

PROFESSIONAL COURT REPORTERS INC.

Court File No. 04-CV-277412 CP

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

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This is the Cross-Examination of LARRY FROOM, on his
affidavit sworn on the 9th day of May, 2005 herein, taken
verbatim before PROFESSIONAL COURT REPORTERS INC., 4950
Yonge Street, Suite 802, North York, Ontario, M2N 6K1, on
the 8th day of June, 2005.

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A P P E A R A N C E S:

S.S. MARR, ESQ. - for the Plaintiffs

A.I. SCHEIN, ESQ.) - for the Defendants

S.C. NADLER, ESQ.)

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LARRY FROOM, Affirmed

EXAMINATION BY MR. MARR:

1. Q. Mr. Froom, you've sworn an affidavit in these proceedings on the 9th day of May, 2005; is that right?

A. Yes.

2. Q. And before I start my questioning, is there anything in the affidavit -- I assume you've looked at it before to prepare for this morning. Is there anything you want to tell me that is incorrect, that you want to change, before I start questioning you? Or as far as you're concerned, is it all accurate?

A. It's all accurate, pretty much.

3. Q. All right. How old are you, sir?

A. 37.

4. Q. And where are you currently employed?

A. H&R Property Management.

5. Q. And how long have you worked at H&R Property Management?

A. 8.5 years.

6. Q. And what position do you hold?

A. VP Finance.

7. Q. When you say "H&R Property Management", your employer is H&R Property Management Limited; is that right?

A. Yes.

8. Q. And you're an employee on the books of that

company?

A. Yes.

9. Q. And that's what you've been for the last 8.5 years?

A. Yes.

10. Q. Just briefly, just a little bit about yourself, what is your educational background? How far did you go in school?

A. I'm a chartered accountant.

11. Q. When did you become a chartered accountant?

A. 1990.

12. Q. Do you have a university degree?

A. Yes.

13. Q. What is that in?

A. Bachelor of Commerce, Bachelor of Accounting.

14. Q. From where?

A. In South Africa, Johannesburg.

15. Q. Sorry?

A. Johannesburg, South Africa.

16. Q. When did you get that?

A. The Bachelor of Commerce in 1998 (sic).

17. Q. Yes?

A. Sorry, 1988. And the Bachelor of Accounting in 1989, and passed the equivalent of what you call the UFE here in 1990.

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18. Q. When did you come to Canada?

A. In 1994. I became a Canadian C.A. in 1995.

19. Q. After you graduated from university in South Africa, did you work in South Africa?

A. Yes.

20. Q. What did you do?

A. I worked for a professional accounting/auditing firm, Kessel Feinstein.

21. Q. As a chartered accountant?

A. Yes.

22. Q. And is that the job you held until you came to Canada?

A. Yes, pretty much. I lost six months. I was cleaning up and working for my brother-in-law.

23. Q. And then when you came to Canada, did you start to work?

A. Yes.

24. Q. And where did you start to work when you came to Canada?

A. Ernst & Young.

25. Q. And how long did you work at Ernst & Young?

A. About two years.

26. Q. And what did you do there?

A. I was Audit Manager.

27. Q. In Toronto?

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A. Toronto.

28. Q. And what would you do as an Audit Manager?

A. Be responsible for running -- planning and running audits.

29. Q. Did that involve -- include you actually doing some auditing work, or was it just a management job?

A. It would include me doing some audit work.

30. Q. All right. And from Ernst & Young, where did you go?

A. To H&R.

31. Q. And at H&R, have you been the VP of Finance since you joined?

A. No.

32. Q. What did you do originally?

A. I was controller.

33. Q. How long were you controller?

A. I became VP Finance two years ago.

34. Q. Sorry?

A. I became VP Finance two years ago.

35. Q. So, before that you were controller?

A. Mm-hmm.

36. Q. You have to say yes or no.

A. Yes.

37. Q. Thank you. What's the difference between the controller job and the VP Finance job? What does each

involve?

A. The company has grown a lot since I joined. When I joined, there was just one controller. Now we have a controller in each of the different divisions, and I oversee all of them.

38. Q. I see. So, let's talk, maybe, about your current job. How many different controllers are there that report to you?

A. Three.

39. Q. And you say there's three ---

A. Well, really, four. The definitions are three or four.

40. Q. And you've said that there were different divisions? What are those divisions?

A. One is the land division.

41. Q. Yes?

A. One is the construction division.

42. Q. Okay?

A. One is the property management division.

43. Q. Okay?

A. And then apartment -- residential apartment division on its own.

44. Q. So, is that the fourth person that -- sort of, reports to you?

A. Yes.

45. Q. And I take it that these divisions are part of -- sort of, a global H&R corporate structure? It's not just H&R Property Management people?

A. No. That's right.

46. Q. So, when you, in your affidavit -- if we turn to paragraph 5? And when you talk about, "H&R Developments has been in business for decades", do you see that?

A. Mm-hmm.

47. Q. I take it that you're not really referring to any one individual corporation when you make that statement? It's more of a ---

A. It's a name.

48. Q. It's a brand name, almost, with a large group of a number of different companies that operate using that brand name; is that right?

A. Correct.

49. Q. And so, one of those companies would be H&R Property Management Limited, which I take it is -- sort of, a financial overseeing company over all the other ones; is that right? Or am I mischaracterizing that?

A. It's an operating management company.

50. Q. So, what does it do as an operating management company?

A. It receives management fees from the properties it manages, and it pays the overhead like

salaries.

51. Q. It pays overhead and...?

A. Overhead like salaries and rent.

52. Q. And is it a -- is the management limited to H&R Properties, or does it manage other arms-length properties?

A. It's not limited to H&R Properties, but...

53. Q. It's mostly H&R?

A. Mostly, yes.

54. Q. All right. So, another company in the H&R group of companies would be Cantertrot Investments Limited; am I right in that?

A. Yes.

MR. MARR: Counsel, do you have my Motion Record?

Could you put that in front of the witness?

BY MR. MARR:

55. Q. And if you turn to Mr. Lewis' affidavit which is at tab 2 of the certification motion? And I'm on page -- the pages are also numbered at the top. Page 7, paragraph 4. Mr. Lewis is talking about the project at 74 (sic) New Westminister Drive. You're familiar with that project?

A. Yes.

MR. SCHEIN: Is it 745 New Westminister?

BY MR. MARR

56. Q. My understanding is it's 745 New Westminister, but it ultimately becomes YRSCC #974. Is that your understanding?

A. I'm not sure of the 974, but it became YRSCC something, yes.

57. Q. All right. If you look at the agreement which is found at tab A? I'm going to come back in a minute, but just for this point, just so there's no confusion about this. First of all, you'll see in the small print just above the part where the purchase price is on the first page of page 20, it has a municipal address, 745 New Westminister. Do you see that?

MR. SCHEIN: Yes.

THE DEPONENT: Yes, sorry.

MR. MARR: So, I don't think there's any -- I mean, counsel, maybe we should do it like this. I mean, I don't think ---

MR. SCHEIN: Mr. Marr, you said "74". That's why I interceded.

MR. MARR: Oh, okay. If I said that, it was an accident.

MR. SCHEIN: I'm sure it was. There's no issue on this matter ---

MR. MARR: Right. I assumed not.

MR. SCHEIN: --- as far as I know.

MR. MARR: Okay. So ---

MR. SCHEIN: If there is, or if something comes to light to suggest that we've got the wrong corporation number, or something like this, I'll let you know.

