative to specific performance (which is not strictly necessary for me to rule on in any event) and the plaintiffs' claims for damages in addition to specific performance, for such things as furniture storage fees.

XI. COUNTERCLAIM

[333] The defendants counterclaimed for damages for the wrongful filing of the certificates of pending litigation.

[334] Although the counterclaim is academic given my finding on liability, I will address it in case I am incorrect.

[335] In ***I.C.R. v. Holdings Ltd.* v. *Tri-Par Holdings Ltd*.** (1996), 3 R.P.R. (3d) 49 (B.C.S.C.), Tysoe J. (as he then was) stated at para. 79:

> … The law is clear that a party who registers a certificate of lis pendens is only liable for damages (i) if it can be shown that there has been malice in the sense of there being an improper purpose collateral to the ostensible purpose of the proceeding, or (ii) if an application has been made to cancel the registration of the lis pendens and the Court requires the party who registered it to give an undertaking as to damages - see *Marshall* v. *Heidi* (1984), 56 B.C.L.R. 107 (B.C.C.A.) and *First*

Canadian Land Corporation Ltd. v. *Rosinante Holdings Ltd*. (1985), 62 B.C.L.R. 262 (B.C.C.A.).

[336] No malice has been shown here. No application was made requiring the plaintiffs to give an undertaking.

[337] That is sufficient to dismiss the counterclaim. However, even if that was not the case, the defendants' evidence of damages was completely deficient. I find no damages have been proved.

[338] Further, the counterclaim was so plagued with issues of failure to produce documents that it deserves to be dismissed on that basis alone.

XII. PERSONAL LIABILITY OF MR. KRETSCHMER

[339] This was another point which was plead but not argued. I do not propose to make any ruling on this. If counsel wish to address this they may make appropriate arrangements. If not the claim will be dismissed.

XIII. CONCLUSION

[] All of the plaintiffs are entitled to specific performance.

[] The parties may make arrangements to argue the issue of damages or personal liability of Mr. Kretschmer. In the absence of that, the claim against Mr. Kretschmer personally is dismissed and there shall be no order for damages.

[] The defendants' counterclaim is dismissed.

[] The plaintiffs are entitled to their costs.

Myers, J.

September 17, 2007 – ***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that paragraph 11(a) and (b) should be changed from:

> (a) the vendors are estopped from relying on the clause, or from canceling the contract, because of the representations made by Mr. Kretschmer, and the use **they** were allowed to make of the land after the contracts were signed;
>
> (b) the deposit clause is a limitation clause and the vendors fundamentally beached the contract. It would be unfair, or unconscionable, to allow the **plaintiffs** to rely on the deposit clause. The plaintiffs rely on the same factors set out in the previous paragraph regarding their estoppel argument; or

to read:

> (a) the vendors are estopped from relying on the clause, or from canceling the contract, because of the representations made by Mr. Kretschmer, and the use **the plaintiffs** were allowed to make of the land after the contracts were signed;
>
> (b) the deposit clause is a limitation clause and the vendors fundamentally beached the contract. It would be unfair, or unconscionable, to allow the **defendants** to rely on the deposit clause. The plaintiffs rely on the same factors set out in the previous paragraph regarding their estoppel argument; or

Paragraph 29 should be changed from:

> [29] Tylon Steepe hoped to build homes for as many of the purchasers as possible. Any purchaser who did so would receive a discounted lot price **on their lot**.

To read:

> [29] Tylon Steepe hoped to build homes for as many of the purchasers as possible. Any purchaser who did so would receive a discounted lot price.

Paragraph 68 should be changed from:

> [68] With respect to the form of the new agreement, there were two main substantive changes, apart from the change in price. The first required purchasers to have Tylon Steepe build their homes. No price for construction was set out in the contract, nor was any formula to arrive at a price. The agreement required **any** purchaser to sell the lot back to the vendors at the original purchase price if the **purchasers** did not have Tylon Steepe build **their** home. The second change was that the lots could not be re-sold by the purchasers until after they had built on them.

To read:

> [68] With respect to the form of the new agreement, there were two main substantive changes, apart from the change in price. The first required purchasers to have Tylon Steepe build their homes. No price for construction was set out in the contract, nor was any formula to arrive at a price. The agreement required **a** purchaser to sell the lot back to the vendors at the original purchase price if the **purchaser** did not have Tylon Steepe build **its** home. The second change was that the lots could not be re-sold by the purchasers until after they had built on them.

The first sentence of para. 85 should be changed from:

> [85] At some point in time after receiving this letter - but still in the late fall - **6** the Cunninghams received a letter from Mr. Kretschmer dated August 25, 2005. ...

To read:

> [85] At some point in time after receiving this letter - but still in the late fall - the Cunninghams received a letter from Mr. Kretschmer dated August 25, 2005. ...

The second sentence of para. 128 should be changed from:

> [128] ... He said that the vendors were **a $1,000,000 in the hole** and were trying to come up with ways to make that up.

To read:

> [128] ... He said that the vendors were **"$1,000,000 in the hole"** and were trying to come up with ways to make that up.

Paragraph 202 should be changed from:

> [202] It is noteworthy that neither Mr. Ho nor Mr. Law was called as **witnesses**. Both of them could have given direct evidence on this issue, as well as many others. I think I am entitled to draw an adverse inference from this.

To read:

> [202] It is noteworthy that neither Mr. Ho nor Mr. Law was called as **a witness**. Both of them could have given direct evidence on this issue, as well as many others. I think I am entitled to draw an adverse inference from this.

The period in the last sentence (in brackets) of para. 317 should be changed from outside the bracket:

> [317] … (If I am wrong in that, the following analysis regarding the remaining plaintiffs would apply)**.**

To inside the bracket so that it now reads:

> [317] … (If I am wrong in that, the following analysis regarding the remaining plaintiffs would apply**.**)