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When it comes to surveys, size matters

Christopher and Lindsay Taggart were dismayed to discover that the lot underneath their newly constructed home was 1,000 square feet smaller than it was represented to be.

The home is located in a new subdivision in Maple Ridge, B.C.

Behind their lot was a parcel of undeveloped land that was to become a later phase of the subdivision. The adjacent lot was at a lower elevation, and a retaining wall had been constructed across the full width of the rear of the Taggart lot.

The wall had been built before the Taggarts viewed the property. When they inspected the house and lot with the builder's sales agent, they were told that the retaining wall marked the back boundary of the lot they wanted to buy.

The size of the backyard was an important factor for the Taggarts. They needed a yard that was large enough to accommodate their household, which included "the world's largest dog" (a Mastiff), two active sons, and future plans to install a swimming pool.

During the purchase negotiations, the Taggarts were told that the lot size was about 6,000 square feet. Based on the agent's representations, the Taggarts were satisfied that the yard was big enough to meet their needs.

About a year after closing, the Taggarts discovered to their surprise that the location of the retaining wall did not actually mark the back boundary of their property but was erected well into the lot behind them. In fact, the actual size of their backyard was about 1,000 square feet smaller than the land enclosed by the wall.

The agreement of purchase and sale, which the parties originally signed, contained the actual, correct dimensions of the land as they were set out in the plan of the subdivision. At the time of closing, the builder provided the buyers with a survey plan which had either party examined it carefully would have disclosed that the back boundary of the lot was not in the same place as the retaining wall.

After closing, in preparation for building a new house behind the Taggart home, the builder fenced in the Taggart yard with the new fence extending out to the retaining wall, which was beyond the actual boundary of their property.

When the lot for the new house was being surveyed, the builder realized that the actual rear boundary line was 10 feet closer to the Taggart house on the east side and 21 feet closer on the west side.

Following the discovery, the builder reconstructed the fence and retaining wall on the true boundary line. Faced with a much smaller lot, the Taggarts sued for negligent misrepresentation.

A four-day trial took place last May before Justice Janet Sinclair Prowse in Vancouver.

She released her 39-page judgment in October, finding that the builder's agent had made specific representations to the buyers that the retaining wall marked the property boundary.

She also found that the Taggarts relied on those representations and would not have bought the house without them. In the end, the plaintiffs were awarded damages of $75,254 plus interest and costs.

This case can be usefully compared to the Meagher case I wrote about last week.

There, the size of the house was 500 square feet less than the advertised size. The purchasers were otherwise happy with the house. They sued to recover damages for the shortfall and lost.

In the Taggart case the retaining wall was specifically represented to be the rear boundary of the lot. The shortage in the lot size was found to be critical to the purchase decision, and the builder was held responsible for the misrepresentation.

Two lessons emerge from the case of Taggart v. Epic Homes:

- Whether you're buying a new or resale home, always insert the lot size in the offer.
- Always examine the survey plan carefully. It's the most important document in every real estate transaction.

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***Case source:** http://www.courts.gov.bc.ca/jdb-txt/SC/08/14/2008BCSC1412.htm*

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	***Taggart v. No. 236 Seabright Holdings Ltd.,***
	2008 BCSC 1412

Date: 20081024
Docket: S073288
Registry: Vancouver

Between:

Christopher John Taggart and

Lyndsay Joanne Taggart

Plaintiffs

And

No. 236 Seabright Holdings Ltd., Branley M.R. Holdings Ltd., Bristar M.R. Holdings Ltd., Dale M.R. Holdings Ltd., and Maple Ridge Homes Ltd. carrying on business under the firm name and style of Epic Homes and Epic Homes

Defendants

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiffs:	W.D. MacLeod
Counsel for the Defendants:	A.P. Prior A.L. Folino
Date and Place of Trial:	May 13 16, 2008
	Vancouver, B.C.

(I) NATURE OF PROCEEDINGS

[1] This case pertains to property that the Defendants sold to the Plaintiffs two and a half years ago. In particular, it pertains to the boundaries of that property.

[2] The Plaintiffs contend that at the time of this purchase, the Defendants represented that a retaining wall at the back of the property was in the same place as the property s back boundary. The Plaintiffs contend that this is the property they agreed to purchase.

[3] The Defendants, on the other hand, argue that they never made such a representation and that the property purchased by the Plaintiffs was the property as set out in the plan referred to in the Contract of Purchase and Sale.

[4] Approximately one year after the Plaintiffs had purchased the property, the Defendants moved the retaining wall to a location that was closer to the Plaintiffs home. (The location of the retaining wall at the time of the purchase has been referred to throughout this judgment as the original location .)

[5] The property that the Plaintiffs claim that they purchased from the Defendants is about 1,000 square feet larger than the property that the Defendants say that they sold to the Plaintiffs.

[6] In this trial, based on their contention as to the representation and agreement made, the Plaintiffs seek specific performance of that agreement (through claims of rectification or of proprietary estoppel) and damages for trespass. In the alternative, they seek damages arising from a claim of negligent misrepresentation. Because the Defendants withdrew their counterclaim shortly before the trial, it was only the claims of the Plaintiffs that were addressed.

(II) BACKGROUND CIRCUMSTANCES

[7] The property purchased by the Plaintiffs is part of a large development in Maple Ridge, B.C. This development includes residential areas and parklands.

[8] Though a general overall design of the development has existed from the outset, the actual development was done in 6 phases. The property purchased by the Plaintiffs was in one of the earlier developed Phases namely, Phase 3.

[9] The Plaintiffs property is a corner lot Lot 42. On the east side of their property was another lot Lot 41. At the time that the Plaintiffs purchased their property, their house was under construction but not yet finished, as was the house on Lot 41. Both of these properties faced onto McClure Drive.

[10] The west side of the Plaintiffs property was bordered by Kimola Drive. The back of their property as well as the back of their neighbour s property (Lot 41) bordered on an as-yet undeveloped property which faced onto Kimola Drive. (This property was part of Phase 6. The development of that Phase did not begin until about one year after the Plaintiffs had purchased their property.)

[11] Although this adjacent property had not yet been developed, because it was at a lower elevation, a retaining wall had been constructed that ran along the side of that property which was at the back of both the Plaintiffs property and of Lot 41. This wall extended across the full length of the back of both Lot 41 and the Plaintiffs property, running from a white peg on the east corner of Lot 41 to a white peg on the west side of the Plaintiffs property. This wall had been installed in January 2006 which was before the Plaintiffs ever viewed the property.

