

Case Name:

Ward-Price v. Mariners Haven Inc.

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

Wendy Ward-Price on behalf of herself and all others similarly situated, plaintiff, and
Mariners Haven Inc., William Kaufman, Peggy Kaufman, Ernst & Young in its capacity as trustee in Bankruptcy of the Estate of William H. Kaufman Inc., Stuart Snyder, Clement, Eastman, Dreger, Martin & Meunier and Sims Clement Eastman, defendants,
and
Clement, Eastman, Dreger, Martin & Meunier and Sims Clement Eastman, third parties

[2002] O.J. No. 4260
Court File No. 96-CU-103518

Ontario Superior Court of Justice
Nordheimer J.

Heard: October 9 and 10, 2002.
Judgment: November 5, 2002.
(52 paras.)

Counsel:

J. Gardner Hodder and Paul N. Feldman, for the plaintiff.
Charles F. Scott and D. Michael Brown, for the defendants.
A. Lev-Farrell, for the third parties.

¶ 1 **NORDHEIMER J.**— The plaintiff moves to certify this action as a class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6. I note at the outset that this action has already had a lengthy procedural history. There have been motions for summary judgment by various parties, numerous amendments to the pleadings and a number of changes in the named parties. This procedural history has already resulted in this action being before the Court of

Appeal on one occasion. I mention this to explain why an action commenced in 1996 is only now being considered for certification as a class proceeding and also, perhaps, to demonstrate why I am of the view that it is generally better that the certification motion be the first matter dealt with in the course of a proposed class proceeding.

¶ 2 This action arises out of the purchase of condominium units in a development project located in Collingwood, Ontario. Mariners Haven Inc. was the developer of the condominium properties in the project. The defendant, William H. Kaufman, was a director and the president of Mariners Haven. Mariners Haven was owned by Hutton Securities Inc. which was in turn owned by Mr. Kaufman. The defendant, Stuart Snyder, was the secretary-treasurer of Mariners Haven but he was not a shareholder nor a director of that company.

¶ 3 At all relevant times, the defendant, William H. Kaufman Inc., was an Ontario corporation which manufactured and sold both footwear and furniture. Mr. Kaufman owns WHK Inc. and has from its incorporation. Mr. Kaufman was president of that company from its incorporation until 1986 and was the chairman from that time forward. Stuart Snyder was vice-president and secretary-treasurer of WHK Inc. from the time of its incorporation.

¶ 4 Mariners Haven and William Kaufman were defendants to this action when it was originally commenced on May 3, 1996. Stuart Snyder and WHK Inc. were added as defendants to the action on May 19, 1998 pursuant to the order of Mr. Justice Sharpe dated May 4, 1998.

¶ 5 Sims Clement Eastman, formerly Clement, Eastman, Dreger, Martin & Meunier, were retained by Mariners Haven to act on its behalf in respect of the sale of units in the condominium project. The solicitors were added as defendants to the main action on August 20, 1998 pursuant to the order of Mr. Justice Sharpe dated August 19, 1998. The main action was subsequently discontinued as against the solicitors. However, pursuant to an order of Mr. Justice Cumming, dated December 9, 1999, the defendants issued a third party claim against the solicitors for contribution and indemnity with respect to any damages for which the defendants are found liable to the plaintiff or members of the proposed class.

¶ 6 The evidence is that in order to minimize the financing costs associated with the development and construction of the condominium project, WHK Inc. acted as the banker for the condominium project. WHK Inc. paid \$3,108,028.55 to architects, engineers and contractors prior to the incorporation of Mariners Haven as well as miscellaneous expenses in respect of the condominium project. Once Mariners Haven was incorporated, the advances paid by WHK Inc. were recorded on the books of Mariners Haven as a loan obligation. WHK Inc. advanced further amounts as required to finance development of the condominium project.

