
CANADA / JUDGMENT

667975 B.C. Ltd. v. Purewal

2008 BCSC 828

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 828 667975 B.C. Ltd. v. Purewal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

667975 B.C. Ltd. v. Purewal,

2008 BCSC 828

Date: 20080626

Docket: S071486

Registry: Vancouver

Between:

667975 B.C. Ltd.

Plaintiff

And:

Amrik Purewal, Jisbinder Purewal

and Manvir Purewal

Defendants

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

Georges E. Sourisseau

Suzanne K. Sheena

Counsel for the Defendants

David Harris, Q.C.

Sean George

Date and Place of Trial:

January 21, 22, 24, 25, 28-30

and February 1, 2008

Vancouver, B.C.

Authorities Considered:

Shaw Industries Ltd. v. Greenland Enterprises Ltd. (1991), 54 B.C.L.R. (2d) 264 (C.A.)

Salama Enterprises (1988) Inc. v. Grewal (1992), 66 B.C.L.R. (2d) 39 (C.A.)

Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.)

Wigmore on Evidence, 3rd ed., Vol. II

Barker v. McQuahe, (1964), 49 W.W.R. 685 (B.C.C.A.)

Skoko et al v. Chychrun Construction Ltd. (1982), 23 R.P.R. 262 (B.C.C.A.)

Semelhago v. Paramadevan, [1996] 2 S.C.R. 415

Trinden Enterprises Ltd. v. Ramsay, 2004 BCSC 226

Earthworks 2000 Design Group Inc. v. Spectacular Investments (Canada) Inc., 2005 BCSC 22

United Gulf Developments Ltd. v. Iskandar (2004), 235 D.L.R. (4th) 609 (N.S.C.A.)

United Gulf Developments Ltd. v. Iskandar, [2004] S.C.C.A. No. 172

Ali v. 656527 B.C. Ltd., 2004 BCCA 350

Paradigm Holdings Ltd. v. Ngan & Siu Investments Co., 2007 BCSC 762

- [1] This is a real estate transaction that failed to complete on the closing date of December 15, 2004. The plaintiff, a numbered company, 667975 B.C. Ltd., the proposed purchaser, seeks an order for specific performance of the contract for purchase and sale.
- [2] The plaintiff was represented at trial by two authorized agents, Harchet Kaler and Harjinder Cheema. The defendants are a family, Amrik Purewal and Jisbinder Purewal being husband and wife, and Manvir Purewal, their adult son.
- [3] The contract of purchase and sale (the "contract") was entered into on or before March 18, 2004. The defendants own the property, 6 lots in the Municipality of Surrey, with the civic address of 2669 - 144th Street. The plaintiff was the buyer. The parties consented to a dual

agency relationship with Valley Pacific Realty Ltd., Antonio Marocco and Luigi Marocco being the realtors, representing both parties to the contract. That dual agency agreement was dated March 10, 2004. Antonio Marocco (Tony) drew up the contract of purchase and sale for the parties.

[4] The terms of the contract included the following:

- (a) The purchase price was \$950,000. That was for the purchase of five of the six lots owned by the defendants. Lot number 3, on which stood a house and barn, was to be retained by the vendors.
- (b) The terms of payment were as follows: An initial deposit of \$150,000 to be held by the realtors in trust upon acceptance of the contract by the vendors. The initial deposit would become non-refundable and released to the vendors upon certain conditions being met. A further non-refundable deposit of \$100,000 to be paid directly to the vendors once the City of Surrey had issued a written Preliminary Layout Approval (the "PLA"), pursuant to an application to be made by the vendors for subdivision of the lands.
- (c) The balance of the purchase price, \$600,000, would be satisfied by the grant of a mortgage from the vendors to the purchaser as a charge against the property, at an interest rate of prime plus 3% per annum.
- (d) The completion term of the contract stated:

The purchase and sale shall be completed on the earlier of the filing of the subdivision plan in the Lower Mainland Land Title Office or December 15, 2004 (the "Completion Date"). If the subdivision plan is not signed and available for filing in the Land Title Office by December 15, 2004, the Seller may, at the Seller's option, terminate this contract and in such event the Initial Deposit and the Further Deposit will be absolutely forfeited to the Seller as liquidated damages.

[5] The purchase and sale was not completed by December 15, 2004. The vendors retained the forfeited \$250,000. The plaintiff seeks specific performance of the contract.

The Issues

- [6] The plaintiff alleges that the defendants did not cooperate in the plaintiff's efforts to complete the subdivision process with the City of Surrey, as the defendants were contractually bound to do; that the defendants failed to act in good faith, failed to perform their obligations under the contract.
- [7] Considerable dispute involves the remediation of the existing house on Lot number 3, the lot that was to be retained by the vendors. It is the position of the plaintiff that the defendants were responsible to undertake the remedial work to the existing house. The defendants say it was the obligation of the plaintiff to do the required work.

