In the Court of Appeal of Alberta

Citation: Condominium Corporation No. 0321365 v MCAP Financial Corporation, 2012 ABCA 26

Date: 20120127
Docket: 1001-0308-AC
Registry: Calgary

Between:

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

Appellant (Plaintiff)

- and -

MCAP Financial Corporation

Respondent (Defendant)

- 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., 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

Not Parties to the Appeal (Defendants)

970365 Alberta Ltd., Dome Britannia Properties Inc., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, Kneppers Consultants Inc., Alberta Permit Pro Inc., Gary Nissen, Archiasmo Architectural Works Limited, David Marshall, Evan Welbourn, Real Estate Strategies Group Inc.,
David Bamber and Allan Penner

Not Parties to the Appeal (Third Parties)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice J.D. Bruce McDonald

Reasons for Judgment Reserved of The Honourable Chief Justice Fraser
Concurred in by The Honourable Mr. Justice Watson

Reasons for Judgment Reserved of The Honourable Mr. Justice McDonald
Dissenting in Part

Appeal from the Judgment by
The Honourable Mr. Justice L.D. Wilkins
Dated the 18th day of June, 2010
Filed the 24th day of November, 2010
(2010 ABQB 573, Docket: 0701-00737)

Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser

I. Introduction

[1] The appellant, Condominium Corporation No. 0321365 (Condo Corporation), owns the common property of a seven building condominium complex in Fort McMurray known as Alfred Penhorwood Place (Condo Project). The Condo Project consists of 168 units. Real Estate Strategies Group Inc. (RESG) was involved with and in some fashion assisted purchasers of 72 of the units in the Condo Project. Together with a representative plaintiff for the condominium unit holders, the Condo Corporation is suing a number of defendants for damages to remedy the alleged faulty design and construction of the Condo Project. The defendants include the developer of the Condo Project, 970365 Alberta Ltd. (970365) and the respondent, MCAP Financial Corporation (MCAP), which provided interim financing to 970365 for the Condo Project.

[2] The appellants allege that the Condo Project, which they characterize as a "disaster", suffers from several serious problems. In particular, they assert that the Condo Project is sinking into the ground because the footings have failed and geotechnical standards for compaction and fill were not followed. They further allege that all roofs require replacement, that the wall system has failed resulting in extensive moisture penetration, and that the air quality and circulation are very poor and hazardous to health. They also allege that the units in the Condo Project and related common property were not substantially completed at the time of transfer of title to the units, and that this triggered certain statutory protections in favour of the purchasers under the *Condominium Property Act*, RSA 2000, c C-22 (*Act*).

[3] MCAP applied under Rule 159(2) of the former *Alberta Rules of Court* (*Old Rules*) seeking a summary judgment dismissing all the appellants' claims against MCAP. Prior to hearing the summary judgment application, the chambers judge dealt with and granted, with the consent of counsel for MCAP, an outstanding application to amend the Statement of Claim. Once that was concluded and the amendment allowed, he dealt with the summary judgment application on the basis of the Amended Amended Statement of Claim. This is the proper procedure and one that ought to be followed as a matter of good practice. That is to say, outstanding applications to amend pleadings should be resolved prior to a chambers judge's considering a summary judgment application on its merits: ***Elbow River Marketing v Canada Clean Fuels Inc.***, 2011 ABCA 258 at para 3.

[4] After hearing MCAP's summary judgment application on its merits, the chambers judge granted summary judgment dismissing all claims against MCAP. It is from this decision that the appellants now appeal.

[5] I have concluded that the appeal must be allowed in part. An inspection of undoubted law plus arguable or provable law shows that there are several material factual disputes interlocked with significant legal issues, all of which need to be tried. This is particularly so where, as here, the legal

issues in dispute are unsettled or complex or intertwined with the facts: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380, 401 AR 88 at para 11.

[6] I stress that my purpose in reviewing the limited evidence and law I do is to demonstrate why there are genuine issues for trial and therefore why certain claims ought not to have been summarily dismissed. Accordingly, my analysis is not intended to provide a complete or balanced view of the contested facts nor foreshadow what may happen at trial. It is for a trial judge to consider the outstanding claims following a full hearing on the merits of the case. Further, for convenience of legal analysis, I discuss various areas of law separately along with certain key allegations of fact only relating to each. But the factual matrix is linked to all claims. Finally, I do not address the question of possible defences, causation, remedies, quantum of damages or mitigation with respect to any of the legal claims. These are separate issues and they too, depending on the outcome of the trial, are for the trial judge.

II. Relevant Legislation

[7] To place in context background information and factual and legal issues in dispute, I must first set out the essential portions of the section of the *Act* primarily engaged on this appeal, namely s. 14, as well as s. 15:

> 14(1) For the purposes of this section,
>
> (a) "common property" includes facilities and property that are intended for common use by the owners notwithstanding that the facilities or property may be located in or comprise a unit or any part of a unit;
>
> (b) "cost consultant" means a person who meets the requirements of the regulations to be a cost consultant or is otherwise designated as a cost consultant pursuant to the regulations;
>
> (c) "developer" includes any person who, on behalf of a developer, ... receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement; ...
>
> (e) "substantially completed" means, subject to the regulations,
>
> > (i) in the case of a unit, when the unit is ready for its intended use, and
> >
> > (ii) in the case of related common property, when the related common property is ready for its intended use.

(2) A reference in this section to "related common property" is, in relation to a unit, a reference to the following:

(a) the common property or a portion of the common property that is necessarily incidental to the completion of the unit;

(b) the common property or a portion of the common property that is necessarily incidental to the intended use of the unit;

(c) in the case of a unit other than a bare land unit, the common property or a portion of the common property consisting of

> (i) utilities required to service the unit and the common property,
>
> (ii) a facility providing for reasonable access to or entrance into the unit,
>
> (iii) a facility providing for reasonable access to highways, municipal roads or streets,
>
> (iv) waste removal facilities or other facilities for handling waste, and
>
> (v) any other improvements or areas
>
> > (A) designated by the regulations, or
> >
> > (B) required under any other Act or regulations,
>
> that are necessarily incidental to the intended use of the unit;

(d) in the case of a unit other than a bare land unit, in addition to the common property referred to in clauses (a) to (c), any common property or any portion of the common property that has been represented in the purchase agreement by the developer as being or as going to be available for the use of the owner of the unit and, without limiting the generality of the foregoing, may include one or more of the following:

(i) roadways, parking areas and walkways;

(ii) fences or similar structures;

(iii) landscaped areas and site lighting; ....

(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

(4) Notwithstanding subsection (3), if a unit is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

(5) Notwithstanding subsection (3), if the related common property is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant ....

(10) Subject to subsection (11), this section does not apply in respect of money paid to a developer under a purchase agreement if that money is held, secured or otherwise dealt with under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both....

(13) Where, with respect to a unit or related common property, or both,

(a) money is held in trust under this section ..., and

> (b) the developer has not met the requirements under which that money is to be paid out of the trust or otherwise disbursed,
>
> the corporation or an interested party may apply to the Court for an order for that money to be paid out for the purposes of substantially completing the unit or related common property, as the case may be, or to be used as directed by the Court....
>
> (15) Once the unit or the related common property, or both, as the case may be, in respect of which money is being held in trust under this section are, as determined by a cost consultant, substantially completed, any money remaining in trust may be paid to the developer.
>
> 15 Section 14 does not apply if the purchaser does not perform the purchaser's obligations under the purchase agreement.

[8] The purpose of s. 14 is clear. This is part of a package of remedial consumer protection legislation designed to protect purchasers buying condominium units off plan, that is before a condominium project has been built. The Legislature opted not to bar closing of purchase agreements where a unit or related common property is not substantially completed. Instead, the Legislature has sought to achieve its objective by statutorily mandating that developers hold back in trust from purchase proceeds sufficient funds to substantially complete sold units and their related common property. It has also imposed a duty of fair dealing on developers and purchasers "with respect to the entering into, performance and enforcement" of agreements: s. 11.

[9] In enacting this package of legislation, the Legislature was alive to several economic and social realities. On the one hand, it did not want to prevent developers from securing, on reasonable terms, the financing required to build and complete condominium projects. On the other, it recognized that consumers needed to be protected from hit and run developers, who promise much but deliver little, whether because of ineptitude, negligence, greed or worse yet, fraud. Through this statutory regime, the Legislature has provided some reasonable assurance that what developers agree to provide, and purchasers agree to buy, will be completed as promised: see ***Bare Land Condominium Plan 8820814 (Owners) v Birchwood Village Greens Ltd.***, 1998 ABQB 1023, 235 AR 217 at paras 9-10.

[10] The statutory trust and holdback provisions in s. 14 may be summarized as follows. If a unit in a condominium project or the related common property is not substantially completed at the time of transfer of title to the unit, then the developer is required to hold in trust sufficient monies to pay for the cost of substantially completing the construction of the unit *as determined by a cost consultant* plus monies sufficient to pay for the proportionate cost of substantially completing the

construction of the related common property *as determined by a cost consultant.* Under s. 1(2)(c) of the *Condominium Property Regulation*, AR 168/2000, a cost consultant must act "at arm's length from the developer of the unit or common property". The Legislature also prohibited contracting out of these provisions: see s. 80(1) of the *Act* which provides that "... any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void".

[11] The Legislature understood that it would not be sufficient to mandate that only the actual developer of the project be bound to comply with these provisions. To minimize the risk of purchase monies flowing out to third parties despite the statutory prohibitions, the Legislature expressly expanded the definition of "developer" under s. 14 of the *Act* to capture and include third parties receiving monies paid by purchasers of units in certain circumstances. Prior to 2000, "developer" was defined simply as a "developer or a person acting on his behalf". This definition was then amended to the present wording under s. 14(1)(c) of the *Act* which provides that "developer" includes "any person who, on behalf of a developer, ... receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement".

[12] The interpretation of this definition will be a live issue at the trial of the matters in dispute between the appellants and MCAP. So too will be the question of whether the units and related common property in the Condo Project were substantially completed at the time of transfer of title of the various units – and who determines this question and under what circumstances. In particular, did the Legislature leave this up to the developer of a project or a s. 14 cost consultant? To be clear, for purposes of complying with the statutory trust and holdback provisions under the *Act*, "developer" in the context of this case includes 970365 and other parties, if any, found to fall within the definition of "developer" under s. 14(1)(c).

[13] The only exception from the statutory trust and holdback provisions imposed on a "developer" is set out in s. 14(10). If a project is within the scope of this exemption, then the statutory trust and holdback provisions do not apply. To come within the exemption, the purchase monies paid must be held, secured or dealt with under the "provisions of a plan, agreement, scheme or arrangement approved by the Minister". The Court was advised that the vast majority of new condominium projects in Alberta fall within this exemption. That includes projects covered under a government-approved plan such as the Alberta New Home Warranty Program which provides a form of insurance coverage for purchase monies. But the Condo Project is not covered by the Alberta New Home Warranty Program or any other approved plan. Therefore, on this record, the exemption under s. 14(10) does not – and did not – apply to the Condo Project.

III. Background Information

[14] I now turn to certain background information for which there is evidence on this record. That evidence remains to be evaluated at trial by the trial judge in the context of all relevant evidence. I also recognize that MCAP has offered contrary evidence on some points and that there is additional

evidence as well that I do not canvass in these reasons. Nevertheless, for purposes of this appeal, the present record includes evidence in support of the following.

[15] MCAP was the construction lender for 970365 and provided interim financing for the Condo Project in accordance with a commitment letter dated July 8, 2002 (the Commitment Letter). The Commitment Letter, which governed the relationship between MCAP and 970365, set out the terms and conditions under which funds would be made available to 970365. There were two other parties to the Commitment Letter, the principal officer of 970365, Gary Nissen, and the parent corporation of 970365, Dome Britannia Properties Inc. Nissen and Dome Britannia accepted and executed the Commitment Letter as guarantors of MCAP's loan to 970365. The Commitment Letter initially dealt with financing for the first three buildings in the Condo Project. By a further agreement dated March 5, 2003 made amongst the parties to the Commitment Letter, it was amended to provide financing for all seven buildings in the Condo Project.

