Court of Queen's Bench of Alberta

Citation: Condominium Corporation No. 0321365 v. 970365 Alberta Ltd., 2010 ABQB 573

Date: 20100909
Docket: 0701 00737
Registry: Calgary

Between:

Condominium Corporation No. 0321365, and an Unspecified Unit Holder, As Representative Plaintiff

Plaintiffs

- and -

970365 Alberta Ltd., Dome Britannia Properties Inc., D. Marshall Project Management Ltd., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, John Cuthbert, Cuthbert Smith Consulting Inc., MCAP Financial Corporation, Residential Warranty Company of Canada Inc., Alberta Permit Pro Inc., Regional Municipality of Wood Buffalo, Gary Nissen, Archiasmo Architectural Works Limited, Macleod Dixon LLP, Burstall Winger LLP, David Marshall and Evan Welbourn

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice L.D. Wilkins

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[1] The plaintiff Condominium Corporation No. 0321365 (the Condo Corporation) is the title holder of the common property relating to a 7 tower apartment style complex known as Penhorwood Place in Fort McMurray, Alberta. The other plaintiff claims as an Unspecified Unit Holder, as a Representative Plaintiff seeking relief on his/her own behalf and on behalf of all the persons other than any defendant who purchased a condominium unit directly from a defendant or who are current owners of a condominium unit.

[2] The plaintiffs (plaintiffs) seeks damages arising from the alleged faulty construction of the condominium property from a large number of defendants, including MCAP Financial Corporation (MCAP). MCAP provided interim mortgage financing to the developer of the Penhorwood project.

[3] MCAP brings this application pursuant to section 159(2) of the *Alberta Rules of Court* seeking a summary judgment dismissing the claims of the plaintiffs against MCAP.

Issues

1) Did MCAP owe any duty of care to the plaintiffs?

2) Did MCAP breach a duty of care to the plaintiffs by its alleged representation that the terms of the commitment letter would be strictly enforced?

3) Was MCAP a "developer" within the meaning of section 14 of the *Condominium Property Act* (the *Act*).

4) Did MCAP conspire with others in the breach of any statutory or fiduciary duty?

5) Was MCAP unjustly enriched by receipt of the net purchase price for any condominium unit from any plaintiff purchaser?

Background Facts

[4] At the outset of this application Counsel for MCAP consented to the additional amendments to the proposed Statement of Claim by the plaintiffs as they relate to MCAP in order to permit the disposition of the motion brought by MCAP in relation to all matters.

[5] By virtue of those permitted amendments the Statement of Claim now advances claims against MCAP based on negligence, negligent misrepresentation and statutory duties as a developer under section 14 of the *Act*. The Statement of Claim also alleges that MCAP was part of a conspiracy with others to breach alleged fiduciary and trust duties and that MCAP, as one of the defendants, was unjustly enriched at the expense of the plaintiffs.

The Law

[6] Counsel were agreed that the test to be applied by this court in determining the motion of MCAP involves a two stage test as found by the Alberta Court of Appeal in ***Murphy Oil Co. v. Predator Corp.***, (2005) CarswellAlta 233 as stated at para. 25:

> "In the first, the moving party must adduced evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding

> party may adduce evidence to persuade the court that there remains a genuine issue to be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established there is no genuine issue to be tried."

[7] Other authorities have directed that the lack of a genuine issue for trial must be established beyond all reasonable doubt.

Issue Number One: Did MCAP Owe Any Duty of Care to the Plaintiffs?

MCAP Argument

[8] MCAP's argues that in its claim, the plaintiffs allege a duty of care owing to the plaintiffs by MCAP arises from the relationship between the plaintiffs as purchasers of condo units and MCAP is interim finance lender to the project. There is no Alberta authority finding such a duty to exist as part of any accepted category of relationships. The court must examine the appropriateness of finding a novel duty of care in this circumstance in light of the tests referred to in the authorities.

[9] In the present case there is no contractual relationship between MCAP and any purchaser. Damages alleged by the purchasers relate to the costs for rectification or repair of construction deficiencies. Other parties have a more direct relationship to the plaintiffs in the process of construction than MCAP. Such building defects cannot be found to be a reasonably foreseeable consequence of the alleged failure by MCAP to enforce the terms of its commitment letter with the developer. It is simply not foreseeable that any alleged failure to enforce the commitment letter could cause building defects in Penhorwood or an economic loss to the plaintiffs for the costs to remedy any such defect.