[12] On February 6, 2006 prior to purchasing the property, the Plaintiffs went through the house and inspected the yard with the Defendants sales agent. During this tour, for reasons that are set out later in this Judgment, I am satisfied that the Defendants sales agent represented to the Plaintiffs that the original location of the retaining wall marked the back boundary of their property.

[13] The size of the backyard was a determinative factor for the Plaintiffs as they needed a yard that was sufficiently large to accommodate their household which included the world s largest dog (a Mastiff), two tall and active sons, a mother-in-law, and future plans to install a swimming pool.

[14] It was not until after the Defendants sale agent advised them that the back boundary of their property (as well as the property next door Lot 41) ran from white peg to white peg and followed the same line as the original location of the retaining wall that the Plaintiffs decided to purchase the property. Those boundaries left them with a yard that was sufficient to meet their needs.

[15] During the discussion regarding the boundaries of the property (Lot 42), the Plaintiffs and the Defendants sales agent discussed the size of the property and, in particular, that it was about 6,000 square feet. The Plaintiffs had reviewed the price list of the properties that were for sale in the development and their property was described as being 6,049 square feet. Though this price list also included the proviso that Lot sizes are approximate-EO&E , the survey plan showed that this was the size of this property. In other words, the property that the Plaintiffs purchased was about 6,000 square feet.

[16] In any event, the evidence proved that at the time of the purchase the Plaintiffs and the Defendants both believed that the size of the property that they were respectively buying and selling was approximately 6,000 square feet in size.

[17] After the Defendants sales agent represented that the back boundary of that 6,000 square foot property was the original location of the retaining wall, one of the Plaintiffs paced out at the property, having inquired of the Defendants sales agent whether the dimensions would probably be about 60 feet by 100 feet. That pacing took this Plaintiff to the original location of the retaining wall.

[18] At the best of times it is difficult to estimate distances, but the situation with the Plaintiffs property was further complicated by the fact that the property has an irregular shape and that it backed onto undeveloped land. (As far as the irregular shape is concerned, the front and west boundaries of the Plaintiffs property meet on the diagonal rather than in a square corner. Further, the sides of the backyard are not symmetrical rather, the depth of the backyard on the east side is slightly less than its depth on the west side.)

[19] As would be discovered about a year later, the original location of the retaining wall did not, in fact, mark the back boundary of the Plaintiffs property. Rather, the size of their backyard was about 1,000 square feet smaller than the land enclosed by that wall: about 1,448 square feet rather than 2,448 square feet. (Though the method of measurement used in the various plans of this property was metres, because the method of measurement used by the Plaintiffs and the Defendants in their discussions and on the price list was feet, I have used feet in this Judgment.)

[20] Put another way, the depth of the backyard as measured from the outer edge of the deck (which runs along the back of the house) was actually 17 feet deep rather than 27 feet deep. The actual size of the backyard was considerably smaller than the Defendants had represented it to be at the time of the purchase. If the Plaintiffs had known its actual size, they would not have purchased the property as the yard was too small for their purposes.

[21] In the intervening year between the purchase of the property and the discovery of the boundary mistake, the Defendants continued (both verbally and by their conduct) to represent this wall as marking the back boundary of the property.

[22] The Plaintiffs purchased the property and signed the Contract of Purchase and Sale (the Contract) on February 6, 2006 (the same day that they inspected the house and yard with the Defendants sales agent).

[23] The Contract did contain the actual dimensions of the property as they were set out in the subdivision plan which, in turn, was specifically referred to in the Contract. Though the plan was not attached to the Contract, a copy of it was available for viewing in the Defendants office. A review of that plan at that time may have alerted the parties to the fact that the original location of the retaining wall was not the back boundary of this property. However, neither party reviewed the plan.

[24] In April 2006, the Plaintiffs took possession of their home and moved in. At that time, the Defendants gave the Plaintiffs an Owner s Binder which included a number of documents pertaining to their home, such as the manuals and warranties for various appliances. It also included a copy of the survey plan of their property. This plan showed the placement of their home on the property as well as the registered dimensions of the property. Though this plan included the proviso that this plan is to be used for Municipal and/or Mortgage purposes only and is not to be used to define boundaries , the boundaries on it did accurately set out the actual boundaries of the property.

[25] The Defendants did not draw the Plaintiffs attention to this plan when they provided them with the Owner s Binder. Moreover, the Defendants could not have looked at it closely either. As with the subdivision plan, if either party had considered this plan, they may have realized that the back boundary was not in the same place on the plan as the original location of the retaining wall.

[26] In August 2006, in preparation for the development of Phase 6 (which included the property adjacent to the Plaintiffs property on the other side of the retaining wall), the Defendants decided to install a wrought-iron fence along the Kimola Drive side of the Plaintiffs property. (Kimola Drive was the street along which Phase 6 was built.)

[27] The Defendants general manager presented this proposal to the Plaintiffs. Because the Plaintiffs had intended to place a cedar fence along the back of their property, they were not initially supportive of the Defendants proposal, as they did not think that the mixture of cedar and wrought-iron was aesthetically pleasing and they could not afford to install wrought-iron fencing along the back.

[28] However, upon the Defendants promise (which was conveyed by the general manager) that the Defendants would later secure wrought-iron fencing for the Plaintiffs back fence at builder s cost, the Plaintiffs agreed to the installation of the side fence.

[29] The fence that the Defendants then installed along the side of the Plaintiffs property went all the way to the original location of the retaining wall. That is, it did not stop at the actual boundary of the Plaintiffs property.

[30] Furthermore, sometime during this first year after they purchased the property, the Plaintiffs made inquiries of one of the Defendants representatives about whether the stones in the retaining wall could be changed to the same stone as was used in the retaining wall across the street. The Defendants representative responded that as the retaining wall belonged to the Plaintiffs, they could change the stones if they wished to do so.

[31] As a final step in the preparation of the development of Phase 6, the individual lots in that Phase were surveyed. (Though the general plan for the subdivision existed from the outset, individual lots were not surveyed until just before the actual development commenced. At the time that the Plaintiffs purchased their property, Phase 6 was an empty space on the plan. That is, only the outside boundaries of that Phase were marked on it. The plan was not amended to include the individual properties of Phase 6 until well after the Plaintiffs had moved into the property.)

