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Get legal advice if no occupancy permit on closing day

I had an interesting response last week to my May 28, 2005 column, in which I told the story of a couple who refused to close their house purchase when a municipal occupancy permit was not available on closing day.

Their lawyer had told them it was illegal to occupy the house unless the city had issued the occupancy permit. The couple found and purchased another house, and when the builder refused to return their $5,000, they asked Tarion/Ontario New Home Warranty Program to intervene.

Tarion denied their claim, saying they should have moved in and relied on the warranty program to ensure that the house was finished and the occupancy permit issued. The couple is appealing the case to the Licence Appeal Tribunal.

It turns out that this is not the first time Tarion (ONHWP) has dealt with the issue of a builder's inability to provide an occupancy permit on closing.

Tim Fuller emailed me last week to say that the same thing had happened to him. He had refused to close his own house purchase in August, 1998, when the builder was unable to obtain an occupancy permit from the municipality. On the day scheduled for closing, the drainage system had not yet been given a "blue dye test" to ensure that the toilets were flushing properly into the city sewer system. The house passed the dye test a week later, the builder undertook to obtain the permit, and the deal closed.

After the warranty program refused Fuller's claim for compensation for the delay, he appealed to the Licence Appeal Tribunal. At issue were extra legal expenses of $600 for work done after the scheduled closing date, and $620 in extra living expenses for the delay.

The appeal tribunal awarded the buyers the full $1,220, acknowledging in effect that their position in refusing to close without an occupancy permit was the correct one.

The builder appealed the tribunal finding, and the case wound up before a three-judge panel of the Divisional Court in Ottawa in November, 2002.

Speaking for the court in Ashcroft Homes v. Fuller (http://canlii.org/on/cas/onscdc/2003/2003onscdc11092.html, see below), Justice Peter Cumming said, "In our view, the obligation was upon the vendor to provide an occupancy permit on or before closing or an explanation as to why such a permit was not necessary. This was not done, which justifies the purchasers, then, on the advice of their lawyer, not closing. We agree the circumstance also justified compensation for the direct cost incurred."

The Divisional Court upheld the decision of the Licence Appeal Tribunal.

A similar issue came before an Ontario court back in the early 1980s. A home purchaser named Tabata sued his lawyer (see below) for failing to tell him that an occupancy permit was required from the Town of Milton before the house could be occupied. The permit was never issued and two years after closing, a basement wall collapsed.

Writing for a three-judge panel of the Court of Appeal, Justice John Arnup said that if it had been known on closing that a permit had not been obtained, the purchaser "would then have had a right to refuse to close or to require an occupancy permit to be obtained by the vendors."

The lawyer had to pay the costs of rebuilding the basement wall.

In 1989, the Ontario District Court in Toronto (two levels below the Court of Appeal) reached a different conclusion. In awarding damages of $150,000 to a buyer named Aiken (see case, below), Justice Corbett decided that the failure to obtain an occupancy permit by itself would not permit the purchaser to refuse to close the transaction. The judge did find, however, that the house "was not finished to the degree that would permit substantial occupancy on (closing)."

Does a purchaser have to move into a new home when no occupancy permit has been issued? Ontario's highest court, the Court of Appeal, says a buyer does not have to close without an occupancy permit. The Licence Appeal Tribunal and the Divisional Court in the Fuller case both say the vendor must provide an occupancy permit or pay for the costs of the delay.

The District Court in the 1989 Aiken case and the current policy of the Tarion Warranty Corporation in the case I wrote about two weeks ago say that the failure to obtain an occupancy permit may or may not entitle a purchaser to refuse to close. According to Tarion, the issue is whether there is a "fundamental breach of contract" so serious that it would require the builder to return the deposit.

Purchasers in similar situations should always consult with their lawyers before taking any action. Legalities aside, the Tarion warranty program does stand behind outstanding construction deficiencies.

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Date: *2003-11-26*
Docket: *02-DV-000718*

Court File Number 02-DV-000718

SUPERIOR COURT OF JUSTICE

(DIVISIONAL COURT)

BETWEEN:

ASHCROFT HOMES

Appellant

-and-

TIMOTHY FULLER AND PATRICIA SWICK AND ONTARIO NEW HOME WARRANTY PROGRAM

Respondents

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REASONS FOR JUDGMENT

GIVEN ORALLY BY THE HONOURABLE MR. JUSTICE E.F. THEN AND THE HONOURABLE MR. JUSTICE A.E. CUSINATO AND MR. JUSTICE P.A. CUMMING

on November 16th, 2002, at OTTAWA, Ontario.

****

APPEARANCES:

Ms. C. L. Burn	Counsel for the Appellant
C. Arnold, Esq.	Counsel for the Respondent

Ashcroft Homes and Timothy Fuller et al

Tuesday,

November 26, 2002

Reasons for Judgment

Cumming, J.

REASONS FOR JUDGMENT

CUMMING, J. (Orally)

The appellant, Ashcroft Homes, appeals the decision of the License Appeal Tribunal seeking three variations of the order of the Tribunal.

The parties entered into a purchase agreement dated November 16th, 1997.

First, the appellant vendor builder seeks to set aside the finding that the respondent purchasers are entitled to compensation as a result of the colour of the exterior siding finish being "grey" rather than "antique rose".

The appellant vendor's sales staff advised the purchasers that "antique rose" would be the colour of the exterior siding, this promise being one item of the Selection Sheet dated February 14th, 1998.

The purchasers accepted this undertaking, which, thereby, became their selection of siding. This promise by the vendor became a contractual obligation by virtue of the addendum amendment dated February 14th, 1998, to the agreement to purchase.

In our view, as found by the Tribunal, the specific contract entered into, in the instant situation, enabled the purchasers to make the selection to the siding. There was a breach by the vendor of this contractual obligation.

The vendor submits that this undertaking is qualified by the provision in Schedule B of the purchase agreement that "all exterior material...are subject to architectural control." In our view, this provision does not imply an arbitrary "control". First, the unqualified specific promise was made by the vendor through the sales staff of "antique rose" siding. The expressed promise constitutes an obligation outside the very general excepting language of Schedule B. Second, there is not evidence in the record that "architectural control" was, in fact, exercised in the situation at hand such as to purportedly govern the selection of the siding for the purchasers' home. Third, given that the siding became the agreed upon selection of the purchasers, s. 18(1) of Regulation 892 R.R.O. 1990 provides that the vendor cannot make a substitution without the written consent of the purchasers.