[10] There was no close and direct relationship between MCAP and the plaintiffs on which to found such a *prima facie* duty.

[11] An analogous situation was considered in ***CareVest Capital Inc. v. Chychrun***, (2008) CarswellBC 331 (*CareVest*) which considered the relationship between the construction lender and condo unit purchasers who held "pre-build" contracts with the developer. Due to rising construction costs, the lender required the developer to cancel existing pre-build contracts and replace these with higher value market contracts. Some of the holders of such pre-built contracts sued the lender alleging a duty of care.

[12] In dismissing that claim, Pittfield, J. states:

> 16 Proximity has been recognized as sufficient to warrant a duty of care in a number of categories of relationships. With respect, the relationship between a mortgagee and others with interests, real or apprehended, in land has only warranted the imposition of an obligation that may amount

to a duty of care when the mortgagee, or anyone acting on its behalf, proceeds to realize upon the mortgaged property. In such a case, the mortgagee is obliged to exercise reasonable care in an effort to ensure that the interest of a prior charge holder or the mortgagor is not harmed by an improvident sale at less than market value: see *Cuckmere Brick Co. v. Mutual Finance Ltd.*, [1971] Ch. 949 (Eng. C.A.). That obligation is not the substance of the respondents complaint in this case. The question is, therefore, whether the scope of the category should be expanded, or a new category created, in order to embrace the respondents' complaint. In my opinion, it should not.

17 *CareVest* and the developer are lender and borrower, respectively. In the ordinary course, no duty of care arises in the context of a debtor-creditor relationship: see *Baldwin v. Daubney* (2006), 275 D.L.R. (4th) 762 (Ont. C.A.). The lender is entitled to take whatever precautions it considers necessary to secure its loan and ensure that the funds it lends will be repaid. A stipulation that the borrower shall not sell property that secures the loan at less than a minimum price exists for the benefit and protection of the lender. It is not a covenant demanded by, nor intended to benefit, anyone else. The lender assumes the risk that the minimums will not yield sufficient funds to repay the full amount of the debt.

18 *CareVest* has no contractual relationship with any of the respondents. The respondents do not plead that the developer asked *CareVest* to take any steps to protect the interests of purchasers. While the respondents plead reliance upon the mortgagee's arrangement with the developer regarding minimum selling prices, the nature of the reliance is not readily apparent. There is no allegation of misrepresentation to any respondent. There is no pleading that any respondent relied upon any appraisal that had been prepared by *CareVest* or for its account. The fact that the respondents would place any reliance on the mortgagee's stipulation regarding minimum selling price was itself unreasonable.

19 In my opinion it is ironic that the respondents claim that the mortgagee had a duty to ensure that the minimum price it demanded would always be equal to market value and sufficient to ensure completion of the project and the discharge of all development and construction costs. The logical result of that claim, given the respondents' pleadings regarding market forces, is that the minimum should have been increased and, so too, the price charged to the respondents. The increased price the respondents suggest they should have been required to pay is the very amount of damages they seek to recover as a consequence of the alleged negligence.

> 20 There is a policy reason why any proximity between the mortgagee and the respondents should be regarded as too remote to create a duty of care. In the face of such a duty, a lender would be obliged to monitor and assess market factors and construction budgets and progress in order to protect purchasers in addition to protecting its own interests as a creditor wanting to ensure repayment of any loan it was prepared to make. In my opinion, the imposition of such a duty would adversely affect the orderly operation of lending and credit markets.

[13] By its terms, the commitment letter issued by MCAP was to remain confidential between MCAP and the developer. There is no evidence that any purchasing plaintiff had knowledge of the terms of its commitment letter with the developer. There simply exists no close or direct relationship between the plaintiffs and MCAP on which to found such a duty.

[14] Alternatively, if the Court were to find sufficient proximity to establish a *prima facie* duty, MCAP argues that such a duty should be rejected for policy considerations. Here, all advances under the interim financing agreement were made pursuant to the Certificate of a monitor/cost consultant engaged by MCAP who in turn relied on professional architectural and engineering certificates. By imposition of this duty the court would require a lender to investigate the worthiness of such certificates.