BY MR. MARR:

58. Q. All right. Fine. So, turning back, then, to page 7 of Mr. Lewis' affidavit, at ---

MR. SCHEIN: Sorry, page 7 of the record?

BY MR. MARR:

59. Q. Page 7 of the record which is paragraph 4 of his affidavit. I take it that Mr. Lewis has said that this project had 120 units; is that correct?

A. Yes.

60. Q. All right. And for all 120 units, I take it the vendor was Cantertrot; is that correct?

A. Yes.

61. Q. And this project ---

MR. SCHEIN: Initially.

BY MR. MARR:

62. Q. Well, Cantertrot entered into Agreements of

Purchase and Sale with 120 people; is that correct?

A. Yes.

63. Q. And do you know the dates from when Cantertrot entered into these 120 agreements? What was the range? Did it start -- I mean, my understanding is it probably started in 1999 and went to 2002. Am I right in that?

A. That sounds about right.

64. Q. And I take it from your files you would know the identity of all 120 people that Cantertrot entered into agreements with?

A. Myself personally? No.

65. Q. The company.

A. Well, we would have files on each of the -- we would have a purchase and sale agreement of each of the 120 units.

66. Q. So, the answer is you could find out that information if you made the inquiry?

A. To the original purchasers, yes.

67. Q. And I take it that some of the -- I understand the -- let me ask the question a different way. The condominium, the declaration was registered, and you'll see it's in my clients' materials at tab F. It was registered on June 28th, 2002. That's what his affidavit is saying, and that's the actual registration. That's your understanding; is that correct?

MR. SCHEIN: June 28th, 2002, yes. He said
so ---

MR. MARR: In his affidavit. That's correct.

BY MR. MARR:

68. Q. And I take it that after the registration,
some of the original 120 had sold the units, and they
directed title to go to somebody else? Am I right in that
understanding?

A. That's normally the case. I don't know the
specifics on these.

69. Q. Well, let me try to -- let's try to do this a
slightly different way. If we take a look at the affidavit
at paragraph 20, my client's affidavit, page 13 of the
record? You'll see that we're proposing two groups of
people who would be in the class.

Paragraph 1 would be the people who entered
into agreements with Cantertrot, and who closed with
Cantertrot, who took title from Cantertrot, and I take it
that you could, by looking through the corporate records,
identify for me how many of those people there were, and
who they are; am I right in that?

A. I think we'd be able to.

70. Q. And the second proposed group of people are
people who entered into agreements not with Cantertrot, but

with somebody else, but who Cantertrot transferred title to after June 28th, 2002.

So, these would be the people who directed on closing that title be taken by somebody else, presumably because they sold it to a third party. Could you identify those people as well by looking at the records?

A. I'm sure there's information there. It's a public record.

71. Q. Okay, but it's not just a public record. These would be in your files?

A. I would hope so, yes.

MR. MARR: Counsel, can you undertake to provide for me the names of the persons described in paragraphs 21 and 22 of Mr. Lewis' affidavit?

MR. SCHEIN: No.

MR. MARR: Why not?

MR. SCHEIN: I don't think you need those names for the purposes of the certification motion.

REFUSAL NO. 1: To provide the names of the persons described in paragraphs 21 and 22 of Mr. Lewis' affidavit.

MR. MARR: Okay, I hear you. I'm not sure I agree with you, but I take it for the purposes of

the motion, you would agree that after certification, you would be able to provide those -- the groups of the proposed class?

MR. SCHEIN: I agree that if we were required to do so, we could do it.

MR. MARR: Okay, thank you.

MR. SCHEIN: We have the capability.

BY MR. MARR:

72. Q. All right. Remind me when you said you became the Vice-President? I forgot that.

A. About two years ago.

73. Q. Do you have an exact date, or exact month?

A. It would have been in December 2003 -- November 2003.

74. Q. So, at the time that the declaration was registered, you were the controller?

A. Yes.

75. Q. And who did you report to in your position as controller?

A. The principals of each of the divisions.

76. Q. Well, you were involved in this project.

A. Yes.

77. Q. Who did you report to? Which individual did you report to for this project?

A. George Hofstedter.

78. Q. And what division was that? He was the principal of what division?

A. Construction.

79. Q. And did Mr. Cappe report to you, or did you report to Cappe, or you were -- sort of, not reporting to each other? You were on the same level on the corporate structure?

A. We'd probably be on the same level in the corporate structure.

80. Q. All right. Now, looking at the agreement that Mr. Lewis signed, the one at tab A, would you agree with me that -- and you'll see that -- if we just look at this agreement for a second, there's pre-printed parts, and then there's some handwritten parts, and then there are some parts that are typed.

And I take it the pre-printed portion was prepared -- well, maybe I shouldn't say that. Who would have actually -- sort of, been involved in the preparation of this? Is this Cantertrot? It's Cantertrot's agreement; correct?

A. It's Cantertrot's agreement. It would have been signing this agreement, but it would be prepared by -- I actually don't know. I'm not involved in this process.

81. Q. All right. But in any event, all 120

purchasers would have entered into the same Agreement of Purchase of Sale, save and except that the handwritten parts and the typewritten parts would be different for each unit, but the pre-printed forms would be the same for all 120; is that correct?

A. I'm not actually sure of that, because I don't -- this is not -- I don't sign or see these Agreements of Purchase and Sale.

MR. MARR: Well, counsel, is there any evidence to the contrary that you're going to be leading on the certification motion?

MR. SCHEIN: I don't know. I haven't considered the point.

MR. MARR: Well, will you consider and let me know? I mean, our evidence was that all 120 would have signed this agreement. That's what Mr. Lewis has said.

MR. SCHEIN: Same form of agreement?

MR. MARR: Same form of agreement.

MR. SCHEIN: I'll look into that.

UNDERTAKING NO. 1: To advise whether all 120 purchasers would have entered into the same Agreement of Purchase and Sale, save and except that the handwritten parts and the typewritten parts would be different for each unit.

BY MR. MARR:

82. Q. Similarly, at tab E, this is the disclosure budget?

MR. SCHEIN: Correct.

BY MR. MARR:

83. Q. And would you agree with me that before executing the agreements, all 120 purchasers would have received exactly the same budget?

A. They should have, yes.

84. Q. And you don't have any information or evidence that they didn't?

A. No.

85. Q. And this was something that was prepared for Cantertrot by H&R Property Management?

MR. SCHEIN: He said he wasn't sure who actually prepared it, but there's no question it's a Cantertrot document.

MR. MARR: No, he was talking about the

agreement. I'm now talking about the budget.

MR. SCHEIN: Oh, I'm sorry. Pardon me.

BY MR. MARR:

86. Q. The budget, just to be clear ---

A. Yes.

87. Q. --- was something that H&R Property Management would have prepared for Cantertrot ---

A. Yes.

88. Q. --- to give to the purchasers?

A. Yes.

89. Q. To comply with the requirements under the Condominium Act, as you understood it?

A. Yes.

90. Q. And it would have been understood that all 120 purchasers would have been relying on this information in making their decision as to whether or not to enter into the Agreement of Purchase and Sale?

MR. SCHEIN: How is he supposed to know what they relied on?

BY MR. MARR:

91. Q. Well, when you were preparing it, did you understand -- was it your intention that they could rely on this information?

A. For the first year, yes.

92. Q. In making the decision as to whether to buy or not, it was your intention that they could rely on this information as being accurate; correct?

A. Yes.

93. Q. And you understood that the purchasers, even after they signed, they had a 10 day period under the Act to change their mind? A cooling off period?

