

CANADA / JUDGMENT

Bontorin v. Greenway Land Corporation

2004 BCSC 1366

COURT

Supreme Court of British Columbia

DECIDED

25 November 2004

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2004 BCSC 1366 Bontorin v. Greenway Land Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bontorin v. Greenway Land Corporation,

2004 BCSC 1366

Date: 20041125

Docket: S033972

Registry: New Westminster

Between:

BRUNO BONTORIN and WANDA BONTORIN

PLAINTIFFS

And

GREENWAY LAND CORPORATION and

CENTRAL PROJECTS LTD.

DEFENDANTS

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

Counsel for Plaintiffs

R.A. Easton

and A. Kanji

Counsel for Defendants

K.A. Pepper

Date and Place of Trial:

March 10-14, 17-19,

June 2-6, 9,

September 15, and

December 15-18, 2003

New Westminster, B.C.

- [1] Mr. and Mrs. Bontorin owned what they thought was five acres of land in Surrey ("Property") and sold their Property to Greenway Land Corporation ("Greenway") expecting that they would receive back the one acre portion of the Property upon which their house ("House") was located. Greenway intended to arrange for the sub-division of the Property so that it could sell the resulting lots which were located on that part of the Property which would not be transferred back to the Bontorins. Despite the completion of the sale and the subsequent sub-division of the Property, no property has been transferred to the Bontorins. This action deals with the question of why that has not occurred.

BACKGROUND

- [2] In August of 1992, the Bontorins were approached by David Hirst regarding the listing of the Property for sale. In an August 25, 1992 "Engagement Agreement", the Bontorins listed the Property with Countrywide Lakeview Realty Ltd. ("Countrywide") and agreed to pay a \$15,000 commission if a sale was completed. There was no listing price set out in the Engagement Agreement.
- [3] An offer was obtained from Central Projects Ltd. ("Central") and the offer was accepted by the Bontorins. The September 16, 1992 Contract of Purchase and Sale ("1992 Contract") provided for a purchase price of \$500,000 as well as the following handwritten provision:

Purchaser to sell back existing house on corner acre lot for one dollar on completion date of this contract and hook the Property to the sewer.

- [4] Deleted from the first page of the 1992 Contract was the following handwritten provision: "All other compliance with the Sub-division shown will be the Vendor's responsibility". That deletion is initialled by the Bontorins but not by someone on behalf of Central. At trial, Mr. Hirst testified that the 1992 Contract was signed on behalf of Central before it was taken to the Bontorins for signature. Regarding the deletions that were not initialled by Central, Mr. Hirst testified that he took what had been signed by the Bontorins to Mr. Manhas on behalf of Central, that Central wrote a cheque for \$5,000 but that he "forgot" to get Mr. Manhas and Central to initial the changes. Regarding the deletion of this phrase, Mr. Hirst stated that Mr.

Manhas was disappointed with that deletion but that he advised Mr. Manhas that it was the only way that a deal could be struck with the Bontorins. I accept the testimony of Mr. Hirst in this regard and I find that the deletion was accepted orally on behalf of Central by Mr. Manhas.

[5] The typewritten Addendums which were attached provided as follows:

Addendum "A"

1. This agreement is conditional upon the purchasers conducting a feasibility study of the Property which indicates that the proposed development is financially feasible in the opinion of the purchasers. This condition is for the sole benefit of the purchaser and is to be removed in writing and the purchasers are to pay a non refundable deposit of \$5,000.00 directly to the vendors on acceptance of this offer, failing which this agreement will become null and void.
 2. This agreement is then conditional upon the purchaser obtaining satisfactory municipal approvals for the proposed development on the Property. The aforementioned shall be such the indicated requirements of the Municipality (for services, development cost charges, and approved development) shall allow for a development that is financially feasible in opinion of the purchasers. The foregoing condition is for the sole benefit of the purchasers and may be unilaterally removed in writing by the purchasers and the purchasers deposit shall be increased by a further \$1,000.00 on or before 365 days after the removal of first subject, failing which this agreement shall become null and void unless the purchasers have, prior to 365 days exercised their option to extend the dates as set out in Addendum "B" attached as integral part of this contract. This agreement may be freely assigned by the purchasers in whole or in part.
- [6] There were handwritten changes to Addendum "A" as the non-refundable deposit was increased from \$1,000.00 to \$5,000.00 and was to be paid directly to the Bontorins on acceptance rather than "sixty days from the acceptance". Those changes are initialled by the Bontorins and on behalf of Central.
- [7] Similarly, all pages of Addendum "B" are initialled by the Bontorins and on behalf of Central. Addendum "B" dealt with the ability to extend the time for the removal of the "purchaser's conditions" and provided that the completion and possession dates would be 60 days after the removal of all subject clauses. Addendum "B" also stated:
5. The vendor, upon acceptance of the agreement, will appoint purchasers or their agent as the vendors agent to deal with Municipality in processing the required development application. The vendors will provide any signatures required by the approving authorities in order to process the development application.

6. All cost of applications and processing the approvals are to be borne by the purchasers and purchaser shall save the vendor harmless from any charges arising from the sub-division and approvals.
 7. Vendors agree that the purchasers or their agents shall have reasonable access to the Property to obtain surveying and engineering information.
 8. Existing Tenants to vacate the premises by 30 days after removal of all subjects.
- [8] In order to comply with paragraph 5 of Addendum "B" of the 1992 Contract, the Bontorins in an undated letter authorized Central and its engineering firm to "... act as our agents to rezone and plan our land for sub-division". Central was also able to purchase an adjacent property and it was the intent of Central to seek sub-division of both properties together. A November, 1992 Rezoning Application was forwarded to Surrey requesting a rezoning from A-3 zoning to R-1 zoning for both properties.
- [9] There appears to have been very little subsequent activity relating to the Rezoning Application. However, the rezoning application was changed from a rezoning for "8 R-1 Lots" to a different concept as the February 24, 1993 "Concept Layout Plan 1" presented on behalf of Central contemplated a total of 40 lots on the two properties, including 18 lots plus a partial lot on the Property and a large lot (Lot 33) for that portion of the Property that would be transferred back to the Bontorins. When the adjacent property was subsequently sold by Central, the Rezoning Application made on behalf of Central was amended to reflect only the request to rezone the Property to provide for "8 R-1 Lots".
- [10] On February 9, 1993, Central entered into an exclusive listing agreement with Mr. Hirst relating to the Property, listing "4 acres bare land" for a price of \$615,000 and with the following "Remarks": "This is an assignment which on Completion of an approved sub-division 1 acre & house to be deeded back to original owner for \$1.00". "Exclusive Listing" contracts in identical form were signed by Central on March 19, 1993 and July 9, 1993. However, the listing price for the 4 acre portion of the Property increased to \$1,020,000.00.
- [11] Duncan & Associates ("Duncan") was the engineering firm retained by Central. On June 2, 1993, Duncan made a request to the Planning Department of Surrey to meet to discuss "recent changes in this project".
- [12] On August 26, 1993, Central tendered a non-refundable \$1,000.00 to the Bontorins to extend for an additional 90 days the clause in the 1992 Contract relating to the Purchaser's condition for obtaining "satisfactory Municipal approvals for the proposed development". On December 13, 1993, Central tendered a further \$1,000.00 to extend the subject removal date to March 15, 1994.
- [13] It was known by the parties that the Property probably had within it the boundary between what was defined by Surrey as "Urban" property and what was defined as "Suburban" property ("Urban/Suburban Boundary"). However, the exact location of that boundary was not set and was part of the negotiations that Central undertook with Surrey. It was in the

interests of Central for the Urban/Suburban Boundary to be as far north as possible within the Property as Urban lots are significantly smaller than Suburban lots, as the portion of the Property which would be transferred to the Bontorins would be in the Urban portion of the Property, and as Central wished to minimize the number of Suburban lots and maximize the number of Urban lots within that part of the Property it would obtain upon sub-division for development.

- [14] By an October 26, 1993 letter, Surrey advised Duncan that City Council had given final adoption to redesignating some of the general area around the Property from "Suburban" to "Urban" and that staff had reviewed the Rezoning Application and had a number of comments:

First, the Urban/Suburban boundary approved by Council lies along the northern boundary of Lot 3 and swings south at a 45 degree angle through the southern third of Lot 14 (see map). The Planning and Development Department cannot support your proposal to re-designate Lot 14 to urban. Land north of the Urban/Suburban boundary should be subdivided into suburban lots.

Second, your sub-division design needs to be amended to reflect the Official Community Plan boundaries, the existing ravine and lots conforming to the appropriate zones in the new Zoning By-law....

Finally, we will require a tree survey to be submitted with your new sub-division layout. The new sub-division layout should take into consideration the preservation of as many trees as possible. The Tree Preservation By-law recently adopted by Council prohibits tree removal within five metres of a Property line or 10 metres of a road.

- [15] In view of the final placement of the Urban/Suburban Boundary, the layout plan presented to Surrey was no longer feasible as that plan had contemplated that all of the Property would be comprised of Urban lots. It was now apparent that only about seven Suburban lots could be placed in that part of the Property above the Urban/Suburban Boundary. Because that was the case, Central then embarked upon a process to maximize the size of the Suburban lots and to advance subdivision plans which would see at least some Urban lots south of the Urban/Suburban Boundary available to the Defendants as part of the Property which would be available to them for development.
- [16] There is nothing in evidence that would allow me to conclude that a copy of the October 26, 1993 letter from Surrey was forwarded to the Bontorins or that they were made aware of the implications of the decision taken by Surrey Council. It is also not clear that the Bontorins were advised about the prohibition against tree removal as a result of the Tree Preservation Bylaw or about the needed amendments to reflect the Official Community Plan boundaries relating to the existing ravine on the west part of the Property.
- [17] Despite the agency of Central, Central throughout did not fulfil its legal obligation to report to its principals from time to time about the progress of obtaining re-zoning of the Property and the sub-division of the Property. Because the Property included portions that would be

available for the Defendants as well as portions that would be available for the Bontorins, it was clear that Central was acting in a dual capacity and that, as agent for the Bontorins, Central was required to act throughout in a way which would not allow its interests to be favoured over the interests of the Bontorins. Unless otherwise indicated, none of the correspondence and negotiations between Central and Surrey were made known to the Bontorins.

- [18] By a November 1, 1993 letter to Surrey, the Provincial Ministry of Environment Lands and Parks ("Ministry") advised regarding an assessment that would have to be undertaken. The letter provided in part:

Consequently, it will be necessary for the proponent to engage the services of a qualified environmental consultant to undertake both a biological inventory and habitat enhancement assessment of the stream. The assessment should encompass the entire stream from its headwaters south to Greenway Drive, to its confluence with the Serpentine River.... Once the assessment has been received by this office, we will review the contents, and then forward our conditions/concerns for this proposal.

- [19] This assessment involved a number of properties adjacent to the stream in question. H.Y. Engineering Ltd. ("H.Y. Engineering") was retained to undertake the work on behalf of owners and developers having properties adjoined the ravine.

- [20] There was a further amendment to the 1992 Contract extending the date when subject clauses had to be removed to March 15, 1994. That Amendment also stated: "balance upon completion will be \$493,000 dollars with our agreement for sale from purchaser to Vendor for House on 1 acre for the price of one dollar as per original contract".

- [21] In a January 26, 1994 letter, Duncan was advised by Surrey that the Ministry had inspected the creek and that, as no inventory data was available relating to this tributary stream of the Serpentine River, it would be necessary for Central to:

... engage the services of a qualified environmental consultant to undertake both a biological inventory and habitat enhancement assessment of the stream.... Also, the various sub-division layout received cannot be evaluated without first determining the conditions of development imposed by the Ministry of Environment. These conditions could affect the overall development pattern north of 84 Avenue. From both a practical and environmental point of view, this study must be undertaken. The quick completion of this task will prevent unnecessary delays in processing your application.

- [22] A December 8, 1993 "Proposed Layout" was prepared showing the possibility of five urban lots south of and eight suburban lots north of the Urban/Suburban Boundary. On the same date and by the same company, a "Proposed Layout" was prepared showing more open space north of, seven Suburban lots north of, one 560 square metre Urban lot south of, and one large Urban lot south of the Urban/Suburban Boundary.

[23] By a February 15, 1994 letter, Duncan was advised by Surrey that, as the Ministry required an environmental assessment of the creek adjacent to the Property, it would be impossible to approve any subdivision layout until that study was completed so that the Ministry could outline their "development requirements". Duncan was also advised that the request for RH-G zoning could only be supported if open space in the amount of not less than 15% of the Property was preserved in its natural state or retained for park and recreational purposes and that Surrey would be seeking the dedication of all streams in the area for a linear park system and for the protection of fish and wildlife habitat. The letter also included the following advice:

1. If the Ministry of Environment requires a 15 metre setback from the top of bank of the creek and additional open space is required, the proposed cul-de-sac may have to be shortened.
3. We will be seeking the dedication to the City of all land within the top of bank of the urban lots.
5. It is possible the City might accept additional open space required by the RH-G zone to be taken from the urban portion of the lot. This may have the effect of maintaining eight RH-G zoned lots.
7. Please provide a topographical survey of the site which locates the top of bank and accurate calculation on open space and undevelopable areas.

MARCH 14, 1994 AMENDMENT

[24] There were negotiations to further extend the time to remove the subject clauses under the 1992 Contract but those negotiations did not produce any agreement. What was agreed to was set out in an Amendment signed by the parties on March 14, 1994 ("March 14, 1994 Amendment"). In this handwritten document, the parties agreed as follows:

Purchaser is now giving notice of completion, possession and adjustments on May 14, 1994.

Lot plan and preliminary layout of application to form & outline an integral part of this contract. (Layout and dedication may change to satisfy Municipality).

In reference to preliminary layout attached.

Lot 10 (1 acre & house Vendors portion) southern portion including creek dedication and future Property line and the purchasers northern 4 acre portion including creek dedication identified on plan attached (Sub-division).

Upon completion on agreement for sale for Lot 10 (1 acre) - house will be registered and held by Vendor until separate titles (sub-division) has been approved.

- [25] The Plan which was attached and which was signed by the Bontorins ("March 14, 1994 Plan") shows a dotted line which was probably intended to represent the Urban/Suburban Boundary. The March 14, 1994 Plan also shows 8 Suburban lots, the approximate boundary of the "top of the bank", a Lot 10 of one acre, the remainder of the Property being 4 acres, and the notation that the area along the creek is "To be dedicated back to Municipality for greenbelt".
- [26] However, the dotted line which is shown on the March 14, 1994 Plan is different than the Urban/Suburban Boundary shown on the December 8, 1993 plan which had been submitted to Surrey. While the most southerly boundary is shown as being 13.975 metres on both, the western boundary is shown as 106.785 metres "approx." instead of 125.073 metres and the southwest boundary is shown as being 81.221 metres "approx." instead of 94.937 metres. Accordingly, the land in the Urban portion of the Property shown in the March 14, 1994 Plan is less than what was shown in the Plan submitted to Surrey. As well, Lot 9 is shown as being north of the Urban/Suburban Boundary and is shown as an "Urban" lot. There is no explanation given as to how an urban lot could be north of the Urban/Suburban Boundary.
- [27] While what was signed by the Bontorins may well have led them to believe that the area that would be available to them would not include Lot 9, would be entirely to the south of the Urban/Suburban boundary, and would be one acre, the two proposed layouts prepared December 8, 1993 and forwarded by Central to Surrey indicated less land below the Urban/Suburban Boundary and one of the Proposed Layouts indicated that there would be an urban lot below the Boundary of 560 square metres. Because the Bontorins had not been kept up to date by Central regarding the demands of Surrey and the Ministry regarding "creek dedication", I can not be satisfied that the Bontorins were fully informed regarding the "creek dedication identified on plan attached". Nor can I be satisfied that the Bontorins would have been aware that there might be less than one acre available to them under the plans that were being submitted to Surrey.
- [28] Mr. Hirst testified that one of the reasons Central needed more time was that it was negotiating to "squeeze further lot" into the proposed subdivision of the 4 acres. One possibility was that the lot number 7 be reduced from 29.74 metres to 27.49 metres in what Mr. Hirst described as "an idea to run by Surrey to see if we could get another lot". I accept the evidence of Mr. Hirst in this regard. I am satisfied that the continuing efforts by the Defendants to maximize the number of lots that they would have available for development are other than in accordance with the contractual obligations established at the time of the 1992 Contract and later. I am also satisfied that these continuing efforts resulted in the Defendants taking steps which resulted in their interests being preferred to the detriment of the interests of their principals, the Bontorins.
- [29] The provision signed by the Bontorins that "Lot 10 (1 acre & house Vendor's portion) Southern portion including creek dedication & future property line & the purchaser's northern 4 acre portion including creek dedication identified on plan attached (Subdivision)" makes it clear that the portion of the property to be received by the Bontorins

would not be 1 acre of developable property but rather 1 acre including Creek Dedication. As well, the plan that was signed by the Bontorins (probably in March, 1994) shows the "top of bank" and an area in "To be dedicated back to the Municipality for Greenbelt" on both the 1 acre and on the 4 acre parcel.

[30] Accordingly, I am satisfied that it is not possible for the Bontorins to now argue that they were getting 1 acre net of dedications. Mr. Hirst described the creek setback as "more or less settled" when the diagram was signed by the Bontorins and he confirmed that the Bontorins were "advised and informed" about these issues. I accept his evidence in that regard.

[31] A typed March 14, 1994 amendment was also prepared. The typed amendment would allow Central to have six months to "obtain Municipal approval" with the subject clauses to be removed by September 15, 1994. The written amendment also provided in part:

Purchaser is now tendering \$50,000 dollars direct to Vendors non-refundable and as consideration not to form a part of the purchase price.

Purchaser is now paying on behalf of the Vendors' commission due in the amount of \$15,000 dollars to Agent not towards Purchase Price.

[32] As the sale completed in May, 1994, as the parties appear to have ignored the possible extension of the date to September 15, 1994, as the purchase price that was ultimately paid and as the amount tendered did not reflect the increase from \$5,000 to \$50,000 for the "non-refundable" amount being tendered, and as the commission was ultimately payable out of the funds ordinarily available to the Bontorins, the provisions of the typed March 14, 1994 amendment appear to have been ignored by the parties.

[33] I find that the March 14, 1994 Amendment is binding on the parties as I find that the sale and purchase of the Property was completed in accordance with that document and not the typed March 14, 1994 amendment even though it was signed by the parties.

CONVEYANCE OF THE PROPERTY

[34] Art Skagen, Barrister and Solicitor, was retained to act on behalf of Central and Judy McMath, Notary Public, was retained to act on behalf of the Bontorins. By an April 27, 1994 letter, Mr. Skagen was advised by Countrywide that the real estate commission payable was \$16,050.00, the completion date was May 14, 1994 and that:

An agreement for sale needs to be drawn up & registered on title - I informed Judy McMath - vendor's lawyer - as I don't know who will be doing this.

[35] Ms. McMath wrote Mr. Skagen on May 11, 1994 stating: "Please forward the required documents to this office as soon as possible as I will need to make an appointment for my clients today or tomorrow to sign".

- [36] By a May 12, 1994 letter to Ms. McMath, Mr. Skagen enclosed an original and two copies of an agreement for sale ("Agreement for Sale") and a freehold transfer ("Transfer") as well as an original and two copies of a Vendor's Statement of Adjustments. In the Transfer, the Transferee is shown as Greenway Land Corporation ("Greenway"). There is nothing in evidence indicating an acceptance by the Bontorins of Greenway in substitution for Central, or that there was a new contract with Greenway.
- [37] Because I can not find that there was a novation, I am satisfied that the assignment of the 1992 Contract from Central to Greenway does not eliminate the continued liability of Central under the 1992 Contract even though Greenway became the owner of the Property once it was transferred: 411076 B.C. Ltd. v. McCullagh (1992), 72 B.C.L.R. (2d) 252 (B.C.S.C.) and Canadian Northern Ry. Co. v. Peterson et al (1914) 6 W.W.R. 1554 (S.C.C.).
- [38] The May 12, 1994 letter to Ms. McMath set out the following undertaking given by Mr. Skagen:

Upon receipt of the executed documents, we undertake not to use the transfer in any way until we hold in our trust account an amount which, when added to the proceeds of the new mortgage to be granted by our client, is sufficient to pay out in accordance with the vendor's statement of adjustments.