¶ 7 From 1987 to 1992, WHK Inc. charged interest only at the bank prime rate on the advances it made to Mariners Haven and these interest charges were recorded on the books of Mariners Haven. Mariners Haven did not, however, repay any of this interest. On December 31, 1992, WHK Inc. forgave a total of \$2,683,035.07 in unpaid interest on the financing provided to Mariners Haven. At present, Mariners Haven continues to owe a total of \$922,506.27 in unpaid principal to WHK Inc. Mariners Haven's financial statements for the fiscal year ending December 31, 1996, indicate that Mariners Haven was unable to satisfy even this principal

amount. The evidence is that, in total, WHK Inc. has suffered a loss of more than \$3,605,541.34 on the financing it provided to Mariners Haven.

¶ 8 In July 2000, for reasons relating to the failure of its footwear and furniture business, WHK Inc. made an assignment in bankruptcy.

¶ 9 The condominium project was constructed in three phases: Phase 1 consisting of twelve condominium units, Phase 2 consisting of ten condominium units, and Phase 3 consisting of ten condominium units, for a total of 32 units. The Plaintiff purchased a unit in Phase 1. All of the purchases of units in each phase closed on the same day. Those closing dates were as follows: Phase 1 - August 16, 1989, Phase 2 - May 3, 1990, and Phase 3 - December 20, 1990.

¶ 10 The plaintiff entered into an agreement of purchase and sale with Mariners Haven on April 14, 1987. The terms of the agreement of purchase and sale provided that the purchase price of the unit, \$340,000, was to be paid by way of two deposits and the balance was to be paid on a monthly basis during the course of construction.

¶ 11 The issue of interim occupancy first arose in late 1986 or early 1987. At that time, Phase 1 of Mariners Haven was nearing completion and several purchasers approached Mr. Kaufman regarding the possibility of obtaining occupancy of their units prior to closing. While the agreements of purchase and sale did not provide for such interim occupancy, Mariners Haven sought to accommodate purchasers in this regard, but only on certain conditions.

¶ 12 Stuart Snyder has given evidence that there were general discussion between Mariners Haven and its solicitors regarding the provisions of the Condominium Act, R.S.O. 1980, c. 84 and possible arrangements for dealing with interim occupancy. The solicitors advised Mariners Haven that the requirements in the Condominium Act to pay interest on deposits during the period of interim occupancy would not likely apply to Mariners Haven. In any event, even if this requirement did apply, the solicitors indicated that any interest paid on deposits would be offset by the interim occupancy fee or rent that could be charged during the period of interim occupancy. This was due, in part, to the fact that purchasers would be required to pay income tax on any interest paid to them by Mariners Haven but would not be entitled to deduct the interim occupancy fee from their taxable income. There was also discussion about the possibility of creating what were called "phantom mortgages", which would increase the amount that could be charged by Mariners Haven as an interim occupancy fee, and the possibility that market rent could be charged by Mariners Haven.

¶ 13 Following several discussions, the solicitors ultimately concluded that the most straightforward manner in which to deal with the issue of interim occupancy was through separate interim occupancy agreements between Mariners Haven and each purchaser who wished to obtain interim occupancy. Under the terms of this agreement, each purchaser who wished to obtain interim occupancy would agree to waive any entitlement to interest on their deposits during the interim occupancy period and, in return, Mariners Haven would agree to permit interim occupancy at no charge.

¶ 14 Once Mariners Haven obtained this advice from its solicitors, a form of interim occupancy agreement was prepared. It was Mr. Snyder's evidence that the form of agreement was prepared in consultation with the solicitors - either he drafted and they reviewed this standard form Interim Occupancy Agreement or they drafted it and he revised the drafting. The recollection of Mr. Cameron, who gave evidence on behalf of the third parties, was that the Interim Occupancy Agreement was not drafted by the solicitors, but may have been reviewed by them.

