IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stoneman v. Denman Island Local Trust Committee,* 2010 BCSC 636

Date: 20100505
Docket: S115162
Registry: New Westminster

Between:

Daniel John Stoneman and Debra Monica Stoneman

Plaintiffs

And

Denman Island Local Trust Committee, Tony Law, Louise Bell, David Marlor, The Islands Trust and The Islands Trust Council

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiffs:	D.W. Burnett
Counsel for the Defendants:	M.M. Skorah, Q.C. J.K. Lamb
Place and Date of Hearing:	New Westminster, B.C. March 2-3, 2010
Place and Date of Judgment:	New Westminster, B.C. May 5, 2010

INTRODUCTION

[1] The plaintiffs own a 23 acre parcel of land on the eastern coast of Denman Island, British Columbia. They commenced this action on September 16, 2008, naming as defendants the Denman Island Local Trust Committee ("DILTC"), effectively the local government for Denman Island; Tony Law and Louise Bell, who according to the plaintiffs were at the material times two of the three DILTC trustees; David Marlor, a planner employed by the Islands Trust, who the plaintiffs allege was "the planner responsible for the decisions that were made with respect to the plaintiffs' property"; the Islands Trust; and the Islands Trust Council.

[2] The essence of the plaintiffs' complaint in this action appears to be that the defendants have abused their statutory authority by rendering a part of the lands of the plaintiffs subject to development permit requirements, refusing an application for a development permit, refusing an application for a Siting and Use Permit necessary for construction of a dwelling on the property, and negligently causing or allowing physical damage to the land via erosion.

[3] The defendants apply to dismiss this action on the basis that the statement of claim (now the amended statement of claim) discloses no reasonable cause of action against them, or is scandalous, frivolous and vexatious, or is *res judicata* and an abuse of process of the court. The application is made on the authority of Rule 19(24)(a), (b), and (d) of the *Rules of Court*. Alternatively, the defendants apply to strike parts of the amended statement of claim on the same grounds. The defendants also apply to dismiss the claim against the defendant, the Islands Trust, on the basis that the Islands Trust is not a legal entity capable of being sued. The applicants also seek special costs, or alternatively costs of the application and the proceedings.

[4] The amended statement of claim filed with the court on July 27, 2009 is attached to these reasons as Appendix "A".

FACTUAL BACKGROUND

[5] On July 8, 2004, the plaintiffs purchased their property from Mr. Francis Dean Ellis. Mr. Ellis owned two parcels of land located on the north east coast of Denman Island in or near an area known as Komas Bluff. The plaintiffs purchased Lot A, and Mr. Ellis retained Lot B.

[6] At the time of their purchase, the Ellis lands were the subject of an existing lawsuit brought against Mr. Ellis by the DILTC. That action (the "Ellis action") related to allegations that Mr. Ellis had removed trees and otherwise altered parts of the two lots in breach of a bylaw. The DILTC had filed a Certificate of Pending Litigation ("CPL") against the Ellis lands. After their purchase, the plaintiffs here, the Stonemans, were joined to the litigation as defendants, as some of the relief sought would affect them. The order joining the Stonemans was made on the consent of the then existing parties, the DILTC and Mr. Ellis. The Stonemans did not seek to set aside the order joining them as parties to the Ellis action. They represented themselves in the Ellis action. They filed a counterclaim in the Ellis action.

[7] The Ellis action was the subject of a decision by Groberman J. of this Court: *Denman Island Local Trust Committee v. Ellis*, 2005 BCSC 1238. The Court of Appeal dismissed an appeal brought by Mr. Ellis: *Denman Island Local Trust Committee*, 2007 BCCA 536. The plaintiffs did not participate in the appeal.

[8] The background set out by Groberman J. in his decision is relevant here as well. For convenience I will quote from the reasons for judgment of Groberman J.:

> [1] The plaintiff is the local government body for Denman Island. It alleges that the defendant Ellis removed trees and otherwise altered areas of two lots in breach of a bylaw. Relying on section 28 of the *Islands Trust Act*, R.S.B.C. 1996, c. 239 and section 281 of the *Local Government Act*, R.S.B.C. 1996, c. 323, it seeks a declaration that Mr. Ellis has violated the bylaw, an injunction to prevent further violations, and an order compelling Mr. Ellis to take measures to remediate the damage caused.
>
> [2] Mr. Ellis resists the action, arguing that he has not violated the bylaw, that the bylaw is invalid or inapplicable, and, in the alternative, that the court has no jurisdiction to require that he undertake remedial measures.

[3] The Stonemans purchased one of the two lots after this litigation was commenced, and after a certificate of pending litigation was registered against the lot. No remedy is currently sought against them, other than an order that they permit Mr. Ellis to enter and remediate their lot in the event that such an order is granted against him.

…

[6] In May 1999, in Bylaw No. 111, the plaintiff amended the Official Community Plan Bylaw (Bylaw No. 60) to designate the Komas Bluff area as a Development Permit Area pursuant to the predecessor of section 919.1(1)(b) of the *Local Government Act*. The bylaw lists the objectives of the designation as follows:

1. To protect areas of unstable terrain from increased risk of slope failure and/or erosion due to cutting or removal of trees or other development.
2. To protect ground water and surface water from degradation due to development.

[7] It should be noted that the validity of Bylaw No. 111 was challenged in *Denman Island Local Trust Committee v. 4064 Investments Ltd.*, 2000 BCSC 1618, appeal allowed 2001 BCCA 736. This court's finding that Bylaw No. 111 was part of a package of invalid bylaws aimed at forest management was overturned by the Court of Appeal. Because certain issues of validity specific to Bylaw No. 111 were not fully argued before it, the Court of Appeal remitted those issues to this court. The case appears to have settled, however, and questions concerning the validity of Bylaw No. 111 remained unanswered.

[8] The lots with which the current case is concerned are located on the [eastern] side of Denman Island, at the south end of the Komas Bluff Development Permit Area (the "Komas Bluff DPA"). They have over 800 metres of coastline, all of which is within the Development Permit area.