- [39] Mr. Skagen imposed an undertaking on Ms. McMath that, once the sale proceeds were received by her, she would arrange for the discharge of the existing mortgages against the Property and would provide him with registration details "in due course".
- [40] In a May 13, 1994 letter to Mr. Skagen, Ms. McMath returned the "duly-executed" Transfer, Agreement for Sale, and Vendor's Statement of Adjustments and advised Mr. Skagen: "These documents are forwarded to you as per the undertakings set out in the above-referenced letter [the May 12, 1994 letter from Mr. Skagen to Ms. McMath]." There was nothing in this letter or in the previous correspondence relating to undertakings given by or imposed upon Mr. Skagen or given by or imposed upon Ms. McMath regarding the Agreement for Sale.

AGREEMENT FOR SALE

- [41] The Agreement for Sale provides that Mr. Skagen's firm would be making the application to register the same in the Land Title Office and that the "nature of the interest" to be registered is "Agreement for Sale". At a later unknown date, the words "Agreement for Sale" were deleted and the words "Option to Purchase" were substituted.
- [42] There are many inconsistencies and inaccuracies within the Agreement for Sale. Although an "Option to Purchase" contained within the Agreement for Sale grants the Bontorins the ability to purchase "one acre (more or less)", the Agreement for Sale purports to deal with all of the Property. In error, the Bontorins are shown as the Transferors and Greenway is shown as the Transferee. Dealing with "Completion", the exercise of the "Option" appears to contemplate that the Bontorins will deliver to Greenway a transfer of the entire Property

even though it should be Greenway executing the Transfer and even though it was contemplated that Greenway would only be required to transfer that part of the Property containing the House of the Bontorins.

[43] The Agreement for Sale provisions are set out in full:

The Parties have entered into an agreement whereby Greenway shall become the registered owner of the Lands and shall redevelop the Lands into a residential development as may be approved by the appropriate municipal authorities.

A fundamental term of the contract of purchase and sale between the parties is an agreement to permit Bontorin the right to reacquire a portion of the Lands upon completion of the said redevelopment. The right to reacquire the land is to be registered on title concurrently with the transfer of land from Bontorin to Greenway. That portion of the Lands shall be designated the Vendor's Lot (as hereinafter defined).

The Greenway has agreed to grant Bontorin this Option to purchase the Vendor's Lot for the price and on the terms and conditions set out in this Agreement;

THE PARTIES to this Agreement therefore agree:

DEFINITIONS

"Vendor's Lot" - The vendor's lot shall be that residue portion of land, which is not the Purchaser's Lot (as hereinafter defined), of one acre (more or less) resulting from sub-division of the Lands as may be approved by the City of Surrey and which will be similar to that indicated as Lot 10 on the proposed sub-division sketch attached hereto as Schedule "A" to this Agreement. The exact size and dimensions of the Vendor's Lot shall be determined at the time the sub-division proposal is approved by the City of Surrey.

"Purchaser's Lot" - The Purchaser's Lot shall be all of the Lands except the Vendor's Lot and in any event shall not be less than four (4) acres of land.

It is anticipated the City of Surrey, as a condition of approving sub-division of the Lands will require a portion of the Lands to be dedicated to the City for park reserve, stream preservation or setback. Accordingly it is agreed between the parties that any land dedication, park reserves, stream preservation and setbacks will be deducted from the gross amount of developable land from each parties respective parcel of land.

GRANT OF OPTION

In consideration of \$1.00 and other good and valuable consideration paid by Bontorin to Greenway, which Greenway acknowledges having received, Greenway grants to Bontorin the sole, exclusive and irrevocable option to purchase the Vendor's Lot, free from any liens, charges and encumbrances other than those specifically permitted in this Agreement, for a total price of \$1.00 (the "Purchase Price"), on the terms and conditions set out in this Agreement.

EXERCISE

Subject to Section 3, this Option may be accepted and is irrevocable and may be exercised by Bontorin, its solicitors, agents or assigns delivering a notice under Section 8 to Greenway upon registration of a plan of sub-division for the Land.

COMPLETION

When this Option [is exercised?], the sale of the Lands will be completed by the parties on a date occurring within thirty (30) days after the date on which the Greenway receives notice that Bontorin has exercised this Option, ... (the "Completion Date"), and on that date Bontorin will deliver to Greenway a Transfer of an Estate in Fee Simple transferring the Lands to the free and clear of all liens, charges and encumbrances of any kind, other than those which Bontorin has accepted in this Agreement, in a form satisfactory to the solicitors for Greenway and in a form acceptable for registration in the appropriate Land Title Office.

ADJUSTMENT AND POSSESSION

As Bontorin will be residing as a Tenant at will in the premises located on the Vendor's Lot the adjustment for taxes shall be made on the basis of Bontorin's portion being 100% of all taxes on improvements and 20% of the assessment based on land.

Bontorin will pay no rent to Greenway while Greenway is the registered owner of the proposed Vendor's Lot but Bontorin will be required to maintain adequate liability insurance and third party insurance upon the improvements.

PERMITTED ENCUMBRANCES

Only charges and encumbrances against the Lands that will be permitted are those encumbrances, covenants and easements as may be required by the City of Surrey and other regulatory authorities as may be required to obtain approval of the plan of sub-division.

- [44] The transfer of the Property was registered in the Land Title Office on May 13, 1994 and, on the same date, a trust cheque for \$480,433.71 was forwarded to Ms. McMath. From the funds received, Ms. McMath arranged for the discharge of the mortgages registered against the Property and advised Mr. Skagen of that fact. Ms. McMath forwarded the net sale proceeds of \$286,918.10 to the Bontorins.
- [45] Subsequently, the Bontorins purchased a new house in the Okanagan, moved into that house and then allowed their daughter and son-in-law to occupy the House on the Property.
- [46] The Agreement for Sale has never been registered. That is not surprising as I find that the document prepared by Mr. Skagen is not registerable in the Land Title Office. First, the Bontorins could not be the Transferors as they would no longer own the Property once it was transferred to Greenway. Second, assuming that the Agreement for Sale could be rectified to show the Defendants as the "Vendor" and all of the Property being transferred

back to evidence the intent of the parties to register the Agreement for Sale as a security document so that all of the Property would be held by the Bontorins until a subdivision had been registered with all of the Property except what was described as Lot 10 to then be transferred back to the Defendants on subdivision, such transactions appear not to have been contemplated and appear to be a very expensive way of providing such security.

- [47] Third, I find that no survey was attached as a schedule to the Agreement for Sale. While the Defendants and Mr. Skagen insisted that the survey was attached, the best evidence that it was not is contained in an August 30, 1996 letter to Mr. Bontorin from Greenway wherein Mr. Bontorin has requested to send "at your earliest convenience" the: "... original layout which form[s] part of the contract".
- [48] Fourth, the Bontorins not Greenway executed the Form C General Instrument-Part I (Land Title Act) as the "Transferor" so that the attestation of documents required under the Land Title Act were not strictly complied with. Fifth, the "Nature of Interest" set out as Item 3 in the Form C General Instrument is shown as being an "Agreement for Sale" whereas the interest that would be transferred to the Bontorins was actually an "Option to Purchase". Accordingly, Item 3 does not properly set out the interest in the Property being granted to the Bontorins.
- [49] I accept the expert opinion of Dale W. Wilcox, Barrister and Solicitor that the Agreement for Sale could not be registered in the Land Title Office for these reasons set out in his expert opinion:

The Option Agreement provided for the granting of an option in favour of the Plaintiffs that would have entitled them, upon exercise thereof, to purchase the unsubdivided portion of the Lands referred to in the Option Agreement as the "Vendor's Lot". As the purported granting of the option contravened subsection 73(2) of Land Title Act R.S.B.C. 1979, c. 219, it is my opinion that the Option Agreement could not be registered in the New Westminster Land Title Office as subsection 73(4) of Land Title Act R.S.B.C. 1979, c. 219 specifically provided that an instrument such as the Option Agreement did not confer on the party claiming under it a right to registration of the instrument or a part of it. In my experience, in 1994 the Registrar of Land Titles at the New Westminster Land Title Office would have refused to register the Option Agreement had it been deposited for registration.

- [50] While Mr. Skagen in his September 6, 1996 letter advised that the Bontorins were "... provided with a registerable form of the document", I find that the Agreement for Sale was never in a "registerable form". Accordingly, I reject the assertion set out in the Amendment Statement of Defence that the Bontorins failed to mitigate their damages by failing to register the Agreement for Sale.

WHO HAD THE RESPONSIBILITY TO REGISTER THE AGREEMENT FOR SALE?

- [51] My review of the correspondence between Mr. Skagen and Ms. McMath and of the Agreement for Sale allows me to conclude that it was intended by the parties that Mr. Skagen would attend to the registration of the Agreement for Sale. The document was prepared by Mr. Skagen. The document shows that the law firm of Mr. Skagen was the applicant to register the document. The originally signed Agreement for Sale was forwarded by Ms. McMath to Mr. Skagen and there would be no reason to do that unless it was intended by the parties that Mr. Skagen would be registering the document.
- [52] At trial, Ms. McMath testified that Mr. Skagen had stated that the Transfer and the Agreement for Sale would be registered "concurrently". I accept her testimony in that regard. The subsequent advices of Mr. Skagen to the solicitor for the Bontorins that it was the responsibility of Ms. McMath to register the Agreement for Sale, that he had a "registerable form of the Option to Purchase [Agreement for Sale] in our possession", that Ms. McMath had the registerable document in her possession, and that there was a plan in existence which had been signed by the parties and which could be attached to the Agreement for Sale are all incorrect.

WHEN WOULD THE AGREEMENT FOR SALE BE REGISTERED?

- [53] The 1992 Contract provided that there would be transfer of part of the Property back to the Bontorins: "... on completion date of this Contract...." As well, the Agreement for Sale drawn by Mr. Skagen provided that: "The right to reacquire [a portion of the] land is to be registered on title concurrently with the transfer of land from Bontorin to Greenway". Such a transfer of the one acre property plus House would not be possible as it would be necessary for a subdivision to take place before such a transfer was possible.
- [54] While the Statement of Claim states that it was a fundamental term that the Bontorins would "repurchase from Central ... approximately 1 acre together with their home, upon the Completion Date....", this would not have been possible as a subdivision would be a precondition of any such transfer. I come to this conclusion despite the statement of Mr. Manhas in his affidavit in support of an April 11, 1997 Motion to remove a Certificate of Pending Litigation ("CPL") from the Property that: "... at closing [of the 1992 Contract] an option to purchase the Vendor's Lot (as defined therein) was to be registered concurrently with the transfer of land."
- [55] I find that both the 1992 Contract and the Agreement for Sale created an impossibility. However, I also find that the parties subsequently agreed that the transfer of a portion of the Property to the Bontorins would be delayed until the sub-division of the Property had been registered.
- [56] However, I am satisfied that the Bontorins assumed that the Agreement for Sale was registerable, that it would and had been registered, that their position was protected as a result of that registration, and that they took great solace from the fact that the Agreement for Sale guaranteed that they would eventually receive back one acre plus their House. Unfortunately, Ms. McMath never did follow up with Mr. Skagen to confirm that the

Agreement for Sale had been registered. When they found out that the Agreement for Sale had not been registered, the Bontorins were justified in subsequently filing a CPL against the Property.

WHAT AGREEMENTS ARE EVIDENCED BY THE AGREEMENT FOR SALE?

- [57] Even though the Agreement for Sale was not registered either because of the inaction of Mr. Skagen or because he later determined it was unregistrable, I am satisfied that the Agreement for Sale is not void and that it records a number of agreements reached between the parties.
- [58] The Agreement for Sale did reflect an agreement reached regarding whether any rent would be payable by the Bontorins. Under Addendum No. 8 of the 1992 Contract, the "Existing Tenants to vacate the premises by 30 days after removal of all subjects". This was what was contemplated by the parties but was not what occurred once the Property was transferred to Greenway. I find that the agreement regarding rentals set out in the Agreement for Sale is binding: "... [the Bontorins] will be residing as a Tenant at will in the premises located on the Vendor's Lot" and the Bontorins "... will pay no rent to Greenway while Greenway is the registered owner of the proposed Vendor's Lot...."
- [59] Second, the Agreement for Sale evidenced an agreement reached regarding the respective shares of the parties regarding the payment of civic taxes on the Property such that the Bontorins would pay 20% of the portion of the taxes that related to the assessment of the land and 100% of the taxes that related to the assessment of the improvements. This agreement on the payment of taxes was in effect as long as no improvements were added to the Property by the Defendants.
- [60] I also find that the Agreement for Sale also evidenced an agreement reached between the parties that: "... any land dedication, park reserves, stream reservation and setbacks will be deducted from the gross amount of developable land from each party's respective parcel of land". While it is clear that the parties had not put their mind to this question at the time of the 1992 Contract, it is a matter which had to be dealt with in view of the stance taken by Surrey and the Ministry.
- [61] Ms. McMath testified that she pointed this provision out to the Bontorins and that she also reviewed the Agreement for Sale on a paragraph by paragraph basis. Ms. McMath remembers that she "expressed my concern but not remember exact words."
- [62] I find that the agreement reached between the parties as evidenced by this portion of the Agreement for Sale contemplated that there should and would be a pro-rata sharing of the necessary land dedication, park reserves, stream reservation and setbacks. There is nothing in the Agreement for Sale which would allow me to conclude that the parties agreed that a disproportionate amount of land dedication would come from either portion of the Property. In due course, the Defendants acted other than in accordance with this agreement. Even if I am wrong in coming to the conclusion that there was a specific agreement reached

in this regard, I am satisfied that it was an implied term of the agreement between the parties that the land that had to be dedicated to Surrey would be shared on a pro-rata basis between the parties and that that pro-rata sharing would be reflected by the final subdivision plan negotiated by the Defendants. It could not have been in the contemplation of the parties that the Defendants would follow up on the suggestion contained in paragraph 5 of the February 15, 1994 letter from Surrey to Duncan to adversely affect the understanding that the subdivision would reflect a 4/1 sharing of the Property and the net share of the Property that would be available for both parties.

WHAT AGREEMENTS DID THE AGREEMENT FOR SALE NOT ALTER?

- [63] While I find that those binding agreements were set out in the Agreement for Sale, I reject the argument advanced on behalf of the Defendants that the Agreement for Sale set out a number of further agreements that are binding on the parties or amended agreements that were already in place.
- [64] Throughout, it was always in the contemplation of the parties that a portion of the Property would be transferred to the Bontorins without the necessity of the Bontorins exercising an option and delivering the notice contemplated by paragraph 8 under the Agreement for Sale. Specifically, the 1992 Contract provided that Central would "sell back" the House and corner acre lot for \$1.00 on the "completion date" of this Contract" Even if I am wrong in concluding that the procedure set out in the Agreement for Sale was not binding, I find that the later dealings between the parties including the undertakings provided by Mr. Skagen evidence an intention that part of the Property would be transferred to the Bontorins without the necessity of them exercising the option contemplated under the Agreement for Sale or following the provisions set out in paragraph 8 of the Agreement for Sale.
- [65] While the Agreement for Sale indicated that Greenway would receive not: "... less than 4(four) acres of land" and indicated that the Bontorins would receive one acre "more or less", these provisions are other than in accordance with the agreement reached in the 1992 Contract as well as the subsequent dealings between the parties and between the Defendants and other parties.
- [66] The February 9, 1993 listing agreement with Countrywide indicated that upon completion of an approved subdivision "1 acre & house to be deeded back...." to the Bontorins. The December 13, 1993 amendment to the 1992 Contract also referred to the "home on 1 acre". The March 1994 Contract refers to "lot 10" as being "1 acre" and the portion available to the Defendants as being "4 acres".

- [67] Mr. Skagen testified that the provision in the Agreement for Sale dealing with the Vendors' Lot as being "of 1 acre" (more or less) related to Greenway getting 4 acres with whatever was left over ("the balance") to the Bontorins. Mr. Skagen testified that what was set out in previous documents was not incorporated by him in the Agreement for Sale because that implied 5 acres was available but this was "not known". Accordingly, it was better to define 4 acres and remainders so that it was "not void for uncertainty".
- [68] The difficulty with that testimony is I can make a finding that the Defendants already knew that the Property was less than five acres. The plan prepared on December 8, 1993 ("Revision: 2") gave detailed calculations of the number of square metres within the Property and an addition of those calculations would have allowed the Defendants to conclude that there was less than five acres available.
- [69] This provision in the Agreement for Sale is the first time that the Defendants introduced the concept that what would be available to them would be not less than 4 acres of land and what would be available to the Bontorins would be "one acre (more or less)". I find that the assumption that what would be available on sub-division would be shared on a one/four basis was fundamental to the agreement reached between the parties and could not be varied without very specific language and except by an informed decision by the Bontorins that they were agreeing to accept anything that was left over after a minimum of four acres was available to the Defendants.
- [70] I also find that the subsequent correspondence and dealings between the parties indicates an understanding that the one acre/four acres concept set out in the 1992 Contract survived the Agreement for Sale and was not replaced by any purported agreement to the contrary set out in the Agreement for Sale.
- [71] For instance, Alternative #11 (October 9, 1996) showed one acre south of the Urban/Suburban Boundary and four acres above that Boundary. The February 5, 1997 letter from Mr. Richards to Mr. Skagen refers to the "corner acre and existing house" and the reply from Mr. Skagen confirms that his clients were committed to transferring: "... the corner acre and existing home on the completion date". In the same vein, the affidavit of Mr. Manhas in support of the April 17, 1996 motion to remove a CPL refers to "four of the five acres" being available for the Defendants and that: "... the remaining land would be one acre of land less that portion of land required by the municipal authorities for setback requirements".
- [72] I find that it remained the intention of the parties that, subject to the pro-rata sharing of any required land dedication, park reserves, stream preservation and setbacks, the parties would share the Property on a one-to-four ratio. The maintenance of this principle became more important later when it was ascertained with certainty that the Property that had been owned by the Bontorins and that had been transferred to Greenway contained less than five acres.

[73] Paragraph 5 of the 1992 Contract as well as the letter of authorization signed by the Bontorins made it clear that Central and then Greenway were to act as the agents of the Bontorins: "... to re-zone and plan our land for sub-division." Nothing in the Agreement for Sale modified the obligations arising as a result of that agency agreement. However, the Defendants continued to provide the Bontorins with no or little information about the progress being made towards re-zoning and sub-division. As well, the Bontorins were not advised about the requirements being imposed by Surrey and the Ministry regarding the same. The Bontorins were also not advised that the goal of the Defendants to see the maximum number of lots and the maximum size of those lots available to them was coming at the expense of the Bontorins and was being produced by the requirements imposed by Surrey and the Ministry being disproportionately shared within the respective shares of the Property.

PROGRESS OF THE PLANS FOR RE-ZONING AND SUB-DIVISION AFTER THE TRANSFER OF THE PROPERTY

[74] My review of the evidence allows me to conclude that very little progress was made by the Defendants between the time when the Property was transferred to Greenway on May 13, 1994 and the summer of 1996. In a June 9, 1994 letter, the Ministry advised it would give its approval to the proposed subdivision subject to a number of "conditions" including:

1. The entire ravine plus 15.0 horizontal metres inland from the top of the ravine bank is to be left in a totally undisturbed, naturally vegetated state. No dumping, landfill or vegetation removal shall be permitted. This area should be protected by restrictive covenant and registered against the title of the (Property/properties) affected as priority agreement according to our standard covenant format.
12. Dwellings must be set back from the covenant boundary. Criteria are as follows: 3.0' metres for the side yard and 5.0 metres for the rear yard.

[75] On October 27, 1994, Surrey was provided with an amended sub-division plan by Duncan with the cover letter noting in part: "The remaining urban portion of this site not shown subdivided is to remain as is until the present occupants subdivide". While it is not clear what was forwarded by Duncan to Surrey, it was probably the case that the revised plan showing 8 lots above the Urban/Suburban Boundary and the potential for 5 urban lots below the Boundary was the one that was being discussed at the time.

[76] This new layout reflected the requested restrictive covenant of 15 metres from the top of the bank. However, there was a notation that this requirement was: "... being appealed to the Ministry of Environment". It may well be that Greenway was actively pursuing this appeal as there appears to have been no further correspondence to Surrey or from Surrey for approximate 7 months.

