

**Cheung et al. v. Kings Land Developments Inc. et al.**

**[Indexed as: Cheung v. Kings Land Developments Inc.]**

55 O.R. (3d) 747  
[2001] O.J. No. 3612  
Docket No. 00-CV-195955

**Ontario Superior Court of Justice  
Cumming J.**

September 12, 2001

*Civil procedure — Class proceedings — Certification — Multiple actions arising out of failed commercial condominium project — Certain defendants requesting certification of class proceeding — Some plaintiffs opposing certification — Criteria for certification satisfied — Class Proceedings Act, 1992, S.O. C. 6, s. 5.*

The representative plaintiffs in a proposed class proceeding were two of some 273 purchasers of units in a commercial condominium project that failed. The representative plaintiffs had initially constituted an individual action against the following: (a) Kings Land Developments Inc. ("Kings") and Henry Lam and Linda Lam, the vendor and its principals; (b) Jeffrey Beber and his law firm, the vendor's lawyer and the trustee for the deposit moneys; (c) Living Realty Inc., the vendor's real estate agent; and (d) two individual sales agents. There were five other very similar individually constituted actions, all of which had been ordered tried together. In all, about 137 purchasers were named as plaintiffs. In all these actions, the plaintiffs sought the return of their deposits and general and punitive damages. It was alleged that deposit moneys totalling \$10,894,104 had been improperly used for project expenses, which expenditures constituted a breach of contract by some defendants and a breach of trust by some defendants. Various claims were also made for negligent and fraudulent misrepresentation, knowing receipt, and knowing assistance. The defendants Kings and the Lams sought certification of the various proceedings as a class proceeding. The certification of the actions was acceptable to some plaintiffs and opposed by others. The representative plaintiffs amended their claim for the purposes of a class proceeding and moved for certification.

**Held**, the motion for certification should be granted, and the individual actions in which plaintiffs did not opt out should be stayed.

The criteria for certification were satisfied. The statement of claim disclosed a cause of action. There was an identifiable class of persons that would be represented by the proposed representative plaintiffs. The class could include 10 residents of Hong Kong who were purchasers. The class would include all purchasers, except those who opted out, whose actions could continue subject to the order that they be tried together. Individual actions in which plaintiffs did not opt out should be stayed. The formulation of common issues was not opposed by the defendants. A class proceeding was the preferable procedure for the resolution of the common issues. A class action would be beneficial because, as the majority of the purchasers have lost between \$20,000 to \$40,000, the costs of pursuing an individual action might exceed the damages suffered. Also, for the defendants, it would be cost prohibitive to separately defend each action that might arise from the failure of the condominium project. The proposed representative plaintiffs would fairly and adequately represent the interests of the class. The action against the two individual sales agents should be stayed without prejudice until the class proceeding has been

determined in respect of the other defendants.

### **Cases referred to**

Lau v. Bayview Landmark Inc., [1999] O.J. No. 4060 (S.C.J.)

### **Statutes referred to**

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 8(1), 9, 10, 11(1)(c), 12, 14, 15(2), (3), 17, 24, 25, 26, 31(2)

### **Rules and regulations referred to**

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 6.01, 21.01(1)(b)

MOTION for certification under the Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5.

Keith M. Landy and S.S. Marr, for plaintiffs Bernard K. Cheung and Ben Wing Pun Mok.

Richard Quance, for plaintiffs in actions #97-CV-138971, #97-CV-195954 and #00-CV-195957.

Morton Adelson, for plaintiffs in actions #5092/98 and #53723/97.

Benjamin Glustein, for defendants Henry Lam, Linda Lam and Kings Land Developments Inc.

W.A. Kelly, Q.C., for defendants Jeffrey Beber and Levitt, Beber.

Michael K. Walter, for defendant Living Realty.

No one appeared for defendants Eddie Lee and RE/MAX T.S. Realty.

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### **CUMMING J.: —**

#### **The Motion**

[1] The plaintiff in this court action (00-CV-195955CM) brings a motion for certification of the class proceeding under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). This action was originally constituted as an individual action. As discussed below, there is now a Fresh as Amended Statement of Claim reconstituting the action as a class proceeding.

