IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110209
Docket: S091578
Registry: Vancouver

Between:

Tylon Steepe Homes Ltd.

Plaintiff

And

Charles Eli Pont and Jill C. Pont

Defendants

And

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

Defendants by Counterclaim

– And –

Docket: S101131
Registry: Vancouver

Between:

Tylon Steepe Homes Ltd.

Plaintiff

And

Heidi Landon

Defendant

And

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

Defendants by Counterclaim

Before: The Honourable Madam Justice Ballance

Oral Reasons for Judgment

Counsel for Plaintiff and Corporate Defendants by Counterclaim in both actions:	S. Turner
Counsel for Defendants:	F.G. Potts and S.W. Urquhart
Appearing on his own behalf:	D. Kretschmer
Place and Date of Hearing:	Vancouver, B.C. November 15-17, 2010 and January 10-11, 2011
Place and Date of Judgment:	Vancouver, B.C. February 9, 2011

INTRODUCTION

[1] Several years ago, Charles and Jill Pont and Heidi Landon (collectively, the "Applicants"), along with many others, entered into written contracts to purchase bare strata lots in a development known as Crystal Waters on Kalamalka Lake near Vernon, B.C. The vendors of the subdivision were 1216396 Ontario Inc. and Tylon Steepe Development Corporation ("Tylon Development"). Assisted by their agent, Dennis Kretschmer, who is also a director of Tylon Development, the vendors developed and marketed the project.

[2] Ms. Landon purchased her lot for the sum of $317,700 on February 5, 2003, and paid the vendors a deposit equal to 10% of that amount. On March 31, 2004, the Ponts purchased their lot for the purchase price of $259,700, and likewise paid a 10% deposit.

[3] The original Landon and original Pont contracts were the same in all material respects and were identical in substance to those entered into by the other purchasers.

[4] The vendors were empowered to cancel the original contracts in the event that the subdivision strata plan was not registered in the land title office by a certain date. The registration deadline was stated to be a date as specified in the contract, or such later date resulting from the application of a separate clause which spoke to the potential of a delay in depositing the plan for registration, flowing from one of a number of causes, including an "...act of any government authority ... or any other event beyond a reasonable control of the [vendors] (other than lack of money)". A delay of the kind contemplated by that provision was capable of extending the stipulated deadline within which the vendors were at liberty to cancel the contract, equivalent to the period of such delay.

[5] The original purchase contracts also provided that in the event the vendors cancelled the agreement, the purchasers would only be entitled to receive repayment of their 10% deposit with interest. For convenience, I will refer to this contractual provision as the "deposit clause".

[6] The Applicants say that they were led to understand by Mr. Kretschmer, on behalf of the vendors, that approval of the subdivision by the District of Lake Country was anticipated in relatively short order. However, approval was not forthcoming in the following months.

[7] Between December 2003 and roughly December 2004, the vendors filed a petition (which was subsequently amended) against the Ministry of Transportation and the District approving officer, and launched a separate action against the District and others, all with regard to the District's conduct in relation to the Crystal Waters subdivision. Few steps of any consequence have ever been taken in relation to those proceedings.

[8] By August 2005, approval of the subdivision had still not been granted.

[9] In mid-August 2005, Mr. Kretschmer and/or the vendors informed the purchasers, including Ms. Landon and the Ponts, that the vendors had elected to cancel their respective original purchase contracts. Their inability to proceed by reason of the delay of government authority was cited as the main reason. There is controversy around the oral representations that Mr. Kretschmer is said to have made to the Applicants and to Ms. Landon's husband, Eric, at the time their original contracts were cancelled with respect to the cause of the subdivision delay. Also in dispute is whether Mr. Kretschmer had previously assured them that the vendors did not intend to cancel the contracts. More or less concurrently with the notice of cancellation, the vendors gave the majority of the purchasers, including the Ponts and Ms. Landon, an opportunity to purchase their respective lots for an increased price. This opportunity was presented in a new form of agreement, which also gave the purchasers an option to enter into a separate building contract with Tylon Development to construct their residences, with a further provision that if they failed to exercise that option within a specified time, Tylon Development had the right to repurchase their lots. The new agreement also prohibited the purchasers from reselling their lots until construction of their homes was completed.

[10] The Crystal Waters purchasers did not respond in unison to the purported termination of their contracts and the accompanying offer to enter into the so-called new contracts. Some opted in and others rejected the proposed course out of hand. The Ponts and Ms. Landon were among those who entered into fresh purchase contracts with the vendors. The Ponts signed their new purchase contract in September 2005; Ms. Landon followed suit in late 2005.

[11] Mr. Romfo and like-minded purchasers took a different approach. In January 2006, they commenced a law suit against the vendors and Mr. Kretschmer. They sought specific performance as their primary relief, and damages in the alternative (the "Romfo Action"). I will refer to those purchasers as the "Romfo plaintiffs".

[12] Meanwhile, the District approved the Crystal Waters subdivision on December 13, 2005, clearing the way for registration of the strata plan on January 16, 2006.

[13] In May 2006, Ms. Landon contracted with the plaintiff, Tylon Steepe Homes ("Tylon Homes") and not Tylon Development as had been agreed, to provide services and materials as the general building contractor for her residence. Mr. Kretschmer is also a principal of Tylon Homes.

[14] The trial of the Romfo Action commenced on April 23, 2007, with Mr. Justice Myers presiding. On September 14, 2007, Myers J. issued extensive written reasons (*Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375), ruling in favour of the Romfo plaintiffs and granting each of them specific performance of their respective lots.

REASONS FOR JUDGMENT IN THE ROMFO ACTION

[15] The following summary of the arguments advanced in the Romfo Action and the reasons for judgment of Myers J. provides the backdrop required to assess the Applicants' motion at hand.

[16] In overview, the Romfo plaintiffs alleged that the vendors had wrongfully breached and repudiated the original purchase contracts by failing to complete, by purporting to cancel them without complying with the specific contractual provisions or the representations they had made, and by wrongfully refusing to take reasonable steps to complete the subdivision. They itemized the representations alleged to have been made to them by the vendors and Mr. Kretschmer which they claim to have relied upon to their detriment, and pled that it was known or ought to have been known that those representations were false, inaccurate and misleading or, alternatively, made negligently, and would visit damage upon the Romfo plaintiffs. As noted, the chief remedy sought by the Romfo plaintiffs was for specific performance of their contracts; they wanted their lots back.

