
CANADA / JUDGMENT

Kreuchen v. Fawcus

2016 BCSC 600

COURT

Supreme Court of British Columbia

DECIDED

6 April 2016

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2016 BCSC 600 Kreuchen v. Fawcus

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kreuchen v. Fawcus,

2016 BCSC 600

Date: 20160406

Docket: S104531

Registry: Vancouver

Between:

Kai Kreuchen, Kai Kreuchen carrying on business

as the Ditton Group, and Roberta Kreuchen

Plaintiffs

And

Michael G. Fawcus, Jason R. Fawcus and

Hjadmar Vlasveld also known as Hjalmar Vlasveld

Defendants

And

Kai Kreuchen

Defendant by Way of Counterclaim

Corrected Judgment: The text of the judgment was corrected at

paragraph [196] where changes were made on May 5, 2016

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Plaintiffs and

Defendant by Counterclaim:

Laura Bevan

Counsel for the Defendants:

Kevin D. Lee

& Simon Turner

Place and Date of Trial:

Vancouver, B.C.

February 23-27 and

March 2-4, 23-27, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 6, 2016

- [1] This action arises out of a dispute over two contracts - a Project Management Agreement and a Real Estate Services Agreement, entered into between the defendants, who owned lands in the District of North Vancouver ("the District") that they wished to develop; and the plaintiffs, who provided consulting services. The plaintiffs Kai Kreuchen ("K Kreuchen") and Roberta Kreuchen ("R Kreuchen") seek specific performance of the contracts; or in the alternative, damages; or in the further alternative, compensation for services provided based on quantum meruit.
- [2] The defendants say that the plaintiffs provided no services under the Real Estate Services Agreement and are not entitled to any payment. The defendants say that the Project Management Agreement is void for uncertainty; unenforceable because the parties failed to reach agreement on essential terms of the contract; or in the alternative, that the contract is silent in respect of the event that occurred to bring the contract to an end. In the alternative, the defendants allege that K Kreuchen breached the Project Management Agreement and the defendants seek damages. The defendants say that if the plaintiff is entitled to compensation based on quantum meruit, he has failed to prove entitlement to compensation in excess of the amounts already paid by the defendants.

DOCUMENTS

- [3] At the start of trial, counsel filed as exhibits, by consent, several large volumes of documents and a document agreement. At the end of the trial there were many documents included in the exhibit books about which no witness had testified and to which no reference had been made in submissions. Counsel were asked by the Court, and agreed, to review the exhibits post-trial and to attempt to agree to the removal from the record of documents which were duplicates of documents in evidence; and documents that had not been referred to during trial. I attach as Appendix A the letter counsel sent to the court post-trial and the list of documents that counsel agreed could be removed from the exhibits. This reduced the bulk of the exhibits by hundreds of pages.

FACTS

- [4] K Kreuchen is a former municipal planner who now does consulting work. Mr. Kreuchen does not have any formal professional qualifications as an urban planner or as a realtor. Roberta Kreuchen is K Kreuchen's wife. Ms. Kreuchen does not have any formal professional qualifications as a realtor.
- [5] Michael G. Fawcus ("M Fawcus") is a retired accountant. Mr. M Fawcus does not have any formal professional qualifications as an accountant. Jason R. Fawcus is M Fawcus' son. Hjadmar Vlasveld ("H Vlasveld") is Mr. J Fawcus' partner.
- [6] In 2006, M Fawcus owned a home on a residential lot at 2832 Capilano Road ("2832 Cap Road") in North Vancouver, where he resided with his wife Lilli Fawcus. M Fawcus had purchased 2832 Cap Road in 1991 and title to the property was in his name alone. M Fawcus had previously been married to Debbie Fawcus, who is J Fawcus' mother. I mention Debbie Fawcus because she assisted the defendants to finance the development project that is the focus of this lawsuit.
- [7] In evidence, although not admitted for the truth of its contents or as expert opinion evidence, is an appraisal of 2832 Cap Road obtained by VanTel Safeway Credit Union in September 2005. The appraiser valued the property at \$730,000.
- [8] M Fawcus had retired from work as an accountant, and in 2006 he and Lilli Fawcus decided to move to the Sunshine Coast. They purchased a home in Sechelt in January 2006 and paid \$445,000 for the property. In order to purchase the Sechelt property before selling 2832 Cap Road, M Fawcus and Lilli Fawcus borrowed \$583,250 from Vancouver Safeway Employees Credit Union (later Vancity Savings and Credit Union ("Vancity")). \$130,000 of the loan was used to pay off an existing mortgage on 2832 Cap Road. The loan was secured by mortgages registered against both the Sechelt property and 2832 Cap Road. By October 2006, the mortgage indebtedness had increased to \$598,000.

- [9] In 2006 M Fawcus listed 2832 Cap Road for sale with a realtor at a listing price of \$860,000. However, both the listing realtor and other realtors consulted by M Fawcus suggested to him that his property would be more valuable if he was able to get the land rezoned from single family residential to multi-family residential zoning.
- [10] Although he had worked as an accountant for many years, M Fawcus had no experience in property development. He decided, however, that he would explore the possibility of having his property rezoned with a view to constructing a strata apartment building on the lot.
- [11] M Fawcus spoke to a former Mayor of the District who recommended that M Fawcus speak to K Kreuchen about his plans. On October 6, 2006, M Fawcus spoke to K Kreuchen by telephone and later that same day the two men met at 2832 Cap Road.
- [12] K Kreuchen was born in Germany in 1939, moved to the United Kingdom in 1948, and then to Canada in 1967. In the United Kingdom he took courses in geography and surveying; worked for a land surveying company; and as a junior community planner. In 1967, K Kreuchen and R Kreuchen moved to Canada, initially living and working in Medicine Hat, Alberta. Eventually the Kreuchens moved to British Columbia and K Kreuchen took a job with the District of North Vancouver, working in the Planning Department as a municipal planner.
- [13] K Kreuchen's employment with the District ended unhappily in 1988. K Kreuchen commenced a lawsuit alleging constructive dismissal that was eventually settled, after which K Kreuchen began offering consulting services to developers and government agencies. He called himself "The Ditton Group" and on letterhead described the Ditton Group as "land use consultants". As "The Ditton Group" is really K Kreuchen's alter ego, I shall not refer to it further in these Reasons.
- [14] After becoming a consultant, K Kreuchen obtained one contract from the Province of BC but most of his clients were small companies or individuals that he described as "inexperienced developers".
- [15] Between 2003 and 2006, K Kreuchen worked as a consultant and project manager for the owners of a property in North Vancouver who successfully developed a 60-unit strata housing complex to replace what had been a rental complex. Although neither K Kreuchen nor R Kreuchen are licensed realtors, K Kreuchen testified that he and R Kreuchen sold one-half of the strata units in the housing complex.
- [16] After their first meeting on October 6, 2006, K Kreuchen and M Fawcus met perhaps six to 12 times during the next two months. They discussed the potential for development of 2832 Cap Road; some of the steps that would be required to obtain rezoning and a development permit; and some of the risks associated with the development process.
- [17] K Kreuchen testified that the process for rezoning and obtaining a development permit involves numerous stages. The owner/developer is required to make a preliminary application which is reviewed by District staff and planners and by the local community

association. The second stage involves incorporating changes suggested by the District or the local community association, and further discussions with those individuals. The third stage involves holding a structured public information meeting that is advertised and of which formal notice must be given to owners or residents living within 100 metres from the property that is the subject of the application. The fourth step requires formulation and consideration of a bylaw amendment, followed by a formal public hearing held in compliance with District rules and policies.

- [18] Two District documents are in evidence setting out the application procedure for an official community plan amendment; (which would include a rezoning application); and the application procedure for a development permit. The first document indicates that the Official Community Plan ("OCP") amendment process takes approximately six months to complete, but that many OCP amendment applications are submitted in combination with zoning bylaw amendments and/or development permit applications and that affects that time frame. K Kreuchen testified that he had never seen a rezoning application completed in a year; and that there is a lot that has to be done before you can even submit a preliminary application for rezoning.
- [19] The District's development permit application document states that the process requires approximately four to six months to complete, but also states that the time-line depends on the complexity of the issue, staff and Council workload, and other factors.
- [20] K Kreuchen was asked at trial if he had discussed the application processes with M Fawcus between October and December 2006. He said that he could not recall having had an in-depth discussion with M Fawcus but that he had provided a general outline of the process. In general, K Kreuchen demonstrated poor recall of the specifics of most of his meetings and conversations with M Fawcus and others, and he did not keep notes or any record of most meetings and discussions. M Fawcus also demonstrated limited recall of some events and also did not keep notes or records of most meetings and discussions.
- [21] In general, I conclude that neither K Kreuchen nor M Fawcus intentionally misled the Court and that both made honest efforts to recall and relate events that occurred over the course of several years. There were significant conflicts on some aspects of their testimony, however, and I have had to resolve those conflicts in order to arrive at findings of fact.
- [22] Between October and early December 2006, K Kreuchen did some preliminary research including reviewing the OCP and the Local Community Plan ("the LCP") for the upper Capilano area. The LCP indicated that some multi-family development was anticipated in the area covered by the LCP although not on M Fawcus' lot. In K Kreucher's opinion, the District was falling short of its stated goal for the development of multi-family housing which he thought might bode well for M Fawcus' proposal. However, the LCP also indicated that zoning changes in established neighbourhoods should be avoided. In order for M Fawcus to construct townhouses or condominiums on his property, there would have to be an amendment to the OCP to permit rezoning of the lot.