A. Correct.

94. Q. So, you understood that the purchasers, all 120 of them, could go home, look this over, and if they didn't like what they saw, they could change their mind and get out of the agreement without any problem within that 10 day period; correct?

A. Yes.

95. Q. And this document, this budget, it was never revised at any time prior to the registration of the declaration?

A. No.

96. Q. And to your knowledge, were there any discussions amongst the people at H&R about whether or not to change or revise this document?

A. No.

97. Q. There were none?

A. There was never any discussion to change this

budget.

98. Q. Was there -- and maybe I need to make that question slightly clearer. I know it wasn't changed, but to your knowledge, was there ever any discussions where you considered changing it?

A. No.

MR. MARR: Counsel, you maybe can help me with this as much as your client. If you look at the pleadings -- did you bring your Defence, by chance?

MR. SCHEIN: I'm sorry, I didn't.

MR. MARR: Okay. The claim itself is in the -- is at tab 3 in the certification motion.

MR. SCHEIN: Okay.

MR. MARR: And I'm just talking now about paragraphs 5 to 9. I just want to -- I don't think any of this is contentious, at least for the purpose of the motion, but I just want to be clear.

When I was -- in your Defence -- I'll let you take a look at it.

MR. SCHEIN: Thank you.

MR. MARR: When I'm just going through the various people -- for example, if you look at paragraph 5, and I've said that Sandor Hofstedter is an officer, director and president of Cantertrot, am I correct that you're admitting that

all that information is true? You're just objecting to the use that he's a businessman?

MR. SCHEIN: Yes.

MR. MARR: Okay. So, there's no -- other than that characterization, without -- you haven't admitted these people are businessmen, but is the information otherwise in paragraphs 5, 6, 7, 8 and 9 correct as to their positions, and so on?

MR. SCHEIN: Yes.

MR. MARR: Okay. Then, I don't have to ask the witness that. That's fine. Thank you.

MR. SCHEIN: It just occurred to me, I'm not sure we've put our Defence in our material. I take it you wouldn't have any objection if we found it necessary to tender a copy of it at the hearing -- or prior to the hearing, would you?

MR. MARR: No. I think what we can do is before the hearing, we could talk about what additional things maybe should go in front of the court, and maybe we can file some sort of supplementary joint book.

The Defence will be one, perhaps the particulars is another that isn't in there, and there may be exhibits, for example. I don't object to that, but I think coordinated, we can do it to

save some paper.

MR. SCHEIN: Thank you.

BY MR. MARR:

99. Q. Let's talk a bit about the budget preparation.

Now, you say that, in paragraph 6 of your affidavit, the initial draft was prepared by Mr. Cappe; correct?

A. Yes.

100. Q. Now, Mr. Cappe isn't working at H&R anymore?

A. No.

101. Q. When did he leave H&R?

A. Three months ago, four months ago.

102. Q. Do you know where he is currently working?

A. No.

103. Q. How long had he been with H&R?

A. I'm not sure. He'd been there longer than I had.

104. Q. So, I take it from this, at least the initial draft, it was his job to prepare it; correct?

A. Yes.

105. Q. And I take it that H&R Property Management and Cantertrot were relying on him to prepare it as accurately as possible; is that fair to say?

A. Yes.

106. Q. And I take it that it's the position -- and

your lawyer can help you with this one -- well, I'll start off with you. Sorry, let me go back. Is it your understanding that the budget which the purchasers received was accurate?

MR. SCHEIN: At the time?

THE DEPONENT: At the time it was prepared.

BY MR. MARR:

107. Q. Okay. At the time it was prepared it was accurate. At the time it was received by the purchasers it was accurate?

MR. SCHEIN: Well, bearing in mind that the budget is in itself a prognostication. Let's just remember the context of this. This is an estimate.

THE DEPONENT: It was our best estimate at the time.

BY MR. MARR:

108. Q. At what time? At the time it was prepared, or the time it was received, or both?

A. Both.

109. Q. And it continued to be accurate up to the date of registration of the declaration?

A. It continued to be accurate?

MR. SCHEIN: As an estimate.

THE DEPONENT: As an estimate.

BY MR. MARR:

110. Q. Yes?

A. Yes.

111. Q. And I take it that you and all the other Defendants were relying on Mr. Cappe to prepare the budget as an "accurate estimate", to use your words?

A. Yes.

112. Q. All right. And that would be true -- when I say all the Defendants, just so that you're clear, I'm talking about all the companies and individuals listed in the style of cause, and H&R Property Management.

Would your answer remain the same, given what I just said? In other words, all those Defendants as listed, and H&R Property Management were relying on Mr. Cappe to prepare the budget accurately?

MR. SCHEIN: Are you presupposing that all of these people actually knew Mr. Cappe was doing something here? Or are you just saying ---

MR. MARR: Well, let's talk about that, then.

BY MR. MARR:

113. Q. The agents knew that a budget was prepared, because they were the ones who gave it to the purchasers;

correct?

A. Yes.

114. Q. So, the agents, Ms. Gorender and Norman Hill, would have been relying on Cantertrot, anyways, to give them an accurate budget estimate; correct?

A. Yes.

115. Q. And did they know that that job was assigned to Mr. Cappe and H&R Property Management?

A. I'm not sure.

116. Q. I take it that -- did the other Defendants, the H&R Defendants, the two Hofstedters, Mr. Mandelbaum, and Ms. Lewin, they knew about this project, I assume. Am I correct in that?

A. They would have known about the project.

117. Q. And they would have known that as part of the project, a budget -- a disclosure budget would have to be prepared; correct?

A. Yes.

118. Q. They would be generally familiar with the process; correct?

A. Yes.

119. Q. And they would have known that that budget was going to be prepared by H&R Property Management, because they would know that that was their function; correct?

A. Yes.

120. Q. And would all of those individuals have known that it was Mr. Cappe that was going to have the primary job for that?

A. I'm not sure whether Sandy Hofstedter and Mark Mandelbaum would have known specifically it would be Stan Cappe, but ---

MR. SCHEIN: But the others, yes?

THE DEPONENT: But the others, yes.

BY MR. MARR:

121. Q. All right. So, even -- but all the H&R Defendants would have at least known that for this project, the budget statement would have been prepared, and that H&R Property Management was going to prepare it; is that fair to say?

A. Yes.

122. Q. And they would have -- all those Defendants would have been relying on that statement being accurate; correct? For the purchasers?

A. Yes.

123. Q. Now, you said in your affidavit that you and Ms. Lewin had a limited involvement in the budget process. Do you see that? That's at paragraph 6, still.

A. Yes.

124. Q. Well, let's talk about you, first of all.

What was your involvement? What did you do?

A. I would have reviewed the budget that Stan had prepared for reasonableness. One of the things I would have checked was has he remembered to include GST in all of his costs, that kind of thing, and just overall, that it made sense on a per square foot basis.

125. Q. And were you satisfied that it did?

A. Yes.

126. Q. Did the first draft change from the one that was ultimately produced for the purchasers?

A. Yes.

127. Q. Do you have any recollection of how it changed?

MR. SCHEIN: You mean the process by which it changed?

MR. MARR: No, the actual change in the numbers.

THE DEPONENT: Like which numbers specifically changed?

BY MR. MARR:

128. Q. Or if you can't give me specifics, general. Whatever you remember about changes in the numbers. Do you have any recollection at all? Did it go up? Did it go down? Or any of the specifics?