[15] The interim lender is in no position to review the state of construction and compliance with plans and building code requirements. The cost of any such enquiries, if required by the court, would have to be borne by the ultimate purchasers. A lender would be obliged to obtain a complete release from every purchaser and future prospective purchaser to protect against any such claim as a condition of the discharge of its mortgage on title should such a duty be imposed. Such a release would in turn render any such duty meaningless.

[16] Counsel for MCAP argued that it is contrary to policy to so dramatically change the accepted role of a mortgage lender to render such a lender potentially liable for any construction defect which may ultimately be found in the completion of the project.

Plaintiff Argument

[17] The plaintiffs did not directly address the issue of whether a duty of care should be found to be owed to the plaintiffs by MCAP arising from their relationship.

[18] Its argument was rather directed to the allegation of negligent misrepresentation and the authorities relating to the determination of such a duty.

The Law

[19] Counsel both advised the court that there was no known Alberta jurisprudence in which a court recognized a duty of care owing by an interim finance lender to purchasers of condominium units.

[20] The law relating to consideration of a duty of care which does not fall within the category previously recognized by the courts is to be found in a number of decisions of the Supreme Court of Canada which consider the application of the "*ANNS* test" which was set out in ***Anns v. Morton London Borough Council*** [1978], AC 728 (H.L.).

[21] The *ANNS* test was considered and interpreted in a number of Supreme Court of Canada decisions being:

> ***Kamloops (City of) v. Neilsen*** [1984] 2 S.C.R. 2
> ***Childs v. Desormeaux,*** 2006 SCC 18, [2006] 1 S.C.R. 643
> ***Cooper v. Hobart*** 2001 SCC 79, [2001] 3 S.C.R. 537
> ***Design Services Ltd. v. Canada*** 2008 SCC 22, [2008] 1 S.C.R. 737

[22] In *Design Services (supra)* at para. 46 the Court states:

> 46 The *Anns* test was recently described by this Court in *Childs (supra),* at para. 11:
>
> In *Anns v. Morton London Borough Council,* [1978] A.C. 728 (H.L.), Lord Wilberforce proposed a two-part test for determining whether a duty of care arises. The first stage focuses on the relationship between the plaintiff and the defendant, and asks whether it is close or 'proximate" enough to give rise to a duty of care (p. 742). The second stage asks whether there are countervailing policy considerations that negative the duty of care. The two-stage approach of *Anns* was adopted by this Court in *Kamloops (City of) v. Nielsen.* [1984] 2 S.C.R. 2, at pp. 10-11, and recast as follows:
>
> > (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?

> 47 In essence, if a *prima facie* duty of care is found at the first stage of the *Anns* test and there are no residual policy concerns negating the creation of that duty at the second stage, then a new category of duty is recognized.

[23] The further explanation offered in *Cooper (supra)* was accepted in *Childs (supra)* decision at para. 48:

> 48 The analytical process for the appellants to establish that there is a close and direct relationship between the parties and thus that there is a *prima facie* duty of care is explained by McLachlin C.J. and Major J. at para. 30 of *Cooper*:
>
> > At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises.
>
> **(a) Reasonable Foreseeability**
>
> 49 The usual indication of proximity is foreseeability. Here, the trial judge found that it was reasonably foreseeable that award of the contract to a non-compliant bidder would result in financial losses for the appellants (para. 110). At the Court of Appeal, PW conceded reasonable foreseeability of harm (para. 48). In this Court, PW does not resile from that concession. However, "[f]oreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320.
>
> **(b) Other Considerations Relevant to Proximity**
>
> 50 At para. 34 of *Cooper*, McLachlin C.J. and Major J. considered several factors for evaluating the closeness of the relationship between the parties in order to determine whether it was just and fair to find a duty of care:
>
> > Defining the relationship may involve looking at expectations, representations, reliance, and the

> property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant .

[24] Should a court conclude that a *prima facie* duty does exist a court in the second stage of analysis must consider whether there are residual policy concerns outside the relationship ought to negate a finding of a duty of care. Here again, the Supreme Court of Canada provides direction in *Cooper (supra)* at p. 552:

> 37 This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155), residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements, (*supra*), on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

Decision

[25] It is the conclusion of this court that there exists no sufficiently close relationship or proximity between MCAP and the plaintiffs to justify the imposition of a novel duty of care owing by MCAP.