[32] It was when the survey of the individual lots for Phase 6 were being completed and, in particular, when the survey of the lot adjacent to the Plaintiffs property was done, that it was discovered that the original location of the retaining wall did not follow the boundaries of these properties. Rather, the actual boundary line was 10 feet closer to the Plaintiffs home on the east and approximately 21 feet closer on the west side. As was touched upon earlier, this resulted in the boundary of the adjacent property being 17 feet away from the outer edge of the Plaintiffs deck rather than 27 feet and the size of the Plaintiffs backyard being reduced from a reasonable size to a very small size.

[33] It was also discovered by the Defendants that the white pegs at either end of this original retaining wall were not meant to mark property boundaries but, rather, to mark service lines namely, a gas line.

[34] To mark their findings as to the actual back boundary of the Plaintiffs property, the Defendants surveyors installed boundary pegs with bright pink plastic ribbons attached to them. Upon being advised of the meaning of these pegs, the Plaintiffs contacted their lawyers who, in turn, contacted the lawyer for the Defendants. (This lawyer was a different lawyer than the lawyer who ultimately represented the Defendants at trial.)

[35] An agreement was reached that neither party would do anything for the time being as both sides tried to reach a mutually acceptable solution. However, contrary to that agreement, the day after the survey pegs appeared the Defendants moved the retaining wall to the location that is the actual boundary of the property. The Plaintiffs filed a *lis pendens* against the adjacent property.

[36] The Defendants contend that this situation cannot be rectified by simply adding this portion of land to the Plaintiffs property as the consequent reduction in the size of the adjacent property would be less than the minimum zoning requirements of a building lot.

(III) ANALYSIS AND DECISION

[37] The pivotal issues are whether the Defendants represented to the Plaintiffs that the original location of the retaining wall did mark the back boundary of the property and, if so, whether that representation was of the kind necessary to succeed in a claim for specific performance based on rectification or on proprietary estoppel; for damages for trespass; or for damages for negligent misrepresentation.

(A) *Did The Defendants Represent To The Plaintiffs That The Back Boundary Of Their Property Was In The Same Place As The Original Location Of The Retaining Wall?*

[38] As was touched upon earlier in this Judgment, I am satisfied that the evidence proved the Defendants represented to the Plaintiffs that the back boundary of their property was located in the same place as the original location of the retaining wall. Not only did the Defendants sales agent make that representation at the time of the purchase, but also other representatives of the Defendants such as the general manager of the development, the site supervisor, and a member of the building personnel (namely, the installer of the original retaining wall) made the same representation (verbally and/or through their conduct) to the Plaintiffs during the year following their purchase of the property.

[39] The Plaintiffs contended that as the sales agent was showing them the property (before they had made their decision to purchase it), they asked him whether the two white pegs at either end of the retaining wall were boundary pegs, and that the sales agent advised them that they were. Moreover, they testified that they also questioned him as to whose responsibility it was to maintain the retaining wall and that he responded that it would be their responsibility as the retaining wall was on their property.

[40] The Defendants sales agent testified that he did not remember either of these questions being asked nor did he remember ever advising the parties that the white pegs marked the back boundary of their property or that the retaining wall was their responsibility. Further, he attested that it was his practice to consult with his manager if there was any uncertainty as to the location of property boundaries. As he did not consult with his manager on this occasion, the sales agent concluded that the Plaintiffs could not have made such an inquiry.

[41] With respect to whether the Plaintiffs asked these questions, I am satisfied that, given the following surrounding circumstances, they probably did ask them.

[42] To begin with, the size of the backyard was a determinative factor for the Plaintiffs. As mentioned before, they needed a space big enough to accommodate their two tall and active sons, a mother-in-law, the world s biggest dog and, possibly, in the future, a swimming pool. Furthermore, because of its irregular shape and because it backed onto an undeveloped property, the back boundary was not something that they could easily discern on their own. In addition, given that a retaining wall would probably require periodic maintenance, it is probable that the Plaintiffs would inquire as to whom would bear the responsibility for that maintenance.

[43] With respect to whether the Defendants sales agent did represent to them that the white pegs at either end of the retaining wall were property pegs marking the back boundary of the property, the Defendants sales agent testified that he understood that white pegs were used to mark property boundaries as well as other aspects of the building process such as marking service locations.

[44] Further, the evidence proved that the Defendants generally (if not always) installed the retaining walls along the property boundaries. (It was certainly always the Defendants intention that the retaining wall follow the property line between these properties as that was the instruction given by the site superintendent to the installer and further the wall was immediately moved to follow the property line when it was discovered that it did not.)

[45] Given that the Defendants sales agent believed that white pegs were used to mark property lines and that retaining walls in this development usually ran along property lines, I am satisfied that he concluded that these pegs marked the boundaries of the Plaintiffs property and that the retaining wall that ran between them marked that boundary. Because of all of these circumstances, I am satisfied that the Defendants sales agent was not uncertain as to the back boundary and therefore had no need to consult his manager.

[46] The policy of the Defendants was that the maintenance of retaining walls was the responsibility of the owner of the property on which the retaining wall was located. The Defendants sales agent was aware of that policy. Given that knowledge and his belief that the retaining wall marked the back boundary of the Plaintiffs property, I am satisfied that the Defendants sales agent did advise the Plaintiffs that it was their responsibility as its owners to maintain the retaining wall.

[47] The Defendants submitted that the pegs were colour-coded in this development and that white pegs were never used to mark property lines but, rather, were used to mark service lines. Because of this system, the Defendants argued that none of their representatives would have advised the Plaintiffs that the white pegs at either end of the retaining wall were property pegs or that the original location of the retaining wall was the back boundary.

[48] If the Defendants did have such a system (and the evidence falls short of proving that they did), many of their representatives were unaware of the system. As was just touched upon, the Defendants sales agent was unaware of this system.

[49] Furthermore, given that the instruction of the site supervisor to the installer of the original retaining wall was to construct the retaining wall as close to the property line as he could; that the installer placed the wall between the two white pegs; and that the site superintendent did not have the installer correct this error, it follows that neither the site superintendent nor the installer appreciated that the white pegs did not mark property boundaries.