A. It did go down.

129. Q. So, the first ---

A. But there was nothing -- it was in the ballpark. I mean, there was no huge movement down.

130. Q. Well, when you reviewed it, did you get it in this form, or did you actually get to see how the calculations were done?

A. I didn't get it in this form. It was a handwritten form.

131. Q. But did you see back up ---

A. No. I didn't see how much kilowatts, or the calculations making up the numbers, or the rate per hour, or those kind of things.

132. Q. You left it to him to do?

A. Right.

133. Q. So, when you say you're -- sort of, you gave it some sort of reasonableness test; right? I think that's what you said, and you mentioned GST, what else -- was there anything else that you were specifically looking for?

You have to verbalize your answer.

A. No.

134. Q. Thank you. And when you -- but you were -- sort of, testing it for reasonableness, in your own mind, anyways?

A. Looking at it overall for reasonableness, yes.

135. Q. And how would you do that? How would you know

that something is reasonable or unreasonable? Are you comparing it to other projects, for example, or how were you doing it?

A. Comparing to other projects, comparing to other market information, compared it to projects at the time.

136. Q. And did you actually look at documents in doing that, or you just did it in your mind?

A. I recall looking at a project that was in the vicinity, Emerald Lanes, or something, a Menkes project.

137. Q. You looked at -- for that project, what did you look at, their disclosure? Or did you look at -- when you say "compared it", what did you look at?

A. Their budget.

138. Q. Okay. And when was this first draft done? What time period are we talking about?

A. I can't recall an exact date, but I think it was some time in 1999/1998.

MR. SCHEIN: Well, the marketing started in September 1999, if that helps you.

THE DEPONENT: So, it would have been done pretty close. Just a couple of months -- probably a couple of weeks before the marketing started.

BY MR. MARR:

139. Q. The draft would have been done a couple of weeks before the marketing?

A. The final. The whole process wouldn't have taken more than a couple of months.

140. Q. So, in the summer of 1999? Does that -- start somewhere in June?

A. I would say July or August, probably.

141. Q. Okay. And when it says that the budget statement for the common expenses for the year following registration, what is the year? When you were looking at it and Mr. Cappe was preparing it, what was the year that it was anticipated to be for?

A. I don't recall. Typically, we know it's going to take a year to build, a year of construction before the unit holders move in, and then typically, we probably build in a year of sales before we start. So, typically, it's a two year. I can't remember if this was any special consideration.

142. Q. So, is there -- does a file exist for this whole process, the drafts, the estimates, how Mr. Cappe did the calculation? Does all of that exist at H&R Property Management?

A. I don't have how he got his calculation, but I have what he gave, his original draft of what he gave us.

143. Q. When you say you don't have it, is that because it doesn't exist anymore, or you don't know where he put it, or -- have you looked, I guess, is what I'm asking.

A. Yes. We looked. We don't know. We don't know where he put it, if he had it, or if he ever wrote it down.

144. Q. Well, when you say you have something, I'm still not quite clear. What is it you're saying you had?

A. I have what he gave me.

145. Q. Which was the first draft?

A. The first draft.

146. Q. Is that, essentially, just a handwritten version with similar numbers to the disclosure budget that's in the materials?

A. Yes.

147. Q. So, it doesn't have, for example, just to take hydro, you can't look in the file and tell me what kilowatt hour he assumed, or how many ---

A. No. It would have just said "hydro" and the number.

148. Q. It wouldn't have the -- just let me finish the question. You wouldn't have the kilowatt hours or the number of hours that went into that calculation?

A. No.

149. Q. Okay. And when you were doing your limited role, I take it that your role -- I'll withdraw that question. What about Ms. Lewin? You say she had a limited role. What was she doing? What's her job, first of all?

A. She's in-house legal manager.

150. Q. Okay. Is she also on the payroll of H&R Property Management?

A. Yes.

151. Q. Okay. And what was her role vis-a-vis this project?

A. She's like the quarterback, if you want to call it that.

152. Q. Okay?

A. So, she put all the different parts together for the project.

153. Q. And with respect to the budget, what specifically was her role?

A. She would have requested that the budget be prepared.

154. Q. Yes?

A. She would have also had a limited review of it overall. She would have been the one passing it on to the agent, and putting it into the disclosure document. She would have had the opportunity to discuss it if anything jumped out at her as well, but again, a limited role.

155. Q. And I take it for neither you nor her, nothing was problematic in terms of either the draft budget or the final budget?

A. No.

156. Q. I mean, you said if something jumps out. I take it nothing jumped out for either of you?

A. No.

157. Q. And you told me earlier that you were reporting at this time, I think, to George Hofstedter? Am I right in that?

A. Yes.

158. Q. And so, he would have -- you would have reviewed this draft budget with him as well?

A. No. I would have -- he had a very limited role in the whole thing. I never actually discussed the budget with him. It could have been Alex passing it off. I don't know whether she discussed it with him, or whether she gave it to the agents, but typically, he would just want to know what the per square foot was. He doesn't really look at the detail.

159. Q. He relies on other people to do that?

A. Yes.

160. Q. And Sandor Hofstedter and Mr. Mandelbaum, they didn't review the budget at all?

A. No.

161. Q. And why are you so definite about that? How do you know that so surely?

A. They weren't involved in the project at all.

162. Q. Well, when you say they weren't involved in the project at all, Sandor was the President of Cantertrot, the vendor; correct?

A. Yes.

163. Q. So, I take it what you're saying to me is he obviously could have asked any questions he wanted. He was the President; correct?

A. Yes.

164. Q. And if he had asked you something, you would have told him; correct?

A. Yes.

165. Q. So, he chose not to be involved, and he left it to others to do this budget work; is that correct?

A. Yes.

166. Q. Okay. And Mr. Mandelbaum was an officer and a secretary of Cantertrot; correct?

A. I believe so.

167. Q. I think your lawyer has already admitted that.

A. Yes.

168. Q. And so, I take it your answer would be the same for him as for Sandor Hofstedter? He could have been involved, but he chose to let others prepare the budget;

correct?

A. Yes.

169. Q. And both of these gentlemen were relying on others to do the job properly; correct?

A. Yes.

170. Q. I think you told me that the project was marketed in September 1999? That's correct?

MR. SCHEIN: That's when it started.

BY MR. MARR:

171. Q. And when were the last agreements entered into, do you know that?

A. I don't know.

MR. MARR: Is that something we could find out, counsel?

MR. SCHEIN: When was the last agreement entered into?

MR. MARR: I guess I'm trying to figure out how long the project was being marketed for, is another way of ---

MR. SCHEIN: Yes. He told you -- he agreed with your proposition earlier that the range was up through at least the early part of 2002.

BY MR. MARR:

172. Q. And just to make something clear, which I think is clear, if we look at the budget itself at tab E, and if you turn to page 40, just so that I'm clear and understanding this, if you look at the middle column there's a monthly assessment figure. It goes from -- I think the low is 171, and the high is 421 per month? Do you see that?

A. Yes.

173. Q. So, that the way this works is ranges of units depending on the size being calculated, the cost per month; correct?

MR. SCHEIN: Based on square footage.

THE DEPONENT: It's a pro rata of the square footage.

BY MR. MARR

174. Q. Right. Based on the square footage. So, it's not, per se, individualized. The same methodology would have went into the calculation. The only variable is the square footage of the unit; is that correct?

A. Yes.

175. Q. Okay. So, that all you'd do is if you take the number on page 39, one page back, which is -- oh, yes, it's repeated here, you then you just allocate it among all

the units based on the square footage; is that correct?

