

Case Name:

**Lewis v. Cantertrot Investments Ltd.**

PROCEEDING UNDER the Class Proceedings Act, 1992

Between

Solly Lewis and Hersl Kalif, plaintiffs, and  
Cantertrot Investments Limited, Sandor Hofstedter, Mark  
Samuel Mandelbaum, George Hofstedter, Larry Froom, Alex  
Lewin, Helen Gorender and Norman Hill Realty Inc.,  
defendants

[2006] O.J. No. 199

Court File No. 04-CV-277412 CP

**Ontario Superior Court of Justice**  
**M.C. Cullity J.**

Heard: January 17, 2006

Judgment: January 19, 2006.

(19 paras.)

*Civil procedure — Pleadings — Amendment of — Statement of claim — To raise additional issues — Motion for certification of class action and for leave to amend statement of claim to add claim for breach of contract allowed in part — Request for leave to add claim for breach of contract dismissed, as amendment did not identify alleged promise with sufficient certainty to require defendants to plead to it.*

*Civil procedure — Parties — Class and representative actions — Certification — Motion for certification of class action and for leave to amend statement of claim to add claim for breach of contract allowed in part — Selection of appropriate method of calculating quantum of damages was genuine common issue between parties and was important common issue to be tried — Certification not denied solely on basis that litigation plan incomplete, as class was small, members not dispersed and members easily identifiable.*

*Motion for certification of class action and for leave to amend statement of claim to add claim for breach of contract — Plaintiffs bought condominiums from defendants — Plaintiffs claimed defendants made misrepresentation when they stated the estimated expenses for the condominium — Plaintiffs argued that as result of the misrepresentation, they had to pay higher maintenance fees and that the values of their properties decreased — HELD: Motion allowed in part — Amendment to add claim for breach of contract dismissed, as amendment did not identify alleged promise with sufficient certainty to require defendants to plead to it — Selection of appropriate method of calculating quantum of damages was genuine issue between parties and was important common issue to be tried — Issue went to merits of plaintiffs' case — Objective of access to justice achieved if action certified as class proceeding — Given that individual trials of plaintiffs' reliance on misrepresentations had to be conducted if plaintiffs successful on common issues, individual trials on other discrete issues were not unmanageable, inefficient or uneconomic — Certification not denied solely on basis that litigation plan incomplete, as class was small, members not dispersed and members easily identifiable.*

## **Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992 S.O. 1992, c. 6 s. 5(1)(d), s. 16(2)

Ontario Rules of Civil Procedure Rule 26.01, Rule 53.03, Rule 76

## **Counsel:**

Samuel S. Marr and Vadim Kats for the plaintiffs

A. Irvin Schein and Stephen C. Nadler for the defendants

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## REASONS FOR DECISION

¶ 1 **M.C. CULLITY J.**— For the reasons released on August 24, 2005, the plaintiffs' motion to certify these proceedings under the Class Proceedings Act, 1992 S.O. 1992, c. 6 ("CPA") was adjourned to permit further submissions to be made after attention had been given to deficiencies in the material filed in support of certification. I had considered the litigation plan filed to be inadequate and I stated that I would require additional information and submissions on the proposed procedure for resolving individual issues, together with reasoned estimates of the damages that are likely to be recovered if the liability of one or more of the defendants is established.

¶ 2 My principal concern related to the question of the preferable procedure that arises under section 5 (1)(d) of the CPA. It was whether the costs of resolving the individual issues would make it uneconomic for class members to participate, so that certification would not significantly enhance their access to justice. I noted also that plaintiffs' counsel had indicated that they would wish to obtain leave to make further amendments to the statement of claim to support the allegation of breach of contract that had been pleaded without, in my judgment, sufficient material facts.

¶ 3 The plaintiffs subsequently delivered a further affidavit of Mr. Landy - a partner in the firm acting for the proposed representative plaintiffs - that addressed my concern and the proposed amendments to the pleading. The defendants filed two affidavits in response to Mr. Landy's affidavits and their counsel submitted that leave to make the amendments relating to breach of contract should be denied. They also opposed the request of plaintiffs' counsel for the approval of additional common issues relating to remedies of waiver of tort, unjust enrichment, quantum meruit and disgorgement of profits. Claims for these remedies had been pleaded but no common issues that referred to them specifically had been included in the list proposed by plaintiffs' counsel in their original notice of motion, or in those that I had found to be acceptable.

¶ 4 I will consider the matters mentioned in the reverse order.

