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COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., BORINS AND MACPHERSON J.J.A.

B E T W E E N:

**WENDY WARD-PRICE on behalf of
herself and all other similarly situated**

)
)
) **J. Gardner Hodder
for the Appellant (Plaintiff)**
)

)
) **Appellant (Plaintiff)**
)

- and -

)
)
) **MARINERS HAVEN INC., WILLIAM
KAUFMAN, PEGGY KAUFMAN,
WILLIAM H. KAUFMAN INC., STUART
SNYDER, CLEMENT, EASTMAN,
DREGER, MARTIN & MEUNIER, and
SIMS CLEMENT EASTMAN**
)

) **D. Michael Brown
for the Respondents (Defendants)**
) **Jeff Carhart
for Ernest and Young**
)

) **Trustee in Bankruptcy of**

) **William H. Kaufman**
)

) **Respondents (Defendants)**
)

- and -

)
)
) **CLEMENT, EASTMAN, DREGER,
MARTIN & MEUNIER and SIMS
CLEMENT EASTMAN**
)

) **Jack Berkow and
Alexandra Lev-Farrell
for the Respondents (Third Parties)**
)

) **Respondents (Third Parties)**
)

) **HEARD: March 9, 2001**

On appeal from the judgment of Justice Peter Cumming dated May 23, 2000.

BORINS J.A.:

[1]The issue in this appeal is whether the motion judge was correct in holding that the obligation imposed on a developer by the *Condominium Act*, R.S.O. 1980, c. 84, s. 53(3)[1] and R.R.O. 1980, Reg. 121, s. 33[2] to pay interest during interim occupancy on monies paid by a purchaser of a residential condominium unit does not impose a trust obligation on the developer. Although the Act uses the term “proposed declarant”, for simplicity in these reasons I will use the word “developer”.

Background

[2]This appeal arises out of an intended class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, which remains to be certified. On April 13, 1987, Wendy Ward-Price (“the appellant”) entered into an agreement of purchase and sale with Mariners Haven Inc. (“Mariners”) for the purchase of a condominium unit. The agreement required that the appellant pay the entire purchase price of \$340,000 prior to taking possession of the unit, but made no provision for the payment of interest on her deposit. Mariners placed the deposit into a trust account and insured the funds with the Ontario New Home Warranty Program and the Mortgage Insurance Company of Canada. Subsequently, Mariners paid the deposit funds to William H. Kaufman Inc. (“WHK”) in partial repayment of a building loan. From January 1988 to December 31, 1990, contemporaneous with most of the closings, Mariners made loan repayments to WHK exceeding \$12,000,000.

[3]The appellant took early possession of her unit on July 15, 1988. By declaration registered on June 27, 1989, the condominium was registered as Simcoe Condominium Corporation No. 94. The final closing took place on August 16, 1989, at which time the appellant became the registered owner of her unit. Interest payable on her deposit, as required by s. 53(3) of the Act, was not calculated on the statement of adjustments and was not paid. This action was brought to recover the interest payable on her deposit, as well as on the deposits paid by the other members of the purchaser class.

[4]In addition to Mariners, the defendants are William H. Kaufman, Stuart Snyder and WHK. At the relevant time, Mr. Kaufman and Mr. Snyder were directors, officers and shareholders of Mariners and WHK, as well as directors, officers and shareholders of corporations which controlled, directly or indirectly, Mariners and WHK. It is alleged, in the alternative, that they were recipients of material benefits from Mariners which are answerable to the appellant’s claim. Mariners is without assets and the action against WHK has been stayed pursuant to s. 69.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

[5]In her statement of claim the appellant seeks a deposit interest entitlement of \$36,761.50. Her claim against Mr. Kaufman and Mr. Snyder is founded on the allegation that s. 53(1) of the *Condominium Act* imposes a statutory trust on the interest payable on all money received by Mariners on account of the purchase price and that Mariner’s was in breach of trust in failing to pay interest on that money. The appellant alleges that if she and the other purchasers had been credited with interest on closing or had been paid interest, WHK would have received less money from Mariners toward the repayment of its loans. She alleges that Mr. Kaufman and Mr. Snyder knowingly assisted Mariners in its breach of trust and knowingly received trust funds flowing from the breach of trust. She alleges that WHK was a knowing recipient of trust money. Hence, the appellant claims that she is entitled to an equitable tracing of the monies that were paid to WHK by Mariners.