A. Yes.

176. Q. So, all the calculations for hydro, or any of the other items, it's uniform for every unit in the building; correct?

A. Yes.

177. Q. It's not like there's an individual hydro calculation for -- the only variable is that some units are bigger, some are smaller?

A. Right.

178. Q. I understand that. It's uniform -- it's individualized in the sense that there is a variable of the square footage, but otherwise, it's common for all the units in the building; correct?

A. Correct.

179. Q. Okay. So, whether Mr. Cappe did the job excellently or whether he did it poorly, the calculation is going to be the same for all the purchasers; correct?

A. Yes.

180. Q. Now, let's take a look at paragraph 17 of your affidavit, and we're talking here about the letter that's Exhibit G to Mr. Lewis' affidavit. That's what you're speaking of?

A. Mm-hmm.

181. Q. Now, you say you didn't see this letter until

after the lawsuit was started; correct?

A. Yes.

182. Q. Is that answer the same for all of the other Defendants?

A. Yes. As far as I know, yes.

183. Q. And is the letter itself in H&R files?

A. Now it is.

184. Q. Now it is, because I've given it to counsel. Before I gave it to your lawyer, was it in the files?

A. No.

185. Q. And you've looked as part of this process, I take it, to see the files, and you're saying that the letter, at least, isn't in the files?

A. Yes.

186. Q. Okay. And has anybody asked Mr. Cappe about that since the letter has come to your attention?

A. I think he had already left when we got this letter.

187. Q. Okay. And since he's left, has anybody spoken to him and asked for some explanation as to why it's not in the files when it seems to have been sent?

A. No.

MR. SCHEIN: No.

BY MR. MARR:

188. Q. Okay. And leaving aside the when and where the letter, or if it was received, what about the information in the letter? Was that all news to you as well? Did you know that Mr. Weinberg had these concerns in June of 2002?

A. In June of 2002? No, this was all new. It would have been news in June 2002. This would have all been news to us.

189. Q. No, but I guess what I'm asking you is here we are in June 2005. I'm asking you in June 2002, you told me you didn't get the letter or didn't see it in June 2002. I have your answer there. What I'm asking you now is in June 2002, did you know that Mr. Weinberg had these concerns?

A. No.

190. Q. And that is the same answer for all the other Defendants? Nobody else knew that there were these concerns?

A. I believe so, yes.

191. Q. Let's be a little more specific. Looking at the letter itself, in the second paragraph, there is a concern about the security hours, and Mr. Weinberg is saying that the building -- I think he's saying that in his opinion, the building needs 24 hour security.

MR. SCHEIN: On-site security.

MR. MARR: On-site security.

BY MR. MARR:

192. Q. Were you aware that there was a concern -- were you or any of the Defendants aware in June 2002 that there was a feeling that the building needed 24 hour on-site security?

MR. SCHEIN: You mean Mr. Weinberg's feeling, that he was expressing ---

MR. MARR: Or anybody else's feeling. His feeling, or if someone else told it to them, I guess. I would want to know that too.

MR. SCHEIN: Well, no one else told it to them. So, the question is: Did you know that in June 2002, Mr. Weinberg had the opinion that your security should be on-site 24 hours? Did you know that in June 2002?

THE DEPONENT: No. Stan would be dealing with Robert Weinberg. I had no dealings with him.

BY MR. MARR:

193. Q. Okay. And just to talk about his role for a second, I mean, what had happened was that before the -- this is just before the registration of the declaration, this letter; correct? Because the declaration is -- you

have to say yes. You're nodding.

A. Yes. Sorry.

194. Q. All right. And the people had moved in, according to your affidavit, the first occupants began to take possession in February of 2002; correct?

A. Yes.

195. Q. And in this time period, your affidavit at paragraph 13 says that the final closings took place in August of 2002, and the turnover took place September 2002; correct?

A. Yes.

196. Q. So, the turnover, by that, what I understand that means is that the declarant, Cantertrot -- H&R is -- after September 26, 2002, the owners take over management of the building, but before the turnover, it's H&R; am I right?

MR. SCHEIN: It's Cantertrot.

MR. MARR: Cantertrot?

BY MR. MARR:

197. Q. Maybe you explain me the process for the record, rather than me trying to -- what's your understanding of what happens on turnover?

A. From registration till turnover, the condo corporation is managed by an interim board which the

developer appoints in that interim, the developer being Cantertrot.

198. Q. And then after turnover, it's the owners who appoint the members of the board or elect them; correct?

A. Right.

199. Q. Between the time that the purchasers took occupation until the turnover, H&R Property Management asked Percel to manage the property for them?

A. Yes. They were managing it during that period. I'm not sure what period they started.

200. Q. Is there a contract, a written contract, between Percel and H&R?

A. Not that I'm aware of.

MR. SCHEIN: Is there one between Percel and Cantertrot, which is probably what the question was meant to say?

THE DEPONENT: I don't think so.

MR. MARR: Well, if there is a -- can you look and let me know if there's a contract with Percel and produce it?

MR. SCHEIN: I'll take it under advisement.

UNDER ADVISEMENT NO. 1: To look and advise if there was a contract with Percel.

BY MR. MARR:

201. Q. And in this period from February till September when the purchasers were in occupation, I take it there was 24 hour security in place at that time? 24 hour on-site security?

A. Yes. And the reason ---

MR. SCHEIN: He didn't ask you the reason. The answer is yes.

BY MR. MARR:

202. Q. You tell me the reason. You were about to tell me something, so I'll ask it now. What was the reason that it was 24 hour security?

A. Between occupancy and still in-between phase, construction workers are in and out, unit holders are moving in and out. So, in that phase, we felt it was prudent to have extra security, or an extra person on staff for a time, at least, to deal with the conflict between the buildings, the move-ins, and the tenants.

203. Q. Who would have been making that decision, Mr. Cappe or you?

A. Mr. Cappe.

204. Q. And just looking at the letter again, it's true that there was not a designated superintendent suite in this project?

A. There's Percel there.

205. Q. Percel says -- you see the second paragraph of the letter? It says, "The situation would be different if the declarant had created a superintendent suite and hired a super." My question was: There was no superintendent suite?

A. Correct.

206. Q. Is it true that -- is this statement that -- do you see in the middle it says,

"Once the main computer system set up is completed, all building security systems (condo plex) will be monitored at the front desk (day or night)."

Is that true?

A. I don't know, but I know that it could be changed.

207. Q. Well, does the building have-- as I understand, the building has visitor's parking in the underground. Is that your understanding?

A. Yes.

208. Q. And the visitors can't -- if there's no security person to let the visitors in, someone will have to come down from their unit to let them in; is that right?

A. I'm not sure.

209. Q. It's not set up so that you can ---

A. I don't know. I don't know.

MR. SCHEIN: Okay, you don't know.

BY MR. MARR:

210. Q. And just so that I'm clear, you're saying that you don't know -- I take it you're saying you don't know if Mr. Cappe got this letter or not? That's your evidence?

A. Correct.

211. Q. So, you're saying that you don't -- no one, other than, perhaps, Mr. Cappe, but no one from H&R knew that Mr. Weinberg had a concern -- looking at the very last sentence of the letter -- that no one than perhaps Mr. Cappe, if he got the letter or spoke to Mr. Weinberg -- but in any event, no one else from H&R and none of the other Defendants knew that Mr. Weinberg was concerned that the second year budget would likely double to balance it with the required expenses to operate efficiently?

A. Yes.

MR. SCHEIN: You're quoting from the letter?