- [23] On or about October 20, 2006, K Kreuchen prepared the first of a series of computer spreadsheets that the parties called "pro forma". The pro forma are, in essence, K Kreuchen's projections, from time to time, of the schedule for obtaining various approvals and for the construction of a multi-family development; construction costs; and possible sales revenue. Between 2006 and 2010, K Kreuchen produced many versions of pro forma and 27 of those versions are in evidence, although only four or five were referred to at trial. Based on the pro forma referred to at trial, it is fair to say that the projected time-lines in the pro forma were rarely, if ever, met and some significant costs were never accounted for, most notably, mortgage payments and loan interest.
- [24] K Kreuchen kept some versions of the pro forma on his computer. Generally he created a "new" pro forma by starting with an earlier version and changing some of the contents. Sometimes he dated the new or amended version of the pro forma but he did not always do so and the dates on which each pro forma was produced; and the order in which the various pro forma were produced, are not clear or necessarily accurate. K Kreuchen testified that he did not provide M Fawcus with a copy of every pro forma that he produced.
- [25] M Fawcus testified that in October 2006 K Kreuchen showed him a pro forma dated October 20, 2006. This document projects submission of a preliminary development application in January 2007; submission of an application for rezoning and for amendment of the OCP in May 2007; a building permit issued by July 2008; building construction commencing October 2008; and completed sales of all strata units by July 2009. K Kreuchen projected that revenue from the sales of all units would be \$8,000,000.00.
- [26] K Kreuchen's projections of sales revenue fluctuated significantly in subsequent pro forma, as various iterations and configurations of the proposed development were considered. At one point, K Kreuchen projected revenue of \$12,800,000; at another point \$17,800,000; at another point \$19,200,000 and later \$7,822,000.
- [27] I note here that all of these documents and projections were created by K Kreuchen alone and represent nothing more than his opinion. He is not a real estate appraiser or a licensed realtor. As time passed and costs were incurred, K Kreuchen incorporated some of the actual costs into the expense side of pro forma he created, but the sales revenue projections were never more than K Kreuchen's own estimates. No expert opinion evidence supporting K Kreuchen's sales revenue projections was submitted at trial.
- [28] As stated earlier in these Reasons, M Fawcus was retired from work as an accountant by the time discussions began between him and K Kreuchen. M Fawcus was not in receipt of employment or business income. I am satisfied that M Fawcus informed K Kreuchen of the fact that he had no employment or business income. The parties anticipated that M Fawcus would have to borrow the money to pay all development expenses, as well as most of his and Lilli Fawcus' living expenses, until a development permit had been obtained; and would then need to obtain a construction loan to finance the construction of any building or buildings for which a building permit was obtained.

- [29] Debbie Fawcus, M Fawcus' ex-wife and J Fawcus' mother, had agreed to lend money to finance the project until a construction loan could be obtained, through a large line of credit she had secured from the Royal Bank of Canada. She was to be repaid, with interest, once a construction loan was in place and/or the project was complete and the strata units were sold.
- [30] On December 6, 2006, M Fawcus and K Kreuchen signed a document that I shall refer to as "the 2006 Project Management Agreement". It is in the form of a letter addressed to M Fawcus on letterhead bearing the name "The Ditton Group". There is no dispute that K Kreuchen drafted this document without input from M Fawcus and without legal advice; that M Fawcus saw the document for the first time on the day that it was signed; and that M Fawcus did not ask for any changes to be made to the document before he signed it. He testified on examination for discovery that he looked at the document before he signed it and that he "guesses" that he understood it at the time.
- [31] The 2006 Project Management Agreement provided for a fee to be paid to K Kreuchen of 5% of the "end selling price". M Fawcus testified that he thought that the 5% fee would be calculated in relation to the end selling price, whatever that turned out to be. He recalled that he asked K Kreuchen if the 5% fee was negotiable and that K Kreuchen said it was not negotiable. Neither K Kreuchen nor M Fawcus obtained legal advice before signing the 2006 Project Management Agreement.
- [32] The 2006 Project Management Agreement provided for monthly advances to be paid to K Kreuchen which would eventually be credited against the 5% fee provided for in the Agreement. The first monthly advance under the 2006 Project Management Agreement was due in December 2006. M Fawcus paid K Kreuchen \$8,000 in January 2007 for the months of December and January; and \$4,000 monthly thereafter until August 2008.
- [33] The 2006 Project Management Agreement was replaced on July 22, 2007 with a document with identical terms. I shall refer to the July 22, 2007 document as "the Project Management Agreement". The only differences between the 2006 Project Management Agreement and the Project Management Agreement are that the July 22, 2007 document was addressed to and signed by all three of the defendants, and the date was changed to July 22, 2007. Again, none of the parties who signed the Project Management Agreement obtained legal advice before signing. There was no discussion among the parties about the content or meaning of the contract before it was signed.
- [34] A brief explanation of the reason for the addition of J Fawcus and H Vlasveld as parties to the Project Management Agreement signed on July 22, 2007 will suffice. At some point - it is not clear whether this happened before or after M Fawcus and K Kreuchen met on October 6, 2006 - the topic of enlarging the development site by acquiring the lot on the north side of 2832 Cap Road was raised. M Fawcus had discussions with L. Groenendy, the owner of 2840 Capilano Road ("2840 Cap Road") and on October 31, 2006 M Fawcus and Mr. Groenendy signed a conditional "Contract of Purchase and Sale" drafted by M Fawcus, specifying a

purchase price of \$625,000. Mr. Groenendy later refused to confirm the arrangement and listed 2840 Cap Road for sale with a realtor.

- [35] In April 2007, M Fawcus entered into another contract of purchase and sale with Mr. Groenendy for 2840 Cap Road. The purchase price was \$690,000 with a completion date of July 19, 2007. M Fawcus could not get a loan to finance the purchase himself, however, and J Fawcus, and H Vlasveld agreed to become involved in the project. M Fawcus assigned the contract for the purchase of 2840 Cap Road to them. M Fawcus testified that he told J Fawcus and H Vlasveld that he would share any profits with them.
- [36] J Fawcus and H Vlasveld borrowed \$188,000 from Debbie Fawcus (she borrowed the money on her line of credit) to pay the down payment on 2940 Cap Road and obtained a mortgage for the rest of the purchase price.
- [37] The sale of 2840 Cap Road to J Fawcus and H Vlasveld closed on July 19, 2007. J Fawcus and H Vlasveld were added as parties to the July 22, 2007 Project Management Agreement because they had purchased 2840 Cap Road, which was to be included in the development.
- [38] It is the Project Management Agreement dated July 22, 2007 that K Kreuchen seeks to enforce. The document is not lengthy and I reproduce it here in its entirety:
- [39] In the Notice of Civil Claim, the plaintiffs plead only contracts "in writing". Although the plaintiffs have pleaded that they rely on both express and implied terms of the written contracts, they have not pleaded that there were also oral agreements; or oral terms that supplement the written terms.
- [40] Before the 2006 Project Management Agreement was signed, M Fawcus had seen at least one pro forma. There is no evidence that J Fawcus or H Vlasveld had seen any pro forma before they signed the Project Management Agreement on July 22, 2007. There was no discussion before or at the time either Management Agreement was signed about the remuneration to be paid to K Kreuchen in the event that the defendants were unable to finance construction of buildings on the land; or chose to sell the property as bare land.
- [41] In cross-examination, K Kreuchen testified that the Project Management Agreement was not the most comprehensive contract he had ever drawn and that he relied on trust and that if a problem arose he expected that the parties would work it out on a reasonable basis. He agreed that there had been no discussion before the Agreement was signed about the possibility that the defendants would not be able to get financing for construction or would choose or be forced to sell the land as bare land.
- [42] K Kreuchen agreed at trial that no dollar figure was specified as the "end selling price" in the Project Management Agreement and that the end selling price could not be determined or known at the time the contract was entered into. He could not recall whether he and M Fawcus had discussed a 5% fee before he presented the Project Management Agreement to M Fawcus on December 6, 2006. He testified that on the previous project he had done, he had charged a fee of 2.5%. He said that if it turned out that his fee would be higher than

originally anticipated he would have adjusted it. He agreed that he wanted his fee to be commercially viable and fair. He testified that if the end selling price had turned out to be \$19,961,800 as he had projected in one pro forma he produced, he would have reduced his fee from 5% to 4%. He testified that if the project had sold for \$14,000,000 he would have also have reduced his fee to 4%. He testified that if the project sold for around \$8,000,000 he would expect to be paid a 5% fee. He was asked what he would have expected to be paid if the end selling price was \$5,000,000. He said that a \$5,000,000 building project would not have been financially viable.

- [43] K Kreuchen testified that the contract was premised on the construction of one or more buildings on the land and if the land was sold before construction, he would expect that M Fawcus would "buy my contract out" or sell his Project Management Agreement with the land. K Kreuchen agreed that there was no express term in the contract that required the defendants to buy out his contract or assign it to any purchaser of the land, but said that he understood that was the effect of the "Enurement" clause he included in the Project Management Agreement. That clause reads:

This agreement will enure to the benefit of and be binding upon the parties, their respective heirs, executors, administrators, successors and assigns.

- [44] K Kreuchen testified that he believed this clause meant that the Project Management Agreement would be binding on any person to whom the defendants sold their land. There is no evidence that he explained his understanding to M Fawcus, or that there was any discussion about the "Enurement" clause among the parties at any time.
- [45] It is probably useful to state here that K Kreuchen was mistaken in his understanding of the effect or meaning of the "Enurement" clause. The Project Management Agreement would be binding on assignees if either the plaintiff or the defendants made an assignment of the Agreement but the Project Management Agreement does not oblige the defendants to assign it in the event they sold their land. A purchaser of lots 2932 and 2940 land would not, in my view, be included in the description "heirs, executors, administrators, successors and assigns" of the parties to the Project Management Agreement.
- [46] K Kreuchen agreed in cross-examination that the Project Management Agreement says nothing about what fee, if any, he would be entitled to be paid if the contract was terminated after refusal of a rezoning application. The contract does not say that he would be entitled to retain the monthly advances paid to that point; or that he would be obliged to return those advances to the defendants.
- [47] On December 6, 2006, K Kreuchen and M Fawcus signed a second document, which I shall call the "2006 Real Estate Services Agreement". This document was also in letter form, on letterhead of The Ditton Group, addressed to M Fawcus. Although both K Kreuchen and R Kreuchen were supposed to provide services under this contract; and R Kreuchen has sued to recover fees under the Real Estate Services Agreement, she never signed the Agreement. She did not testify at trial and there is no evidence that she appointed K Kreuchen her agent.