[6]The defendants Mariners, WHK, Mr. Kaufman and Mr. Snyder issued a third party claim against the law firm of Sims Clement Eastman, the successor to the law firm Clement, Eastman, Dreger, Martin and Meunier, the solicitors for Mariners and WHK, seeking contribution and indemnity with respect to all damages for which they are found liable to the appellant and to the members of the class.

[7]The third parties delivered a statement of defence to the main action and moved under rule 20.04(2) for summary judgment dismissing the appellant's claim. They submitted that s. 53(1) of the *Condominium Act* does not impose a trust on the interest payable on money received by a developer on account of the purchase price of a unit.

[8]In a decision reported as *Ward-Price v. Mariners Haven Inc.* (2000), 48 O.R. (3d) 785 (Sup. Ct.), Cumming J. agreed with the third parties. The motion judge issued summary judgment dismissing the appellant's claim "to the extent that it is based upon breach of trust" (*supra*, at p. 794). The plaintiff appeals from this judgment. Counsel for the defendants Mariners, Mr. Kaufman and Mr. Snyder filed a factum and made submissions in support of the position taken by the respondent third parties.

The relevant legislation

[9]Section 53 of the *Condominium Act* states:

53(1)All money received by or on behalf of a proposed declarant from a purchaser on account of a sale or an agreement for the purchase and sale of a proposed unit for residential purposes before the registration of the declaration and description, other than money paid as rent or as an occupancy charge, shall, notwithstanding the registration of the declaration and description thereafter, *be held in trust by the person receiving such money for the person entitled thereto in respect of the agreement* and such money shall be held in a separate account designated as a trust account at a chartered bank or trust company or a loan company or credit union authorized by law to receive money on deposit or a Province of Ontario Savings Office until,

(a)its disposition to the person entitled thereto; or

(b)delivery of prescribed security to the purchaser for repayment.

(2)Where an agreement of purchase and sale referred to in subsection (1) is terminated and the purchaser is entitled to return of any money paid under the agreement, the proposed declarant shall pay to the purchaser interest on such money at the prescribed rate.

(3)Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, *the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the day the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.*

(4)Subject to subsections (2) and (3), the proposed declarant is entitled to any interest earned *on the money required to be held in trust under subsection (1).* [Emphasis added.]

[10]Section 33 of Regulation 121 states:

33.The rate of interest under subsections 53 (2) and (3) of the Act *on money held in trust under subsection 53 (1) of the Act* shall,

(a)for the six months immediately following the last day of March of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st day of April of that year; and

(b)for the six months immediately following the last day of September of each year, be 1 per cent per annum below the rate paid on The Province of Ontario Savings Office savings accounts on the 1st of September of that year. [Emphasis added.]

Reasons of the motion judge

[11]In his reasons, the motion judge reviewed the background of the plaintiff's claim and the remedy she seeks on behalf of herself and the other condominium unit purchasers. At p. 790 he set out the respondents' position, a position which was repeated before this court:

The third party law firm submits that although Mariners had an obligation pursuant to s. 53(1) of the Act to hold the deposits in trust, that obligation ceased when Mariners obtained the prescribed security through the insurance. It is their position that the delivery to the purchasers of the insurance permitted the moneys held in trust to then be released and that the trust created by s. 53(1) thereby ceased to exist. The third party submits that the obligation to pay interest under s. 53(3) is not a trust obligation. Accordingly, the third party submits there is no genuine breach of trust issue for trial.

[12]At p. 790 the motion judge provided the following analysis of the purpose of s. 53 and the obligations which the section imposes on a developer:

The underlying policy of s. 53 is to protect consumer purchasers who generally are not in equal bargaining positions with developers.

Section 53(1) provides for the creation of a trust by statute. Moneys paid towards the purchase price are to be held in the requisite trust account "until" one of the two events in s. 53(1)(a) and (b) occurs. Disposition of the trust moneys may be made to the developer at closing, upon completion of the developer's obligations under the purchase contract: s. 53(1)(a). However, if the developer was unable to close the transaction, the purchaser would be entitled to the return of trust moneys.

The developer is entitled to the interest that has been earned on the money in the trust account: s. 53(4). However, this entitlement is subject to the stipulations imposed by s. 53(2) and (3).