- [8] The plaintiff affirms, more particularly, that the defendants failed to meet their contractual obligations to cooperate, particularly with respect to providing information about what work needed to be done on the house.
- [9] One of the initial prerequisites needed for approval for a subdivision is to obtain the PLA. The PLA was issued by the City of Surrey on April 5, 2004. It was obtained by the defendants, as contractually required. The PLA contained standard requirements. Two of those, clauses 4 and 7 of the PLA, are in issue in this case. They are significant in relation to the barn and house on Lot 3. Clauses 4 and 7 of the PLA state as follows:
4. Any building or structure encroaching upon any proposed lot line must be satisfactorily removed or demolished PRIOR to the Approving Officer executing the subdivision plans. Prior to removing or demolishing any building or structure, a permit must be obtained from the Building Division for the removal or demolition.
 7. Prior to the execution of the subdivision plans by the Approving Officer, the applicant must engage a qualified professional to confirm that all buildings and structures being retained conform to the B.C. Building Code with respect to limiting distance requirements (i.e. the number and size of openings in a building wall in relation to the distance of the wall from the new property line). If it is determined that the buildings or structures to be retained do not conform to the B.C. Building Code with respect to limiting distance requirements, the buildings or structures will have to be upgraded to conform to the B.C. Building Code with respect to limiting distance requirements before the Approving Officer executes the subdivision plans.
- [10] Remedial work was required on the house. It was never done. The barn was not in compliance, but the defendants had it demolished and it did not present a problem at the time of closing.

Background

- [11] The defendants had purchased the property in question in 2003. By July 2003, the defendants had sent a letter of authorization to the Planning and Development Department of the City of Surrey advising them that Amrik Purewal of Amrika Enterprises Ltd. and Greg Sewell of Coastland Engineering & Surveying Ltd. were the persons authorized to act as agents for the application to develop the property. They were seeking a subdivision of the property into six suburban single family residential lots.
- [12] The previous owner of the property wrote to the City of Surrey on August 28, 2003 confirming that the property had been sold to the defendants. The defendants took over the existing application for subdivision from the previous owner. Greg Sewell was confirmed in September as the engineer acting on behalf of the defendants with regard to the subdivision application.

- [13] On October 8, 2003, on behalf of the defendants, Mr. Sewell wrote a letter to the Planning Department at Surrey advising them that Amrik Purewal was not prepared to dedicate the requested parkland as a condition of rezoning. The letter pointed out that the existing dwelling which is proposed for retention on Lot 3 "would require significant structural modification, including removal of the southerly portion of the dwelling, in order to comply with the minimum 7.5 m rear yard setback requirement." The letter asked for a reconsideration of the parkland dedication requirement.
- [14] This is an early indication that both Amrik Purewal and his agent, Mr. Sewell, were well aware that remedial work had to be done on the existing house on Lot 3. Ankenman Associates Architects Inc. ("Ankenman") responded on October 16, 2003 to Amrik Purewal's request for a proposal to work on the subdivision. Part of the proposal set out conferring with the City of Surrey with regard to their requirement for conformity of existing structures. Their proposal was accepted on October 21, 2003 by Amrik Purewal.
- [15] By early November 2003, Mr. Sewell was reporting to Mr. Purewal that the existing house could be retained on Lot 3, "with the deck to be removed." The note warned that "this is where we may have a battle with Surrey on." By November 5, 2003, Carolyn Stewart of Ankenman had provided a building design guideline for the defendants. In a letter of that same date, Ms. Stewart wrote to the Planning Department at Surrey to advise that they were in the process of writing "a Spatial Separation Report", but they were waiting for the surveyor to provide a site plan for the existing building.
- [16] Mr. Sewell wrote to the Planning Department on November 7, 2003 confirming that the existing house was to be retained on the proposed Lot 3. The letter stated that the existing deck was proposed to be removed from the house, "however our client would like to retain the existing solarium. Therefore he would require granting of a Development Variance Permit (DVP) to achieve retention of the solarium."
- [17] By February 13, 2004, the architects were ready with their revisions to the character study and building scheme for the property, and in contact with the Planning Department on that. Then on February 18, 2004, Ms. Stewart wrote a letter to the Planning Department, with copies to Amrik Purewal and Greg Sewell. The first paragraph of the letter stated as follows:
- This letter is to verify that the existing principal dwelling located on the proposed Lot 3 at 2669 144th Street is not within the allowed percentage of unprotected openings of the exposed building face area on the rear facade/west elevation.
- [18] She gave details of the house to the City, together with a survey from surveyors acting for the defendants, and photos of the existing building. Then and throughout all of the period in question, Lainya Wilcox (later Lainya Rowett), was the person everyone was dealing with in the Planning Department at the City of Surrey.