In any event, K Kreuchen did not purport to sign the Real Estate Services Agreement on behalf of R Kreuchen. I conclude that R Kreuchen is not a party to the agreement and has no right to enforce the contract.

- [48] There is no dispute that K Kreuchen is the sole author of the 2006 Real Estate Services Agreement. No changes were made to the document by M Fawcus before he and K Kreuchen signed it. No party obtained legal advice before signing the 2006 Real Estate Services Agreement.
- [49] The 2006 Real Estate Services Agreement was replaced on July 22, 2007 by a document with identical terms that I shall call the Real Estate Services Agreement. The only differences are the date and the fact that the latter document is addressed to and signed by M Fawcus, J Fawcus and H Vlasveld, as well as K Kreuchen. J Fawcus and H Vlasveld were added as parties because they had acquired an interest in the project through their purchase of 2840 Cap Road. Once again, R Kreuchen did not sign the Agreement.
- [50] I think it useful to reproduce the Real Estate Services Agreement here:
- [51] Like the Project Management Agreement, the Real Estate Services Agreement also contains undefined terms. "Purchase price" is undefined, as is "the purchase contract". The contract contains no provision for termination, except that it "shall be in force until 45 days after the issuance of the Final Occupancy Permit". K Kreuchen testified that he believed the Real Estate Services Agreement gave the Kreuchens the exclusive right to sell units in the project, but there is no reference in the contract to "exclusive rights". He testified that the Agreement provided that he and R Kreuchen would be "employees" of the defendants, although that was never to be the case. He said that that terminology had to be used because he and R Kreuchen were not licensed realtors.
- [52] In December 2006, K Kreuchen provided a pro forma to M Fawcus that projected that rezoning; issuance of a development permit and a building permit; and construction of a strata building would all be accomplished by August 2009. As events transpired, third reading of the rezoning bylaw was not given until July 2009 and a development permit was not issued until February 2010. The defendants were unable to obtain construction financing and no buildings were ever constructed on the lands by the defendants. Lots 2832 and 2840 were sold to Mayfair Properties Ltd. ("Mayfair Properties") in September 2010 for \$2,500,000.
- [53] The first preliminary proposal for rezoning and development was submitted to the District in February 2007. This proposal called for the construction of a 12-unit condominium building to be constructed entirely on 2832 Cap Road. Based on early feedback indicating that a larger project on two lots might prove more attractive to District planners and owners of nearby properties, M Fawcus proceeded with the purchase of 2840 Cap Road as stated earlier in these Reasons, in July 2007. By that time, a second set of architects' drawings had been obtained, as well as a Traffic Study and an "Assessment of Riparian Conditions". On July 23, 2007, K Kreuchen submitted a formal application for rezoning to permit the development of 26 multi-family units - 12 townhouses, and 14 apartments on the two lots.

- [54] A Public Information Meeting was held on November 21, 2007. The facilitator hired to run the meeting reported to District staff on November 22, 2007 that "most, if not all" of the audience members who spoke at the meeting expressed concerns about the development, including increased traffic, increased density, the proximity of the proposed apartment building to adjacent buildings, and loss of sight lines. District staff thought the traffic study that K Kreuchen had obtained and submitted to the District was inadequate.
- [55] K Kreuchen and the defendants thought some of the neighbour's concerns could be alleviated by an expansion of the project to incorporate adjoining lots and began negotiations with the owners of four lots to acquire the lots. I shall refer to these properties as the "Paisley Road lots".
- [56] On November 28, 2007, K Kreuchen had a heart attack after which he required surgery. He recommended to the defendants that they hire Ian Birtwell, who was a friend of the Kreuchens and had planning experience, to fill in until K Kreuchen was well enough to resume work. The defendants agreed in January 2008 H Birtwell began providing services to the defendants. The defendants paid Mr. Birtwell's fees but also continued to pay the monthly advances of \$4,000 to K Kreuchen.
- [57] On January 7, 2008 the District formally responded to the application that had been submitted on July 23, 2007. The response revealed a host of problems and objections, summarized in the final paragraph of the response in these terms:
- the project requires resolution with regards to density, design, vehicular access/egress and visitor parking. Mitigating neighbourhood concerns through facilitated workshop(s) could go a long way toward providing an alternate housing choice which justifies an OCP amendment
- [58] A second public meeting, to which only persons who had attended the first public meeting were invited, was held on January 29, 2008. Mr. Birtwell went to this meeting to assist the defendants. Attendees at the meeting were told that the current proposal was for the construction of 27 higher end units with a range of sizes.
- [59] On February 20, 2008, a third public meeting took place, organized by neighbours opposed to the proposed development. Ian Birtwell testified that he had had very little involvement with the project after January 29, 2008 but that he did attend the meeting on February 20, 2008. On February 21, 2008, Ian Birtwell submitted a bill for \$3,400 for the services he had provided between January 8 and February 21, 2008. By February, K Kreuchen was again actively involved with the project.
- [60] Following the February 20 meeting, District staff informed K Kreuchen that there was no support for a project that included the Paisley Road lots and negotiations with the owners of those lots ended.
- [61] By the spring of 2008, it was obvious that the time-line projected in the October 2006 pro forma produced by K Kreuchen had proved to be entirely unrealistic. M Fawcus' financial situation was had deteriorated significantly. Debt servicing costs and architects' fees were

already much higher than had been anticipated; and K Kreuchen continued to be paid monthly advances, with little progress having been achieved. I am satisfied that K Kreuchen was aware that the extended time-line meant that the defendants were rapidly depleting the financial resources available to them.

- [62] On March 19, 2008, K Kreuchen submitted another proposal to the District, this time for the construction of 10 townhouses - two duplexes, and three triplexes, laid out north to south, on lots 2832 and 2840. In the final paragraph of his letter to the District, K Kreuchen wrote:

Please note that we hope to have a scheduled public hearing by mid-June, otherwise we will lose a whole year because of the election and other logistics. A delay of a further year will likely not be financially possible for the present owner. (underlining added)

The reference to "the election" was the municipal election scheduled for November 2008.

- [63] A response received April 24, 2008 from the District indicated that the location of the proposed buildings provided for a 5-metre setback from the top of the stream bank but the District required a 15-metre setback.
- [64] Revised plans were submitted on May 7, 2008. The District responded on May 8 stating that plans were incomplete; an "open house" scheduled for May 13 would not meet the District's requirements for a public information meeting; the revised design did not reflect discussions that had taken place between K Kreuchen and District staff on April 29, 2008; the stream setback requirements had to be met; and there were still concerns about proposed access/egress for vehicles and pedestrians.
- [65] At the public meeting on May 13, 2008 new plans were presented - for an 11-unit apartment building with large "high end" apartments. A revised proposal submitted to the District on June 4, 2008 envisioned a 12-unit apartment building. A further public information meeting was held on June 26, 2008.
- [66] The parties had discussed having bylaw amendments put before Council for first reading on July 7, 2008, Council's last meeting before summer vacation, but this did not happen. K Kreuchen's testimony indicates he did not make significant efforts to get the application on the Council agenda for July 7, 2008. He said that the necessary Public Information Meeting would have had to be delayed until September in any event. There were Council meetings in August but K Kreuchen was on holidays that month.
- [67] M Fawcus testified that K Kreuchen told him that the application could not go before Council on July 7, 2008 because the architects had submitted the wrong plans. M Fawcus was frustrated and disappointed with the further delay. To that point, he had paid the architects \$70,000 - much more than K Kreuchen had originally projected for architects' fees to the end of construction - but owed the architects even more. M Fawcus told K Kreuchen that he would be out of money by September.

- [68] By July 2008, Debbie Fawcus had drawn down nearly all of the money available to her on the line of credit she had obtained from the Royal Bank. She had only \$21,800 available credit left on her \$565,000 line of credit. M Fawcus testified that it was costing the defendants over \$15,000 a month for mortgage payments and the \$4,000 monthly advance paid to K Kreuchen.
- [69] K Kreuchen would not agree in cross-examination that he knew that M Fawcus was at the end of his financial rope, but I am satisfied he knew the situation was dire. K Kreuchen testified that among other options, the parties had discussions about the possibility of abandoning the plans for rezoning, subdividing lots 2832 and 2840 into three residential lots, and selling the lots. If each of the three lots could be sold for \$600,000, there would be enough money to pay off the defendants' debts.
- [70] On August 5, 2008, K Kreuchen submitted a revised submission to the District. District staff responded on August 14, 2008 stating that the architectural plans were still inadequate and incomplete and that the District continued to have concerns about stream setbacks and landscaping plans. M Fawcus testified that K Kreuchen did not give him a copy of the August 14, 2008 letter from the District.
- [71] Despite the expressed reservations of District staff, on September 11, 2008 the District's Community Planner submitted a report to Council with draft bylaws to amend the OCP, rezone the defendants' property, and open the door for issuance of a development permit for an 11-unit, three storey, apartment building.
- [72] On September 26, 2008, the secretary of the Edgemont Community Association - the group representing homeowners in the vicinity of the defendants' property - wrote to the District Mayor and Councillors objecting to the proposed OCP amendment and rezoning.
- [73] M Fawcus testified that K Kreuchen had assured him that getting first reading of the bylaw amendments at the Council meeting on September 29, 2008 would be "a formality" and had led M Fawcus to believe that the project had support from the Edgemont Community Association and members of Council. K Kreuchen has testified that he was not surprised that Council declined to approve the project. I conclude that if K Kreuchen was expecting a negative outcome, he did not warn M Fawcus that a negative outcome was likely.
- [74] At the Council meeting on September 29, 2008, there was considerable public opposition to the proposed development, in particular from representatives of the Edgemont Community Association. M Fawcus had not been told in advance that members of the public would be permitted to speak at the Council meeting and K Kreuchen had not arranged, in advance, for anyone to speak in favour of the defendants' proposal.
- [75] At the meeting, Council passed a motion that the amendment and the bylaw not be referred to public hearing - essentially they declined to give the proposal first reading.