Section 53(2) protects a purchaser who is entitled to the return of moneys paid by requiring the developer to pay interest at the prescribed rate on those moneys.

Section 53(3) *imposes an interest obligation upon the developer* when the purchaser enters into possession of the unit before a final closing and a deed or transfer acceptable for registration is delivered to the purchaser. [Emphasis added.]

[13]In concluding that s. 53(3) imposes a debt obligation with respect to interest payable on purchase monies paid by purchasers, rather than a trust obligation, the motion judge considered the reasons of Adams J. in *Counsel Holding Canada Ltd. v. Chanel Club Ltd.* (1997), 33 O.R. (3d) 285 (Gen. Div.) aff'd. (1999), 43 O.R. (3d) 319 (C.A.) and the reasons of Morden A.C.J.O. in *Ackland v. Yonge-Esplanade Enterprises Ltd.* (1992), 10 O.R. (3d) 97 (C.A.).

[14]At p. 791, the motion judge made the following reference to *Counsel*, noting that:

Adams J. dealt with the competing claims of condominium purchasers and a mortgagee for priority with respect to the funds of an insolvent developer in receivership. In that case, prescribed security through deposit receipts had been delivered to the purchasers. Adams J. found that “. . . there could be no breach of trust once deposit receipts were issued to the purchasers” (at p. 296).

Although this court dismissed an appeal from the judgment of Adams J., an appeal from his finding on whether the deposits were subject to a trust claim was abandoned.

[15]The motion judge then considered the judgment in *Ackland*, which dealt with a developer's obligation under s. 53(3) to pay interest on all funds received by it on account of the purchase price of a unit, where a purchaser enters into possession or occupation of the unit before closing. The issue in *Ackland* was the proper rate of interest payable by the developer on the funds as stipulated by s. 33 of Regulation 121. Cumming J. observed that the developer in *Ackland* was obliged by s. 53(3) to pay the purchaser interest during the period of interim occupancy. At p. 792 he quoted the following passages from the reasons for judgment of Morden A.C.J.O. in *Ackland*, at pp. 106-07:

. . . the trust obligation clearly extends to the duty to pay interest based on the higher rate [introduced by the Province of Ontario Savings Office], particularly where the proposed declarant may enjoy an increased personal benefit from paying . . . [the interest due under s. 53(3)] on the basis of the lower rate [being the historical rate set by the Province of Ontario Savings Office].

.

. . . while the basic relationship between a purchaser and a proposed declarant may be contractual *s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee* and it is with this particular aspect of the relationship only that we are concerned . . . *this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.* [Emphasis added.]

[16]The motion judge continued at pp. 792-793:

Plaintiff's counsel in the case at hand submits that *Ackland* is authority for his submission that s. 53(3) *in itself* creates or recognizes a trust with respect to the interest payable to the purchaser under that provision.

I do not agree with this submission as to the decision in *Ackland* which is, of course, binding on this court. In my view, Morden A.C.J.O.'s quoted statement recognizes the statutory trust which is clearly created by s. 53(1). The corpus of the moneys held in trust pursuant to s. 53(1) belongs beneficially to the purchaser, and not the developer, until one of the two circumstances contemplated by s. 53(1) occurs and terminates the trust.

A trust involves a fiduciary relationship and imposes duties upon the trustee. This fiduciary relationship is relevant "in interpreting the scope of the obligation to pay interest on the money held in trust": *Ackland*, at p. 107. In interpreting the Regulation as to the prescribed rate intended to apply to s. 53(3), the statutory trust created by s. 53(1) provides an instructive backdrop.

The result in *Ackland* is logical and fair, particularly when the declarant can earn interest on the corpus of the trust at a higher rate than the rate which the developer in *Ackland* proposed to pay to the purchaser.

In my view, *Ackland* is not authority for the plaintiff's assertion that s. 53(3) creates *a trust* with respect to the interest entitlement. It is only s. 53(1) that creates a trust. The Court of Appeal in *Ackland* held that in interpreting the Regulations to determine the proper prescribed interest rate for the purpose of applying s. 53(3), the statutory trust created by s. 53(1) is relevant.

In the case at hand, the trust created by s. 53(1) was terminated by reason of s. 53(1)(b) upon the purchase and delivery of the "prescribed security" through the deposit receipts. This was done prior to the interim occupancy by the purchasers and before the developer became obligated to pay interest during the occupancy period prior to final closing.