[50] In addition, the Defendants general manager could not have appreciated that white pegs were not property pegs as the wrought-iron fence that he had installed to run along the side of the Plaintiffs property ran to the white peg at the ends of the original location of the retaining wall. As became evident later, this fence went 20 feet into the adjacent property.

[51] The conduct of all of these representatives of the Defendants that is, the installer of the original retaining wall; the site supervisor; and the general manager constitute further representations of the Defendants that the white pegs were property pegs and that the original location of the retaining wall was the back boundary of the Plaintiffs property.

[52] I am further satisfied the Defendants represented to the Plaintiffs that the white pegs at either end of the retaining wall were property pegs and that the original location of the retaining wall was the back boundary of their property, because they made the same representation to the Plaintiffs neighbours that is, to the owners of Lot 41, the property on the east side of the Plaintiffs property. As was set out earlier, the retaining wall also ran across the back of their property.

[53] In addition to these representations, the manner in which the Defendants constructed the wrought-iron fence itself constituted a representation of the boundary being in the same location as the original location of the retaining wall.

[54] As was set out earlier, about four months after they had moved onto their home the Plaintiffs agreed to allow the Defendants to install a wrought-iron fence alongside their property in exchange for the Defendants promise that they would secure, at builder s cost, wrought-iron fencing to be later installed as the back fence for the Plaintiffs property.

[55] The Defendants built the fence along the Plaintiffs property to the original location of the retaining wall. This fence was composed of panels. The actual boundary of the Plaintiffs property was located in the middle of one of these panels. There was nothing in that design which would alert the Plaintiffs as to the actual boundary being different than the original location of the retaining wall. That is, the fence was not designed to be disassembled at the actual boundary. To the contrary, given the actual boundary of the property, when the back fence is installed the side panel to which it will be adjoined will have to be removed and replaced with a partial panel.

[56] The Defendants further argued that because the Plaintiffs knew that the size of the property that they were purchasing was 6,000 square feet, they knew or ought to have known that their property did not extend as far back as the then location of the retaining wall.

[57] The evidence does not support this argument.

[58] There is no dispute that the Plaintiffs understood the size of the property was 6,000 square feet; that on the same occasion that they discussed the white pegs with the Defendants sales agent, they also discussed the size of the property; that on that occasion, one of the Plaintiffs indicated to the Defendants sales agent that the dimensions of the lot would be about 60 feet by 100 feet; and that he then paced the property off.

[59] However, when this Plaintiff paced out the property (which he did in the presence of the Defendants sales agent), that pacing took him to the original location of the retaining wall. This exercise goes no further than demonstrating the shortcomings of pacing (particularly when the property is of an irregular shape, as this one is) and of the difficulty of accurately visually measuring distances.

[60] In other words, the evidence fell short of proving that after this pacing exercise and after the conversation regarding the approximate measurements of the property, either the Plaintiffs or the Defendants sales agent were alerted to the fact that the original location of the retaining wall could not be the actual back boundary of the property. To the contrary, they all concluded that the size of the property as bordered by the original location of the retaining wall was 6,000 square feet.

[61] Additionally, sometime during the year following the purchase of the property, the Plaintiffs asked another representative of the Defendants (one of the construction people) about the stone in the retaining wall and in particular whether they could replace it. The Defendants representative responded that because the retaining wall belonged to the Plaintiffs, they could replace the stone if they chose to do so. By indicating that the Plaintiffs owned the wall, the Defendants representative was indicating that the wall was in the same location as the property border.

[62] Given all of these circumstances, I am satisfied that the Defendants did represent to the Plaintiffs that the original location of the retaining wall which ran from white peg to white peg marked the back boundary of their property.

(B) *Is The Defendants Representation Of The Kind Necessary To Succeed In A Claim For Specific Performance Based On Rectification Or On Proprietary Estoppel; For Damages For Trespass; Or For Damages For Negligent Misrepresentation?*

[63] To put this issue in context and to provide a general overview of the situation, the evidence proved: that the size of the property that the Plaintiffs agreed to buy and that the Defendants agreed to sell them was 6,000 square feet; that the retaining wall between the Plaintiffs property and the adjacent property was supposed to follow the property line; that it was not until the survey was done on the adjacent property that it was discovered that the original retaining wall was not located in the right place; that prior to that discovery the Defendants represented to the Plaintiffs that the back boundary of their property was the original location of the retaining wall; that the Plaintiffs purchased this property based on this representation; and that had the Plaintiffs known of the actual location of the back boundary, they would not have purchased this property.

[64] As also became evident in this trial, pegs (whether they are colour-coded or all white) are used to mark different aspects of the development process. For example, some are used to mark property boundaries, some are used to mark the location of services to be installed, and some are used to mark the perimeters of a house to be constructed.

[65] The evidence disclosed that it is not uncommon for these pegs to be dislodged during the building process. I am satisfied that the actual pegs marking the boundaries of the Plaintiffs property were probably dislodged sometime earlier on in the development of that property, prior to the installation of the retaining wall and well before the Plaintiffs first saw the property.

[66] Though the Defendants did make the representation regarding the back boundary of the property, the evidence did not prove (nor was it alleged) that they did so to intentionally mislead the Plaintiffs. Rather, the evidence showed that they made a mistake.

(1) The Claim for Specific Performance Based on Rectification

[67] With respect to this claim, the Plaintiffs contend that the property that they agreed to buy and the property that the Defendants agreed to sell them was the property as bordered by the original location of the retaining wall.

[68] Because their written Contract with the Defendants did not reflect this agreement (being an agreement for a 6,000 square foot property rather than a 7,000 square foot property), the Plaintiffs submit that they are entitled to a rectification of that written Contract to reflect the terms of their actual agreement with the Defendants and, upon rectification, to specific performance of that Contract.

[69] The position of the Defendants, on the other hand, is that the written Contract does actually reflect the agreement that they had with the Plaintiffs. The agreement throughout had been that they were selling and that the Plaintiffs were buying a 6,000 square foot property. As the written Contract accurately reflects that agreement, the claim for rectification should be dismissed.

[70] As far as the legal principles governing this claim are concerned, [t]he remedy of rectification is available only in certain defined circumstances and cannot be invoked to correct every mistake : ***Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.*** (1996), 28 O.R. (3d) 327 at 336, 133 D.L.R. (4th) 550 (C.A.) [***Downtown King West***].