[9] In early 2000, the then-owner of the land obtained a development permit allowing it to harvest trees and clear parts of the lots for the purpose of creating a Christmas tree farm. The development permit included the following conditions:

> No Harvesting of trees and/or clearing or alteration of land is permitted within 50 metres of the top edge of the bluff situated on the eastern side of the subject property.
>
> Harvesting of trees and/or clearing or alteration of land lying 50 metres or more from the top edge of the bluff … is permitted only if the 50-metre setback line mentioned above has first been located and clearly identified on site by the applicant, to the satisfaction of the Denman Island Local Trust Committee.

…

[13] Mr. Ellis made a number of inquiries to Islands Trust staff about cutting trees, and was advised that he needed to obtain a development permit prior to any cutting. Nonetheless, there is overwhelming evidence indicating that Mr. Ellis made a concerted effort to remove trees from the buffer zone.

> …
>
> [30] The parties have generally referred to the bylaw that establishes the Komas Bluff DPA as Bylaw No. 111. In fact, Bylaw No. 111 enacted amendments to the Official Community Plan Bylaw (Bylaw No. 60), and its operative provisions are now part of Bylaw No. 60. In the balance of these reasons, I will refer to the bylaw as Bylaw No. 60.
>
> [31] The plaintiff claims that the clearing of the lots contravened Bylaw No. 60, and also contravened the existing development permit in respect of the lots, which specifically required the maintenance of a 50 metre buffer zone.
>
> [32] I am satisfied that the only reasonable conclusion that can be drawn from the facts is that there has been a deliberate and systematic effort on the part of Mr. Ellis to clear the buffer zone of tree cover. He has knowingly ignored the requirement to obtain a Development Permit before clearing the land, and, to the extent that it is valid and enforceable, contravened Bylaw No. 60 and (in the result) section 920 of the *Local Government Act*. Even if I accepted his own evidence as accurate (which I do not), it is clear that he has removed tree cover from the buffer zone without a permit.

[9] Mr. Justice Groberman dismissed the following arguments made by Mr. Ellis:

1. that the bylaw was void for vagueness, in that the western boundary of the Development Permit Area established by the bylaw was imprecise;

2. that the bylaw establishing the Komas Bluff Development Permit Area effectively prohibited farming in the subject area, and therefore the bylaw was of no force or effect due to inconsistency with the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36; and

3. that the bylaw was unenforceable due to conflict with regulations under the *Workers' Compensation Act* requiring the removal of dangerous trees.

[10] After ruling the bylaw valid, Groberman J. granted an injunction against Mr. Ellis, and ordered that he remediate the property, including the relevant parts of the lands sold to the Stonemans. The Stonemans were ordered to allow Mr. Ellis access to their property for the purpose of carrying out the remediation efforts. No other order was made in respect of them. Although the Stonemans sought payment of their costs by the DILTC, Groberman J. ordered that as between the Stonemans and the DILTC, both sides would pay their own costs.

[11] The Stonemans were self-represented in the Ellis action. They did not apply to set aside the order joining them as parties. On January 20, 2005, a few days prior to the hearing before Groberman J., they filed a counterclaim against the plaintiff in that action, the DILTC. No decision has been made relating to their counterclaim, and no trial date has been set. The Stonemans assert that the counterclaim has essentially been dormant since its filing. However it remains extant. Part of the basis of the defendants' present application is that the present action in part duplicates the existing counterclaim and is therefore an abuse of process.

[12] On April 12, 2006, continuing to act on their own behalf, the Stonemans commenced proceedings for judicial review by filing a petition under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. In those proceedings, the respondents are the DILTC and the Minister of Community Services. The allegations are difficult to discern, but there are contentions that on November 23, 2005 the DILTC refused an application for a development permit, and that the DILTC denied an application made by the Stonemans on August 3, 2005 for a Siting and Use Permit which would allow for construction of a farmhouse "to be located 50 metres from the top of the bluff". There appear also to be continued complaints about the validity of Bylaw 111 or the manner in which it was being applied. The application for judicial review has never been heard. Again, the proceedings remain extant, however.

[13] On September 16, 2008, now acting through legal counsel, the Stonemans commenced this action. On July 27, 2009 they filed an amended statement of claim. Subsequently, they retained new legal counsel who now represent them and who appeared before me on this application.

LEGAL PRINCIPLES

[14] Rule 19(24) of the *Rules of Court* is as follows:

> Scandalous, frivolous or vexatious matters
>
> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[15] The notice of motion of the defendants refers to Rules 19(24)(a), (b) and (d), but not subrule (c).

[16] The purpose of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 59-60, citing *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.); and *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544.

[17] In *Homalco*, K. Smith J. stated at para. 5:

> The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action.

[18] The leading case relating to an application under R. 19(24)(a) is *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959. There, the Court, at 968, related the Rule and analogous provisions in other provinces to the court's "inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action".

[19] Madam Justice Wilson, for the Court, referred to some of the relevant British Columbia authorities at 978 as follows:

> In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O.

> 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in Minnes v. Minnes (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:
>
> > In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied.
>
> For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):
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> > I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried.

[20] Mr. Justice Wilson summarized the relevant law, at 980, as follows:

> Most recently, in *Dumont v. Canada (Attorney General),* [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* [*Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735] was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".
>
> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[21] The "plain and obvious" (or "beyond reasonable doubt") test means that the court is "obliged to read the statement of claim as generously as possible": *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 451. The plaintiff's case

is "put at its highest" by the court assuming that facts set out in the statement of claim are true: *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 at para. 7 (S.C.), aff'd [1998] B.C.J. No. 2965 (C.A.); and *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15.