In my view, and I so find, the obligation to pay interest under s. 53(3) is not a trust obligation. Rather, it is a debt obligation created by statute.

[17]The motion judge concluded at p. 793:

Thus, the overall scheme of s. 53 provides that upon the termination of the trust created by s. 53(1) through the delivery of the prescribed security (and the release of the trust moneys to the developer), there is insurance in place to protect the purchaser in the event of a claim for interest under s. 53(3).

For the reasons given, in my view, there is no trust obligation under s. 53(3). Since there is no trust obligation, there is no genuine issue for trial with respect to breach of trust.

Analysis

[18]In my view, the motion judge erred in interpreting s. 53(3) as creating a debt obligation, and not a trust obligation, in respect of the interest payable by a developer under that subsection. I have no doubt that s. 53(3) constitutes a developer as a debtor of the purchaser in respect to interest payable by the developer on purchase money while the purchaser is in interim occupancy. However, as I will explain, that does not extinguish the statutory trust imposed by s. 53(1) on “all money received by . . . a proposed declarant from a purchaser on account of a sale or agreement of purchase and sale” of a unit. This includes a trust imposed on a developer on the interest payable on that money under s. 53(3). In my opinion, this conclusion is supported by the reasons of Morden A.C.J.O. in this court’s decision in *Ackland*.

[19]In this action, the appellant seeks to vindicate her property right in the interest payable to her on money held in trust for her by the developer. She intends to establish that the respondents are in receipt of property, or its traceable proceeds, which belongs beneficially to her. It is, therefore, necessary to consider in more detail the appellant’s claim and the legal principles on which she relies.

[20]Stated simply, the appellant submits that when the developer failed to pay her interest on her purchase money as required by s. 53(3) for the time that she was in interim occupancy of her unit, the developer breached the trust imposed on the purchase money by s. 53(1). Central to this submission is the claim is that interest payable on the purchase money is trust property because the purchase money is trust property; in failing to pay interest, the developer therefore misappropriated trust property. The appellant’s prime remedy for this breach of trust is against the developer personally for compensation for the loss to the trust resulting from the failure to pay interest. However, as the developer is financially unable to provide compensation, as the beneficiary of the trust the appellant asserts a proprietary remedy to make good the loss. By seeking to recover the misappropriated trust property from the respondents, the appellant seeks restitution from the respondents on the ground that property in which she has a right of ownership can be followed or traced into their hands. See D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984), at p. 1033 *et seq.*; R. M. Goode, “The Right to Trace and Its Impact on Commercial Transactions” (1976), 92 L.Q.R. 360; 528; *In re Diplock*, [1948] Ch. 465 (C.A.), *aff’d sub nom. Ministry of Health v. Simpson*, [1951] A.C. (H.L.). As Lord Millett stated in *Foskett v. McKeown*, [2001] 1 A.C. 102 at 127 (H.L.):

A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice.

[21]Generally, the appellant’s claim is based on her equitable proprietary interest in identified property. However, it is helpful to identify her interest more precisely. She has an absolute equitable interest in the purchase money by virtue of the statutory trust imposed by s. 53(1) and, by virtue of s. 53(3), she has an equitable interest in the interest payable on that money while she was in interim occupancy of her unit. This case does not involve any question of constructive or resulting trusts. The only trust in issue is the express statutory trust created by s. 53(1). Although it may be argued that this trust lacks, in some respects, the three certainties of intention, object and subject-matter, this does not effect its essential character as a trust. As McLachlin J. pointed out in *British Columbia v. Henfrey Samson Blair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.) at 742: “The provinces may define ‘trust’ as they choose for matters within their own legislative competence . . .”.

[22]Reading s. 53 in its entirety, depending on the circumstances, the appellant, as purchaser, is entitled to equitable proprietary interests in the purchase money and interest thereon. Had the transaction been terminated as a result of the developer's default, the appellant would have had an equitable proprietary interest in the purchase money, as well as in the interest payable thereon by virtue of s. 53(2). However, because the transaction closed after the appellant was in interim occupancy, the developer obtained an equitable interest in the purchase money while, by virtue of s. 53(3), the appellant acquired an equitable proprietary interest in the interest payable on that money while she was in interim occupancy.