Second, the appellant submits that the purchasers were not entitled under the contract to kitchen and bathroom cabinets made from natural maple wood and, hence, are not entitled to compensation because the cabinets were, in fact, made of oak.

The Selection Sheet re interior finishes, under the title "kitchen colour", has the written words "natural maple", with the word maple underlined twice.

We agree with the finding of the Tribunal that the purchasers intended to purchase cabinets made of natural maple and that this was promised by the vendor's sales staff (who did not testify and in any way contradict the purchasers evidence on this point). This promise became a contractual obligation, which was breached by the vendor. As well, s. 18(1) of Regulation 892 applies here, as it did in respect of the first issue.

Third, the appellant seeks to set aside the finding of entitlement with respect to delay in closing with the purchasers thereby being entitled to compensation. In our view, the obligation was upon the vendor to provide an occupancy permit on or before closing or an explanation as to why such a permit was not necessary. This was not done, which justified the purchasers, then, on the advise of their lawyer, not closing. We agree the circumstance also justified compensation for the direct cost incurred.

For the reasons given, notwithstanding the able and thorough submission of Ms. Burn, the appeal is dismissed. We add that, in our view, the Tribunal's lengthy and detailed Reasons of Decision were well reasoned, thorough, carefully stated and well supported by the evidence in the record.

"Then, J."

_____

"Cusinato, J."

_____

"Cumming, J."

_____

Released: November 26, 2003

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Tabata v. McWilliams et al.

40 O.R. (2d) 158

COURT OF APPEAL
ARNUP, LACOURCIERE and GRANGE JJ.A.

OCTOBER 27, 1982

Barristers and solicitors Negligence Solicitor liable for losses caused by collapse of part of house when he allowed his client to occupy premises without attaining an occupancy permit Inspection of property to obtain permit would have disclosed defects in construction which led to collapse.

The defendant solicitor acted for the plaintiff on the purchase of a house. The defendant failed to inform the plaintiff that an occupancy permit was required. The plaintiff went into occupation and subsequently part of the house collapsed due to defects in construction. These defects would have been discovered had the municipal inspection required to obtain the permit been carried out. The trial judge (33 O.R. (2d) 32, 123 D.L.R. (3d) 141, 19 R.P.R. 137) held the defendant liable for the costs of rebuilding the wall. The duty to inform the plaintiff of the need for an occupancy permit fell within the obligations of a solicitor in this transaction. The defendant appealed and the plaintiff cross-appealed on two items of costs disallowed by the trial judge.

Held: the appeal of the defendant should be dismissed; the cross-appeal of the plaintiff should be allowed in respect of the cost of replacing a defective condition of the house, but dismissed in respect of the claim to recover the legal fees paid to defendant. As regards the latter claim, the fee has been earned in that the plaintiff had now been given that which the fee entitled him to.

APPEAL and CROSS-APPEAL from a judgment by Lerner J., 33 O.R. (2d) 32, 123 D.L.R. (3d) 141, 19 R.P.R. 137, against a solicitor for professional negligence.

R. N. Bates, and I. Rogers, Q.C., for defendant, appellant.

T. Dunne, and E. Forster, for plaintiff, respondent.

The judgment of the Court was delivered orally by

ARNUP J.A.: This appeal by the defendant McWilliams, a solicitor, is from the judgment of the Honourable Mr. Justice Lerner delivered on May 28, 1981, and reported in 33 O.R. (2d) 32, 123 D.L.R. (3d) 141, 19 R.P.R. 137. There is a cross-appeal by the plaintiff with respect to one item of the damage claimed to have resulted from the acts of the solicitor.

The facts are dealt with in detail in the judgment of the learned trial judge and I do not propose to repeat them here other than such as are essential to give the background of the appeal and our decision thereon. It is sufficient to say that the firm of the appellant was retained to act for the plaintiff in the purchase of a residential property which, it subsequently developed, had been constructed by the vendor himself as his own contractor. In the course of his work as the purchaser's solicitor, the appellant on October 1, 1975, wrote a letter to the Town of Milton into which the former Township of Nassagaweya had been incorporated since the house was built. In that letter the appellant asked whether the location of the structure as shown on an enclosed survey complied with the zoning regulations of the municipality; whether there were any outstanding work orders against the lands and buildings; whether the site, grading and elevation plan was approved at the time of the issuance of the building permit; if the final inspection and subsequent approval covering construction and lot grading had been given, and finally (and most important in this case) whether an occupancy permit was required prior to occupancy.

The municipality replied to this letter on October 8th by letter stating that the subject property complied with the building and zoning by-laws, that the writer was not aware of any outstanding work orders and stating:

> An Occupancy Permit must be obtained prior to the premises being occupied.

As found by the trial judge, and indeed not disputed, the appellant did not communicate the statements in this letter to his client and in fact did nothing with respect to the matter of an occupancy permit. As the trial judge has found, a basement wall in the property collapsed some considerable time after the purchase had been completed; it was found by the trial judge as a fact that the wall had been improperly constructed and that for the cost of making good the collapsed wall and sundry other items related thereto, the defendant McWilliams was liable.

In addition, it was asserted at the trial that the weeping tile which was uncovered at the time of the work necessary to repair the wall and eventually to reconstruct it, had been improperly installed; it was above, rather than alongside, the footings. At the time the purchase was closed, the weeping tile was, of course, several feet underground, but evidence was led that the condition which the defective weeping tile installation occasioned would have been discovered on inspection because of the presence of a phosphoric efflorescence on the interior walls of the basement, which in turn would have led to further investigation, because it would have appeared that something was wrong with the drainage of the property.

The cross-appeal relates to the cost of taking out the old weeping tile and installing new weeping tile properly.

At the conclusion of the submissions of counsel for the appellant, we indicated that we did not require to hear counsel for the respondent on the main appeal. We then proceeded to hear full argument on the cross-appeal.