[16] The Commitment Letter contained a number of terms under which financing would be provided. In particular, Funding Condition 11 stated (at Appellants' Extract of Evidence (AEE) A18):

> A soils test report (load bearing capacity) by an acceptable professional engineer or such other similar report as is acceptable to the Lender, must be provided, demonstrating to the satisfaction of the Lender and its Cost Consultant that the proposed construction and site improvements of the Project are feasible under existing soil conditions, together with evidence that the construction specifications for the Project provide for construction in compliance with such conditions and with the recommendations, if any, which may be contained in such soils test report.

[17] The Commitment Letter identified the need for "the Lender's Cost Consultant" to verify the costs of the Condo Project: see *eg.* Funding Condition 7 at AEE A17. The cost consultant was described in various ways throughout the Commitment Letter. For example, references were made to "the Cost Consultant" (see *eg.* Funding Condition 7 at AEE A17) or "its cost consultant" (see *eg.* Funding Condition 22 at AEE A20) or the "Lender's cost consultant (see *eg.* Availability Condition 2 at AEE A21). Other Conditions 28 provided that:

> The Lender's [monitor(s)/cost consultants] shall be: Cuthbert Smith Consulting ... The terms of reference for the monitor/cost consultant will be as detailed in Schedule "B".

[18] Schedule "B" then set out the Terms of Reference for the subject cost consultant. Those terms included the requirement that prior to the initial advance, a required Project and Budget Review Report include "Documents confirming that project has been designed in accordance with

Geotechnical Engineer's Report": see AEE A32. The Commitment Letter prescribed that all requests by 970365 for advances or draws include an inspection certificate from the "Lender's Cost Consultant" confirming that "the work to date is in accordance with the plans and specifications" and calculating "the amount of holdbacks and cost to complete": see Availability, Condition 2 at AEE A21. It was also a term of the Commitment Letter that if actual costs exceeded the budgeted and approved costs, such that the completion costs exceeded the balance of the loan not yet advanced, that 970365 would contribute the excess toward the Condo Project before receiving any further advances: see Funding Condition 22 at AEE A20.

[19] MCAP retained the "firm" of Cuthbert Smith Consulting (CSC) to act on our behalf as Cost Consultant" under a letter agreement between the two dated July 16, 2002 (CSC Contract). CSC's role as cost consultant was detailed in the CSC Contract. Certain parts of the Commitment Letter were attached to the CSC Contract. Among them was the section on the Funding Conditions, including Funding Condition 11 regarding the soils conditions report noted above. The Terms of Reference for the cost consultant attached to the Commitment Letter were also attached to the CSC Contract. This included the requirement that prior to any progress advance for work in place, CSC "[p]rovide revised cost schedule showing original Budget, Budget changes, revised Budget, total work in place, net holdback, work in place previous, payment due, and cost to complete [*sic*]": AEE A226. Thus, the CSC Contract mirrored the Commitment Letter in certain key respects.

[20] On July 15, 2002, a conversation took place between Doug Frey of RESG and Robert Balfour of MCAP. What was discussed during that conversation has not yet been fully explored. It was followed by what the appellants claim was a critical phone conversation the next day, that is on July 16, 2002 (2002 Phone Call). There is evidence on this record that the 2002 Phone Call took place between two representatives of RESG, namely Frey and Allan Penner, and the Vice-President of MCAP, Michael Roulston. According to the appellants, it was during the 2002 Phone Call that Roulston, on behalf of MCAP, represented that the terms and conditions of the Commitment Letter would be enforced for the benefit of those represented by RESG, namely purchasers of units in the Condo Project and the Condo Corporation. The appellants also contend that Roulston represented that CSC was the cost consultant for the purposes of s. 14 of the *Act*.

[21] The 2002 Phone Call, and what transpired during that Call, would figure prominently in the events that unfolded in 2003 when RESG's ongoing concerns about the Condo Project were finally brought to a head in September of that year.

[22] CSC had a scheduled inspection of the Condo Project arranged for September 10, 2003. RESG was apparently advised by Peter Abramovich of CSC in a phone message left September 10, 2003 that its request to attend this inspection would not be honoured. Penner did attend the site on September 10 and 11, 2003, accompanied by Ellen Martin, the resident manager of the Condo Project. Penner's evidence is that he was "shocked at the state of the site....": AEE A112. On September 11, 2003, Dan Kuhn of Permit Pro accompanied Penner to the site. Penner deposed that

Kuhn identified four Alberta Building Code violations which Kuhn advised he would immediately address with 970365: AEE A112-113.

[23] On September 12, 2003, Penner, on behalf of RESG, wrote a detailed 10 page letter to CSC (Deficiency Letter), copying MCAP, setting out various alleged serious deficiencies in the design and construction of the Condo Project, including suspected Alberta Building Code, development permit and contractual deficiencies. It is the appellants' position that this Deficiency Letter signalled grave concerns that the units and related common property in the Condo Project were not in fact substantially completed as contemplated by the *Act*. In particular, in their view, the suspected construction and design deficiencies identified for which statutory holdbacks might therefore be mandated included the effectiveness and safety of the mechanical system, the use and operation of the Heat Recovery Ventilator units, corridor pressurization and airflow, and the compaction and composition of fill materials in the asphalt areas.

[24] Accordingly, in the Deficiency Letter, RESG repeatedly requested that CSC provide it with estimates of costs to correct the identified deficiencies. It also confirmed that it had been "advised" that CSC had been selected as the required cost consultant for purposes of s. 14 of the *Act*. It pointed out to CSC that it "appears you were made aware of the fact that your reports are being used for statutory purposes, in addition to your monitoring role for MCAP.... Your role is to determine the appropriate level of funds to be held in trust for the benefit of purchasers, after assessing all pertinent information at your disposal. Your role is not to take your instructions from the developer": AEE A150 and A183. RESG closed the Deficency Letter by reminding CSC that 970365 had an obligation under the *Act* to act fairly and that it had breached that duty in several ways. It specifically asked CSC for an "immediate reply" to the Deficiency Letter.

[25] At the time that the Deficiency Letter was sent, construction was still progressing on the Condo Project. Although some transactions to purchase units in the Condo Project had closed, many others had not.

[26] Four days later, that is on September 16, 2003, Penner received a telephone call from James Cuthbert, the principal shareholder and director of CSC. There is evidence that Cuthbert advised Penner that he had reviewed the Deficiency Letter, that CSC was in the process of preparing its report to MCAP with respect to the September 10, 2003 site visit and that Cuthbert would require some time to evaluate the items Penner had raised in the context of CSC's dual role as the lender's monitor and the s. 14 cost consultant.

[27] On September 22, 2003, Penner wrote CSC another letter (Geotechnical Testing Letter) on behalf of RESG, copying MCAP, and urgently requesting that further development activity on the site of the Condo Project cease until a geotechnical soils test could be conducted to evaluate site conditions. This Letter asserted that there was "alarming evidence" that the recommendations by the geotechnical consultants had not been followed: AEE A160. It then proceeded to outline some of that evidence. RESG also put CSC on express notice that Roulston of MCAP had assured RESG

during the 2002 Phone Call "that the terms of the commitment letter would be carefully monitored and upheld" by CSC: see AEE A160-1. RESG also wrote CSC another letter that same day, that is September 22, 2003, notifying CSC that it was considering advising certain tenants that "there exists a serious life safety issue, which will compound as the weather gets colder": AEE A162.

[28] On this record, the geotechnical testing RESG had requested in the Geological Testing Letter did not happen. Instead, on September 23, 2003, 970365 wrote a letter to CSC instructing CSC that CSC had not been retained as a s. 14 cost consultant and that it did not consent to CSC's taking on such role. The next day, September 24, 2003, MCAP wrote a letter to CSC instructing CSC to the same effect in essentially identical terms, that is that CSC had not been retained as a s. 14 cost consultant and MCAP did not consent to its taking on this role. RESG was not copied on either letter.

[29] There is evidence on this record that 970365 threatened to cancel agreements of purchase and sale and retain the deposits paid if the transactions of purchase and sale were not closed as 970365 demanded. Under s. 15 of the *Act*, purchasers lose the protection of s. 14 if the purchaser does not perform his or her obligations under the purchase agreement.

[30] On September 26, 2003, a number of purchases of units in the Condo Project were closed and MCAP received $1,463,940 from 970365's lawyers. Later, between October 8 and 16, 2003, MCAP received another $2,891,439 from 970365's lawyers. MCAP applied the funds received to reduce the debt 970365 owed to MCAP. Letters from 970365's lawyers to lawyers for purchasers of units in the Condo Project referenced the requirements of s. 14 of the *Act* at least, it appears, as regards the completion of the "related common property". For example, at AEE A268, in a letter dated August 15, 2003, 970365's lawyers gave the following undertaking to counsel for a purchaser (see also another letter to the same effect at AEE A524-525):

> To maintain a holdback pending completion of related common property in accordance with section 14 of the Condominium Property Act, provided that we shall be entitled to rely on the advice of our client's cost consultant, Cuthbert Smith, Chartered Quantity Surveyors, to determine the appropriate amount of such holdback from time to time.

IV. Reasons of the Chambers Judge

[31] Before the chambers judge, the appellants alleged that MCAP was responsible to them for the losses arising from the deficiencies in the Condo Project on a number of grounds. The chambers judge considered five issues:

> (1) Did MCAP owe any duty of care to the appellants so as to ground an action in negligence for failing to strictly enforce and uphold the terms and conditions of the Commitment Letter?
>
> (2) Did MCAP breach a duty of care to the appellants through its alleged representation that the terms of the Commitment Letter would be strictly enforced so as to ground an action in negligent misrepresentation?
>
> (3) Was MCAP a "developer" within the meaning of s. 14 of the *Act*?
>
> (4) Did MCAP conspire with others in the breach of any statutory or fiduciary duty?
>
> (5) Was MCAP unjustly enriched by receipt from any purchaser of the net purchase price for any condominium unit?

[32] On the first issue, the chambers judge held that no sufficiently close relationship existed between MCAP and the appellants to justify imposing what would be a novel duty of care: Appeal Book Digest F96 at para 25. And even if it did, the chambers judge concluded that imposing such a duty on a lender would fundamentally change the nature of project financing and disrupt the market place. Thus, he determined that this too justified the court's refusing to impose such a duty. Accordingly, the appellants had no claim against MCAP in negligence.

[33] On the second issue, the chambers judge concluded that there was no basis for finding the required proximity between MCAP and the appellants. He determined it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation; there was no evidence that any did; and in any event, any such reliance by a purchaser could not be found to be reasonable. Therefore, a claim in negligent misrepresentation did not lie.

[34] On the third issue, whether MCAP was a developer, the chambers judge held that when MCAP received funds from 970365's lawyers, the funds were the property of and paid by 970365 even though those funds came from purchase proceeds of the sale of units in the condominium project. Consequently, MCAP did not receive funds "on behalf" of a developer and did not fall within the definition of a "developer" under the *Act*.

[35] On the fourth issue, the chambers judge concluded that it would be impossible for MCAP to conspire with others in the breach of any duty since he had already found that MCAP owed no statutory or fiduciary duty to the appellants.

[36] Finally with respect to the fifth issue, unjust enrichment, the chambers judge noted that the law requires that a plaintiff be deprived of a benefit and that a defendant be correspondingly enriched without juristic reason. He found that since MCAP had received funds from 970365 under the terms of an interim financing agreement, this constituted a juristic reason for that receipt. Also, he determined that the receipt was not at the expense of the purchasers "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": ABD F104.

[37] As a result, the chambers judge summarily dismissed all claims against MCAP.