- [19] A report to council on February 23, 2004 from the Planning Department recommended that a bylaw be introduced to rezone the property for the subdivision. The Planning Department noted to council on page 6 of its report: "The subject property is the last available parcel in this suburban area for infill." Infill refers to the development of bare land for housing.
- [20] After Ms. Stewart sent a revised building scheme to the City on March 12, 2004, she received a letter from an upset Amrik Purewal dated March 14, 2004. He was unhappy that proposed changes were made and faxed to the City without prior consultation with him. He was upset that smaller homes were to be built on the proposed one acre lots, and the letter stated that smaller size houses on those lots did not make any sense. He reminded her in the letter that he had 25 years of being in the business. The letter stated, in part, "Right now I have to cover my costs or I would be mad to even contemplate going ahead with this development if I am going to incur a loss with the whole development."
- [21] Four days later, Mr. Purewal, his wife and son entered into the agreement to sell the property to the plaintiff. A cheque dated March 19, 2004 in the amount of \$150,000 was deposited with Valley Pacific Realty Ltd. in trust.
- [22] Agents for the plaintiff contend they had no idea the house needed prerequisite remedial work until late November, weeks before the closing date. The defendants state there were a number of ways that the plaintiff could have found out, had the plaintiff done due diligence and/or hired appropriate professionals to have the required work done. What is clear is that remedial work was never done on the house. The work itself may not have been major. But without the remedial work being done, there would be no approval of the subdivision plan.

The Contract of Purchase and Sale

- [23] Further relevant sections of the contract are as follows:
12. TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the Real Estate Act, on account of damages, without prejudice to the Seller's other remedies.
18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out above all of which will survive the completion of the sale.

SCHEDULE "B"

[A] The Seller and the Buyer agree that if any of the provisions of this Schedule "B" are at variance with the other provisions of this Contract, the provisions of this Schedule "B" shall prevail.

CONDITION PRECEDENT:

[D] This Contract is subject to approval of the Application by Surrey City Council at the public hearing of the Application to be held on March 22, 2004. This Condition Precedent is for the benefit of both the Buyer and the Seller. If not satisfied on March 22, 2004 this Contract shall null and void and the Initial Deposit shall be returned to the Buyer.

COSTS AND RESPONSIBILITY:

[F] The Seller shall have carriage of the Application and shall bear all the costs of the Application up to and including the issuance of the PLA.

[G] The Buyer shall have carriage of the Application and shall bear all the costs of the Application and the Subdivision from and after issuance of the PLA.

[H] The Buyer covenants to pursue the Application and the Subdivision expeditiously and in a timely manner and to pay all the costs, post all the securities and do all the acts and things required both by the City of Surrey and otherwise to subdivide the lands in substantial accordance with Schedule "A".

CO-OPERATION:

[M] The Seller agrees to co-operate with the Buyer in the development of the Property and will sign all documents including a letter of authorization to the City, as may be reasonably required by the City to develop and subdivide the lands.

[N] The Buyer and its authorized agents may enter on the lands for the purpose of inspection, soil testing, tree survey, environmental testing and topographical surveys upon 24 hours written notice to the Seller. All such agents shall be registered with the Workmen's Compensation Board and the Buyer will provide proof of such registration to the Seller upon request....

[O] The Seller is not aware of any condition pertaining to the site that would adversely affect the development of the Property.

LANDS RETAINED BY THE SELLER:

[P] The Buyer shall be responsible for and shall pay the complete cost of driveway re-location and of providing all services to the existing house on the lands being retained by the Seller (as outlined in yellow on Schedule "A") as may be required by the City of Surrey.

[Emphasis added]

Evidence at Trial

[24] Seven witnesses testified over eight days of trial. For the plaintiff, Mr. Kaler and Mr. Cheema testified as well as Michael Kompter who works with Hub Engineering, the engineering firm hired by the plaintiff to help guide the application for the subdivision. Amrik Purewal testified for the defendants. The examination for discovery of his wife, Jasbinder Purewal, was read in. Also testifying were Antonio Marocco, the realtor for both parties, John Wilson from the Engineering Department of the City of Surrey, and Lainya Rowett from the

Planning Department of the City of Surrey.

Harchet Kaler

- [25] Mr. Kaler testified that the defendants were late in telling them that the PLA had been obtained April 5, 2004. He also testified that he and Mr. Cheema knew nothing until late November of the existing problems with regard to the house on Lot 3, with little time before the completion date. Mr. Purewal had wanted Greg Sewell and his company to continue doing the engineering work on the subdivision plan, but Mr. Kaler wanted Mike Kompter from Hub Engineering to do the work. Mr. Kaler testified it took a while to get Mr. Purewal to agree to this, as there had to be an authorization indicating to the City that it was no longer Coastland, Greg Sewell's company, but rather Hub Engineering.
- [26] The desired change of engineers was discussed at a May meeting between the parties, and at that time, Mr. Kaler said that the defendants refused to authorize the change of engineers. An authorization for the change was finally obtained by the plaintiff in August, although it had a handwritten date of July 19, 2004 on it.