[71] Rectification deals with the situation where, contracting parties having reduced into writing the agreement reached by their negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole or in part, of the contract : G.H.L. Fridman, *The Law of Contract in Canada* 5th ed. (Scarborough: Carswell 2006) at 826. The mistake may be unilateral or mutual: ***Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.***, 2002 SCC 19, [2002] 1 S.C.R. 678 [***Sylvan***].

[72] Rectification is not used to verify the intention of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly : ***Saskatoon Drug & Stationary Co. v. Saskatoon Building & Development. Co.*** (1980), 8 Sask. R. 421 at 423, (Sask. Q.B.) [***Saskatoon Drug***].

[73] In principle, rectification is permitted to correct a contract (which has been mistakenly drawn) so as to carry out the common intention of the parties and have the contract reflect their true agreement and cannot be used to alter the terms of an agreement: ***Downtown King West***.

[74] The court s task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or another : ***Sylvan*** at para. 31. Put another way, [t]he doctrine of rectification provides for the correction of documents where those documents inaccurately record the intention of the parties : ***Swiss Reinsurance Co. v. Camarin Ltd.***, 2007 BCSC 1202, 52 C.C.L.I, (4th) 94 at para. 75 [***Swiss Reinsurance***].

[75] A party seeking rectification must show that there was some prior agreement whereby the parties expressed a common intention regarding the terms in question and that this common intention continued until the execution of the instrument which did not accurately record that intention: ***Swiss Reinsurance***; ***Il Caminetto di Umberto Restaurant (1982) Ltd. v. Mountainside Lodge Ltd.***, 2005 BCSC 876, 32 R.P.R. (4th) 281, aff d by 2006 BCCA 408, 49 R.P.R. (4th) 199 relying upon ***Bank of Montreal v. Vancouver Professional Soccer Ltd.***, 15 B.C.L.R. (2d) 34 (S.C.).

[76] To establish the terms of the oral agreement, the Court must look at the outward acts [of the parties] i.e. at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed : ***Swiss Reinsurance*** at para. 81 quoting with approval from ***Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co.***, [1953] 2 All E.R. 739 (Eng. C.A.).

[77] In ***Sylvan***, at para. 41, the Court held that rectification requires a higher standard of proof than the balance of probabilities that it requires convincing proof . This standard may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil more probable than not standard .

[78] This may no longer be the standard of proof given the recent decision of the Supreme Court of Canada in ***F.H. v. McDougall***, 2008 SCC 53 that there is only one civil standard of proof and that standard is the balance of probabilities.

[79] However, I find that I do not have to determine that issue, as I find that regardless of which standard was used, the evidence did not prove this claim.

[80] The underlying element of a claim for rectification is that the evidence proves that there is an agreement between the parties that was not accurately reflected in their subsequent agreement. Consequently, to remedy this situation the Contract has to be rectified to accurately reflect the actual agreement made between the parties.

[81] In the present case, the Plaintiffs contend that they and the Defendants agreed that they would purchase and the Defendants would sell them the property as bounded by the original location of the retaining wall namely, a property that was 7,000 square feet in size. As the Contract of Purchase and Sale was for a smaller property (namely, a 6,000 square feet property) the Contract did not accurately reflect their agreement with the Defendants.

[82] The evidence did not prove that the parties had such an agreement. To the contrary, the evidence proved that the size of the property that the Plaintiffs agreed to purchase and that the Defendants agreed to sell them was 6,000 square feet. The evidence did not prove that the parties ever had an agreement that the size of the property was to be to be 7,000 square feet.

[83] Given that the agreement of the parties was for the purchase and sale of a 6,000 square foot property and given that their Contract of Purchase and Sale was for a 6,000 square foot property, the Contract did accurately reflect the agreement of the parties. There is nothing in the Contract to be rectified.

[84] The Plaintiffs claim for rectification is dismissed.

(2) The Claim For Specific Performance Based On Proprietary Estoppel

[85] With respect to the claim for specific performance based on proprietary estoppel, the circumstances in which this cause of action provides a remedy were set out in ***Zelmer v. Victor Projects Ltd.*** (1997), 147 D.L.R. (4th) 216, 34 B.C.L.R. (3d) 125 at para. 33 (S.C.) quoting with approval from ***Crabb v. Arun District Council***, [1976] 1 Ch. 179 (Eng. C.A.) namely:

If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights then, even though that promise may be unenforceable in point of law for want of consideration or want of writing then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise.

[86] The circumstances in ***Zelmer*** provide an example of this principle. In that case, the plaintiffs and the defendants owned adjoining properties. The plaintiffs built a water reservoir on the defendants land as a consequence of the representations of the defendants that they (the defendants) would grant the plaintiffs an easement over their property specifically over the land occupied by the water reservoir and by the water lines and pipes running from that reservoir to the plaintiffs property. After the plaintiffs completed the construction of this water reservoir, the defendants failed to grant them the agreed upon easement.

[87] The Court in ***Zelmer*** found the defendants were estopped from denying the plaintiffs this easement because they had promised the plaintiffs that they would grant it to them if the plaintiffs built the reservoir and the plaintiffs acted upon that promise or representation of the defendants. As a consequence, the defendants were bound by the representations that they made to the plaintiffs and consequently were estopped from denying them the easement.

[88] Applying these principles to this case, to succeed with a claim of proprietary estoppel the Plaintiffs would have to prove:

1. that the Defendants were aware that the original location of the retaining wall did not mark the back boundary of the legal description of their lot (but, rather, extended 1,000 square feet into the adjacent property);
2. that the Defendants had agreed to convey this land to the Plaintiffs although the Plaintiffs did not have any legal right to it because of some act that the Plaintiffs had done for the Defendants;
3. that the Plaintiffs had performed the act that they had agreed to perform; and
4. that the Defendants had failed to convey the property as agreed.

[89] This is not the situation in this case. Not only does the evidence fall short of proving that, at the time that the Contract was signed, the Defendants were aware that the original location of the retaining wall was not the back boundary of the Plaintiffs property, the evidence does not prove that there was an agreement that upon the performance of some service by the Plaintiffs, the Defendants would convey this additional property to them.

[90] As was set out in the preceding section, the evidence proves that the only agreement between the parties was the agreement as set out in the Contract nothing more.