#### **Background**

[2] There are six civil actions brought against the same defendants, Kings Land Development Inc. ("Kings"), Henry Lam and Linda Lam (the "Lams") (these three defendants are collectively referred to as the "Kings Land defendants"), Jeffrey P. Beber, his firm Levitt, Beber and Living Realty Inc. with respect to the failure of a commercial condominium project called "The World Centre" (the "project") in Richmond Hill. Kings was the developer/vendor of the estimated 251 units in the project. The proposed representative plaintiffs purchased units in the project. There are some 273 purchasers of units as putative class members. An estimated ten of the purchasers reside in Hong Kong. Some 137 of the total 273 purchasers are named plaintiffs in the six civil actions. About 136 purchasers of 125 units have not commenced individual court actions.

[3] The project was to be constructed on property at the north-east corner of Bayview Avenue and Major MacKenzie Drive, being part of Lot 21, Concession 2, East of Yonge Street, in the Town of

Richmond Hill, in the Regional Municipality of York (the "property").

[4] The Lams were officers and directors, and the sole shareholders of Kings. The defendant Levitt, Beber is the law firm that held the deposit funds made in respect of the agreements of purchase and sale. The defendant Jeffrey P. Beber is a principal of the law firm and was the solicitor acting for the vendor, Kings. The law firm at all material times was trustee for the deposit moneys. (The defendant law firm and Mr. Beber are collectively referred to as the "Beber defendants".)

[5] The defendant Living Realty Inc. ("Living Realty") carries on the business of a real estate broker, and marketed the units in the project on behalf of Kings as the exclusive listing real estate broker. The defendants Eddie Lee and RE/MAX T.S. Realty Inc. were the agents retained on behalf of the proposed representative plaintiff, Mr. Cheung. (These two defendants are not parties in any of the other actions.)

[6] Kings did not provide occupancy. The project was never built. Kings reportedly did not have sufficient funds to develop the project. In each case, the plaintiffs seek the return of their deposits and punitive and general damages.

[7] Orders have been made with respect to the individual actions under rule 6.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended (the "rules"), for a common documentary discovery, examinations for discovery, pre-trial conferences and that the actions ultimately be tried together.

[8] The five remaining individual civil actions are #97-CV138971, #97-CV-195954, and #00-CV-195957 (all commenced in Toronto) and #5092/98 and #53723/97 (both commenced in Newmarket). The counsel for the plaintiffs in #97-CV-138971, #97-CV-195954 and #00-CV-195957 advises that he does not oppose the motion for certification. Counsel for the plaintiffs in #5092/98 and #53723/97, however, opposes the motion.

[9] Given the multitude of actions, the Kings Land defendants brought a motion to compel certification of #97-CV-138971 as a class proceeding (being an action with many individual plaintiffs). The plaintiff, Mr. Cheung, then moved to certify his individual action in #00-CV-195957 as a class proceeding. This required extensive amendments to the statement of claim which have now been done with a Fresh as Amended Statement of Claim. Accordingly, an order, not opposed, is to be issued allowing such amendments nunc pro tunc.

[10] This class action is unusual in its development in that it originated in the first instance simply as an individual action by Mr. Cheung. My impression from the history of alleged events is that there are not any limitation of action issues that arise in respect of any putative class member. However, in fairness to the defendants, the nunc pro tunc order allowing the Fresh as Amended Statement of Claim is made without prejudice to any limitation of actions defences that may be raised against any individual class members.

[11] The Kings Land defendants consent to certification. As stated above, counsel for the plaintiffs in #5092/98 and #5373/ 97 opposes this motion for certification.

[12] If certified, the class will include all purchasers except for those who may opt out. There is an absolute right to opt out under s. 9 of the CPA. For any purchasers who opt out who are already plaintiffs in existing individual actions, those actions will, of course, continue to move forward. The individual actions in which plaintiffs do not opt out will be stayed.

[13] It is up to informed putative class members to decide whether or not they remain in a certified

class proceeding or opt out. Class members, other than the representative plaintiffs, are not responsible for an adverse costs award with respect to a determination of the common issues: s. 31(2) of the CPA. The proposed class counsel is seeking certification on the basis of a contingency agreement. Thus, class counsel will receive payment of their fees and disbursements only if the plaintiffs are successful.