¶ 15 The Interim Occupancy Agreement is a one page document. It provides that the interest on the deposit funds to which a purchaser might be entitled during the period of interim occupancy of their unit and the rent Mariners Haven could charge for the period of interim occupancy would be "offsetting amounts". As a result, the purchaser and Mariners Haven agreed that Mariners Haven would not charge rent and the purchaser would not receive any interest on funds paid towards the purchase price of the unit.

¶ 16 It is a matter of significant dispute by the plaintiff as to whether these two amounts were truly offsetting. Indeed, the plaintiff points to the evidence of Mr. Snyder that neither he nor Mr. Kaufman turned their minds to what the specific amounts were. It appears, therefore, that the statement in the Interim Occupancy Agreement that the amounts were offsetting was made without any knowledge of what the specific amounts were. The plaintiff contends that, in fact, the amounts were not offsetting, and that had she paid interim occupancy rent and had she been given credit for deposit interest, she would have been entitled to a substantial payment from Mariners Haven when the condominium purchase finally closed. Specifically, the plaintiff contends that her entitlement to deposit interest at closing was \$36,761.50 whereas the most that she would have had to pay in interim occupancy fees was \$8,302.76. The difference is \$28,458.74.

¶ 17 The plaintiff did enter into an Interim Occupancy Agreement on those terms on July 15, 1988. The plaintiff (and at least some of the other purchasers who entered into such agreements) received their own independent legal advice prior to entering into the Interim Occupancy Agreement.

¶ 18 Following preparation of the Interim Occupancy Agreement, Mr. Kaufman met with some of the purchasers, who had requested interim occupancy, in order to discuss the terms of the agreement. On the current state of the record, there is nothing to suggest that, in dealing with purchasers regarding the issue of interim occupancy (and other issues relating to the condominium project, including the distribution of funds released from the solicitors' trust account), Mr. Kaufman and Mr. Snyder were acting other than in their capacities as officers (or, in Mr. Kaufman's case, also as a director) of Mariners Haven.

¶ 19 Pursuant to the provisions of the Condominium Act, deposits from purchasers in all three phases were placed into a trust account. In respect of Phase 1 and Phase 2, the deposit funds received remained in the trust account until security was obtained as prescribed by section 53(1)(d) of the Condominium Act. In each case the prescribed security consisted of insurance provided by the Ontario New Home Warranty Plan in respect of the first \$20,000.00 (plus interest) of each deposit together with insurance purchased by Mariners Haven from the

Mortgage Insurance Company of Canada for all deposit sums in excess of \$20,000.00 (plus interest).

¶ 20 After the prescribed security was in place, the deposit funds were removed from the trust account and used to finance the construction of Phase 1 and Phase 2 of the condominium project as permitted by s. 53(1)(b) of the Condominium Act. No insurance was purchased from Mortgage Insurance Company of Canada in respect of Phase 3 of the development. Accordingly, all deposit funds received from Phase 3 purchasers remained in the trust account until final closing.

¶ 21 The proposed class consists of purchasers who took interim occupancy of their respective units prior to final closing. Of the thirty-two original purchasers of units in the condominium project, only twenty-seven took interim occupancy prior to final closing. Two of those purchasers purchased units in Phase 2 of the condominium project and three of those purchasers purchased units in Phase 3 of the condominium project.

¶ 22 On or about May 11, 1992, Emily Fodor, an original purchaser of a Phase 3 unit, issued a statement of claim against Mariners Haven seeking interest alleged to be owing pursuant to the Condominium Act in respect of Fodor's interim occupancy of unit 18 of the condominium project. Fodor's claim was settled and the action was dismissed on a without costs basis. On settlement, Fodor provided Mariners Haven with a release.

¶ 23 Of the twenty-six remaining original purchasers who took interim occupancy, two have sworn affidavits in this proceeding stating that they do not wish to be associated with the proposed class action. Accordingly, if this action is certified as a class proceeding, it would appear that the maximum size of the class will be twenty-four individuals.