- [77] In a May 30, 1995 letter, Duncan was advised by Surrey that a new development cost schedule had been adopted and that, if the sub-division of the Property was to be eligible for the previous cost schedule, the application for sub-division had to be completed by February 6, 1996 including the provision that a "servicing agreement" had to be completed and signed, re-zoning had to be in place, all fees had to be paid, and all conditions of approval fulfilled and final plans of sub-division had to be ready for approval by the Approving Officer.
- [78] In a February 16, 1996 letter, Greenway was advised by Surrey that the application for sub-division "had been inactive for some time" and that, if a "revised sub-division plan" was not received within 30 days, Surrey would presume that it did not wish to proceed with the application. After a request was made to Surrey, Surrey confirmed that the application would remain open until April 15, 1996.
- [79] H.Y. Engineering then replaced Duncan as the firm representing Greenway regarding the rezoning application. In an April 1, 1996 letter, H.Y. Engineering forwarded a "proposal layout and tree removal/preservation plan" to Surrey. The "proposed sub-division Layout" (Alternative #3) indicated a total of 9 lots for the Property. Lots 1 through 7 were to the north of the Urban/Suburban Boundary and Lots 8 and 9 were to the south of the Urban/Suburban Boundary with Lot 9 including the "existing House".
- [80] Lot 8 was shown as having 800 square metres and Lot 9 was shown as having 2,692.5 square metres (66.5% of an acre). In dotted lines within the boundaries of Lot 9, three parallel lots of approximately 560 square metres each are shown. Lots 8 and 9 together would have 3,492.5 square metres or approximately 85% of one acre (equal to 4,046.856 square metres).
- [81] There is a notation on Alternative #3 that the "Gross Site Area" is 4.94 acres, that the "Park Dedication" is .40 hectares or 20.2% of the site and that the "Number of Lots" is seven Lots zoned RHG and two Lots zoned RF with a possibility of four Lots zoned RF ultimately. While it would have been patently clear to the Defendants that the Property was not five acres but was 4.94 acres, there is nothing in evidence which would allow me to conclude that this information was given to the Bontorins. I find that the failure to advise the Bontorins in this regard was other than in accordance with the obligations imposed upon the Defendants and that the Defendants later used this knowledge to the detriment of the Bontorins.
- [82] In an April 15, 1996 letter from Greenway to the Bontorins, Greenway referred to an earlier telephone conversation and wrote to confirm:
- ... we are proceeding forward with our 4 acre, 9 Lot sub-division and to further confirm that you intend to keep your share of the Property undeveloped. We will keep [you] informed of our progress.
- [83] This letter may well have led the Bontorins to conclude that what would be available to them was one acre. There is no indication that a copy of Alternative #3 was forwarded to the Bontorins contemporaneously. Accordingly, there is no indication that the Bontorins were advised that the "8 Lot sub-division" included one of those lots being south of the Urban/

Suburban Boundary and adjacent to the lot on which the House of the Bontorins was located, that there was less than a full acre below the Urban/Suburban Boundary, or that, if only Lot 9 was made available to them, they would only receive about two-thirds of an acre.

- [84] In a May 3, 1996 letter, H.Y. Engineering forwarded a further revised sub-division layout to Surrey. "Alternative #5" showed 7 lots north of the Urban/Suburban Boundary and 3 lots (Lots 8-10) south of the boundary. Lot 10 is said to comprise 3,872.4 square metres (about 96% of an acre) and shows the existing House within the boundary of the proposed Restrictive Covenant prohibiting buildings. Lots 8 and 9 are surrounded by Lot 10 and each are shown as having 560 square metres. Virtually all the dedicated open space is contained within Lot 10 and virtually none of that space is shared by Lots 8 and 9. The Gross Site Area is again shown as 4.94 acres. I find that Alternative #5 was not forwarded to the Bontorins.
- [85] Mr. Thompson of Surrey confirmed a May 14, 1996 discussion in his May 15, 1996 facsimile transmission to H.Y. Engineering:

... Planning and Development Department would prefer the removal of the existing house, as part of the redevelopment of the Property. If the house is to remain, then the portion of the site designated for Urban development is to remain under its current zoning of A-1, and the Suburban portion of the site rezoned to RH-G.

- [86] In a May 28, 1996 letter, H.Y. Engineering forwarded a further revised layout (Alternative #6) to Surrey. This layout incorporated the removal of the previous Lot 9 from the urban portion of the site, a future building envelope should the existing House be demolished, and the following proposal:

We would propose to register a restrictive covenant should the house be demolished, renovated or damaged by fire, to ensure the building could not be reconstructed in the existing location.

- [87] What was formerly Lot 10 and was renumbered as Lot 9 is shown as having 3,888.4 square metres (on about 96% of an acre). The retained Lot 8 continues to be shown as having 560 square metres. The size of Lots 9 and 10 together not net of Dedications amounts to 4,448.4 square metres or approximately 1.1 acres.
- [88] There is also a calculation of the "Park Dedication Required". There is a notation that the total "Park Dedication Required" is .25 hectares as required under the RH-G Zoning (.22 hectares) and RF Zoning (.03 hectares). The dedication required in the RH-G Zone was 15% and in the RF Zone was 5%. It was obviously in the interests of the Defendants that the Park Dedication in the RH-G Zone be decreased in order that there would be more of the Property available for their development. It was proposed in Alternative #6 that the Park Dedication will be in excess of the requirements (.3 hectares). I find that Alternative #6 was not forwarded to the Bontorins.

- [89] On July 29, 1996, the Ministry advised H.Y. Engineering that they were unable to support the application to reduce the setback from the top of the bank to less than 15 metres and that the site layout should be revised "to take this condition into account".
- [90] On August 14, 1996, H.Y. Engineering forwarded Alternative #7 to Surrey. This layout incorporated 3 lots in the Urban portion of the Property (Lots 8 and 9 with 560.0 square metres each and Lot 10 with 1,219.0 square metres or about 30% of an acre), "the demolition of the existing house", and a 3.60 metre flanking side yard on Lot 10. I find that the Bontorins were not provided with a copy of Alternative #7.
- [91] Surrey forwarded an August 13, 1996 letter to H.Y. Engineering advising that it would be necessary for a "Development Proposal Sign" to be posted on the Property and that the "text of the development intent" should read in part: "Proposed rezoning from A-1 to RH-G and RF to allow development of approximately 7 suburban and 3 urban residential lots." Such a sign was erected on the Property on or about August 21, 1996.
- [92] An internal document within the Planning and Development Department of Surrey dated August 14, 1996 noted: "The applicant has agreed to remove the existing house from the Property as part of the redevelopment of the site". There is no indication that the Bontorins provided their agreement to a demolition of the House at this time or ever.
- [93] While I place no reliance on this internal document to come to the conclusion that the Defendants had proposed to Surrey that the House would be demolished, I can come to that conclusion based solely on Alternatives #7, #8, #9, #10, #11, #12, #13 which was submitted by the Defendants to Surrey between August 12, 1996 and October 11, 1996, all of which Alternatives indicate either that the House was to be demolished or do not show the House at all. There is nothing in evidence which would allow me to conclude that the Bontorins were advised during this time period that the Defendants were proposing that the House would be demolished.

DISPUTE REGARDING THE REGISTRATION OF THE AGREEMENT FOR SALE

- [94] George H. Richards became the solicitor for the Bontorins. On July 12, 1996, Mr. Richards wrote to Mr. Skagen to request a "registered copy of the agreement for sale dated May 13, 1994". In that letter, Mr. Richards enclosed "an unregistered copy" for the reference of Mr. Skagen. On July 29, 1996, Mr. Richards wrote to Ms. McMath stating that he had been advised by Mr. Skagen that Mr. Skagen had forwarded the Agreement for Sale to her office for registration.
- [95] On August 1, 1996, Mr. Richards wrote to Mr. Skagen stating:

... you indicated that your file supported the conclusion that Janice McMath was to have registered the Agreement for Sale. I have now been advised by Janice McMath that her file shows that you were to register the Agreement for Sale concurrently with the transfer to your client. In support of her position she has provided me with a copy of her letter to you dated May 13, 1994, a copy of which is attached, whereby she returned the executed Agreement for Sale to you. Kindly advise of your position by close of business tomorrow in light of this new information.

As I have told both you and Janice McMath the failure to register the Agreement for Sale prejudices my client. So long as the Agreement for Sale remains unregistered my client continues to be exposed. I suppose one way to protect my client would be to commence legal action and register a CPL. I would have to take instructions who to name as defendants in the law suit. It seems far simpler to register the Agreement as soon as possible.

[96] On August 29, 1996, Mr. Richards commenced this action on behalf of the Bontorins claiming specific performance and, alternatively, damages in lieu of specific performance relating to the 1992 Contract. A CPL was filed and the Writ of Summons was served on Greenway and Central on August 29, 1996.

[97] On September 6, 1996, Mr. Skagen wrote to Mr. Richards stating that he was "mystified" as to why the action had been commenced and then stating:

As you are no doubt aware, our clients purchased the Property from your client with an agreement that your client would have the option/right to repurchase the Property upon which their home sits. While your client did not register the Option to Purchase, they were provided with a registerable form of the document. We suggest go ahead and register it. Our client continues to acknowledge and has at all times acknowledged, your client's rights in this matter and has no intention, desire or motivation to do anything else than honour the terms of the contract. Our client has neither refused or [sic] neglected to complete a transfer and you are perfectly aware of that. You are also aware that our client is currently trying to obtain approval for a sub-division of the subject Property and upon registration of those documents at the land title office, your client's transfer will be able to proceed. That's in complete accordance with the contract between the parties.

In addition, our client has at all times kept your client informed as to developments with respect to the progress on obtaining sub-division approval and has undertaken no steps without keeping your client apprised of developments and/or problems as they emerge.

We are aware of a problem with respect to the location of the building upon the Property. The existing home no longer conforms to setback requirements as set out by the Fisheries Department and/or the Surrey Planning Department. That's a problem. It's a problem for both our clients. Our client is and always has been prepared to resolve any problems which may emerge. However, to commence a lawsuit claiming a breach of contract is something both the writer and our client has difficulty understanding.

We would suggest that the Lis Pendens be removed, the action abandoned, and the Right to Purchase or Option to Purchase registered as agreed.

[98] Despite the request set out in this letter from Mr. Skagen, the CPL was not removed from the Property until a later Court Order.

FURTHER DEVELOPMENTS REGARDING THE NEGOTIATIONS WITH SURREY

[99] Alternative #8 (August 28, 1996) was prepared although I can make no finding as to whether it was presented to Surrey. It shows 3 Urban lots, (being Lots 8 and 9 of 667.8 square metres each and Lot 10 of 1,044.1 square metres), 7 Suburban Lots, and "Park Dedication Required" as .28 hectares with a proposal that .49 hectares be dedicated in total. The Park Dedication is shown as totalling 3,354.4 square metres shared on the basis of 1,197 square metres below the Boundary and 2,157.4 square metres above the Boundary. The creek dedication is shown as totalling 3,045.5 square metres being shared 1,625.1 square metres above the Boundary and 1,420.4 below the Boundary. I find that Alternative #8 was not forwarded to the Bontorins.

[100] In an August 30, 1996 letter to Mr. Bontorin, Greenway stated:

I have some good news for you, my engineer came up with a new layout for Lot 10 onto which you may be allowed to move your house with few changes made to the exterior. Planning department has accepted this layout however it will still have to be approved by the Council. As per your wishes, we will not be allowed to leave it undeveloped, it will have to be fully serviced to meet the city's requirements. I do not have the cost estimate at this time. I will send it to you as soon as it becomes available to me. Please find copy of the new layout attached.

I am still waiting for your fax of the original layout which form part of the contract. Please send it at your earliest convenience.

[101] There is no immediate response from Mr. Bontorin to this letter and, in particular, he does not respond to the suggestion that the cost of "fully" servicing that part of the Property which would be returned would be at the cost of the Bontorins or that it would be necessary to move the House from its location on the Property.

[102] Alternatives #9 and #10 (September 19, 1996 and September 24, 1996) are in evidence. In the RH-G Zone, the 15% Park Dedication is 18% rather than 15% and totals 1,495.34 square metres. The Creek Dedication area is 1,144.95 square metres. In the RF Zone, the Park Dedication is 34% rather than 5% and totals 826.1 square metres. The Creek Dedication is 902.65 square metres. I find that Alternatives 9 and 10 were not forwarded to the Bontorins.

- [103] Alternatives #11 and #12 (October 8 and October 11, 1996) show Park Dedication in the RH-G Zone as 18% rather than 15% comprised of 1,532.6 square metres and show the Creek Dedication as 1,199.49 square metres. The Park Dedication in the RF Zone is 33% rather than 5% and is comprised of 726.9 square metres. The Creek Dedication is shown as 675.15 square metres. I find that Alternatives #11 and 12 were not forwarded to the Bontorins.
- [104] An October 2, 1996 letter from H.Y. Engineering to Surrey enclosed Alternative #13 which is referred to in the letter as the "accepted ... Layout". This layout shows 4,010.8 square metres south of and 15,995.9 square metres north of the Urban/Suburban Boundary, Lots 9 (560 square metres) and 10 (1,284.6 square metres) south of the Urban/Suburban Boundary, and the notation that the House is to be removed.
- [105] While an agreement may well have been reached between Greenway and Surrey in that regard, I find that the Bontorins at no time agreed to the demolition of their House. On the assumption that only Lot 10 would be available for the Bontorins, they would only receive approximately 32% of an acre net of the necessary Dedications. Even if the Bontorins were to receive both Lots 9 and 10, they would receive only approximately 45.6% of an acre net of Dedications. However, the gross area available would be 1.15 acres.
- [106] Alternative #13 shows the Park Dedication for the RH-G Zone as being 18% rather than 15% and made up of 1,532.6 square metres with the Creek Dedication shown as 1,199.49 square metres. The Park Dedication for the RF Zone is shown as 33% rather than 5% and is represented by 726.90 square metres. The Creek Dedication area is shown as being 675.15 square metres.
- [107] Despite there being no agreement in place, the Defendants proceeded to deal with Surrey on the assumption that Alternative #13 would proceed. In an October 24, 1996 letter to H.Y. Engineering, Surrey advised that the layout set out in Alternative #13 was "acceptable, subject to by-law compliance".
- [108] In an October 15, 1996 letter to Surrey, H.Y. Engineering advised that a British Columbia Land Surveyor had prepared a plan showing the proposed Zoning boundaries "consistent with the current O.C.P. meets and bounds description." As a result, a revised site layout was enclosed with the following notation:

As discussed the exact plotting of the Urban/ Suburban O.C.P. line by the land surveyor has resulted in the Suburban area growing larger and the Urban area decreasing. We hope the revised lot configuration can be supported by your department.

- [109] There is no indication that a copy of the October 15, 1996 letter was forwarded to the Bontorins. The concern of the Bontorins and their counsel revolved around the question of whether the subdivision plan being pursued by the Defendants would require the demolition of their House. It appears that the Bontorins made a decision in November, 1996 to continue to monitor the situation. In a note to his file, Mr. Richards recorded this: "Choices seems to be (1) agree to demolition of house & subdivide. (2) Nullify agreement -

keep land & as much \$ as possible".

[110] The December 10, 1996 Minutes of the Council of Surrey record an application to rezone the Property: "1.97 ha (4.9 acre) Property to allow for the development of approximately two urban and eight suburban residential lots". Second reading was given to the rezoning by-law on that date. Staff were instructed to resolve "the following issues prior to the final adoption":

- (b) submissions of sub-division layout to the satisfaction of the Approving Officer;
- (c) input from the Ministry of Environment; and
- (d) submission of an acceptable tree survey and a statement regarding tree preservation.

[111] The Proposed Sub-division Layout which was available for inspection at City Hall noted: "Existing house to be removed". Property owners and occupants of Property within 300 feet of the Property were advised of the Public Hearing so that they could be given the opportunity to make representations concerning the proposed sub-division.

RULING REGARDING "WITHOUT PREJUDICE" DEALINGS

[112] A great deal of the "without prejudice" correspondence between the parties was in evidence as a result of a Ruling that it was appropriate to consider such correspondence in view of the positions taken by the parties that there was or was not settlement of the various matters which are presently in issue, In this regard, see *Pearlman v. National Life Assurance Co. of Canada* (1917), 39 O.L.R. 131 (S.C.); *McLeod v. Pearson*, [1931] 3 W.W.R. 4, [1931] 4 D.L.R. 673 (Alta. T.D.); *Fischer v. Robert Bell Engine & Thresher Co.*, [1923] W.W.R. 320 (Sask. K.B.); *rev'd on other grounds* [1924] 3 D.L.R. 545 (C.A.); *Vardon v Vardon* (1883), 6 O.R. 719 (O.R.); *Omnium Securities Co. v. Richardson* (1884), 7 O.R. 182 (Ch.); *Tomlin v. Standard Telephones and Cables Ltd.*, [1969] 1 W.L.R. 1378 (C.A.); *Re River Steamer Co.; Mitchell's Claim* (1871), 6 L.R. Ch. App. 822; *Cameron Packaging Ltd. v. Ruddy* (1983), 31 C.P.C. 154 (Ont. H.C.J.); *aff'd* (1984), 41 C.P.C. 154, (Ont. C.A.); *Rush v. Tomkins v. Greater London Council*, [1988] 3 W.L.R. 939 (H.L.); *rev'd* [1988] 2 W.L.R. 533, [1988] 1 All E.R. 549 (C.A.); *Forest Protection Ltd. v. Bayer A.G.* (1999), 169 D.L.R. (4th) 374 (N.B.C.A.); *Darcy v. Maier*, [1995] B.C.J. No. 578, [1995] 8 W.W.R. 525, [1995] B.C.L.R. (3d) 41 at paras. 17-18; *FS Industries Ltd. v. MacDonald* (1991), 105 N.S.R. (2d) 271, 284 A.P.R. 271 (N.S.S.C.T.D.).

FURTHER DISCUSSIONS BETWEEN THE PARTIES

[113] In a January 30, 1997 letter to Mr. Richards, Mr. Skagen enclosed a copy of the Alternative #13 (which included the notation "existing house to be removed") and stated:

We propose the transfer of Lot 10 to your client take place concurrently with the filing of the sub-division plan. Accordingly, please advise whether you would prefer us or yourselves to prepare the transfer documentation. In any event, we suggest the documentation be forwarded to us on our undertaking to file it concurrently with the filing of the sub-division plan together with your release of your L.P. In addition, please advise the writer how your client proposes to pay his servicing costs for Lot 10.

[114] Also included in the letter was one of the pages from Alternative #11 showing the area below the Urban/Suburban Boundary as 4,010.8 square metres (1.0 acre) and the area north of the Urban/Suburban Boundary as being 15,995.9 square metres (4.0 acres). Accordingly, the information forwarded in the January 30, 1997 letter did not include the advice that an actual survey had shown that there was less than 1.0 acres south of the Urban/Suburban Boundary, that it was Alternative #13 which had been approved by Surrey or that what had been approved by Surrey continued to carry the note: "Existing House to be Removed".

[115] In his February 5, 1997 reply, Mr. Richards stated in part:

I attach for your client's consideration a copy of the map approved by both parties about the time the contract of purchase and sale was made. You will note that there is substantial difference between the two maps. Furthermore you will note that where there is a difference it is to my client's prejudice.

Your client contracted to transfer back the corner acre and existing house to my client on the completion date. My client still demands that be done.

[116] The February 7, 1997 reply from Mr. Skagen to Mr. Richards stated in part:

With respect to the difference between the maps approved by the parties and the sub-division plan, we refer you to the following documents:

1. Option to Purchase Agreement [Agreement for Sale] - Definition of "Vendors Lots"; and
2. The Amendment to the Contract of Purchase of Sale dated and signed by our respective clients on March 14th, 1994 and in particular paragraph 2 of that Amendment.

These items both clearly show that the parties are in agreement that the actual finished lot being provided to your client and the proposed lot may be different. We specifically note that there will be no prejudice to your client's lot in this matter.

We confirm our earlier advice to you that our client agreed to and is committed to transferring to your client the corner acre and existing house on the completion date. As you well know, that cannot complete until the sub-division plan has been deposited at the Land Titles Office and titles are available.