V. Issues

[38] The issues on this appeal may be summed up as follows. Did the chambers judge err in concluding that:

> (1) MCAP could not have owed a duty of care to the appellants in the circumstances of this case and thus, no action could lie in either negligence or negligent misrepresentation;
>
> (2) no claim could be brought against MCAP for breach of a statutory trust or unjust enrichment; and
>
> (3) MCAP did not fall within the s. 14(1)(c) definition of a "developer" in the circumstances of this case.

VI. Standard of Review

[39] Absent an error of law, the standard of review on an appeal of a summary judgment is reasonableness given the discretionary nature of the remedy. In ***Murphy Oil Company Ltd v Predator Corporation Ltd***, 2006 ABCA 69, 384 AR 251 at para 23, this Court explained the standard of review this way:

> ... the applicable standard of review is correctness with respect to errors of law. For both errors of mixed fact and law, and fact alone, the standard is palpable and overriding error, unless the error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable legal question.... Deference is owed given the discretionary nature of a decision to grant summary judgment. Accordingly, a chambers decision will not be upset unless it is unreasonable....

[40] Where a legal standard is applied to a set of facts, if an extricable question of law is engaged, the applicable standard of review remains correctness with respect to that question of law: ***Housen v Nikolaisen***, 2002 SCC 33 at para 36, [2002] 2 SCR 235. Findings of fact are accorded great deference, absent palpable and overriding error: ***Housen***, *supra* at paras 10 and 25. Whether a cause of action exists is a question of law reviewable on a correctness standard: ***Mitten v College of Alberta Psychologists***, 2010 ABCA 159 at para 9, 487 AR 198.

VII. Test for Summary Judgment

[41] What then is the test for summary judgment? Under the *Old Rules*, Rule 159 (2) and (3) provided:

> 159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> (3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[42] The *Old Rules* have now been replaced by new *Rules of Court* [*New Rules*] effective November 1, 2010. Under transitional *New Rule* 15.2(1), the *New Rules* apply to this appeal. *New Rule* 7.3.1(b) provides that summary judgment is available when "there is no merit to a claim or part of it". It is unnecessary on this appeal to consider whether there exists a subtle difference in the summary judgment rule under the *New Rules* as opposed to the *Old Rules*. That is not in issue on this appeal and I leave it for another day. It is clear under both the *New Rules* and the *Old Rules* that summary judgment may be granted where there is "no merit" to a claim or part of it.

[43] In the first instance, a summary judgment application involves two steps. First, the moving party must adduce evidence to show there is no genuine issue for trial. This is a high threshold. If there is no genuine issue for trial, then there will be no merit to a claim. Accordingly, if the evidentiary record establishes either that there are missing links in the essential elements of a cause of action or that there is no cause of action in law, then there will be no genuine issue for trial. The fact there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 11, [2008] 1 SCR 372. Second, once the burden on the moving party has been met, the party resisting summary judgment may adduce evidence to persuade the court that a genuine issue remains to be tried:

Murphy, *supra* at para 25. That effectively means showing that the claim has what is often referred to as "a real chance of success". This may be accomplished by establishing the existence of disputes on material questions of fact, including inferences to be drawn therefrom, or on points of law that cannot be readily resolved given the factual disputes.

[44] The question here is whether the chambers judge was correct in concluding that there was no merit to any of the appellants' claims.

VIII. Analysis

[45] I now turn to the three issues raised by this appeal.

A. The Duty of Care Issue

[46] The appellants' position is that MCAP owed a duty to the appellants to take reasonable steps to ensure that 970365 complied with and satisfied the terms and conditions of the Commitment Letter. They contend that MCAP's alleged failure to do so was either negligence or negligent misrepresentation. They assert that the chambers judge erred in concluding that MCAP could not have owed a duty of care to the appellants on either ground in the circumstances of this case.

1. Why There is No Genuine Issue for Trial Based on the Claim in Negligence

[47] To determine whether the appellants' claim in negligence against MCAP for failing to enforce the terms and conditions of the Commitment Letter should be summarily dismissed, the chambers judge was required to begin with this starting point. Is there a genuine issue about whether MCAP owed a duty of care in tort to the appellants?

[48] The appellants contend that an interim financier owes a duty of care to the purchasers of a condominium unit in a project financed by it to enforce the lending agreements between the financier and the developer of the project. To date, Canadian courts have not recognized the existence of such a duty of care. In deciding whether the law of negligence should be extended to recognize this claimed duty, the chambers judge correctly turned to the two-part test set out by the House of Lords in ***Anns v Merton London Borough Council***, [1978] AC 728 as adopted and recast by the Supreme Court of Canada in ***Kamloops (City of) v Nielsen***, [1984] 2 SCR 2 at pp 10-11 (the recast test being referred to as the ***Anns*** test). See also ***Cooper v Hobart***, 2001 SCC 79, [2001] 3SCR 537 at paras 25 and 29-39; ***Hill v Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 SCR 129 at para 20; and ***Reference re Broome v Prince Edward Island***, 2010 SCC 11, [2010] 1 SCR 360 at para 14.

[49] The first stage of the ***Anns*** test focusses on the relationship between the plaintiff and defendant. It contains two requirements: reasonable foreseeability of harm plus a close and direct relationship of proximity sufficient to justify the imposition of a *prima facie* duty of care. In other

words, a court must determine whether a sufficiently close relationship – otherwise called proximity – exists between the defendant and the plaintiff that has suffered the damage such that the defendant could reasonably foresee that carelessness on its part might cause damage to the plaintiff. If foreseeability and proximity are established, a *prima facie* duty of care arises. The second stage asks whether there are any 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 a breach may give rise.

[50] I have concluded that the chambers judge was correct in determining that a construction lender does not owe a duty of care to the purchasers of units in a condominium project which it is financing or to the condominium corporation. Difficulties arise at both stages of the ***Anns*** analysis, making the recognition of a duty of care in these circumstances legally unmanageable and commercially unreasonable.

[51] To begin, liability in negligence is premised on the assumption that a party can reasonably foresee who would be damaged by its actions. While a plaintiff need not be foreseeable as an identified individual, the plaintiff must belong to a class of persons within the foreseeable range of risk: ***Stewart v Pettie*** [1995] 1 SCR 131 at para 28. This presupposes an ability on the part of the allegedly negligent party to determine who would fall within that range, that is within the affected class, as well as the degree to which that class might be adversely affected.

[52] However, in the context of the lender-purchaser relationship, problems arise in defining the composition of the class to whom a lender would owe a duty of care. Knowing this would be very important to an interim financier. What if the financier were willing to waive a default or grant extensions of time to the developer or consent to other changes, major or minor, to existing loan agreements? This it would typically be entitled to do under its contractual arrangements with the developer. But in order to mitigate its risk of being sued in negligence for breach of a duty of care, the lender would no doubt seek to consult those to whom it owed a duty of care or, at a minimum, put them on notice of proposed changes before implementing them.

[53] The difficulty is that an interim financier would not ordinarily be able to determine with any reasonable degree of certainty who should be consulted. Downstream purchasers change on a rolling basis. This problem is compounded by the very real possibility of units being "flipped" to other purchasers without notice to the developer or interim financier before construction is completed and before transfer of title. And where would the additions to the class stop? Would it include only the initial purchasers? Or ones to whom units had been "flipped" before closing? Or future purchasers even after title had been transferred following closing? And for how long into the future would this go on? This demonstrates that attempts to define the "class" to whom an interim financier would owe a claimed duty of care would be bound to lead to undue uncertainty for all.

[54] Turning to the proximity requirement, what a court is looking for is whether the circumstances of the relationship between the parties are such "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": ***Hercules Managements Ltd v Ernst & Young***, [1997] 2 SCR 165 at para 24. Put another way, in deciding whether the required proximity exists to give rise to a *prima facie* duty of care, is it just and fair to impose a duty of care in law on the defendant?

[55] On the broad issue of fairness, an interim financier's legitimate business interests might well conflict with those of the purchasers and condominium corporation. For example, a financier may elect to declare a loan in default, not advance any further funds and realize on its security rather than extend time to cure a default, advance the balance of the loan and allow the project to be completed. What if purchasers preferred the latter option? On what basis would these competing business interests and choices as between the lender's contractual rights and a supposed duty of care in tort to enforce those contractual agreements for the benefit of third parties then be resolved? By whom? And whose interests would prevail? And in what circumstances? And in any event, how, when and on what basis would a lender consult with the purchaser beneficiaries of a duty of care and secure their consent to changes in the financing agreements? And what would the lender do when and if there were disagreements amongst the purchasers?

[56] These problems expose a fundamental flaw in the appellants' assertion that a lender owes a duty of care to purchasers of units in a project it is financing. The Commitment Letter is a private contract between MCAP and 970365. No rights accrue under that contract to third party beneficiaries, including the purchasers of units in the Condo Project and the Condo Corporation. The alleged "duty to enforce" the Commitment Letter essentially amounts to an attempt to step round this limitation and create a cause of action. This attempt to obtain benefits for third party beneficiaries via the law of negligence is, in these circumstances, fundamentally unsound. It would place the lender in the position where legitimate business rights it has in contract could be undercut, indeed rendered nugatory, if a third party beneficiary did not agree with the way in which the lender was exercising its contractual rights.

[57] Collectively, the concerns noted reveal the practical and policy difficulties inherent in finding the required foreseeability of harm and proximity between an interim financier, on the one hand, and purchasers and a condominium corporation, on the other, sufficient to ground a *prima facie* duty of care. Many of the features of the subject relationship would necessarily be undefined, not only in scope and time but also content. By themselves, these reasons justify rejection of a duty of care.

[58] A consideration of the second stage of the ***Anns*** test also justifies rejection of the appellants' claimed duty of care. At this stage, a court must consider the purposes served by permitting recovery as well as any policy considerations which would call for a limitation on tort liability. The relationship between the parties is not the focus; it is the effect that recognizing a duty of care might have on other legal obligations, the legal system and society: see ***Cooper v Hobart***, 2001 SCC 79, [2001] 3 SCR 537 at para 37. Generally, the question of concern to the courts is this. Would imposition of the duty of care expose the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class": ***Hercules***, *supra* at para 31?

[59] Policy considerations have particular import where the claims are not for serious physical harm or threats to a person's health and safety but rather for economic loss in a commercial context: see *eg.* John G. Fleming, *The Law of Torts*, 10th ed. (Sydney: Law Book, 2011) at 202-203. In commercial cases, potential plaintiffs acting with due diligence may well have alternative means of protecting their positions. Their autonomy as individuals means that they have the freedom to make the choices they see fit. For this reason, policy considerations in commercial cases may more readily weigh in favour of limiting tort liability.

[60] Compelling policy reasons exist for not recognizing a duty of care by an interim lender to the purchasers of condominium units or the related condominium corporation to enforce the terms of a lending agreement. Intractable practical problems exist with defining the scope of any such duty. Just how far would a lender be required to go in enforcing the terms of the lending agreements? The fact that there is no reasonable answer to this question reveals the difficulty inherent in defining an issue related to the scope of the duty – and that is the standard of care. That standard of care must be capable of being identified with some degree of precision: see ***Fullowka v Pinkerton's of Canada Ltd.***, 2010 SCC 5, [2010] 1 SCR 132 at para 80.

[61] Further, were this duty of care found to exist, this would fundamentally alter the economic and commercial realities of construction financing and significantly undermine the continued viability of the commercial lending industry. The risks to interim financiers in financing developers would increase substantially. It would no longer be sufficient for a lender to protect its interests and ensure repayment of its loan. Instead, a lender would effectively become a guarantor of the due performance by the developer of its obligations to the lender. This makes no sense. A developer owes obligations to a lender; the lender does not act as surety for the developer's non-performance of obligations owed to it. If the developer's obligations to the lender were to become the lender's obligations to third parties, the allocation of commercial risk would then fall disproportionately on the lender. The lender would typically face this dilemma: pursue the developer to "fully enforce" all contractual agreements with the lender or run the very real risk of liability to third parties.