- [76] M Fawcus was shocked, disappointed and angry following the Council meeting. He felt certain members of Council had reneged on earlier assurances of support. He thought District staff had misled him.
- [77] M Fawcus testified that after the Council Meeting on September 29, 2008 he told K Kreuchen he had already paid him a lot more money than he had expected to. He said that he had already paid him \$84,000 and it should only have been \$48,000 to \$56,000 based on the projections K Kreuchen had made in 2006. M Fawcus told K Kreuchen he was not going to pay any more fees. M Fawcus stopped paying monthly advances to K Kreuchen. The last payment M Fawcus had made to K Kreuchen was in August 2008, which was the payment for July.
- [78] Counsel for K Kreuchen objected to this testimony on the ground that the specifics of M Fawcus' evidence had not been put to K Kreuchen in cross-examination. However, the plaintiffs did not ask to recall K Kreuchen at the end of the defendants' case to rebut M Fawcus' testimony. I am of the view that M Fawcus' testimony about discussions in late September or early November is admissible, but that little turns on it.
- [79] The Project Management Agreement provides for termination "without penalty upon refusal by Council of the rezoning application". In their Response to Civil Claim, the defendants pleaded that the Project Management Agreement was terminated following the negative outcome of the September 29, 2008 Council meeting.
- [80] Although I accept M Fawcus' testimony that he told K Kreuchen following the September 29, 2008 Council meeting that he was not going to pay any more advances, I'm not persuaded that the defendants terminated the Project Management Agreement at that time. If the failure to pay monthly advances was a breach of the Project Management Agreement, I am satisfied that K Kreuchen elected not to treat the defendants' failure to pay monthly advances as a repudiation of the contract. In my view, he affirmed the contract. He sent no invoices and made no demand for payment. He did not tell the defendants or anyone else that he considered the contract to be at an end.
- [81] M Fawcus did not testify that he expressly communicated to K Kreuchen that the Project Management Agreement was terminated or that K Kreuchen's services were no longer required. M Fawcus's actions in the fall of 2008 and early 2009, with the exception of the suspension of payment of the monthly advances to K Kreuchen, are inconsistent with the Project Management Agreement having been terminated. The defendants did not revoke K Kreuchen's authorization to act on their behalf in negotiations with the District and did not notify the District that K Kreuchen was no longer acting on behalf of the defendants. K Kreuchen continued to be involved with the project.

- [82] On October 2, 2008, the District wrote to K Kreuchen stating that Council's decision meant that the project had been rejected; that the District was closing its file; and that the \$500 public hearing portion of the application fee to the District by the defendants was being returned.
- [83] On October 6, 2008, he and M Fawcus met with the Mayor of the District to discuss what had happened at the Council meeting and the prospect for renewing the application for rezoning after the municipal election. K Kreuchen wrote to the District on October 14, 2008 indicating that he did not agree that the motion passed by Council on September 29 meant the project had been rejected - he considered it to be unresolved. He returned the \$500 public hearing fee and asked that the application remain active for Council reconsideration at a later date.
- [84] Municipal elections were scheduled for November 2008. Until the outcome of the election was known there was no prospect of advancing the development proposal. M Fawcus took the time to consider his options, explore possibilities for additional funding, and take advice.
- [85] In the fall of 2008, the sub-zero mortgage fiasco in the United States and the resulting worldwide economic crisis was having an impact on lending practices of Canadian banks and other financial institutions, as well as the real estate market in British Columbia. M Fawcus had exhausted the sources of funds available to him. Debbie Fawcus' line of credit was fully extended. M Fawcus talked to his brother about possibly borrowing funds from him (that turned out to be impossible); and to his brother-in-law about the prospects for obtaining construction financing given the downturn in the economy. He considered abandoning the project. He considered trying to get approval to subdivide 2932 and 2840 Cap Road into three lots and selling the three lots as bare land.
- [86] In November 2009, K Kreuchen prepared a document for M Fawcus titled "Development Options Responding to Current Conditions" that included the option of acquiring the Paisley Road lots and constructing townhome triplexes in addition to a 14-unit apartment building or increasing the number of units in the proposed three-storey condominium building on lots 2832 and 2840 to 14. K Kreuchen's new time-line projected submission of a revised proposal to District staff in December; first reading of the rezoning bylaw by Council in January; and a public hearing in February. He sent M Fawcus a pro forma dated "November 2009" based on construction of a 14-unit condominium building indicating projected sales revenue of \$8,795,000.
- [87] M Fawcus testified that he was not looking for construction financing in the fall of 2008 because "there was no project". I conclude, however, that he had not abandoned the project, although he testified that business people he spoke to said they thought he would not be able to get construction financing given the state of the world economy.

[88] M Fawcus talked to a lawyer about prospects for suing the District but was advised there was little likelihood of success. On February 26, 2009, M Fawcus sent an e-mail to the lawyer in which he stated:

I am still working with Kai and currently we expect to go back to DNV Council for third reading in April 2009.

[89] M Fawcus' brother in law put him in touch with Peter Martin, the President of Howe Sound Developments Ltd. After M Fawcus outlined the history of the project and provided various documents to Mr. Martin, and Mr. Martin had inspected lots 2832 and 2840, Mr. Martin sent an e-mail to M Fawcus dated March 8, 2009. He told M Fawcus that he thought the prospects for a successful outcome for the condominium development proposal were "dim" but that a forced sale of three subdivided lots would likely net no more than \$1,200,000.

[90] From Mr. Martin's reply it appears that M Fawcus had discussed the Project Management Agreement with Mr. Martin. I also infer from Mr. Martin's comments that M Fawcus did not tell Mr. Martin that he had already terminated the Project Management Agreement. Mr. Martin wrote:

I don't think it would be too difficult to terminate your contract with the Ditton Group should you so desire. The reality is that the market has changed in an unpredictable way and your project appears virtually unfinanceable at this date. I believe your consultant would understand and should accept this. So if it were me I would meet with your consultant and terminate his contract;

[91] M Fawcus replied to Mr. Martin's e-mail. He wrote, in part:

I will advise Kai I cannot go forward with the current contract and see what he is willing to do.

[92] One of the positions advanced by the defendants is that the Project Management Agreement was terminated by M Fawcus during a telephone conversation with K Kreuchen on March 12, 2009.

[93] M Fawcus testified that he terminated the Project Management Agreement during a telephone conversation with K Kreuchen on March 12, 2009. It was a long conversation - 74 minutes. M Fawcus testified that during this telephone call he told K Kreuchen he had no ability to continue to finance the development project; that he had to abandon the project; and that that meant their agreement was at an end. He testified that he told K Kreuchen that even if he was able to get Council approval for rezoning, he would have to sell the land without constructing anything on it. He testified that K Kreuchen replied that he was the least of M Fawcus' worries and that he would do everything he could to help M Fawcus mitigate his losses. K Kreuchen told M Fawcus that the best option was still to get the property rezoned; that he had been discussing the project with the Mayor and some of the Councillors and thought that some Councillors who had failed to support the project before the election would vote in favour if the application came back before Council. K Kreuchen told M Fawcus that it was District policy not to reconsider an application for the same development within one year, but that they could reconfigure the interior of the building to

increase the number of units from 11 to 14, which would not cost a lot, but could be enough of a change to justify Councillors changing their positions.

- [94] M Fawcus told K Kreuchen that he would agree to try again if the proposal could go back to Council without any significant changes and Council would give a definitive response but that even if Council approved the bylaw amendment, he would not be able to get the money to construct the project and would have to sell the land. K Kreuchen told M Fawcus that he would do the work to get the rezoning application back before Council if M Fawcus agreed to pay \$5,000 to the architects (who had an outstanding account) and \$5,000, plus GST, to K Kreuchen. M Fawcus agreed to this request.
- [95] K Kreuchen did not say anything about the lengthy March 12, 2009 telephone conversation in direct examination, but was cross-examined about the discussion. He said that in general he could not recall what had been discussed during the call. He testified that he thought he and M Fawcus had talked earlier about resubmitting the application to the District and about the architects being unwilling to do any more work unless they were paid \$5,000 on account. He denied that M Fawcus told him during the call on March 12, 2009 that he was out of money and had to abandon the project and that the Project Management Agreement was at an end. He agreed that he told M Fawcus that K Kreuchen was the least of his worries, but denied saying he would help to mitigate potential losses. K Kreuchen said that the \$5,000 payment M Fawcus agreed to give him was a "good will" payment that was to be in addition to any other fee he was owed.
- [96] I believe most of M Fawcus' testimony about the content of the telephone conversation on March 12, 2009 and I prefer his testimony to that of K Kreuchen, who was evasive and argumentative when cross-examined about the conversation, but I am not persuaded that M Fawcus terminated the Project Management Agreement during that call. I believe that it was his intention at the outset to do so, but that as a result of his conversation with K Kreuchen he decided to make one last effort, with K Kreuchen's assistance, to get the land rezoned. I conclude that there was implicit agreement on the part of K Kreuchen in March 2009, as there had been in late September 2008, that he would forego payment of the monthly advances for the time being, with the exception of the \$5,000 to be paid on account, and would proceed with the attempt to get the development application back before Council.
- [97] I consider this interpretation of the March 12, 2009 conversation between K Kreuchen and M Fawcus to be consistent with subsequent actions taken by both men. On March 14, 2009, M Fawcus sent an e-mail to his sister in which he wrote, in part:

I have now talked to Kai, my project manager, and explained Jim's advice to abandon the project due to financing and the new market conditions. Kai advised he is the least of my worries and will help mitigate any potential losses and has advised the best value for my property is still to rezone and then sell. The rezoning process will not cost me any further money and will be completed by May