[91] Given these findings, the Plaintiffs claim for proprietary estoppel is dismissed.

(3) The Claim For Damages For Trespass

[92] To pursue this cause of action, a plaintiff must possess a proprietary interest in the property on which the alleged trespass occurred.

[93] Given my findings that the Plaintiffs do not have a proprietary interest in the disputed property (that is the additional 1,000 square feet enclosed by the original location of the retaining wall), this claim cannot succeed. Consequently, it is dismissed.

(4) The Claim For Damages Based On Negligent Misrepresentation

[94] With respect to this claim, there are two matters to be addressed namely, a preliminary matter as to whether the Plaintiffs are precluded from bringing this claim and, secondly, if they are not precluded whether they have proven all of the elements of this claim.

(a) Preliminary Issue

[95] The Defendants contend that the Plaintiffs are precluded from bringing this claim because of the provisions of the Contract of Purchase and Sale. Specifically, paragraph 23 of this Contract provides:

> Entire Agreement
>
> This agreement shall constitute the entire agreement between the Parties and no representations, warranties and previous statements made by any person or agent other than those in writing in this Agreement signed by the Parties shall be binding on the parties.

[96] There is no dispute that an action in tort for negligent misrepresentation may lie even though the relevant parties to the action are in a contractual relationship: ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87, 97 D.L.R. (4th) 626 and ***BG Checo International Ltd. v. British Columbia***

Hydro and Power Authority, [1993] 1 S.C.R. 12, [1993] 2 W.W.R. 321 [***BG Checo***]. Such claims may lie even though the contract includes an Entire Agreement or general exclusion clause: ***Zippy Print Enterprises Ltd. v. Pawliuk*** (1994), 100 B.C.L.R. (2d) 55, [1995] 3 W.W.R. 324 (C.A.) [***Zippy***] and ***BG Checo***. In other instances, Entire Agreement clauses were found to exclude total liability: ***Intrawest Corp. v. No. 2002 Taurus Ventures Ltd.***, 2007 BCCA 288, 281 D.L.R. (4th) 420 and ***Bow Valley Husky Bermuda Ltd. v. Saint John Shipping Ltd.***, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385.

[97] A review of these cases demonstrates that the determination of whether tort liability is excluded will depend on all of the circumstances of the case, including such circumstances as the sophistication of the parties. Of particular significance is whether the terms of the contract specifically address the matters that were the subject of the pre-contractual representations.

[98] The Court in ***Zippy*** at para. 45 described the underlying principle in the following manner:

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[99] Applying these principles to the facts in this case, the Entire Agreement clause in the parties Contract does not preclude the Plaintiffs from bringing this action.

[100] First, the Entire Agreement clause in this Contract is a general exclusion clause. That is, it does not specifically exclude claims for negligent misrepresentations there is, in fact, no reference to negligent misrepresentation.

[101] Further, the Defendants made a specific representation regarding a point of substance (namely the location of the back boundary of the property). Given that this representation was made when the Plaintiffs were in the process of deciding whether they were going to purchase the property and given that they specifically asked about the property line, I am satisfied that the representation was made to induce them to purchase the property.

[102] When the Contract was signed, it was not brought to the Plaintiffs attention that they should not rely upon any representations made to them regarding the location of the boundary. Furthermore, there was nothing in the Contract that would alert them to the fact that the description of the property in it was different than the representation made to them.

[103] The only reference to the property in the Contract was its legal address (namely, Lot 42, Sec 10, TWP 12, NWD, Plan BCP 17976) and its municipal address (namely, 24751 McClure Dr., Maple Ridge, B.C.). The plan referred to in the legal address did have the actual measurements of the property in it. This plan was not attached to the Contract nor did either party review the copy that the Defendants had in their office.

[104] Though providing the Plaintiffs with a plan of the property showing the specific location of the house on the property as well as the specific dimensions of the backyard and drawing that plan to the attention of the Plaintiffs may have been sufficient to override the Defendants representation, such a plan was neither provided to them nor drawn to their attention. The Defendants did provide such a plan to the Plaintiffs after they had moved into the property, which was well after the Contract had been signed. Moreover, even then the plan was not specifically drawn to their attention but, rather, was included in a binder with a number of other documents (such as warranties and guaranties) pertaining to their home.

[105] To conclude, there was nothing in the Contract that specifically addressed the representation made by the Defendants. The evidence fell short of meeting the requirements for a general exclusion clause to override a specific representation as set out in ***Zippy***. That is, there was no evidence that the exclusion clause was brought to the attention of the Plaintiffs nor that they were advised that they were not to rely on any representation made by the Defendants. This is in keeping with the fact that at the time that the Contract was made, the Defendants themselves were unaware that their representation as to the location of the back boundary was different than the actual boundary of the property.

[106] Given these circumstances, I am satisfied that the Entire Agreement clause in the parties Contract does not preclude the Plaintiffs from bringing this negligent misrepresentation claim.

(b) The Claim

[107] Pre-contractual representations may constitute a warranty or collateral contract (and therefore give rise to an action of negligent misrepresentation founded in principles of contract) or they may constitute an inducement to enter a contract (and therefore give rise to a tort claim of negligent misrepresentation). This distinction is of importance because both the essential elements of the claims and the measure of damages are different: ***Table Stake Construction Ltd. v. Jones*** (1977), 18 O.R. (2d) 203, 82 D.L.R.(3d) 113 (Ont. S.C.J.).

[108] In this case, the Plaintiffs contend that the Defendants representation constituted an inducement to enter the Contract and therefore they are pursuing a tort claim of negligent misrepresentation. I agree with this analysis of the possible claim. To support a claim that the representation constituted a warranty or collateral contract would require (as did the claims of rectification and proprietary estoppel) that the parties entered into an agreement that was additional to the Contract. As was set out previously in this Judgment, the evidence did prove that the parties only had one agreement and that agreement was accurately set out in the Contract.

[109] As is set out in ***Queen v. Cognos*** at 110, the elements for the tort of negligent misrepresentation are:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee;

(2) the representation in question must be untrue, inaccurate, or misleading;

(3) the representor must have acted negligently in making the misrepresentation;

(4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[110] With respect to the first element, the Defendants concede that it has been proven that is, they concede that they owed a duty of care to the Plaintiffs.