[26] There was no contractual relationship between MCAP and the plaintiffs. MCAP was a lender to the developer whose advances remained unpaid at the time of each purchase. The only interest of MCAP in any purchase agreement between developer and plaintiffs is the enforcement of the covenant by the developer to ensure that the developer paid the net proceeds of the sales so received from a purchaser to MCAP. No harm to the plaintiffs arising from the allegedly faulty construction of the project can be found to be a reasonably foreseeable consequence of the actions of MCAP. That alleged harm must be found to arise by virtue of the alleged breaches of contractual terms between the developer and purchaser or, by those who participated in the construction of the project and thereby owed a duty of care to the unit purchasers.

[27] It is the opinion of this court that the reasoning of Pittfield, J. in *CareVest* is logical and persuasive in a closely analogous situation.

[28] Having so concluded, there is no need for this court to consider the policy implications of finding such a *prima facie* duty to exist. However, in the event it should be determined that I have erred in relation to my finding of insufficient proximity, I will address the second portion of the Anns test.

[29] It is my view that the imposition of such a duty upon a lender to somehow ensure for the benefit of a future purchaser of a unit in a project such as this that the construction of that project is compliant with the building code and planning regulations or without other defects would fundamentally change the nature of the project financing for similar projects. Such an obligation if imposed would require the lender to engage in a separate analysis of all aspects of the construction to ensure itself against any failures relating thereto and, in all probability to insist on receiving a complete release of any such obligation as part of any permitted purchase contract signed by the developer.

[30] Such a fundamental intrusion into the traditional role of interim finance lenders, would in my opinion be very disruptive to the market place and would be reason in itself for refusing to impose such a *prima facie* liability.

Issue Number Two: Did MCAP Breach a Duty of Care to the Plaintiffs by its Alleged Representation that the Terms of the Commitment Letter Would be Strictly Enforced?

Defendant's Argument

[31] MCAP argued there should be no finding of proximity between itself and any purchaser which could ground a claim for negligent misrepresentation.

[32] No purchaser was ever provided with or received a copy of the commitment letter. Nor was any prospective purchaser advised of the alleged undertaking by an MCAP representative to enforce the commitment terms. The reliance argument itself is solely based on the evidence of Penner that possession of the commitment letter by RESG was a factor that led RESG to recommend purchase of Penhorwood units to sophisticated investors. The plaintiffs' evidence as to the alleged undertaking is only based on the impression created in the mind of Penner - not actual words spoken or conduct by MCAP officers. RESG was at all times a sales agent for the developer, not an agent for the purchaser at the time of any such alleged representation.

[33] MCAP argues that even if the alleged undertaking had been provided to the purchasers, it would be of no value to give assurance to a purchaser that the building would be in compliance and free from defect particularly where the developers, architects, engineers and others accept contractual responsibility for such defects. MCAP further argued that the plaintiffs have shown no evidence of any actual reliance by a purchasing plaintiff.

[34] Even in the court should find a *prima facie* duty arising out of the relationship MCAP argues that policy considerations should preclude a duty being imposed on MCAP.

[35] The lender would lose its contractual ability to waive or vary any of the lending conditions with the developer if any future prospective purchaser could be found to be reasonably relying on the original commitment terms. The lender would be obliged to conduct its own investigations through experts rather than rely on a cost consultant's certificates which were in turn based on certificates from architects, engineers and other construction professionals.

[36] The cost of such investigations would necessarily be borne by the ultimate unit purchasers. The cost of insurance protection would also add to the lender as recoverable expense.

[37] MCAP argues that other parties directly related to the process of construction should be found to be better able to shoulder responsibility for any alleged defects and to ensure themselves against such liability.

[38] Should such a duty be imposed, any lender continuing in the project financing business would require a complete release from any purchaser of all possible claims under this duty as a condition of the discharge of its security interest which would totally negate the benefit of any such duty to the plaintiffs.

[39] The reasoning of Pittfield, J. in *Chycren (supra)* that the proximity between a lender and a unit purchaser is too remote to create a duty of care should be adopted by this court.

