

** Unedited **

Indexed as:

Hui v. 617531 Ontario Ltd.

Between

Yuk Chun Hui, Chan Min Chung, Po King Fok, Hon Wa Tam, Janice Lam in Trust, Kam Wing Yip and Ming Kwong Ling in Trust, William Shu Wing Chan in Trust, Siu Han Wong, William Kwok On Wong, Man Kam Lui, Kam Shing Cheng, Tak Sing Pong, Chiu Yu Kuen, Yuen Chung Wa Anita, Wai Lau, Mee-To Chau, Kam Chuen and Man Lan Kam (plaintiffs/respondents), and
617531 Ontario Limited, Famous Players Development Corporation Limited, Christo George Bacopulos, John George Bacopulos, John Joseph Pizale, Barry Bernstein, Century 21 King's Quay Real Estate Inc., Edward Luiz, Maria Park, Stanley Yau, John Kwok, Daniel Chan, Ken Wong, Edmond Kwok, Ricky Chee, Ivy Chee, Daniel Chow, Frank Chan, Capitol Life Insurance Company of Canada and Parkview Properties Limited (defendants/appellants)

[1997] O.J. No. 2482

Docket No. C25962

**Ontario Court of Appeal
Toronto, Ontario
McKinlay, Charron and Goudge JJ.A.**

Heard: June 16, 1997.

Judgment: June 18, 1997.

(4 pp.)

Practice — Judgments and orders — Summary judgments — Setting aside.

Appeal by the defendants from a summary judgment. The appellants challenged portions of the judgment relating to repayment of the deposits, the payment of pre-judgment interest and the imposition of a trust on certain funds of the appellants.

HELD: Appeal allowed in part. There was no genuine issue for trial respecting the repayment of the deposits. The agreements between the parties provided that the deposits were to be repaid if the project did not proceed and there was very little evidence that some respondents somehow disintitiled themselves to the return of their deposits. The agreements did not preclude interest from the time that the deposits were due back so that prejudgment interest was appropriate. The trial judge was not, however, entitled to impose a trust with respect to certain funds held by the appellants and this paragraph of the judgment was set aside.

Statutes, Regulations and Rules Cited:

Counsel:

Thomas Dunne, Q.C., for the appellants.
Keith Landy, for the respondents.

The following judgment was delivered by

¶ 1 **THE COURT** (endorsement):— The appellants challenge paragraphs 1, 2 and 3 of the judgment of Cameron J. made on a motion for summary judgment on October 1, 1996.

¶ 2 While it would have been of assistance had reasons been given for this judgment, we have determined that the appeal must be disposed of as follows:

¶ 3 Paragraph 1 of the judgment below orders that the appellants pay to the plaintiffs \$682,215, an amount equal to the deposits provided by the respondents. The appellants argue that s. 9 of the agreements signed by the respondents must be read subject to s. 3 of those agreements, so that the obligation to return the deposits (which has clearly arisen here because the project has not proceeded) extends only to that portion of the deposits not used by the appellants for the project pursuant to s. 3. In our opinion s. 9 requires that when the project fails to proceed the appellants pay back the deposits in full to the respondents. Section 9 is not limited in its terms to "unspent deposits". This argument raises no genuine issue for trial.

¶ 4 The appellants also argue that some of the respondents are not entitled to have their deposits paid back because they have defaulted on their own obligations under the agreements. The evidence to support this argument is sketchy at best. Rule 20 requires parties to put their best foot forward. That being so, there is no genuine issue requiring trial as to whether some of the respondents have in some way disentitled themselves to the return of their deposits.

¶ 5 As to paragraph 2, the appellants argue that the agreements provide for the return of deposits to be without interest and therefore no pre-judgment interest can be ordered. We disagree. The agreements preclude interest for the time up until the deposits are required to be returned. However, once the deposits are due back to the respondents, pre-judgment interest is appropriate. There is therefore no error in paragraph 2 of the judgment below.

¶ 6 In paragraph 3, the trial judge imposed a trust on certain funds of the appellants and required that they be paid over to the respondents' solicitors in trust. In our view, he did so in error. These agreements do not provide for the respondents' deposits to be held in trust by the appellants. Rather, they permit the appellants to use these funds for specified purposes. Nor is there any evidence that the funds dealt with in this paragraph in fact originated as deposits from the respondents. These funds are not trust funds. To order that they be treated as such is to permit the respondents to have execution without following the required procedure for execution that recognizes the possible interest of other creditors of the appellants. We would therefore set aside paragraph 3 of the order below and order that the funds which have been paid over to the respondents' solicitors pursuant to that paragraph be repaid.

¶ 7 However, we would not interfere with the order below as to costs. Cameron J. was fully familiar with the proceedings and we would not interfere with his fixing costs on a solicitor-client scale at \$15,000.

¶ 8 We would therefore allow the appeal in part, by deleting paragraph 3 from the judgment below and substituting a paragraph ordering solicitor and client costs in the action to date, in the amount of \$15,000, to be paid by the appellants to the respondents. We would also order that the funds paid over to the respondents' solicitors pursuant to paragraph 3 of Cameron J.'s order be repaid.

¶ 9 Given that success here has been divided we would order no costs of this appeal.

McKINLAY J.A.
CHARRON J.A.
GOUDGE J.A.

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