[22] The meaning of the terms used in subrules 19(24)(b) and (c) was discussed by Romilly J. in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* [1999] B.C.J. No. 2160 (S.C.) at para 47:

> Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: Gittings v. Caneco Audio-Publishers Inc. (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: Keddie v. Dumas Hotels Ltd. (1985), 62 B.C.L.R. 145 at 147 (B.C.C.A.). An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: College of Dental Surgeons of B.C. v. Cleland (1968), 66 W.W.R. 499 (B.C.C.A.). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: Strauts v. Harrigan, [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: Lutz v. Canadian Puget Sound Lumber and Timber Co. (1920), 28 B.C.R 39 (C.A.). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: Chrisgian v. B.C. Rail Ltd. et al., [1992] B.C.J. No. 1567, (6 July 1992), Prince George Registry 20714 (B.C.S.C.).

[23] The modern view is that novel claims should not be struck at the pleadings stage: see *Mohl v. University of British Columbia* 2006 BCCA 70 at para. 40.

[24] The "plain and obvious" test also applies to applications under the other subrules of Rule 19(24): see *Parmar v. Blenz the Canadian Coffee Co.*, 2007 BCSC 1190 at para. 33.

ISSUES

[25] The issues on this application are as follows:

1. Do the pleadings fail to disclose a reasonable claim, or are they unnecessary, scandalous, frivolous or vexatious, or otherwise an abuse of process?

2. If so, what should the remedy be?

3. Should the action be struck out as against the Islands Trust, on the ground that it is not a legal entity capable of being sued?

ISSUES

First Issue: Do the pleadings fail to disclose a reasonable claim, or are they unnecessary, scandalous, frivolous or vexatious, or otherwise an abuse of process?

Preliminary Remarks

[26] The amended statement of claim (Appendix "A" hereto) fails to satisfy the basic purposes of pleadings. It generally fails to set out the material facts of the pleading (Rule 19(1)), and it fails to avoid inconsistent pleadings (Rule 19(7)). It is confusing and contradictory. When facts are apparently referred to, it is unclear as to what facts are intended to relate to what purported cause of action. It is difficult to discern with any precision or clarity what causes of action are being alleged and against which defendants.

[27] There is no express requirement in the *Rules of Court* to set out a cause of action by name: see *Alford v. Canada* at paras. 12-15. However, a pleading may be struck or an action dismissed where it "discloses no reasonable claim or defence as the case may be," in the words of Rule 19(24)(a). The requirement is simply to set out the material facts upon which the plaintiff relies to support a cause of action known in law. However, when it is apparent that several causes of action are being alleged against multiple defendants, then unless the statement of claim sets out with clarity what facts relate to what cause of action and against which defendant, the pleading fails to "clearly define the issues of fact and law to be determined by the court": *Homalco* at para. 5.

[28] I will refer to some examples of lack of clarity in the amended statement of claim herein (these examples are not intended to be exhaustive):

1. Paragraph 11 alleges that "the defendants refused or neglected to issue and/or honour existing permits concerning the plaintiffs' property, and have acted contrary to law". In this respect:

    (a) it is unclear what "existing permits" are being referred to;

    (b) it is unclear what permits were refused (although one can guess that it is the Siting and Use Permit and the Development Permit referred to in paras. 17(f) and (g));

    (c) only the DILTC would issue permits, yet the contention is against all defendants;

    (d) on one reading, the plaintiffs are contending that the defendants have refused to honour permits that they have failed to issue; and

    (e) the reference to acting "contrary to law" is so vague as to be meaningless.

2. Paragraph 12 alleges a breach of a statutory duty said to be owed to the plaintiffs on the part of the defendants other than Mr. Marlor. This is followed in para. 17 by a reference to a "breach of trust" which I might speculate was intended to refer back to para. 12. However the material facts that relate to para. 12 are not pleaded.

3. Similarly, paras. 13, 14, and 15 fail to set out the material facts upon which the claims are made.

4. Paragraph 16 contends that the defendants have acted "negligently, in bad faith, with malice, and in abuse of public office". Paragraph 17 purports to set out "specifics" (particulars) of the claims. In many instances it is not clear what particulars are intended to relate to which

> claim, or to which defendant. In most instances the particulars themselves lack any adequate factual foundation. For example—and these are only the most glaring examples—subparagraphs (a), (h), (i), (k), (l), (m), (n), (o), and subparagraphs (q) through (x) all lack material facts as required. In each instance one is left to guess as to what is being referred to. Several paragraphs allege some kind of wrongdoing against the defendants, or some of them, "or one or more of them".
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> 5. Paragraph 18 alleges a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. (Section 7 of the *Charter* states that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.) Quite apart from whether such a claim could be sustainable in law, there are no material facts pleaded to support the allegation.

[29] The existing amended statement of claim does not provide the defendants with appropriate notice of the claim that they are expected to meet. As relevancy for the purposes of discovery and trial depends upon the pleadings, it does not allow the litigation to be kept within proper bounds. It does not allow for adequate delineation of the factual and legal issues to be determined by the court. In the circumstances, it is very difficult to assess whether a reasonable cause of action is made out, as it is virtually impossible to determine what was intended by the pleadings in question.

[30] Moreover, many of the specific matters as presently pleaded appear to be without merit.

[31] There are references in the amended statement of claim to "breach of trust". The Islands Trust is not a legal trust in the common law sense. There is no trust property vested in the trustees, and no beneficial holder of the trust property.

[32] A similar claim was advanced in *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334. Madam Justice Stromberg-Stein stated at paras. 140-142:

> [140] The breach of trust claim appears to have been an afterthought. It was neither properly pled nor particularized. Ms. Costello characterizes the trust claim such that "the Trust property is clearly the Trust area including the property the Plaintiff owns and occupies". Ms. Costello acknowledges she has a weak argument in support of her trust claim, suggesting the defendants are trustees who owe a duty to protect her building.
>
> [141] In fact, no such trust relationship exists in fact or in law as the defendants are not trustees of Ms. Costello's property. To the extent that Ms. Costello's property is within the jurisdiction of the Islands Trust, it is subject to the benefits of and the land use obligations of the Islands Trust outlined in s. 3 of the Act: "to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust and of British Columbia generally".
>
> [142] The Act was not intended to create a private law duty as between the Islands Trust and Ms. Costello. Rather, it intended to create a general public law duty for the Islands Trust to act in a manner to preserve the trust area. Further, local trust committees cannot be responsible as fiduciaries to individual residents, particularly in the realm of bylaw enforcement.