[62] The deleterious effects that recognizing this novel duty of care would have on commerce and the financial industry and in turn economic development are obvious. Additional costs would be incurred by individual lenders in their quest to minimize the risk of being sued for not properly enforcing the terms and conditions of lending agreements between it and a borrower. Lenders would no doubt seek to pass these costs along to borrowers and borrowers to consumers. Imposing obligations on interim financiers that allocate risk in a commercially unreasonable manner is not in the public interest since this would in turn seriously jeopardize the availability of capital for the development of housing. In the end, all consumers – homeowners and renters alike – would lose.

[63] Thus, these reasons too justify rejecting the recognition of a duty of care by an interim financier in favour of purchasers of units in a project and its condominium corporation. Accordingly,

there is no genuine issue for trial based on the appellants' claim against MCAP in negligence for failing to strictly enforce the terms and conditions of the Commitment Letter.

[64] However, this conclusion does not foreclose the possibility of liability being imposed on an interim financier for negligent misrepresentation depending on the specific facts of an individual case. It is to the issue of the appellants' claim against MCAP for negligent misrepresentation which I now turn.

2. Why There is a Genuine Issue for Trial Based on the Claim for Negligent Misrepresentation

(a) Elements for a Successful Negligent Misrepresentation Claim

[65] The Supreme Court of Canada outlined the required elements for a successful negligent misrepresentation claim in ***Queen v Cognos Inc***, [1993] 1 SCR 87 at para 33. First, there must be a duty of care based on a "special relationship" between the representor and the representee. Second, the representation in question must be untrue, inaccurate or misleading. Third, the representor must have acted negligently in making the representation. Fourth, the representee must have relied, in a reasonable manner, on the negligent misrepresentation. And fifth, the reliance must have been detrimental to the representee in the sense that damages resulted.

[66] Regarding the first element, the duty of care, the same general framework that is used to assess whether a duty of care exists in negligence – the two-part ***Anns*** test – applies to negligent misrepresentation: ***Hercules***, *supra* at para 21.

[67] At the first stage of the ***Anns*** test, in deciding whether a *prima facie* duty of care exists to ground a claim in negligent misrepresentation, a court must determine whether the defendant-representor and plaintiff-representee can be said to be in a relationship of proximity or neighbourhood, that is a "special relationship". As to what is required to create the necessary special relationship and corresponding *prima facie* duty of care, two criteria must be met. The defendant ought reasonably to foresee that the plaintiff will rely on its representations; and reliance by the plaintiff would be reasonable in the circumstances: see ***Hercules***, *supra* at para 24. If these criteria are satisfied, then the special relationship exists to give rise to a *prima facie* duty of care. Thus, for negligent misrepresentation claims, more than foreseeable harm to a foreseeable plaintiff is required; the reasonableness of the plaintiff's reliance must also be considered.

[68] If the proximity requirement is met, a court must then go on and consider the second part of the ***Anns*** test. Are there policy considerations that warrant not recognizing, or otherwise limiting, the duty of care? It is at this stage that a court is concerned about the possibility of indeterminate liability. Of course, to properly take policy considerations into account, a court must have a clear understanding of the scope of the alleged misrepresentation. The precise wording of that misrepresentation is key to assessing whether a duty of care has been breached. The Supreme Court confirmed the nature and extent of that in ***Cognos***, *supra* at para 55:

> The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading.

(b) Analysis of Reasons of Chambers Judge

[69] Against this backdrop, I now turn to why I have concluded that the chambers judge erred in summarily dismissing the negligent misrepresentation claim.

[70] To situate this in context, the appellants' claim against MCAP for negligent misrepresentation rests on the following theory. MCAP owed a duty of care to the appellants based on the special relationship between the appellants and MCAP as reflected in the dealings between RESG, the appellants' representative/agent, and MCAP. MCAP impliedly represented to RESG that (1) the terms and conditions of the Commitment Letter would be strictly enforced and upheld by CSC; and (2) it had retained a cost consultant for the purposes of s. 14 of the *Act*. Neither occurred and MCAP was negligent in making these implied representations. MCAP ought reasonably to have foreseen that RESG, and those it was representing, would rely on these representations. The appellants, through RESG, relied on these representations and that reliance was reasonable. MCAP's failure to enforce the terms of the Commitment Letter and to retain a cost consultant for purposes of s. 14 has resulted in significant damages to the appellants.

(i) Trying the Case is Not for the Chambers Judge

[71] The chambers judge began by concluding that it was "highly unlikely" that the appellants would be successful at trial in establishing that a representation had been made. He reasoned that while MCAP had asserted that its representative never undertook to enforce the Commitment Letter, the appellants offered "only an impression that that was what was meant" in the 2002 Phone Call between Penner and Frey of RESG and Roulston of MCAP. The chambers judge erred in purporting to try the case given the patent conflict in the evidence on the issue of the alleged representations. It was not for the chambers judge to determine that it would be "highly unlikely" that the appellants' claim would succeed at trial. Whether MCAP made any implied representation and, if so, the content of any such representation, are both issues for a trial judge following a trial on the merits.

(ii) Whether an Implied Representation was Made Remains a Live Issue

[72] Further, the chambers judge framed the issue improperly. The question is not whether there was evidence that MCAP made an *express* representation; the absence of evidence about an express representation is not dispositive of the real issue. Nor is the question whether the evidence established that the appellants received an *impression* only of what was meant by Roulston of MCAP. The question is whether there was evidence on this record to support the appellants' claim that MCAP made an *implied* representation. The underlying assumption by the chambers judge that

representations are not actionable at law because they depend on inferences or implications rather than on direct and express statements is incorrect: see ***Cognos***, *supra* at paras 73-76.

[73] Whether a statement or implied statement is a representation is a question of fact that depends on a trial judge's assessment of the evidence and inferences drawn from the evidence: ***Ault v Canada***, 2011 ONCA 147, 274 OAC 200, leave den. (October 20, 2011) [2011] SCCA No 206 (QL). The impression conveyed may in fact be evidence of an implied representation. If the party listening received that impression from what was said – and not said in response to what was said – it may be some evidence that a reasonable bystander would also have had the same impression. A trial judge would consider what MCAP conveyed through Roulston during the 2002 Phone Call viewed from the perspective of a reasonable person in those circumstances.

[74] Put simply, representation by implication, that is an implied representation, may well suffice to ground a successful claim in negligent misrepresentation. The chambers judge's failure to recognize that this is so and that there is on this record a dispute on a material fact, namely whether MCAP made an implied representation, constitutes reviewable error. These are both matters for a trial judge as is whether any representation, if implied, is actionable negligence.

(iii) Scope of Implied Representation is Also in Dispute

[75] This takes me to a further error. The chambers judge appears to have characterized the alleged representation this way. Is there evidence that MCAP represented that it would enforce strictly the terms of the Commitment Letter? But what this means in the context of this case was never explored by the chambers judge. It should have been. In the result, he failed to recognize that the scope of the alleged representations was broader than he assumed.

[76] The appellants' claims go beyond maintaining that MCAP represented during the 2002 Phone Call that the terms of the Commitment Letter would be monitored and upheld by CSC. The import of this claim is that MCAP represented that it would audit or supervise the quality of construction of the Condo Project through CSC. In addition, the appellants contend that MCAP represented that CSC had been retained as a cost consultant for purposes of s. 14 of the *Act*. Penner, on behalf of RESG, alleges that during the 2002 Phone Call, Frey specifically asked Roulston whether a cost consultant had been engaged, who it was and whether the selected cost consultant, CSC, possessed the necessary qualifications in terms of timeliness and quality in reporting processes: see AEE A498-499. RESG contends that MCAP assured it during the 2002 Phone Call that the terms of the Commitment Letter would be enforced including the provisions relating to the cost consultant for the Condo Project.

[77] MCAP contends that no representation of any kind was ever made to any of the appellants during the 2002 Phone Call or otherwise. It submits that the terms and conditions of the Commitment Letter were confidential and intended to be treated as such. Again, while there is evidence to this effect, there is also evidence from Penner of RESG from which it may be inferred

that the subject of the Commitment Letter and the cost consultant in particular came up, and were discussed, during the 2002 Phone Call. Penner contends that it was made clear to Roulston of MCAP during that conversation that if MCAP did not undertake the due diligence required under the Commitment Letter that "we would have to": AEE A499.

[78] This, and other evidence, underscores the fact that serious factual disputes exist about many issues: what transpired during the 2002 Phone Call; whether CSC was the cost consultant for purposes of s. 14 of the *Act*; who retained CSC for this purpose; if CSC was not the cost consultant for this purpose, whether MCAP represented to RESG that CSC was nevertheless acting in that role and capacity; whether RESG relied on that representation to the detriment of the purchasers for whom it alleges it was acting as representative/agent; whether MCAP knew that there was no cost consultant for the Condo Project and, if so, when; whether MCAP, by itself or in concert with 970365, concealed that information from RESG or failed to inform RESG that its understanding that there was a s. 14 cost consultant was incorrect; and, if so, what, if anything, turns on any of this.

[79] There are other related statutory interpretation issues that might well be relevant and linked to the cost consultant issue. Given the requirement that the cost consultant act at arms length from the developer, who is to retain the cost consultant for purposes of s. 14 of the *Act*? And when, if ever, is this to occur? Does the legislative scheme envision one cost consultant only per project? Further, do the duties of a cost consultant under the *Act* mirror the duties of the cost consultant under the Commitment Letter?

[80] In the Geological Testing Letter, Penner confirmed RESG's position on the 2002 Phone Call, namely that Roulston of MCAP had assured RESG that the terms of the Commitment Letter would be monitored and upheld by CSC. The Geological Testing Letter was written within a week of the Deficiency Letter. By the time of both, it had become obvious, at least to RESG, that there were a number of grave deficiencies in the Condo Project. Penner, on behalf of RESG, not only sent the Geological Testing Letter to CSC, but also copied MCAP. RESG urged that geotechnical testing be conducted at the site of the Condo Project since it appeared that recommendations of the geotechnical consultants had not been followed. Roulston testified that, to the best of his knowledge, MCAP did not respond to this Geological Testing Letter or advise RESG that it should not rely on MCAP: AEE A593-595.

[81] When Roulston was cross-examined about the reference in the Geological Testing Letter to his having represented to RESG during the 2002 Phone Call that the terms of the Commitment Letter would be carefully monitored and upheld by CSC, and the fact that MCAP had not responded to that Letter, Roulston stated that MCAP had no intention of responding to RESG about the Commitment Letter because it was confidential and RESG should not have had a copy. He emphasized that MCAP would never talk about or make commitments to third parties about the Commitment Letter. That may be so. But whether it is, and what, if anything, turns on this, is for the trial judge. So too is the issue of what transpired during the 2002 Phone Call.

[82] It is sufficient to note that on this record, a pointed evidentiary dispute exists on the cost consultant issue. Given the context here and the centrality of the cost consultant issue, the evidence led to date reveals that there is a material dispute whether MCAP represented to RESG that CSC would be acting as cost consultant for the purposes of s. 14 of the *Act*. The evidence adduced to date confirms the existence of this factual and legal dispute. That evidence also reveals the existence of a dispute on whether MCAP represented to RESG that the terms and conditions of the Commitment Letter would be strictly enforced and upheld by CSC. Therefore, unless summary dismissal is warranted on another ground, all of this is a matter for a trial judge as is the question of whether there is linkage between these two alleged representations.

(iv) Material Disputes Remain on Special Relationship – Reasonable Foreseeability and Reliance Issues

[83] I recognize that the chambers judge did go on to conclude that summary dismissal was justified irrespective of his assessment that it was "highly unlikely" that the appellants would succeed in proving that MCAP had made a representation. His reasons for so concluding were that:

> [I]t was not reasonably foreseeable by MCAP that any prospective purchaser or plaintiffs could reasonably rely on the alleged representation.
>
> Furthermore, there is no evidence that any such purchaser or plaintiffs did rely...upon that alleged undertaking.
>
> 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": ABD F101 at paras 54-56.