[17] I will sometimes refer to the vendors and Mr. Kretschmer collectively as the "Romfo defendants".

[18] The claim was initially defended on the basis that the deadline for cancelling the original contracts had been extended by the government delay the Romfo defendants say they encountered in obtaining approval of the subdivision and that, consequently, the vendors were within their rights to cancel the original purchase contracts as and when they did so. Notably, however, the Romfo defendants later abandoned that defence. At trial, they agreed that their notification to the purchasers purporting to terminate the original purchase contracts (except for one plaintiff whose contract had already been cancelled) was a nullity because notice was given too late. Instead, they defended on the ground that the purchase contracts were not enforceable because they lacked mutuality of obligations. In the alternative, they asserted that if the contracts were enforceable, the provision referred to as the "deposit clause" limited the Romfo plaintiffs' sole remedy to the return of their respective deposit amounts with interest. As the case unfolded, the Romfo defendants' alternative assertion concerning the effect of the deposit clause emerged as the central issue to be decided by Myers J.

[19] In response to the assertion of the Romfo defendants that the most the plaintiffs could hope for was return of their deposits, the Romfo plaintiffs argued that if the deposit clause applied, it should not be enforced for the following reasons:

(1) the vendors were estopped from relying on the deposit clause or from cancelling the contracts because of Mr. Kretschmer's representations and the use that the plaintiffs had been permitted to make of the land after the contracts were signed (for example, use of the beach);

(2) the deposit clause was a penalty clause;

(3) alternatively, if the deposit clause was a limitation of liability clause rather than a penalty clause, it would be unfair and/or unconscionable to allow the vendors to rely on it given the representations made to them and the post-contractual use they were allowed to make of the land.

[20] The Romfo defendants were represented by legal counsel throughout.

[21] Document production was a contentious issue that persisted right up to the end of trial. In the body of his reasons for judgment, Myers J. referred to the ongoing disclosure disputes when explaining the context underlying the decision of the Romfo defendants to abandon their defence based on reliance of the government delay provision. At para. 34 he noted that the Romfo defendants no longer relied on that provision to extend the time for the performance of their obligations, which resulted in a narrowing of the scope of their document production. At para. 185, his Lordship remarked further:

> The defendants originally relied on their ability to extend the cancellation option date by invoking clause 5.2 on the basis of governmental delay. When faced with a motion to produce all of the documents surrounding the vendors' dealings with the District, the defendants abandoned this portion of their defence and took the position that these documents were no longer relevant.

[22] Myers J. also referred to the abandonment of the government delay defence when considering the main submission of the Romfo defendants that there was no mutuality of obligations in the agreement between the parties. At paras. 208-210 he described the modified position that the Romfo defendants had come to adopt:

> This argument was the subject of an amendment on the eve of trial. The amendment was by consent on certain terms. Before continuing to summarize the defendants' argument I need to explain those terms because it limits the use the defendants can make of clause 5.2.
>
> I mentioned earlier (at para. 185) that originally the defendants relied on delay caused by government action and clause 5.2. When faced with a document production motion with respect to the vendors' dealings with the District, the defendants amended their defence to remove this plea. The defendants' document production and the scope of the examinations for discovery were based on the premise that the issue of whether the vendors made reasonable efforts to obtain the subdivision approvals was irrelevant because they admitted they were in breach of the agreement.
>
> But, as will be explained below, the vendors' lack of mutuality argument depends, in part, on clause 5.2. Therefore, the amendment was allowed on the basis that the defendants could rely on the fact that clause 5.2 was in the contract, but that it was not properly invoked. In other words, it was to be assumed that the vendors did not make reasonable efforts to effect the subdivision.

[23] The Romfo defendants conceded there had been a fundamental breach of the purchase contracts in the form of failing to convey the lots, and invited Myers J. to assume that they had not made reasonable efforts to effect the subdivision, and that Mr. Kretschmer's representations otherwise were false. In this context, Myers J. noted at para. 211:

> It was also to be assumed that Mr. Kretschmer's representations to the vendors that the subdivision registration was delayed because of difficulties with the District had no factual foundation. To use the terminology of counsel for the defendant in his submissions regarding the amendment, it was to be assumed that Mr. Kretschmer's representations to the defendants with respect to governmental delay were "a pack of lies". (The following sub-paragraph (b) will, I hope, make it clear why the defendants want to make this limited use of clause 5.2).
>
> The defendants' argument that the plaintiffs could have elected not to complete the agreement at the time the notices of cancellation were sent by the vendors is based on the following reasoning:
>
> (a) Clause 2.2 allowed the purchasers to cancel the agreement if the strata plan had not been deposited by the cancellation option date.
>
> (b) At the time the defendants' notice of termination was sent, the specified option date of August 15, 2002 had come and gone. Nevertheless, under clause 5.3, that date was extended if the inability to register the strata plan was due to governmental action. The defendants do not rely on the reality of whether or not the delay in registration was due to governmental action; as I said above, they could not do so. Rather, they rely on the purchasers' *belief* that that

> was the reason for the delay. That belief was induced by the representations of Mr. Kretschmer. ...

[24] Myers J. dealt a heavy blow to Mr. Kretschmer's overall credibility. He rejected Mr. Kretschmer's evidence that he did not begin to discuss the possible termination of the contracts with the vendors until sometime in July 2005 and that the decision to cancel them was not reached until August 2005. To the contrary, at para. 205, Myers J. found that the decision to terminate had been made much earlier, sometime within the period between July and November 2004. He also accepted the evidence of the individual Romfo plaintiffs that before August 17/18, 2005, Mr. Kretschmer had assured them that their purchase contracts would not be cancelled.

[25] Myers J. dismissed the mutuality argument, reasoning that at the time of the vendors' breach, the parties had existing obligations and intended and believed that a binding contract was in place. He went on to determine that the deposit clause was not a penalty clause, and did apply to the vendors' intentional breach of contract. He noted that, due to these findings, the Romfo plaintiffs were left with only two available legal arguments to avoid the unfavourable effect of the deposit clause: estoppel and fundamental breach.