Harjinder Cheema

- [27] Mr. Cheema testified that toward the end of November, in discussions with the Planning Department, he learned there was a problem with the subdivision gaining approval; a problem with the house on Lot 3, that needed remedial work done before any approval of a subdivision. Although Mr. Cheema was described originally as a silent partner, he was obviously very involved in these matters after the contract was signed in mid-March.
- [28] An impressive witness with good recall, Mr. Cheema testified that the defendants never told him of any problems with regard to the house, or the letter from the City that had been received by the defendants in June 2004 referring to the required work. He also testified that money was no problem for the plaintiff, that the money was available; the additional \$100,000 that was to be paid at the date of closing, and the monies that would be required just prior to approval of the subdivision, for various fees.

Michael Kompter

- [29] He is a professional civil engineer, with experience not only in these types of subdivision applications, but more particularly in this area of the Lower Mainland. He enjoys a good relationship with the Surrey Engineering and Planning Departments, and advised the agents for the plaintiff that there should be no problems obtaining a subdivision, in his view. At that time, he was unaware of any problems with the existing house. His area was engineering, not architecture, so it would not be within his domain to investigate the existing house. I found him to be a candid and credible witness.

- [30] On November 9, 2004, when he tried to get information from the Planning Department at the City, he was told that he could not receive information on what problems were still outstanding, because no letter of authorization from the defendants had been given to them; that authorization had to be signed by the owners of the property, the three Purewals. He could not proceed further without that letter of authorization.
- [31] Mr. Kompter stated that he had had his first serious meeting on May 25, 2004 with Mr. Kaler and Mr. Cheema, and at that time told his clients that an authorization would be needed for the City. Again in early June and in early July, he told them of his need for an authorization. He said if there is no authorization at the beginning of a procedure, it can be almost fatal to an application.
- [32] There were two authorizations placed in as exhibits. The first appears to come from the three Purewals, "Re: 2669 - 144 Street, Surrey, B.C.". It states, "I hereby authorize Coastland Engineering to provide Hub Engineering Inc. with all files, drawings and detailed related information associated with the above referenced project. I hereby authorize Harchet Kaler to act as our agent on the above referenced project." It is not addressed to the City. There is a handwritten date at the bottom of the page "July 19/2004". Amrik Purewal testified that he wrote that in. Mr. Kaler and Mr. Kompter testified that this note was not received by them until August 2004.
- [33] The authorization that the City required is entitled "Letter of Authorization", from the Planning and Development Department. This more formal authorization is the same form that Mr. Purewal obtained from the previous owner of the property upon his purchase of the land in question. Mr. Kompter testified that he filled in the top part of the form, giving the address and legal description, indicating the agent was to be Hub Engineering with the address and phone numbers, and his name as the contact person. The date of December 1st, 2004 is written in, not by Mr. Kompter. It is signed by the three Purewals. I accept the testimony of the plaintiff that this document was not received by anyone representing the plaintiff until December 6, 2004.
- [34] Handwritten at the top of that letter of authorization by the Purewals was the following notation:

Please note

Sale of contract for 2669 - 144 Street - completion date is December 15, 2004. Authorization expires after that (December 16, 2004)

"Amrik Purewal"

- [35] Jisbinder Purewal testified that she wrote that and her husband signed it.

- [36] It is interesting to note that on October 4, 2004, there was a letter from Carolyn Stewart, still apparently acting on behalf of the Purewals, to Lainya Rowett verifying that the existing building on Lot 3 was not in conformity. A copy of this letter was sent to Amrik Purewal as well as his company, and to Greg Sewell at Coastland Engineering. It also enclosed photos and drawings. That letter and enclosures were never disclosed by the defendants to the plaintiff.
- [37] Nor was a fax sent from Lainya Rowett in the Planning Department to Greg Sewell on October 8, 2004. That fax letter stated as follows:

Dear Greg:

The Building Division has reviewed the Spatial Separation Report prepared by Ankenman Associates Architects Inc., October 4, 2004, for the house to be retained at 2669 - 144 Street. They confirmed that the house, particularly the rear wall (west elevation), is not within the allowed percentage of unprotected openings of the exposed building face areas. Please ensure the applicant resolves this matter as a condition of subdivision approval.

The plaintiff was unaware of this letter. It was never disclosed to the plaintiff. The Planning Department was still dealing with the architect and engineer for the defendants.

- [38] On December 7, 2004, Mike Kompter is finally in correspondence with the Planning Department. Lainya Rowett writes to him thanking him for the estimate of the 15% cash in lieu of park dedication. She also writes, "Attached is a copy of the final checklist I sent to Amrik Purewal on June 23, 2004."... In order to have the subdivision approved, "all PLA requirements must be met including a resolution of building code and setback issues with the existing house to be retained on proposed Lot 3." She set out the problems that existed with regard to that house. Again, the final checklist that had been sent to Amrik Purewal on June 23, 2004 was never sent by Mr. Purewal to the plaintiff, evidence that I accept from the plaintiff.