[33] The unique nature of the Islands Trust legislation was noted in the decision of the Court of Appeal in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*, [1995] B.C.J. No. 1763 (C.A.).

[34] The references to "breach of trust" in the amended statement of claim are misplaced, but could be perhaps be interpreted as allegations of breach of statutory duty.

[35] To the extent that the plaintiffs allege breach of statutory duty, without more (as in paras. 12, 17(c), and 17(i) of the amended statement of claim), that is not a cause of action. As stated by McLachlin C.J.C. in *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9:

> The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: The Queen in right of Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a

> declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

[36] Paragraphs 9, 10 and 17(d) of the amended statement of claim complain about the plaintiffs having been joined as defendants to the Ellis action after they purchased their land from Mr. Ellis. The Stonemans could have applied to have the order joining them as defendants set aside. Instead, they actively participated in the Ellis action, including the filing of a counterclaim.

[37] Paragraph 17(e) complains of the filing of the CPL against the lands in the Ellis action. It was open to the Stonemans to apply under s. 256 of the *Land Title Act*, R.S.B.C. 1996, c. 250, to set aside the CPL within the action in which it was issued.

[38] Paragraph 17(f) and (g) and 17(q) refer to refusal to issue a Siting and Use Permit, and a Development Permit. Only the Siting and Use Permit is referred to in the claim for relief. To the extent that the plaintiffs seek to challenge the decision not to grant a Siting and Use Permit, they must proceed by way of judicial review: *Berscheid v. Ensign*, [1999] B.CJ. No. 1172 (S.C.) at paras. 50-52. No such remedy is available in tort. This claim is clearly duplicated by the petition the plaintiffs have already brought.

[39] The DILTC has no duty to the plaintiffs or at all to litigate the bylaws referred to in paragraph 17(j).

[40] Paragraph 17(k) refers to the plaintiffs being compelled to execute a consent order. It sets out no material facts having any connection to any cause of action.

[41] Paragraphs 17(r) and (s) also set out no material facts. To the extent that these pleadings refer to the order made by Groberman J. that Mr. Ellis remediate the damage he caused to the properties, the matter is *res judicata*.

[42] With respect to the existing proceedings, it is an abuse of process for a party to commence a second legal proceeding for substantially the same relief as a prior proceeding: *Berscheid* at paras. 52, 53, and 132.

[43] The allegations in the counterclaim the Stonemans filed in the Ellis action are difficult to discern or to characterize from a legal perspective. There is a complaint that the DILTC failed to apply Bylaw 111 in a manner which would have prevented a landslide that occurred November 12, 2003, after the Stonemans agreed to purchase the lands, but before they completed the transaction, resulting in the loss of 975 square meters of land. There is a complaint about the CPL that the plaintiff filed against the lands. There is a vague reference to "bad faith" and to "false representations and assertions made by the Plaintiff" that have denied the Stonemans the use and enjoyment of their lands.

[44] Clearly there is much duplication between the counterclaim and the new action.

[45] As noted previously, the plaintiffs' existing petition filed under the *Judicial Review Procedure Act* refers to the refusal by the DILTC of application for a development permit on November 23, 2005, and that the DILTC denied an application made by the Stonemans on August 3, 2005 for a Siting and Use Permit for the construction of a farmhouse.

[46] In response to this application, Mr. Stoneman has sworn an affidavit in which he concedes there is "some overlap" between this action and the counterclaim, and with the claim for judicial review. He deposes that he has no intention of pursuing rulings based upon the same allegations in more than one proceeding. He agrees to abide by any order that the court should make to prevent this from occurring.

[47] The plaintiffs rely heavily upon the "plain and obvious" principle. They also say that the argument of the applicants inappropriately parses the allegations in the amended statement of claim for the purpose of arguing that parts thereof do not in and of themselves set out a reasonable cause of action. They argue that the proper test is whether the pleading as a whole sets out a reasonable cause of action, or could be amended to do so. The plaintiffs say that if necessary, they should be permitted to amend the pleading in order to appropriately plead their causes of action.

[48] I was not, however, provided with a draft proposed further amended pleading, with which I might better evaluate the potential pleading.

[49] I am satisfied that the existing amended statement of claim is vexatious, prejudicial to a fair trial of the proceeding, and an abuse of process, and should be struck out in its entirety.

Second Issue: What remedy should be ordered?

[50] I turn to an examination of the causes of action that the plaintiffs appear to allege, in order to assess whether the action should be entirely dismissed, or stayed, and whether the plaintiffs should be granted leave to amend.

[51] In their submissions, the plaintiffs characterize their action as follows:

> The present action is in tort, arising from the ongoing implementation and application of bylaws to pursue objectives outside the defendants' legal power. Principally that amounts to abuse of statutory authority, but also to the extent the actions have negligently caused damage (most obviously in the form of a landslide for failure to allow diversion of water in the development permit area) it also includes negligence.

[52] They argue that the core of the present claim is abuse of statutory authority. They argue that the conduct complained of falls within the tort of "misfeasance in public office."

Misfeasance in public office, "bad faith"

[53] The tort of misfeasance in public office is now broadly recognized: see L. Berry, ed., *Remedies in Tort*, looseleaf (Toronto: Carswell, 2009) vol. 3 at paras. 56-65. There, such cases as *Roncarelli v. Duplessis*, [1959] S.C.R. 121 are referred to.

[54] More recently, in *Odhavji*, the Supreme Court of Canada confirmed the existence of the tort, and set out its constituent elements. The Court held that the pleading in that case set out the constituent elements of the tort, and therefore should not have been struck out on an application under an Ontario rule equivalent to Rule 19(24)(a).

[55] Mr. Justice Iacobucci, for the Court, explained at para. 22 that there are two forms of the tort, which he called Category A and Cateory B:

> Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

[56] He went on to explain, at paras. 22-23, the constituent elements of the tort, and their manner of proof as follows:

> [22] … It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.
>
> [23] In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[57] The tort is an intentional one: mere inadvertence or negligent performance of obligations is not sufficient: *Odhavji* at para. 26.