- [98] M Fawcus paid the architects \$5,000 on March 13, 2009. K Kreuchen submitted a new application to amend the OCP to the District on March 31, 2009. District staff met with representatives of the Edgemont Community Association on April 29, 2009 after which the Association said it had no objection to the proposal proceeding to the public hearing stage.
- [99] On May 23, K Kreuchen sent an e-mail to M Fawcus asking to be paid the \$5,000 (plus GST) that M Fawcus had agreed to pay on March 12. Soon after, M Fawcus gave K Kreuchen a cheque for \$5,300.
- [100] M Fawcus testified that in May 2009 he borrowed additional funds from Vancity. Of the \$128,000 he received he repaid Debbie Fawcus \$70,000, paid \$5,300 to K Kreuchen, paid property taxes, and retained the balance to be used to pay mortgage payments.
- [101] On May 31, the District's Community Planner submitted a report to Council with draft bylaws for the rezoning of 2832 and 2840 Cap Road. At a meeting of Council on June 15, 2009 they gave first reading to the proposed bylaws. A further Public Hearing was held on June 23, 2009 and on July 6, 2009 the bylaw amendments were given second and third reading.
- [102] All of the parties attended the Council meeting on July 6 and afterwards went out for dinner together. K Kreuchen was going on vacation on his boat the next day. He said that the political process was over and that the technical process for a development permit could be done by the end of July and a development permit could be issued by September.
- [103] Buoyed by having obtained third reading of the bylaw amendments, and the short time-lines projected by K Kreuchen, M Fawcus decided he would to move forward with the project. He told K Kreuchen that he would look for construction financing; that he had enough money to pay the mortgages until September and that he'd keep going until someone said "no".
- [104] The parties met at K Kreuchen's home for about two hours on July 16, 2009 to talk about next steps. M Fawcus testified that at this meeting he reminded K Kreuchen that they no longer had a contract. He testified that he told K Kreuchen that although their contract had ended on March 12, 2009 he was honourable man if he was able to get construction financing and complete the project he would still pay K Kreuchen pay 5% of the end selling price; and in the interim would pay K Kreuchen \$8,000 a month. The Project Management Agreement provided that the monthly advance paid to K Kreuchen would increase from \$4,000 to \$8,000 following third reading of the rezoning bylaw. M Fawcus gave K Kreuchen a cheque for \$8,000. He continued to pay K Kreuchen monthly advances of \$8,000 for each of the following three months.
- [105] I accept some, but not all, of M Fawcus' testimony about the July 16, 2009 meeting. I do not believe that M Fawcus asserted that the Project Management Agreement had been terminated on March 12, 2009. In any event, if the Project Management Agreement had been terminated, or if there had merely been an implicit agreement to suspend the payment of monthly advances, then the effect of the discussions on July 16, 2009 was that

the Project Management Agreement was revived, or a new contract was entered into on the same terms as the Project Management Agreement.

- [106] After Council passed the bylaw, M Fawcus approached various lenders to talk about construction financing. He talked to representatives of Taiwan Bank, Bank of Nova Scotia, Canadian Western Bank, and the Royal Bank but none of those institutions was interested. M Fawcus also approached Vancity, with whom he had an existing relationship as a borrower. He met with Nissar Dalal and Ralph Castagno of Vancity's business lending division. His first meeting with Mr. Dalal took place on July 23, 2009.
- [107] Architectural plans needed to support the application for a development permit, were submitted to the District on August 28, 2009. In September 2009, K Kreuchen began discussions with The Haebler Group, a general contractor, about the project and a construction budget.
- [108] On October 6, 2009, Vancity provided a Discussion Paper indicating interest in making a construction loan in the amount of \$4,600,000. This was expressly stated to be an expression of interest, but not an offer. There were numerous conditions that would need to be met, including the requirement for a "fixed price contract" with a construction company for no more than \$2,995,000 plus a 10% contingency budget; and an appraisal indicating the lands were valued at no less than \$2,200,000.
- [109] In October 2009, having exhausted the funds he had borrowed from Vancity earlier that year, M Fawcus borrowed \$200,000 from his sister-in-law Wendy Fawcus.
- [110] K Kreuchen was negotiating with the Haebler Group for a "cost-plus" contract. M Fawcus wanted to explore other options and arranged to meet with Jacob Brothers Construction.
- [111] On November 3, 2009, the defendants met with K Kreuchen. This was an unhappy meeting. K Kreuchen complained that he had not been paid the \$8,000 monthly advance due for the month of October. K Kreuchen said he was tired of being a banker for the project and that his heart was no longer in it. M Fawcus was upset that K Kreuchen continued to talk to the Haebler Group about a cost-plus contract when Vancity - the only lender who had shown any real interest in financing construction - required a fixed-price contract. After K Kreuchen left the meeting, J Fawcus and H Vlasveld said that if K Kreuchen had lost interest in the project it might be time to part ways.
- [112] In November, K Kreuchen applied to the District for permits for demolition, tree removal and excavation.
- [113] On November 12, 2009, Vancity provided a new discussion paper. There were also ongoing discussions with the District about various aspects of the development permit application.
- [114] On December 1, 2009, the District sent an e-mail indicating that before the development permit could be issued the District required the filing of refundable security deposits, in significant amounts. This came as a surprise to M Fawcus as K Kreuchen had led him to

believe that security deposits would not be required until after a development permit had been issued. K Kreuchen testified that he saw this as a change to the District's previous practice. M Fawcus had no money to pay the deposits and Vancity would not lend him any money until he had a development permit.

[115] On January 29, 2010, the District's Community Planner submitted a report to Council recommending issuance of a development permit. At a meeting of Council on February 15, 2010 the rezoning bylaw was adopted and a development permit was issued.

[116] On February 22, 2010, the District wrote to K Kreuchen enclosing a copy of the development permit and outlining in detail several conditions that would require discussion with District staff. K Kreuchen sent an e-mail to the defendants on February 25 advising he had received the development permit and the covering letter setting out further requirements. He asked how the defendants wished to proceed.

[117] By this time, the defendants had consulted the lawyers who became their counsel in this lawsuit. On March 4, 2010, Mr. Lee sent a letter to K Kreuchen and R Kreuchen referring to the Real Estate Services Agreement and stating, in part:

Our clients will not be requiring your services as described in (the Real Estate Services Agreement) of July 22, 2008. Please be advised that our clients hereby give you notice that any employment with respect to the real estate services described in the letter of July 22, 2007 is hereby terminated effective immediately.

[118] On the same date, March 5, 2010, counsel for the defendants sent a second letter addressed to K Kreuchen. It did not specifically mention the Project Management Agreement. The "Re" line reads: "Project Management Services for Development of 2832 and 2840 Capilano Road, North Vancouver". The letter stated, in part:

We understand that you have provided project management services to this development. Our clients are currently assessing how to best proceed with their application for financing and the actual construction. As part of this review, they are evaluating what, if any, additional project management services they will require from you.

For the time being, our clients ask that you refrain from taking any action on their behalf with regard to this project. Please await any further directions that may be given.

Please be aware that our clients will likely be in contact with third parties including the District, the architects and Vancity and if so, they will advise those parties that they should direct any communications to the owners themselves and not to you. If you are contacted by third parties, please redirect those parties to Michael Fawcus.

We hope that the parties can resolve questions regarding any continuing involvement in the near future.

- [119] K Kreuchen considered this letter to be a "constructive dismissal" and a breach of the Project Management Agreement.
- [120] The March 5, 2010 letter regarding the Project Management Agreement does not state that the defendants were "terminating" that contract or did not intend to continue to be bound by its terms. K Kreuchen was not an employee of the defendants and therefore was not "constructively dismissed". I interpret the letter as an indication that the contract could be terminated in future, if, for example, no "additional project management services" were required of K Kreuchen. I conclude the Project Management Agreement was not terminated on March 5, 2010.
- [121] On March 6, M Fawcus sent an e-mail to K Kreuchen asking him to turn over the development permit and the letter from the District that had accompanied the permit, as well as the latest architectural plans, and the other permits that had been issued by the District. K Kreuchen did not reply to this e-mail. On March 7, 2010, he sent an e-mail to the defendants stating that monthly advances of \$74,563.95 were due and payable.
- [122] On March 8, M Fawcus sent an e-mail to the District advising that he had decided "for the time being" to be directly involved with the development project and was rescinding the previous authorization granted to K Kreuchen to act as the defendants' agent.
- [123] On March 9, K Kreuchen spoke with counsel for the defendants. On March 11, defendants' counsel wrote to K Kreuchen asking him to deliver up the development permit, architectural drawings and the District's covering letter.
- [124] On March 12, 2010, K Kreuchen had a lawyer file a Builder's Lien on the titles to 2832 and 2840 Capilano Road. On March 15, 2010, he wrote to the District Mayor stating that he had filed a builder's lien against the properties. He asked that the District not issue a duplicate copy of the development permit, or copies of any plans or other documents to the defendants. He also wrote to Vancity on March 15, 2010 stating that his Project Management Agreement had been "suspended indefinitely"; and that he had filed a lien against the properties. He wrote that he was taking the position that the development permit was not the property of the owners until all debts had been paid and "the breach of contract resolved".
- [125] K Kreuchen wrote to counsel for the defendants on March 19. He wrote that he was seeking certainty in his contractual position and final payment; that the terms of the contract "are not negotiable and must be confirmed irrefutably" and "The payment schedule can be rearranged but must include a guaranteed monthly payment."
- [126] On March 19, 2010, counsel for the defendants wrote to the lawyer who had filed K Kreuchen's builder's lien and delivered "Notice to Commence an Action" under the Builders Lien Act. On April 8, 2010, K Kreuchen discharged the liens registered against lots 2832 and 2840 Cap Road.