[117] In a February 19, 1997 letter from Mr. Skagen to Mr. Richards, an articulated student on behalf of Mr. Skagen states that "we do have a registerable form of the Option to Purchase in our possession", that a copy had been forwarded to Ms. McMath, but they were reticent to provide the Agreement for Sale to Mr. Richards in view of the "improper" CPL. The letter concludes:

With respect to Lot 10 (the one lot south of the Urban/Suburban Boundary containing the house), our client is amenable to either purchasing the lot from your client at his raw lot cost (which appears to be somewhere between \$50,000.00 and \$60,000.00) and your client can do with the existing residence anything he desires, provided of course that it is removed from the lands in accordance with the approved sub-division plans and/or our client will arrange to have the lot serviced for your client at his cost. He advises the current servicing costs will be somewhere between \$65,000.00 and \$70,000.00. If your client decides that he would prefer to have the lot serviced and sell it himself we can arrange for payment of those servicing costs and proceeds.

In conclusion, we confirm our earlier advice to you that our client requires that this matter be completed without delay. This is prime selling season for the lots and our client advises that he has numerous buyers ready willing and able to purchase. We have advised our client to obtain those offers and secure deposits to ensure that he does not either miss the prime selling season and/or lose a cause of action against your client for loss of profits as a result of his improper filing of the CPL.

[118] Mr. Richards responded to the February 19, 1997 letter in his February 21, 1997 "Without Prejudice" letter to Mr. Skagen. Mr. Richards pointed out that his discussions with Mr. Cowley of Mr. Skagen's office were without prejudice, that the Agreement for Sale was not complete as there was no attached Schedule "A", and that it might not be in registerable form. Mr. Richards also pointed out that the fair market value of "my client's 1 acre is greater than \$60,000". Mr. Richards also stated: "Further it is clear from the written agreement that there is no expectation by either party that my clients should pay for lot servicing". Mr. Richards then indicated that a Statement of Claim would be forthcoming.

[119] The Statement of Claim was filed on February 24, 1997. It was alleged that, while the sale completed on May 13, 1994, the Defendants had failed to complete the transfer back of the House and one acre.

[120] As a result of discussions and negotiations that Mr. Bontorin had directly with Surrey (Mr. Rob Thompson), Mr. Richards was able to advise Mr. Skagen in his February 27, 1997 letter that Surrey was prepared to approve a "phased sub-division of the Property. Mr. Richards also forwarded a Survey Plan and Proposed Sub-division Layout and advised that this meant that:

"... the existing house does not have to be destroyed or moved". Further that the Property can be divided into approximately 1 acre and 4 acres. My client will continue to reside on the corner 1 acre and your client may subdivide the 4 acres. Consider this another formal demand that your client's performance of the obligations under the contract of purchase and sale.

[121] Until the February 27, 1997 letter to Mr. Skagen, there is nothing in evidence which would allow me to conclude that Mr. Richards had advised Mr. Skagen that Mr. Bontorin was discussing the Property directly with Surrey. Such discussions were other than in accordance with the 1992 Contract wherein the Bontorins designated Central as their agent to discuss matters with Surrey and other than in accordance with the ownership of the Property which was with Greenway and not with the Bontorins. However, I find that the discussions instigated by the Bontorins led to a way whereby the House could be retained on that portion of the Property which would be transferred to the Bontorins and that this was in accordance with the 1992 Contract and with the continuing understanding between the parties.

[122] In evidence is a February 24, 1997 letter from Mr. Skagen which appears to have been forwarded to Mr. Richards by facsimile transmission on March 3, 1997 and which appears to be in response to the February 27, 1997 letter from Mr. Richards. There is no explanation as to why the letter is dated February 24, 1997. In the letter, Mr. Skagen states:

Firstly, if we can in fact get approval for a phased sub-division, that is truly good news for everybody.

Notwithstanding, our client's concern is two-fold. Firstly, the difficulty with respect to the retention of the house as in your proposed Block A has never been a difficulty with the City of Surrey. The difficulty arises in dealing with Fisheries. Accordingly, before we get too excited, the proposed phased sub-division should be approved by Fisheries.

The second concern, of course, is more fundamental to the agreement between our clients. In particular, your proposed phased sub-division transfers to your client in excess of one acre. In that regard, please refer to the definition of "Purchaser's Lot" in the Option [sic] dated May 14th, 1994. The difficulty with the extra land to your client in the proposed Block A is, of course, the difference between an eight lot sub-division and a nine lot sub-division. The excess land is, of course, Lot 9. We propose that the difficulty of excess land can be addressed in one of two ways. Firstly, your client can buy from our client the excess amount or, we can have the proposed Block A redrawn to exclude the proposed Lot 9.

[123] On March 4, 1997, Mr. Richards wrote to Mr. Thompson of Surrey confirming a March 3, 1997 telephone conversation and enclosing a copy of the 1992 Contract as well as the pleadings filed. There is no indication that this letter was forwarded to Mr. Skagen. The letter continues:

As I told you Greenway Land Corporation transferred title into its name but failed to transfer back the corner acre and house to Mr. Bontorin. In order to protect his interest in the Property, Mr. Bontorin instructed me to commence a Supreme Court action and register a CPL against the title which I did. The action is outstanding and unresolved to this point.

[124] As a result of this letter, Surrey was not prepared to meet with representatives of the Defendants to discuss issues relating to the Rezoning Application until the CPL was removed from title. This position was taken despite the March 11, 1997 letter from H.Y. Engineering to Surrey pointing out that the Bontorins had authorized Greenway to act as their agent and that the Bontorins were not the owners, developers, or authorized agents of the Defendants.

[125] In a March 12, 1997 letter to Greenway, Surrey advised: "The City Solicitor has advised the Planning & Development Department that the Preliminary Layout Approval is not to be issued to the applicant for Sub-division ... until the CPL ... has been cancelled ...".

[126] Mr. Richards had a conversation with Mr. Thompson of Surrey on March 13, 1997 and records Mr. Thompson as advising that the Ministry "... will consider leaving the house there". In a March 14, 1997 letter, Mr. Richards then advised Mr. Skagen:

As you know my client is not agreeable to your client's plan of sub-division going ahead. It is in breach of the parties' agreement in that it requires destruction of my client's home and uses the wrong line to divide the respective properties.

[127] Mr. Richards retained Dhaliwal Oliver Wong Professional Land Surveyors ("Dhaliwal") to advise regarding the Property. In his March 15, 1997 advice to Mr. Richards, Mr. Dhaliwal attached a plan "showing lot dimensions according to Land Title Office Records" but cautioned that "these dimensions may change upon legal field survey." What was attached showed a one acre parcel of 4,046.86 square metres and a 3.94 acre parcel of 15,959.88 square metres. I find that this is the first time that the Bontorins would have been aware that their land was 4.94 acres rather than the 5.0 acres contemplated by the parties in the 1992 Contract.

[128] In a plan prepared on April 16, 1997, Dhaliwal provided Mr. Richards with a plan showing the placement of the Urban/Suburban Boundary on the Property. This plan shows 15,420.08 square metres (3.81 acres) above and 4,586.66 square metres (1.133 acres) to the south of the Urban/Suburban Boundary. There is a separate portion shown between the portion of the Property which was previously described as 4,046.86 square metres and the newly imposed Urban/Suburban Boundary. This portion is 78.443 metres on its southern side, 90.893 metres on its northern side, and 20.156 metres on its western side. It is described as being a total of 767 square metres or .190 acres. I find that this is the first time that the Bontorins would have been aware that the part of the Property which was to the south of the Urban/Suburban Boundary was in excess of one acre so that they could not necessarily assume that all of the part of the Property below the boundary would be transferred to them as this would potentially be other than in accordance with the 1992 Contract and the

agreement between the parties throughout.

MOTIONS TO DEAL WITH THE DISPUTE WITHOUT THE NECESSITY OF A TRIAL

[129] A copy of the April 16, 1997 plan was attached to the April 16, 1997 affidavit of Mr. Richards which was sworn in support of the application pursuant to the Rule 18A of the Rules of Court of the Bontorins for specific performance and in opposition to the application by the Defendants pursuant to ss. 235(1) and 236 of the Land Title Act, Rule 19(24)(a) and (b) of the Rules of Court, and the inherent jurisdiction of the Court requesting cancellation of the CPL.

[130] In his affidavit in support of the application of the Defendants, Mr. Manhas stated in part:

That the [1992] Contract ... provided that the Defendants would acquire all of the Lands (consisting of five acres owned by Mr. and Mrs. Bontorin) for the sum of \$500,000. The companies agreed to undertake all necessary expense to subdivide four of the five acres into a nine lot sub-division. Mr. and Mrs. Bontorin, upon completion of the sub-division and registration of the sub-division plan were to have the right to re-acquire, for a nominal consideration, the remaining lands.

That the [1992] Contract further provided that the remaining land would be one acre of land less that portion of land required by the municipal authorities for setback requirements as determined by those municipal authorities.

That the [1992] Contract also provides that, at closing, an option to purchase the Vendor's lot (as defined therein) was to be registered concurrently with the transfer of the lands. Attached hereto ... is a copy of the Option to Purchase Agreement.

That the Option to Purchase was, due to inadvertence, not registered.

That as the Plaintiffs well know, the Lands cannot be transferred to them until the sub-division plan has been filed at the Land Title Office.

The Defendant Companies cannot complete the sub-division while the Certificate of Pending Litigation clogs title.

That the current market value of the lots, when fully serviced, are approximately \$190,000 each. Accordingly, the Defendant Companies cannot realize any profit or recoup any of their expense until the Certificate of Pending Litigation is removed from title.

That the Defendants herein are prepared to offer alternative security in replacement of the Lands until this matter has been concluded either by court order or agreement between the parties. Alternative security may include either the posting of the bond or holding sale proceeds of lots in trust.

[131] Included within Exhibit "A" which is said to be a copy of the 1992 Contract is a plan which appears to be the same plan associated with the March, 1994 Amendment. It is clear that this Plan was not actually attached to the 1992 Contract which is in evidence. The Agreement for Sale which is attached as Exhibit "D" to the affidavit of Mr. Manhas contains no Schedule "A" as set out in the definition of "vendor's lot" which states that the vendor's lot would be the residue portion of land "... which will be similar to that indicated as Lot 10 on the proposed sub-division sketch attached hereto as Schedule "A" to this Agreement."

[132] However, the affidavit of Mr. Manhas is consistent with the concept of sharing the Property on a one/four acre basis and is consistent with the assumption that the Agreement for Sale would be immediately registered but that the portion of the Property which would be transferred to the Bontorins would not be registered until a sub-division plan had been filed.

[133] In opposition to the Motion of the Defendants, Mr. Bontorin swore an affidavit stating in part:

The agreement was that we would have the corner acre and our house and the Defendants would have the remainder which is approximately 4 acres. Before we signed the contract in September, 1992 [Mr.] Manhas showed me a plan indicating that the 4 acres would be subdivided into 8 lots. A copy of that plan is attached as Exhibit "A". [What is attached as Exhibit "A" is a document which was not produced until December 8, 1993].

When we signed the contract in September, 1992, we were led to believe that our home and the corner acre would be transferred to us the same day that title to the 4 acres was transferred to Central Projects Ltd.

At paragraph 6 of his affidavit [Mr.] Manhas states that the contract provided that our home on the corner acre was defined as a remainder less that portion of the Land required for municipal setback requirements. [Mr.] Manhas is absolutely wrong about this. My wife and I always agreed that our house and the corner acre would be preserved. We never agreed that the corner would be determined as a remainder after approval of whatever plan of sub-division [Mr.] Manhas decided to put forward.

At paragraph 7 of his affidavit [Mr.] Manhas states that the contract provided that an option to purchase was to be registered on the completion date at the same time as the transfer to the Purchaser. My wife and I never agreed to an option. This idea was introduced in March, 1994, when we were told that the title to our home and the corner acre could not be transferred to us on the completion date. The contract did not provide for an option. We signed the document attached as Exhibit "D" to Manhas' affidavit because it was the day before the completion date and our notary told us we should. However we understood that the document could not be a complete agreement until the proposed sub-division sketch referred to in the option as Schedule "A" was attached. Further we understood that the sketch that was to be attached is the one that the parties had already approved. A copy of the sketch I expected to see as Schedule "A" to option is attached as Exhibit "D". In the end no sketch was ever attached to the document.

However his plan of sub-division requires the destruction of our home. Further it does not divide the corner acre and the remaining 4 acres along the line that we agreed on. Rather it divides the two parcels along a line which gives the Defendants more usable area and my wife and I less. When Manhas' proposed plan of sub-division received third reading about January 30, 1997, I met with Rob Thompson at the City of Surrey. I asked him to consider approving another plan of sub-division which did not require the destruction of my home. He told me that the City would approve such a plan. Rob Thompson then gave me a plan which does not require destruction of our home and is consistent with the sketch that we approved. I attach a copy of my lawyers letter to the Defendants' lawyer and that plan of sub-division as Exhibit "H". [What is attached as Exhibit "H" appears to be a variation of Alternative #10 which is dated September 24, 1996.]

[134] While the Bontorins have taken the position throughout that they would receive one acre net of any requirements imposed by Surrey and the Ministry, it is clear that the agreement set out in the Agreement for Sale obligates them to assume a proportional share of those municipal and provincial requirements. It is also clear that Mr. Bontorin is acknowledging that he knew at the time the Transfer was registered that part of the Property could not be transferred immediately and that it would be necessary for them to accept the registration of the Agreement for Sale to protect their position until the sub-division was in place. At the same time, Mr. Bontorin makes it clear in his affidavit that they were not agreeing to a sub-division plan which required the destruction of the House or which resulted in a sub-division which would provide them with less land than what was originally contemplated under the 1992 Contract.

APRIL 17, 1997 ORDER

[135] On April 17, 1997, Smith, J., as he then was, ordered that the application of the Bontorins pursuant to Rule 18A be adjourned generally and that the CPL be discharged ("April 17, 1997 Order"). The CPL was discharged on the following terms:

- (a) that the Defendants forthwith undertake to pay into trust as security for any claims for damages herein, until further court order or written agreement between the parties, the proceeds of sale realized from the sale of first two lots situate upon the subject lands;
- (b) that the Defendants deliver an undertaking that neither they, nor any person acting on their behalf or with their authority, shall remove, alter or change the house situate and being upon the subject lands;

On behalf of the Defendants, Mr. Manhas signed an "Undertaking" in the form of the April 17, 1997 Order. That Undertaking was filed in the Court Registry on April 25, 1997.

MORTGAGE ARRANGED BY GREENWAY

[136] In April, 1997, Greenway was making arrangements with I.W.A. + Community Credit Union ("I.W.A.") for a Mortgage against the Property. In an April 17, 1997 memorandum to I.W.A., Greenway enclosed a copy of the "lot layout forwarded to the appraisers". The memorandum also contained the following advice:

Please also note that lot #10 will not remain as the Property of Greenway Land Corporation. It will be transferred to the original vendor upon sub-division registration for the price of \$1.00. And the remaining lots will be the Greenway's Property.

[137] I.W.A. requisitioned an appraisal from Falcus Appraisals Inc. ("Falcus") who provided an April 25, 1997 opinion that the "aggregate market value of the fee simple interest as of April 23, 1997" was \$1,620,000.00 ("1997 Falcus Appraisal"). The "as is" basis valuation before rezoning or other approvals was given as \$750,000.00. The value estimates were "gross with no allowance or discount for marketing/ development time or costs". There were valuations for Lots 1 through 9 but no value is given for what is shown as Lot 10 on Alternative #13. Lot 9 being the lot to the south of the Urban/Suburban Boundary is shown as having a value of \$135,000.00.

[138] There were a number of attachments to the 1997 Falcus Appraisal including a letter from Greenway to another appraiser indicating: "... Lot 10 will be transferred to the original vendor upon sub-division registration for the price of \$1.00."

[139] At this point, Lot 10 consisted of 1,284.6 square metres or approximately 32% of an acre. The Defendants do not indicate to I.W.A. or to Falcus that the Bontorins had not agreed to accept Lot 10 in satisfaction of the obligations arising out of the 1992 Contract.

[140] Also attached to the 1997 Falcus Appraisal is an April 23, 1997 letter from Greenway to the same appraiser setting out all of the costs associated with subdividing and developing the Property. At this point, there is no agreement between the parties that the Bontorins would be responsible for any of these costs.

FINALIZATION OF DEALINGS WITH SURREY

[141] On April 29, 1997, H.Y. Engineering wrote to Surrey requesting a meeting "... to discuss and finalize the siting of the house and determine when a P.L.A. can be issued". The letter again requested that any discussion relative to the rezoning application be limited to discussions between Surrey and the Defendants.

[142] On May 9, 1997, Mr. Manhas wrote to Surrey to confirm the advice received that a sub-division plan would be approved by Surrey which would not require the destruction of the House on the basis that the lots described as Lots 9 and 10 would remain "... as one lot for a future sub-division" and on the basis that those lots would have to be "... fully serviced as separate lots to make it easy for a future sub-division". The following statement was also made by Mr. Manhas in the letter:

And further it would still require the destruction of the existing dwelling, if you are to approve the layout as per application, single phase sub-division of 10 lots, and as we suggested placing a Restrictive Covenant, that would not be an option you would consider.

[143] In a May 13, 1997 internal memorandum from the General Manager, Planning & Development Department to the Mayor of Surrey, the following was set out:

The proposed layout was discussed with the applicant's agent, and the Planning and Development Department indicated on May 15, 1996 that it was preferable that the house be removed, and the entire creek and 15 metre setback area dedicated, as indicated by the Ministry of Environment. However, if the house had to be retained, then the area of the site designated for Urban development could remain zoned A-3, and rezoned to RF and the open space dedicated in the future. The second option was not acceptable to the applicant, whose agent submitted a revised layout on August 14, 1996 (Alternative #7), indicating demolition of the house and dedication of some, but not all of the creek and 15 metre setback area. Several of the proposed lots did not comply with the requirements of the Zoning By-law, in terms of lots widths, area and dimensions. This was discussed with the applicant, who submitted a revised layout.

(Alternative #13) on October 22, 1996. This revised layout complied with by-law requirements and the OCP boundary, indicated demolition of the house, and dedication of almost all of the creek and 15-metre setback area (see Attachment III). On October 24, 1996, the Planning and Development Department indicated to H.Y. Engineering that their most recent layout was acceptable.

H.Y. Engineering submitted information on April 30, 1997, indicating that the Certificate of Pending Litigation had been cancelled against the title of the Property, subject to Court Order that the house remain where it is. In the same letter, H.Y. Engineering requested the issuance of the Preliminary Layout for the proposed sub-division. The PLA would indicate 8 RH-G lots in the Suburban area, with the dedication of all the open space area in the Suburban portion of the site. The urban area would be left as 1 large RF lot, with future sub-division potential into 2 RF lots and the dedication of the open space area. This would allow the retention of the house, as ordered by the Court, while still retaining the potential for the dedication of the open space area when the house is eventually demolished, and the sub-division of the site into 2 RF lots. The applicant indicated that this was not acceptable, as he needed one of the RF lots in order to make a profit out of the development.

In order to allow the applicant to proceed with their application, and meet the requirements of Courts, the Ministry of Environment and the City, the Planning and Development Department is prepared to issue a PLA indicating eight RH-G lots in the Suburban area of the Property, and one RF lot in the Urban area of the Property, with future sub-division potential into two RF lots. This will ensure that when the house is eventually demolished or destroyed the open space in the Urban portion of the site will be dedicated to the City. The applicant does not agree with this and has requested a meeting, which is being scheduled.

[144] The May 13, 1997 internal memorandum was not introduced as evidence for the proof of its contents. However, I am satisfied that the rejection by the Defendants of the concept that the area to the south of the Urban/Suburban Boundary would be left for future sub-division so as to allow for the retention of the House is accurate. First, the Defendants continued with their request that Alternative #13 be approved. Second, there was considerable delay while the Defendants continued to negotiate with Surrey regarding a sub-division which would see the demolition of the House before the Defendants ultimately agreed to accept what was outlined by Surrey in May, 1997. Third, that was the basis of the mortgage application to I.W.A. Fourth, there is nothing in the evidence of the Defendants which would refute the statement that the two-phased sub-division was unacceptable to the Defendants in May, 1997.