Plaintiffs' Argument

[40] The plaintiffs argues that the proximity exists between the plaintiffs and MCAP sufficient to impose the duty of care alleged.

[41] The plaintiffs and MCAP were in the requisite "special relationship" such that MCAP ought reasonably to foresee that the plaintiffs would rely on its representation and the reliance by the plaintiffs in these particular circumstances would be reasonable.

[42] The plaintiffs argues that the reasonable reliance of the plaintiffs on the alleged representation was contributed to by:

1) MCAP's financial interest in the transaction.

2) the professionalism or special skill or knowledge of MCAP.

3) that the representation was provided in the course of MCAP's business.

4) that the information was provided deliberately.

5) that the information was given in response to a specific inquiry.

[43] The plaintiffs argue that as a lender MCAP was in sufficient proximity to the purchasers to be found with an existing category of duty citing ***Con-Drain Co. (1983) Ltd. v. 846539 Ontario Ltd.*** (1997) 35 CLR (2d) 230 (*Con-Drain*). However, unlike *Con-Drain*, MCAP knew that the purchasers representative, RESG was relying on MCAP to strictly enforce the terms of its commitment letter to the benefit of future purchasers.

[44] To similar effect the plaintiffs cited ***Strata Plan NW 580 v. Canada Mortgage and Housing Corp.***, (2000) BCCA 507 (*Strata Plan 580*) and ***Keith Plumbing and Heating Ltd. v. Newport City Club Ltd.***, (2000) BCCA 141 (*Keith Plumbing*) as analogous situations in which a *prima facie* duty was found.

[45] Plaintiffs argue that in this case there was evidence that MCAP knew that RESG as purchaser's representative, had a copy of the commitment letter and was relying on MCAP to strictly enforce its conditions; the letter had been provided in the course of the business of MCAP and was a condition of the agreement between RESG and the developer; MCAP, through Roulston, had a special knowledge of the situation and MCAP had a direct financial interest in benefiting from RESG's experience to present qualified purchasers.

[46] These circumstances should persuade the court to find a duty owing by MCAP in relation to that representation. Evidentiary issues relating to the circumstances of the representation alleged are in direct conflict between the parties and therefore must be resolved at trial rather than in the present motion.

The Law

[47] The decision of the Supreme Court of Canada in ***Hercules Management Ltd. v. Ernst & Young*** (1997), 2 SCR 165 (*Hercules*) provides the leading authority in relation to an action for negligent representation. The court states at para. 21:

> 21 I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991), 107 *L.Q.R.* 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. Whether the respondents owe the appellants a duty of care for their allegedly negligent preparation of the 1980-82 audit reports, then, will depend on (a) whether a *prima facie.*

duty of care is owed, and (b) whether that duty, if it exists, is negatived or limited by policy considerations. Before analysing the merits of this case, it will be useful to set out in greater detail the principles governing this appeal.

[48] And further at para. 24:

> 24 This can be done most clearly as follows. The label "proximity", as it was used by Lord Wilberforce in *Anns, supra,* was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. Indeed, this idea lies at the very heart of the concept of a "duty of care", as articulated most memorably by Lord Atkin in *McAlister (Donoghue) v. Stevenson,* [1932] A.C. 562 (U.K. H.L.), at pp. 580-81. In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendants words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos, supra,* at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

[49] The court additionally observed at para. 18:

> 18 The final preliminary matter concerns whether or not the appellants actually relied on the 1980-82 audited reports prepared by the respondents. More specifically, the appellants allege that the Court of Appeal erred in finding, at p. 248, that
>
> > [t]here was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose *or that the appellants did rely upon the [1980-82] reports before infusing more capital into their companies.* The appellants were content to allow management

> to continue running the companies despite a drop in profitability reflected in the 1982 audited report and invested capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue. [Emphasis added.]

> Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; see: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at p. 110. In light of my disposition on the duty of care issue, however, it is unnecessary to inquire into this matter here - the absence of a duty of care renders inconsequential the question of actual reliance.

Decision

[50] It is the conclusion of this court that no duty of care ought to be imposed upon MCAP in favour of the plaintiffs in relation to the commitment letter and alleged undertaking by MCAP to strictly enforce its terms.