Amrik Purewal

- [39] Mr. Purewal testified as to the three extensions of time that the plaintiff had requested, in July, September and November 2004. These requests for extensions were denied. There was also some discussion of revising the contract, to sell all of the properties including Lot 3, but the parties could not agree on terms.
- [40] So the original agreement remained the same, with the exception of an addendum that was dated April 26, 2004 between the parties. In that later contract, the plaintiff buyer acknowledged receipt of the PLA as of April 26, 2004. The buyer was then given an additional 21 days from April 26 to May 17 to pay the second deposit of \$100,000. The PLA had in fact been obtained by the defendants on April 5, but for reasons no one seems able to explain, the purchaser did not know of or receive a copy of the PLA until April 26. The second deposit of \$100,000 was paid directly to the defendants on May 3.

- [41] Mr. Purewal acknowledged that he knew by November 6, 2003 of the issues with regard to the existing house on Lot 3 and the need for remediation in order to obtain subdivision approval. He was aware the barn was also a problem, and he testified that in March the barn was torn down, as required by the City. He said a neighbour had done it, but he could not remember the neighbour's name. Mr. Purewal paid \$700 to have the barn taken down. He testified he had asked Tony Marocco about the barn being taken down, and Tony told him he could do that. Mr. Purewal confirmed he knew a permit was required for the demolition.
- [42] At his examination for discovery on April 10, 2007, Mr. Purewal testified that the barn was demolished around the end of April or the beginning of May. He said that the demolition was not his responsibility, but, rather, the plaintiff's responsibility. He could not remember if the demolition of the barn had been discussed with the plaintiff or not. Placed in evidence was an invoice from an individual for the demolition on the barn of April 9, 2004, for \$700. Mr. Purewal's application to the City of Surrey for a permit to allow the demolition was dated April 27, 2004.
- [43] Mr. Purewal's evidence with regard to the barn, the permit and the demolition was inconsistent. The barn was a very obvious impediment to subdivision approval, and under the contract, according to the interpretation of the defendants, the responsibility of the plaintiff. So why did the defendants remove it, at their own cost, with no communication with the plaintiff?
- [44] There were a number of other areas where Mr. Purewal's evidence was inconsistent; and at times he was evasive and/or unresponsive to questions. From all the evidence, I am satisfied that at no time did the defendants advise the plaintiff or anyone acting on behalf of the plaintiff that there was a problem with the existing house on Lot 3; that remedial work had to be done on that house before a subdivision plan could be obtained.
- [45] Amrik Purewal clearly knew of the existing problems with regard to the house as of November 3, 2003, if not earlier. It was on November 3, 2003 that Greg Sewell sent a fax to "Amrika" "Re: Prop. 6 Lot C-D Subdivision". That is where Sewell predicted there may be "a battle with Surrey" with regard to Lot 3 and the existing house. But a month previously, Sewell had sent a fax on October 8, 2003 to the Planning Department - copy to Amrik Purewal - which said, in part, "The existing dwelling which is proposed for retention on Lot 3 would require significant structural modification..."
- [46] Mr. Purewal testified that sometime before the March 18 signing of the contract, Tony Marocco took Mr. Purewal's entire file with regard to the property, copied it, and returned it to his home. He stated this a number of times. Yet when Mr. Marocco testified, he said that never happened, that he would have remembered that.

- [47] In testifying that his file was copied by Mr. Marocco, Mr. Purewal said that it was "around or shortly after the offer." That he gave the purchaser all that was needed. Repeatedly, he said of documents that he was being questioned on, particularly with regard to the remedial work on the house, that this was a document that he gave to Mr. Marocco.
- [48] Amrik Purewal was very clear that the work would have to be done and paid for by the purchaser, but that he, Mr. Purewal, would have to approve any work done on the home. "We could consult." He said it was not of much concern to him, that it was a house that was being rented out, it was "an old house".
- [49] It appears at no time did the defendants hand over to the plaintiff or anyone representing the plaintiff, or their realtors, the work that the Purewals' architect had done on the house, including photographs. Mr. Purewal was concerned about how the deck would be done. He wanted the sundeck to stay. But he never told the plaintiff of his intentions. And the contract does not expressly deal with any work to be done on the house on Lot 3.
- [50] On June 23, 2004, the Planning Department was still contacting the defendants and Mr. Sewell with regard to the subdivision. There had been no authorization provided by the defendants to the plaintiff, no notification by the defendants to the City of Surrey that the subdivision application was no longer that of the defendants. Earlier, on April 14, Greg Sewell had listed for Mr. Purewal, people who had made inquiries to buy the property. Mr. Purewal could not recall this in his evidence.
- [51] Mr. Purewal testified documents on the need for remedial work on the house would have been in the Coastland file. He had signed an authorization for Coastland to provide Hub Engineering with "all files, drawings and detailed information associated with the above referenced project." The reference was "Re: 2669 - 144 Street, Surrey, B.C.". He said he signed that July 19, 2004.
- [52] There is no evidence when Coastland or Greg Sewell received this authorization, or what was in the Coastland file. Greg Sewell was not called as a witness.
- [53] Mike Kompter of Hub Engineering testified he had been involved with this property previously. He was familiar with issues pertinent to the engineering requirements on the property. He stated the authorization signed by the defendants for Coastland to provide material to Hub was not received by him until sometime in August. He said the file was never transferred from Coastland.
- [54] Mike Kompter did say he spoke to Mike Kelly at Coastland, and "asked where they were at". He said Coastland had a pre-design meeting set with the City. But under the rules of the Engineering Association, Kompter testified they, Hub, had to prepare their own design.
- [55] The file from Coastland was never sent over, never received by Mike Kompter or anyone else representing the plaintiff. Greg Sewell continued to do work for the defendants. I question why Sewell was not called to give evidence.