[26] Mr. Justice Myers found that some facts were common to all of the claims of the Romfo plaintiffs and that others, particularly those pertaining to the nature and timing of making of Mr. Kretschmer's representations to the various plaintiffs and whether they had relied on them to their detriment, were uniquely fact-specific.

[27] In addressing the overlapping categories of promissory and proprietary estoppel, Myers J. noted that they both required the party raising the estoppel to have acted on the other's representation to his or her detriment. Emphasizing at para. 255 the fact-driven inquiry the court must embark upon to determine whether the estoppel applies, Myers J. examined the evidence relative to each claim of the Romfo plaintiffs. In his analysis, he drew from the conclusion that he had already reached, namely that Mr. Kretschmer had previously assured the Romfo plaintiffs

that their contracts would not be cancelled, to assess whether and to what degree the individual Romfo plaintiffs had relied on those or other assurances. His Lordship concluded that the evidence established detrimental reliance in respect of some of the Romfo plaintiffs and held that only they were entitled to raise an estoppel with respect to the deposit clause.

[28] Moving next to the issue of whether the doctrine of fundament breach would avoid the application of the deposit clause, Myers J. held that it would be unfair and unreasonable to enforce the deposit clause with respect to all of the Romfo plaintiffs given the following:

(1) the vendors decided to terminate the Romfo plaintiffs' contracts between July and November 2004 (except for one couple), but Mr. Kretschmer chose not to inform them of that decision until the summer or fall of 2005;

(2) Mr. Kretschmer gave the Romfo plaintiffs constant assurances that the subdivision would be registered soon;

(3) Mr. Kretschmer knew that the market was rising; and

(4) the Romfo plaintiffs were given the option to purchase the lots at a higher price and presented with a building contract that was virtually impossible to sign as it had no terms as to cost or any formula to arrive at cost.

[29] In the end, Mr. Justice Myers ordered specific performance in favour of all of the Romfo plaintiffs.

[30] It is noteworthy that the Romfo defendants had earlier applied under the former Rule 18A for a declaration that the Romfo plaintiffs were not entitled to certificates of pending litigation. The substantive points in dispute related to the remedies available to the Romfo plaintiffs, in particular whether they were entitled to

more than merely the return of their deposits, and could claim an interest in the lots or obtain an order for specific performance.

[31] Of significance is that, for the purposes of the summary trial, the Romfo defendants had already designed their defence on the premise that the issue of government delay was not relevant. By that stage, the vendors had, through their counsel, admitted their breach of contract, which thereby deprived them of recourse to the government delay excuse and its legal ramifications. In his written reasons on the Rule 18A trial, Myers J. repeatedly forewarned that the conduct of the parties would be crucial in relation to the estoppel argument and the determination of the effect of a fundamental breach. He concluded that consideration of the issue of conduct was best left to a conventional trial.

ROMFO APPEAL

[32] An appeal of Mr. Justice Meyer's judgment was taken and dismissed with reasons on April 30, 2008 [*Carlson v. Tylon Steepe Development Corp.*, 2008 BCCA 179].

[33] On the appeal, the Romfo defendants accepted that their repudiation of the Romfo contracts was fundamental and did not directly challenge Myers J.'s conclusion that enforcement of the deposit clause would be unfair, unreasonable or unconscionable, depending on how the test was formulated. Instead, they asserted that for the purposes of fundamental breach, the deposit clause could not be severed from the rest of the contract, and that if the deposit clause fell, it brought down with it the whole of the contract, making the remedy of specific performance unavailable. That argument failed and the judgment of Myers J. was affirmed.

[34] Mackenzie J.A., for the Court, examined the two approaches taken in the Canadian jurisprudence to the fundamental breach analysis. He noted that the construction approach asks whether on a proper interpretation the deposit clause applied to a termination of the contracts in the circumstances. He remarked that under that model the court is asked to consider the parties' intention when they made the contracts, and at para. 27 reasoned as follows:

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

[35] As to the alternate analytical approach based on the theory of unconscionability, Mackenzie J.A. readily concluded that Mr. Kretschmer's deception was unconscionable and equally precluded the vendors from relying on the deposit clause. In this connection, his Lordship expressly observed that the vendors' motivation in cancelling the contracts was simply to take advantage of a rising market by reselling the lots to third parties at substantially higher prices.

THE PRESENT APPLICATION

[36] Approximately one month after release of Myers J.'s reasons, the Ponts entered into a construction contract with Tylon Homes.

[37] Dissatisfied with the pace and quality of the construction of their residences, the Applicants eventually refused to pay Tylon Homes the further advances called for under their respective construction contracts. Several builders' liens were filed. In due course, Tylon Homes brought these actions seeking damages for breach of contract and a declaration of entitlement to a claim of builder's lien.

[38] The Ponts and Ms. Landon have counterclaimed against the vendors, Mr. Kretschmer and Tylon Homes (collectively, the "Respondents"). They allege that they relied to their detriment on the fraudulent misrepresentations knowingly or recklessly made to them by Mr. Kretschmer on behalf of himself and the vendors with respect to the reason for the delay in obtaining registration of the strata plan and to the effect that it was unknown whether approval would ever be granted, and

that the vendors were entitled to rely on the government delay provision to cancel the contracts leaving them liable to repay the deposits only. The Applicants further allege that such representations, in combination with Mr. Kretschmer's deliberate withholding of material information, induced them to enter into their so-called new purchase contracts and the compulsory construction contract with Tylon Homes.

[39] In their counterclaims, the Applicants recite several facts which they allege were secretly taking place behind the scenes and driving the conduct and representations of the vendors and Mr. Kretschmer. Several of the representations that they allege Mr. Kretschmer made to them concerning the progress of the subdivision approval status and the reasons for and ramifications of cancelling their original contracts, are the same as or similar to the representations which Myers J. found that Mr. Kretschmer had made to the Romfo plaintiffs.

[40] In the current proceedings, the Applicants seek rescission of the new purchase contracts (which they characterize as an amended version of the original purchase contracts as distinct from a fresh contract), including a declaration that the purchase price increase, the option clause and the compulsory building clause in favour of Tylon Homes are null and void. They further seek a general declaration that "... the terms of the original sales agreement, as interpreted by this Honourable Court in the matter of [the Romfo Action] remain in full force and effect, and govern the relationship between the parties hereto".