[14] In the event any of the individual actions remain alive then the existing order under rule 6.01, that all actions be tried at one time, will continue to apply.

[15] Winkler J. granted certification in another class proceeding dealing with the failure of another like project involving the same defendants and identical agreements for the sale and purchase of units. See *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (S.C.J.) ("Bayview Landmarks").

#### Analysis

[16] The two proposed representative plaintiffs entered into agreements of purchase and sale with Kings and paid deposits.

[17] The agreements provided that the deposits would be paid in trust to the vendor's solicitors, Levitt, Beber, to be credited on account of the purchase. The agreements provided that if the premises were not completed by the stipulated occupancy date, March 3, 1997, that such date could be extended up to March 3, 2000.

[18] As the project was never built, the purchasers demanded the return of their deposits. The purchasers were told their moneys, allegedly totalling \$10,894,104, had been paid out to cover costs of Kings, including the fees of Living Realty and Levitt, Beber.

[19] The plaintiffs claim that Kings is in breach of contract. The plaintiffs claim that all of the defendants (except for the defendants Eddie Lee and RE/MAX Realty Inc.) committed a breach of the express trust allegedly established for the benefit of the putative class members with respect to their moneys held on deposit toward the purchase price. The purchasers claim that the terms of the trust did not permit the funds on deposit to be applied to the acquisition price of the property and the related expenses. The plaintiffs also claim that the defendant Living Realty is liable for negligent misrepresentation. The plaintiffs also allege that the defendants Mr. and Mrs. Lam misappropriated the moneys and are liable for fraud, and that the Beber defendants knew or ought to have known that the deposits would be improperly spent.

[20] There are five mandatory criteria for the certification of a class action under s. 5(1) of the CPA.

#### Section 5(1)(a)

[21] Section 5(1)(a) requires that the statement of claim meet the threshold test of disclosing a cause of action. The test for meeting the s. 5(1)(a) test is the same as seen in a rule 21.01(1)(b) motion. All allegations of facts in the pleading, unless patently ridiculous or incapable of proof, must be accepted as proved; the novelty of the cause of action will not militate against the plaintiff; the statement of claim is to be read liberally, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies; and finally, to succeed, a defendant must establish that it is plain and obvious there is not a reasonable cause of action.

[22] The claims by all purchasers are the same against all defendants except for the defendants Eddie Lee and RE/MAX T.S. Realty Inc. The claim against those two defendants pertains only to the plaintiff

Cheung. This claim may well fall away if the plaintiff is successful against the other defendants. Even if unsuccessful against the other defendants, Mr. Cheung may then determine that he does not wish to proceed against the defendants Eddie Lee and RE/MAX T.S. Realty. Accordingly, the action against these two defendants should be stayed without prejudice until the class proceeding has been determined in respect of the other defendants. There is agreement of counsel for all other parties with this interim disposition of the action with respect to these two defendants. (My references to "defendants" hereafter does not include Eddie Lee and RE/MAX.)

[23] The plaintiffs allege they entered into agreements of purchase and sale as a result of representations made to them by the Kings Land defendants and Living Realty that Kings was the owner of the property, that the necessary approvals had been obtained for the development of the proposed project, and that the project would be comprised of a 460,000 square foot retail mall containing certain stores. There is common ground that occupancy was to be made available by no later than March 3, 2000.

[24] The plaintiffs allege that the defendant Beber received deposit moneys under the purchase and sale agreements and wrongfully or negligently released the deposit moneys in breach of trust and contract to the Lams and Kings. The plaintiffs say that the Lams and Kings wrongfully directed the release of the deposit funds and unlawfully disbursed and benefited from the deposit funds. The plaintiffs say they are entitled to the return of their deposit moneys and to damages.

[25] The plaintiffs found their claim in allegations of breach of trust (in respect of all defendants), breach of contract (in respect of Kings), fraud (in respect of the defendants Mr. and Mrs. Lam), knowingly assisting in a dishonest and fraudulent plan designed to deprive the class members of the deposits (in respect of the Beber defendants) and negligent misrepresentation (in respect of Living Realty).

[26] In my view, and I so find, the criterion of s. 5(1)(a) is met. Indeed, the defendants do not oppose this finding.