MR. MARR: I'm quoting from the letter. I'm saying that ---

MR. SCHEIN: I got your question.

THE DEPONENT: No one else.

BY MR. MARR:

212. Q. Mr. Cappe or -- that's it? No one else from the Defendants would have known that; correct?

A. Yes.

213. Q. And just -- you're sure that Mr. Cappe didn't discuss this letter or any of the issues raised in the letter with any of the other Defendants, to the best of your knowledge?

A. To the best of my knowledge, no, he didn't.

214. Q. Now, you told me earlier that there was never any discussion or contemplation of ever changing the budget among the Defendants. At any time before June 28, 2002, were any of the Defendants -- did any of the Defendants consider whether or not any changes to market utility costs required an amendment to the disclosure budget?

A. No.

215. Q. Were the Defendants aware of any changes in the market price for hydro or other utilities occurring between the time the sales commenced and the registration of the declaration?

A. Were the Defendants aware of any increase in utility rates? As besides as we see on our own private bills, residential bills, no.

216. Q. And in paragraph 20, you're saying -- paragraph 20 of your affidavit -- you're saying that late

November 2002 was the first time that you became aware there would be a shortfall in the first year of operations?

A. Yes.

217. Q. During the occupancy period, I take it that all the costs are being paid by the declarant; is that correct?

A. Yes.

218. Q. And after the registration, but before the turnover, how did that work? How did bills get paid?

A. Sorry, after the registration?

219. Q. Well, after the registration, but before the turnover. So, there's a gap in there; right?

A. Percel.

220. Q. Well, where do they get their money from? Are they collecting it from the units?

A. They're collecting it from the units.

221. Q. And in that period, before November, was there any shortfall that H&R had to give over?

A. No. I think in November was the first time we were asked to contribute to the shortfall.

222. Q. So, turning now to the agents for a second, I take it that Norman Hill Realty was hired by Cantertrot to sell the property?

A. Yes.

223. Q. And was there a listing agreement for that?

A. I don't know.

MR. MARR: Can we get a copy if it exists?

MR. SCHEIN: No. I don't see the relevance of that.

REFUSAL NO. 2: To provide a copy of the listing agreement.

BY MR. MARR:

224. Q. Well, were they the exclusive selling agents for all 120 units, for the entire project?

A. I believe so, yes.

225. Q. And they would have met with all 120 purchasers that Cantertrot entered into agreements with; correct?

A. Yes. I would think so, yes.

226. Q. And was anybody other than Ms. Gorender involved in this project from Norman Hill?

MR. SCHEIN: There was somebody else before her.

THE DEPONENT: I think they had somebody else before her.

MR. SCHEIN: Like for a very, very brief period of time.

THE DEPONENT: I think at the very beginning of the project there was someone else, and she took

over from there on.

MR. MARR: Can we find out who that someone else was?

MR. SCHEIN: I'll try and find the name.

UNDERTAKING NO. 2: To use best efforts to advise who the real estate agent was before Ms. Gorender.

MR. MARR: Looking at paragraph 11 of the Statement of Claim, that paragraph is not being admitted, counsel?

MR. SCHEIN: Do you have the Defence handy?

MR. MARR: I did. Did you give it back to me? I don't remember now. Yes.

MR. NADLER: Well, I think the reason simply, it provides for a legal conclusion that is up to the court in this matter to decide upon. It's not something that is a fact that is properly -- can be properly admitted or denied in a pleading.

MR. MARR: Well, let me just explore that slightly, because I think it's relevant to the issue of the motion. I take it there's no dispute that she was employed by Norman Hill -- Gorender was?

MR. SCHEIN: I'm not sure if it was an employment

relationship or an agency relationship. But she was certainly affiliated with Norman Hill. She was there because Norman Hill had the listing.

MR. MARR: Okay. And counsel, you indicated to me in correspondence that although there's an applicable insurance policy in this matter, they're not reporting this to their insurer, Norman Hill?

MR. SCHEIN: To date, they have not made a claim on any insurance policy.

MR. MARR: Is there any indemnification agreements amongst any of the Defendants?

MR. SCHEIN: I'm not answering the question.

REFUSAL NO. 3: To advise if there are any indemnification agreements amongst the Defendants.

BY MR. MARR:

227. Q. So, in any event, someone from Norman Hill, whether it's Ms. Gorender or this other person, would have met with all 120 purchasers; correct?

A. Yes.

228. Q. And they would have given them the disclosure statement and the disclosure budget? The agents would have given it to the purchasers?

MR. SCHEIN: The budget is part of the disclosure

statement.

MR. MARR: Right.

MR. SCHEIN: So, the answer is yes, they gave them the disclosure statement which included the budget.

MR. MARR: Okay. Thank you.

BY MR. MARR:

229. Q. And the flyer that's found at tab C of the certification motion -- there's two of them, actually. There's one at tab C, and there's one at tab D. Each one of the Plaintiffs got one of these? The only difference seems to be the date at the bottom, the very bottom right hand corner.

MR. SCHEIN: That's not exactly right.

MR. MARR: There's differences on the -- there's differences on the price.

MR. SCHEIN: And the models are not characterized exactly the same way. But if your point is are they both estimating \$0.32 a foot? The answer is yes.

BY MR. MARR:

230. Q. Okay. So, all 120 purchasers would have received a flyer from the agent with at least the

maintenance fee portion of the flyer, the \$0.32 a square foot? That would have been -- and all the wording at that section would have been identical, and would have been received by all 120 purchasers?

MR. SCHEIN: We're not sure. I don't know how we can answer that question.

MR. MARR: Well, one way would be to ask the agents.

MR. SCHEIN: Okay. That is one way.

MR. MARR: Have you done that?

MR. SCHEIN: Sitting here today, I don't know that anyone sitting in this room can tell you that every single person that walked in the door got handed a flyer.

MR. MARR: Well, you're acting for all the Defendants.

MR. SCHEIN: That's correct.

MR. MARR: So, sitting here in this room, is there any evidence that they didn't all get it? Let's start with that.

MR. SCHEIN: We don't know what they did get or what they didn't get in terms of the flyer. We can only tell you that they all got the disclosure statement.

MR. MARR: Well, the ---

MR. SCHEIN: And we don't have any evidence from every single owner, by the way, that they did get it. So, it's not like there's something on the table for us to deny.

MR. MARR: Well, it was prepared for the project.

I guess why don't you ask the agents if everybody got a flyer with that estimate?

MR. SCHEIN: We'll make that inquiry.

UNDERTAKING NO. 3: To ask the agents if all the purchasers received a copy of the flyer.

MR. MARR: And you can ask them if the flyer was in the sales office available for the purchasers when they would have come in, all 120.

MR. SCHEIN: We will ask that.

UNDERTAKING NO. 4: To advise if the flyer was in the sales office available for the purchasers when they would have come in, all 120.

BY MR. MARR:

231. Q. Did you know about the flyer yourself?

A. No.

232. Q. Had anybody from -- who prepared the flyer?

The agents? Am I assuming that correctly?

A. I believe the agents did.

233. Q. Did they review it with anybody at Cantertrot, or H&R Property Management, or any of the Defendants before they distributed it?

A. I'm not sure. They didn't with me. I don't know if they did with any other Defendants.

MR. MARR: Sorry, counsel. When you're asking the agents for the undertakings, can we ask the question slightly differently? Was there ever a flyer prepared which had this maintenance fee information different than that as what is in here? Can we ask them that?