[41] In a similar vein, and here I refer specifically to para. 43 of the counterclaim filed in the Pont Action, it is further pled:

> The Ponts plead and rely on the findings of fact and law made by this Honourable Court in the matter of [the Romfo Action] and, say that by reason of the doctrines of *res judicata* and/or issue estoppel, [the Romfo defendants] are foreclosed and estopped from taking issue with any such findings."

[42] In para. 52 the Ponts seek a declaration that the terms of their original purchase contract, as interpreted by Meyers. J. in the Romfo Action, governs the parties. At para. 54 the counterclaim continues as follows:

> Further, or in the alternative, the Ponts say that by reason of the matters aforesaid, the [vendors] are estopped and barred from relying on the said amendments and that the Ponts are entitled to a Declaration to that effect and to an Order that the Options to Purchase be discharged and removed from title, and for a Declaration that the terms of the Original Sales Agreement, as interpreted by this Honourable Court in the matter of [the Romfo Action] remain in full force and effect and govern the relationship between the parties hereto.

[43] On February 2, 2011, those pleas were amended by consent of the parties and order of this Court to include Tylon Homes within the ambit of the estoppel. Virtually identical pleas, also amended as aforesaid, are contained in Ms. Landon's counterclaim.

[44] In their defence to the counterclaim, the Respondents plead that the progress of the development of the subdivision was unreasonably delayed by the wrongful acts of the District and others beyond their control. They specifically plead and rely on the deposit clause, the government delay clause and severance provisions of the contracts. Those terms are virtually identical to the counterpart provisions contained in the original purchase contracts. In other words, the respondents purport to invoke the government delay provision which the Romfo defendants had elected not to pursue in the Romfo Action. They also deny that Mr. Kretschmer made false representations of fact to the Applicants or that any of them intended to deceive, mislead or defraud the Applicants, or that the Applicants relied upon or were induced by their representations. They say that the doctrines of *res judicata* and issue estoppel do not apply because the factual issues differ from those in the Romfo Action.

[45] The Applicants argue that within the current proceedings the Respondents are attempting to relitigate certain fundamental issues that have already been decided or could have been decided in the Romfo Action. Their position is that the doctrines of *res judicata* and abuse of process are each engaged and serve to bar the Respondents from recycling the government delay defence with its entailing consequences that they chose not to litigate in the Romfo Action. At various times in their submissions, the Applicants framed the issues and the relief sought in slightly

different, though not incompatible, terms. In essence, they argue that in the within actions, the Respondents (as defendants to the counterclaims) are estopped from:

(1) denying that the vendors cancelled the Applicants' original contracts in August 2005 because they wanted more money for the lots, including lots 4 and 24, and that Mr. Kretschmer wanted to have the exclusive right to build the homes;

(2) denying that the vendors decided to cancel the Applicants' original contracts in 2004, but wrongfully refrained from so informing the purchasers, including the Ponts and Ms. Landon;

(3) denying that they knew that subdivision approval was imminent at the same time as Mr. Kretschmer represented to the Ponts and Ms. Landon that the development could not proceed because of government delay;

(4) alleging that the vendors had the right to cancel the Applicants' original contracts because the development of Crystal Waters had been delayed by act of government authority;

(5) denying that any representations to the purchasers that the subdivision registration was delayed because of difficulties with the District had no factual foundation;

(6) denying that they made representations to the Applicants to the effect that the cancellation of their original contracts was the result of government delay and that these were false representations;

(7) relying on either the cancellation or the delay clauses in the purchase contracts; and

(8) denying that they failed to make reasonable efforts to effect the subdivision.

[46] The Applicants pose two additional questions which, when distilled, essentially ask whether, if the respondents are bound by the findings of fact and law in the Romfo Action, it can be found, based on the whole of the evidence before the Court on this application:

(i) that the Applicants have proven a fundamental breach such that the deposit clause is unenforceable as against them; and

(ii) that it is unfair and unreasonable to enforce the deposit clause in the circumstances.

[47] And finally, the Applicants ask whether, on the whole of the evidence, it can be found that Ms. Landon and/or the Ponts were fraudulently induced to accept the amendments to their original contracts or enter into the new purchase contracts, as the case may be, and enter into their respective building contracts, and to what remedies are they entitled.

[48] The Applicants seek summary disposition of these issues pursuant to Rule 9-7. Alternatively, they seek partial relief under Rule 9-4 asking, as a point of law, whether the respondents are precluded from raising certain defences given the findings of fact in the Romfo Action.

[49] During submissions, the Applicants condensed the preliminary threshold issue to whether, as a matter of law and/or fairness, the parties are bound by the findings made by Myers J. in the Romfo Action. The primary controversy embedded in that issue is whether the respondents are free to defend the Applicants' counterclaims on the ground that development of the subdivision was unreasonably delayed by the actions of the District and others beyond the respondents' control which, in turn, extended the date by which the vendors were entitled to cancel the original purchase contracts.

[50] As will be seen, that issue is deceivingly simple on its surface, and complex at its root.

DISCUSSION

[51] I will now summarize the legal arguments and address the application of the doctrines of *res judicata* and abuse of process to this case.

[52] The doctrine of *res judicata* is a time-honoured cornerstone of Canadian justice. Where a cause or a fundamental issue has been decided, it is said to be *res judicata* and, absent special circumstances, is precluded from being adjudged a second time. When *res judicata* applies, a litigant is stopped by the prior suit, from proceeding in the subsequent action. The maxim has been traditionally regarded as an exclusionary rule of evidence. The paramount policy considerations include the avoidance of duplicative litigation, potential inconsistent results and inconclusive proceedings. Finality to litigation is the prime objective. (See generally: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 [*Angle*]; *Grdic v. The Queen*, [1985] 1 S.C.R. 810 [*Grdic*]; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 1 S.C.R. 460 [*Danyluk*]).

[53] *Res judicata* takes two distinct forms: issue estoppel and cause of action estoppel, indicating that there can be estoppel with respect to the entire cause or a discrete issue(s). Much of the judicial analyses of the doctrine spring from a scenario where it is a plaintiff who is attempting to relitigate a matter; however, the principles apply, with obvious modifications, to the attempted recycling of a defence.