In the particular circumstances of this case, we think it was both reasonably foreseeable and within the reasonable contemplation of the parties that if the defendant had done what he should have done when he learned that an occupancy permit was required and had never been obtained, the defects in the construction in all probability would have been ascertained. The plaintiff would then have had a right to refuse to close or to require an occupancy permit to be obtained by the vendors, in which case the defects in all probability would have been required to be fixed before the permit was issued. We therefore think that the plaintiff should recover not only the heads of damage allowed by the trial judge, but also the cost referable to correcting the defective installation of the weeping tile.

We agree with the final conclusion of the trial judge that on the question of damages in this case there is no difference whether the damages are recoverable in tort or in contract. As the trial judge said [at p. 50 O.R.]: "The losses here were both 'reasonably foreseeable' and 'reasonably contemplated'".

We were asked, in connection with the cross-appeal, to vary the judgment by including within the heads of damage the legal fees of $610 paid by the respondent to the appellant. We do not allow this claim. The plaintiff is theoretically made whole by the award of damages that is embraced within our decision.

In the result, accordingly, the appeal of the defendant McWilliams is dismissed with costs. The cross-appeal of the plaintiff is allowed with costs and para. 1 of the formal judgment is varied by adding thereto the following:

> (f) The costs referable to the defective installation of the weeping tile and its replacement.

Appeal dismissed; cross-appeal allowed in part.

Aiken v. Regency Homes Inc.

Between
David Aiken and Roseanne Aiken, Plaintiffs, and
Regency Homes Inc., 478293 Ontario Limited, Israel Katz,
Joseph Fishman and Dorsam Investments Limited, Defendants

Action No. 268017/86

Ontario District Court - York Judicial District
Toronto, Ontario
Corbett D.C.J.

November 30, 1989

William G. Dingwall, Q.C., and Thomas S. Kent, for the Plaintiffs.
Milton A. Davis and Suzette Blom, for the Defendants, Regency Homes Inc., 478293 Ontario Limited, and Israel Katz.
Melvyn L. Solmon and Randall M. Rothbart, for the Defendants, Joseph Fishman and Dorsam Investments Limited.

CORBETT D.C.J.: This action arises out of an agreement of purchase and sale dated February 15, 1985 which was not completed. The plaintiffs claimed specific performance against the defendants Regency Homes Inc. ("Regency Homes") and 478293 Ontario Limited ("478"): damages against the defendants Katz and Fishman for inducing breach of contract; general damages against all defendants for fraudulent misrepresentation; and a declaration that the plaintiffs' claim for specific performance ranks in priority to a charge registered against the subject lands in favour of the derendant Dorsam Investments Limited ("Dorsam"). The defendant, Fishman, is the sole director and officer of Dorsam.

THE AGREEMENT OF PURCHASE AND SALE

On February 15, 1985 an agreement of purchase and sale of lot 7, plan 65M-2210 in the Town of Vaughan was entered into between the plaintiffs and Regency at a consideration of $210,000. The vendor agreed to complete the construction of a dwelling house and the closing date was July 15, 1985. By amendment to the agreement dated March 25, 1985, the closing date was extended to October 31, 1985, and time was to remain of the essence.

Stanley Arbus, solicitor for the plaintiffs, delivered a letter dated October 30, 1985 to Bernard Noik, solicitor for the vendor, stating it was apparent the vendor would not be closing the transaction and asked if the vendor was extending the closing for 90 days as provided by the agreement of purchase and sale.

Mr. Noik advised Mr. Arbus that his letter was referred to the vendor. No response was communicated to the purchasers from the vendor until Mr. Noik's letter of November 20, 1985 where he stated,

> I confirm I advised that, based on my information from my client, bricklayers will be on the site shortly along with other forces necessary to complete the transaction of purchase and sale. I have written my client and have requested specific information and when same is available I will advise.

Mr. Arbus wrote Mr. Noik on November 21, 1985 requesting that the vendor inform him immediately of the final closing date (Exhibit 1-8). He also referred to the vendor not being able to find a bricklayer, to the vendor's refusal to hire a bricklayer suggested by the plaintiffs, and to Mr. Noik's assurance that something would be done towards completing the property.

By letter dated January 20, 1986, Mr. Noik offered a choice to the purchasers through Mr. Arbus to close the transaction as of that date subject to adjustments and subject to a hold back in the sum of $50,170.00 for the uncompleted work or, in the alternative, that the closing is extended to March 30, 1986, all other terms of the agreement of purchase and sale to remain the same. By letter dated February 25, 1986, Mr. Arbus advised his clients were pleased to complete the transaction in accordance with the agreement of purchase and sale.

On March 18, 1986 Mr. Arbus wrote to Mr. Noik requesting a new closing date as it appeared the vendor would be unable to have the premises completed on the closing date. There was no response to that letter and the second date fixed for closing went by.

After the date fixed for closing in March 30, 1986, neither party acted to terminate the agreement. The plaintiffs remained anxious, if not desperate, to have the house completed. in spite of problems, neither the vendor nor its agents indicated the house would not be completed. At a meeting with Mr. Katz on December 15, 1985 the plaintiffs asked if there were financial problems and Katz replied, "We are light years away from bankruptcy." Mr. Aiken asked if they could return the money and consider the deal null and void, but Katz refused because the home was custom-built for them and he said he intended to complete it. This is confirmed in Mr. Noik's letter to Mr. Aiken of December 16, 1985 (Exhibit 1-13).

By telephone conversation of May 8, 1986 Mr. Noik offered to close if the purchasers would pay $32,000.00 and take the house as-is. On or about May 13, 1986, David Aiken met Mr. Katz who told the plaintiff that he had no further funds available to complete the house, that the bank would take over, and that dealings with him were at an end. David Aiken knew generally that the real estate market was rising at this time. He felt that if he did not agree to take the house in its existing state of construction, the matter would end up in litigation. The plaintiffs agreed to take the house as-is. However, Mr. Arbus subsequently advised the plaintiffs not to close the transaction without an occupancy permit or the HUDAC warranty. Mr. Arbus testified it was more prudent not to close since there was no occupancy permit and because the house was not finished. The plaintiffs accepted his advice and did not close the transaction.

By letter of May 13, 1986 delivered to Mr. Noik, Mr. Arbus fixed the closing date for May 16. Mr. Arbus was provided with funds to close. Although the plaintiffs pleaded that they notified Regency on May 13, 1986 that the plaintiffs would be ready, willing and able to complete the transaction with the dwelling in its then current stage on May 16, 1986, the transaction did not close on May 16th. Tender was waived by agreement between the solicitors.