#### Section 5(1)(b)

[27] There is an identifiable class of persons, being all purchasers of units in the condominium project sold by Kings, that would be represented by the proposed representative plaintiffs in the class proceeding.

[28] Counsel for Living Realty submits that the class cannot include the ten residents of Hong Kong who were purchasers. I disagree.

[29] Ontario has jurisdiction with respect to this proceeding. All purchasers have the same claims against the defendants. Non-residents can be plaintiffs in Ontario courts. The Hong Kong residents would receive notification and have the right to opt out. In the event the plaintiff class is ultimately successful, then the Hong Kong purchasers who have not opted out should benefit from the judgment like all other class members. If the plaintiff class is ultimately not successful, then (if the Hong Kong class members brought an action in Hong Kong) the Hong Kong courts should recognize the Ontario judgment on the principle of comity.

[30] In my view, and I so find, the non-resident purchasers are properly to be included in the class.

#### Section 5(1)(c)

[31] There is common ground that each of the agreements of purchase and sale signed by the purchasers of units contained identical terms, with the possible exception, as alleged by the defendant Living Realty, that some agreements contained a caution with respect to the status of requisite municipal approvals. Hence, each purchaser was subject to the same terms applying to the use of funds held in trust and in respect of the aborted "Final Occupancy Date" of March 3, 2000. There is common ground that the vendor did not own the property when the agreements to purchase were signed.

[32] The resolution of the claims for breach of trust against Kings and the Lams requires little evidence from the purchasers, as they could not have been involved in the alleged breach of trust.

[33] The record establishes that Living Realty conducted some three or four group sales presentations in Toronto, involving hundreds of prospective purchasers, and another presentation in Hong Kong. Scale models and sales brochures were employed in these sale presentations. At least 39 individual real estate agents employed by Living Realty completed sales of units. The statement of claim alleges that Living Realty placed advertisements in local Chinese language newspapers which misrepresented the state of development of the project.

[34] The following formulation of the common issues is not opposed by the defendants:

#### Breach of Contract

1. Did Kings breach the agreements of purchase and sale ("agreements") and are the deposits contractually required to be repaid to the class members?

#### Breach of Trust

2. Are the Beber and Kings Land defendants liable to the members of the class on the following grounds:

- (i) breach of trust simpliciter;
- (ii) as a constructive trustee for the trust funds and thereafter taking action inconsistent with that obligation;
- (iii) by being in knowing receipt of trust funds;
- (iv) by knowingly assisting in a dishonest and fraudulent plan designed to deprive the class of the deposits?

3. Is Living Realty liable to the members of the class on the following grounds:

- (i) as a constructive trustee for the trust funds and thereafter taking action inconsistent with that obligation;
- (ii) by knowingly assisting in a dishonest and fraudulent plan designed to deprive the class of the deposits?

#### Negligence

4. Do the Kings Land defendants, the Beber defendants and Living Realty owe the class members a duty of care based on the nature of the relationship between these defendants and the class?

5. Were the Beber defendants, as trustees, negligent in the release of the deposits?

6. Were the Kings Land defendants and Living Realty negligent in the representations made to the class members, or in failing to disclose material information to the class members before they signed the agreements?

#### Fraud and Piercing the Corporate Veil

7. Do the actions of the Lams and Kings constitute fraud, deceit, and a basis for piercing the corporate veil?

#### Punitive, Exemplary and Aggravated Damages

8. Should there be an award of punitive, exemplary or aggravated damages against the defendants or any one or more of them?

#### Section 5(1)(d)

[35] A class proceeding must be the preferable procedure for the resolution of the common issues. In my view, the policy goals underlying the CPA, being access to justice, judicial economy and modification of wrongful behaviour, are all supported by certification. The record establishes that purchasers lost deposits ranging from \$17,000 to \$116,000, with the majority losing deposits between \$20,000 to \$40,000. Given the expense of litigation, it is improbable that all these purchasers would be able to pursue their claims individually. Given the commonality of the issues, judicial economy is advanced by a class proceeding. If the allegations are established, the policy objective of general deterrence of wrongful behaviour modification will be advanced.

[36] A determination of the common issues will significantly advance the progress of the litigation, even if individual issues remain to be resolved.