[58] At para. 31 of *Odhavji*, Iacobucci J. explained that his conclusions were not inconsistent with the Court's decision in *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, which held that the nominate tort of statutory breach did not exist. Breach of a statute alone is insufficient to establish liability; however a public officer who breaches a statute may be liable for misfeasance in public office where the constituent elements of the tort are made out.

[59] At para. 32, Iacobucci J. explained that as in any other tort claim, the plaintiff must prove that the tortious conduct was the legal cause of his or her loss, and that the losses suffered are compensable in tort law.

[60] In *Entreprises Sibeca Inc. v. Frelighsburg (Municipality),* 2004 SCC 61 at paras. 15 and 23, the Court confirmed that a municipality will not be liable in tort for damages caused in relation to passage of a bylaw, even if the bylaw is later ruled invalid. However the immunity it enjoys has limits: there could be liability if the passage of the bylaw was in bad faith, in the sense of an abuse of power.

[61] As the plaintiffs submit, the general nature of a number of the allegations appears to relate to the tort of misfeasance in public office.

[62] Based upon *Odhavji,* the constituent elements of the tort of misfeasance in public office are as follows:

1. the defendant is a public officer;

2. the public officer must have engaged in deliberate and unlawful conduct, in his or her capacity as a public officer;

3. the public officer's conduct was specifically intended to injure the plaintiff, or the public officer must have been aware:

    i. that his or her conduct was unlawful, and

    ii. that it was likely to harm the plaintiff.

4. the tortious conduct was the legal cause of the plaintiff's loss or injury; and

5. the plaintiff suffered compensable loss as a result of the tortious conduct.

[63] As noted, the tort is an intentional one: mere inadvertence or neglect in the performance of official duties is insufficient. Paragraphs 16 and 17 of the amended

statement of claim refer to “negligence”, which is either inconsistent with the claim of abuse of public office, or an alternative plea. It is impossible to be sure.

[64] The public officer defendants are the two trustees, Tony Law and Louise Bell, and the planner, David Marlor.

[65] A number of the existing allegations refer specifically to Mr. Marlor. There are some vague references to the trustees Law and Bell.

[66] The defendants point out that the trustees and Mr. Marlor enjoy immunity from actions for damages for conduct within their official duties, under s. 287(2) of the *Local Government Act*, R.S.B.C. 1996, c. 323. However, s. 287(3) excepts conduct where the public officer has been guilty of “dishonesty, gross negligence or malicious or wilful misconduct”. The reference to “malicious or wilful misconduct” could potentially allow a claim for misfeasance in public office.

[67] Paragraph 17(b) complains of a passage of a bylaw. It is apparent that the bylaw being referred to is the development permit area Bylaw 111, referred to in the judgment of Groberman J. as Bylaw 60. On its face, the plaintiffs seek to re-litigate the same issue already decided by the court. In argument, the plaintiffs say that there are issues and evidence relating to the passage of the bylaw that were not before Groberman J., such as concerning the boundaries of the Development Permit Area. Paragraphs 17(u), (v), and (w) appear also to relate to the passage of the bylaw. Without proper pleadings, I am unable to decide whether the plaintiffs may have a claim in tort in this respect.

[68] The plaintiffs have existing legal proceedings apparently challenging the validity of the bylaw. Whether issues have already been litigated and decided by the court in that respect will be for the court to decide within those proceedings. I note that even if the bylaw were ruled invalid, that would not necessarily result in tortious liability to the DILTC: *Welbridge Holdings Ltd. v Greater Winnipeg*, [1971] S.C.R. 957; and *Entreprises Sibeca* at paras. 15 and 23. The local government would have to be found to be acting in bad faith.

[69] The Court in *Entreprises Sibeca* did not set out the elements of the tort of municipal bad faith as it did in *Odhavji* in relation to misfeasance in public office. In the administrative law sphere, at least, good faith is presumed: *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* at para. 156 *per* Finch J.A. (as he then was).

[70] However, in general, it is conceivable that the plaintiffs could make claims in tort for damages for misfeasance in public office and bad faith misconduct.

[71] Such claims have not been properly pleaded. The material facts are not alleged. It is insufficient merely to allege “bad faith” without specifics. The existing pleading is hopelessly clouded by imprecision. In relation to misfeasance in public office, there is no pleading of deliberate and unlawful conduct by specific officials, knowingly unlawful, specifically intended to harm the plaintiffs, or knowing that harm would likely result.

[72] I conclude that the plaintiffs have not pleaded reasonable causes of action in relation to misfeasance in public office, or bad faith misconduct on the part of the local government. However such causes of action are known in law. I conclude that the plaintiffs should be granted leave to properly plead such claims.

Negligence

[73] In *Costello*, after a 28-day trial, the Court rejected the plaintiffs claims based upon misfeasance in public office, and negligence.

[74] Madam Justice Stromberg-Stein described the essential requirements for the negligence claim in the context of the case before her as follows:

> [122] Ms. Costello must establish three elements in order to succeed in her claim for negligence:
>
> (i) that the defendants owed her a duty of care;
>
> (ii) that the defendants breached that duty of care; and
>
> (iii) that damages resulted from that breach: *Odhavji*, at para. 44.
>
> [123] …It is well-accepted that establishing a duty of care must be done through the two-step analysis outlined by the House of Lords in Anns v. Merton London Borough Council, [1978] A.C. 728, [1972] 2 W.L.R. 1024 and

> adopted by the Supreme Court of Canada in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641 and further clarified in Cooper v. Hobart, 2001 SCC 79, [2001] 3 S.C.R. 537 [Cooper]; Edwards v. Law Society of Upper Canada, 2001 SCC 80, [2001] 3 S.C.R. 562 [Edwards]; Odhavji and Childs v. Desormeaux, 2006 SCC 18, [2006] 1 S.C.R. 643 [Childs]. The two-step approach, recast in Childs, at para. 11, asks:
>
> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?
>
> …
>
> [128] In this case, Ms. Costello's foundation for her claim in negligence is less than clear. The pleadings, as outlined earlier in these reasons, are vague and do not clearly set out a factual and legal basis for Ms. Costello's case. The essence of the pleadings appears to be that the Trust Council was negligent in its oversight, or failed to properly supervise, the HILTC [Hornby Island Local Trust Committee] during the SUP [Siting and Use Permit] and DVP [Development Variation Permit] applications.
>
> …
>
> [130] In addition to these problems, Ms Costello has not cited, nor am I aware of, any authorities which recognize a duty of care in the circumstances that she alleges in this case. The analysis must therefore turn to whether the law of negligence should be extended to establish a novel standard of care.