[54] Generally speaking, the authorities require fastidious adherence to the constituent elements of *res judicata* in order to permit its application. However, even where the requisite ingredients are present, the court retains a residual discretion to decline to apply it if doing so would cause unfairness in the particular case: *Danyluk* at para. 33; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50, 50 B.C.L.R. (3d) 1 (C.A.) [*Bugbusters,* cited to D.L.R.]. As Finch J.A. (now the Chief Justice) emphasized at para. 32 in *Bugbusters,* the doctrine "inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case".

[55] The three-fold requirements which must be established in order to successfully invoke issue estoppel are:

(1) that the same question has been decided and was fundamental, as opposed to collateral or incidental, to the decision;

(2) that the decision in the first proceeding said to create the estoppel was final; and

(3) that the parties to the first proceeding or their privies are the same persons as the parties, or their privies, to the subsequent proceeding:

(See *Angle; Grdic and Danyluk*).

[56] The "same question" test is a crucial element and a focal point of both types of estoppel under the *res judicata* umbrella.

[57] The Respondents claim that they abandoned the government delay defence in the Romfo Action in reliance on their lawyer's advice. They assert that this bold defence strategy, which favoured proceeding on a more narrow footing, left them with a limited, legalistic and highly technical defence. They complain that in that sense they have been deprived of their day in court and of a full and proper defence. In making these submissions, the Respondents emphasized that in the Romfo Action, Myers J. was not asked to actually determine whether there had been a delay on the part of the District or any other third party beyond the vendors' control as contemplated under the contract or determine the legal effect of such a finding, and hence the matter has not been squarely adjudicated.

[58] The Respondents wish to have an opportunity in this proceeding to fully explain their conduct and provide details of the circumstances surrounding the development of the subdivision. Their submissions imply that their counsel in the Romfo Action, who incidentally (and I think significantly) was also their counsel on the unsuccessful appeal, had been on a frolic of his own in pursuing the so-called limited defence with disastrous consequences. They go so far as to suggest that

their trial counsel led them astray. In support of these assertions, the Respondents' evidence suggests that it was only after the Romfo Action was lost at trial and on appeal, that they came to appreciate the full extent of the relevant issues.

[59] The Respondents also adduced evidence in the form of an affidavit sworn by a lawyer, Mr. Corson, which they offer as indicating that there could be merit to the underpinnings of a defence based on the government delay excuse. What I take to be most significant from the Corson affidavit is that if there was any issue with respect to the delay by the District, Mr. Kretschmer and the vendors were well aware of it before the trial of the Romfo Action was underway. This is not a case where fresh evidence is discovered post-trial or where evidence that the Respondents, acting diligently, could not have adduced at the Romfo trial. Indeed, Mr. Kretschmer's testimony is to the opposite effect; he says that he expected that Mr. Corson and others would be called to testify at the trial and professes surprise that they were not. What concerns the Court at this stage is not whether that evidence was indeed called in the Romfo Action, but whether it could have been. It plainly could have.

[60] The thrust of the Applicants' response is that the vendors and Mr. Kretschmer are attempting to resurrect a defence that they had pled and advanced initially but, as a matter of pure strategy, retreated from in the first proceeding. They forcefully contend that this is precisely what is forbidden by the doctrines of *res judicata* and abuse of process.

[61] Many authorities affirm the broad proposition that *res judicata* applies not only to the same issues or causes of action, but extends to cover every point that properly belonged to the subject matter of the first litigation, and which the parties, exercising reasonable diligence, might, ought or should have brought forward at that time: *Foreman v. Niven,* 2009 BCSC 1476 at paras. 10 and 12; *Chapman v. Canada (Minister of Indian and Northern Affairs),* 2003 BCCA 665 at para. 17 [*Chapman*], and *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 109 D.L.R. (3d) 729, 19 B.C.L.R. 59 (C.A.). However, they do not always articulate

whether this principle applies to issue estoppel as well as cause of action estoppel. When the issue is addressed under the rubric of issue estoppel as opposed to *res judicata* at large, the "same question" test is generally taken to mean that the question must have been put into issue and directly determined: *Danyluk*. In contrast, the scope of cause of action estoppel, also a form of *res judicata*, is more expansive in its treatment of the same question test.

[62] Cause of action estoppel is grounded in the judicial intolerance of litigation by instalment and the ancient prohibition against a party splitting its case. It incorporates what is often referred to as the "might and ought" principle meaning that a defendant must bring forward every defence based on the subject matter at one time, once and for all. This longstanding rule derives from the reasons for judgment of Wigram V.C. in the seminal case of *Henderson v. Henderson*, [1843-60] All E.R. Rep. 378 and is often abbreviated as the "*Henderson Rule*". Its application compels conformity to the principle that there is only one opportunity to prosecute a claim or raise a defence, unless special circumstances exist.

[63] An early Canadian statement of the principle is found in the decision *Glatt v. Glatt* (1935), [1936] O.R. 75, 1 D.L.R. 387 (C.A.) [cited to O.R.]. With respect to defendants in particular, Middleton J.A. wrote at 79:

> It is I think clear beyond possibility of a doubt that a defendant who is sued must in the action in which he is sued put forward all defences which he has to the plaintiff's claim. He cannot allow the action to go to trial upon a certain defence which he sets up, and when that defence fails set up another and in consistent defence by bringing an action to set aside the judgment. If in the original action he applies for some relief, his application will be scrutinized with the greatest of care, but there would be no end to litigation if proceedings such as these received the sanction of the Court.

[64] The reasons for judgment of Middleton J. A. were unanimously affirmed by the Supreme Court of Canada in *Glatt v. Glatt,* [1937] S.C.R. 347. The subsequent decision of the Supreme Court of Canada in *Grandview v. Doering* (1975), [1976] 2 S.C.R. 621 [*Grandview*] is regarded as the leading decision illustrative of the *Henderson Rule*. In *Cobb v. Holding Lumber Co.* Ltd. (1977), (1978) 79 D.L.R. (3d) 332 (B.C.S.C.), this Court extracted the following principles from *Grandview* at 334:

> 1. Where a given matter becomes the subject of litigation the law requires the parties to bring forward their whole case.
>
> 2. This applies where the issue sought to be litigated anew was not pursued in the first action either through negligence, inadvertence or even accident and covers every point which properly belonged to the first action.
>
> 3. In special circumstances one party may be allowed to pursue the same matter in a second action but only if he can show that the new facts he has discovered could not have been ascertained by reasonable diligence on his part and presented by him in the first action.
>
> 4. The burden lies upon the party who brings the second action to at least allege the new facts could not have been ascertained by reasonable diligence in the first instance.