[23]It is the appellant's position that her equitable proprietary interest arising from the statutory trust are enforceable against whomever for the time being holds the property. On the authority of *Ministry of Health v. Simpson, supra*, the appellant asserts that if, as a result of tracing, it can be determined that the interest monies have come into the possession of the respondents in circumstances in which the law permits her to obtain recovery, she has an absolute proprietary interest in such monies.

[24]In my view, should the developer, as trustee, breach that trust by making wrongful use of the funds, it makes sense to interpret s. 53(3) both in the context of the entire section and in conformity with the proprietary remedy available to the purchaser. Given that the beneficiary of a trust has the right to trace assets that have been wrongfully distributed, and given that the tracing includes any interest which the assets may have earned, it follows that a trust imposed by statute, or a trust deed, on the assets of a trust necessarily constitutes a trust imposed on the interest. This is particularly true in this case, where by statute the trustee must account to the beneficiary for the interest. The legislature is presumed to know the remedy for breach of trust and to have drafted s. 53 in accordance with that remedy. See F. Bennion, *Statutory Interpretation*, (Toronto: Butterworths, 1997) at pp. 827-830. Therefore, s. 53(3) should be interpreted to conform with the proprietary remedy available to the purchaser should the developer breach the trust imposed on the purchase money by s. 53(1).

[25]In interpreting s. 53, the nature and purpose of the *Condominium Act* is also helpful. It is well recognized that the Act is consumer protection legislation. The trust created by s. 53(1) is for the protection of purchasers. Subsections (2) and (3) further protect purchasers by ensuring, in the circumstances provided for, that they receive interest on their deposits. As the motion judge recognized at p. 791, it has been held, including by this court in *Ackland* at p. 105, that the purpose of s. 53(3) "is to provide an incentive to the developer to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has taken occupancy". Applying a purposive approach to the interpretation of s. 53(3) therefore provides further support for my view that s. 53(3) is to be interpreted to give effect to the trust created by s. 53(1).

[26]As I understand the reasons of the motion judge, he adopted the view of Adams J. in *Counsel*, that the obligation of the developer to retain the purchase money in a trust account comes to an end upon the delivery to the purchaser of the prescribed security referred to in s. 53(1)(b). I do not take issue with this interpretation of s. 53(1)(b). It makes good commercial sense to interpret s. 53(1)(b) as providing that once security is received by a purchaser, the amount of purchase monies covered by the security can be removed from the trust account by the

developer. I agree with Adams J.'s conclusion at p. 295 that "[t]he purpose of the [prescribed security] is to permit a vendor to release deposit funds from trust". Reading this statement in the context of his reasons, Adams J. meant that the developer could remove from the statutory trust account the amount corresponding to the coverage provided by the insurance. However, it is my view that the provision of security under s. 53(1)(b) does not terminate the trust obligation imposed on the developer by s. 53(1) on the *entire* amount of purchase monies it receives from a purchaser. Such an interpretation would defeat the purpose of the statutory trust imposed by the legislation. That trust is imposed on the entirety of the purchase monies, including the interest payable on the purchase monies pursuant to subsections 53(2) and (3), which the developer, as trustee of the purchase monies, must pay thereon.

[27]To be sure, s. 53(1) is not a model of legislative drafting. Nonetheless, it should be read as affecting two objects: (1) imposing a trust on the developer for the benefit of a purchaser on all money received from the purchaser on account of the purchase price; and (2) requiring the developer to hold the money in a separate trust account until (a) its disposition to the person entitled to the money, or (b) the delivery of the prescribed security to the purchaser. While it is correct that payment of the purchase money to either the developer or the purchaser under s. 53(1)(a), or the delivery of security to the purchaser under s. 53(1)(b), permits the developer to remove the purchase money from the separate trust account in which it must be held, neither terminates the trust created by s. 53(1). That trust remains until the termination of the agreement of purchase and sale and the return of the purchase money, with interest, to the purchaser under s. 53(2), or the payment of the purchase money to the appropriate party under s. 53(1)(a). While I agree with the motion judge that s. 53(3) imposes a debt obligation on the developer to pay interest on purchase money, because the provision of security under s. 53(1)(b) does not terminate the trust, the debt obligation imposed by s. 53(3) is a debt obligation to pay interest on trust funds.

[28]Moreover, there is nothing in the statutory language of either s. 53(2) or s. 53(3) which provides that the developer's obligation to pay interest on the purchase money terminates with the delivery of the prescribed security under s. 53(1)(b). This supports my opinion that the entire amount of the purchase money continues to be impressed with a trust, including interest payable thereon, until the interest is paid.