[145] Fifth, that position is consistent with the subsequent correspondence between the Defendants and Surrey. For instance, Greenway wrote to Surrey on May 20, 1997, including a proposal that a Restrictive Covenant be placed on Lot 10 so that, if the House was destroyed, it could not be rebuilt on the existing building envelope and that any new building would be placed on the proposed building envelope. The letter concluded: "I tried very hard to understand your Planning Department's logic to a two-phased subdivision, since it does not serve the interests of the Public, mine, or Mr. Bruno Bontorin's."

[146] I find that Surrey was agreeable as early as May 15, 1996 to see the House retained, the Urban area rezoned A-3, a possible rezoning of the Urban area to RF and a dedication of open space in the future but that these possibilities were rejected as the Defendants continued their efforts to obtain a demolition of the House and a dedication of some but not all of the creek and 15 metre setback areas. I am satisfied that this possibility was rejected because the Defendants required at least one RF lot below the Urban/Suburban Boundary in order to make a profit out of the development or to increase their profits to what they considered an acceptable level. Accordingly, I find that it was only at the insistence of the Defendants that it was necessary for the part of the Property below the Urban/Suburban Boundary to be rezoned to RF zoning.

WAS A SETTLEMENT REACHED IN MAY AND JUNE, 1997?

[147] The parties entered into negotiations in June, 1997. After meeting with Messrs. Skagen and Manhas, Mr. Richards wrote to Mr. Bontorin on May 22, 1997 indicating that a settlement offer with two options had been presented at the meeting:

1. Firstly they say that they will purchase your interest in the 5 acres, with Property lines set by the proposed 10 lot sub-division plan, at the appraised value. Manjit [Manhas] says that the appraised value is about \$70,000.00 but I do not know.
2. Secondly they say that you can keep all the land on your side of the Urban/Suburban Line and develop later. Under this proposal you will have to pay him for: - for servicing the two lots which can be presently subdivided on your side of the line. This does not include sewer hookup which he agreed to pay. - For the market value of Lot 9 which he says belongs to him.

[148] I am satisfied that Mr. Richards accurately set out what was discussed at the meeting as none of the evidence presented on behalf of the Defendants refuted the information set out in the letter to Mr. Bontorin. In this regard, it is clear that Mr. Manhas was misrepresenting the appraised value of the interests of the Bontorins in the Property as the 1997 Falcus Appraisal indicated that Lot 9 alone was worth \$135,000.00 fully serviced, that Lot 9 was 560 square metres and Lot 10 was 1,284.6 square metres, and that the value of the bare land was \$750,000.00. As well, knowing that it was the position of Surrey that any two-phased development of the sub-division would require the servicing of both lots south of the Suburban/Urban Boundary and that the agreement between the parties required the Defendants to pay all costs including the sewer hookup, the Defendants introduced the concept of the Bontorins paying for all servicing other than the sewer hookup. The Bontorins quickly responded to these matters.

[149] In a May 28, 1997 "Without Prejudice" letter, Mr. Richards advised Mr. Skagen's office:

I am instructed to advise, with respect to your client's settlement proposal, that my clients elect to receive all of the land on the urban side of the Urban/Suburban line. They do not intend to sub-divide so there is no need for servicing the proposed Lot 9 as your client described. We will abide by the servicing requirements set by the City's engineering department for the house. Your client will hook up the sewer at his expense and the balance of the servicing cost will be for my clients' account. There is no offer to pay your client any money under this proposal.

[150] I find that the proposal set out in the May 28, 1997 letter by Mr. Richards on behalf of the Bontorins was never accepted by the Defendants. The offer to pay for the servicing costs of the lot that would be retained by the Bontorins (other than the sewer hookup) was never accepted so that this offer does not form part of the agreement between the parties.

[151] On May 29, 1997, H.Y. Engineering wrote to Mr. Skagen to confirm its understanding of a May 16, 1997 meeting with the Planning Department of Surrey:

Further, the Planning Department would be prepared to approve an alternative sub-division based on the following terms which would not require the destruction of the existing dwelling.

1. Planning would approve a two phase sub-division, first phase, the suburban portion of the land to be subdivided into eight one half acre gross density lots, and the balance of the land (urban portion) proposed as lots 9 and 10 under the current application to be left as one large lot for future sub-division as phase two.
2. Lot 9 and 10 would have to be fully serviced as separate lots with phase one, and
3. The owners would be required to take full responsibility of any claims that may arise from the Ministry of Environment or anyone else due to allowing development which is not consistent with current Ministry of Environment guidelines.

[152] In a June 4, 1997 "Without Prejudice" letter to Mr. Richards, Mr. Skagen described the "four outstanding issues" as follows:

Firstly, how do we keep the house?; secondly, what is your client's lot?; thirdly, who gets the proposed Lot 9? and; fourthly, who pays the servicing costs?"

[153] The solutions suggested by Mr. Skagen were that the Bontorins would support a two-phase subdivision which would allow an 8 lot subdivision of the Suburban portion of the Property, that the remainder of the Property would be transferred to the Bontorins "upon filing the sub-division plan" providing the Bontorins agreed that the servicing costs "as may be required" on the property to be transferred to them were to be paid by them, that the servicing costs would relate not to only the proposed Lot 10 but also the proposed Lot 9 so that the only issue remaining was then:

... the difference in the amount of land which your client is acquiring and the contracted amount for which our client was to receive. Namely, your client was to receive one acre (more or less) and our client not less than four acres. The difference in land amounts may be purchased by your client at fair market value as assessed by an independent appraiser or if no agreement is reached we will submit this issue to a judge for resolution.

[154] In his June 6, 1997 "Without Prejudice" response to the June 4, 1997 letter from Mr. Skagen, Mr. Richards stated:

1. We are in agreement with division of the two parcels along the urban suburban line which will allow 8 lots to your client and one lot to mine. There is no need to deal with the proposed lots 9 and 10. My client will take title to the remainder concurrently with registration of the sub-division plan.
2. The sewer connection costs to my clients' existing house will be for your client's account. Any additional servicing to the existing house required by the Municipality will be for my clients' account.
3. My client is not prepared to compensate your client for the "loss" of the urban lot number 9 as designated in the sketch signed by the parties. Further the land my client is acquiring in excess of one acre is now subject to the creek setback and is therefore of no value.

- [155] Mr. Skagen is of the view that the June 4, 1997 letter to Mr. Richards and the June 6, 1997 letter in response constitutes a settlement. My notes indicate Mr. Skagen stated at trial: "No disagreement over the matters which are at issue...." However, this is clearly not the case.
- [156] The proposal on behalf of the Defendants that everything other than the 8 lot subdivision would be transferred to the Bontorins was subject to all servicing costs on what would be transferred to the Bontorins being paid by the Bontorins and an agreement that: "The only issue then remaining is the difference in the amount of land which your client is acquiring and the contracted amount for which your client was to receive". It is clear that this proposal was not accepted by the Bontorins. Mr. Richards clearly sets out the position of the Bontorins regarding the so-called "additional property" in his June 6, 1997 letter to Mr. Skagen.
- [157] At Trial, Mr. Skagen could not recall any specific conversations with Mr. Richards which would have resulted in a settlement being concluded. He did confirm that he told Mr. Manhas that there was an "agreement in place".
- [158] I have no hesitation in finding that no agreement was reached as a result of the correspondence between Mr. Richards and Mr. Skagen in May and June of 1997.
- [159] The best indication that there was no overall agreement in place is the November 24, 1997 letter to Mr. Richards from Mr. Skagen which states in part:

Finally, we confirm our earlier discussions with you that notwithstanding the agreements set out herein our clients still have a dispute between themselves. In particular, it is our client's position that proposed Lot 9 is our client's property. We acknowledge Mr. Bontorin does not agree. We have also advised you, and you have agreed, that [it] will continue to be a matter of debate and/or litigation between our respective clients if we are unable to resolve it ourselves.

- [160] The notes to file of Mr. Richards on June 5, 1997 indicate a telephone conversation with Mr. Thompson of Surrey and the following:

She would do one connection to existing house - at minimum - sanitary & storm sewer, & water.

If 2 lots then 2 connections.

Also can apply for pre-servicing for 1 lot.

They can pre-service intended lots - makes sense - economically.

So must be fully serviced same as other lots. Existing house in application - connect to sewer, water, hydro, telp., sanitary, storm, gas, cable.

To same level as other houses in sub-division.

[161] While it is not clear, it may well be that this telephone conversation was the first time that Mr. Richards and the Bontorins became aware of the requirement of Surrey that all lots be fully serviced. I find that they had not received that advice earlier from the Defendants or Mr. Skagen.

AGREEMENT DRAFTED BY MR. SKAGEN

[162] In a June 9, 1997 memorandum to Mr. Skagen, Mr. Manhas followed up on a conversation with Mr. Skagen that morning and stated:

... Would you please draft the agreement today and send to George Richards, in the event we cannot come to an agreement, I would like to go back to the court right away so that we don't lose anymore valuable time. Please make sure to fax me copy of the agreement before sending it to George Richards.

[163] A draft June, 1997 Agreement was in evidence ("June 1997 Draft"). There is no evidence that this June 1997 Draft Agreement was signed by any of the parties or even forwarded to the Bontorins for their review and signature. As Mr. Skagen did not keep time records on this matter, there is no way to verify that he even discussed with Mr. Richards what was set out in the June 1997 Draft. It is the position of the Defendants that this document sets out a binding agreement between the parties. It is the position of the Bontorins that the June 1997 Draft does not evidence any agreement reached.

[164] The June 1997 Draft sets out mutual promises including that Greenway would proceed with a two-phase sub-division, the first phase would be 8 half-acre lots, the second phase would be the remainder of the land, the remainder would be transferred to the Bontorins concurrently with the filing of the sub-division plan, and the Bontorins would pay to Greenway:

upon demand, all servicing costs? [the question mark is in the draft] relating to the remainder land Lots 9 and 10 as may be required by the City of Surrey pursuant to the servicing agreements to be entered into with the City of Surrey.

[165] The June 1997 Draft also set out that the parties with due diligence were to seek judicial review of the 1992 Contract "to determine ownership of the excess land which is, for the purposes of this agreement, referred to as Lot 9"; that all costs "associated with this matter shall be borne by the party who is not entitled to the ownership of the said Lot 9" with those costs to be assessed on a solicitor/client basis; that no proceeds of the sale of lots 1 through 8 would be held in trust by Greenway as was required under the April 17, 1997 Order; and that the Bontorins would not be in a position to encumber or in any way alienate Lots 9 and 10 until the matter had been "completely resolved".

[166] In a June 27, 1997 letter to Mr. Skagen, Mr. Manhas inquired: "How did you make out with the agreement you sent to George Richards's [sic]?" In that letter, Mr. Manhas also enclosed a draft agreement for potential purchasers as Mr. Manhas indicated: "I would like to proceed with selling some of the lots."

[167] On July 8, 1997, Mr. Manhas wrote to Mr. Skagen as follows:

I would like to know if George Richards intends to send us a signed copy of the agreement? If they are in agreement, only then will I request the City to prepare release documents for Bontorin, otherwise the City may insist the Bontorin's sign the release and that would be a problem for us without the agreement in place. This would have potential of further delaying the project.

[168] It is nonsensical for Mr. Skagen and the Defendants to be adamant that there was an agreement in place, that the June, 1997 Draft documented that agreement, and that an agreement was ultimately signed by the Bontorins. At trial, Mr. Skagen was asked what happened with the draft and I record him as asking: "Is there a signed one?" When he was advised that there was not, Mr. Skagen testified: "I don't recall what would have happened after this". He also agreed that he did not communicate with Mr. Richards during the summer of 1997.

[169] Despite the fact that Mr. Skagen advised Mr. Manhas otherwise, I have no hesitation in finding that an overall agreement was not in place in June, 1997. The only agreement that was reached between the parties was that the two-phased subdivision would proceed so that the House could be retained on the Property. I find that there was no agreement that the Bontorins would compensate the Defendants for the alleged "extra" part of the Property being received and, although the Bontorins were now aware that it would be necessary to service all of the lots which would be created as a result of the subdivision of the Property, there was no agreement between the parties that the Bontorins would pay for the cost of all of the services except for the cost of the sewage connection which had always been the responsibility of the Defendants.

[170] The submission that the June, 1997 Draft sets out an agreement reached is without merit. First, it is clear that the June, 1997 Draft was never finalized by Mr. Skagen. Second, the June, 1997 Draft was never signed by the Bontorins and, despite what Mr. Skagen may have misled Mr. Manhas to believe, I find that the June, 1997 Draft was never even sent to Mr. Richards or the Bontorins. Third, if there was an overall agreement in place, that agreement is not reflected in the November 20, 1997 affidavit of Mr. Skagen where he stated: "... there are currently outstanding issues between the parties respecting that portion of the Property to be transferred by the Defendants to the Plaintiffs upon the registration of their subdivision plan".

- [171] While Mr. Manhas may well have been advised by Mr. Skagen that there was an agreement in place, I find that Mr. Manhas did not believe that there was an agreement in place by early June, 1997. If there had been an agreement in place, it would not have been necessary for Mr. Manhas in his June 9, 1997 memoranda to state to Mr. Skagen that the agreement should be drafted but: "... in the event we cannot come to an agreement, I would like to go back to the court right away...."
- [172] I find that there was neither an oral nor a written agreement relating to the matters which remained in dispute between the parties as at June, 1997.

FURTHER DEALINGS WITH SURREY

- [173] Perhaps in view of what Mr. Skagen advised Mr. Manhas regarding whether or not there was an agreement in place, Greenway advised Surrey in a June 13, 1997 letter that they were "ready to proceed with [the] two phase sub-division". Alternative #14 (June 17, 1997) divided the Property along the Urban/Suburban Boundary and described the southerly portion as "future sub-division" containing "Future Lot" A, B, and C. Future Lot "A" appears to be what was previously numbered as Lot 9, Future Lot "B" is what was previously numbered as Lot 10 and Future Lot "C" is what was previously to be transferred to Surrey in order to provide for the creek set-back and the parkland required by Surrey.
- [174] In a June 18, 1997 letter to Surrey, H.Y. Engineering enclosed the "revised layout" and advised that the project would be proceeding on a:
- two-phase development concept until the legal issues between Mr. Bontorin and Greenway Land Corporation have been resolved. Finally, the third plan illustrates just the proposed sub-division boundaries and the future development potential for Lot 9 [being everything south of the Urban/Suburban Boundary].
- [175] As H.Y. Engineering was receiving instructions from either the Defendants or Mr. Skagen, I take the comment in the June 8, 1997 letter to Surrey as further evidence that the Defendants and/or Mr. Skagen could not have been of the understanding that there was settlement of the issues between the parties.
- [176] In a June 26, 1997 letter to H.Y. Engineering, Surrey advised that a Restrictive Covenant would be required to deal with the situation if the House was destroyed. On July 3, 1997, H.Y. Engineering forwarded various "legal documentation" prepared at the request of the Defendants in order to meet the requirements set out in the June 26, 1997 letter from Surrey.
- [177] The same letter set out a number of "development cost charges" to be levied against the sub-division indicating a lot charge of \$15,200 was to be paid "for the proposed R.F. lot". The letter also set out the road dedication requirements by attaching a Plan with the "dedication of the roads and lanes shown in R.E.D.". What is referred to throughout in the letter is Alternative #14.

I.W.A. MORTGAGE

- [178] Perhaps in view of what Mr. Skagen advised Mr. Manhas regarding whether or not there was an agreement in place, the Defendants proceeded with the financing arranged from I.W.A. I.W.A. was prepared to lend \$650,000 against the Property. Greenway passed a resolution on July 10, 1997 authorizing the execution of such a mortgage.
- [179] The mortgage was executed on July 10, 1997 and was registered in the Land Title office on July 11, 1997 ("I.W.A. Mortgage"). The interest rate under the Mortgage was the "Basic Lending Rate [of I.W.A.] Plus 1.000% per annum" on the principal amount of \$650,000.
- [180] On August 11, 1997, an employee of Mr. Skagen made a note as a result of her telephone conversation with Mr. Manhas: "Advise Lot 9 is not to have the I.W.A. mortgage charged against it as this Property is being transferred concurrently with subdiv docs. to the Bontorins." There is nothing in evidence to suggest that I.W.A. was advised at the time that the portion of the Property which was to be transferred to the Bontorins could not be mortgaged. In any event, the I.W.A. Mortgage would have to charge all of the Property until sub-division had been completed and the I.W.A. Mortgage was being obtained so that the Defendants could undertake the expenses associated with obtaining the approval of Surrey and other associated sub-division costs.

JULY AND AUGUST, 1997 DEALINGS WITH SURREY

- [181] Letters of Credit were insisted upon by Surrey and included \$499,402.00 ("engineering works"); \$80,533.00 ("development costs charges"); and \$20,500.00 ("detention upon maintenance and for sand removal"). A revised budget was available showing "standard works" of \$486,424.00 and "hydro/tel utility charges/pavement cut" of \$12,978.00, plus "administration, inspection and legal fee" totalling \$22,454.20.
- [182] In a July 17, 1997 letter to Greenway, Surrey forwarded a Servicing Agreement for execution. By July 22, 1997, the signed Servicing Agreement and monies required had been received by Surrey.
- [183] The July 29, 1997 Minutes of Surrey Council reflect the adoption of "Amendment By-law 1996, No. 12980" thereby bringing into effect the rezoning of the Property from "Agricultural Zone Three (A-3)" with the 4578 square metres south of the Urban/Suburban Boundary being zoned as "Single Family Residential Zone (RF)" and with the 15,414 square metres north of the Urban/Suburban Boundary being rezoned to "half-acre Residential Gross Density Zone (RH-G)". The portion north of the Boundary then became Block "B" and the portion south of the Boundary became Block "A".
- [184] In an August 11, 1997 letter, Mr. Skagen sent executed copies of a "Section 215 Covenant No Building Covenant in Area" pertaining to Lots 4, 5, 6 and 8 of the proposed sub-division plan and requested that the Ministry execute the same. There was a delay in obtaining the "No Building Covenant" from the Ministry and it was not obtained until November, 1997.

[185] It is not clear why there was a delay between the rezoning of the Property on July 29, 1997 and November, 1997 when work commenced on the Property. While the delay may have been caused as a result of the delay of obtaining the "No Building Covenant" from the Ministry, I am satisfied that any delay and any damages which are alleged by the Defendants to flow from the delay were in no way caused by what was or was not done by the Bontorins. From the November 20, 1997 affidavit of Mr. Skagen which is in evidence, I can conclude that the delay related to the insistence of Surrey of obtaining the necessary "undertakings" before the subdivision plan could be filed.

[186] On August 14, 1997, Greenway executed a Release in favour of Surrey releasing Surrey from any claims arising:

... with respect to all environmental issues, statutes, laws, regulations, orders, by-laws, permits or other lawful requirements of any federal, provincial, municipal or other government authority having jurisdiction now or hereafter in force relating to the environmental, health, occupational health, safety, product liability or transportation of dangerous goods, including all applicable guidelines and standards with respect to the foregoing as adopted by any of those governmental authorities from time to time and the principles of common law and equity applicable to the lands and premises [the Property] ... and without limiting the generality of the foregoing, all issues with the Ministry of Environment, Lands and Forests, and the Department of Fisheries and Oceans with respect to the Lands.

COMMENCEMENT OF WORK ON THE PROPERTY

[187] In early November, certain work commenced on the Property. Probably because Mr. Bontorin had not been advised that the work would commence and because the contractors had damaged a fence and a hedge which was near the House, Mr. Bontorin confronted the contractors before they could continue work. In a November 14, 1997 letter to Mr. Richards, Mr. Skagen advised that:

... Mr. Bontorin is interfering with our client's contractors on the subject land. We are advised by our client the police have been called this morning. Please take notice that unless your client ceases and desists from his intentional interference with our client's Property rights, we will seek immediate injunctive relief without further notice to you.

[188] Common courtesy would have required Greenway to advise the Bontorins that work on the Property would commence and that it would be necessary to have access to that part of the Property occupied by the former dwelling of the Bontorins to undertake that work. That common courtesy would have avoided the confrontation which took place. While nothing excuses the actions of Mr. Bontorin in threatening the workers of Gemco, Greenway was not in a position to enter on to the Property without appropriate notice to the Bontorins. While the 1992 Contract had provided that Central "... or their agents shall have reasonable access to the property to obtain surveying and engineering information", the ability to enter on to the Property for those purposes came to an end when Greenway became the

registered owner of the Property.