- [56] I found Mr. Purewal to be evasive at times, very informed at times, and utterly uninformed at others. His evidence was inconsistent, and all of this diminished his credibility.

Tony Marocco

- [57] Mr. Marocco is a realtor and developer and has been in the Surrey area for many years. He was away in July and August of 2004, but his son Luigi Marocco was in town during that time.
- [58] Mr. Marocco testified with regard to the barn. He said he only learned at trial in 2008 that the barn had been demolished. He had no knowledge of it up until that time. He denied telling Mr. Purewal that it was all right to take the barn down. He gave an absolute denial with regard to copying Mr. Purewal's file, taking it from Mr. Purewal's home and then copying it and returning it. He said that never happened.
- [59] At the end of November 2004, Mr. Cheema contacted Mr. Marocco with regard to the remediation required on the house. This was the first that Mr. Marocco knew of that problem. Had that been a problem known by him at the time the contract was being drawn up, he said it would have been dealt with in the contract. It is apparent that the defendants did not advise the realtor or the plaintiff of the existing problem prior to or at the time that the contract was drawn up.
- [60] With regard to the value of the lots, Tony Marocco's testimony is that as of December 2004 the lots would each be worth anywhere from \$350,000 to \$450,000. At the time of trial, January 2008, he said they would each be worth probably in excess of \$700,000.
- [61] Mr. Marocco was present at the May meeting between the parties, but he testified for an hour or longer the parties spoke almost entirely in Punjabi, which he does not understand.

John Wilson

- [62] John Wilson from the Engineering Department of the City of Surrey testified. He was the project manager for the proposed subdivision plan. On August 10, he began dealing with Mike Kompter from Hub Engineering. He said there was no letter of authorization needed as far as the Engineering Department was concerned. He also testified that by December 15, nothing more was required from Hub. Mike Kompter had submitted everything that was required up to that point in time for the subdivision.

Lainya Rowett

- [63] Lainya Rowett also testified. She confirmed that she could not deal with Mike Kompter, Hub Engineering or the plaintiff until she received an appropriate letter of authorization. She had never seen the July 19 authorization, stating that Mr. Kaler should be the agent. Nor did she have any information from Mr. Sewell that the agent had changed. She kept dealing with the defendants' engineer and architect. She did not receive any change in authorization from anyone until December 6; before that, no written document from the defendants with

regard to such a change.

- [64] In December 2004, Mrs. Rowett said she received a telephone call from Amrik Purewal. He advised her that the contract was going to expire December 15. "I got the sense the date was coming up quickly, and he was indicating it was not going to be completed in time." She said she asked him to explain this in writing, and she received a letter from him on December 23 to that effect.

Credibility

- [65] There is a problem with the credibility of Amrik Purewal in a number of areas. For example, he was unable to give an appropriate explanation as to why his son's signature was totally different on two separate documents. But he assured the court in evidence that his son had signed both; he just did not know why his son used two different signatures.
- [66] I am satisfied that the defendants sat on vital information, the information of the requirement of work to be done on the existing house on Lot 3. That information was not disclosed to the plaintiff, or to any representative from the plaintiff, nor to the realtor who was acting as agent for both parties to the contract. In effect, the defendants were lying in the weeds while the value of the property was apparently increasing rapidly and the clock was ticking on the subdivision application. I accept the evidence of Mr. Marocco on the increasing value of the lots. He is an experienced realtor and developer in the area, and someone I regard as an independent witness.
- [67] In those areas where the evidence of Mr. Purewal is in conflict with the evidence of Mr. Kaler, Mr. Cheema, Mr. Kompter or Mr. Marocco, I do not accept the evidence of Mr. Purewal over those other witnesses.