On May 21, 1986 Mr. Noik wrote to Mr. Arbus advising the vendor was prepared to close the transaction on an as is basis for the full purchase price. Alternatively, Mr. Noik advised the vendor relied on the provision of the agreement which provided that if the dwelling is not completed the vendor may terminate the agreement. On May 22, 1986, Mr. Noik proposed to complete the transaction on May 23, 1986. The plaintiffs did not agree to this proposal and commenced this action on June 9, 1986.

LIABILITY FOR FAILURE TO COMPLETE AGREEMENT

The plaintiffs submit that the transaction did not close solely because the defendants collectively and individually refused to complete the house and made no reasonable efforts to do so.

The defendants submit that the agreement of purchase and sale was at an end on March 30, 1986, and that there was a new agreement entered into that the property should be transferred as-is on May 13th. In the alternative, they submit that if the contract was not at an end on March 30, 1986, the plaintiffs were obliged to complete the contract and sue for damages in respect of the outstanding matters, namely the lack of HUDAC warranty and the minor construction to be completed.

The oral agreement in May to take the house as-is was not a new agreement and the original agreement of purchase and sale continued. In my opinion, the oral agreement purported to amend the original agreement and is unenforceable as it was made without consideration. As a result, the rights of the parties are to be determined as at March 30, 1986.

As at March 30, 1986, the house was not completed. The course of construction was slow. The foundation was poured in May, 1985. There were difficulties in getting trades and the plaintiffs had engaged their own contractors for certain work. Construction liens were registered. In January, 1986, work began again after three months of little being done. By May, 1986 the frame work, brick work, drywall, stairs, roof, some electrical and plumbing work, ceramics, insulation, and the windows were completed.

Mr. Katz testified the outstanding matters in May were electrical completion work, some plumbing, painting, broadloom on the second floor, paved driveway, sodding, and the kitchen cabinets. His best estimate of the cost to complete was $10,000 to $12,000 and it would take seven to ten days to complete.

The vendor agreed to construct and complete a dwelling in accordance with plans and specifications. The agreement provided as follows:

> ...Aside from delays and approvals, if for any reason the completion of the house shall be delayed, the Vendor may, at its option, further extend the Completion Date herein for ninety (90) days in order to complete the house and the closing date shall be extended accordingly to a date ninety (90) days after the date herein provided or the extended date. If the Vendor should be unable to substantially complete the house within such extension of time, the deposit shall be returned to the purchaser by the Vendor without any interest and the contract shall be at an end and the Vendor and its agent shall not be liable to the purchaser in any way for damages, or otherwise. Monies paid for extras ordered by this agreement or any other authorization shall be non-refundable.
>
> In the event that the house erected on the lands should be substantially completed by the closing date or postponed closing date... the sale shall be completed on that date and the vendor shall complete any outstanding items of contruction required by the Contract within a reasonable time thereafter, having regard to weather conditions and the availability of trades and supplies. The house shall be deemed to be substantially completed when the interior work has been finished to permit substantial occupancy...

Schedule A to the agreement provides "Closing not contingent on occupancy permit."

The plaintiffs pleaded the house was not complete by March 30, 1986 and was not fit for habitation. The defendants pleaded that they relied upon the agreement quoted above respecting inability to complete after the 90-day extension.

While the failure to obtain an occupancy permit by itself would not permit the plaintiffs to refuse to close the transaction, I find as a fact that the house was not finished to the degree that would permit substantial occupancy on March 30, 1986. Accordingly, the plaintiffs were not obliged in law to complete the sale. I also find as a fact on the evidence that the house was not substantially completed in May, 1986.

With respect to the HUDAC warranty, the agreement provided as follows: "Vendor to provide HUDAC New Home Warranty. Vendor is registered as a builder under the plan and the dwelling will be enrolled under that plan." The registration of Regency Homes under the Ontario New Home Warranties Plan Act had been revoked. By decision released March 10, 1986, the Commercial Registration Appeal Tribunal refused to renew the registration of Regency Homes on the grounds that the company's undertakings would not be carried out in accordance with law and integrity and honesty as required by section 7 of the Ontario New Home Warranties Plan Act.

Had the lack of HUDAC registration been the only outstanding matter, the parties would likely have closed the transaction and, in such circumstances, an action for damages would have been an appropriate remedy in respect of this breach of warranty.

At March 30, 1986, neither the vendor nor the purchaser treated the agreement as terminated. The plaintiffs continued to insist on performance until May, 1986. At that time the vendor refused to complete the agreement in accordance with its terms and purported to terminate the agreement.

In conclusion, the vendor breached the agreement of purchase and sale and is liable to the plaintiffs for the failure to complete.

RIGHT TO DAMAGES IN LIEU OF SPECIFIC PERFORMANCE

Although the plaintiffs sought specific performance of the agreement, specific performance cannot be ordered because the subject lands were sold under power of sale to Max Aiken Limited on April 27, 1987 and conveyed to third parties on June 8, 1987 for $340,000. David Aiken is a director and 50% shareholder of Max Aiken Limited. Max Aiken is David Aiken's father. The net surplus sale proceeds have been ordered to be paid into court by the Supreme Court of Ontario in prceedings commenced by Dorsam and 478 against Max Aiken Limited and the matter was referred to the Master for an accounting. The plaintiffs were added as parties to the reference.

In their statement of claim, the plaintiffs did not claim damages for breach of contract as an alternative to specific performance. At trial, evidence was lead respecting the plaintiffs' damages as a result of the failure to complete the agreement of purchase and sale. Because the claim for damages for breach of contract in addition to or in substitution for specific performance was not pleaded, I invited counsel to address me further on the issue.

The first issue to be determined is whether an amendment to the statement of claim is necessary in order to recover damages in lieu of specific performance. If an amendment is required, the court must then determine if such amendment should be granted after the conclusion of the trial and before judgment.

The plaintiffs submit that the disappearance of the equitable claim for specific performance does not disentitle the plaintiffs to damages and that the plaintiffs may elect the remedy of damages at any stage in the proceeeding prior to judgment. The defendants submit that by claiming specific performance without an alternative claim for damages, the plaintiffs have in effect elected specific performance and are bound by that election. The defendants further submit that by not pleading damages in the alternative, a substantial benefit has been obtained by the plaintiffs by the registration on title of the certificate of pending litigation which the defendants may have moved to vacate had the alternative claim for damages been pleaded.