[84] This analysis is flawed. The proposition that it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation and that there is no evidence that any purchasers did so ignores the fact that these matters are tied up with a dispute on other material facts, namely the relationship between RESG and the appellants, on the one hand, and RESG and MCAP, on the other. In the Amended Amended Statement of Claim, RESG is described as "a representative of purchasers in the Project": AEE A79. In an affidavit before the chambers judge, Penner, part owner of RESG, refers to RESG as an "authorized representative of a number of past and present owners of condominium units" and describes RESG as an "advocate" for the RESG purchasers as regards individual unit matters, and for all potential purchasers as regards the condominium common property: AEE A89. There is also evidence that MCAP was on notice that RESG was acting as a "real estate syndicator" in the sale of the units with everything that this would arguably entail: AEE A48, A49. In this regard, there is evidence that RESG was acting in

accordance with certain agreements made between it and 970365 to sell units in the Condo Project and that both 970365 and MCAP were involved in direct dealings with RESG for this purpose. In addition, the affidavit evidence indicates that RESG made certain representations to the prospective purchasers": AEE A87.

[85] Thus, there is a genuine issue whether RESG was acting as an agent for the purchasers or in some other capacity such that knowledge by or representations that MCAP made to RESG, if any, could be held to be knowledge of the appellants. Further, in any event, regardless of the technical nature of the relationship between the purchasers and RESG, there is also a material dispute about whether MCAP ought to have reasonably foreseen that any alleged representation to RESG would arguably be a representation to prospective purchasers through RESG and would be relied on and whether, in turn, RESG or the ultimate purchasers or both did rely on those alleged representations. And if RESG alone were found to have relied on the alleged representations, then a further issue is whether that would suffice for purposes of the appellants' claim against MCAP given other evidence that indicates that the purchasers were relying on RESG to represent them in relation to their purchases of units. Again, these are all matters for a trial judge.

[86] The record reveals that RESG was particularly concerned to ensure that a cost consultant for purposes of s. 14 of the *Act* had been retained for the Condo Project. When a party asks a question and receives an answer, one reasonable inference is that they are relying on the answer given, and, depending on the circumstances, that the answer is important to it. Otherwise, unless idle chit chat, why ask the question? In other words, when specific information is requested and a response provided, this may be relevant in assessing whether a party will reasonably foresee that it will be relied on. All of this is for a trial judge including whether the questions that RESG asserted it posed to MCAP about the cost consultant went to the issue of who would play the central role envisioned under s. 14 of the *Act* in protecting purchasers and what, if anything, turns on this. In considering these issues, a trial judge should evaluate the 2002 Phone Call in accordance with commercial realities. The term "cost consultant" has a special meaning under the *Act*.

[87] More fundamentally, the reason the chambers judge gave for finding that any such reliance could not be reasonable is without merit. That stated reason: a purchaser cannot look to an interim lender to ensure the proper completion of the project. I agree that an interim lender owes no duty of care to purchasers of units in a project it is financing to ensure that the project is completed in accordance with the lending agreement. I have explained why this is so earlier. However, a court cannot use the absence of a duty of care based on a lender-purchaser relationship to determine whether the specific facts and circumstances of a particular case created or gave rise to a special relationship between the lender and purchasers and a corresponding duty of care sufficient to ground an action in negligent misrepresentation. But that is what happened here. This too constitutes reviewable error. There may well be circumstances in which a lender owes a duty of care to third parties involved in a project it is financing sufficient to ground an action in negligent misrepresentation: see ***Keith Plumbing & Heating Co v Newport City Club Ltd***, 2000 BCCA 141, 184 DLR (4th) 75.

[88] As to why reliance on the alleged representations would be reasonable, a trial judge would need to take into account a number of considerations. Professor Bruce Feldthusen has set out in *Economic Negligence* (3rd ed. 1994) at pp. 62-63 five general indicia of reasonable reliance, namely: (1) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made; (2) the defendant was a professional or someone who possessed special skill, judgment, or knowledge; (3) the advice or information was provided in the course of the defendant's business; (4) the information or advice was given deliberately, and not on a social occasion; and (5) the information or advice was given in response to a specific enquiry or request. To what extent these indicia existed in this case is for a trial judge.

[89] Therefore, it was not open to the chambers judge, on this record, to determine that it was not reasonably foreseeable by MCAP that any prospective purchasers could reasonably rely on the alleged representations. There is ample evidence here demonstrating the existence of a material dispute on this point too. Again, all of this is for a trial judge with the benefit of a full hearing.

[90] So too is the question of whether any alleged representation involved a future expectation and whether, in law, that claim is actionable. There is authority that only a representation of a present fact and not a future intention can give rise to actionable negligence. This issue was not definitively resolved by the Supreme Court in ***Cognos***, *supra* at para 71-72. Nevertheless, the weight of authority at present supports the view that statements about future intentions cannot ground an action in negligent misrepresentation: see ***Motkoski Holdings Ltd. v Yellowhead (County)***, 2010 ABCA 72, 474 AR 367 at paras 39-55. That said, one has to be careful not to confuse a statement of present fact with the future consequences flowing from the negligent misrepresentation of that fact. Many statements of existing facts are inextricably linked to the future and it is what happens in the future that brings home the full extent of the damages caused by the negligent misrepresentation.

(c) Conclusion

[91] Thus, for these reasons, the appellants have shown that the claim for negligent misrepresentation is a genuine issue for trial.

B. Why a Genuine Issue for Trial Exists on the Claims Related to Breach of a Statutory Trust and Unjust Enrichment

1. Threshold Elements for Knowing Assistance and Knowing Receipt

[92] The appellants submit that MCAP participated in a breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of a trustee or by receiving monies it knew were subject to trust conditions. In submissions before the chambers judge, this argument was not

developed at any length. Understandably, therefore, it was not dealt with expressly by the chambers judge. However, on appeal it became one of the main grounds of appeal.

[93] In ***Citadel General Assurance Co v Lloyds Bank Canada***, [1997] 3 SCR 805, the Supreme Court of Canada discussed the fundamental distinction between a stranger to a trust knowingly assisting in a fraudulent and dishonest design on the part of a trustee ("knowing assistance") and knowingly receiving trust property ("knowing receipt") and set forth the different thresholds that had to be met in each situation. Assuming for the sake of argument that MCAP is not a "developer" for purposes of s. 14, MCAP would be a stranger to the statutory trust created under s. 14 of the *Act*.

[94] Under the first category, knowing assistance, a finding of liability requires that the stranger to the trust have either actual knowledge of the trustee's fraudulent and dishonest design or be reckless or willfully blind to that intention. And where the trust is, as here, imposed by statute, the stranger will be deemed to have known of it: ***Air Canada v M & L Travel Ltd.***, [1993] 3 SCR 787 at para 39. The dishonest and fraudulent intent of the trustee does not refer to fraud in the criminal sense; conduct that is morally reprehensible will do. Nor is it necessary that the stranger have acted in bad faith or dishonestly. The test is whether the stranger can be said to be "taking a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take": ***Air Canada***, *supra* at para 60.

[95] The second category, knowing receipt, occurs where a stranger receives trust property for its own use or benefit and with knowledge that the property was transferred to it in breach of trust. It is irrelevant whether the breach was fraudulent. For knowing receipt, the level of knowledge required is lower since the stranger is being enriched at the expense of the plaintiff. Thus, relief will be granted where a stranger, having received trust property for its own benefit and having knowledge of facts which would put a reasonable person on inquiry, fails to inquire as to the possible misapplication of trust property. Because the recipient is held to this higher standard, constructive knowledge, that is knowledge of facts sufficient to put a reasonable person on notice or inquiry, will be adequate as the basis for liability: ***Citadel***, *supra* at paras 48-49.

2. Threshold Elements for Unjust Enrichment

[96] The claim for unjust enrichment stands on a different legal footing than the claims for knowing assistance and knowing receipt. Unjust enrichment is a separate common law cause of action; the latter two are equitable causes of action: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 SCR 261 at para 94. Three elements must be proven to establish unjust enrichment: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: ***Garland v Consumers' Gas Co.***, 2004 SCC 25, [2004] 1 SCR 629, at para 30.

3. Material Disputes Remain for Knowing Assistance, Knowing Receipt and Unjust Enrichment Claims

[97] The appellants' position may be summed up this way. MCAP knew that RESG considered CSC to be the cost consultant for purposes of s. 14 of the *Act*. MCAP was aware of the terms of the purchase and sale agreements since it had required that those contracts be on terms agreeable to it. Those agreements contemplated a cost consultant as required under s. 14. At the time of closing of the transactions of purchase and sale, MCAP was on notice through the Deficiency Letter and later the Geological Testing Letter that individual units and related common property had not been substantially completed. Therefore, the proceeds of sale were subject to the statutory trust and holdback provisions mandated under the *Act*. MCAP took no steps to correct RESG's understanding of CSC's role. Indeed, MCAP instructed CSC not to act as a s. 14 cost consultant but never at any time disclosed this critical fact to RESG. Nor did MCAP make any inquiries after receiving RESG's warnings in September 2003 about substantial deficiencies in the Condo Project to determine whether there could be a misuse or misapplication of trust funds by 970365. Further, given the very short period of time between MCAP's receiving notice of the serious deficiencies and the actual closing of the transactions of purchase and sale, MCAP would have known that those deficiencies could not have been substantially completed. Thus, MCAP is liable for knowing assistance, knowing receipt and unjust enrichment.

[98] I have concluded that based on the record before this Court, there are genuine issues for trial with respect to all three claims.

[99] I begin with this. The Commitment Letter contemplated that the Condo Project would be registered with a new home warranty provider acceptable to MCAP: Funding Condition 16 of the Commitment Letter at AEE A19. Under the terms of the Commitment Letter, all purchasers and contracts of purchase and sale were required to be "satisfactory" to MCAP: Other Conditions 6 of the Commitment Letter at AEE A23. It appears from this record that the new home warranty provider was not intended to be one that would bring this Condo Project within the exception to s. 14 of the *Act*. If so, the statutory trust and holdback provisions under s. 14 would apply to the Condo Project. The contracts of purchase and sale appear to contemplate this as well since they provided in relevant part (AEE A131):

> **3. <u>Money in Trust</u>**
> All funds paid by the Purchaser ... shall be held in trust by the Vendor's solicitors pursuant to section 14 of the *Condominium Property Act* (the "Act") and released in accordance with the Act.... For the purposes of section 14 of the Act, a written statement of the Vendor's consulting engineer or architect for the Project confirming (as the cost consultant under the Act) that the improvements to the Property or any part of it or to the Common Property are substantially complete shall be proof of such facts and conclusively binding upon the Purchaser. The Vendor may act on the statement of the cost consultant in disbursing or using the Purchase Price.

[100] Other evidence supports the appellants' position that there are genuine issues for trial with respect to both the knowing assistance and knowing receipt causes of action. The appellants point to the fact that on September 12, 2003, RESG sent the Deficiency Letter to CSC, copying MCAP, confirming that RESG had been "advised by counsel" that 970365 had failed to obtain the appropriate exemption from the cost consultant requirements under the *Act*. As noted above, the Deficiency Letter stated that RESG had been "further advised that CSC has been selected as the required cost consultant" for the purpose of determining the amount of the statutory holdback to be held in trust under s. 14 of the *Act*: AEE A150. The Deficiency Letter then went on to describe at considerable length the numerous and varied serious alleged deficiencies in the design and construction of the Condo Project.

[101] There is also evidence that prior to the Deficiency Letter, CSC had issued letters to 970365 certifying costs to complete common areas for the purpose of determining a holdback from purchaser funds for units that had closed. The appellants assert that both 970365 and 970365's lawyers represented that these certification letters were the certifications required under s. 14 of the *Act*.

