

CANADA / JUDGMENT

Advanced Glazing v Multimetro et al

2000 BCSC 804

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 804

Citation: Advanced Glazing v Multimetro et al 2000 BCSC 804

Date: 20000525

Docket No.:

S19169

Registry: Nanaimo

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ADVANCED GLAZING SYSTEMS LTD.
PLAINTIFF

AND:

pAMELA FRYDENLUND, MULTIMETRO MORTGAGE CORP., LANDMARK TOWER
CORP., LANDTEC VENTURES INC., 543902 BRITISH COLUMBIA LTD. , AND ALL
PERSONS RESPECTIVELY IDENTIFIED ON SCHEDULE "A"
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LANDER

Counsel for the plaintiff: R.M. Young

Counsel for the defendants, Pamela Frydenlund, Multimetro Mortgage Corp. and other
defendants described on Schedule "A" Counsel for the investors:

M.L. Palleson

G.G. Plottel

Date and Place of Trial: February 9,10,11,14,15,16,17,18,2000

Nanaimo, B.C.

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- [1] The plaintiff's action is for one of negligent misrepresentation by the defendant, Multimetro Mortgage Corp. (hereinafter called "MMC") and its Vice President, Pamela Frydenlund, as agent of investors thereby creating personal liability for each investor in a building project at Nanaimo, British Columbia known as the Landmark Tower Corp.
- [2] In the spring of 1996 the project was promoted by two persons Katerenchuk and Deschamps. These two men had previous dealings with MMC on developments on Vancouver Island which were not successes.
- [3] The plan was to renovate and reconstruct a derelict hotel on Front Street in Nanaimo as well as expand the old building by the addition of a new design structure.
- [4] The projected construction was budgeted at Twenty Two Million Six Hundred Thousand dollars (\$22,600,000.).
- [5] The defendant MMC entered into a mortgage contract with Landmark for the amount of Fifteen Million dollars (\$15,000,000.) on June 7, 1996. The mortgage due and payable period was from July 1, 1996 to June 28, 1998, at the rate of 18% per annum.
- [6] MMC is a corporation which deals through independent financial advisors who obtain funds from investors for specific projects of MMC.
- [7] In the Landmark MMC obtained funds from approximately 1,400 investors whom I will describe as co-lenders.
- [8] At the time of the entering into the mortgage contract MMC had in its possession circa Three Million dollars (\$3,000,000.) received from co-lenders. Thereafter the entire principal sum of the mortgage was received by MMC over the next approximately nine months.
- [9] As construction got underway it was MMC that co-ordinated the payments to the developer Landmark. MMC throughout surveyed the construction in order to assure the work had been done prior to such payments being made.
- [10] The promoters did not advance any equity money to the project. Of the Fifteen Million dollars (\$15,000,000.), the promoter/developers understood they were to receive only Ten Million Three Hundred Thousand dollars (\$10,300,000.).
- [11] Before registration of the mortgage could be effected approximately Two Million Two Hundred Thousand dollars (\$2,200,000.) was required to purchase the property. A further Six Hundred and fifty-four Thousand dollars (\$654,000.) was required to discharge a "loan" called the Vancouver Island Corporate Bond.
- [12] The remaining funds available for construction amounted to Seven Million Four Hundred and forty-five Thousand dollars (\$7,445,000.).
- [13] The records of the defendant MMC show that by March 12, 1997, all but One Hundred eighty-seven Thousand dollars of the face value of the mortgage had been advanced.
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- [14] Advanced Glazing became involved when Glen Robert Allen an officer of the plaintiff and estimator was approached to bid on the project in March of 1997 for glass and fixtures.
- [15] Mr. Allen testified that "I wanted to be absolutely certain Advanced would be paid." Mr. Allen instructed the comptroller of Advanced, Nadine Bourne, to contact Advanced's banker to "check it out." Allen told Ms. Bourne there would be information forthcoming on the project and then to contact the Toronto Dominion the plaintiff's bank.
- [16] The information received came from Stefan Peterson the project manager at Nanaimo for Landmark Tower.
- [17] Allen said that a couple of days later Ms. Bourne came to him with notations on the documents received from Peterson. Allen went on to say "It indicated sufficient. I had a comfortable feeling that Advanced Glazing would be paid. I put my OK on it March 18, 1997."
- [18] Allen emphatically stated in response to Advanced counsel's question about reliance on the information received from Mr. Kraal of the T.D. Bank, "We totally relied on the information."
- [19] Prior to the work commencing Mr. Allen testified about ordering the custom glass and the necessary lead-time required.
- [20] Counsel for the defendant MMC submitted that upon ordering of glass aluminium accessories that a contract thereby had been entered into by the plaintiff with Landmark.
- [21] Mr. Allen told of meetings in Nanaimo with architects through February and March requiring changes.
- [22] Mr. Allen stated that if their participation in the project did not go ahead the company's expenses would be a cost to the company of doing business. I find that there was no contract until such time Mr. Allen placed his "OK" on the fax cover sheet sent to Mr. Ron Kraal, Accounts Manager Toronto Dominion Bank on March 18, 1997. (Exhibit #1, Tab 34 Common Book of Documents).
- [23] Ms. Bourne, the comptroller testified that when she first heard of Landmark was on March 13, 1997, in Mr. Allen's office. She learned that the proposed work of Advanced on the Landmark Tower project would be Seven Hundred Fifty Thousand (\$750,000.) to One Million dollars (\$1,000,000.). She was instructed by Allen to investigate, as she said, "the people." She went on to say, "we made the decision to call our bankers."
- [24] Ms. Bourne said that Advanced had never dealt with an owner before. "If no assurance on payment we wouldn't do the job." Ms. Bourne phoned Commercial Account Manager Ron Kraal at the Toronto-Dominion Bank that she would fax him information about the "people" involved in the Landmark project. This call was made on March 13, 1997.
- [25] The instructions from Ms. Bourne were for Mr. Kraal "to investigate and have assurance we would be paid." She stated Mr. Kraal agreed to do it. She said, "I did not discuss the mechanics. This was a new thing for us, we never dealt with an owner."