- [189] Upon the transfer of the Property, the relationship between Greenway and the Bontorins became a landlord/tenant relationship as a result of Paragraph 4.2 of the Agreement for Sale which indicated that the Bontorins would be residing as a "Tenant at will in the premises "located on what was referred to under the Agreement for Sale as the "Vendor's Lot" but that the Bontorins would not pay rent to Greenway while Greenway was the registered owner of the "proposed Vendor's Lot".
- [190] It is clear that the necessary notice between landlord and tenant was not given by Greenway prior to Gemco entering on to the part of the Property referred to in the Agreement for Sale as the Vendor's Lot. Even if that agreement set out in the Agreement for Sale was not enforceable, the Bontorins could continue to occupy part of the Property as the Defendants had taken no steps to require them to deliver up vacant possession when the Transfer of the Property was registered in the Land Title Office.
- [191] In either case, I find that the Bontorins were entitled to notice that work on the Property was about to commence. However, I find that there were no grounds for Mr. Bontorin to take the position that the work on the Property could not proceed until he had title in his name to "my acre". By that time, it was clear to the Bontorins that they could not obtain title to "their" portion of the Property until the subdivision had been completed and that the subdivision could not be completed without the work being undertaken.
- [192] In an ex parte Motion returnable November 18, 1997, the Defendants requested an order that Mr. Bontorin be restrained from interfering with the construction work being undertaken. In support of the Motion, Mr. Manhas stated in his November 17, 1997 affidavit that the contractor, Gemco Construction Ltd. ("Gemco") would not return to work until "... they are assured that Mr. Bontorin will no longer interfere with and threaten them". The application was adjourned to November 20, 1997 so that the Bontorins could be given notice of the Motion.
- [193] In support of the Motion to restrain Mr. Bontorin, Mr. Skagen swore a November 20, 1997 Affidavit stating in part:

That the parties agreed that the Plaintiff shall have the option to purchase approximately one acre and house from the Defendants upon the registration of a final sub-division plan (the "Plan"). And that there are currently outstanding issues between the parties respecting that portion of the Property to be transferred by the Defendants to Plaintiffs upon the registration of a final sub-division plan.

... as part of Greenway's obligation and, pursuant to the Agreement with Mr. and Mrs. Bontorin and the servicing agreement with the City of Surrey, it must install Municipal services on the Property.

That portion of the Property to be conveyed to the Plaintiff is that portion of the Property over which the installation of the servicing connections must pass to connect to existing services.

[194] Mr. Manhas also swore a supplementary affidavit on November 20, 1997 stating in part:

That, although there is an ongoing dispute between the parties, we are prepared to litigate this matter at a later date and our current actions regarding installation of services are conferring a benefit on the Property which the Plaintiffs will share.

[195] In a November 20, 1997 affidavit, Mr. Bontorin stated that he had told the workers that the work "sounded OK" but that: "... I would not let them proceed until I had title to my acre in my name from the Purchaser". Mr. Bontorin also stated in his affidavit:

I was prepared to discuss this with the purchaser. I wanted to make arrangements allowing the workers to destroy my fence or garden then fix the damage done. As well I want to get the title to my Property in my name. However the Purchaser did not attempt to contact me to discuss this work. Instead the Purchaser sent his workers in secretly at night under the cover of darkness to rip down my fence.

[196] In a November 19, 1997 facsimile transmission from Surrey, Mr. Richards received the comments of Mr. Thompson regarding the affidavit of Mr. Manhas including the advice that Surrey had approved a 10 lot subdivision, Lot 10 was to be transferred to Surrey and "Lot 9 has the potential to be further subdivided into 3 lots, one of which is to be transferred to the City at the time of subdivision." Mr. Thompson further advised that the subdivision layout was as indicated in the Schedule "A" which was attached to the Restrictive Covenant which was to be registered against title to Lot 9. Mr. Thompson also advised as follows:

The filing of the sub-division plan in the Land Title Office does not require the installation of certain services on the Property.

[197] The Motion to restrain Mr. Bontorin was eventually adjourned generally after the parties were able to come to certain agreements after conducting further settlement negotiations.

NOVEMBER, 1997 NEGOTIATIONS

[198] By a November 21, 1997 letter to Mr. Richards, Mr. Skagen advised that he had received confirmation from the Ministry that it:

... has consented to execution of its covenant. Accordingly, we are now in a position to be able to comply with our undertakings to the City of Surrey to file a sub-division plan concurrently with all of the covenants. The filing of the documents will take place today. Accordingly, upon receipt of the sub-division plan number from the Land Title Office, this matter will be able to proceed.

Based upon the representations made to our client and Mylene deGuzman of this office at the New Westminster Court House on November 20th, 1997, we would anticipate receiving by return fax your confirmation that Mr. Bontorin will no longer interfere in any manner with our client proceeding with installation of municipal services.

[199] The parties negotiated through a series of letters including November 21, 24 and 26, 1997 letters from Mr. Richards to Mr. Skagen and November 24 and November 27, 1997 letters from Mr. Skagen to Mr. Richards. In reviewing that correspondence, I make the findings that the parties agreed as follows:

- (a) Mr. Bontorin would no longer interfere with Gemco and their efforts to provide services to the Property;
- (b) Prior to any party entering on to that part of the Property which would, in the words of Mr. Skagen, be "Mr. Bontorin's" property, Mr. Richards or Mr. Bontorin would be advised of the "intent and the work being performed" by any party entering on to that the portion of the Property;
- (c) The work that was required was work which Mr. Skagen described as being work "which is required by the servicing agreement" with Surrey;
- (d) The Defendants agreed as follows: "We confirm Mr. Bontorin's fence will be re-erected between the right-of-way areas and the house immediately and following installation of services, will be restored, as close as possible, to its original location and re-shrubbed";
- (e) Mr. Skagen agreed to provide the registration numbers for the sub-division plan immediately upon those numbers being available from the Land Title Office;
- (f) A copy of the servicing agreement with Surrey would be provided by Mr. Skagen to Mr. Richards;

[200] Additionally, I find that Mr. Skagen provided his undertaking to Mr. Richards as set out in his November 24 and 17, 1997 letters to Mr. Richards:

You are preparing and will forward to us, a copy of the Transfer for the Property from Greenway to your client. We confirm our earlier undertaking to register that document forthwith upon obtaining legal title for the Property after filing of the sub-division plan. In addition, we will give our additional undertaking to ensure there are no financial charges registered against the Property.

[201] Mr. Skagen's understanding of the agreement reached and what remained unresolved, was set out in his November 27, 1997 letter to Mr. Richards where it was stated in part:

We have agreed there continues to be unsettled and unresolved difficulties between our clients. If these matters are unable to be resolved, we will continue through to judicial determination of those issues. In particular, outstanding matters include the determination.

[202] The last sentence in that letter was not completed. Accordingly, although Mr. Skagen acknowledges that there are "unsettled and unresolved difficulties", those "outstanding matters" are not particularized in this letter.

[203] However, the matters which were in dispute had been described by Mr. Skagen in his November 24, 1997 letter to Mr. Richards as:

Finally, we confirm our earlier discussions with you that notwithstanding the agreements set out herein our clients still have a dispute between themselves. In particular, it is our client's position the proposed Lot 9 is our client's Property. We acknowledge Mr. Bontorin does not agree. We have also advised you, and you have agreed, that will continue to be a matter of debate and/or litigation between our respective clients if we are unable to resolve it ourselves.

[204] I reject the submissions made on behalf of the Defendants and I find that there were still no agreements in place regarding the following matters:

- (a) whether the Bontorins would or should pay for services for that part of the Property that would be transferred to them;
- (b) whether the Bontorins would or should have to compensate the Defendants for that portion of the Property that was being transferred to them which was in excess of what was contemplated by the agreement in place between the parties and, in particular, whether all of what was designated as Lot 9 in the Phased subdivision plan would belong to the Bontorins or to the Defendants.

[205] That there was no agreement is best evidenced by the November 27, 1997 Letter from Mr. Skagen to Mr. Richards where Mr. Skagen stated: "We have agreed there continues to be unsettled and unresolved difficulties between our clients" and by the November 28, 1997 letter from Mr. Skagen to Mr. Richards where Mr. Skagen stated: "In a final attempt to settle this matter ... our clients will be providing us with documentation in support of the costs of providing the services to Mr. Bontorin's land". If a settlement was already in place, then these letters from Mr. Skagen would have taken a decidedly different course.

[206] As to the entitlement to Lot 9, where this dispute was left as at November 24, 1997 is set out in a letter of that date from Mr. Skagen to Mr. Richards: "[who is entitled to Lot 9] will continue to be a matter of debate and/or litigation between our respective clients...."

[207] The questions of whether the Bontorins would be liable to pay for services for that part of the Property that would be transferred to them and of whether the Bontorins should compensate the Defendants for "extra" property being transferred to them other than in accordance with the 1992 Contract is the subject matter of this litigation. However, what is clear from the correspondence and the agreements reached as at November, 1997 is that Mr. Skagen had undertaken to convey to the Bontorins that part of the Property that included the House upon the sub-division being registered.

REGISTRATION OF THE SUB-DIVISION PLAN

[208] In a November 26, 1997 letter from Mr. Skagen to Mr. Richards, Mr. Skagen advised that their application had been "recently rejected by the Land Title Office" and that, after re-submission of the application for sub-division, "... we will attend to filing your form of Transfer, in favour of your client, concurrently with our application".

[209] The sub-division plan was deposited in the Land Title Office on November 28, 1997 as Plan LMP 35991. Contemporaneously, a Transfer from Greenway to Surrey was filed transferring Lot 10, Plan LMP 35991. There is no indication as to why Mr. Skagen had not arranged for a contemporaneous transfer of some of the Property to the Bontorins.

[210] In a November 28, 1997 letter to Mr. Richards, Mr. Skagen advised that the sub-division plan had been deposited on that date and that:

... we hold the executed form of Transfer from Greenway to Bontorin and we will be in a position to file that Transfer immediately upon plan numbers being available.

In a final attempt to resolve this matter without having to resort to litigation, our client will be providing us with documentation in support of the cost of providing the services to Mr. Bontorin's land. In addition, he will be providing us with a valuation as to the excess land which is currently part of the existing Lot 9.

On the assumption those numbers will be acceptable to Mr. Bontorin, it would be nice to be able to file the Transfer together with Discontinuances for the outstanding matters between them.

[211] This letter from Mr. Skagen provides further evidence that no agreement had been reached between the parties regarding a valuation and a payment for the "excess land" and for the cost of providing services to "Mr. Bontorin's land".

[212] On January 13, 1998, Mr. Richards wrote to Mr. Skagen requesting his advice on the progress of the registration of the sub-division plan. In a February 10, 1998 letter, Mr. Richards also asked: "Have you been able to register the Transfer from Greenway to Bontorin?" In a February 13, 1998 response, Mr. Skagen stated:

Titles are not yet available, but are expected shortly and we will keep you informed. In the interim, we were advised that servicing of the lots, including your client's lot, is proceeding smoothly. We also take this opportunity to confirm our instructions to register the Transfer as quickly as titles are available.

[213] In fact, the titles issued on January 8, 1998 almost 5 weeks earlier. When Mr. Skagen received the January 13 and February 10, 1998 letters from Mr. Richards, Mr. Skagen knew that the title had issued. The statement that Mr. Skagen made in his February 13, 1998 to Mr. Richards was false.

- [214] I can reach this conclusion as Mr. Skagen advised Surrey in a January 14, 1998 letter setting out the registration numbers of the Sub-division Plan (LMP 35991), the explanatory plan (LMP 35992), the "No Building Covenant" (No. BL404655), the "Priority Agreement" granting the No Building Covenant priority over the I.W.A. Mortgage, and the "Transfer" conveying Lot 10 to Surrey (No.BL404665). Lot 10 was transferred to Surrey in order to comply with required dedication for the park and creek setbacks. Copies of the State of Title Certificates were enclosed in that letter to Surrey.
- [215] As well, on January 14, 1998, Mr. Skagen advised the Ministry of the registration number of the No Building Covenant and forwarded copies of the State of Title Certificates to the Ministry, provided I.W.A. with all registration details including the "Priority Agreement" granting the "No Building Covenant" priority over the I.W.A. Mortgage, and provided a report letter to Greenway enclosing copies of the State of Title Certificates for each of the lots.
- [216] At trial, Mr. Skagen admitted his advice on January 14, 1998 that the "titles not yet available" was not correct. He provided what I find to be an implausible excuse. I record him as saying: "I would have gone to my conveyancer and asked her and she would have said no". If that was what he was told, it is inconceivable that his conveyancer would have prepared the letters for signature which Mr. Skagen then sent to Surrey and the Ministry.
- [217] At no time did Mr. Skagen ask to be relieved from the undertakings that he provided to Mr. Richards. At no time did Mr. Richards relieve Mr. Skagen of the undertakings that he had given. The undertaking of Mr. Skagen to register the Transfer either contemporaneously with the registration of the Sub-division Plan or upon the registration numbers of the Sub-division Plan being available remains in effect and unfulfilled.
- [218] On February 17, 1998, it came to the attention of Mr. Richards that the titles on the subdivided Property had already been raised. This apparently came as a result of a conversation that Mr. Bontorin had with Mr. Thompson of Surrey. As a result, Mr. Richards wrote to Mr. Skagen on February 20, 1998 as follows:

Thank you for your fax of February 13, 1998, to advise that titles were not available on that date but were expected to be available shortly. Subsequent to receipt of your fax I received information which caused me to perform a search of the subject Property. That search appears to show that titles have been available since January 8, 1998. Since it appears titles are in fact available I forward to you the following documents in order that you may immediately complete the transfer of Lot 9, which you hold, into my clients' names.

- [219] What was enclosed included a Statement of Citizenship, a Property Purchase Tax Return in duplicate and a cheque payable to the Minister of Finance for \$1,002.40 in payment of the Property Purchase Tax. Mr. Skagen had not previously requested nor had he received these enclosures. Mr. Skagen did not immediately respond to the February 20, 1998 letter.

[220] In a February 20, 1999 letter to I.W.A., Mr. Skagen enclosed a discharge of mortgage relating to Lot 10 stating that Lot 10 was transferred to Surrey so that the I.W.A. Mortgage should have been released from that lot. Despite the fact that the Falcus 1997 Appraisal had not including the property south of the Urban/Suburban Boundary, the contents of the February 17, 1997 memorandum to I.W.A. making it clear that Greenway would have to transfer part of the Property to the Bontorins on sub-division, and the November 24, 1997 undertaking that Mr. Skagen gave to Mr. Richards that the part of the Property to be transferred to the Bontorins would have "no financial charges registered against the Property", no effort was made by Mr. Skagen to also obtain a Discharge of the I.W.A. Mortgage against what was shown as Lot 9 on Plan LMP 35991. It was only on June 13, 2001, almost 28 months later that the I.W.A. Mortgage was discharged from the Property.

[221] Having received no written response from Mr. Skagen, Mr. Richards wrote Mr. Skagen on March 9, 1998 as follows:

I write to confirm our telephone conversation of February 24, 1998. You were responding to my letter of February 20, 1998, in which I said that I had discovered that your client's sub-division plan was registered at the Land Title Office on January 8, 1998. On that basis I forwarded to you the documents necessary to transfer to title to my clients' name. You said that you did not realize that titles were available. Further you said that you would get your client in to sign and would register the transfer shortly. When I asked for a specific date you said that the transfer would be registered by Friday - which was February 27th.

Also, pursuant to the terms of the contract, title must go into my clients' name free and clear of all financial charges. Therefore I ask that you undertake to payout and cause to be discharged mortgage number BL243792 which appears on my title search and provide discharge particulars in due course.

In the event that you cannot transfer clear title to my client kindly advise forthwith.

[222] Mr. Skagen finally responded to Mr. Richards. In his March 12, 1998 letter, Mr. Skagen stated:

We confirm that we are in receipt of executed transfer documents to transfer the remainder of the land (now defined as Lot 9) to your client. We have requested, and our client has provided us with a copy of the costs incurred to date, and for which your client is responsible for payment of certain amounts. In particular, your client is responsible for payment of the servicing costs, the cost for converting the existing house to the new utilities, and the value of the extra lot being acquired by your client.

In those regards, we confirm as follows:

1. Cost to complete the ten lot sub-division was \$704,685.50. Accordingly, your client's share is 1/10th, being \$70,468.55;

2. The costs to convert 16927 Greenway Drive to the new utilities was \$9,603.25 (please find enclosed a copy of the invoice from Gemco Contracting Ltd. in that regard). Please note that this invoice should be reduced by the sum of \$875.00 plus GST of \$61.25, for a total of \$936.25, being the cost of the sanitary sewer connection which our client agreed to provide free of charge to Mr. Bontorin;
3. Finally, the value of the future lot shown on the sub-division plan is \$139,000.00.

Accordingly, upon receipt of your trust cheque in the sum of \$209,468.55 we are instructed to proceed with registration of the transfer.

[223] The response from Mr. Richards was immediate. In view of the breach of the undertaking of Mr. Skagen and in view of the false statements made by Mr. Skagen about whether the subdivision plan had been registered and whether the final numbers for the registration were available, the tone of the March 13, 1998 letter from Mr. Richards to Mr. Skagen was remarkably subdued. That letter states:

Your client's proposal that my clients pay money to your client before registration of the transfer into my clients' name is unacceptable. It is not consistent with the agreement between the parties. It is not consistent with the court proceedings to date. It is not consistent with your promise to register the transfer upon registration of the sub-division plan.

Please register the transfer immediately.

Failing receipt of registration particulars by close of business on Monday, March 16, 1998, I will seek instructions from my clients how to proceed.

[224] In a March 14, 1998 letter to Mr. Richards, Mr. Skagen acknowledged receipt of the March 13, 1998 letter and then stated: "Is it your position the land is to be transferred without cost to your client? If so, please provide the basis upon which your position is founded."

[225] In his March 16, 1998 response, Mr. Richards states:

You ask if my clients take the position that the land is to be transferred to them without cost? Yes, title to the Property must be transferred to them forthwith. The issues regarding costs can only be dealt with after the title is transferred.

You ask the basis for this position. The basis is the contract of purchase and sale prepared by Dave Hirst [the 1992 Contract]; the documents passing between you and Janice McMath; the history of court proceedings to date; the discovery that the sub-division plan was registered about January 8, 1998; and, the discovery that your client has mortgaged my clients' Property.

[226] In his March 20, 1998 response, Mr. Skagen states:

Firstly, you refer to "your client's Property". This is not your clients Property. The registered owner of the Property is Greenway Land Corporation. Your client has the right to acquire a certain portion of that land. We have previously agreed to disagree with respect to how much land is your client's entitlement and to deal with that entitlement later. For all intents and purposes later is now. If we are unable to resolve this problem let us get this matter on the trial list and set down the Examinations for Discovery forthwith.

Our client is and has always been prepared to transfer the subject land to your client. However, if your client is now claiming, in addition to the extra lot, free servicing costs, we have another issue to be resolved. Based on your statements our client believes your client has no intention of fulfilling his obligations with respect to costs for improvements.

With respect to your comments about a mortgage being registered over Lot 9, we confirm as follows. Our client obtained mortgage financing prior to registration of the sub-division plan. As you are no doubt aware a mortgage registered at the Land Title Office charges all of the Property. Our client is obliged to deliver lands to your client at closing free and clear of all financial encumbrances. Not before. Prior arrangements have been made to ensure discharge of any financial encumbrances at closing. This matter is a non-issue. Why make it one?

[227] Despite the undertakings provided by Mr. Skagen to Mr. Richards including those set out in his November 24, 1997, November 26, 1997, November 27, 1997, November 28, 1997 and February 13, 1998 letters, Mr. Skagen remains in breach of his undertakings as no part of the Property has been transferred to the Bontorins. Further, a CPL was registered by the Bontorins on April 6, 1998 but only against the subdivided Lot 9. Accordingly, the Defendants were in a position to proceed with the sale of those lots above the Urban/Suburban Boundary.