- [127] On June 24, K Kreuchen filed a Writ of Summons and Statement of Claim in this action. It was amended and replaced on October 28 with the Notice of Civil Claim. The defendants filed a Response to Civil Claim on November 23 and a Counterclaim. An Amended Counterclaim was filed August 5, 2011. A Response to Counterclaim was filed December 15, 2011 and an Amended Response to Counterclaim was filed February 18, 2013.
- [128] Late in June 2010, M Fawcus met with representatives of Vancity to discuss Vancity's latest proposal for construction financing. At that meeting, the Vancity representatives told M Fawcus that there had been an error in their previous calculations and that in addition to the \$400,000 in additional equity that they had previously specified, they needed the defendants to contribute a further \$660,000.
- [129] The defendants had been able to negotiate a loan for \$400,000 from another lender but M Fawcus testified, and I accept, that there was no way for the defendants to contribute a further \$660,000 to the project. Debbie Fawcus' line of credit at the Royal Bank was fully extended; the defendants did not have enough income to qualify for any additional personal loans; M Fawcus had already borrowed all he could from family members. He and Lilli Fawcus had even fully utilized credit available to them on their credit cards.
- [130] On July 12, Vancity sent an email to M Fawcus confirming that Vancity was not able to proceed with the loan without additional equity of approximately \$700,000. M Fawcus tried to persuade Vancity to reconsider but on July 22 Vancity confirmed it would not provide the construction loan.
- [131] At this point, the defendants considered that they had no alternative but to sell the land. K Kreuchen submits that the defendants could have found the money to carry on if they had made sincere efforts but I conclude that the defendants have met any onus they may have to prove that they made all reasonable efforts and that it was impossible for them to obtain the necessary financing to pay for construction of buildings on the land. Getting the OCP amendment from Council and the development permit had taken years longer than any of the parties had anticipated, based on the projections made by K Kreuchen in October 6, 2006 and thereafter. Architectural fees had doubled, tripled and quadrupled the original estimate. M Fawcus had borrowed an additional \$400,000 in addition to the original Vancity mortgage and had utilized the full extent of Debbie Fawcus' line of credit.
- [132] In his testimony at trial, K Kreuchen failed to identify any realistic alternative source of construction financing available to the defendants. He testified that he believed the defendants could have got financing if they had started applying for loans earlier than they did, but I am satisfied that it is improbable that any legitimate lender would have made a commitment until a development permit had been obtained.
- [133] On September 1, 2010, the defendants accepted an offer from Mayfair Properties to sell lots 2832 and 2840, the development permit, the architectural plans and all other plans, reports and surveys. Mayfair agreed to pay \$2,500,000; \$200,000 by way of deposit, \$1,000,000 secured by way a first mortgage to be paid in one year, or on the purchaser obtaining a

building permit, whichever occurred first; and the balance due on closing. Mayfair also agreed to pay the defendants' architects for outstanding fees up to the sum of \$65,000 plus taxes.

- [134] The sale closed on October 22, 2010. Mayfair paid the defendants \$1,502,000 on closing. \$450,000 went to the Royal Bank to pay out the mortgage on 2940 Cap Road. \$775,000 went to Vancity to pay out the loans secured against 2832 Cap Road; \$10,000 was paid to the lawyers handling the transactions. M Fawcus received the balance - just under \$270,000. He paid \$215,000 to Wendy Fawcus to repay her loan, together with interest. He paid off some credit cards and other bills.
- [135] On September 16, 2011, the defendants received the balance of the purchase monies - \$1,000,000. Debbie Fawcus was paid \$537,000. J Fawcus and H Vlasveld were paid \$175,000 to compensate them for property taxes, interest and other expenses they had incurred in relation to 2840 Cap Road, and provide a \$50,000 "bonus" to each of them, partly to compensate them for the fact their funds had been tied up for so long. M Fawcus paid his mother some rent he owed for living in her home when he was in the Lower Mainland. \$22,000 went to pay a Royal Bank line of credit. As of September 19, 2011 M Fawcus retained a balance of \$218,000. He testified that he intended to use that money or some of it to contribute to his daughter's purchase of a property.

POSITIONS OF THE PARTIES

- [136] K Kreuchen asserts that the Management Agreement provides that he is to be paid a fee of 5% of the "end selling price" which he asserts is the estimated gross sales revenue the defendants would have received if they had actually obtained a building permit and construction financing; constructed a 14-unit strata building; and sold all of the units in the building. K Kreuchen asserts that the Court should consider the "end selling price" to be \$8,795,000, based on his 2009 revenue projections; and should award him \$319,750 calculated as 439,750 (5% of \$8,795,000) less advances of \$120,000 already paid, plus GST, and interest pursuant to the Court Order Interest Act from March 4, 2010 to the date of judgment or payment.
- [137] In addition, K Kreuchen and R Kreuchen assert that pursuant to the terms of the Real Estate Services Agreement, they are entitled to judgment for \$175,900, calculated as 2% of K Kreuchen's projected sales revenue of \$8,795,000.
- [138] In the alternative, K Kreuchen asserts that he should have judgment for \$74,563.95 plus interest - his calculation of the balance of the unpaid monthly advances.
- [139] In the event that the Court determines that there was no contract for project management services, K Kreuchen seeks to recover \$74,564.95 as the value of services provided, in addition to the \$120,000 already paid to him by the defendants.

- [140] The defendants assert that the Project Management Agreement lacks certainty as to essential terms and is unenforceable. In the alternative, they assert that the Project Management Agreement was terminated in March 2009 by agreement between the parties, and that after that date the parties entered into a new, oral agreement and that K Kreuchen was paid in accordance with that agreement. In the further alternative, they assert that the Project Management Agreement was frustrated by the lack of available construction financing, or if terminated, terminated for "reasonable cause" - the long delay in obtaining rezoning and a development permit and the resulting inability of the defendants to obtain construction financing.
- [141] If the Project Management Agreement is a valid contract, the defendants assert that the maximum fee payable to K Kreuchen is \$125,000, calculated as 5% of the \$2,500,000 the defendants were paid for the lands by Mayfair; of which K Kreuchen has already been paid \$120,000.
- [142] In the further alternative, the defendants assert that K Kreuchen has been adequately compensated on a quantum meruit basis by payment to him of the \$120,000 paid to date.
- [143] The defendants assert that no services were provided under the Real Estate Services Agreement and no fee is payable.

THE CLAIM FOR FEES UNDER THE REAL ESTATE SERVICES AGREEMENT

- [144] I begin with the claim by K Kreuchen and R Kreuchen for judgment in the amount of \$175,900 for fees payable pursuant to the terms of the Real Estate Services Agreement. Although R Kreuchen was intended to be a party to the Real Estate Services Agreement she did not sign the Agreement and is therefore not a party to the contract. The defendants terminated the Real Estate Services Agreement on March 5, 2010.
- [145] Like the Project Management Agreement, the Real Estate Services Agreement was drafted by K Kreuchen. It outlines the services to be provided by the plaintiffs. It states that the plaintiffs will provide these services as "direct employees" of the defendants. The relevant fee provision is titled "Fee Proposal" and reads:

The fee proposal shall be 2% of the purchase price, payable directly by the lawyer as part of the purchase disbursements upon completion of the purchase contract.

Although "purchase price" is not defined in the contract, I consider it sufficiently clear, when read in the context of the document as a whole, that purchase price means the combined selling price of all strata units actually constructed and sold.

- [146] There are no express terms in the Real Estate Services Agreement that require the defendants to build on the lands, to pay for services that the plaintiffs did not provide, or to pay the plaintiffs a significant penalty if the lands were sold without a building having been constructed. There is no covenant on the part of the defendants that the lands would not be sold prior to construction of a building on the lands.
- [147] In my view, had the intention of the parties been that there would be payment to the plaintiffs even if no building was built and no real estate services were provided, a specific term to that effect would be required. To imply such a term into the contract would not, in my view, be commercially reasonable or fair, particularly in view of the fact that the Agreement was drafted by K Kreuchen.
- [148] In relation to both the Project Management Agreement and the Real Estate Services Agreement, the plaintiffs submitted that the defendants owed a duty of "good faith" to the plaintiffs and breached that duty. At paragraph 159 of the plaintiffs' written submissions, the plaintiffs assert that the defendants:
- breached their duty to perform the 2007 Contracts honestly and reasonably, and not capriciously or arbitrarily, by terminating the 2007 Contracts on March 4, 2010. In the circumstances, their breach of the duty of good faith performance is incompatible with a finding that the 2007 Contracts were terminated for "reasonable cause".
- [149] On this point, counsel for the plaintiffs referred this Court to *Bhasin v. Hrynew*, 2014 SCC 71; and *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2014 BCSC 2433. I do not agree with the plaintiffs' submission on this point. In essence, the plaintiffs assert that the defendants owed a duty to the plaintiffs to build a condominium complex on the lands in order that the plaintiffs could provide real estate services and earn the fee referred to in the contract, no matter what obstacles the defendants encountered.
- [150] In March 2010, when counsel for the defendants wrote to the plaintiffs terminating the Real Estate Services Agreement, no building had been built; no construction financing had been arranged; and there was little prospect that the defendants would obtain such financing. The relationship between the parties - in particular between K Kreuchen and M Fawcus - had become strained. K Kreuchen had told the defendants that his heart was no longer in the project. As matters evolved, there were no strata units to sell. In my view, the defendants made every reasonable effort to find the necessary funds to construct a building on the lands - it was in their own best interests to do so, given the significant investment of time and money that had gone into the project.
- [151] The claims of the plaintiffs for fees pursuant to the Real Estate Services Agreement are dismissed.

DID THE DEFENDANTS BREACH THE PROJECT MANAGEMENT AGREEMENT BY FAILING TO OBTAIN FINANCING FOR THE CONSTRUCTION OF A MULTI-DWELLING BUILDING?

[152] The Project Management Agreement includes a section titled "Owners' Responsibility". That section reads, in part:

The owners are responsible for an efficient process by:

- ensuring adequate financial resources are provided to meet all fiscal requirements in a timely manner.

[153] K Kreuchen alleges that the defendants had a contractual obligation to find or provide the necessary funds to construct a multi-dwelling building on the lands and that the defendants failed to make reasonable and necessary efforts to find financing.

[154] I am not persuaded that the quoted clause from the contract can be regarded as an unconditional covenant to provide or obtain construction financing or that the defendants breached the Project Management Agreement by failing to obtain financing. As stated earlier in these Reasons, in 2006 K Kreuchen gave M Fawcus a pro forma that projected completion of the entire project by 2009, including construction and sale of all units. In fact, it took until 2010 to obtain a development permit. By that time, the costs of the project - including the monthly fees paid to K Kreuchen as well as interest costs, architects' fees and other costs - had used up all of the financial resources available to the defendants.

[155] By the time the defendants finally succeeded in obtaining a development permit, the international economy had taken a downturn and banks and other financial institutions were less willing to lend money for real estate development.