[51] As previously determined, there is no proper basis for finding that the requisite proximity exists between MCAP and the plaintiffs. That relationship proximity must arise through reliance by the plaintiffs upon the defendants words. (*Hercules supra* para.24) - such reliance must be based upon the existence of two factors determined by the facts:

1) The defendant ought reasonably foresee that the plaintiff would rely on the representation.

2) Reliance by the plaintiff in the circumstances would be reasonable.

[52] In this case the terms of the commitment letter were contractually agreed between MCAP and the developer to remain confidential. MCAP never released a copy to any purchaser or RESG. Nor was such a release in the course of any of the business of MCAP.

[53] MCAP offered evidence that its representative at no time undertook to enforce strictly the conditions of the commitment letter. On the other hand the plaintiffs' evidence offers only an impression that that was what was meant between Fry and Roulston in their telephone conversation.

[54] It seems to this court, highly unlikely that the plaintiffs would be successful at a trial in establishing that such a representation was made. However, irrespective of any evidentiary issue

on this point, it is my conclusion that it was not reasonably foreseeable by MCAP that any prospective purchaser or plaintiffs could reasonably rely on the alleged representation.

[55] Furthermore, there is no evidence that any such purchaser or plaintiffs did rely on the upon that alleged undertaking.

[56] In my view, any such reliance by a purchaser or plaintiffs or the alleged purchaser's representative RESG cannot be found to be reasonable. A purchaser could not reasonably look to the interim finance lender to ensure the proper completion of the project.

[57] Accordingly, no *prima facie* duty of care in relation to the commitment letter can be found by this court to be owing by MCAP to the plaintiffs. The authorities cited by the plaintiffs in support of their argument are of no assistance to it and are distinguishable from this case. The *Keith* decision is remarkable only for the difference in its facts from this case - there the lender provided a letter confirming the availability of funding to the developer for the express purpose of satisfying the concerns of sub-contractors. That representation was in the course of the lenders business; it was provided in response to a request; and it was intended to be relied upon by the sub-contractors.

[58] Here none of those considerations are present.

[59] Accordingly the allegations of the plaintiffs alleging negligent misrepresentation must be struck.

Issue Number Three: Was MCAP a "Developer" Within the Meaning of Section 14 of the *Condominium Property Act* (the *Act*)?

MCAP Argument

[60] MCAP argued that it was not a developer within the scope and definition of the term as set out in Section 14 of the *Act* and it therefore owed no statutory fiduciary or trust obligations to the plaintiffs as alleged. MCAP argues that the definition in Section 14 (1)(c) requires the plaintiffs to establish that MCAP is a person who, on behalf of a developer, receives money paid by or on behalf of the purchaser of a unit pursuant to a purchase agreement.

[61] MCAP cannot be found to be within the definition of developer in that it, MCAP, did not receive money paid by the purchaser pursuant to a purchase agreement "on behalf of a developer". Here the monies received by MCAP were paid directly to MCAP by the developer pursuant to the terms of the interim financing contract, and in no way should be considered to have been "received by MCAP on behalf of the developer" from the purchaser.

Plaintiffs Argument

[62] The plaintiffs argued that the *Act* should be given a fair, large and liberal construction and interpretation that best assures the attainments of its objects citing ***Bear Land Condo v. Birchwood Village*** [1998] A.J. No. 1300.

[63] The plaintiffs argued that the purchase price paid by a purchaser's solicitor to the vendor's solicitor remain trust funds until the discharge of the MCAP mortgage. Counsel argues that because of that trust, monies paid to MCAP by the vendor's solicitor on the "understanding that MCAP will provide a partial discharge of its permitted encumbrance are monies paid by the purchaser and received by MCAP on behalf of the developer pursuant to the purchase agreement. Accordingly, MCAP becomes a developer within the meaning of the *Act*. The plaintiffs points to evidence offered in relation to the sale of Unit D104 to support its argument that MCAP should be found a developer pursuant to the *Act*.

The Law

[64] Any duty arising from the *Act* must be found within the statute itself. Section 14 provides that certain monies must be held in trust by a developer until:

a) Section 14(3) - title is issued to a purchaser.

b) Section 14(4) - substantial completion where a unit is not substantially complete.