[102] This evidentiary record suggests that 970365's lawyers also understood that CSC was acting as the s. 14 cost consultant under the *Act*. In their trust letters to purchasers' counsel, 970365's lawyers undertook to maintain a holdback in accordance with s. 14, stating that in doing so, "we shall be entitled to rely upon the advice of our client's cost consultant, currently Cuthbert Smith Chartered Quantity Surveyors, to determine the appropriate amount of such holdback from time to time": AEE A525. Further, 970365's lawyers have given evidence in this case that, in closing the transactions of purchase and sale, they believed that CSC was acting as the s. 14 cost consultant: see affidavit of 970365's lawyer, Gordon Van Vliet, at AEE A4C at line 13.

[103] This record reveals that Penner discussed the Deficiency Letter with Cuthbert of CSC on September 16, 2003. In addition, as noted above, RESG then sent the Geotechnical Testing Letter to CSC and copied MCAP. This was the Letter that asked that further development activity cease until geotechnical testing could be done at the site of the Condo Project. In the Geotechnical Testing Letter, RESG advised that it had been provided with the Commitment Letter on July 15, 2002 and pointed out that the Commitment Letter required a soils test and "construction in compliance with such conditions and with the recommendations". As also noted above, RESG then asserted that it had been assured by MCAP that the Commitment Letter would be enforced, stating (AEE A160):

> By telephone conversation on July 16.2002 with Mr. Michael Roulston, Assistant Vice-president of MCAP, we were assured that the terms of the commitment letter would be carefully monitored and upheld by Mr. John [*sic*] Cuthbert of CSC.

[104] As also discussed above, on September 23 and 24, 2003, 970365 and MCAP respectively wrote separate letters to CSC instructing CSC that it had not been retained as a s. 14 cost consultant and that neither consented to CSC's taking on such a role.

[105] Specifically, 970365's September 23 letter admonished CSC for what 970365 perceived to be "unauthorized communications" between CSC and RESG. The letter stated at AEE A570:

> We wish to make it expressly clear that your firm has been retained as the cost consultant for the purposes of the loan transaction between ourselves as developer and MCAP Financial as lender, and for no other purpose. Your firm has not been retained for any expanded role as alleged by RSG, nor do we consent to you taking on such a role. RSG is simply wrong in this regard.

[106] That letter went on to state that 970365 was taking the allegations advanced by RESG "very seriously" and had referred the correspondence to the architects, engineers and contractor. 970365 copied MCAP on this letter. It did not copy RESG and the appellants point to the fact that there is no evidence that 970365 or MCAP ever provided a copy of that letter to RESG.

[107] MCAP sent CSC a letter to the same effect on September 24, 2003 (AEE A36). In that letter, MCAP referred to the various allegations that RESG had made concerning the Condo Project and cautioned CSC, in words essentially identical to those used by 970365 in its September 22 letter, that CSC's role was as follows (AEE A36):

> [W]e wish to make it clear that your firm has been retained by our office as the cost consultant for the purposes of the loan transaction between 970365 Alberta Ltd as developer and ourselves as lender, and for no other purpose. MCAP Financial has not retained your firm for any expanded role as suggested in RSG's correspondence of September 12, 2003, nor do we consent to you taking on such a role.

[108] MCAP did not copy RESG with this letter and again, the appellants note that there is no evidence that MCAP ever provided a copy of this letter to RESG. They also observe that, on the current record before this Court, at no time did MCAP or 970365 ever write to RESG or Penner advising that CSC was not the s. 14 cost consultant under the *Act*.

[109] In addition, the appellants assert that both MCAP and 970365 knew full well the jeopardy that existed for each at the time that they sent their subject letters to CSC. According to the appellants, at this stage the exposure for both MCAP and 970365 was at its greatest since the outstanding loan amount would have been approaching the highest level. In the appellants' view, by not informing RESG that CSC was not the cost consultant for purposes of s. 14 of the *Act*, MCAP

improperly reduced its own risk exposure to the significant detriment and harm of purchasers of units in the Condo Project.

[110] As noted earlier, on September 26, 2003, MCAP received $1,463,940 from the closing of a large number of sales transactions in the Condo Project. And then between October 6 and 8, 2003, it received another $2,891,439. MCAP applied all funds against the debt 970365 owed to MCAP.

[111] Intertwined in all of this is also the alleged threat by 970365 to cancel the contracts of purchase and sale and claim forfeiture of deposits paid, who knew what and when about these threats, whether they were used to force closings notwithstanding 970365's alleged failure to substantially complete specific units and related common property and what, if anything, turns on all this.

[112] All this being so, given the allegations contained in the Amended Amended Statement of Claim and the evidentiary record before this Court, I cannot say that the appellants' claims for knowing assistance and knowing receipt are without merit. There are genuine issues for trial as to whether MCAP knowingly assisted in a breach of trust or knowingly received monies impressed with a statutory trust.

[113] Similar considerations apply to the appellants' claim against MCAP for unjust enrichment. The chambers judge relied on the fact that there was a juristic reason as between 970365 and MCAP for the payments received by MCAP to summarily dismiss the unjust enrichment claim. But whether the subject proceeds had lost all identity as purchasers' funds once MCAP received them is very much in dispute on this record. The appellants' position is that when MCAP received the subject monies, these were payments from the purchasers, rather than being 970365's monies. Assuming only for the sake of argument that the appellants are correct, the analysis would then lead a different inquiry. The question would be whether MCAP had a juristic reason to retain monies received from the *purchasers* of the units. That is a different issue than what the chambers judge considered. The answer to it is also in dispute.

[114] I again caution that I make no findings on any of the matters discussed. Suffice to say that given this record, summary dismissal of these claims was not appropriate.

C. Why There is a Genuine Issue on Whether MCAP was a "developer" under s. 14 of the *Act*

1. Statutory Definition of "developer"

[115] Section 14(1)(c) defines developer as follows:

> "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

[116] The significance of the appellants' claim that MCAP falls within this definition in connection with the Condo Project is this. If MCAP were found to be a "developer" under the *Act*, it would have been subject to, and bound by, the statutory trust conditions under ss. 14(4) and (5) of the *Act* in its own right irrespective of any potential liability for knowing assistance, knowing receipt or unjust enrichment.

2. Appellants' Theory of Liability

[117] As noted, the relationship between MCAP, as lender, and 970365, as borrower, was governed by the Commitment Letter. Neither the Condo Corporation nor any condominium unit owner was a party to that Commitment Letter. Nevertheless, it is the appellants' position that when MCAP received monies from 970365's lawyers, these monies were captured by the wording of s. 14(1)(c) such that MCAP should properly be treated as a "developer" for purposes of s. 14 and the statutory trust and holdback provisions.

[118] The test for determining who is a "developer" for purposes of s. 14 of the *Act* has three parts. The person or entity in question must: (1) "receive money paid by or on behalf of a purchaser"; (2) "pursuant to a purchase agreement"; and (3) "on behalf of a developer".

[119] The appellants assert that when MCAP received the proceeds of sale, those funds had not lost all their identity as purchasers' monies. On their theory, these funds were subject to repayment if the required partial discharges of MCAP's mortgage security and caveat 022 293 886 relating to an assignment by 970365 of rents and leases in favour of MCAP (Caveat) were not provided as required. They assert that this is clear from the way in which the subject transactions were structured, documented and closed. In their view, MCAP knew the monies it received from 970365's lawyers were "monies paid by or on behalf of a purchaser" and also knew it had received the monies "pursuant to a purchase agreement" especially since MCAP had required that 970365 grant in its favour a general assignment of all agreements of purchase and sale made between 970365 and purchasers of units in the Condo Project.

[120] In the appellants' view, there are several reasons why MCAP should be found to have received the purchase monies "on behalf of a developer", namely 970365. They point out that the purchase and sale agreements themselves mandated that purchase monies be paid to MCAP "on behalf of the developer". Why? Because item 4 of Schedule I defines "Permitted Encumbrances" as including: "Registrations relating to the Vendor's financing requirements which are to be discharged out of and conditional upon receipt of the full Purchase Price". The appellants further submit that this is also consistent with the Commitment Letter, under the heading "Partial Discharge" which states: "Partial Discharges shall be provided in respect to each condominium unit upon payment to the Lender of 100% of the Net Closing Proceeds".

[121] They also point out that the way in which the purchase and sale transactions were closed supports their position. In particular, they stress that 970365's lawyers did not pay the purchase proceeds to MCAP unconditionally. The purchase monies paid by purchasers of the condominium units were initially paid into the trust account of 970365's lawyers. Those lawyers in turn then paid those funds to MCAP but those payments were expressed to be conditional on receiving partial discharges of both MCAP's mortgage security and Caveat. Thus, according to the appellants, those funds were open to being returned to 970365's lawyers if MCAP failed to comply with its obligations to provide a partial discharge of both its mortgage security and Caveat. More important, on the appellants' theory, these funds remained the purchasers' funds until the purchasers received clear title. Accordingly, in their view, MCAP received those payments "on behalf of a developer", thereby making it a developer within the meaning of s. 14.

[122] I have concluded that there is a genuine issue for trial as to whether MCAP should, in the particular circumstances of this case, be properly characterized as a "developer" for purposes of s. 14 of the *Act*. Accepting, without deciding, that ordinarily, an interim financier would not be found to have received funds "on behalf of a developer" when it receives proceeds of sale of condominium units in repayment of the debt a developer owes to it, it does not follow that this will invariably be the case. Depending on the facts, there may well be instances in which an interim financier is properly included within the definition of "developer" under s. 14 of the *Act*. A trial judge considering this issue in this case will need to address and resolve a number of matters.

3. Material Disputes Remain on Whether MCAP was a "developer"

[123] First, there is the issue of the intended scope of the legislation and s. 14 in particular. Interpreting legislation is best done in context. It is a matter of statutory construction as to what the Legislature intended under s. 14 and in particular s. 14(1)(c), the definition of developer. This definition is special to s. 14; the *Act* contains another definition of "developer" for other purposes under the *Act*. Statutory construction assesses not merely the words of an act in their grammatical and ordinary sense; it does so in their entire context, harmoniously with the scheme of the act, its object and the intention of the Legislature.

[124] It is preferable for the development of the law that a trial judge consider the intended breadth and scope of s. 14 and the definition of "developer" thereunder. We have had no argument on the policy implications of different interpretations of the definition of "developer" contained in s. 14(1)(c). As noted, this is part of a parcel of consumer protection legislation designed to protect purchasers of condominium units from being unfairly taken advantage of by developers. But what precisely do the words "on behalf of a developer" in this section mean? Do the words simply mean "for the benefit of" and "in the interest of"? Or does this wording require that the developer or a third party to whom the developer may otherwise be accountable for those funds have retained some claim on those funds? And if so, what kind of claim will do for a court to conclude that the recipient of the purchase proceeds has received those monies "on behalf of a developer"?

[125] Further, did 970365 retain an absolute or some lesser claim on the monies paid by its lawyers to MCAP? The payments that MCAP received from 970365 were paid in partial satisfaction of the debt 970365 owed to MCAP. But if so, does this necessarily mean that MCAP received those proceeds solely in its own right and for its own benefit? Also, since the limitation "on behalf of a developer" does not state "on behalf of a developer alone", could a recipient of purchase proceeds be found to be a developer where the recipient has arguably received funds on two grounds, namely "on behalf of a developer" and in the recipient's own right? And if so, what would be the consequences to the recipient?

[126] MCAP contends that it received the funds in question solely for its own benefit, pointing out that they were not sent to them in trust. While the funds received were not sent in trust in the sense of their being subject to lawyer's trust conditions, a trial judge will need to consider whether it follows that MCAP received the funds unconditionally and for its sole benefit. The record reveals that they were paid by 970365's lawyers on the "understanding" that MCAP would provide partial discharges of both its mortgage security and Caveat. This "understanding" is not a solicitor's trust condition and would not be enforceable as such. But the Commitment Letter imposed a contractual obligation on MCAP in certain circumstances to provide partial discharges on receipt of Net Closing Proceeds as defined therein. MCAP points out that if 970365 had been in default when MCAP received the Net Closing Proceeds, it would have had no obligation to provide even the partial discharges. Whether this is so and how it affects MCAP's contention that it received the Net Closing Proceeds unconditionally and for its sole benefit is also for the trial judge.