[156] I conclude that the defendants did make all reasonable and necessary efforts to find financing. The defendants and K Kreuchen were optimistic that they would reach an arrangement with Vancity but when that institution insisted on additional equity, the defendants had no ability to meet the conditions for the loan. The contract was frustrated by the exceptional and unanticipated delay in getting bylaw amendments and a development permit from the District, and the change in the economic climate.

K KREUCHEN'S CLAIM FOR PAYMENT OR DAMAGES IN RESPECT OF THE PROJECT MANAGEMENT AGREEMENT

[157] The defendants submit that the Project Management Agreement lacks certainty in respect of essential terms relating to fee entitlement and is therefore unenforceable.

[158] There is no dispute between the parties that an enforceable contract requires that the parties be able to demonstrate that there was agreement on essential terms of the contract. The Project Management Agreement does not contain an "entire agreement" clause, but the plaintiff has pleaded only a written contract and does not assert oral terms supplementing the written contract. This issue was raised during the trial and the plaintiff did not seek to amend the Notice of Civil Claim.

[159] In *Grace Residences Ltd. v. Whitewater Concrete Ltd.*, 2009 BCCA 144, at para. 25, the Court of Appeal wrote:

the starting point for any inquiry into the meaning of a contractual provision is the words of the agreement. The words must be viewed objectively, using their plain and ordinary meaning, in the context of the circumstances surrounding the making of the agreement. The Court may only consider extrinsic evidence to ascertain the meaning of the words based on the intention of the parties, if the meaning of the words cannot be determined or, when viewed objectively, they raise two or more reasonable interpretations

[160] In *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107, the Court restated longstanding principles of contractual interpretation as follows:

[42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.

[47] If after the contextual inquiry into the circumstances in which the agreement was reached, the language of the contract remains ambiguous (that is the meaning of the words is vague, inconsistent, or in conflict with other provisions of the contract, redundant, or overly general), extrinsic evidence of what was said, done or known by the parties when the contract was made, is admissible for the purpose of determining the parties' common intention.

[48] There is a presumption against adding an unexpressed term to a contract by implication unless: (i) it is necessary to do so in order to give the contract business efficacy (this does not include a test for reasonableness for the contract); (ii) to correct an obvious oversight for which there is "no dispute" that the parties intended to include such a term in the contract (i.e. the implied term "goes without saying"); (iii) the term can be clearly and precisely formulated; and (iv) the term will not conflict with or be inconsistent with an express term of the contract. However, a term of a contract may only be implied where it is necessary to give legal effect to the parties' presumed intention, as expressed in the contract, and to give business efficacy to the contract. The onus is on the party seeking to establish an implied term of a contract. See *Perin v. Shortree Joint Venture Ltd.*, 2009 BCCA 478 at para. 27.

[161] The Court of Appeal also addressed the issue of implied contractual terms in *Catalyst Paper Corporation v. Companhia de Navegacao Norsul*, 2008 BCCA 336. In that case, the court below had awarded damages against the appellant *Companhia de Navegacao Norsul* ("Norsul") for breach of a shipping contract. The main issue at trial and on appeal was whether the parties had reached a concluded agreement concerning responsibility for

liability for cargo care. The court below held that the parties had reached agreement on essential terms relating to cargo care. The Court of Appeal disagreed and allowed the appeal. At para. 27 of the Reasons, Justice Hall, speaking for the Court, said:

Courts strive to uphold contracts for the very good reason that commerce would be gravely impaired if parties could with impunity shrug off contractual obligations solemnly and freely undertaken. But, of course, if important terms of a purported contract are not agreed, it would be contrary to settled law for a court to impose a contract on parties who have not concluded an agreement. The law will on occasion imply certain terms to give efficacy to a contract but it will not impose a contractual arrangement on parties where salient terms of an agreement are unresolved. Somewhat reluctantly, I conclude that is what we would be doing here if we affirmed the judgment of the trial judge.

[162] Lord Wright, in *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, [1932] All E.R. 494 pointed out that the court must attempt to give meaning to a contract however inexpertly it may have been drafted, but cannot create a contract for the parties. He said:

Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; That...however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.

[163] The defendants submit that the Project Management Agreement is incomplete and unenforceable because it lacks essential terms in relation to K Kreuchen's entitlement to a fee in the event of cancellation or frustration of the contract.

[164] This contract can certainly be described as "crude and summary", in the words of Lord Wright. The relevant terms in the Project Management Agreement are ambiguous. In the circumstances of this case, little assistance can be found by reference to context or to extrinsic circumstances. There was no history of business dealings between the parties. There were no negotiations leading up to the execution of the contract.

[165] There was no discussion about either the "Fee Proposal" clause or the "Termination" clause before the contract was signed except that M Fawcus asked if the 5% fee was negotiable and K Kreuchen said it was not.

[166] K Kreuchen had experience with property development from the perspective of a municipal planner but had previously acted as project manager on only one project. K Kreuchen testified that a lawyer had drafted a project management agreement for that project. K Kreuchen testified that he referred to that agreement when he created the Project Management Agreement but did not replicate it. The previous agreement is not in evidence, so it is not possible to know what terms K Kreuchen borrowed; and there is no evidence, in any event, that the previous agreement was reflective of normal practice in

property development management arrangements.

- [167] M Fawcus had no experience in property development or with property management contracts. Neither he nor K Kreuchen had any knowledge of "trade practices" or "trade usage". K Kreuchen testified that he had been paid a lower percentage fee for his work on the earlier project. M Fawcus testified that he was told, in the fall of 2008 and early 2009 that a fee of 5% was excessive, but he had no knowledge of the industry norm was if an industry norm existed.
- [168] There are ambiguities in the "Fee Proposal" clause, which contribute to ambiguity and uncertainty in the "Termination" clause. The phrase "the end selling price" is not defined in the "Fee Proposal" clause. However, the reference to "until the building is occupied" in sub-clause "b" and "occupancy of the building" in sub-clause "c" indicates that the parties contemplated the construction and sale of a building. The agreement is premised on the expectation that, among other things, K Kreuchen would provide management services in relation to the construction of a building or buildings, in addition to assisting to obtain necessary rezoning and permits from the District.
- [169] There is a problem with the calculation of "the end selling price", even if one assumes the construction of a building has occurred. Sub-clause (c) of the Fee Proposal clause provides that the entire 5% fee must be paid when 50% occupancy of the building is achieved. If there were unsold units when 50% occupancy was achieved, and that seems probable, it would be impossible to know what the "end selling price" of all of the units would be.
- [170] There was no discussion, before the parties signed either the 2006 Project Management Agreement or the Project Management Agreement about what fee, if any, K Kreuchen would be entitled to be paid in the event that it proved impossible for the defendants to build on the land, after rezoning had occurred. I am satisfied that the parties did not even turn their minds to that issue in December 2006 or in July 2007. The contract is silent in relation to the obligations of the parties in the event that the contract was not terminated, but no building was built or sold by the defendants.
- [171] The termination clause is ambiguous and uncertain in several respects. The clause states that the agreement may be terminated "without penalty" if the project is abandoned "after the preliminary application result or upon refusal by Council of the rezoning application". The contract does not state whether K Kreuchen would be obliged to return all monthly advances paid to the date of termination or whether he would be entitled to retain the advances. An argument could be made that "without penalty" means K Kreuchen would be obliged to repay all advances, but that interpretation is by no means certain.
- [172] The contract provides:

All projected fees shall become payable upon termination of the Ditton Group if for no reasonable cause, or as may otherwise be agreed by both parties.

- [173] It is unclear whether "or as may otherwise be agreed by both parties" is a reference to termination of the contract by agreement; or whether it means that all projected fees are payable on termination unless both parties agree otherwise.
- [174] The term "all projected fees" is not defined and the contract does not include a mechanism for calculating "all projected fees". As I understand it, the position of K Kreuchen is that "all projected fees" means 5% of the gross sales revenue that he estimated would be realized if a building was actually constructed and sold. In effect, his position is that he could determine his own compensation by utilizing his own estimate of gross sales revenue. There is no term in the contract that expressly provides for K Kreuchen to determine "all projected fees"; and thereby determine his own compensation in the event the contract is terminated. In the pro forma he prepared from time to time, the projected gross sales revenue varied significantly, from less than \$8,000,000 to more than \$19,000,000. An industrial arbitrator would, in my view, be no more able to attribute a meaning to "all projected fees" than this Court. The clause also refers to "settlement" of any dispute by an arbitrator. Arbitrators decide disputes; they do not "settle" them.
- [175] It might be argued (although it was not argued) that "all projected fees" could be determined by obtaining an appraisal at the time the contract was terminated or the parties "otherwise agreed" to bring it to an end. The appraiser would presumably look at the building or buildings that the defendants planned to build, or that were under construction at the time termination of the contract occurred; and provide an opinion about the gross sales revenue that would likely be realized when the building was constructed and sold. While the parties could have specified such a mechanism, they did not do so, and I am not persuaded that the Court can add the mechanism to the contract by implication. No expert opinion evidence was led at trial that would allow the Court to arrive at an "end selling price" or "all projected fees" at any time at which the plaintiffs allege the Project Management Agreement was terminated. In any event, K Kreuchen's position is that "all projected fees" means fees calculated by reference to his own estimate of "end selling price" closest to the time that the contract was terminated.
- [176] M Fawcus testified that he understood "the end selling price" to mean the price for which the lands would ultimately be sold. I understood him to mean the price for which the lands would ultimately be sold with or without any buildings having been constructed.
- [177] The lands were sold for \$2,500,000. Five percent of that selling price is \$125,000. K Kreuchen has already received advances totalling \$120,000 and would be owed a further \$5,000. This interpretation is simple and appealing, but it would require the Court to ignore and give no meaning to sub-clauses (b) and (c) of the Fee Proposal provision.
- [178] The contract cannot bear the construction proposed by K Kreuchen and in my view, the Court is not permitted to resolve the uncertainty and fill in the gaps. The provisions for the payment of fees in the Project Management Agreement lack certainty and are unenforceable.