Section 14(1)(c) states:

c) "developer" includes any person who, on behalf of a developer, acts in respect of the sale of a unit or a proposed unit or receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement.

Decision

[65] It is the conclusion of this court that MCAP cannot be held to be a "developer" under the *Act* and by virtue of that label impressed with any statutory duty owing to the plaintiffs.

[66] I accept the argument of the defendants that MCAP at no time received monies paid by a purchaser of a unit pursuant to a purchase agreement "on behalf of a developer".

[67] The monies received by MCAP were paid by the developer pursuant to the terms of an interim financing agreement. Even the broadest interpretation of the *Act*, could not logically determine that monies paid by a developer could also be categorized as monies paid "on behalf of the developer". It was equally open to the legislature and drafting the legislation that all monies received "from" a developer would attach those duties. The legislators instead used the words "on behalf of a developer".

[68] It is the view of this court that MCAP did not receive any monies paid by a purchaser of such a unit. Funds received by MCAP were the property of and paid by the developer. The obligation of the developer and its solicitors under a trust condition to discharge the MCAP mortgage from title cannot change the ownership of the monies in the hands of the vendor, from the vendor back to the purchaser. The purchaser retains no right to repayment of the purchase price from the vendor in the event the mortgage is not discharged; the purchaser merely has the right to sue to quiet his title or seek to enforce the undertaking given by solicitors for the vendor.

[69] The decision of our Court of Appeal in ***Condominium Plan No. 8222630 v. Danray Alberta Ltd.***, (2007) ABCA 11 reflects an interpretation of "developer" consistent with the objectives of the *Act* where it is stated at para. 40:

> [40] We conclude, therefore, once Danray signed the Sale Agreement with Newco it was no longer the beneficial owner of the property. It was simply an unpaid vendor under an agreement for sale with no greater rights unless the sale to Newco failed. As well, because it was not involved in selling the individual units to the public, it was not a developer with respect to the individual purchasers. It follows that it did not owe a fiduciary obligation to the purchasers of the individual condominium units because it was an owner-developer of the property.

[70] The position of MCAP as interim finance lender seems to be virtually identical to that of an unpaid vendor in *Danray*. Accordingly, the allegations asserting a statutory trust of fiduciary duty owing by MCAP to the plaintiffs must fail and be struck.

Issue Number 4: Did MCAP Conspire with Others in the Breach of Any Statutory or Fiduciary Duty?

[71] Little argument was advanced by either Counsel on this issue.

[72] Having found that no statutory on fiduciary duty was owing by MCAP to the plaintiffs it would be impossible for MCAP to conspire with others in the breach of such a duty. The plaintiffs must show that it has a factual basis for an assertion that any conduct was in furtherance of a conspiracy. It is insufficient that conduct could have been in result of a conspiracy where such conduct is easily explained by lawful motives. In this case it is clear that MCAP had a contractual right to receive the proceeds of condominium sales to the plaintiffs which were due pursuant to their purchase agreements. Accordingly, that allegation against MCAP must be struck.

Issue Number 5: Was MCAP Unjustly Enriched by Receipt of the Net Purchase Price for Any Condominium Unit from Any Plaintiff Purchaser?

[73] Again little argument was advanced on this issue at the hearing. Such a claim requires the receipt by MCAP of funds for no juridical reason to the detriment of the plaintiffs.

[74] Here funds were received by MCAP from the developer/mortgagor pursuant to the terms of an interim financing contract, a clearly recognizable juridical reason for that receipt.

[75] Furthermore receipt of such funds was not at the expense of the plaintiffs but pursuant to the terms of their purchase agreements with the developer and required in order to obtain a discharge of MCAP's mortgage on their title.

[76] There is no basis to include MCAP in such an allegation which must be struck against MCAP.

[77] In summary, the application of MCAP for summary judgment dismissing all of the claims advanced by the Amended Statement of Claim is granted. Those claims are dismissed.

[78] MCAP shall be entitled to its costs of this application. Should the parties be unable to resolve any issues of costs, they are invited to contact this court to discuss such issues within 90 days of the issue of this decision.

Heard on the 18th day of June, 2010.

Dated at the City of Calgary, Alberta this 9th day of September, 2010.

L.D. Wilkins
J.C.Q.B.A.

Appearances:

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