Counsel for the plaintiffs and counsel for the defendants relied upon Dobson v. Winton & Robbins Ltd., [1959] S.C.R. 775. In that case, the plaintiff vendor sued for specific performance and, a few days before trial, accepted an offer to sell the property. Mr. Justice Judson stated at p. 777:

> Any claim for specific performance had, therefore, disappeared and the action, if properly constituted, had become one for damages. The real question in the litigation emerged only at this time--whether the plaintiff, by selling as he did, could go on with a claim for damages and whether his pleading was adequate for this purpose.

In the Dobson case, the court reviewed the prayer for relief which sought (a) specific performance, (b) damages for de1ay, and (c) in the alternative to (a) and (b), forfeiture of the deposit and punitive damages for failure to perform the contract. The court concluded that (c) was clearly identifiable as a common law claim for breach of contract and accordingly the court found that damages could be awarded on the pleadings.

In this case, the plaintiffs claimed:

a) specific performance on the agreement against Regency and 478;

b) certificate of pending litigation;

c) general damages of $250,000 for inducing breach of contract against the defendants Katz and Fishman;

d) the declaration that the plaintiffs' claim for specific performance ranks in priority to a charge registered by Dorsam;

e)

e) general damages of $250,000 for fraudulent misrepresentation against all defendants;

f) special damages of $20,000 against Regency;

g) solicitor and client costs.

Clause (f) is a common law claim for damages, being the claim for the return of deposit monies. However, no claim for general damages for breach of contract in lieu of specific performance was pleaded.

While the court has power under s. 112 of the Courts of Justice Act, 1984 to award damages in addition to, or in substitution for specific performance, in my opinion, I do not have the power to award general damages for breach of contract on the statement of claim unless an amendment is granted.

Pursuant to rules 26.02 and 26.06 of the Rules of Civil Procedure, the court has jurisdiction to amend this statement of claim at or after the trial. I have had regard to the following in addition to the nature of the amendment sought:

a) prejudice or injustice to the opposing parties;

b) nature of the case met by the defendants: the element of surprise;

c) delay and reason for delay in moving to amend; and

d) whether opposing parties may be adequately compensated in costs.

The plaintiffs submit that the evidence related to the claim for damages was canvassed fully at trial and at discovery and that the defendants were not taken by surprise. The plaintiffs submit that no injustice would be done and rely on Legault v. Chapleau Realties and Equities Ltd., 1 C.P.C. 220, 225. In that case an amendment to plead waiver was allowed because the evidence relating to the plea was fully disclosed at trial, the respondent was not taken by surprise, no injustice would be done, and the matter could be compensated by costs.

The defendants submit that the proposed pleading is improper in that no amount was claimed. In argument, the plaintiffs sought $200,000 and I am dealing with the proposed amendment as one to add "or in the alternative damages in the sum of $200,000" in paragraph 1(a) of the statement of claim. In my view, a more precise pleading at this point may be to delete the claim for specific performance and to claim damages for breach of contract.

The defendants submit that allowing the amendment prejudices the defence because they have not pleaded to such a claim for damages. For example, mitigation may have been pleaded by the defendants. The defendants rely on Burns v. Pocklington (1985), 5 C.P.C. (2d) 18 (C.A.) where MacKinnon A.C.J.O. denied an amendment which would require the defence to meet a new issue of quantum meruit and where the defence could not be compensated in costs.

The defendants submit that the issue of damages was not canvassed as thoroughly as if the claim for damages for breach of contract had been made by the Plaintiffs. The defendants referred to cases including Skender et al. v. Barker et al. (1987), 24 C.P.C. (2d) 147 (B.C.S.C.) and Color Your World Inc. v. Robert F. Avery Holdings Ltd. and Avery (1987), 56 Alta. L.R. (2d) 190 (C.A.), Lion Oil Trading Co. Ltd. and Shell Canada Limited (1987), 10 W.D.C.P. 215 and Loucks v. Peterson (1988), 67 O.R. (2d) 325 (D.C.) which discuss various circumstances where amendments were not permitted.

The evidence of damages adduced at trial by the plaintiffs was thorough and was the same evidence which would have been adduced by the plaintiff had the plaintiff claimed damages for breach of contract. Certainly the plaintiffs were able to maintain the benefit of having a certificate of pending litigation on the property up until the sale to Max Aiken Limited, but there is no evidence of prejudice to the defendants by their inability to move to vacate the certificate of pending litigation.

Although the defence now submits further evidence would have been adduced if the appropriate claim was made, I cannot find this to be the case having regard to the issues canvassed at discovery and to the nature of the other claims made, in particular, the claim for damages for inducing breach of contract. Consideration of damages for inducing breach of contract necessarily includes consideration of the damages which flow from the breach itself.

Accordingly, I have allowed the plaintiffs to amend their pleadings to claim damages for breach of contract.

The plaintiff also sought to claim pre-judgment interest which was not pleaded. In my opinion, such a claim must be specifically pleaded.

Section 138 of the Courts of Justice Act, 1984 provides in part:

> 138(1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate..

The plaintiffs sought pre-judgment interest during the course of argument after the evidence was concluded. No formal motion was made to amend the pleadings; nor was such a claim added to the motion to plead damages in lieu of specific performance. In the circumstances of this case and having regard to the lateness of the motion to amend the statement of claim to claim damages, and having regard to the fact that the proceeds of the sale were paid into court, I decline to permit the plaintiffs to claim pre-judgment interest. In any event, I would exercise my discretion and disallow such interest pursuant to s. 140 of the Courts of Justice Act, 1984 having regard to the conduct of the proceeding.

Measure of Damages

The general measure of damages for breach of contract is to place the aggrieved party in the same position as if the contract had been performed. In respect of a contract for the sale of land, the plaintiff may recover reasonably foreseeable out of-pocket expenses and may also recover damages for loss of the bargain in certain circumstances.