[75] Madam Justice Stromberg-Stein went on to hold that there was insufficient proximity to establish a duty of care, strong policy reasons against imposition of a duty of care, and even if there were a duty, no breach of that duty on the facts of the case before her.

[76] In the case at bar, the Court would be required to undertake a similar analysis upon the trial.

[77] Paragraph 13 of the amended statement of claim refers to unspecified loss, damage and expense, mental distress, loss of 975 square meters of "waterfront property" due to landslide and erosion, and continued risk to the property through landslide and erosion. The only fact alleged in support of the claim in negligence is para. 11, which refers to a breach of duty under the legislation. As noted, mere breach of statutory duties without more does not constitute the tort of negligence.

[78] A person wishing to bring a negligence action against a public authority must establish that the claim falls within a category of case in which a duty has been previously recognized, or an analogous case; otherwise the two-step *Anns* analysis must be undertaken: A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis, 2006), at 710; and *Syl Apps Secure Treatment Center v. B.D.*, 2007 SCC 38 at paras. 22-34.

[79] However, there have been many successful cases in negligence against public authorities. As I cannot say at this stage that the claim for damage to the land is bound the fail, the plaintiffs should be granted leave to amend the statement of claim to properly plead such a claim.

Charter of Rights and Freedoms, s. 7

[80] Paragraph 18 alleges a breach of s. 7 of the *Charter*.

[81] The plaintiffs acknowledge that pure property and economic rights have not been held to engage s. 7 of the *Charter*, but they argue that the concept of "liberty" is engaged when government makes decisions that compel or prohibit important and fundamental life choices: *A.C. v. Manitoba (Director of Child and Family Services)* 2009 SCC 30 at para. 100, citing *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844 at para. 66. Therefore, they argue that government actions which impact the Stonemans' lifestyle choices in relation to the use of their lands can be said to engage their liberty. Although there is no pleading to this effect, they say that the defendants' conduct has denied them their liberty to engage in the livelihood of farming their land, in that they have been prevented from farming a large part of their land.

[82] In *A.C.*, the Supreme Court of Canada upheld the constitutional validity of Manitoba's child welfare legislation, in relation to orders for medically necessary treatment of minors. *Godbout* related to a municipal resolution mandating that employees reside within the City.

[83] At its highest, the plaintiffs argue that their ability to farm this particular parcel of land is impaired to some extent. Similar arguments could be made with respect to almost any land use restrictions. Nothing prevents the Stonemans from farming any lands for which such use is allowed, either on Denman Island or elsewhere. A nearly identical pleading was struck out by Stromberg-Stein J. in *Costello* at para. 3, on the ground that s. 7 of the *Charter* does not protect property or economic rights. I consider myself bound by that ruling.

[84] There is no reasonable claim based upon an alleged breach of s. 7 of the *Charter*. No amendment could save it. The pleading must be struck out, with no liberty to re-plead it.

Abuse of Process

[85] The applicants argue that this action duplicates the prior proceedings that the plaintiffs have brought, and which remain extant: the counterclaim in the Ellis action, and the petition under the *Judicial Review Procedure Act*.

[86] These proceedings are of fundamentally different character than the judicial review proceedings. Relief in the nature of the prerogative writs is to be brought by way of judicial review. Conversely, damages cannot be obtained in the judicial review proceedings: see *Judicial Review Procedure Act* at s. 2; and *McLean v. British Columbia (Minister of Human Resources)*, 2004 BCSC 285 at paras. 47-49.

[87] Therefore, it would not be appropriate to stay the judicial review proceedings.

[88] If within those proceedings there are issues raised that are *res judicata*, or pleadings that are otherwise an abuse of process, that should be dealt with by an application within those proceedings, or can be dealt with by the court on the hearing of the petition on the merits.

[89] The applicants also argued that parts of the new claim are *res judicata*, on the basis that Groberman J. already decided certain issues relating to the validity of the Development Permit Bylaw in the Ellis action, and that the Stonemans were parties

to that action. However, as I understand it, the plaintiffs here do not seek to attack the validity of the bylaw. Their claim is in tort. It is not plain and obvious to me that claims the plaintiffs are asserting are *res judicata*.

[90] In relation to the existing counterclaim, the normal course would be to strike out the new proceeding, to the extent that it duplicates a prior proceeding. Here, however, in my view, it is more appropriate to allow the new action to proceed, upon the limited basis that I have indicated, rather than directing that the plaintiffs completely recast their counterclaim, including the addition of new parties.

[91] The motion of the defendants here is to strike out the new action. They made no alternative application to stay the counterclaim. However, given the position of the Stonemans as set out in the affidavit, and the position taken by their counsel before me, I order that the counterclaim in the Ellis action shall be stayed.

Parties to the Action

[92] In my view, any questions relating to whether any particular defendants is a proper party to the action should be decided after the plaintiffs amend their pleading to properly plead the claims set out in this decision.

Third Issue: Is the Islands Trusts a legal entity capable of being sued?

[93] The defendants argue that the Islands Trust is not a legal entity and therefore cannot be sued. Both parties acknowledge that the point is of minimal practical significance.

[94] In *Talbot v. Hornby Island Local Trust Committee*, 2010 BCSC 524, I decided that the Islands Trust remains a legal entity. I adopt that conclusion herein.