### A. The Additional Common Issues

¶ 5 Mr. Schein submitted that, as the motion had been adjourned only for the purpose of my concerns relating to the preferable procedure and the foreshadowed amendments dealing with breach of contract, it was improper for the plaintiffs to propose additional common issues at the resumed hearing. I indicated that, although I had no doubt that the court had jurisdiction to order further common issues to be tried at this stage of the proceeding when no certification order has been made - or by amendment to any such order after it was made - I would defer consideration of the plaintiffs' request to a later date to be arranged. In the meantime, the plaintiffs are to provide defendants' counsel with a formulation of the

additional issues that they propose in order to enable them to determine whether they will oppose their inclusion in the common issues to be tried.

## B. Breach of Contract

¶ 6 The plaintiffs seek leave to add the following as paragraph 32 of the statement of claim:

The Plaintiffs state that the Disclosure Statement and Budget Statements (as defined in paragraph 15 above) were contractual terms of the Agreements entered into between the Class and the Defendant Cantertrot. These contractual terms promised the purchasers the following:

- a) that the projected expenses for the first year following registration of the condominium would be \$413,000.00,
- b) that the projected monthly assessments for the first year after registration of the condominium would be between \$312.39 and \$354.05.

These representations as contained in the Disclosure Statement and Budget Statement were untrue, and as a consequence the Defendant Cantertrot has breached its Agreements with the Class Members. As a consequence of this breach of contract, the Class Members have suffered damages including, but not limited, to increased maintenance fees, loss of services of YRSCC No. 974, diminished property values. Further particulars of damages will be provided prior to trial.

¶ 7 Mr. Schein submitted that the amendment was unsatisfactory and that leave to make it should be refused. I accept that submission. It is, I believe, clear that, notwithstanding the provisions of rule 26.01, leave to amend should not be granted if the proposed amendment does not comply with the rules of pleading. The amendment here would not, in my opinion, identify the alleged promise with sufficient certainty to require the defendants to plead to it. The promise is said to relate to "the projected expenses". When read in the context of the pleading as a whole, the plaintiffs' case is not based on any claim that the expenses and monthly assessments referred to were not projected by the defendants. Indeed, in paragraph 15 of the statement of claim, it is pleaded that the particular assessments were projected. The plaintiffs' complaint appears to be that the projected estimates were misleading and should be considered to be misrepresentations - not of what the plaintiffs projected, but of what the expenses and monthly assessments would be. If the plaintiffs wish to plead - and to prove - a promise that the expenses and assessments would not exceed the amounts referred to in subparagraphs a) and b) of the proposed amendment, they must, in my opinion, do so clearly. Misrepresentations without a promissory intent may give rise to liability in tort, or a claim for rescission, but they do not support a claim for damages for breach of contract: Waddams, *The Law of Contracts* (third edition, 1993), para. 420. If what is alleged in the proposed paragraph 32 is a promise that the amounts would be projected this is very different from a promise that the projections will turn out to be accurate - and the nature of the defence that the defendants will wish to plead may be similarly different.

¶ 8 For these reasons, leave to make the proposed amendment is denied. If the plaintiffs wish to propose further amendments before any order certifying the proceedings is made, they should deliver a notice of motion for leave to do so, together with a formulation of any consequential common issues, so that the questions can be dealt with at the later hearing to consider the proposed common issues relating to the restitutionary claims.

## C. Preferable Procedure

¶ 9 The affidavit of Mr. Landy clarifies the position of the plaintiffs on the matters referred to in my earlier reasons. Their counsel propose that summary trials of the individual issues - relating to reliance and, possibly, the computation of damages in respect of each class member - would be conducted in accordance with the simplified rules. They have undertaken, further, to represent all class members who wish to participate and to do so on the basis of the contingent fee agreement with the representative plaintiffs that provides for the firm to receive a percentage of the global recovery. To be enforceable, that agreement must, of course, be approved by the court at the appropriate time.

¶ 10 The selection of the appropriate method of resolving individual issues is for the judge who presides at the trial of common issues. The procedures proposed by the plaintiffs are, however, of relevance in a case like this when the motions judge is attempting to determine whether access to justice will be significantly advanced by a class proceeding and, for that purpose, is considering whether such proceedings are economically viable. For the same reason, I requested estimates of the quantum of damages that might be awarded to class members. These were provided by Mr. Landy with the assistance of two professional advisers or experts.

¶ 11 In response, the defendants delivered affidavits of experts whose estimates were markedly different from those supported by the plaintiffs. The differences reflect opinions about the appropriate methodology for attributing a dollar amount to the losses that are alleged to have been incurred by the plaintiffs and the other class members. The plaintiffs' estimate of the total loss suffered by the putative class members was in a range of \$2,112,552.00 and \$2,538,541.00 with the loss for each unit falling within a range of \$26,004 to \$31,101 for each of nine units; \$10,572 to \$12,643 for each of five units; and the losses on each of the other 106 units in various ranges falling between those extremes. On the other hand, one of the defendants' experts preferred a methodology that would suggest that no damages were incurred, and the other estimated that the aggregate losses would be \$52,300.00.