The plaintiffs sold their own home at the end of October, 1985 and lived at Roseanne Aiken's mother's home and paid her mortgage and condominium expense. The plaintiffs claimed the cost of the mother's flight to Texas. The plaintiffs incurred moving and storage charges for their furniture. The plaintiffs rented a cottage from May to September, 1986 for $2,000. The plaintiffs rented an apartment from October, 1986 to February, 1987 at $470.72 per month for two months and $489.55 for three months. I would not allow the alleged "key money" of $3,000 agreed to be for furniture of sublessor. The plaintiffs purchased another home for $245,000 which closed on February 26, 1987. If required to do so, I would assess reasonable rent and storage expenses from November, 1985 to February, 1986 at the rate of $500 per month for 16 months for a total of $9,000. The claim made respecting kitchen cabinets was not adequately proved and was eventually assumed by Max Aiken Limited.

On June 4, 1985, Regency Homes and the plaintiffs agreed to ten modifications respecting construction (Exhibit 1-36). David Aiken testified that Mr. Katz advised him that the cost would be $7,000, but if he wanted to pay cash, the cost would be $4,000, except that the receipt would say no charge. I find the sum of $4,000 was paid by David Aiken to Mr. Katz on June 6, 1985.

I find the plaintiffs made the following extra payments:

June 6, 1985 $4,000
March 9, 1986,

garage door	220
March 24, 1986 whirlpool	1,878
March 31, 1986 drywall contractor	685

TOTAL	$6,783

Damages for loss of the bargain are recoverable in cases involving, among others, fraud or bad faith or wrongful repudiation by the vendor. A vendor has a duty to make a genuine effort to obtain what is necessary to carry out a contract. (Mason v. Freedman, [1958] S.C.R. 483.)

In Cull v. Heritage Mills Developments Limited (1974), 5 O.R. (2d) 102 (H.C.) where a defendant wrongfully repudiated a contract for the sale of a house, the plaintiff was entitled to recover damages in the amount of the difference between the contract price and the market value of the property at the time of the breach.

Thompson, J. stated at page 110:

> The right of the vendor to terminate in any event, arises only if it is unable to substantially complete within the meaning of the contract for reasons beyond its control.

He went on to find that:

> The reason for delay and the failure to complete by the time appointed by the contract was not the inability of the Defendant within the meaning of the agreement, but simply its unwillingness.

Thompson, J. assessed damages to reflect the increase in value to the time of the breach and would not have allowed the plaintiff the cost of renting an apartment while awaiting the closing of another house he purchased.

In Metropolitan Trust Co. of Can. et al. v. Pressure Concrete Services Ltd. et al. (1973), 3 O.R. 629 (H.C.J.), Holland J. assessed damages to include the increase in value of land from the date of closing to the date of judgment.

If damages were assessed at the date of breach of the contract. there being no evidence of the difference in value of the property at the date of the breach, I assess them as follows:

return of deposit	$20,000
extra payments	6,783
rent and storage	9,000

	$35,783

If damages were awarded for loss of the bargain and reflected the increase in value of the property, the appropriate date would be spring of 1987 when the property was sold for $340,000. The difference between the contract price and this resale price is $130,000. On this basis, I would not allow the extra payments which are reflected in the resale value. I would also deduct the amount of any allowances found by Master Linton to Max Aiken Limited from the sale proceeds which represents the increase in value from the contract price and the resale price. For the purposes of assessing damages, any relevant recovery by Max Aiken Limited is recovery by the plaintiffs.

The defendants submit that the plaintiffs have the benefit of the appreciation in value of their own home from February, 1986 to June, 1987. No evidence was adduced to determine such an amount. As a result, I am not discounting the re-sale value. Further, there is no evidence of any unreasonable delay by the plaintiffs in effecting the subsequent resale.

The plaintiffs submit that the defendants Fishman and Katz concocted a scheme to put them in a position to frustrate creditors, exact additional consideration from purchasers, and to avoid contracts. The defendants submit the failure to close was the result of a lack of trades and a lack of funds to complete.

In order to determine whether the defendants wrongfully refused to complete the agreement or acted in bad faith, some description of the course of the project and surrounding circumstances is helpful.

The subject lands were one lot in a 38-unit housing subdivision development in the Town of Vaughan financed by Counsel Trust Company by way of mortgage. This project was also referred to as Regency Manor. By transfer registered June 21, 1984. Regency Homes transferred title to 478. Mr. Katz and Mr. Fishman were the sole directors of Regency Homes and 478. It appears Mr. Fishman resigned from these companies effective February 28, 1986. 478 was dissolved on June 16, 1986, and Regency Homes was dissolved on November 30, 1987. On November 1, 1984, a mortgage was registered by 478 in favour of Counsel Trust in the sum of $350,000 on lot 7 and other lots. On June 27, 1985, a mortgage was registered by 478 in favour of Counsel Trust in the sum of $97,000 on lot 7 and the sum of $41,000 was advanced under this mortgage.

On December 6, 1985, 478 agreed to sell 13 lots (not including lot 7) in the subdivision to Tromwood Homes Inc. ("Tromwood"), whose principals were Tuvia Sagi (Mr. Fishman's son-in-law) and Warren Weiss, for $1,391.000, being $107,000 for each lot with a closing date of December 10, 1985. Mr. Fishman testified that Counsel Trust had given an ultimatum to sell the remaining lots and that no one else wanted to buy them. He therefore sold the lots to Tromwood for no consideration except repayment of financing on the sale of lots.

On December 16, 1985, an agreement (Exhibit 24) was entered into between Tromwood, Katz and Fishman in trust, Mr. Fishman, Mr. Katz, Tuvia Sagi and Warren Weiss. This agreement created a joint venture respecting the 13 remaining lots in the Vaughan subdivision which were sold to Tromwood whereby Tromwood and Katz and Fishman in trust would share the profits, 60% for Katz and Fishman and 40% for Tromwood, if at least ten houses were sold and closed by May 30, 1987. On December 17, 1985, Counsel Trust demanded payment from Regency Homes of outstanding indebtedness in respect of a $4.9 million land loan registered on June 29, 1983 and executed by Regency Homes, Regency Investments Ltd., Katz and Fishman, in respect of construction loans to 478 in the principal amount of $456,030, and in respect of the $350,000 loan.