PROCEEDS FROM THE SALE OF THE FIRST TWO LOTS SOLD

[228] Despite the April 17, 1997 Order which required that the "proceeds of sale realized from the sale of the first two lots" be paid into trust, no proceeds from sale are in trust. The first two "purchases" are set out in a March 31, 1999 contract of purchase and sale, wherein 16977 and 16965 Greenway Drive were "sold". The purchase price was \$310,000.00, the "purchaser" was to place a non-refundable deposit of \$1,000.00 "upon subject removal" and Greenway was to carry the balance by way of an agreement for sale at an interest rate of 0% per annum for a period of eight months and then the prime rate of the Royal Bank of Canada plus 4% per annum thereafter with the entire balance due in eight months. The subject clause was removed on April 18, 1999 and, on October 28, 1999, Greenway agreed to extend the agreement for sale to December 15, 2001.

[229] The purchaser of these two lots is related directly or by marriage to Mr. Manhas. Greenway takes the position that the only "proceeds of sale" received relating to the sale of these first two lots is \$1,000. The Bontorins submit that Greenway has used this contract of purchase and sale to effectively avoid the requirements of the April 17, 1997 Order.

[230] I find that the concoction of this "contract of purchase and sale" was a deliberate act to avoid the requirements of the April 17, 1997 Order so that it would be possible for the Defendants to receive the net sale proceeds from the first 2 legitimate and genuine sales of lots in the 8-lot portion of the Property in violation of the April 17, 1997 Order.

[231] The April 17, 1997 Order and the circumstances leading up to the making of that Order allow me to conclude that it was the intention of Smith J. to substitute the security of the sale proceeds for the security of the CPL so that the interests of the Bontorins could be protected. It was only once the CPL had been removed that the Defendants were in a position to continue their negotiations with Surrey. The Defendants evaded the Undertaking provided to the Court and the terms of the April 17, 1997 Order by entering into the March 31, 1999 transaction relating to 16977 and 16965 Greenway Drive.

[232] By an August 15, 2001 Order, the Bontorins were granted liberty to amend their Statement of Claim as follows:

The undertaking given by the Defendants on April 17, 1997 to forthwith pay into trust for any claims for damages herein all of the proceeds of sale realized from the sale of the first and second lots situate at the subject Property, be and is hereby rescinded.

POSITIONS TAKEN BY THE PARTIES

[233] The Amended Statement of Claim alleges Greenway represented that the Agreement for Sale would be registered against the Property; the Plaintiffs relied upon this representation to their detriment; it was an implied term of the 1992 Contract and the Agreement for Sale that Greenway would make an application for sub-division which would enable it to transfer a lot to the Bontorins in a size as close as possible to what was originally intended with "as little disturbance as possible to the house"; Greenway did not attempt to register the Agreement for Sale "either because it knew that it could not be registered or through inadvertence"; Greenway breached the 1992 Contract when it made the representation that it did regarding the registerability of the Agreement for Sale; the Bontorins paid in error 50% of the Property tax payable in respect of the Property for the years 1995, 1996 and 1997; Greenway obtained financing and provided security to I.W.A. by giving the I.W.A. Mortgage in breach of paragraph 17(c) of the Agreement for Sale; the negotiations between Greenway and Surrey were entirely within the control of Greenway because the Bontorins had no registered interest in the Property; the Bontorins made it plain to Greenway that they did not require or want their lot to be serviced other by connection to the sewer system; the agreement reached between Greenway and Surrey resulted in approval of a revised sub-division plan requiring for full servicing; Greenway continues to refuse to transfer Lot 9 to the Bontorins; in breach of the undertaking imposed in the April 17, 1997 Order, the Defendants failed to pay into trust the proceeds realized from the sale of the first two lots that Greenway sold to unrelated third parties after the sub-division of the Property; Greenway has refused to repair the damage on that part of the Property which is now Lot 9; and the Bontorins have expended sums and will need to expend sums to repair the

damages referred to.

- [234] As a result, the Bontorins seek an Order that Lot 9 be transferred to them by Greenway; a declaration that any servicing costs or other charges arising from the sub-division of the Property are not recoverable by the Defendants from them; damages for breach of the 1992 Contract and the other agreements reached between the parties and for breach of the undertaking referred to; damages for breach of duty of care; aggravated damages; punitive damages; Court ordered interest; and "such further and other relief as may be just".
- [235] In the Amended Statement of Defence, the Defendants say the 1992 Contract was supplemented by the September 18, 1992, January 8, 1993, August 26, 1993, December 13, 1993 and March 14, 1994 amendments; the "material terms" of the Agreement for Sale were that the properties available to Greenway would be not less than four acres, the properties available to the Bontorins would be "one acre (more or less)", the properties available to the Bontorins would exclude any "land dedication, park reserves, stream preservation and setbacks required by Surrey as a condition of approving sub-division of the Lands"; and there was an "Option to Purchase" available to the Bontorins upon registration of the sub-division plans if they gave the required 30 days notice which they have not done.
- [236] The Defendants further submit that, contrary to the provisions of the Agreement for Sale, the Bontorins opposed and interfered with the final approval of the plan submitted to Surrey and registered the CPL against the Property on August 29, 1996, and that, as a result of the April 17, 1997 Order, Greenway was unable to register the original plan presented to Surrey. As a result of the wrongful acts of the Bontorins and as a consequence of the approved sub-division plan having divided the sub-division into two phases, Greenway was required by Surrey to pay for and provide full servicing of all lots in the sub-division. The Defendants also submit that, because the Bontorins wrongfully interfered with the completion of services and work on the Property as required by Surrey and wrongfully filed a CPL on April 6, 1998, the Bontorins are estopped from benefiting or relying upon their wrongful or other acts to found their cause of action against the Defendants. The Defendants also plead and rely upon the Limitation Act and submit that any claim for damage to property is statute barred.
- [237] The Defendants also deny that they warranted or represented to the Bontorins that the Agreement for Sale was registerable or would be registered and deny that the Bontorins relied upon any such alleged warranty or representation or that they suffered any damages or detriment as alleged or at all. The Defendants deny that they owe a duty of care to the Bontorins as alleged or at all as they were under no obligation to register the Agreement for Sale and that, as the Bontorins failed to submit the Agreement for Sale for registration at the Land Title Office, the Bontorins then failed to mitigate their damages. As well, the Defendants state that the Bontorins sought and obtained approval directly from Surrey for the eventual sub-division plan which required two phases and that they gained control of such negotiations as a result of the filing of the CPL and the April 17, 1997 Order despite the fact that Greenway was responsible for redevelopment of the Property.

[238] As a result, the Defendants seek an Order that the claims of the Plaintiffs be dismissed and for damages for the wrongful filing of a CPL. Alternatively, the Defendants seek an Order that the second phase of the sub-division plan be filed by the Plaintiffs, the proposed Lot 10 in that plan be transferred to the Plaintiffs, the Plaintiffs pay Greenway damages in the amount of \$105,738.98 plus pre-judgment interest and that the Plaintiffs pay damages for wrongfully filing a CPL. In the further alternative, the Defendants seek an Order that all of Lot 9 be transferred to the Plaintiffs, the Plaintiffs pay damages of \$259,031.45 to Greenway plus pre-judgment interest and that the Plaintiffs pay damages to the Defendant for wrongfully filing a CPL.

DISCUSSION - CLAIMS OF THE PLAINTIFFS

PAYMENT OF THE CIVIC TAXES

[239] Despite the agreement reached as evidenced in the Agreement for Sale, the Bontorins were called upon by the Defendants and obliged the Defendants by paying 50% of the civic taxes by making payments directly to the Defendants or directly to Surrey as follows: 1995 (\$2,183.36); 1996 (\$2,189.67); 1997 (\$2,047.00); and 1998 (\$2,923.76).

[240] Pursuant to the agreement reached, I find that the Bontorins are entitled to recover from the Defendants all differences between the amounts paid and what should have been paid taking into account the payment of 20% of the civic taxes relating to the assessed value of the land and 100% of the assessed value of improvements. If the parties are not in a position to come to an agreement as to the amount owing, then there will be a reference to the Registrar of the Court to determine the amounts and certify the balances owing.

DAMAGES TO THE BONTORIN PROPERTY

[241] Despite my finding that an agreement was reached that the fence would be "re-erected" and "restored, as close as possible, to its original location and re-shrubbed", the Defendants submit that s. 3(2) of the Limitation Act applies, that the Amended Statement of Claim is the first time that the claim for damages was established, and that the two-year limitation period had already expired as the claim of the Bontorins was for "... damages in respect of injury to ... property ...".

[242] I reject the submission of the Defendants. The claim is a contractual one arising out of the negotiations which culminated in the November letters between counsel. Even if I am wrong in that conclusion, I am satisfied that the original Statement of Claim included a claim for the damages to the Property.

[243] I also reject the submission that the damages were as a result of the servicing required by the City so that the Bontorins can not claim for those damages. Any submission to that effect does not give effect to the contractual obligations agreed to by the Defendants in November, 1997.

- [244] As to the cost of restoring Lot 9, three written estimates were received relating to the cost of repairing a light post, removal of an electrical pole, removal of dangling wires, removal of dead hedges and replanting new ones, repair of grading on the lawn, remedial work relating to an Italian tree on the Property, and replacement of the chain-link fence.
- [245] Mr. Bontorin received a June 9, 2000 estimate from Oasis West Land Design for the removal of the dead hedge, for the digging of a trench for the new hedge and a filling of that trench with good topsoil, the supply of 45 six-foot high "new hedging cedars", and the filling in of the trenches left by the servicing lines. That estimate was for \$2,900.00 plus G.S.T.
- [246] There is a June 14, 2000 estimate of \$493.40 to remove the power pole, to repair the driveway lighting and to remove the surplus meter from the side of the House.
- [247] The February 13, 2003 estimate from John Thompson Construction totalled \$8,150.00 plus GST of \$570.50 and was broken down as follows: repair light post (\$400.00); remove electrical pole (\$375.00); remove dangling wires (\$75.00); remove dead hedges and supply and re-plant new ones (planting new six foot "Emerald Green" cedars - approximately 70) (\$5,500.00); repair grading on the lawn and adding top soil and seed (\$500.00); remedial work for the Italian tree (\$200.00); and installing 140 feet of new light gauge chain-link fencing with cement posts (\$1,100.00). The estimate of Regent Maintenance was \$5,650.00 (not including GST) with no breakdown given for the various items.
- [248] I can find no agreement for the replacement of the electrical pole, the removal of the dangling wire, the replacement of the light post, the grading of the lawn in order to alleviate the problem of the trenches dug to provide the installation of underground services, and the replacement of the Italian Tree at the south part of Lot 9.
- [249] However, I am satisfied that the Bontorins are entitled to damages for the breach of the contract by the Defendants to replace the chain link fence and the 6-foot cedar hedge that was on the Property. The chain link fence and the cedar hedges were removed to allow the widening of the road which was required by the subdivision plan and, in accordance with the estimates in evidence and the testimony of Messrs. Chamberlain and Thompson of Regent Management Corporation and John Thompson Construction, I set the damages available to the Bontorins as being: (a) \$5,500 to remove the dead hedges and supply and replant new ones; and (b) \$1,100 to install 140-feet of new light gauge chain-link fence with cement posts.

THE I.W.A. MORTGAGE

- [250] As I am satisfied that the part of the Agreement for Sale which set out permitted encumbrances as including "... those encumbrances, covenants and easements as may be required by the City of Surrey and other regulatory authorities as may be required to obtain approval of the plan of subdivision" was enforceable as between the parties, the question which arises is whether the I.W.A. Mortgage was a permitted encumbrance. I am satisfied that it was not. I am satisfied that the reference to the Agreement for Sale cannot refer to

financial charges.

- [251] I find that permitted encumbrances could only include such things as restrictive covenants, easements, and dedications required by Surrey and/or the Ministry. I reject the submission of the Defendants that the I.W.A. Mortgage was "required by the City of Surrey" because the financing provided by the I.W.A. Mortgage provided the funds which allowed the subdivision to proceed and which allowed the subdivision plan to be formulated and submitted to the City. Even if I am wrong in that finding, the extent of the I.W.A. Mortgage would only relate to those funds which were required to obtain approval and would not extend the expenditures undertaken after approval of the plan of subdivision was obtained.
- [252] The question which arises is whether any actual damages are available to the Bontorins as a result of the registration of the I.W.A. Mortgage and the subsequent refusal to discharge that mortgage against the Property or against Lot 9. In this regard, I note that the April 17, 1997 advice from Greenway to I.W.A. indicated that part of the Property would be transferred to the Bontorins "upon sub-division Regis-tration....", that Mr. Skagen arranged for the release of the I.W.A. Mortgage against Lot 10 that was conveyed to Surrey after subdivision but did not arrange for the discharge of the I.W.A. Mortgage against Lot 9, and that Mr. Skagen was in breach of his November, 1997 undertaking to Mr. Richards which was stated as follows: "In addition, we will give our additional undertaking to ensure there are no financial charges registered against the Property [the lot which was to have been transferred to the Bontorins]".
- [253] Regarding the question of damages, I am satisfied that no direct damages flow to the Bontorins as a result of the I.W.A. Mortgage being registered against the Property while the Property remained in the name of Greenway. While the I.W.A. Mortgage was not a permitted encumbrance, the Bontorins were not in a position to mortgage the Property once it had been transferred to Greenway so that they did not suffer damages as a result of their inability to mortgage the Property which they formerly owned.
- [254] As well, I am satisfied that the financial position of the Bontorins was not jeopardized by virtue of the presence of the I.W.A. Mortgage. I find that the valuation of the Property at the time it was conveyed to Greenway was such that the position of the Bontorins was well protected even if I.W.A. had found it necessary to commence foreclosure proceedings because of the failure of the Defendants to pay the balances owing under the mortgage. In this regard, the Falcus 1997 Appraisal indicated a value of the property at \$1,620,000.00 without that part of the property which was to be transferred to the Bontorins if subdivision could be accomplished and \$750,000.00 on an "as is where is" basis. As the I.W.A. Mortgage has now been discharged, there can be no further damages available to the Bontorins.

- [255] However, I am satisfied that the deliberate breach of the agreement not to encumber the property by way of financial charges, the failure to obtain a discharge of the I.W.A. Mortgage once the subdivision had been registered, the failure of Mr. Skagen as the agent of Greenway to fulfill the undertaking given to Mr. Richards are factors which can be taken into account when assessing whether the Bontorins are entitled to aggravated damages, punitive damages and/or Special Costs.

COURT ORDER REQUIRING THE SALE PROCEEDS FROM THE SALE OF THE FIRST TWO LOTS TO BE HELD IN TRUST

- [256] Having found that the "sales" arranged by the Defendants were merely a means for the Defendants to circumvent the April 17, 1997 Order and the "Undertaking" signed by Mr. Manhas on behalf of the Defendants and filed in the Court Registry on April 25, 1997, the Bontorins claim damages as a result of the failure to have the proceeds from the first two "actual" sales to be held in trust. While this circumvention of the April 17, 1997 Order can be taken into account when assessing whether aggravated damages, punitive damages and/or Special Costs should be available to the Bontorins, I am satisfied that general damages are not available to the Bontorins as a result of this chicanery.
- [257] The Bontorins can point to no damages that were suffered by them as a result of the sale proceeds from the two lots not being tied up so that they would be available to secure the claims set out in their Statement of Claim. Additionally, the CPL registered against the Property served the same purpose from time to time.

REPRESENTATION THAT THE AGREEMENT FOR SALE WAS ENFORCEABLE AND WOULD BE REGISTERED

- [258] Even on the assumption that a representation was made that the Agreement for Sale was enforceable and would be registered, I cannot make a finding that the Bontorins relied upon any such representation. When the Agreement for Sale was prepared by Mr. Skagen, the Bontorins were represented by Ms. McMath. As a notary public, Ms. McMath was in a position to provide an opinion as to the registerability and the enforceability of the Agreement for Sale and, if the Bontorins were led to believe that it was registerable and enforceable, they would have obtained that opinion from Ms. McMath who was representing their interests.
- [259] I cannot accede to the argument that the mere preparation of a document by the lawyer representing a party such as Greenway can be a representation to parties such as the Bontorins that the document that was being prepared for their signature was registerable and enforceable.

[260] As well, although my review of the documentation between Ms. McMath and Mr. Skagen allows me to conclude that Mr. Skagen had the responsibility to register the Agreement for Sale, I can not conclude he made this representation to the Bontorins or that he provided any undertaking to Ms. McMath.

[261] Subject to the argument that the failure to register the Agreement for Sale constitutes a factor which can be taken into account when determining whether aggravated damages, punitive damages, and/or Special Costs are available to the Bontorins, I am satisfied that no actual damages are available to the Bontorins as a result of the Agreement for Sale not being registerable, being enforceable in whole and being registered by the Defendants or by Mr. Skagen on their behalf.

DISCUSSION - CLAIMS OF AND DEFENCES OF THE DEFENDANTS

DAMAGES ALLEGED BY THE DEFENDANTS RELATING TO THE FILING OF THE CPL

[262] On February 19, 1997, Mr. Skagen wrote to Mr. Richards regarding the CPL that was on the Property and advised: "This is a prime selling season for the lots and our client advises that he has numerous buyers ready willing and able to purchase". There is nothing in evidence which would indicate that was the case.

[263] In his affidavit in support of the April 11, 1997 Motion to Discharge the CPL, Mr. Manhas stated that the current market value of the lots when "fully serviced" would be approximately \$190,000.00 each. After reviewing what is in evidence, I cannot reach the conclusion that any damages should be available to the Defendants as a result of the filings of Certificates of Pending Litigation.

[264] First, the Bontorins were merely protecting their rights arising out of the 1992 Contract and the enforceable parts of the Agreement for Sale. Second, even though Surrey later took the position that the subdivision could not be filed until the CPL was removed or the dispute resolved and even though the Bontorins had taken steps to advise Surrey regarding the dispute and the CPL, it is clear that the delays relating to the final approval of the subdivision were caused by the continuation of negotiations with the Ministry and the insistence by the Defendants on a subdivision of the Property which would see the removal of the House of the Bontorins. In this regard, I note the May 9, 1997 letter from Mr. Manhas confirming the advice received from Surrey that the House could remain and what was then described as Lots 10 and 9 would remain: "... as one lot for a future division". If that proposition was acceptable to Surrey, because the retention of the House was required by the Bontorins, and because the retention of the House was the very essence of the agreement reached between the parties, there is no ability by the Defendants to blame the actions taken by the Bontorins as I find that any actions that they took which were inappropriate did not lead to any delay or any substantial delay of the procedure whereby the subdivision plan was ultimately approved.

- [265] I am satisfied that any delays associated with the approval of the subdivision plan were caused by the Defendants attempting to obtain the most favourable location of the Urban/Suburban Boundary, the attempts by the Defendants to maximize the number of Urban lots on the Property, the requirements of Surrey regarding the retention of trees, the setback from the adjacent stream, and the other preconditions to subdivision, and the requirements of the Ministry.
- [266] I find that these delays rather than anything done or not done by the Bontorins caused the delays and therefore the damages claimed by the Defendants. Accordingly, the claim of the Defendants for damages from the filing of a CPL is dismissed.

SHOULD THE BONTORINS PAY SOME OF THE COSTS TO OBTAIN SERVICING OF THE PROPERTY?

- [267] The Defendants submit that there is an agreement in place that the Bontorins would pay some of the costs of bringing services to Lot 9 of the Property. I can find no support for that position. First, paragraph 6 of the 1992 Contract provided that Central would: "... save the vendor [the Bontorins] harmless from any charges arising from the subdivision and approvals". I am satisfied that this part of their agreement was broad enough to result in no subsequent servicing costs being chargeable to the Bontorins. The requirement that all lots in the sub-division be serviced comes within the phrase "any charges arising from the subdivision and approvals". Central agreed to hold the Bontorins harmless from any such charges and Greenway is bound by that agreement.
- [268] Second, despite Greenway raising with the Bontorins as early as the August 30, 1996 letter to Mr. Bontorin that Surrey would require all lots on the Property to be "fully serviced", I can find no agreement by the Bontorins that they would pay any such costs. While an offer to pay such costs was set out in the "without prejudice" May 28, 1997 letter from Mr. Richards to Mr. Skagen, that offer was never accepted by the Defendants. Accordingly, it is not binding on the Bontorins. As well in his March 20, 1998 letter to Mr. Richards, Mr. Skagen indicates that the cost of servicing is: "... another issue to be resolved."
- [269] Third, as early as May 9, 1997, the Defendants were aware that, if the House was to be retained, it would be necessary to have a two-phased subdivision but that it would be a condition of such a subdivision that all lots had to be "fully serviced". As the Defendants were not in a position to proceed with a subdivision which would see the demolition of the House, they had no choice other than to choose the Alternative which would require full servicing of all lots so that, if the part of the Property to be transferred to the Bontorins was subsequently subdivided, the services would already be in place. As well, I can not conclude that the requirement that the lots below the Urban/Suburban Boundary had to be fully serviced came from anything other than a requirement by the Defendants that this part of the Property be rezoned to RF Zoning.