[29]I find further support for my view that the purchase money trust created by s. 53(1) is not terminated by s. 53(1)(b) in s. 33 of Regulation 121, which is a helpful aid in interpreting s. 53(3). Section 33 stipulates the rate of interest payable under subsections 53(2) and (3) "on money held in trust" under subsection 53(1). If the legislature had intended for the trust to be terminated, in whole or in part, on the occurrence of the circumstances contained in subsection 53(1)(a) or (b), the legislation would have provided that after the prescribed security has been given to a purchaser, interest is no longer payable.

[30]In my view, it does not make commercial sense to deprive the purchaser of interest on money of which he or she is the beneficial owner during the time that the developer continues to have the use of it. It is only on the closing of the purchase and sale or the failure of the transaction to be completed as a result of the purchaser's default that the money ceases to be the property of the purchaser and becomes the property of the developer. To interpret s. 53(3) to

produce the result that the statutory trust impressed on the purchase money fails to extend to interest which that money has earned would simply not accord with commercial reality.

[31]A convenient way to test my interpretation of s. 53(1)(b) is to ask what effect, if any, on the trust imposed on the purchase money would result from the developer's failure to hold the money in a separate trust account. The answer in my view is that it would have no effect. Because the legislation has said that the purchase money is trust money, it is immaterial whether the purchase money is in fact kept separate and apart from the developer's own money: *cf. Re Deslauriers Construction Products Ltd.* (1970), 13 D.L.R. (3d) 551 (Ont. C.A.). Similarly, the purchase money continues to be held in trust by the developer even when the developer is entitled to remove it from a trust account upon the provision of the security prescribed by s. 53(1)(b).

[32]Moreover, to hold that the statutory trust imposed on the purchase money for the purchaser's protection is terminated on the provision of security under s. 53(1)(b) would render the trust meaningless. The trust is intended to create a broader range of remedies for a purchaser than would be available if only a debtor-creditor relationship existed. It does this by providing the traditional remedies available to a beneficiary when there has been a breach of trust. Indeed, the trust is also intended to protect the purchaser in the event of the developer's insolvency, which is the situation in this case.

[33]In *Ackland*, as in this case, a developer was required to pay interest on several purchasers' deposits during the period of the purchasers' interim possession of their units. The sole issue in *Ackland* was the amount of "the prescribed rate" of interest the developer was required to pay under s. 53(3), as stipulated by s. 33 of Regulation 121.

[34]*Ackland* was an appeal from a decision of Keenan J. In *Ackland*, Morden A.C.J.O. found it helpful to interpret s. 33 in the context of s. 53 of the Act, to which it applied. The specific issue was whether the proper interest rate was the rate that was in effect when the regulation was enacted, or the higher rate that was in effect at the time the developer was required to pay interest on the purchase monies. Morden A.C.J.O. held that the proper interpretation of s. 33 required payment of the higher interest rate.

[35]In reaching his conclusion, Morden A.C.J.O. applied a number of propositions found in several recognized authorities on statutory interpretation. In addition, he found that an analysis of the purpose of the regulation was helpful in its interpretation. At p. 105, he stated:

The new account, on the facts of this case, clearly comes within the purpose of the regulation – which is to provide an incentive for the proposed declarant to register the condominium corporation and transfer title to the purchaser of the condominium unit as soon as possible after the purchaser has entered into occupation. In *Berman v. Karleton Co. Ltd.* (1982), 37 O.R. (2d) 176, 24 R.P.R. 8 (H.C.J.), Gray J. said at p. 184 O.R., pp. 19-20 R.P.R.:

The intent of the Act is clearly that the purchaser be paid interest on money paid to the vendor on account of purchase price during the interim occupancy period before a registrable deed or transfer is delivered. The reason for doing so is to protect purchasers of proposed condominium

units from abuses by vendors who delay in registering declarations by providing an incentive to register quickly.

Morden A.C.J.O. went on to add at p. 106 that interpreting s. 33 to require the developer to pay a low rate of interest would diminish the effect of the incentive against delay.