On January 15, 1986, an agreement (Exhibit 1-34) was entered into between Ccunsel Trust, Regency Homes. Regency Investments Ltd., 478, Kamron Holdings Inc., Fishman, Katz and Castlerigg Investments Inc. Tromwood executed the agreement, but not as a party, which agreement recited the indebtedness to Counsel Trust which had demanded payments by December 30, 1985 (extended to January 15, 1986). Clause 2 of the agreement provided that Fishman and Katz would advance on a timely basis all funds required to accomplish, among others,

> ...payment on a timely basis of all amounts required to be paid to third parties in order to close agreements of purchase and sale with third party purchasers on lot 7, 8, 9, 10, 16, 35 and 36;...

This agreement required closing on or before January 30, 1986 of the "14" vacant lots at a price of $1,498,000. (Lot 24 appears to be added as the 14th lot.)

Mr. Katz is the sole director and officer of Regency Investments Ltd. and Kamron Holdings Incorporated (Kamron), both incorporated in 1976. Mr. Fishman is the sole director and officer of Castlerigg Investments Inc., incorporated April 3, 1985.

Lot 10 was transferred for $149,500 and registered on March 5, 1986. Lot 16 was transferred for $224,900 and registered on March 11, 1986. On March 19, 1986, a mortgage in the principal sum of $150,000 was registered from 478, as mortgagor, and Dorsam, as mortgagee, in respect to lots 7, 8, 35 and 36. Lot 9 was transferred for $269,104 and registered on April 25, 1986. Lot 35 was transferred for $260,000 and registered on May 2, 1986. On August 18, 1986, a deed was registered for lot 36 from 478 to Tromwood and subsequently sold by deed registered October 3, 1986 for $294,000.

Lots 7 and 8 were the only transactions which did not close.

The defendants Katz and Fishman had been in business together for about ten years. They were involved in three housing projects: the subject subdivision in Vaughan, 36 units in Markham, and 25 units in Scarborough. The projects were carried out through various companies. Mr. Fishman testified the subject project was carried on by Regency Homes as trustee. There is no written agreement respecting the relation between the defendants, Katz and Fishman, but they agreed that profits and losses were to be shared equally and, for the most part, put through their respective companies, Kamron and Dorsam. Generally, Mr. Katz, who had been in the building and development business for ten years, ran the day-to-day operations and was more involved with the site. Mr. Fishman described his involvement as one of signing cheques. I find that at all material times, the defendants Katz and Fishman were equal co-venturers who used a variety of companies, which they alone controlled, to advance their own interests.

Mr. Fishman testified that Regency did not have the money to complete the house because Counsel Trust called their loan and that Dorsam and Kamron put up huge amounts of money to complete the houses. He testified that Mr. Katz was supposed to finish the last houses in Vaughan, but that he abandoned the project. I do not accept the defendants' contention that the plaintiffs requested excessive modifications. In any event, all such modifications were approved by the vendor.

Mr. Katz testified under normal circumstances a house like this one could be built in five to eight months. He agreed other houses were completed before the plaintiffs' house. He agreed he had authority to send workers where he wanted on the project.

When financial problems were experienced on the project, a new account and ledger were used. Monies were transferred from the Regency Homes account to the KGN account to pay trades and to avoid lien claims against Regency Homes. Mr. Fishman testified his company put up to $300,000 or $400,000 into the project, not including the March $150,000 mortgage.

It is extremely difficult to ascertain from the documents and books of account what monies were used for which project and for which house. For example, Exhibit 19-4 is a cheque from Dorsam to Regency Homes for $20,000, which was endorsed by Regency Homes and deposited in the Regency Centre bank account (another project). Mr. Fishman testified he used the Regency Centre account to pay creditors of Regency Homes.

Again, Exhibit 19-1A is a cheque dated March 7, 1986 from Asim Developments Inc. (Asim) to K.G.N. Developments for $4,000. Exhibit 19-1B is a cheque for $38,000 dated March 17, 1986, to 478 from Mold-Die Engineering Limited (Mold-Die). Mr. Fishman is the sole director of Asim and both Mr. Fishman and Katz were the first directors of Mold-Die. Mold-Die and Asim are two companies referred to in the books of account for the Vaughan project. Mr. Fishman testified Mold-Die was a trustee for Dorsam.

Paul Colodny, a chartered accountant, acted for Regency Homes and Dorsam. He treated Mold-Die, Regency Homes, and 478 as trustee companies, and no statements were done for trustee companies. He was unable to ascertain what the monies going into and going out of the accounts represented. I have no difficulty finding that money was continually moved from one project to another, from one bank account to another and from one company to another.

The bookkeeper for Regency Homes, Susan Aleong, testified money came out of any convenient account and it would be documented at year-end by inter-company loans at the end of the year. She testified the books reflect that personal cheques were brought in to make the personal mortgage payments. She expressed surprise and found it hard to believe there were no entries in the credit journals. There were no financial statements for Regency Homes for 1984, 1985, or 1986.

Neither Mr. Fishman nor Mr. Katz were credible witnesses respecting the financial affairs of the project or the many companies used by them. For example, Mr. Fishman testified that when Regency Homes got into trouble, monies were placed in the KGN account to pay trades. He testified that this was not to avoid creditors, but was done so that creditors could get money for the work they were doing. Mr. Fishman had earlier testified under oath that the KGN account was used as a device to flow money through to avoid creditors of Regency Homes. I find as a fact that monies were put through the KGN account in order to avoid lien claims against Regency Homes.

Mr. Katz testified that personal bills were not paid out of Regency Homes and, if they were, they were so marked. However, I find that personal bills, such as mortgage payments on their residences, OHIP, credit cards, of Katz and Fishman were paid from the corporate accounts and were not so marked. Mr. Katz' testimony that funds and accounts were intermingled solely for convenience, such as if the appropriate deposit book was not available, is untenable. Mr. Katz gave contradictory evidence at trial and at discovery. For example, despite the fact profits were shared 60/40 with Tromwood, Mr. Katz stated at his discovery that Tromwood was completely independent and had nothing to do with Regency Homes.

I find that sufficient funds were advanced to complete construction of the dwelling on lot 7 and that in spite of the general difficulties experienced in getting trades, the defendants could have completed the dwelling by the end of March, 1986, and wilfully refused to do so. The vendor's right to terminate was not validly exercised in these circumstances. Therefore, I find that the plaintiff is entitled to damages for loss of the bargain in the sum of $130,000, plus the return of the deposit in the sum of $20,000.