[95] As noted above, the separate question of whether the plaintiffs can properly plead their claims against this defendant should await their amended pleading.

CONCLUSIONS

[96] The existing amended statement of claim is struck out in its entirety. However, the action will not be dismissed at this time. The plaintiffs will be granted leave to amend their statement of claim to properly plead claims in tort for misfeasance in public office, bad faith, and negligence. They will have 90 days to do so. Until the amended pleading is filed, the action is stayed.

[97] Although it may not need to be stated, the defendants will be at liberty to apply to strike out or dismiss all or any part of the amended pleading filed by the plaintiffs, upon any valid ground available.

[98] The defendants have been substantially successful, and shall receive costs. They should not have to wait for payment until the cause is ultimately determined, where it will be up to the plaintiffs to decide whether to continue the litigation. Therefore, costs will be payable forthwith, in any event of the cause. Costs will be ordinary costs at Scale B.

"Verhoeven J."
The Honourable Mr. Justice Verhoeven

APPENDIX "A"

Amended pursuant to "Rule 24.1(a) No. S115162
[Original filed Sep. 16/08] New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DANIEL JOHN STONEMAN AND
DEBRA MONICA STONEMAN

PLAINTIFFS

AND:

DENMAN ISLAND LOCAL TRUST COMMITTEE,
TONY LAW, LOUISE BELL, DAVID MARLOR, THE ISLANDS TRUST,
THE ISLANDS TRUST COUNCIL

DEFENDANTS

AMENDED STATEMENT OF CLAIM

1. The Plaintiff, Daniel Stoneman is retired. The Plaintiff Debra Stoneman is a retired office manager. Both Plaintiffs reside at 2600 Swan Road, Denman Island, British Columbia.

2. The Defendant, Denman Island Local Trust Committee (hereinafter referred to as "DILTC") is a Corporation under the provision of the *Islands Trust Act* and has an address for delivery at 700 North Road, Gabriola Island, British Columbia, V0R 1X3.

3. The Defendants, Tony Law and Louise Bell, were at all times material to this action, Islands Trust Trustees. Bell was the elected Trustee for Denman Island, and Law was the elected Trustee for Hornby Island, and sat as a Trustee for the DILTC. The Defendants Tony Law, and Louise Bell, (collectively "The Trustees") have an address for delivery in care of 200 – 1627 Fort Street, Victoria, British Columbia, V8R 1H8.

4. The Defendant, The Islands Trust (hereinafter referred to as "Islands Trust") is a statutory trust established and continued under the Islands Trust Act, RSBC 1996 Chapter 329. The Islands Trust has an address for delivery at 200 – 1627 Fort Street, Victoria, British Columbia, V8R 1H8.

5. The Defendant, David Marlor (hereinafter referred to as "Marlor") is a planner with the Islands Trust and was at all times material to this action the planner responsible for the decisions that were made with respect to the Plaintiffs' property. He was, at all material times, the agent, servant or employee of the Islands Trust. He has an address for delivery in care of 200 – 1627 Fort Street, Victoria, British Columbia, V8R 1H8.

6. The Defendant, The Islands Trust Council (hereinafter referred to as the "Trust Council") is a Corporation under the provisions of the *Islands Trust Act*. The Islands Trust Council has an address for delivery in care of 200 – 1627 Fort Street, Victoria, British Columbia, V8R 1H8.

7. The Islands Trust and Trust Council are vicariously liable for the actions of the DILTC, and the Trustees, by virtue of sections 4(3) and 11 of the *Islands Trust Act*.

8. In July 2004 the Plaintiffs purchased property at 2600 Swan Road, Denman Island. It was and is 23 acres. (Deleted) At the time of purchase, the property had two Development Permits registered on title, which permits allowed farming, logging and construction up to 50 meters from the bluff.

9. At the time the property was purchased, the DILTC was embroiled in litigation (the "Litigation") with Dean Ellis, the vendor of the Plaintiffs' property, concerning the Plaintiff's property, and another parcel of land. (Deleted)

10. At no time were the Plaintiffs in violation of any bylaw, yet they were added to the Litigation. When the Litigation went to trial, the Defendants offered no evidence against the Plaintiffs, and no judgment was granted against the Plaintiffs.

11. The Defendants refused or neglected to issue and/or honour existing permits concerning the Plaintiff's property, and have acted contrary to law.

12. Further or in the alternative the Defendants except Marlor breached their trustee duties to the Plaintiffs, in that they have failed to preserve and protect the Trust Area, and its unique amenities and environment for the benefit of the Plaintiffs, which area and amenities include the Plaintiffs' property. Further, these Defendants failed to protect farming and failed to protect development from hazardous conditions, contrary to the Denman Island Official Community Plan. In the result, these Defendants have breached their statutory duty to the Plaintiffs.

13. As a result of the actions of the Defendants, or one or more of them, the Plaintiffs have suffered and continue to suffer loss, damage and expense, mental distress and aggravation of damages. The Plaintiffs' losses include the loss of 975 square meters of waterfront property, to landslide and erosion. The Plaintiffs' property continues to be at risk of landslide and erosion.

14. The conduct of the DILTC, The Trustees, and Marlor as set out herein is outrageous, highhanded, vexatious, and entitles the Plaintiffs to punitive damages.

15. The actions of the DILTC are part of a pattern of conduct, and a plan or corporate strategy to delay, hinder, and prevent development, and prevent tree cutting, within the area administered by the DILTC . The plan, or corporate strategy extends far beyond the powers granted to the DILTC, and the Trust Council in bylaws and legislation, including Section 3 of the *Islands Trust Act*.

16. DILTC, The Trustees, and Marlor have acted negligently, in bad faith, with malice, and in abuse of public office. Islands Trust and Trust Council have acted negligently.