Analysis

¶ 24 Before turning to my analysis of the requirements for certification, I wish to mention one procedural issue. The third parties appeared on the certification motion. I raised at the outset of the hearing the standing of third parties to make submissions on the issue of certification. While I ultimately permitted the third parties to make submissions because counsel said she would be very brief in her submissions, I remain unconvinced that third parties have standing to make submissions on a certification motion. There is nothing in the Class Proceedings Act, 1992 which would give them such standing. I recognize that this issue would not normally arise as, in most certification motions, the existence of third parties is not known because normally no statement of defence has been delivered and therefore no third party proceedings can be instituted. It nonetheless remains a matter of concern. Having said that, however, I have concluded that it is not appropriate to resolve the issue in this case because the matter was not fully argued.

¶ 25 In order to have an action certified as a class proceeding, the plaintiff must satisfy the requirements of section 5(1) of the Class Proceedings Act, 1992 which requires that (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiffs; (c) the claims of the class members raise

common issues; (d) the class proceeding would be the preferable procedure for the resolution of the common issues; and (e) the representative plaintiffs (i) would fairly and adequately represent the interests of the class, (ii) have produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) do not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

¶ 26 The defendants challenge only whether the requirements contained in sub-paragraphs 5(1)(c), (d) and (e) are met in this case. In other words, the defendants accept for the purposes of this motion that the plaintiff has satisfied the requirements contained in 5(1)(a) and (b). It is not necessary, therefore, for me to address those requirements.

Common Issues

¶ 27 The common issues as proposed by the plaintiff are set out at para. 173 of the plaintiff's factum as follows:

- (a) whether the defendant, Mariners Haven, breached the Condominium Act, R.S.O. 1990, c. 84 and section 33 of Regulation 121, R.R.O. 1980, by paying interest to the members of the Plaintiff Class at less than the prescribed rate and/or paying no interest on deposits paid by the members of the Plaintiff Class during the interim occupancy period, and whether Mariners Haven is liable to pay same;
- (b) whether the Defendants, other than Mariners Haven, are liable to the Plaintiff Class in respect to their knowing assistance of breach of trust and their knowing receipt of trust funds and whether a tracing order should be made;
- (c) whether liability may attach to any or all of the Defendants without the trial of issues which are specific to individual class members and regardless of any reasons Mariners Haven may have led to let the purchasers into occupancy and regardless of any agreements written or oral that may have been made in respect to same;
- (d) whether the Defendants were negligent, reckless or fraudulent in representations made to class members, or in failing to disclose material information to class members, prior to their signing of the Interim Occupancy Agreements;
- (e) whether the actions of the Defendants constitute fraud and a basis for piercing the corporate veil;
- (f) whether or not the actions of the Defendants constitute unlawful interference with economic interests or civil conspiracy or an unjust preference;
- (g) whether the Defendant, Mariners Haven, may set off against the class members' claims any charges set out in subsection 51(6) of the Condominium Act, and what is the calculation of same;
- (h) whether the defendant, Mariners Haven, is entitled to counterclaim against

the members of the Plaintiff Class for fair market value rent for the period of interim possession of the subject condominium units and what is the calculation of the same;

- (i) whether or not the Defendants may assert a claim in unjust enrichment against the members of the Plaintiff Class, or vice-versa;
- (j) whether the claims of some or all class members are governed by the Limitations Act, and if so, whether the limitations issue may be decided without reference to individual issues;
- (k) whether the Defendants' conduct justifies an award of punitive damages, and if so, what amount of punitive damages is appropriate;
- (l) whether the class members are entitled to costs of the action or to prejudgment interest, and if so, whether it should be calculated on a compound basis as equitable interest; and
- (m) the method by which any money payable to the members of the Plaintiff Class is to be determined and distributed.

¶ 28 At the outset, I will say that proposed common issues (k), (l) and (m) are not common issues that can, by themselves, justify certification of the action as a class proceeding. Those common issues are clearly an adjunct to the central issues raised by the action. Consequently, their validity as common issues must be predicated on a finding that there are other common issues raised by the claim as a whole.