[65] The *Henderson Rule*, as I am referring to it, also extends to any point that was the subject of an admission fundamental to the decision: See Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 3rd ed., (Markham, Ont: LexisNexis Canada Inc., 2009) at 1297.

[66] In *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal ref'd [1998] 1 S.C.R. x, Cromwell J.A. (as he then was) cautioned against too broad an application of the *Henderson Rule*. He endorsed as a preferable proposition that the issues which the party had the opportunity to raise and in all the circumstances should have raised – as opposed to could have raised – will be barred. At para. 37, he writes:

> ... In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[67] Issue estoppel applies to separate and distinct causes of action. As its name would suggest, cause of action estoppel does not. Thus, a defendant is permitted to raise defences to a new cause of action which might or should have been raised to the first action, but were not: *Angle*, *Grdic*.

[68] In *Danyluk*, the Supreme Court of Canada provided a definition of cause of action at para. 54. Whether the cause of action in the first proceeding is the same as that sought to be enforced in the second does not turn on technical considerations; it depends upon whether they are identical in their substance. Accordingly, where the facts are the same and the causes of action are the same, although different legal descriptions are applied in the two actions, the second action may be lost through cause of action estoppel. If the defendant should have raised in the first action the facts supporting the defence theory advanced in the second, even in the context of a different claim, cause of action estoppel will ordinarily apply: see generally Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham, Ont.: LexisNexis Canada Inc., 2004) at 125; 144-46).

[69] In addition to the "same question" criterion, *res judicata* will only govern where the party invoking the estoppel is a party to the former proceeding (in this case, the Romfo Action), or in privity with such party. Privity is a two-fold issue here because neither Tylon Homes nor the Applicants were parties in the Romfo Action or in any other litigation supporting or against the Romfo defendants.

[70] The concept of privity is treated the same under the doctrine of *res judicata* whether it takes the form of issue estoppel or cause of action estoppel. It is not possible to be categorical about the degree of interest which will create privity at law. To be "in privity", the parties must share parallel blood, title or interests.

[71] I found instructive the justice-driven analysis of privity and its application adopted by Chief Justice McEachern of this Court (as he then was) in *Saskatoon Credit Union v. Central Park Enterprises* (1988), 47 D.L.R. (4th) 431, 22 B.C.L.R. (2d) 89 (S.C.) [*Saskatoon* cited to D.L.R.]. There, Ms. Gaspari, a creditor, obtained judgment for a claim of debt against a holding company. Thereafter, the defendant holding company transferred its assets to a related company. The same creditor then launched a second action, this time against the related company, asserting a fraudulent conveyance. After a trial on the merits, the Court found that the transfers were indeed fraudulent. Although an appeal was filed, the parties settled prior to the

hearing of it. In accordance with the terms of settlement, a consent order allowing the appeal was entered.

[72] Following the appeal, another creditor of the holding company, Saskatoon credit union, which had not in any way participated in the earlier proceedings, sued the related company. In that proceeding, the credit union applied for summary judgment seeking to bar the related company from relitigating the issue of whether the transactions were fraudulent or whether it was bound by the findings in the prior suit.

[73] The Chief Justice opened his discussion by remarking that the principle of *res judicata* in its various manifestations had become far too complicated. He then explored the history of *res judicata* and its related principles and doctrines, paying particular attention to the privity ingredient, required to successfully raise *res judicata*. Beginning at 438, he writes:

> Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.
>
> The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence: [citation omitted]. No material has been filed which would create such an exception in the circumstances of this case.
>
> I decline to decide whether the foregoing conclusion represents the application of a species of estoppel by *res judicata* or abuse of process as the result is the same. The fact that the plaintiff in this action was not a party to the earlier proceedings is of no consequence. With the defendants participating fully, it was judicially determined at trial by Spencer J. that the lease and transfers between the defendants were fraudulent and that is the end of that issue. The defendants are stopped from saying otherwise.

[74] At 439, his Lordship confronted the thorny privity issue as follows:

> Lastly, I would decide, if it were necessary so to do, that the doctrine of privity, if it applies at all, is broad enough to embrace both Ms. Gaspari and the present plaintiff within its grasp. Both were creditors of Holdings; both had the same interest in the debtor's assets; both were damnified by the

> fraudulent lease and transfers; and both, along with all other creditors, were entitled to share in the results of the earlier litigation each according to his rank as a creditor. ...

[75] Drawing on a favoured metaphor which originated with Lord Denning M.R. in *McIlkenny v. Chief Constable of the West Midlands*, [1980] 2 W.L.R. 689 (C.A.), McEachern, C.J. concluded at 439: "Privity would be less than rickety – it would be no chair at all – if it could not sustain the weight of both or all the creditors of a fraudulent transferor."

[76] Privity was at issue recently in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282. There, ten of several hundred plaintiffs who had lost money an investment scheme were selected to pursue the action as a test case. Their claim was ultimately dismissed. The claims subsequently advanced by the remaining plaintiffs were thereafter dismissed on the basis that the ten initial plaintiffs were their privies. On appeal, the remaining plaintiffs argued that *res judicata* did not apply, in part, because there was no agreement that they would be bound by the findings in the test case.

[77] Frankel J.A. for the Court said this at para. 42:

> The flaw in this argument is that it is not for the parties to litigation to decide whether issue estoppel will or will not apply; it is not a matter of "opting in" or "opting out". A party cannot evade the application of the common-law doctrine of issue estoppel merely by asserting that it will not apply. In this regard, it is to be remembered that the doctrine is based, in part, on the public interest in the finality of litigation: [citation omitted]. I agree with the trial judge that if at the first trial it had been found that the Credit Union and Mr. Thomas knowingly assisted Taylor Ventures in breaching obligations to its investors, then the Credit Union and Mr. Taylor would have been bound by that finding with respect to the claims of the remaining plaintiffs, despite the assertions of their counsel to the contrary.