[111] As far as the second element is concerned, given my finding that the Defendants represented to the Plaintiffs that the original location of the retaining wall marked the back boundary of their property, and given that the back boundary was actually 1,000 square feet closer to the Plaintiffs home, I am satisfied that the Defendants representation was inaccurate.

[112] With respect to the third element, the issue to be addressed is whether, using the objective standard of the reasonable person, the Defendants exercised reasonable care with respect to the representations that they made to the Plaintiffs regarding the back boundary of their property.

[113] When the Defendants represented to the Plaintiffs that the white pegs at either end of the retaining wall marked the property boundary, they knew or ought to have known that pegs were not only used to mark property boundaries but were also used for other purposes such as marking the location for the installation of gas services, etc. and that it was not uncommon for boundary pegs to be removed or to be displaced during the construction process.

[114] Consequently, the Defendants should have taken care to ensure that these pegs were marking the property boundary and were not being used to mark another aspect of the construction process.

[115] If (as some of the Defendants testified) the pegs were colour-coded and white pegs were never used to mark property boundaries, the

Defendants should have taken the necessary steps to ensure that all of their representatives were aware of this fact. It was foreseeable by the Defendants that if they did not take these steps, their representatives would misinform third parties as to the location of a property line.

[116] As the Defendants did not take any of these precautions, they fell below the standard of care required of them. Given these findings, the third element has been proven.

[117] With respect to the fourth element, the Plaintiffs must prove that they relied, in a reasonable manner, on the negligent misrepresentation.

[118] The Plaintiffs did rely on the Defendants representation as to the location of the property s boundary and in particular that it ran from the white peg at one end of the retaining wall to the white peg at the other end of the retaining wall. As the evidence proved, but for this representation the Plaintiffs would not have purchased this property. Put another way, they would not have purchased a property with a yard as small as the actual size of the yard on this property.

[119] The Defendants argued that as one of the Plaintiffs had been a real estate agent for a few years, the Plaintiffs did not or ought not to have relied upon this representation because they knew or should have known that the white pegs did not mark the property line.

[120] Though one of the Plaintiffs had indeed been a real estate agent for a period some years before the purchase of this property, the evidence did not prove that he knew or ought to have known that white pegs do not mark property boundaries. Rather, the evidence failed to prove that there was a universal colour-code system of pegs used to mark property boundaries. If there was a uniform system, the Defendants own representatives were unaware of it.

[121] With respect to whether it was reasonable for the Plaintiffs to rely upon the Defendants representation of the location of the back boundary of the property, given that the property backed onto undeveloped land; that the only pegs visible at that time were white pegs (the ones at either end of the retaining wall); and that the Plaintiffs did not know the function of these pegs (that is whether they were used to mark boundaries or for some other purpose), it was reasonable that they relied upon the representation of the Defendants (who were the owners and developers of the property) as to the boundaries of that property and as to the meaning of the pegs that the Defendants used.

[122] Given these conclusions, I am satisfied that the Plaintiffs have proven the fourth element.

[123] As far as the last element is concerned, the Plaintiffs must prove that as a consequence of the reliance that they placed on the Defendants negligent misrepresentation, they suffered a loss. Because this is a tort claim (as opposed to a breach of contract claim), the measure of damages is the loss that a plaintiff suffered that they would not have suffered had the negligent statement not been made: ***BG Checo*** and Allan Linden et al., ***Remedies in Tort***, Vol. 2 (Toronto: Carswell, 2002) c. 16. (The measure of damages for breach of contract, on the other hand, is the difference between the present position of a plaintiff and the position that that plaintiff would have been in had the statement been true.)

[124] As has been touched upon earlier, the Plaintiffs would not have purchased the property had they known the actual location of the back boundary. That is, if the negligent statement had not been made, they would never have expended the monies that they did to purchase the property.

[125] Those expenditures included not only the purchase price of the property which was $491,823.75, but also the ancillary costs which totalled $43,254.84, being $34,427.66 for Federal Tax (GST), Property Transfer Tax of $7,836.48, $10.70 for the Law Society of British Columbia Trust Administration Fee, $30.00 for Park Insurance etc.), $200.00 for Stewart Title Guaranty Company Title Insurance Fee, $694.95 in Legal Fees and Disbursements, and $55.05 for Taxes on Legal Fees and Disbursements. For convenience, these expenditures will be referred to respectively as the purchase price expenditure and the ancillary costs expenditure .

[126] The Defendants contend that the Plaintiffs have not suffered any loss as a result of these expenditures because they acquired the property.

[127] To prove this contention, because the Plaintiffs would not have purchased this property (and therefore would not have expended any monies) had the negligent misrepresentation not been made, the evidence would have to establish that the value of the asset acquired by the Plaintiffs was equal to the total of all of the monies that they expended as a result of the Defendants negligent misrepresentation. In other words, the evidence would have to establish that the value of the property at the time that it was acquired (which was the time of the negligent misrepresentation) was at least $535,078.59 which is the total of the monies that the Plaintiffs used to acquire it, being $491,823.75 for the purchase price and $43,254.84 for ancillary costs. If that is proven, because the asset acquired is equal to the total of the monies expended, there is no loss.

[128] However, the evidence did not prove that the value of the property was equal to the total amount of the monies expended by the Plaintiffs as a result of the Defendants negligent misrepresentation. To the contrary, I have concluded that the value of the property was probably about $471,823.75 which is $63,254.84 less than the total of the monies expended by the Plaintiffs and $20,000.00 less than the purchase price expenditure.

[129] Given this conclusion, the Plaintiffs did suffer a loss even though they acquired the property, the quantum of that loss being the difference between the amount that they expended to acquire the property (namely, $535,078.59) and the fair market value of the property at the time of its acquisition (namely, $471,823.75).

[130] With respect to the ancillary costs expenditure, because the Plaintiffs would not have purchased the property had the negligent misrepresentation not been made, they would not have incurred this expense at all. (If the evidence had proven that the Plaintiffs would have purchased this property anyway had the negligent statement not been made but would have paid less money, only a portion of these costs would be recoverable because the Plaintiffs would have incurred some of these ancillary costs in any event. However, that was not the situation in this case. Rather, in this case, the evidence proved that the Plaintiffs would have not purchased the property at all.)