¶ 29 The first proposed common issue is indeed common to all members of the proposed class. However, the resolution of that common issue would not significantly advance the overall litigation because that issue relates only to the defendant Mariners Haven. The same is true with proposed common issue (g).

¶ 30 I find that proposed common issue (b) is a common issue. So is the first part of proposed common issue (e), that is, whether the actions of the defendants constitute fraud. Similarly, I would also consider proposed common issue (f) to be a common issue. However, I confess that I have difficulty understanding how the latter part of proposed common issue (e), regarding piercing the corporate veil, arises in this case in light of the specific allegations made and claims advanced.

¶ 31 I would not consider proposed common issue (d) to be a common issue because it is too broadly stated. If proposed common issue (d) is reduced to the single representation contained in the Interim Occupancy Agreement, that the interest on the deposit funds to which a purchaser might be entitled during the period of interim occupancy of their unit and the rent Mariners Haven could charge for the period of interim occupancy "are, in effect, offsetting amounts", then that would constitute a common issue. There is then only one representation and it is one that was made in writing to all members of the proposed class. Such a representation is one whose validity and effect can therefore be determined on a class wide basis.

¶ 32 Similarly, proposed common issue (j) dealing with the application of limitation periods is too broadly stated. There is, in this case, an issue as to whether the limitation period governing these claims is twenty years on the basis that the claim is an action upon a specialty pursuant to

section 45(1)(b) of the Limitations Act, R.S.O. 1990, c. L.15 or that there is no applicable limitation period because the claim is for breach of trust. If the proposed common issue is limited to the determination of those questions, then again the matter is one that can be dealt with on a class wide basis.

¶ 33 Lastly, proposed common issues (g), (h), and (i) might be common issues but they are common issues which would only be advanced by the defendants. The defendants are not seeking to certify this action as a class proceeding and I do not believe that the plaintiff can rely on possible common issues arising from a potential counterclaim by the defendants as justifying the certification of an action as a class proceeding. I note, in this regard, that section 5(1)(c) of the Act refers to the claims or defences "of the class members" revealing common issues.

¶ 34 In the end result, there are certain common issues raised. While I appreciate that depending on the resolution of those common issues, individual issues may still need to be determined, that fact does not preclude the certification of an action as a class proceeding. I would also observe that the defendants concede in their factum, at para. 112, that the question of whether or not a breach of trust or other fiduciary obligation has occurred may raise issues common to all class members. They contend, though, that the question as to whether such a breach entitles the plaintiff to equitable relief is an inherently individual inquiry. The fact that the relief that each class member is entitled to may differ is not, however, a sufficient reason to deny certification - see section 6.3 of the Act. I am satisfied that the determination of the common issues will advance the litigation significantly. Indeed, the determination of the common issues may well determine the entire proceeding.

¶ 35 Having concluded that, with some amendment, there are common issues, I must turn to the consideration of whether a class proceeding is the preferable procedure for the determination of those common issues.

Preferable Procedure

¶ 36 The issue of preferable procedure does produce some concerns respecting this proposed class action. While section 5(1)(d) of the Act makes it clear that preferability is to be determined with respect only to the resolution of the common issues and not the claim as a whole, it is nonetheless true that the issue of preferability must be considered in the context of the case as a whole. As Chief Justice McLachlin said in *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67, at para. 28:

"In my view, it would be impossible to determine whether the class action is preferable in the sense of being a 'fair, efficient and manageable method of advancing the claim' without looking at the common issues in their context."

¶ 37 Looking at the common issues in their context involves a consideration of the degree to which the resolution of those common issues will advance the overall action compared to the individual issues that remain to be determined thereafter. The overall approach must be guided

by the three accepted goals of a class proceeding: judicial economy, access to justice and behaviour modification.