[127] Second, the basis on which, and circumstances under which, a lender receives funds may be relevant to this issue. Here, the structure of the transactions of purchase and sale may raise the question whether there was in fact any privity of contract as between MCAP and unit purchasers as a result of the security granted by 970365 to MCAP. Certain evidence may be relevant to this issue. While MCAP was not a party to any of the agreements of purchase and sale, nevertheless, in accordance with the Commitment Letter, those agreements were required to be on terms satisfactory to MCAP. The sales prices had to be not less than the amounts set forth in Schedule "C" in the Commitment Letter. Further, MCAP required that 970365 provide "satisfactory confirmation that each of the purchasers has qualified and accepted take out mortgage financing at a financial institution acceptable to" MCAP: Commitment Letter Funding Condition 2 at AEE A17. Of particular note, in accordance with the Commitment Letter, 970365 was required to deliver to MCAP a general security agreement registered under the *Personal Property Security Act of Alberta* granting a first general assignment of all Agreements of Purchase and Sale inclusive of purchaser's deposits. In addition, 970365 was required to pay the Net Closing Proceeds of sale of each condominium unit to MCAP: see Commitment Letter at AEE A14.

[128] Third, this issue is further complicated by reason of the appellants' outstanding claims against MCAP for knowing assistance and knowing receipt. If an interim lender to a developer is found to have received sale proceeds knowing, or being deemed to know, that the developer has

failed to comply with its statutory obligations under s. 14 of the *Act* and the funds in question are the proceeds of sale, then it may be open to a trial judge to conclude that those funds were then impressed with a statutory trust. If so, then the issue is whether they were *received* by the lender "on behalf of a developer" and were required to be returned for the benefit of the beneficiaries of the statutory trust. I am not suggesting that the dragnet of liability as a "developer" under s. 14 should be expanded to sweep within it all interim lenders. But where an interim lender is liable for knowing assistance or knowing receipt, then a trial judge must assess whether that lender properly falls within the definition of "developer" under s. 14. Simply because a lender is liable for knowing assistance or knowing receipt does not innoculate the lender from potential liability on another basis, that is as a "developer" under s. 14. It also goes without saying that any lender liable for knowing assistance or knowing receipt is not carrying on business in accordance with acceptable commercial practices.

[129] Fourth, public policy issues will no doubt factor into a trial judge's analysis of this issue. On the one hand, an interpretation of this legislation that seriously compromises the integrity of the commercial lending industry ought to be rejected. On the other hand, a court will need to consider how best to ensure that this legislation protects those whom it was intended to protect. This will include an assessment of whether claimed risks from the lender's perspective are valid or whether means exist by which any risks might be obviated.

[130] The trial judge may explore whether this situation is analogous to the builders' lien regime. Lenders require appropriate land titles searches to ensure that as advances are made, no builders liens are registered against the title to the lands. The concept underlying the builders' lien regime is that in certain circumstances, employees and suppliers of materials may gain priority over the interests of a secured lender. Prudence dictates therefore that lenders follow certain procedures to minimize the risk of this occurring by demanding that borrowers provide evidence of clear title as and when advances are made plus whatever additional assurances the lender may consider appropriate to ensure that workmen and suppliers are being paid as required.

[131] A trial judge will no doubt consider as part of this analysis the steps that may reasonably be available to a lender to mitigate the risk that it might lose priority over purchase proceeds if the developer has failed to substantially complete a unit and related common property at the time of sale. And what steps, if any, a lender is required to take to avoid the risk that it may be considered a developer for purposes of s. 14. In other words, is it possible for a lender to protect itself from being treated as a developer under s. 14 by the simple expedient of requiring an appropriate certificate of substantial completion from a cost consultant each time it receives purchase proceeds from the sale of units in a new condominium project to which the statutory trust and holdback provisions apply? And if a lender does not do so – if this degree of due diligence is not followed – then what consequences, if any, should properly flow from this? All of this is for a trial judge.

[132] For these reasons, I have concluded that whether MCAP is a developer for purposes of s. 14 of the *Act* is also a genuine issue for trial and ought not to have been summarily dismissed.

IX. Conclusion

[133] In conclusion, the appellants have shown that there are a number of genuine issues for trial in connection with certain claims against MCAP. Therefore, for the reasons explained, I allow the appeal from the order of the chambers judge summarily dismissing the claims for negligent misrepresentation, knowing assistance, knowing receipt, unjust enrichment and the s. 14 developer

issue. This case should go to trial on these various claims. However, the chambers judge was correct in summarily dismissing the negligence claim and thus, the appeal on this ground is dismissed.

Appeal heard on September 13, 2011

Reasons filed at Calgary, Alberta
this 27th day of January, 2012

Fraser C.J.A.

I concur:

Watson J.A.

Reasons for Judgment Reserved
of the Honourable Mr. Justice McDonald
Dissenting in Part

Introduction

[134] I have had the benefit of reading the Reasons for Judgment Reserved of the majority. While there is much with which I agree, I have respectfully come to a different conclusion regarding the issues of negligent misrepresentation (paragraphs 65 - 91) and whether or not MCAP is a developer within the meaning of section 14 of the *Act* (paragraphs 115 - 132).

[135] In particular, I agree with the comments contained in paragraph 43 of the Reasons for Judgment Reserved regarding the two-step process to be followed in a successful application for summary judgment. The first step involved requires the moving party to adduce evidence to show that there is no genuine issue for trial. This is admittedly a high threshold. If the evidentiary record establishes that either there are missing links in the essential elements of the cause of action, or that there is no cause of action in law at all, there will then be no genuine issue for trial. The fact that there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14, [2008] 1 SCR 372 at para 11. Secondly, once the burden on the moving party has been met, the party resisting the summary judgment application may then adduce evidence to persuade the court that a genuine issue remains to be tried.

[136] Ultimately this devolves to the question as to whether there is "no merit to any of the alleged causes of actions".

Background

[137] The background to this appeal, including the facts of the case and the decision of the chambers judge below, is set out in paragraphs 1 through 37 of the Reasons for Judgment Reserved of the majority.

[138] That said, there are certain facts, or more accurately, a lack of any evidential basis, relevant to the points on which I diverge from my colleagues that I will need to highlight in the appropriate sections below.

Claim for Negligent Misrepresentation

[139] In paragraph 65 the majority, citing *Cognos*, identified the necessary elements for a claim in negligent misrepresentation. I repeat these again for convenience. In order to succeed in establishing negligent misrepresentation, the plaintiff must prove:

(i) a duty of care based on a "special relationship" between the representor and the representee;

(ii) the representation in question was untrue, inaccurate or misleading;

(iii) the representor acted negligently in making the representation;

(iv) the representee relied, in a reasonable manner, on the negligent misrepresentation; and

(v) the reliance was detrimental to the representee in the sense that damages resulted.

[140] I concede that there may be a genuine issue for trial with respect to whether, on the unique and specific facts of this case, there was a "special relationship" between MCAP and the appellants, in large part through the involvement of RESG, sufficient to give rise to a duty of care in this case. I further concede that, as noted in paragraphs 72 through 74 of the Reasons for Judgment Reserved, the question of whether there was in fact an implied representation made by MCAP that it would enforce the terms of the Commitment Letter may be a live issue. Consequently, there may be a genuine issue for trial as to whether such an implied representation was untrue, inaccurate or misleading, and furthermore whether it was made negligently. Finally, there is no question that the appellants suffered damages in this case. However, I respectfully disagree with the majority on the issue of reasonable reliance.

[141] The majority writes at paragraph 84, that "[t]he proposition that it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation and that there is no evidence that any purchasers did so ignores the fact that these matters are tied up with a dispute on other material facts, namely the relationship between RESG and the appellants, on the one hand, and RESG and MCAP, on the other."

[142] With the greatest of respect, in my opinion, there is no evidence to support the argument that the appellants were aware of any alleged representation or that they reasonably relied on it if it was in fact made. Furthermore, there is no evidence of an agency relationship between RESG and the

appellants, and therefore no basis upon which to impart any reliance by RESG to the appellants themselves.[1]

[143] No where in the substantial affidavit evidence before the chambers judge was there any indication that RESG communicated its understanding of the alleged representations by MCAP to the purchasers, or that the purchasers themselves relied on MCAP's representations. The chambers judge expressly found that "there is no evidence that any such purchaser or plaintiffs did rely on the [sic] upon that alleged undertaking": ABD F101 at para 55. This court owes deference to the findings of fact of the chambers judge. I see no palpable and overriding error in his conclusion that there was no evidence of reliance by the appellants, and therefore, I see no basis for interfering with his conclusion on this point.

[144] The evidence is clear that RESG believed MCAP had represented it would enforce the terms of the Commitment Letter, and furthermore that RESG relied on that perceived representation when making recommendations to the purchasers. Penner, of RESG, deposed that "a critical factor that influenced RESG to recommend that purchasers enter into the Purchase Agreements, and subsequently close their transactions, was *RESG's reliance* on MCAP's assurances and representations that it intended to enforce the terms of the Commitment Letter": AEE A50 at para 31 [emphasis added]. See also AEE A95 at para 42. However, RESG's reliance is not the same as the appellants' reliance.

[145] Penner further deposed that "All [the potential purchasers] were prepared to enter into agreements based solely on the reputation of Bamber, Frey, and I. Nor did they enquire as to the exact nature of what they understood to be a co-venture relationship between RESG and the Developer Group. Rather, their only concern was that they were acquiring what was represented to them by the Developer Group and RESG": AEE A87 at para 30. There was no mention of any representations made by MCAP to the appellants. To succeed in establishing negligent misrepresentation the appellants must demonstrate that *they* relied on the alleged misrepresentation *by MCAP*; the absence of any evidence on this point is, in my opinion, fatal to their claim.

[146] Having failed to provide any evidence of an essential element of the cause of action of negligent misrepresentation, the appellant's claim was bound to fail and accordingly the chambers judge's decision summarily dismissing this aspect of the appellant's action was not unreasonable.

[147] The majority finds, at paragraph 85, that "... there is a genuine issue whether RESG was acting as an agent for the purchasers or in some other capacity such that knowledge by or

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[1]By virtue of a Letter Agreement dated May 8, 2008, between RESG and 970365, RESG was named as a "co-developer" and it was contemplated that it would have involvement as a financial participant in the Condo Project. AEE A85 at para 26.

representations that MCAP made to RESG, if any, could be held to be knowledge of the appellants." Again with the greatest of respect, I disagree with this conclusion.

[148] The onus of establishing an agency relationship lies with the party alleging that the agency existed: *Tanouye v KJM Developments Ltd* (1980), 25 AR 200 (QB) at para 25 citing *Canadawide Investments Ltd v Muirhead* (1958), 15 DLR (2d) 526, 26 WWR 460 (Alta SC-AD). See also *Merchants Bank of Canada v Stevens* (1919), 30 Man R 46, 49 DLR 528 (CA) at page 561. In this case, if the appellants desire to establish the essential element of reliance through an agency relationship with RESG, they must lead evidence to establish the existence of such a relationship. Based on the record before us, there is no evidence capable of supporting an argument that RESG was agent for the appellants.

[149] The essential elements of a relationship of agency include (i) consent of both the agent and the principal, (ii) the ability of the agent to affect or alter the principal's legal relationship with third parties, and (iii) the principal's control over the agent's actions: *Royal Securities Corp v Montreal Trust Co*, [1967] 1 OR 137, 59 DLR (2d) 666 (HCJ) at page 684. Consent is particularly important because, in general, "[n]o one can become the agent of another person except by the will of that other person": *Johnson v Forbes* (1931), 26 Alta LR 268, [1932] 1 DLR 219 (SC -AD) at 222[2].