[37] The evidence required with respect to the breach of trust and breach of contract claims is common for all purchasers and requires little or no evidence from any purchaser. The evidence as to the use of deposit funds and whether such use was contrary to the terms of the trust, and whether there was any personal benefit by the Lams through the receipt and misappropriation of trust funds will largely not come from the purchasers. This evidence would be identical in any action brought with respect to the project.

[38] As noted above, each purchaser has lost deposits ranging from \$17,000 to \$116,000, the majority of the purchasers having lost between \$20,000 to \$40,000. A class action would be beneficial to them in that the costs of pursuing such an action may exceed the damages they have suffered.

[39] In each of the additional actions which may be filed over the course of the next few years, the limitation period perhaps runs from the failure to complete the building by the occupancy date of March 3, 2000; pleadings, examinations for discovery, and trials would all be required. These elements would impose significant costs on individual purchasers. The existing order under rule 6.01 with respect to the individual actions tends to meet, in part, the objectives of access to justice and judicial economy that underlie a class proceeding. However, there may well be more individual actions at a later date.

[40] Counsel for the representative plaintiffs will be able to seek the evidence to establish the common issues to the benefit of all purchasers, including those who would not otherwise have sufficient funds to pursue an individual action.

[41] Counsel for the Kings Land defendants will be able to respond to any allegations and evidence concerning the common issues in one proceeding, providing an expedient forum to resolve the issues for both the plaintiffs and the defendants and avoiding any possible unfairness for purchasers and defendants.

[42] It would be cost prohibitive for the defendants to separately defend each action which may arise as a result of the failure of the project. If there are further individual actions at a later date, the defendants might be required to attend additional, separate examinations for discovery, pre-trial conferences, bring requisite motions if necessary, and attend further trials, all of which would address the common issues raised above.

[43] In the event of more than one trial, the courts would be required to consider the evidence in each case and arrive at a conclusion as to the terms of the trust, breach of the trust, whether the Lams wrongfully received trust funds or participated in a dishonest and fraudulent scheme, and the appropriateness of punitive damages. These common issues will require determinations of credibility, which raise the significant risk of a multiplicity of proceedings and inconsistent judgments.

[44] Scarce judicial resources would be better utilized, and judicial economies would be effected, by determining all of the common issues in one proceeding. Further, if any one or more of the defendants are found liable on the allegations of breach of trust, there may be no need for the plaintiffs to proceed against the defendant Living Realty with respect to the allegation of negligent misrepresentation.

[45] While precise monetary damages need to be calculated on an individual basis, the methodology for calculating the damages represented by the loss of the deposits allegedly caused by some or all of the defendants' conduct may be able to be determined on a class-wide basis, without examining the plaintiffs.

[46] Certification of the issues against the defendants would assist the parties in attempting to resolve the issues raised in the litigation. It would be impractical for the defendants to consider settling litigation with one set of plaintiffs when there may be numerous additional individual actions at a later date raising the same issues.

[47] It is recognized that there may well be significant individual issues that must be resolved at some later point. This action involves many complexities. The CPA provides flexibility to deal with such eventualities as may be necessary: see ss. 10, 11(1)(c), 12, 14, 15(2), (3), 24, 25 and 26. A class action is the preferable procedure for resolution of the common issues and will significantly advance the progress of the litigation.

#### Section 5(1)(e)

[48] The proposed representative plaintiffs are Bernard K. Cheung and Ben Wing Pun Mok. In my view, the proposed representative plaintiffs would fairly and adequately represent the interests of the class, have produced a plan for the class 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 neither has, on the common issues for the class, an interest in conflict with the interests of other class members.

#### Disposition

[49] For the reasons given, this action is to be certified as a class proceeding. An order is to issue in accordance with these Reasons for Decision and in compliance with s. 8(1) of the CPA.

[50] Notice to class members as required by s. 17 of the CPA shall be done by prepaid mail to each putative class member and by advertisements in Chinese language newspapers in Toronto and Hong Kong. The opt out date is 60 days from the mailing and last advertisement date, whichever is later. Costs of the notice are to be borne by the Kings Land defendants on a joint and several basis.

[51] Class counsel are to prepare an order and form of notice to class members in accordance with these Reasons for Decision. I may be spoken to if there is not agreement between counsel as to the form and content of the order or as to the content of the notice and the precise manner of giving notice.

Order accordingly.