¶ 38 I have some concerns as to whether the certification of this action as a class proceeding necessarily accomplishes the goal of judicial economy in a fashion that is preferable to other alternatives such as test cases or joinder of claims. Of some consequence in the consideration of this requirement is the size of the proposed class. The size of the proposed class is a proper matter to take into account in determining whether to grant certification. As Mr. Justice Winkler said in *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.) at para. 26:

"Although s. 5(1)(b) only requires that there be a minimum of two members in the class, it is readily apparent that whether a proposed class includes a handful of claimants or conversely, a multitude of members, will have an impact on the disposition of the certification motion."

¶ 39 There are a maximum of twenty-six members in the proposed class. Two of those people have already stated in affidavits that they are not interested in pursuing such claims which would reduce the size of the class to twenty-four members. It is possible, of course, that additional opt outs may reduce the size of the class even further. It is inherently problematic, in my view, to contemplate unleashing the full panoply of procedural requirements which arise in a class proceeding for the purpose of determining the claims of a small group of proposed class members. I refer in this regard to the notice requirements, the opting out process, the restrictions on discovery rights and like matters. Simply put, the smaller the membership of the proposed class, the more difficult it is to see a class proceeding as accomplishing the goal of judicial economy.

¶ 40 Having said that, I am nonetheless mindful of the fact that section 5(1)(b) expressly states that an action may be certified as a class proceeding if there is an identifiable class "of two or more persons". It may be taken from that provision that the Legislature contemplated that there might be class proceedings where the number of members of the class would be fairly small but concluded that that fact, by itself, should not pose a barrier to certification. My concerns nevertheless remain on this point, mainly because there remains the prospect that the class may shrink even further as a result of opt outs. On balance, however, I have concluded that the mere possibility of that occurring is an insufficient reason to deny certification. If it should turn out that, after the number of opt outs are known, the size of the class has been significantly reduced, the defendants have the right to move to decertify the proceeding under section 10 of the Act.

¶ 41 In the end result, the determination of the common issues on behalf of all twenty-four members of the proposed class still realizes an economy over having those issues determined individually. I am satisfied therefore that the goal of judicial economy is met through a class proceeding.

¶ 42 On the other hand, I am not satisfied that the denial of certification in this case would constitute a denial of access to justice. The claims advanced by the members of the proposed

class are stated in the plaintiff's factum as ranging, based on the available information, from \$21,762.42 to \$127,609.94 with the median amount of the claims being \$43,163.91 and the average claim being about \$60,000. Those claims reflect amounts that are frequently individually litigated in this court. It is also apparent that the basic claims raised are not complicated. Indeed, counsel for the plaintiff referred to the plaintiff's claim, at one point in his argument, as "relatively simple". The consequence of that reality is that there is nothing innately complex about these claims such that there would be some appreciable benefit in having the costs of litigating them spread over a large group of claimants. For one thing, as I have already mentioned, we do not have a large group of claimants here in any event.

¶ 43 I would as well observe that a number of the claims of the proposed class members would appear to fall under the simplified rules procedure established by Rule 76 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. That procedure is designed to make the determination of claims expeditious and inexpensive.

¶ 44 In response on this point, the plaintiff asserts that the accumulated legal fees to date incurred by her exceed the value of the largest known claim of any purchaser. The problem with that assertion is that the legal fees incurred to date have been chiefly incurred in an effort to maintain this action as a class proceeding. They do not reflect the costs of prosecuting the underlying claim. The accumulated legal fees are not, therefore, in any way reflective of what it would cost a given plaintiff to prosecute his or her claim for the deposit interest which is alleged to be owed.

¶ 45 On the final consideration of behaviour modification, in this case its impact is limited given some of the realities of this case. Both defendant companies are either practically or actually insolvent. There is, consequently, little behaviour modification that could be accomplished with respect to them. Still, the conduct of officers and directors of those companies would properly be the subject of behaviour modification if the allegations made by the plaintiff are proven. I am, of course, not making any finding whatsoever on that point at this time. I merely observe that the allegations regarding the conduct of the officers and directors are such that the spectre of the need for behaviour modification is clearly raised.