[150] The record in the present appeal provides no evidence of the appellants' consent or desire that RESG act as their agent; nor is there any evidence that RESG had authority to act on behalf of or bind any of the appellants by its own actions, or alter the appellants' legal relationships with other parties. In my opinion, in the absence of any evidence on these essential points, there can be no genuine issue whether RESG was acting as agent for the appellants. Therefore RESG's reliance on MCAP's alleged representation cannot be imputed to the appellants and one fundamental element of a claim in negligent misrepresentation is still lacking.

[151] In any event and regardless of the exact nature of the relationship between RESG and the appellants, it bears repeating that the Supreme Court of Canada decision in *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, makes clear the necessity of a party being able to satisfy the court that reliance on a statement actually occurred. La Forest J. stated, in part, at para 18:

> 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 at p.110.

[2] There are, of course, exceptions to this general proposition (eg. agent by necessity) but none of these are applicable to the facts of this case. Unquestionably, a contract of agency requires the consent of both parties.

Although the above comment was strictly speaking *obiter*, it is a correct statement of the law. There being no evidence given by any plaintiff that MCAP's alleged representations were a factor in his/her purchase of a unit in the Condo Project, there can be no basis for a successful claim in negligent misrepresentation.

[152] Based on the reasons above, I conclude that there is no genuine issue for trial based on a claim in negligent misrepresentation. I would dismiss the appeal on this point.

Claim that MCAP is a "Developer" Under Section 14 of the *Act*

[153] I repeat here, again for convenience, the test for determining who is a "developer" for the purposes of section 14 of the *Act*, as stated in paragraph 118 of the Reasons for Judgment Reserved of the majority. A "developer" includes a person who:

(i) received money paid by or on behalf of a purchaser;
(ii) pursuant to a purchase agreement; and
(iii) on behalf of a developer.[3]

I concede that there may be genuine issues for trial as to whether the funds MCAP received through the purchase transactions of units in the Condo Project was money "paid on behalf of a purchaser" "pursuant to a purchase agreement". However, I cannot accept the suggestion that those funds were received "on behalf of a developer".

[154] The majority concludes that it is an open question what precisely the words "on behalf of a developer" in section 14 means: paragraph 124. However, in my opinion, whatever the scope of that phrase might be, it cannot be so broad as to include money received by MCAP, pursuant to a loan agreement, to pay off the debt owed by 970365. Money received in this way is fundamentally received by MCAP on its own behalf. The chambers judge clearly held that, based on the arrangement between the parties, the money received by MCAP was 970365's money, and it was paid *by* 970365, not *on behalf of* 970365.

[155] Again, I see no reversible error with respect to the chambers judge's finding on this point. Having concluded that one element of the definition in section 14 was not established, the chambers judge summarily dismissed the appellants' claim on this point; his decision to do so was not unreasonable.

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[3] The reference to a "developer" here is to the general definition contained in section 1(i)(j) of the *Act*, viz "a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction".

[156] I respectfully disagree with the majority's position that the Legislature's failure to state "on behalf of a developer alone" opens the door to claims based on money paid by a developer that benefits both the developer and the recipient; after all, every payment, save for perhaps pure charity, provides some benefit to the payor in that it either relieves the payor of an obligation owed to the payee or creates an obligation that the payee owes back to the payor. Such an interpretation of section 14 is, in my opinion, too broad and unsupportable on the words of the legislation.

[157] As further support for the position that there is a genuine issue on the section 14 developer argument, the majority also concludes, at paragraph 127, that there remains an unanswered question as to whether there might be privity of contract in this case between MCAP and the appellants based on the security granted by 970365 to MCAP. Again, I respectfully disagree. I can see no evidential basis for this suggestion on the record before this court.

[158] Furthermore, the chambers judge expressly held that "[t]here was no contractual relationship between MCAP and the plaintffs [appellants] ... The only interest of MCAP in any purchase agreement between the developer and the 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": ABD F96 at para 26.

[159] This was part of the lending arrangement between MCAP and 970365. I see no basis upon which this court can disturb this factual finding. And in any event, I see no way such a finding could affect the nature of the money MCAP received from 970365; even if there was a contractual relationship between MCAP and the appellants, the specific money impugned in this appeal was still received by MCAP from 970365 in repayment of 970365's loan, and therefore was received on MCAP's own behalf and not on behalf of a developer.

[160] Further on this point, the majority notes that the issue of whether MCAP received money "on behalf of" 970365 is further complicated by the possibility that MCAP knowingly received trust funds. This reasoning flows from the fact that if a party receives money knowing that the developer has failed to comply with the *Act*, those funds may be found to be impressed with a statutory trust. If they are subject to a statutory trust, then the developer is liable to the purchaser for those funds, *i.e.* the purchaser can require that they be returned. As such, the money in question is not unconditionally available to the receiving party, but rather that party is in effect holding that trust money for the developer; therefore the receiving party received the money "on behalf of the developer".

[161] With the greatest of respect, this reasoning is flawed and I disagree with the majority on this point. As noted by the majority in paragraphs 93 and 95 of their Reasons for Judgment Reserved, a condition precedent to a finding that a party knowingly received trust property is a finding that the party was a *stranger* to the trust. With respect to a section 14 statutory trust, this means the party is *not* a "developer" for the purposes of section. In paragraph 95, the majority explains that "[t]he second category, knowing receipt, occurs where a *stranger* receives trust property *for its own use*

or benefit and with knowledge that the property was *transferred to it in breach of trust*" [emphasis added]. This requirement is essential because if the party was a trustee, as opposed to a stranger to the trust, it would not receive the trust property for its own benefit, but rather for the benefit of the trust's beneficiaries. Also, a transfer to such a party would not be a transfer in breach of trust; it would merely be a transfer from one trustee to another. Therefore, if MCAP is liable for knowingly receiving trust property, it cannot have been a developer under section 14. It begs the question to say that MCAP might have knowingly received trust property, based on the premise that MCAP is a stranger to the section 14 statutory trust, and subsequently use that finding to bring MCAP within the definition of "developer" and therefore within the ambit of the trust itself.

[162] Furthermore, with respect to section 14 holdbacks, that money is subject to a statutory trust. Therefore, if a party receives that money knowing it is subject to a statutory trust, that party would likely already be held liable to the beneficiary on that basis. It seems unnecessary to me to extend the analysis to the issue of whether the money is also held "on behalf of a developer", simply to engage the definition of "developer" in section 14 of the *Act*.

[163] There is no need to take the further step of categorizing the money as received "on behalf of" the developer and thereby bring the receiving party within section 14 if that party does not otherwise satisfy the criteria set out in the definition of "developer". In my respectful opinion, with this argument the majority is conflating, unnecessarily, the cause of action noted above (knowingly receiving trust property) with the meaning of "on behalf of a developer" in section 14.

[164] The majority recognizes that public policy issues will be a factor to consider when analyzing the scope of the definition of "developer " in section 14 of the *Act*. However, the majority believes this is a question that is best left to be decided at trial. With respect, I again diverge on this point. In my opinion, even opening the door at trial to an interpretation of section 14 that may include interim construction lenders in the definition of "developer" would clearly be inconsistent with the object of the *Act* and the intention of the Legislature.

[165] The *Act* is, admittedly, consumer protection legislation aimed at protecting the interests of purchasers and owners of condominiums. However, this is not the only objective of the legislation. The *Act* attempts to strike a balance between the need to protect the interests of purchasers and owners, and the need to enable developers to undertake and complete condominium projects in an efficient and effective manner.

[166] Section 14 is an example of the balance that the *Act* attempts to create. On the one hand, the definition of "developer" is directed at holding a larger group of persons accountable for the proper construction and completion of new condominium projects. In fact, the definition of "developer" presently set out in section 14 was only introduced in 2000 as part of a package of amendments to the *Act* (the "2000 Amendments").

[167] Prior to that time, the applicable definition was the much narrower definition of "developer" applicable to the entire *Act*; the current general definition of "developer" in section 1(j), which was also amended in 2000 but for the purposes of this appeal is substantially the same as it was prior to the amendments, reads:

> "developer" means a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction.

[168] Clearly the section 14 definition encompasses a wider range of persons than the definition in section 1(j) of the *Act*, indicating a focus on consumer protection. On the other hand, the calculation of trust holdbacks under section 14 now seeks to allow developers easier access to sufficient funds to complete a condominium project, while at the same time maintaining sufficient holdbacks to ensure the completion of the units and related common property for which purchase monies have already been paid.

[169] Prior to the 2000 Amendments, 50 percent of the money paid to a developer or a person acting on the developer's behalf was required to be held in trust until the unit and related common property was substantially complete. As such, this money was not available to the developer to finance the completion of the remainder of the condominium project.

[170] Under the current section 14, however, the required holdback has been modified, and now the developer (as newly defined) is required to hold in trust that amount of money that is sufficient, when combined with the unpaid portion of the purchase price, to substantially complete the unit in question and the related common property.

[171] This modified method of calculation makes available to the developer more of the money paid by purchasers of units in a condominium project in order to complete the project, or an additional phase, while still ensuring there are sufficient funds to complete the immediate unit and related common property to which those purchase monies apply. This exemplifies the balance struck in the legislation.

[172] The Legislature clearly intended a balance in section 14 of the *Act*. When debating the 2000 Amendments in the Legislative Assembly, one of the noted effects of the changes was "to protect the rights of the condominium owners while allowing the builders to finance their projects more easily": Alberta, Legislative Assembly, *Hansard* (3 April 2000) at 662 (Hon. Mr. Gibbons). As noted, one objective of section 14 is to expand the group of persons who are accountable to the purchasers of units in a new condominium project for the completion of the project.

[173] However, in my opinion, the Legislature did not intend to cast the net so wide as to include interim finance lenders, since doing so will undermine the other objective of section 14, namely,

ensuring that construction financing is available and funds are accessible to allow developers to complete, with reasonable diligence, the construction of new condominium projects. Expanding section 14 to apply to interim construction lenders carrying on business in the ordinary course and through well-accepted and time-proven practices will doubtless have a detrimental effect on the availability of financing for new condominium developments. This cannot have been the intention of the Legislature when amending section 14.

[174] Of course, if the facts of a case are such that a lender clearly falls within the definition of a developer in section 14 – based on the particular financing arrangement or lending practices involved in that situation – the policy reasons just referred to will not be a sustainable basis for shielding that particular lender from the application of section 14. But where the lender has made use of commercially reasonable lending practices and one cannot reasonably fit the arrangement between the lender and the developer within the definition in section 14, these policy considerations support the conclusion that the definition should not be expanded unnecessarily to capture the interim lender in those circumstances.

[175] Based on the analysis above, and supported by the public policy considerations just articulated, I conclude there is no genuine issue as to whether MCAP is a developer within the meaning of section 14 of the *Act*. I would dismiss the appeal on this point.

Conclusion

[176] While I agree with the majority's conclusions that there is no genuine issue for trial based on a claim in negligence and that, on the particular facts of this case, there is a genuine issue for trial on a claim that MCAP knowing participated in a breach of a statutory trust and that MCAP was unjustly enriched, I am unable to agree with the balance of their conclusions. In my respectful opinion, there is no genuine issue for trial based on a claim in negligent misrepresentation, and there is no genuine issue with respect to whether MCAP qualifies as a "developer" within the meaning of

section 14 of the *Act*. Accordingly, I would grant the appeal and allow to stand only the claims that MCAP knowingly participated in a breach of a statutory trust and that MCAP was unjustly enriched. I would dismiss the appeal on all other issues.

Appeal heard on September 13, 2011

Reasons filed at Calgary, Alberta
this 27th day of January, 2012

McDonald J.A.

Appearances:

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for the Appellant

R.H. Haggett
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