- [270] While the Amended Statement of Defence states that the Defendants were required to pay for servicing of all lots because of the new plan which was forced upon them as a result of the interference of the Bontorins, I can find no support for that proposition. As early as October 27, 1994, Surrey was provided with an amended sub-division plan which would see the urban portion of the Property not sub-divided until the Bontorins chose to sub-divide it. As early as May 15, 1996, Surrey confirmed that, while they preferred the removal of the existing House as part of the redevelopment of the Property, if the House was to remain then a portion of the Property designated for "urban development" was to remain under its then current zoning with the Suburban portion only being re-zoned. There is no indication at this time that the cost of servicing would be imposed.
- [271] The undertakings of Mr. Skagen were clear. It was not a precondition of the registration of a transfer of Lot 9 to the Bontorins that the Bontorins pay either the \$70,468.55 demanded by Mr. Skagen in his March 12, 1998 letter to Mr. Richards or any other amount. It is clear that Lot 9 should have been transferred to the Bontorins early in 1998. I find an absence of an agreement ahead of time that the Bontorins would be responsible for their proportional cost of servicing the Property and I find that there was no contractual obligation on the Bontorins to pay for the cost of bringing services to the Property.
- [272] What was demanded by the Defendants in the March 12, 1998 letter from Mr. Skagen and Mr. Richards was one-tenth share of the total cost of development, being a claim for \$70,468.55 less \$936.25 for the sewer hook-up that Central agreed to pay. No rationale was given as to why it would be necessary for the Bontorins to pay for one-tenth of all of the costs associated with obtaining the approval for the subdivision of the Property and the subsequent development of that part of the Property which was available to Greenway.
- [273] However, because the Bontorins bargained for the return of one acre plus the House with the only new service being the sewer hook-up, the Bontorins have benefited from the requirements of Surrey to the extent that services have now been provided to what is now Lot 9.
- [274] The March 12, 1998 letter from Mr. Skagen to Mr. Richards indicates that the cost of bringing new utilities to Lot 9 was \$9,603.25. From that amount should be subtracted a total of \$936.25, being the cost of bringing the sanitary sewer connection to that Lot.
- [275] I find that the bringing of new utilities to Lot 9 is a benefit to the Bontorins over and above what they bargained for and that it would be inequitable for them to receive that benefit without paying for it. Accordingly, the Defendants will have judgment in the amount of \$8,667.00 with pre-judgment interest on that sum from and after January 8, 1998 when Lot 9 of the Property should have been conveyed to the Bontorins.

CLAIM OF THE DEFENDANTS FOR OCCUPATIONAL RENT

[276] The Defendants claim \$19,750.00 relating to the use of part of the Property since June, 1997. Under the agreement relating to rent as evidenced in the Agreement for Sale, the Bontorins were to pay "... no rent to Greenway while Greenway is the registered owner of the proposed Vendor's Lot..." As Greenway remains the registered owner of what was to have been transferred to the Bontorins, Greenway is not in a position to claim that the Bontorins should be paying occupational rent. Accordingly, that claim of the Defendants is dismissed.

HOW MUCH OF THE PROPERTY SHOULD BE TRANSFERRED TO THE BONTORINS, AND SHOULD THEY COMPENSATE THE DEFENDANTS FOR ANY "EXTRA" BEING TRANSFERRED?

[277] Had the sub-division plan been completed in accordance with the sub-division approved by Surrey Council at third reading, the Bontorins would have received .99 acres and Greenway would have received 3.95 acres. Similarly, the Plan set out in the April 1, 1996 letter from H.Y. Engineering to Surrey which would have made available approximately 86% of an acre and Alternative #5 which would have made available approximately 96% of an acre are all in accordance with the original understanding between the parties but were not pursued by the Defendants.

[278] Instead, the current plan provides the Bontorins with more than they bargained for, being 1.15 acres and Greenway with less than it bargained for, being 3.81 acres. The difference between 3.81 acres and 4 acres is slightly larger than the size of the disputed urban lot within Lot 9.

[279] The amount of land which would be above and below the Urban/Suburban Boundary was largely outside the control of the parties and I am satisfied that this is acknowledged in various agreements reached between the parties. I can make no finding that the Defendants did not diligently pursue the placement of that Boundary in a way which would minimize the number of suburban lots on the Property. I can also make no finding that the parties contemplated that all of the land below the Urban/Suburban Boundary would be available to the Bontorins.

[280] However, I am satisfied that the Defendants pursued a course of action which was other than in accordance with their obligations. What would be available to the Bontorins had to reflect the very reason why the 1992 Contract was structured the way it was ---- that the Bontorins wished to preserve their House and that they would retain the one acre in its immediate vicinity.

[281] Because of paragraph 5 of Addendum "B" of the 1992 Contract, the Defendants were the agents of the Bontorins to deal with Surrey in processing the required development application:

The vendor, upon acceptance of the agreement, will appoint purchasers or their agent as the vendors' agent to deal with Municipality in processing the required development application. The vendors will provide any signatures required by the approving authorities in order to process the development application.

- [282] This agency required the Defendants to act in the interests of the Bontorins and required them to take no steps which were contrary to the interests of the Bontorins. Instead, there was minimal or no communication between the Defendants and the Bontorins. The steps taken by the Defendants to obtain a sub-division plan which was in their best interests was other than in accordance with the duties imposed upon them by paragraph 5 of Addendum "B" and other than in accordance with the agreement that had been reached in the 1992 Contract and later that the House and approximately one acre would be available to the Bontorins.
- [283] The Defendants were required to act in good faith so that Surrey would approve a sub-division plan that came as close as possible to fulfilling the original expectations of the parties. The ultimate result is that there is one lot of 1.13 acres south of the Urban/Suburban Boundary and, on any further sub-division of that lot, more than half of it has to be dedicated to Surrey and the House has to be demolished.
- [284] The ultimate result also includes a disproportionate sharing of the land required for Park Dedication and for Creek Dedication. Approximately 21% of the Property has been dedicated to Park and Creek. While this takes into account the location of the creek and the requirements of Surrey and the Ministry, the RH-G Zone requirement for Park Dedication is 15% and the RF Zone requirement for Park Dedication is 5% and the existing "share" of total Park Dedication and Creek Dedication reflects a share of approximately two-thirds to that part of the Property which is in the RH-G zone and one-third to that part of the Property which is in the RF zone. Such a sharing is other than in accordance with the agreement reached between the parties that the land dedication would be shared by the parties on a pro-rata basis which would require Park Dedication and Creek Dedication shared on roughly a 4/1 ratio. If the Bontorins are to receive all of the Property which is below the Urban/Suburban Boundary, then their share of the two Dedications will be one-third of the total rather than the contemplated 20% of the total.
- [285] As early as February 15, 1994, the Defendants were advised through Duncan that: "It is possible the City might accept additional space required by the RH-G zone to be taken from the urban portion of the lot. This may have the effect of maintaining eight RH-G zoned lots." I can not be satisfied that the Defendants embarked upon a deliberate course of action to maximize the necessary Park Dedication and Creek Dedication which would be taken from what would be available to the Bontorins and to minimize what should come from what the Defendants would have available or from what they hoped would be available to them. However, I find that the subdivision which was approved and registered results in a disproportionate part of the Property below the Urban/Suburban Boundary being taken up by land included within the Park Dedication and the Creek Dedication.

- [286] That being the case, I am satisfied that all of Lot 9 should be transferred to the Bontorins without the necessity of any compensation being paid by the Bontorins to the Defendants for what the Defendants have referred to as the "extra" property being transferred. Specifically, the request of the Defendants that there be an order that the second phase of the sub-division plan be filed by the Plaintiffs, the proposed Lot 10 in the plan be transferred to the Plaintiffs, and that the Plaintiffs pay the Defendants damages in the amount of \$105,738.98 plus pre-judgment interest is dismissed as is the request for an order that, if all of Lot 9 is to be transferred to the Plaintiffs, the Plaintiffs would then be required to pay damages of \$259,031.45 to the Defendants plus pre-judgment interest.
- [287] The disproportionately smaller share of the required Dedications is contained within that part of the Property which has already been sold by the Defendants, the Defendants have had the benefit of either more lots in their parts of the subdivision or larger more valuable lots that were available for sale. I am satisfied that it would be inappropriate for the Defendants to benefit financially in those circumstances and still take the position that more of that part of the Property below the Urban/Suburban Boundary should be available to them or that they should be compensated for that part of the Property if all of it is to be transferred to the Bontorins.

DAMAGES AND DECLARATIONS AVAILABLE TO THE PLAINTIFFS

SHOULD THE BONTORINS BE ENTITLED TO AGGRAVATED DAMAGES?

- [288] A leading case dealing with punitive and aggravated damages is *Vorvis v. Insurance Corporation of British Columbia* [1989] 1 S.C.R. 1085 where the Court distinguished between punitive and aggravated damages indicating that, while punitive damages are designed to punish thereby constituting an exception to the general common law rule that damages are designed to compensate the injured and not to punish the wrongdoer, the role of aggravated damages remains compensatory. An exception to that general principle regarding aggravated damages was set out in *Wharton v. Tom Harris Chevrolet* [2002] 3 W.W.R. 629 (B.C.C.A.), where Levine, J.A. approved the statements of Lord Steyn in *Farley v. Skinner* [2001] 4 All E.R. 801 when stating:

Lord Steyn rejected the argument ... that to fall within the "peace of mind" category of cases, the "very object of [the] contract" had to be pleasure, relaxation and peace of mind. He rejected a narrow reading of those words, pointing out that in *Watts*, the Court of Appeal did not consider the contract in issue to be of that kind. Citing *Jackson v. Chrysler Acceptances Ltd.*, where a spoiled holiday was only one object of the contract, he held (at para. 24), "It is sufficient if a major or important part of the contract is to give pleasure, relaxation or peace of mind". (at para. 52)

- [289] In *Wharton*, Levine J.A. stated the following two principles that apply to claims for aggravated damages in a contract case:

- (a) a contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension, or aggravation which the breach of contract may cause to the innocent party.
- (b) The rule is not absolute. Where a major or important part of the contract is to give pleasure, relaxation or peace of mind, damages will be awarded if the fruit of the contract is not provided or if the contrary result is instead procured. (at para. 57)

[290] The Bontorins submit that the primary purpose of the Agreement for Sale and the immediate registration of it, the agreement reached to repair "their" property, and the agreement to transfer part of the Property to them upon registration of the subdivision plan was to give them peace of mind. When these agreements were breached, there was no financial loss to the Bontorins but the frustrations that had led the Bontorins to seek the agreements in the first place returned "in aggravated form" according to the submissions made by the Bontorins. In the circumstances, the Bontorins seek a claim for aggravated damages of \$35,000 "... taking into account not only the aggravations experienced by the Bontorins but the high-hand and oppressive conduct of Mr. Manhas's company which caused those aggravations".

[291] I am satisfied that the Bontorins obtained significant peace of mind as a result of the various agreements reached with the Defendants. The assumption that the Agreement for Sale would be registerable and registered gave the Bontorins comfort that their home of many years would be returned to them along with one acre of the Property. The agreement that the Property would not be subject to any financial charges would make it likely that, in due course, they would receive what they had bargained for. The agreement reached to repair their fence and hedge was obtained after the very emotional Mr. Bontorin objected to the presence of workers on what he considered his property. When the agreement was reached that the fence and the hedge would be replaced, the Bontorins received the solace they had sought that "their" property would be restored to its original state once it was transferred back to them. The agreement reached with the Defendants that a portion of the Property would be conveyed to the Bontorins as soon as the subdivision plan was filed in the Land Title Office and titles raised, gave them the considerable peace of mind that at least part of the protracted litigation and disputes between the parties had finally come to an end. I am satisfied that the conditions set out in *Farley and Wharton*, supra, have been met. I assess the aggravated damages available to the Bontorins at \$35,000.

SHOULD THE BONTORINS BE ENTITLED TO PUNITIVE DAMAGES?

[292] In the alternative, the Bontorins submit that, if aggravated damages are not recoverable, that damages of \$35,000 should be recoverable as punitive damages. The law relating to punitive damages for breach of contract was set out in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* (2002) 209 D.L.R. (4th) 318 (S.C.C.), where Binnie J. on behalf of the Court stated:

Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency". The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, supra, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, at para. 196.

O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct". These are both legitimate objectives for the award of punitive damages (*Whiten*, supra, at paras. 43, 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. (at paras. 87-88)

[293] Before punitive damages can be awarded, there must be a finding that compensatory damages along with any order made for costs must be inadequate to achieve the objectives of retribution, deterrence and denunciation. It is also the case that punitive damages will also more likely be awarded if there was an abuse of a dominant position and if the defendant profited from the misconduct.

[294] I am satisfied that the conduct of the Defendants throughout can be described as malicious, oppressive and high-handed and offensive to the sense of decency of the Court. The registration of the I.W.A. Mortgage in contravention of the Agreement for Sale, the failure to discharge the I.W.A. Mortgage against Lot 9 in January of 1998 when the subdivision plan was filed and the final titles raised, the breach of the undertaking of Mr. Skagen, the outright fabrications contained in the February 13, 1998 letter of Mr. Skagen to Mr. Richards, the concocted "sales" of 16977 and 16965 Greenway to circumvent the April 17, 1997 Order, and the last minute refusal to register the transfer of part of the Property to the Bontorins unless in excess of \$70,000 was paid amount to such conduct. Regarding the refusal to register the transfer of Lot 9, the Bontorins had been induced by the Defendants

to cease activities which stopped the construction on the Property, to agree not to require an immediate transfer of part of the Property to them, and to agree that there would be a deferral of any question regarding the sharing of the costs of providing services to the Property and whether they would have to "compensate" the Defendants for "extra" property that they were about to receive when the transfer was registered. When the Defendants induced the Bontorins to make those agreements, the Defendants knew that the subdivision could not proceed without those agreements being in place and the CPL removed.

- [295] I am satisfied that the Defendants occupied a position of dominance in relation to the Bontorins. The Defendants were developers and could be expected to have the usual resources available to a developer. I am satisfied that the Bontorins were working-class persons without much sophistication with respect to legal disputes, complex contractual matters, and the development including subdivision of property. As well, the 1992 Contract required the Bontorins to have no involvement in the negotiations that the Defendants undertook with Surrey and the Ministry and required the Bontorins to trust the Defendants that they would negotiate a subdivision and a development of the Property which was in accordance with the agreement that had been reached between the parties relating to such matters as what part of the Property would be returned to the Bontorins, whether dedications required by Surrey and the Ministry would be equally shared by the parties, whether the subdivision would allow a return of property on a one/four basis, and whether their House could be maintained. All of this is in the context of the Bontorins having what might be described as a beneficial interest in 20% of the Property and despite their overpayment of one-half of the municipal taxes owing on the Property.
- [296] I also find that the Defendants profited from their breaches of contract and their disregard for the April 17, 1997 Order. The Defendants had the benefit of a mortgage covering all of the Property when there was a prohibition against such a mortgage in the Agreement for Sale. As well, the I.W.A. Mortgage could remain over the first two lots that were sold so as to provide I.W.A. continuing security which would not otherwise be available to it if the sale proceeds had been deposited into trust. At the same time, the Defendants were not required to face the possibility that I.W.A. might seek collateral security when they would have to provide a partial discharge of their mortgage without being in a position to receive any of the proceeds from the first two sales.
- [297] In *Vorvis*, supra, the Court stated that the principle established in *Rookes v. Barnard* [1964] A.C. 1129, was that the scope of punitive damages was restricted to two categories, namely, abuse of power by government, and torts committed for profit. After noting that the limitation in *Rookes* should not apply in Canada, McIntyre J. on behalf of the majority stated:

When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or a jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely can not be merely conduct of which the

Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actual wrong which caused the injury complained of by the plaintiff. (at pp. 1105-6)

[298] McIntyre J. cites with approval the following statement in that regard:

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. (at p. 1106)

[299] While the breaches of contract caused great mental distress and frustration to the Bontorins, while the conduct of the Defendants and Mr. Manhas was sufficiently offensive throughout, while the Defendants occupied a position of dominance in relation to the Bontorins, and while the Defendants profited from their breaches of contract and their disregard for the April 17, 1997 Order, I find that the breaches and the conduct throughout are not sufficiently offensive, standing alone, to constitute an actionable wrong so as to justify the imposition of an award of punitive damages. Accordingly, I would dismiss the claim of the Bontorins for an award of punitive damages.

SHOULD THE BONTORINS BE ENTITLED TO SPECIAL COSTS?

[300] Special Costs can be awarded where the conduct in question can properly be categorized as "reprehensible". In *Garcia v. Crestbrook Forest Industries Ltd.* (1994) 119 D.L.R. (4th) 740 (B.C.C.A.), the Court stated:

In *Fullerton v. Matsqui* (District) (1993), 12 C.P.C. (3d) 319, 34 W.A.C. 284, 74 B.C.L.R. (2d) 311 (C.A.), Mr. Justice Cumming, whose judgment was concurred in by Mr. Justice Wood and whose statements of the law on special costs were expressly not disagreed with by Madam Justice Proudfoot in her dissenting reasons, expressed the rule with respect to special costs in these terms, at p. 328: "Special costs, or solicitor-and-client costs, are therefore awarded when a court seeks to disassociate itself from some misconduct."

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District), and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word "reprehensible", taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs. (at pp. 746-7)

[301] In *Heppner v. Schmand* (1998) 59 B.C.L.R. (3d) 336 (B.C.C.A.), Hinds, J.A. on behalf of the Court stated:

While the conduct complained of may not have been scandalous or outrageous it was, nevertheless, reprehensible in the sense that it constituted a milder form of misconduct deserving of reproof or rebuke. It was conduct from which the court sought to disassociate itself. (at para. 17)

[302] I am satisfied that the Bontorins are entitled to Special Costs throughout. The matters which justify an award for aggravated damages and which would have justified an award of punitive damages if there had been actionable wrong can only be described as reprehensible, scandalous, outrageous and deserving of rebuke.

SUMMARY

[303] The claims of the Defendants for occupational rent, for damages arising out of the filings of various Certificates of Pending Litigation, for damages in the amount of \$105,738.98 plus pre-judgment interest if the proposed Lot 10 in the second phase of the subdivision is transferred to the Plaintiffs, and for damages of \$259,031.45 plus pre-judgment interest if all of the present Lot 9 is transferred to the Plaintiffs are all dismissed. However, the Defendant, Greenway Land Corporation will be entitled to Judgment in the amount of \$8,667.00 with pre-judgment interest on that sum from and after January 8, 1998.

[304] The claim of the Plaintiffs for punitive damages is dismissed. However, the Plaintiffs will be entitled to the following Declarations and Orders:

- (a) Lot 9 of Plan LMP 35991 will be transferred forthwith to Bruno Bontorin and Wanda Bontorin as Joint Tenants, without the necessity of those parties to pay to the Defendants or either of them any compensation upon such a transfer;
- (b) Aggravated damages in the amount of \$35,000;
- (c) Special costs throughout.

[305] If the Defendants refuse or neglect to execute the required documents to arrange for the transfer of Lot 9 to the Plaintiffs by December 10, 2004, then an Order vesting Lot 9 in the names of the Plaintiffs shall issue. On the transfer of Lot 9, there will be no adjustments as would ordinarily be between Vendor and Purchaser. However, all costs associated with the registration of a transfer or a vesting order in the Land Title Office relating to the transfer of Lot 9 will be borne by the Plaintiffs.

[306] If any party relies on the provisions of Rule 37 of the Rules of Court, then that party is at liberty to apply for directions regarding the costs payable.

"G.D. Burnyeat, J."

The Honourable Mr. Justice G.D. Burnyeat

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Prepared on 24 October 2026 · Esheria