17. The specifics of the breach of trust, negligence, bad faith, malice, and abuse of public office include the following:

a. The Defendants and each of them have attempted to prevent, and have prevented, the Plaintiffs from having the use and enjoyment of their property;

b. DILTC, The Trustees, and Trust Council passed, and/or allowed a bylaw to be passed which purported to regulate developments in hazardous areas, on the Plaintiff's property, but in fact was designed to prohibit development, and was in furtherance of the Defendant's desire to stop the cutting of trees on Denman Island;

c. Trust Council, and the Islands Trust, failed to review the activities of the DILTC as required by the *Islands Trust Act*, which activities include review of Bylaw 164, Bylaw 111, and the Schedules to the Bylaws.

d. The Plaintiffs were added to the Litigation without a resolution of the Executive Committee of the Trust Council, without a complaint, without any investigation, and without giving the Plaintiffs any opportunity to be heard in response. The Plaintiffs had no opportunity to provide any defence to being added. These actions violated Islands Trust policy. Further the Plaintiffs were denied the opportunity to have counsel present in Court when they were added to the Litigation;

e. The Defendants or one or more of them refused to remove a Certificate of Pending Litigation from title to the Plaintiffs' property without any legal basis for such refusal;

f. After the DILTC lost the Litigation as against the Plaintiffs, the Defendants, or one or more of them, still refused to issue a Siting and Use Permit to the Plaintiffs so they could build a house, and Marlor deliberately misrepresented the circumstances of the Plaintiffs' situation to DILTC;

g. DILTC, The Trustees, and Islands Trust refused to grant a Development Permit to the Plaintiffs, and refused to recognize the Development Permits that were already in place, and refused to issue a Siting and Use Permit to the Plaintiffs without any legal authority for these actions;

h. Marlor acted contrary to his professional obligations, which were to balance the interests of his employer with those of the Plaintiffs;

i. The DILTC, The Trustees, and Marlor failed to report to the Trust Council with respect to the steps that they were taking concerning the Plaintiffs;

j. DILTC failed to clarify the status of Land Use Bylaws 111 and 112 as required by the British Columbia Court of Appeal, in Denman Island Local Trust Committee v. 4064 Investments Ltd., before suing the Plaintiffs, and thus acted contrary to law;

k. DILTC demanded that the Plaintiffs consent to an Order of the Court after the DILTC lost in Court as against the Plaintiffs, and continued to insist that no Development Permit or Siting and Use Permit would be issued until they did consent to the Order, and further, refused to remove the Certificate

of Pending Litigation, if the Plaintiffs refused to sign the Order, even though the Consent Order had nothing to do with the Plaintiffs;

l. Marlor failed to follow the guidelines for issuance of a Development Variance Permit, and a Development Permit for the Komas Bluff area, he demanded the Plaintiffs obtain a new Development Permit when they applied for a Siting and Use Permit in early 2004;

m. Marlor prejudged the Plaintiff's Development Permit application by stating that it was incomplete when it was not;

n. Marlor failed to provide the DILTC with the proper information concerning the Plaintiffs' application;

o. Marlor recommended against approval of the Development Permit because there was an alleged violation of the existing permit which had not been dealt with, when he knew, or ought to have known, that there was no violation;

p. Marlor refused to recommend issuance of the Siting and Use Permit to the Plaintiffs without any justification;

q. The Islands Trust refused to issue a Siting and Use Permit, and other permits, to the Plaintiffs, and required other permits, without any legal justification. Further, the Islands Trust refused to recognize the existing permits the Plaintiffs possessed;

r. The Defendants failed to conduct an adequate or any investigation of the need for remediation of the Plaintiffs' property;

s. The Defendants, or one of them, failed to conduct an adequate or any investigation of the need for remediation to protect the Plaintiffs' property, prior to the Litigation, and ignored expert advice concerning the need for extensive remediation;

t. Marlor refused to accept a geotechnical report presented by the Plaintiffs, without any justification

u. Bell, Marlor and the DILTC, or one or more of them, misled the Agricultural Land Commission with respect to the Plaintiff's property and whether or not it should be included in a development permit area;

v. Bell, Marlor and the DILTC, or one or more of them, further included the Plaintiffs' property in the development permit area when they knew or ought to have known that it was included in the agricultural land reserve, it was regulated by the *Agricultural Land Commission Act,* it was flat and farmable, and in the result they acted contrary to orders made by the Agricultural Land Commission, and contrary to law.

w. Bell, Marlor and the DILTC, or one or more of them, acted without justification as required by the Local Government Act, when they extended the development permit area to include the Plaintiff s property.

x. Marlor deliberately misrepresented portions of the Plaintiff's property as unstable land, and withheld information from the Court in The Litigation.

18. Further, the DILTC, Islands Trust, and Trust Council are 'government,' as defined in the Canadian Charter of Rights and Freedoms. These Defendants owed a duty to the Plaintiffs to enact a scheme of even handed, non-political bylaw enforcement. These Defendants failed to enact such a scheme, and allowed bylaw enforcement to be conducted at the whim of the local trustees, and thus infringed or denied the Plaintiffs' rights under section 7 of the *Charter*.

WHEREFORE the Plaintiffs claim as follows:

As against the DILTC, The Trustees and Marlor and each of them:

a. Damages;

b. Special Damages;

c. Punitive, aggravated and exemplary damages;

d. Special costs;

e. An Order requiring the DILTC to issue a Siting and Use Permit for the buildings on the Plaintiffs' property that have been constructed;

f. A Declaration that the Plaintiffs' right to liberty, under the Charter of Rights was infringed or denied;

g. Such further and other relief as this honourable Court deems just.

As against the Islands Trust, and the Trust Council and each of them:

a. Damages;

b. Special Damages;

c. Aggravated damages;

d. Special costs;

e. An Order requiring the Islands Trust to issue a Siting and Use Permit for the buildings on the Plaintiffs' property that have been constructed;

f. A Declaration that the Plaintiffs' right to liberty, under the Charter of Rights was infringed or denied;

g. Such further and other relief as this honourable Court deems just.

PLACE OF TRIAL: New Westminster, BRITISH COLUMBIA

DATED at the City of Vancouver, in the Province of British Columbia, this 16 day of September, 2008.