[131] Given that the ancillary costs expenditure is an expenditure that the Plaintiffs would not have incurred but for the Defendants negligent misrepresentation and given that the value of the property acquired was not sufficient to cover this expense, the monies expended by the Plaintiffs for the ancillary costs expenditure constitute a loss. For this loss, the Plaintiffs are awarded $43,254.84 plus interest.

[132] Although the Plaintiffs submitted that the real estate commission should also be included in the ancillary costs expenditure, the evidence (and specifically the Statement of Adjustments) did not prove that such a payment had been made. Therefore it was not included.

[133] In addition to the loss suffered as a result of the ancillary costs expenditure, I am satisfied that, in addition, the Plaintiffs suffered a further loss as the fair market value of the property was probably less than the purchase price expenditure that they incurred, given the actual location of the back boundary of the property. In other words, not only was the value of the property insufficient to cover the ancillary expenses, it was insufficient to cover the whole of the purchase price expenditure. The difference between the purchase price expenditure and the probable fair market value of the property also constitutes a loss that the Plaintiffs would not have suffered had the negligent representation not been made.

[134] As was set out earlier in these Reasons, the actual depth of the backyard of the property (as measured from the outside edge of the deck to the adjacent yard) was just over 17 feet the view from the deck will now be straight into the house next door.

[135] The backyard is very small given the placement of the house on the property and the actual back boundary. As the Defendants site superintendent expressed to the Plaintiffs when he first viewed the backyard after the retaining wall had been moved from its original location to its present location Holy shit that s a small yard. In response to the Plaintiffs question about how this mistake could have happened (that is, the retaining wall being in the wrong location), he responded Somebody must have screwed up.

[136] Though during his testimony this witness did not recall making these statements, I am satisfied that he did. Not only are they in keeping with the reality of the situation, but they are also in keeping with the open and friendly relationship that he had with the Plaintiffs and with the manner in which he expressed himself during his testimony. With respect to this last point, although I found that this witness was unreliable and evasive with respect to some aspects of his evidence, when he was candid and truthful his manner of expressing himself was plain-spoken and blunt just as these statements were.

[137] Given the extraordinary smallness of the backyard and the consequent proximity of the adjacent property to the edge of the deck on the Plaintiffs home, I am satisfied that the fair market value of the property was probably less than the purchase price paid by the Plaintiffs.

Consequently, although the Plaintiffs did acquire the property, they nevertheless suffered a loss as the value of the property was less than the purchase price amount that they paid.

[138] As to the quantification of that loss, given the aforementioned circumstances I am satisfied that the purchase price would probably have been about $20,000 lower. (The evidence having proven that the value of the 1,000 square foot piece of property that was originally on the Plaintiffs side of the retaining wall was $20,000.) In other words, had the negligent misrepresentation not been made, the purchase price of the property would probably have been $471,823.75 rather than $491,823.75.

[139] The Plaintiffs are awarded $20,000 plus interest for this loss.

[140] Though the Plaintiffs submitted that they were entitled to damages equivalent to the increase in property values, the legal authorities presented did not support that submission. Though that type of loss may be recoverable for breach of contract (including warranty or collateral contract), it is not recoverable in tort.

[141] Lastly, the Plaintiffs are also entitled to recover general damages: ***BG Checo*** and ***Khaira v. Nelson***, 2002 BCSC 1045, 1 R.P.R. (4th) 76. Both of the parties testified that this tortious conduct of the Defendants resulted in a loss of enjoyment of their property as well as a loss in their quality of life.

[142] One of the Plaintiffs testified that she had found the whole experience emotionally draining and frustrating. She felt that she had been deceived by people that she trusted. She further attested that this stress and emotional upset, in turn, had resulted in tension and conflict in the household. Before all of this happened, she testified that they had frequently used the back deck to entertain friends and family something she and the other members of her family enjoyed. They no longer enjoyed that activity because of the lack of privacy.

[143] The other Plaintiff testified that this incident had been disheartening and stressful. This property had been the place that he and the other Plaintiff had intended to stay in indefinitely. Now they were unsure as to what they were going to do. He agreed with the other Plaintiff that prior to the discovery of the actual location of back boundary, they had often used their back deck to entertain friends and family but that now they did not do that because of the proximity of the adjacent property.

[144] The Plaintiffs did not seek medical help and consequently did not present medical evidence supporting the mental and emotional stress that they claimed they experienced as a consequence of the Defendants tortious conduct. However, I am satisfied that it is unnecessary, in the circumstances of this case, for them to lead such evidence to support their claim for general damages: ***MacDonald v. Clark***, 2001 ABQB 89, 287 A.R. 176; ***MacDonald v. Gerristen*** (1994), 39 R.P.R. (2d) 292, 156 A.R. 219 (Alta. Q.B.); ***Murray v. Tilley***, 2005 NLTD 2, 244 Nfld. & P.E.I.R. 1 (Nfld. and Lab. S.C., T.D.); and ***Vivian v. Pye*** (1996), 146 Nfld. & P.E.I.R. 1, 456 A.P.R. 1 (Nfld. and Lab. S.C., T.D.).

[145] I accept the evidence of the Plaintiffs as to the mental and emotional stress that they both experienced as a consequence of the Defendants tortious conduct. I am satisfied that that conduct adversely affected their quality and enjoyment of life.

[146] When testifying, both of the Plaintiffs presented as straightforward candid people endeavouring to be as accurate and as fair as possible. Their evidence was balanced. They avoided exaggeration and clarified when they were unsure of an event. Not only was their evidence internally consistent, it was consistent with their conduct and with the surrounding circumstances.

[147] For all of these reasons, I found both the Plaintiffs to be reliable witnesses and that is the reason that I accepted their evidence regarding the mental and emotional stress that they experienced as a result of the Defendants tortious conduct.

[148] I assess the quantum of general damages at $12,000 in total $6,000 per Plaintiff.

[149] To conclude, the Plaintiffs have proven their claim of negligent misrepresentation. Damages are assessed at about $75,254.84, being $43,254.84 for the ancillary costs expenditure; $20,000 for the purchase price expenditure; and $12,000 for general damages. The actual award will be higher than this amount as the Plaintiffs are entitled to interest on the amount awarded for ancillary costs expenditure loss and purchase price expenditure loss.

(IV) COSTS

[150] If the parties are unable to reach an agreement with respect to costs they may set down an application to address that issue at any mutually convenient time.

Sinclair Prowse, J.