¶ 12 Having reviewed the qualifications of the professional advisers, or experts, and the conflicting analyses they have proposed, I am satisfied that the selection of the appropriate method is a genuine and real issue between the parties. It may well be the most important of the common issues to be tried. It was that question that the common issue I accepted as relating to the "measure" of damages - common issue (f) - was intended to address. On further consideration, I believe it would be more clearly formulated as:

- (f) If the answer to question (a), (b), (c) or (d) is yes, what would be the appropriate methodology to be applied in computing the losses, if any, suffered by Class members who relied reasonably on such misrepresentations?

¶ 13 As the issue goes directly to the merits of the plaintiff's case and is one of the common issues, I agree with Mr Marr that it would be inappropriate for me to attempt to choose between the conflicting estimates that have been provided. On the basis of this evidence, however, it is sufficient to satisfy me that the objective of access to justice is likely to be achieved if the action is certified as a class proceeding. Class members - other than the representative plaintiffs - will be shielded from liability for costs in the event that the disposition of the common issues is unfavourable to them. If the question of valuation is decided in favour of the defendants, the litigation is not likely to proceed. In the event that this and the other common issues are decided against the defendants, my concern about the economic viability of the proceedings for class members will have been met. Whether or not the trial judge would be disposed to order summary trials, the simplified procedure under Rule 76 - or some modification of it - would be available. Moreover, once the methodology for computing damages has been determined, the main focus of individual trials is likely to be on the issue of reliance on the defendants' misrepresentations that were identified at the common issues trial. If the opinions of the plaintiffs' experts on the issue of valuation are accepted, reliance may be the only individual issue of any significance. Given the existence of this discrete issue, the other findings that would have been made at the trial of common issues and the

maximum potential size of the class, I see no reason why individual trials of the individual issues are likely to prove unmanageable, inefficient or uneconomic.

¶ 14 Mr. Schein submitted that, even as implicitly expanded by the contents of Mr. Landy's affidavit, the proposed litigation plan lacks the detail required by Nordheimer J. in *Bellaire v. The Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.). The learned judge identified nine particular matters that should be addressed in a litigation plan. He did, however, preface the list by acknowledging that "litigation plans will vary in the amount of detail they contain depending on the degree of complexity of the underlying claims". He commented, also, that any litigation plan will be a work in progress and indicated that the purpose of addressing the matters mentioned was to satisfy the court at the certification stage that "some level of attention has been given to how the action will progress thereafter".

¶ 15 In addition, of course, it has been accepted in the authorities that the contents of a litigation plan may be important because of the light they throw on other requirements for certification - including, in particular, the significance to be attributed to the resolution of the common issues and the question whether a class proceeding would be the preferable procedure. It was the last of these matters that prompted my comments on the inadequacy of the litigation plan in this case.

¶ 16 I do not think it can be denied that the necessity to itemize in a litigation plan a number of the matters in the helpful list provided in *Bellaire* may depend on circumstances other than the complexity of a plaintiff's claims. Where, as here, the class is small - relative to the estimated 45,000 members of the class in *Bellaire* - and, for the most part, its members are not dispersed and either have been, or can be identified, I would not reject the litigation plan, and refuse certification, for a failure to deal with matters such as ongoing reporting to members, the collection and management of documents, and mechanisms for responding to inquiries. Nor, at this stage, do I see why the plaintiffs should address the likelihood that the defendants will wish to discover individual class members and will move for leave to do so pursuant to section 16(2) of the CPA.

¶ 17 Some of the matters referred to in *Bellaire* will be dealt with in any notice of certification provided to the putative class members. If difficulties arise with respect to any of the others, they can appropriately be addressed at a case conference. For example, the plaintiffs have now indicated that they intend to call expert evidence on the question of damages. If they intend to call other experts, the defendants must be advised in advance in accordance with rule 53.03 and the court has power to order earlier notification if persuaded that this should be done in the circumstances.

¶ 18 For the purpose of certification in this case, I consider the important factor to be, as the Court of Appeal stated in *Cloud v. Attorney-General (Canada)* (2004), 247 D.L.R. (4th) 667:

... nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

¶ 19 In the light of the above, I will make an order certifying these proceedings after the pending questions relating to the amendment of the statement of claim, and acceptance of additional common issues, have been resolved. The terms of the certification order, including those of the notice to be given to class members, can also be deferred until the outcome of that event.

M.C. CULLITY J.