LIABILITY OF DORSAM INVESTMENTS LIMITED

The plaintiffs sought a declaration that their claim for specific performance ranked in priority to a charge registered in favour of Dorsam. By Reasons for Judgment delivered on November 1, 1989, Master Linton, with the agreement of counsel, determined this issue in the Supreme Court action. He found that Dorsam advanced $150,000 under the mortgage with actual knowledge of the plaintiffs' agreement of purchase and sale and concluded the plaintiffs' claim would rank in priorty to Dorsam's claim. It is unnecessary, therefore, for me to determine this issue.

The plaintiffs submit that the defendants Katz and Fishman are personally liable on a number of grounds. To a large extent these issues and the evidence relating to them overlapped. These grounds include:

a) fraudulent misrepresentation;

b) fraud by the corporate defendants for which the directors are liable or fraud by the personal defendants;

c) inducing breach of contract.

LIABILITY OF DEFENDANTS KATZ AND FISHMAN

On the first ground, the claim for fraudulent misrepresentation related to the representation that Regency could convey title and that the plaintiffs should have been told the company was a bare trustee. This claim has not been pleaded with particularity and has not been established by the plaintiffs. This claim is dismissed against all defendants.

With respect to fraud, the plaintiffs submit that the defendants Fishman and Katz are personally liable because they concocted an illegal fraudulent scheme designed to frustrate creditors and to exact additional consideration from purchasers. The plaintiffs submit the personal defendants were in a fiduciary position and were obliged as officers and directors of the vendor to do all they could to ensure that Regency completed the contract. The plaintiffs' pleading respecting fraud is as follows:

> 23. The plaintiffs say that all of the defendants entered into a scheme to defraud the plaintiffs when land values increased by:

a)
failing to complete the home in time for completion;

b)
encumbering the title to the lands so that Regency could not be forced to complete;

c)
demanding an increased purchase price as the price of performing the contract already entered into...

The defendants submit that the failure to complete the agreement was not part of a scheme to defraud the plaintiffs. The defendants subnit financial difficulties were experienced when Counsel Trust called its loan and there were difficulties in obtaining certain construction trades.

In my opinion, the evidence falls short of establishing fraud by the personal defendants or their companies in relation to the plaintiffs. The plaintiffs also sought to establish liability on the grounds that the personal defendants breached trustee obligations in relation to the funds required to be held under the Ontario Construction Lien Act, 1983. This issue was not pleaded with particularity and I am unable to find the defendants Katz and Fishman liable for breach of trust.

On the remaining ground, the plaintiffs claimed damages against the defendants, Katz and Fishman, for inducing a breach of contract. The plaintiffs pleaded that Mr. Fishman wilfully prevented the completion of the transaction by preventing 478 from conveying title on the closing date and that the defendants 478, Katz and Fishman, together knowingly and wilfully caused or induced Regency to breach the agreement. I do not find that the failure to convey title was the reason for the failure to complete the agreement.

In my opinion, any personal liability involves a determination of whether these directors are personally liable as having failed to act bona fide within the scope of a director's duties.

The general principle is set out in Said v. Butt, [1920] 3 K.B. 497 where McCardie J. stated at page 506:

> ...if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

It would appear that directors of officers who fail to act bona fide within the scope of their authority may be personally liable for inducing a breach of the company's contract. In McFadden v. 481782 Ontario Ltd. et al. (1984), 47 O.R. (2d) 134 Callon J. stated at page 146:

> In short, if an officer or director of a corporation is to be relieved, as an agent, of the consequences of his otherwise tortious act of inducement, it is not because he is the company's alter ego. Rather, it is because in so acting he acts under the compulsion of a duty to the corporation. His act is thus justified. But where he does not act under such a duty, as, for example, where he fails to act bona fide within the scope of his authority, his act is no longer justified, and he becomes liable. The corporation remains insulated from the legal consequences of such an act, inasmuch as the director or officer has acted outside the scope of his authority.

The McFadden case was referred to in a brief submitted by Mr. Davis and was not relied upon by the plaintiffs. I note that the McFadden principle was approved in Fink v. 511996 Ontario Ltd. et al. (1987), 39 C.C.L.T. 196 at 205 (B.C.S.C.): and Acme Bldg. & Construction Ltd. v. Leadway Masons Group Inc. et al. (1986), 35 B.L.R. 17 at 23-24 (D.C.O.).

On the facts of this case, the defendants Katz and Fishman acted together as joint-venturers through various companies, which they controlled, including Regency Homes and 478. The vendor companies were trustee companies incorporated to carry out the subdivision project on behalf of the personal defendants and their own holding companies Kamron and Dorsam.

At the relevant times, the degendants Katz and Fishman moved corporate monies from one account to another and from one project to anolher on an as-needed basis and to pay some creditors at the expense of others.

The facts establish that the real estate market for homes in this subdivision, and generally, was rising. The defendants Katz and Fishman breached the agreement (Exhibit 1-34) to advance monies on a timely basis to close this tansaction. The defendants Katz and Fishman took advantage of the rising market to induce purchasers to take homes in an as-is condition. Another purchaser in the same subdivision, Marvin Dands, testified he closed his lot for the full purchase price when there remained work outstanding of about $15,000. As I found earlier, the defendants Katz and Fishman could have caused the vendor companies to complete the dwelling as agreed, but willfully refused to do so. In these circumstances, I find the defendants Katz and Fishman were acting male fides and were not being bona fide in their functions as directors of the vendor companies and were acting outside the scope of their authority as directors. As a result, the defendants Katz and Fishman induced the vendor company to breach its contract with the plaintiffs. The measure of damages for the tort of inducing breach of contract is that for the breach of contract.

CONCLUSION

There shall be judgment in favour of the plaintiffs against the defendants Regency Homes Inc., 478293 Ontario Limited, Israel Katz, and Joseph Fishman in the sum of $130,000, plus $20,000, for a total of $150,000. There shall be no award of pre-judgment interest. The action against the defendant Dorsam Investments Limited is dismissed.

Unless counsel wish to address me respecting costs, the judgment shall be with costs to be assessed, save and except that there shall be no costs awarded to the plaintiffs respecting the motion to amend the pleadings.

CORBETT D.C.J.