[36]Morden A.C.J.O. continued at pp. 106-107:

There is a further aspect of the provision's purpose, *one related to a matter of legal context. The money for which the interest is paid is held by the proposed declarant as a trustee in a separate trust account.* The money held in trust, belongs, beneficially, to the purchaser and not to the proposed declarant. *It is the most fundamental duty of a trustee to administer the trust solely in the interest of the beneficiary and a trustee is not permitted to profit at the expense of the beneficiary: see Scott on Trusts, 3rd ed. (1967), Vol. I at p. 39, and Vol. II at pp. 1297-98. I think that the trust obligation clearly extends to the duty to pay interest based on the higher rate, particularly where the proposed declarant may enjoy an increased personal benefit from paying it on the basis of the lower rate.* This legal consideration is an important part of the context for determining the proper application of s. 33.

This point is succinctly made by Cavarzan J. in *Kates v. Camrost York Development Corp.*, *supra*:

It seems to me to be consistent with the intent and purpose of the *Condominium Act* which protects trust moneys deposited by the applicant and which permits the respondent to earn and keep interest on those trust moneys [s. 53(4)] that the applicable rate, the higher or lower one, be determined by the amount held in trust.

With respect to the trust aspect point, Keenan J. said:

While the relationship of the developer declarant and the condominium purchasers gives rise to obligations of a fiduciary nature, such as holding deposits in trust, it is not *per se* a fiduciary relationship. It is primarily a contractual relationship and the rights and obligations are set out in the contract. A statutory obligation is separate and while it may impose a duty on the declarant for the protection of the purchaser, it does not impose a duty on the declarant to extend the scope of the duty beyond that which is clearly recited in the statute.

With respect, while the basic relationship between a purchaser and a proposed declarant may be contractual, *s. 53(1) clearly imposes on the proposed declarant, with respect to the money we are concerned with in this appeal, the duty of a trustee and it is with this particular aspect of the relationship that we are concerned. As I have said, this fiduciary relationship is of direct relevance in interpreting the scope of the obligation to pay interest on the money held in trust.* [Emphasis added.]

[37]In my view, it is clear that Morden A.C.J.O. was of the opinion that the duty of a developer imposed by s. 53(3) to pay interest on the purchase money of which the developer is a trustee is the duty of a trustee. I am entirely satisfied that this conclusion was not *obiter dictum*. It is clear

from the final sentence of the passage quoted above that his conclusion that the combined effect of subsections 53(1) and (3) is to impose a trust duty on a developer was a necessary finding in the interpretation of s. 33. Indeed, one of the reasons why Morden A.C.J.O. held that the developer was required to pay interest at the higher statutory rate was because it was required to pay interest on trust monies under s. 33. Even though it is not indicated whether s. 53(1)(b) security had been provided, I do not believe that the provision of security would have affected the result reached by Morden A.C.J.O. as the interest was payable on trust monies. It was part of the developer's obligation as trustee of the purchase monies to pay interest.

[38]In referring to Morden A.C.J.O.'s reasons in *Ackland* quoted earlier, the motion judge reproduced only the penultimate sentence of the first paragraph in the above passage and part of the final paragraph thereof. It appears that he was of the view that the developer's duty as trustee to pay interest was terminated when it provided the appellant with the approved security referred to in s. 53(1)(b). As I have explained, the provision of the security did not affect the statutory trust that was impressed on the purchase money paid by the appellant. The *Condominium Act* constituted the developer the trustee of the money for the benefit of the purchaser. The trust impressed on the money continued whether the money remained in a trust account or was, in effect, replaced by a prescribed form of security. As s. 53(1) states, the trust is for the benefit of "the person entitled thereto in respect of the agreement" for the purchase and sale of the unit. Depending on the circumstances, "the person entitled thereto" means either the developer, if the sale is completed and any interest on the purchase money payable to the purchaser pursuant to s. 53(3) has been paid or the sale has not been completed because of the purchaser's default, or the purchaser, if the sale has not been completed because of the developer's default and interest on the purchase money payable to the purchaser pursuant to s. 53(2) has been paid.

Conclusion

[39]For these reasons I would allow the appeal with costs, set aside the summary judgment dismissing the appellant's claim based on breach of trust and dismiss the motion with costs. As it was not unreasonable for the respondent to bring the motion, the costs of the motion and the appeal are on a party and party basis.

Released: May 8, 2001

"S. Borins J.A."

"I agree R. Roy McMurtry C.J.O."

"I agree J.C. MacPherson J.A."