- [179] I am of the view, in any event, that there was reasonable cause for the defendants to terminate the Project Management Agreement. K Kreuchen was not an employee of the defendants. He could not be "dismissed" and for that reason I do not conclude that "if for no reasonable cause" should be interpreted in the same way as it would be understood in a contract of employment. The termination clause deals with termination of the contract. The defendants had the right to terminate the contract for reasonable cause. The long delay in obtaining a development permit had resulted in the defendants using up all of the funds they had available to finance the project. Without the ability to contribute additional funds, they could not get a construction loan. Added to that, the lending climate had deteriorated significantly.
- [180] I am not persuaded that the defendants have proved that K Kreuchen breached his obligations under the Project Management Agreement. I accept that he made some bad decisions and sometimes gave poor advice to the defendants. The time-lines projected in the numerous pro forma he prepared proved to be unrealistic and were almost never achieved. He failed to accurately assess the level of resistance to the project from the community - in particular, the Edgemont Community Association - and did not do all he might have to muster support for the project. The wrong plans were submitted to the District in advance of the July 2008 Council meeting - an error K Kreuchen attributed to the architects. K Kreuchen made no real attempt to get the bylaw amendments before Council in July 2008 although he knew that the election scheduled for November 2008 was likely to make the Mayor and Councillors more increasingly sensitive to neighbourhood resistance to the project. He did not alert M Fawcus that there would be an opportunity for members of the public to speak in opposition to the project at the September 29, 2008 Council meeting and made no effort to have supporters of the project attend and speak. He led M Fawcus to believe that passage of the OCP amendment at that meeting would be a mere formality. He misread the level of support the project would have from the Mayor and some Councillors. The traffic studies he commissioned turned out to be inadequate. He lacked up to date knowledge of the District's requirements for riparian setbacks and the timing for posting of letters of credit. He recommended against putting the bylaw amendments and the application for a development permit before Council at the same meeting. He continued to negotiate a cost-plus construction contract with Haebler Construction after he knew that Vancity was insisting on a fixed-price construction contract. These matters are relevant to the issue of the value of the services provided by K Kreuchen. I am not persuaded, however, that the errors or shortcomings constitute a breach of his contractual obligations.

WHAT COMPENSATION IS OWED TO K KREUCHEN ON A QUANTUM MERUIT BASIS?

- [181] The Project Management Agreement was terminated in 2010 either for reasonable cause, or by the doctrine of frustration, when Vancity required the injection of an additional \$660,000 in "equity"; when K Kreuchen commenced this lawsuit, or when the defendants sold the land to Mayfair in September 2010. As I have concluded that the contract does not provide a

means for determining the fee to paid to K Kreuchen in either event, the amount of compensation to which K Kreuchen is entitled must be determined on a quantum meruit basis.

- [182] In *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215, the appellant Infinity alleged that the trial judge erred when he valued services provided by the respondents without regard to deficiencies and amounts the appellant had paid to another contractor to correct the deficiencies. The parties had an agreement but the trial judge had concluded that the parties had not made an enforceable contract because the agreement "lacked the essential and critical term of price". Justice Huddart, writing for the Court of Appeal, noted that the trial judge had not specified whether he was making the quantum meruit award as a contractual remedy or as an unjust enrichment remedy, but she concluded that the claim had been for a monetary award as a remedy for unjust enrichment.
- [183] In the Notice of Civil Claim, K Kreuchen has not specified whether his quantum meruit claim is a "contractual quantum meruit" claim or a "restitutionary quantum meruit" claim. Based on the criteria discussed by Justice Huddart in *Infinity Steel*, I conclude that this must be treated as a restitutionary quantum meruit claim.
- [184] I am satisfied that the services provided by K Kreuchen did benefit the defendants. Ultimately, the defendants did succeed in obtaining an amendment to the OCP bylaw for the rezoning of Lots 2832 and 2840; and a development permit and I do not think this would have been accomplished without the services of K Kreuchen or another consultant. While it is impossible to arrive at a precise calculation as to the amount by which the rezoning and the issuance of the development increased the value of the lands, and there is no expert opinion evidence to assist the Court with that calculation, I am satisfied that the work done by K Kreuchen did have value and did result in an increase in the value of the lands. M Fawcus testified that he decided to seek rezoning in 2006 because he had received advice from various sources that the value of his land would be increased if rezoning could be achieved. He offered Lot 2832 for sale in 2006 for \$860,000. J Fawcus and H Vlasveld paid \$690,000 for Lot 2840 in 2007. The defendants offered to pay between \$800,000 and \$900,000 for each of the Paisley Road lots. If the values of lots 2832 and 2840 were roughly comparable to the values of the Paisley Road lots, then 2832 and 2840 may have been worth between \$1,600,000 and \$1,800,000 in 2008. The lands sold in 2010 for \$2,500,000 after rezoning and the issuance of the development permit. I conclude it would be an error, however, to attribute all or even most of the increase in value of the land to the rezoning and the development permit. I consider it to be more probable than not that land values had increased by September 2010. It would also be unreasonable to consider the entire increase in value a "benefit" conferred by K Kreuchen as the defendants incurred significant costs between 2008 and 2010, and M Fawcus also put his own time and effort into obtaining rezoning and the development permit.

[185] Included in the plaintiffs' book of authorities is the decision in *Aerovac Systems Limited v. Darwin Construction (Western) Ltd.*, 2010 BCSC 654. That was a construction case in which the contractor had provided the owner with a cost estimate but the court determined that the estimate had not become a contract. Although some of the issues addressed are peculiar to construction contracts, some of the general principles referred to in the decision are applicable here. Justice Savage stated at para. 44:

Where a benefit is conferred on another, at the request of the other and is accepted, the person conferring the benefit may be entitled to reasonable payment on the basis of quantum meruit

[186] The onus of proof is on the party seeking payment. The court may consider evidence of what reasonable rates for the work involved would be; abortive negotiations as to price and expert opinion evidence as to a reasonable sum. Ultimately, Justice Savage concluded:

the court has a broad discretion in determining the appropriate method to apply in calculating a quantum meruit claim. (para. 49)

[187] In *Infinity Steel Inc. v. B & C Erectors Inc.*, Justice Huddart agreed with Justice Savage's statement. She also quoted Justice Lowry's statement in *Malik (Estate of) v. State Petroleum Corporation*, 2009 BCCA 404, at para.42:

[188] It is for the court to try to do the best it can to determine a reasonable fee for the service provided, by assessing what the service was worth having regard for the relevant circumstances in any given instance.

[189] Justice Huddart noted that in determining the appropriate measure to remedy unjust enrichment, that court may consider the value of the benefit obtained by the defendants, the amount the claimant deserves, the reasonable market value of the services provided, the "fair" value of the services rendered, and may take into account the course of dealings between the parties, any estimates obtained, the costs incurred, the scope of work, the actual work done, and the market value of the services provided.

[190] I noted earlier that no expert opinion evidence was led about an industry standard for fees charged by consultants who assist landowners with property developments, if such an industry standard even exists. The defendants pointed to the more modest fees charged by Ian Birtwell. He testified that he charged \$120 for an hour, or \$500 for a full day of work.

[191] K Kreuchen readily agreed that he did not work full-time for the defendants. He testified he would have charged \$150 an hour if paid by the hour, but there is no evidence that his services were worth \$150 an hour or that that is "fair market value" for the services. The Project Management Agreement did provide that work done for the defendants "after completion" would be charged at \$150 an hour, but there is no evidence about what "completion" means; when "after completion" would commence; or the nature of the work that would be done at that stage of the project.

- [192] K Kreuchen had some other small projects underway when he began working with M Fawcus in 2006. Nothing in the Project Management Agreement prevented him from taking on other clients or projects if he chose to do so. He was not expected to work full-time for the defendants, or to provide a specific number of hours of service.
- [193] K Kreuchen kept no records of the hours, days, or even weeks during which he did work for the defendants. He did not record his activities on their behalf. He rarely made notes of meetings or telephone conversations. His memory of events was not sufficiently comprehensive to provide much assistance to the Court in understanding what he was doing during any specific time period; or how much of his time was occupied by work for the defendants. The architects, engineers and other consultants retained by K Kreuchen may have kept records of the time they spent in meetings or telephone calls with K Kreuchen, but K Kreuchen did not call any of these potential witnesses.
- [194] K Kreuchen spent weeks on his boat during the summers. He was essentially out of commission for two or three months following his heart attack. I am satisfied that there were long periods when there was little work for him to do - the months between submission of the first application for rezoning and the date on which the District replied, for example. The documents in evidence indicate that there were periods of relative inactivity interspersed with periods of more intense activity.
- [195] It is fair, in my view, in assessing the benefit conferred on the defendants to also take into account the shortcomings in K Kreuchen's performance that I referred to earlier in these Reasons. While much of the delay and many of the problems that extended the time-line of the project were beyond K Kreuchen's control, I am satisfied that he did contribute to some of the delay and some of the increased costs resulting from the delay. He acted against the interests of the defendants by refusing to deliver up the architectural plans and the District permits when requested to do so in March 2010, by filing liens on the lands which he was subsequently obliged to discharge; and by writing to Vancity and to the District Mayor about his dispute with the defendants.
- [196] K Kreuchen bears the onus to prove the value of the services provided and/or the value of the benefit provided to the defendants. K Kreuchen provided services to the defendants for approximately three years and three months (December 2006 until March 2010). He has already received advances from the defendants of \$120,000, or approximately \$40,000 a year. If I had determined that the fee provision in the Project Management Agreement could be interpreted to entitle K Kreuchen to 5% of the \$2,500,000 for which the lands were sold to Mayfair Properties in 2010, he would have been entitled to be paid no more than \$125,000.

[197] Having considered all of the factors referred to in the preceding paragraphs, I conclude that a fair value for the services provided by K Kreuchen to the defendants is \$50,000 a year for the years 2007, 2008 and 2009; plus an additional sum of \$12,500 for the additional three months during which he provided services, for a total of \$162,500. Deducting from that sum the \$120,000 already paid to K Kreuchen by the defendants, I award K Kreuchen the sum of \$42,500.

[198] All other claims in the Notice of Civil Claim and the Counterclaim are dismissed.

COSTS

[199] The parties may either make submissions in writing about costs, or arrange with Trial Scheduling to appear to make oral submissions.

"W.G. Baker J."

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