Analysis

- [68] The PLA issued by the City of Surrey contains certain standard requirements, and more particularly, clauses 4 and 7 are in issue. They have already been set out. The barn was demolished by Mr. Purewal, at his own cost, without notice to the plaintiff. But Mr. Purewal insists that it was the contractual obligation of the plaintiff to undertake the remedial work of the existing house.
- [69] The plain reading of the contract does not determine whose responsibility it would be. The house is not mentioned. So it is essential to look at both the terms of the contract of March 18, 2004 as well as clauses 4 and 7 of the PLA. And then look at the surrounding circumstances for assistance in determining where the responsibility for remediation of the house might lie. In my view, it lies with both parties. The responsibility begins with the defendants, and should end with the plaintiff. There seem to be five stages in determining and undertaking the responsibility of the remedial work to the existing house.

- (a) The defendants must identify the problem to the plaintiff, because of their prior knowledge. Had the problem been unknown to both parties then there would have been no such obligation on the defendants. But the contract deals with "Representations and Warranties", and "Co-operation", in the development of the property. The contract further states in Schedule "B" at paragraph [O], "The Seller is not aware of any condition pertaining to the site that would adversely affect the development of the Property." These defendants were "aware".

The defendants had prior knowledge as early as October and November, 2003. It would have been very simple to tell the purchaser and/or the realtor before the contract was drawn that there is a known problem, and it should be dealt with in the contract. This was not done. Even after the contract was signed, it would still be the responsibility of the defendants to show good faith, to cooperate as they are contractually bound to do; to tell the plaintiff and/or the real estate agent, and/or give copies of all prior documents detailing the problem so that it could be corrected in a reasonable time. Mr. Purewal testified that he gave his whole file to Mr. Marocco, and then it should have been made available to the plaintiff. In my view, that did not happen, and I accept the evidence of the agents for the plaintiff and Mr. Marocco.

- (b) The defendants would then have to be consulted and agree as to what work will be done on the house that they own. Which windows, how should they be downsized, what about the deck, what about the solarium? There would have to be a consultation process between the defendants and the plaintiff with regard to the remedial work that had to be done to satisfy both the City and the owner, the defendants.
- (c) The plaintiff would then have to arrange and pay for the work to be done. This would have to be done at a time and in a manner that was acceptable to the defendants. The plaintiff would not be allowed to simply go onto the property without the clear permission of the defendants.
- (d) The defendants would then have to allow the plaintiff and its workers on the land, with the usual conditions and safeguards to satisfy insurance requirements and workers' safety.
- (e) It would be the sole responsibility of the plaintiff, the purchaser, to pay for the remedial work.

[70] Instead of cooperating with the plaintiff, the defendants stayed silent and the question arises - were the defendants still active in proceeding with their own subdivision? They were certainly aware that the completion date was speeding ever closer. Every delay and roadblock, every document not provided in a timely manner, worked to the benefit of the defendants and against the interests of the plaintiff.

[71] Prices were going up rapidly, and these lots were prized. A draconian deadline was sitting waiting. There was no obligation on the defendants to grant an extension, but there was an obligation not to delay. The defendants have failed to act in good faith throughout, in my view. Amrik Purewal was a very experienced developer, experienced with subdivisions, over

a 25 year period. He must have known that the failure to do the remedial work on the house that he owned was going to be fatal to the plaintiff's subdivision application. That is the only inference that can be drawn.

The Value of the Lots

- [72] In his testimony, Tony Marocco agreed that lots of this size were very rare in this area, and even more rare since the time of the contract. By December 2004 such lots were more rare and even more so as of the date of the trial.
- [73] It appears the value of the lots increased substantially, even within the short period in 2004 between the signing of the contract on March 18, 2004 and December 2004.
- [74] The contract for five lots was for \$950,000, or \$190,000 for each lot. According to Mr. Marocco, by December 2004, the lots would each be worth anywhere from \$350,000 to \$450,000. Then by the date of trial, January 2008, his estimate was that each lot would be worth \$700,000.
- [75] According to Mr. Purewal in his testimony at trial, he always keeps up to date with the real estate market. He said that in 2004 the market remained level, that it might have been up maybe one or two percent, but was "flat". That evidence is the opposite of what Mr. Marocco stated, and is not believable.

Conclusion

- [76] I accept the evidence of Mr. Cheema and Mr. Kompter that in all other respects, except for the remedial work to be done to the house on Lot 3, the necessary work and funds were available to complete the necessary steps to obtain subdivision approval by the completion date. Money was not a problem. The extension given in April to pay the second part of the deposit, the \$100,000, was apparently sought and granted without question because the PLA had not been delivered in a timely fashion to the plaintiff. Once the PLA was delivered, on April 26, 2004, the additional \$100,000 was paid on May 3, two weeks before the deadline of May 17.
- [77] I accept the evidence of John Wilson from the Engineering Department and Mike Kompter, that everything had been done as required as far as the Surrey Engineering Department was concerned. The problem was with the Planning Department. And that problem was the remedial work that had to be done on the house.
- [78] The advantage to the defendants of having the plaintiff unable to close on the completion date, December 15, 2004, is evident. The defendants get to keep \$250,000 cash, the money forfeited under a rather tough contract. The lots are virtually unique within that area, and the value of the lots has risen dramatically from March to December 2004, from \$190,000 each to \$350,000 to \$450,000 each.