[78] In the result, the Court of Appeal did not disturb the finding that remaining plaintiffs were privies of the ten plaintiffs in the earlier case.

[79] In response to perceived difficulties in demanding strict adherence to the constituent elements of *res judicata*, modern Canadian courts have developed the independent but related concept of abuse of process as a means of barring

relitigation where permitting it to proceed would offend vital principles such as judicial economy, consistency, finality of legal disputes, and, perhaps most importantly, the integrity of the judicial decision-making process. Abuse of process is a flexible doctrine that finds its roots in the Court's inherent residual discretion to prevent an abuse of its process.

[80] The concepts of *res judicata* and abuse of process are inter-related and share several overlapping features and common policy objectives. They are each extraordinary remedies to be applied sparingly: *Chapman*. Indeed, the decision in *Saskatoon* ultimately rested on abuse of process. It is key to appreciate that with respect to abuse of process the proper focus is on the integrity of the administration of justice and not the motive of the parties in terms of their treatment of the judicial process.

[81] The leading case in the area is *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63, [2003] 3 S.C.R. 77 [*Toronto (City)*]. That case involved a municipal employee, Oliver, who had been convicted of sexually assaulting a boy under his supervision. Following Oliver's criminal conviction, the municipality fired him. He grieved his dismissal. At the grievance hearing, the municipality relied upon the complainant's testimony from the criminal trial and the notes of Oliver's supervisor. The complainant was not called to testify at the grievance hearing, and Oliver denied the assault.

[82] The arbitrator ruled that the criminal testimony was admissible to raise a presumption that the assault had occurred, but was rebutted by Oliver's evidence and reasoned that he had thus been dismissed without cause.

[83] The municipality successfully applied for judicial review and the union unsuccessfully appealed, and then appealed again to the Supreme Court of Canada. In dismissing the union's final appeal, Arbour J. held that the doctrine of abuse of process barred the relitigation of Oliver's conviction. LeBel J. wrote a concurring judgment.

[84] In her reasons, Arbour J. reviewed the controversy surrounding the mutuality/privity requirement of *res judicata*. She observed that it has largely been discarded in the United States and has been the subject of academic and judicial debate there and throughout the United Kingdom. Arbour J. explained that in Canada there has been no need to abolish the mutuality/privity requirement because of the availability to our courts of the evolving doctrine of abuse of process.

[85] At para. 38, her Ladyship wrote:

> It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one [citation omitted]. The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, *supra*, at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[86] She continued at paras. 42-43:

> The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process [references omitted].
>
> Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of the judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the

> doctrine become easier to define, and the exercise of discretion is better anchored in principle.

[87] And at para. 51, Arbour J. cautioned:

> ... It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. ...

[88] As to the parameters of the same question test under abuse of process, there can be no doubt that the expansive "might and ought" *Henderson Rule* governs. Consequently, that the question of whether there was government delay and, if there was, the ramifications flowing from it, was not litigated *per se* in the Romfo Action by no means precludes a finding that raising it in these proceedings amounts to an abuse of the court's process: *Saskatoon*; *Toronto (City)*.

[89] I will now consider the application of these legal principles to the matter at hand.

[90] At the outset I wish to say that the scope of the declaratory relief sought by the Applicants to the effect that the parties are in all matters bound by the findings of Myers J. and the decision of the Court of Appeal in the Romfo Action is framed too broadly. Some of Myers J.'s findings pertained to factual issues that were collateral. Others were entirely dependent on his assessment of the evidence in that case as to the nature and timing of the representations made to the Romfo plaintiffs and whether and to what extent any of them may have detrimentally relied upon them. I intend to be specific in my ruling as to precisely what the Respondents are stopped from raising, in preference to granting the far-reaching declaration sought.

[91] In *Saskatoon,* the Chief Justice also discussed the concern of the "wait and see" plaintiff who deliberately avoids participating in the first action in order to preserve the prospect of coming forward later to share the fruits of the successful plaintiff without having assumed any of the risk. This unpopular litigant is also dealt with in detail in *Bomac Construction Ltd v. Stevenson,* [1986] 5 W.W.R. 21 (Sask. C.A.). The Respondents suggest, although they did not plead it, that the Applicants

themselves are abusing the Court's process by attempting to ride on the coattails of the Romfo plaintiffs. I do not see it that way. There is nothing to suggest that the Applicants acted other than in good faith in choosing to follow a course different than that of the Romfo plaintiffs and others – a course that the Romfo defendants themselves put into motion. The evidence does not indicate that the Applicants could have readily attached themselves to the Romfo Action but chose instead to lie in the weeds and await a successful outcome before advancing their claim as plaintiffs by counterclaim.

[92] With respect to the issue of privity, it is my view that there is plainly a community of interest sufficient to establish privity between Tylon Homes and the Romfo defendants. In my opinion, the question of privity relative to the Applicants (as plaintiffs by counterclaim) and the Romfo plaintiffs is more vexing. However, based on the expansive approach endorsed in *Saskatoon*, and the approach more recently followed by this Court in *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2010 BCSC 956, I conclude that the interests of the Applicants under their original purchase contracts are sufficiently parallel to the interests of the Romfo plaintiffs so as to establish privity as concerns the government delay excuse and certain other findings of Myers J. To paraphrase Chief Justice McEachern in *Saskatoon*, I find that privity is wide enough to embrace them within its grasp; they were all purchasers pursuant to the original purchase contracts and had the same interest as against the vendors and Mr. Kretschmer, and were all damnified by the purported cancellation of the original contracts.

[93] Having found sufficient privity, I will next address whether the same question test has been satisfied for the purposes of issue estoppel. The answer is partly "yes" and partly "no". As to the affirmative, it is my opinion that issue estoppel, at least in its traditional formulation, does not apply to the government delay excuse because that issue was not actually adjudicated in the Romfo Action. In contrast, I have no hesitation in concluding that the issue of when the decision was taken to cancel the original purchase contracts, including the Ponts' and Ms. Landon's original contracts, has been decided in the Romfo Action and is precluded by the doctrine of issue estoppel from being retried in this proceeding. Consequently, the

parties are bound by Myers J.'s finding that the decision was made some time between July and November 2004.