MR. NADLER: So, to replace the prior ---

MR. MARR: No, in addition. I want to know if there was ever a flyer prepared which had maintenance fee information different than that contained in the exhibits in the Motion Record.

MR. SCHEIN: We'll ask that.

MR. MARR: And can we ask them if they reviewed ---

MR. SCHEIN: Sorry, I'm going to ask that on the basis -- let me qualify that. I'm going to ask if there was ever a flyer with different maintenance fee information that was prepared and disseminated.

MR. MARR: No, I think I'd want it whether it was prepared and disseminated. I think that's two requests. You can agree to one, and refuse on.

MR. SCHEIN: That's what I'm doing.

UNDERTAKING NO. 5: To advise if there was ever a flyer with different maintenance information that was prepared and disseminated.

REFUSAL NO. 4: To advise if there was ever a flyer with different maintenance information that was prepared, whether or not it was disseminated.

MR. MARR: And can you ask them, as well, if they reviewed the flyer with anybody at H&R Property Management, or with any of the other Defendants?

MR. SCHEIN: All right.

UNDERTAKING NO. 6: To advise if the agents reviewed the flyer with anybody at H&R Property Management, or with any of the other Defendants.

BY MR. MARR:

234. Q. And I notice from the flyer that the sales office was closed on Saturday. Do you see that? I assume

that that's instructions from the vendor, that they didn't want sales taking place on the Jewish Sabbath; am I right about that?

A. Yes.

235. Q. Can you ask the agent where they got the specific figure of \$0.32 a square foot? Did they calculate that themselves, or did they get that information from H&R? How as that arrived at?

MR. SCHEIN: We'll ask.

UNDERTAKING NO. 7: To advise how the agent got the specific figure of \$0.32 per square foot.

BY MR. MARR:

236. Q. Mr. Froom, is that \$0.32 figure -- it's not in the budget itself, I don't think. Is that a figure that H&R Property Management did calculate at the time the budget was being prepared?

MR. SCHEIN: You mean did somebody actually sit there with a calculator?

MR. MARR: Well, the number is there.

MR. SCHEIN: The number is there, and the square footage is known, and the 413 is known, and anyone with a calculator can figure this out.

MR. MARR: Well, when you say the square footage

is known, I mean -- okay. I guess the question is:
Is that a number -- I've already asked what you're
going to ask the agent, but I'm just asking now of
the witness.

BY MR. MARR:

237. Q. Is that a number -- in 1999, when the budget
was being finalized, was part of your understanding of the
budget that it came out to \$0.32 a square foot? Did
someone at H&R Property Management actually do the math
that your lawyer said could be done? Did somebody actually
do that?

A. Yes.

238. Q. And is that because it was that -- when you
were telling me that you were testing the reasonableness of
a number, is that a number that you considered reasonable,
\$0.32 per square foot?

A. Yes.

239. Q. And that was comparable to other buildings in
other condominium projects? Is that your understanding?

A. Yes.

240. Q. In paragraph 6 of your affidavit, you say in
the very last sentence there was a minimal profit. Do you
see that?

A. Yes.

241. Q. What is "minimal"? What number is that?

MR. SCHEIN: Actually, I think it was a loss.

THE DEPONENT: It was a loss.

BY MR. MARR:

242. Q. Okay. What number was that?

A. It was a loss of \$1 million before land.

243. Q. You say in the affidavit that none of the individual Defendants played any role in the distribution of sale proceeds. Do you see that? It's a couple of sentences up from the one -- in the same paragraph, it says, "None of the individual Defendants played any role in the distribution of sale proceeds." Do you see that?

A. Mm-hmm.

244. Q. If it wasn't the individual Defendants who played that role, who did play that role?

A. It was an automatic process where the bank loan was repaid.

MR. MARR: Counsel, are you prepared to provide me with the financial statements that go behind these statements here in the affidavit? I assume there are financial statements that support what's said in the affidavit. Are you prepared to produce that?

MR. SCHEIN: I'll take it under advisement.

UNDER ADVISEMENT NO. 2: To provide the financial statements that support what's said in the affidavit.

BY MR. MARR:

245. Q. I would want -- when you say no profit was realized in the distribution of the sale proceeds, it was done automatically, is that all the financial statements of Cantertrot? Is that where I would be -- where you're getting this information? Or is there another company?

A. Cantertrot is just a bare trustee company. It doesn't have any -- anything it had was tied with the land.

246. Q. So, who are the cheques written to for the agreements? The deposit cheques and the closing cheques. Aren't they given to Cantertrot?

A. They were made out to Cantertrot and deposited by an agent of Cantertrot.

247. Q. Who got ---

A. That was managing the project, who was H&R managing the project for Cantertrot.

248. Q. So, did all the money for this project go into H&R Property Management Inc.?

A. No.

249. Q. Okay. So, where ---

A. It was a ---

MR. SCHEIN: It went to the bank.

THE DEPONENT: There was a separate bank account set up for the project.

BY MR. MARR:

250. Q. And whose name is the account in?

A. I'm not sure.

MR. SCHEIN: I'm not sure it makes a difference.

I'm not sure what difference it makes whose name was on the account. What difference, presumably, if it's important, ultimately, assuming this matter proceeds, arguably is where the proceeds went, and he's given you that information. Because you're asking for details basically for what is a conduit. There's nothing substantive.

MR. MARR: Well, a conduit of what? I mean, it's ---

MR. SCHEIN: Sale proceeds to repay a bank loan.

BY MR. MARR:

251. Q. Well, who borrowed the money from the bank?

MR. SCHEIN: Don't answer that question.

REFUSAL NO. 5: To answer who borrowed money from the bank.

BY MR. MARR:

252. Q. Well, you've told me that the vast bulk of the sale proceeds went to cover costs. Whose costs?

A. Cost of the construction.

253. Q. But the cost of the construction would have to be some person or corporation's cost. What person or corporation had those costs?

A. There was a separate set of books set up for the construction and sale of this whole thing.

254. Q. Whose books were those? Which corporation?

A. They were administered by H&R on behalf of Cantertrot.

255. Q. Well, when you say that there was a loss, for example, I would assume if there was a loss, there were financial statements prepared to document that loss. Am I right in that assumption?

A. Yes.

256. Q. And who suffered the loss? Which company?

MR. SCHEIN: Don't answer that question. This is a Cantertrot project. You're asking about -- you're alleging that certain people made off with funds surreptitiously, or channelled them in some improper way, or whatever it is, good luck.

REFUSAL NO. 6: To advise which person or corporation suffered a loss.

MR. SCHEIN: You know, Mr. Marr, you can find this amusing, but when there's an adverse costs award based on your failure to prove fraud and deceit, I'm not sure you're going to find it so funny.

MR. MARR: Just so that I'm clear, there are financial statements that show this loss. You're producing that, counsel?

MR. SCHEIN: I've said I've taken it under advisement.

MR. MARR: And what about the -- I take it there's a set of books which would show what money came into the project and what money went out of the project. Are you refusing to produce those books?

MR. SCHEIN: I'll give you the same answer on that.

UNDER ADVISEMENT NO. 3: To provide the set of books which would show what money went into the project, and what money went out of the project.

BY MR. MARR:

257. Q. So, I assume that you yourself had no personal contact with any of the 120 purchasers prior to the registration of the declaration; am I right in that?

A. Correct.

258. Q. And before the individuals closed their units, you wouldn't have had any contact with any of the purchasers; correct?