- [79] Further, the defendants never really ceased their efforts toward a goal of subdivision, not a subdivision for the plaintiff, but for the defendants. Greg Sewell continued to do work as an engineer on behalf of the defendants. Carolyn Stewart continued some work on behalf of the defendants with regard to subdivision requirements. Both these professionals were engaged with the City of Surrey Planning Department, not on behalf of the plaintiff, but only on behalf of the defendants, long after the contract was signed on March 18, 2004, and after the PLA was obtained on April 5, 2004.
- [80] Mr. Purewal was very quick to remind the Surrey Planning Department that his belated letter of authorization would expire as of December 16, 2004. He and his wife made that note on the letter of authorization in early December 2004. I can only assume that was an important date for them.
- [81] On all the evidence, on a balance of probabilities, I can only conclude that the defendants were not acting in good faith. They breached the contract of purchase and sale that they entered into with the plaintiff on March 18, 2004. They failed to disclose necessary information to the plaintiff, and continued to act in their own best interests, and not in the interests of cooperation with the plaintiff, as stipulated in the contract.
- [82] This is a situation where specific performance of the contract should be ordered. The property in question is not property that is easily duplicated. The defendants were in breach of the contract through their conduct, in failing to act in good faith. The plaintiff was in breach, unable to close as required by December 15, 2004, not able to perform the required remedial work on the house before the closing date.
- [83] As the Shaw Industries Ltd. case confirms, in such a situation, time ceases to be of the essence. As Madam Southin stated in Shaw Industries Ltd. at page 7:

From the proposition that the contract still subsists, it follows that neither party is relieved of his own contractual obligation to complete by the failure of performance of the other. He cannot treat that failure as a repudiation. In order that he may do so he must himself first give such a notice and must at the time thereby fixed for completion be himself ready, willing and able to perform.

The underlying reason for this is that a party to a contract for the sale of land, who is in essential default, cannot be heard to complain of the wrongdoing of the other until he has given the other the opportunity to do right and is himself ready to do right. To cast stones, one must be without sin or at least have expiated one's sin.

- [84] In that case, the purchaser made it clear that they were ready to continue and complete the contract, and specific performance was ordered. The same situation exists in this case, the purchaser is ready and willing to complete, once the remedial work is done on the house. The funds remain available for completion.

[85] In the Salama Enterprises decision of our Court of Appeal in 1992, the decision in Whitehall Estates Ltd. v. McCallum (1975), 63 D.L.R. (3d) 320 was cited. The decision by Mr. Justice McIntyre cited an 1881 decision of Mackay v. Dick (1881), 6 App. Cas. 251, where Lord Blackburn stated:

... that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

[86] That is helpful with regard to the situation of the remedial work to be done on the house. As I have stated, it was necessary for both parties to do something to ensure that the remedial work was done, as a prerequisite for the subdivision approval. As in the Salama case, the vendors here made compliance almost impossible in any practical sense.

[87] The position of the defendants is that specific performance should not be granted, as there is no evidence that the property in question is unique, to the extent that substitute property could not be readily available. The evidence says otherwise.

[88] The defence maintains that specific performance as a form of relief is not available because the plaintiff was not ready, willing and able to complete on the closing date. That is true, but I have found that it was due in large part because of the fault of the defendants. The defence then argues that specific performance should not be the relief granted, because damages are an adequate remedy.

[89] In the Semelhago decision, the Supreme Court of Canada in 1996 dealt with the issue of damages in lieu of specific performance. At paragraph 20 of that case, the court stated that at one time the common law did regard every piece of real estate to be unique. But that that was no longer the case. That when a deal falls through, another piece of property is frequently readily available. Specific performance is no longer granted as a matter of course, "absent evidence that the property is unique to the extent that its substitute would not be readily available." (paragraph 22).

[90] In this case, if there were to be damages in lieu of specific performance, those damages would be assessed according to the value of the property at the time of trial, not at an earlier date. At paragraph 18 of the Semelhago case, the court concluded that in the circumstances of that case, the appropriate date for assessment of damages was the date of trial, or more precisely, the date of the judgment. That was the date upon which specific performance was ordered.

[91] In this case, it is my view that specific performance is the appropriate remedy, and I so order.

[92] Costs to the plaintiff, Scale B.

"Morrison J."

Madam Justice Morrison

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