¶ 46 In the end result, two of the three goals of a class proceeding would be accomplished by a class proceeding. While I consider it to be a knife-edge case on this requirement, I am satisfied on balance that a class proceeding is the preferable procedure for the determination of the common issues.

Representative Plaintiff

¶ 47 There are three separate considerations in section 5(1)(e) of the Act under this final requirement for certification. It must be demonstrated that the representative plaintiff (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of the other class members.

¶ 48 The only challenge made under this requirement is whether the plaintiff has an interest in conflict with other class members. The defendants assert that the presence of alleged misrepresentations and the limitations defences set up different subclasses within the overall class and that the plaintiff could not fairly represent all of these subclasses. This might be a problem if the proceeding was certified with those issues as common issues but that is not the conclusion I have reached. If the action is certified, it will be on the common issues I have identified regarding the trust issues and I see no conflict among the class members with respect to those issues. I am not satisfied therefore that the conflict allegation raised by the defendants constitutes an impediment to certification.

¶ 49 I am satisfied that the proposed representative plaintiff would adequately and fairly represent the interests of the proposed class. There is a litigation plan proposed that sets out a workable plan for advancing the proceeding. The requirements of section 5(1)(e) of the Act are, therefore, met.

Conclusion

¶ 50 There are common issues and a class proceeding is the preferable procedure for resolving those common issues. All of the requirements of section 5 of the Act are met. For these reasons, therefore, an order is granted certifying this action as a class proceeding for the purpose of determining the common issues which are as follows:

- (i) whether the defendant, Mariners Haven, breached the Condominium Act, R.S.O. 1990, c. 84 and section 33 of Regulation 121, R.R.O. 1980, by paying interest to the members of the Plaintiff Class at less than the prescribed rate and/or paying no interest on deposits paid by the members of the Plaintiff Class during the interim occupancy period, and whether Mariners Haven is liable to pay same;
- (ii) whether the Defendants, other than Mariners Haven, are liable to the Plaintiff Class in respect to their knowing assistance of breach of trust and their knowing receipt of trust funds and whether a tracing order should be made;
- (iii) whether the Defendants were negligent, reckless or fraudulent in making the single representation contained in the Interim Occupancy Agreement, that the interest on the deposit funds to which a purchaser might be entitled during the period of interim occupancy of their unit and the rent Mariners Haven could charge for the period of interim occupancy "are, in effect, offsetting amounts";
- (iv) whether the actions of the Defendants constitute fraud;
- (v) whether or not the actions of the Defendants constitute unlawful interference with economic interests or civil conspiracy or an unjust preference;
- (vi) whether the claims of the class members are governed by the Limitations Act, R.S.O. 1990, c. L.15, and, if so, whether those claims are governed by section 45(1)(b) thereof, and;

- (vii) whether the Defendants' conduct justifies an award of punitive damages, and if so, what amount of punitive damages is appropriate.

¶ 51 Since I have amended the proposed common issues and counsel have not had an opportunity to address the common issues as I now find them, counsel are at liberty, if they wish, to make submissions on the amended common issues before the formal order is taken out. As well, issues arising from the granting of certification, such as the proper notice to be given, can be addressed before me on a date to be arranged.

¶ 52 If the parties cannot resolve the issue of costs, the plaintiff and the defendants may make written submissions on the appropriate disposition. I would make no award of costs for or against the third parties both because of the standing issue I mentioned above and also because of the fact that in this case they made very limited submissions. The plaintiff's submissions are to be filed within 15 days of the release of these reasons and the defendants' response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave. The submissions should include, among other things, a bill of costs or equivalent, time summaries or actual time entries, receipts for all disbursements claimed, etc. that will allow me to fix the costs of the motion should I decide that costs are to be awarded.

NORDHEIMER J.

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