A. Yes.

259. Q. And that answer would be the same for all of the Defendants except the agents; am I right in that? Leave out the agents for a second. None of the H&R Defendants, the companies, Mr. Cappe, property management, the two Mr. Hofstedters, Ms. Lewin and Mr. Mandelbaum, none of them would have had individual personal contact with any of the purchasers; is that correct?

A. The only one that might have would be Ms. Lewin, but I'm not sure whether she specifically did.

260. Q. I mean, is it fair to say that the way that you communicate information to the purchasers is through the documents that Cantertrot and the companies created? The Agreements of Purchase and Sale, the disclosure statement and the budget; correct?

A. Yes.

261. Q. And that information is common for all the

purchasers; correct?

A. Yes.

262. Q. It's a global and common way of informing the purchasers about the project; correct?

A. Yes.

263. Q. And just looking at your affidavit and the report that was prepared on the issue of damages, we're starting at paragraph 24 of your affidavit. So, do I take it from this that you're saying that all the purchasers didn't suffer a loss? Is that what you're saying?

A. From paragraph 24?

264. Q. Well, if you read the whole thing from there to the end ---

A. From paragraph 24?

265. Q. To the end of the affidavit.

A. Mm-hmm.

MR. SCHEIN: Just so that we have this straight, when you say "loss", are you saying an increase in the amount that they had to pay in monthly maintenance fees?

Because I think we accept that their actual experience was having to pay increased monthly maintenance fees starting from the time they moved in and onwards up to today.

MR. MARR: All right. And based on this expert

report, you're saying that that doesn't have ---

MR. SCHEIN: We're saying that doesn't translate into a viable damage claim against any of the Defendants.

MR. MARR: Because it doesn't impact on the market value of the unit? Is that what you're saying in paragraph 23?

MR. SCHEIN: Not just that. I mean, there's also the question of mitigation. I mean, there are other legal doctrines out there that bear on it.

MR. MARR: Well, look at 28 (b) of this witness' affidavit.

MR. SCHEIN: Yes?

MR. MARR: He's saying that increased maintenance fees to do not have an impact on the value of the unit.

MR. SCHEIN: He's relying on the report which says that when you go to sell a unit and you tell people that the maintenance fee is \$0.32 as opposed to saying \$0.34, or \$0.38, or some other number, those numbers, according to our expert, do not impact on the value that that unit can be expected to fetch in the market.

At most, it impacts on the speed or the rapidity with which the developer can actually

expect to sell units. In other words, the higher the fee, the longer it may take to, potentially, all other things being equal, to sell out the building.

MR. MARR: So, the statement you made about the lack of impact on the value of the unit, that statement would be true for all 120 units; correct?

MR. SCHEIN: Well, the expert has not differentiated between one unit or another unit.

MR. MARR: These are questions I think your lawyer is going to answer more than you, sir. I'm just now looking at the tests on the motion, and I want to know your position on the various issues.

Under section -- the test under Section 5.1(e) of the Class Proceedings Act, is it -- do you agree that the two Plaintiffs can fairly and adequately represent the interests of the class?

MR. SCHEIN: We haven't cross-examined these fellows. We plan to do it next Monday. We'll answer that question following the cross-examinations. I want to be able to do that first before I respond.

MR. MARR: All right. And if we keep going through the test, Section 5.1(e)(ii), do you agree that the Plaintiffs have produced a plan for the

proceeding that sets out a workable method of advancing the proceeding on behalf of the class, of notifying class members of the proceeding?

MR. SCHEIN: I'm going to give you the same answer.

MR. MARR: (iii), do the Plaintiffs have an interest in conflict of interest to the other class members?

MR. SCHEIN: I'm not aware of anything at the moment. If that changes after I cross-examine, I will advise you.

UNDERTAKING NO. 8: To advise whether the Plaintiffs have an interest in conflict of interest to the other class members.

MR. MARR: Do you agree that the class proceeding raised common issues under the test under 5.1(c) of the Act?

MR. SCHEIN: Same answer.

MR. MARR: And Section 5.1(d) on the preferable procedure, do you agree that a class proceeding would be a preferable procedure for a resolution of the common issues?

MR. SCHEIN: Same answer.

MR. MARR: Section 5.1(a), do you agree that the Statement of Claim discloses a cause of action?

MR. SCHEIN: No.

MR. MARR: What is it in the Statement of Claim that is not a cause of action?

MR. SCHEIN: I'm not sure I'm obliged to give you that answer now. I'm telling you that it's in issue, and be prepared to argue it.

MR. MARR: You're not going to -- before the motion, you're not going to help me as to what the problem is? You just want me to ---

MR. SCHEIN: No, I mean, we've got to do a factum, and it will outline our argument on the point.

MR. MARR: But I have to do the factum first. You're saying that I've got to spend the time for each issue before you'll tell me if some ---

MR. SCHEIN: You can assume for present purposes that you are going to have to prove every aspect of that part of the matter, and draft your factum accordingly.

MR. MARR: Does Cantertrot have any assets?

MR. SCHEIN: I think it's an agreed -- it's agreed in the material that the answer to the question is no.

MR. MARR: Did they ever have any assets?

MR. SCHEIN: Don't answer that question.

REFUSAL NO. 7: To advise whether Cantertrot ever had any assets.

MR. MARR: I don't know how to deal with it. He was shaking his head no, and you were telling him not to answer. I don't know how to deal with that.

You didn't want him to answer, but he was answering.

MR. SCHEIN: I'm instructing the witness not to answer that question. So, you can assume for today's purpose that you don't have an answer, and you have a refusal, and you have your remedies.

MR. MARR: Let's go off.

--- SHORT RECESS

BY MR. MARR:

266. Q. Just one other small point. When you were talking about the first draft that Mr. Cappe had prepared, and you reviewed, and you tested for the reasonableness, and all that, do you still have a copy of that?

A. Yes.

267. Q. I take it you have a file relating to the budget in your possession at the office?

A. Yes.

MR. MARR: Can we get that, counsel?

MR. SCHEIN: No. You can't have the file. I actually don't think there's a file relating to the budget. There's a file that Mr. Froom keeps relating to the project, as I understand it, with a bunch of stuff in it that includes budget material; am I right?

MR. NADLER: That is right. Sorry.

MR. MARR: Okay. So, you won't produce for me the whole file.

MR. SCHEIN: No.

REFUSAL NO. 8: To provide the entire file relating to the Westminster project.

MR. MARR: Okay. What, from that file, if anything, are you prepared to produce for this ---

MR. SCHEIN: This is a cross-examination. Ask your questions.

MR. MARR: Well, the draft, can I have that?

MR. SCHEIN: I'll take under advisement the initial draft.

UNDER ADVISEMENT NO. 4: To provide the initial draft.

MR. MARR: I guess I'd like any documentation he has relating to the budget, which seems narrower than the whole file.

MR. SCHEIN: Same answer.

MR. MARR: You'll let me know. All right.

UNDER ADVISEMENT NO. 5: To provide any documentation relating to the budget.

MR. MARR: Subject to the undertakings, which I'm not sure there were any, and the refusals, those are my questions.

* * * * *

I hereby certify the foregoing to be the Cross-Examination of LARRY FROOM, on his affidavit sworn on the 9th day of May, 2005, taken before the offices of PROFESSIONAL COURT REPORTERS INC. on the 8th day of June, 2005.

CERTIFIED CORRECT:

Shirley Chang,
Stenomask Verbatim Reporter

Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of Shirley Chang, and accordingly are in direct violation of Ontario Regulation 587/91 Courts of Justice Act, January 1, 1990.

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