[94] Inextricably tied to that finding is Myers J.'s conclusion that the Romfo defendants refrained from informing the purchasers of their decision until mid-August 2005. Also linked to it is his finding that the Romfo defendants knew that approval of the subdivision was imminent at the same time that Mr. Kretschmer was representing that the vendors could not proceed because of government delay. Those fundamental issues have been determined in the Romfo Action and cannot be relitigated and are binding on the within actions. It is my further view that even if those issues are not precluded from being raised under issue estoppel, relitigation of them is forbidden by the doctrine of abuse of process.

[95] What then of the entitlement of the Respondents to raise the government delay excuse in their defence?

[96] As I have said, I do not think that defence has been lost as a matter of issue estoppel. It may also be that cause of action estoppel does not apply so as to bar the Respondents from peddling the government delay excuse in these proceedings. I say this because although there is overlap in the substance of the cause raised in these proceedings and the cause of action in the Romfo Action, there are differences which cannot be glossed over. The main difference is that unlike the Romfo Action, fraud is a material element of the cause in these proceedings. However, I need not answer whether that species of *res judicata* does or does not apply because I have concluded that the doctrine of abuse of process is available to the Applicants to bar the Respondents from asserting the government delay excuse. I find this is so even if the Applicants' counterclaims raise separate causes of action distinct in substance from the Romfo Action.

[97] The stubborn fact remains that the advancement of the government delay excuse and its impact on the interpretation of the original contracts, including the original contracts of the Ponts and Ms. Landon, and the entailing ramifications, belonged to the Romfo Action. That remains so even though the Romfo defendants

elected to discard that defence as a matter of litigation strategy. They had a full opportunity to defend themselves in the Romfo Action and chose a defence path that they now regret. They ought not be permitted a second kick at the can (to put it crudely) when they had ample opportunity to assert that position in the Romfo Action. It would turn the doctrine of abuse of process on its head to permit them to resurrect that defence in the absence of compelling circumstances.

[98] Facilitating the potential for a finding in these proceedings that there was governmental delay which entitled the vendors to rely on the delay clause, and hence the cancellation and deposit clauses in the original purchase contracts, would fly in the face of the findings of Myers J. and the decision of the Court of Appeal, and would constitute a misuse of this Court's procedure in a way that would violate the integrity of the judicial decision-making process.

[99] Even if the Respondents have a legitimate complaint against their counsel in the Romfo Action (and let me be clear, I am not making a finding that they do) that is a separate matter unconnected to the Applicants' entitlement to invoke *res judicata* and abuse of process.

[100] I am not persuaded that there are any special factors, either standing alone or cumulatively, that would compel me to exercise my discretion so as to refuse to apply either issue estoppel with respect to the matters I have described, or abuse of process in this case.

[101] In my opinion, the doctrine of abuse of process governs so as to stop the Respondents from asserting that they had the right to cancel the Applicants' original purchase contracts because the development of the Crystal Waters subdivision had been delayed by an act of government authority.

[102] From the foregoing, it necessarily follows that the Respondents are likewise estopped from:

- relying on the cancellation or delay clauses in the original contracts;

- denying that they failed to make reasonable efforts to effect the subdivision;

- denying that the representations made to Mr. and Ms. Pont and Ms. Landon to the effect that the cancellation of the original purchase contracts was due to government delay, was false; and

- denying that any representations to the Ponts or Ms. Landon that the subdivision registration was delayed because of difficulties with the District, has no factual foundation.

[103] I now move to the issue of the suitability of a summary trial of the other factual issues in contention. As I have already noted, the findings of Myers J. regarding Mr. Kretschmer's representations to the Romfo plaintiffs and their conduct alleged to have been carried out in reliance on such representations, are uniquely case specific. In my opinion, those factual findings do not automatically translate to the within proceedings and cannot bind the Respondents relative to the representations made or not made to the Ponts and/or Ms. Landon. Those facts are hotly contested by the parties and require the Court to evaluate the evidence peculiar to the interactions of the vendors and Mr. Kretschmer *vis-à-vis* the Ponts and Ms. Landon respectively, and make findings accordingly.

[104] The Applicants assert that Myers J.'s findings concerning the representations made by Mr. Kretschmer in the Romfo Action should be accepted as admissible on this application as similar fact evidence for the purpose of supporting their claim of misrepresentation in these proceedings. I do not agree. In the first place, it is my view, having regard to the test formulated in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, (1990) 36 C.P.C. (2d) 199 (C.A.), and its extensive judicial lineage, that the nature and effect of any representations made to the Applicants is not suitable for a summary determination under Rule 9-7. In my opinion, the significant conflicts in the evidence and findings of credibility can only be fairly resolved by resort to a conventional trial.

[105] Secondly, the applicable test for the admissibility of similar fact evidence was not developed in submissions. I do not say that as a criticism of counsel but more as an observation, as it was clearly not an issue in the foreground to either side. In a civil suit, the similar fact test requires careful adherence to the framework established in the criminal law context by the Supreme Court of Canada in *R. v. Handy,* 2002 SCC 56, [2002] 2 S.C.R. 908, aimed at balancing the probative value of such evidence against its prejudicial effect: *Gorman v. Tyhurst*, 2003 BCCA 224. Those evidentiary arguments will be available at trial should counsel wish to pursue them.

[106] Except for the matters that I have determined the Respondents are estopped from raising either by way of *res judicata* or the doctrine of abuse of process, or both, they are entitled to litigate the factual matrix surrounding their dealings with the Ponts and Ms. Landon prior to the cancellation of the original purchase agreements and in the aftermath. It will remain open to the Court to determine, among other things, whether on those facts the Applicants can avoid the application of the deposit clause through estoppel or unfairness/unconscionability, and to determine the circumstances surrounding their agreement to enter into the subsequent purchase agreements and the compulsory construction contracts with Tylon Homes.

[107] Accordingly, under either Rule 9-7 or 9-4, I am not able to answer the three questions posed by the Applicants.

[108] If counsel are unable to agree as to costs, they have liberty to make written submissions.

Ballance, J

Madam Justice Ballance