- [26] Ms. Bourne had received the documents forwarded by Stefanson which might be termed a basic information sheet about Landmark Tower Corp. On the front page it sets out location of the project, project cost, number of employees, and the company's bank.
- [27] The important item on that page for Mr. Kraal's purpose was reference to "Mortgage Company: Multimetro Mortgage Corp. 300-355 Burrard Street Vancouver, B.C. contact person: Ken Megale. Pamela Frydenlund."
- [28] On March 14, 1997, Ms. Bourne faxed the information sheet to Mr. Kraal. On March 18, 1997, Kraal called Ms. Bourne and as he was talking she had the copy of the fax material, second page information sheet and on it she made notes. The notes have arrows one to MMC and a second one to the name Pamela Frydenlund. The note states "whole mortgage in place Ron Kraal spoke to bank. He advised them we had work 7.5 to 1 mil they said it was fully financed and in place. Ron felt there should be no problem."
- [29] Ms. Bourne went on to say that after she spoke to Mr. Kraal she summarized her conversation with him on the fax cover sheet sent to Kraal: March 18, 1997.
1. Attached TD Bank's requesting info from Royal Bank/Ron Kraal - everything seems to be in order
 2. Multimetro Mortgage Corp.
- project is fully financed and they were advised our works were 7.5 to 1 million - they confirmed to Ron Kraal all financing was in place for the job.
- Ron Kraal felt there shouldn't be any problems.
- [30] This is the document which Ken Allen placed his OK and initials on permitting the work by Advanced to proceed.
- [31] Mr. Ronald Kraal testified that he is an Independent Business Manager for the Toronto Dominion Bank. He has twenty-four years of service, twenty of those years have been in commercial loans.
- [32] Mr. Kraal said that he received a telephone call from Nadine Bourne regarding a credit reference on Landmark. "I asked Ms. Bourne to send me the information. She was looking for a Credit Inquiry Royal Bank, Multimetro Mortgage for \$750,000. to determine if Landmark would be responsible for the amount."
- [33] On March 17, 1997, Kraal received a Standard Credit Inquiry form sent by the Royal Bank. He said, "It did not tell me a lot. I called Multimetro Mortgage, the lending institution on March 18, 1997. I asked for Megale, he was not there. I spoke to Frydenlund. She said, 'Pamela,' I was satisfied."
- [34] The conversation he says he had with Ms. Frydenlund went as follows:

I said I was Kraal and I was acting on behalf of Advanced Glazing and that my client was about to enter into a \$750,000. contract with Landmark. I was told I did not have to worry my client would be paid. Funding was in place. She answered all my questions to my satisfaction. No qualification in the answers.

- [35] Kraal then phoned immediately to Ms. Bourne with the information at which time she made her notations on Exhibit 1, Tab 39.
- [36] Expert evidence by former bankers was called both by the plaintiff and defendant MMC on whether the procedure adopted by Mr. Kraal was proper. I have considered both opinions and have concluded in all the circumstances the method undertaken by Mr. Kraal was proper and acceptable banking practice.
- [37] As a result of Mr. Kraal's evidence there arose an issue of credibility - one that I find to be somewhat unusual. Ms. Frydenlund when called to testify by the defendant and categorically swore that she never spoke to Mr. Kraal. In many circumstances in cases conflicting evidence is advanced as to what was actually said as between persons however, in this instance there is a denial that the conversation ever took place.
- [38] I find that the conversation occurred and it unfolded as Mr. Kraal testified. To conclude otherwise I would have to find that he fabricated his evidence, which I am not prepared to do. I found Mr. Kraal to be a credible witness.
- [39] Ms. Frydenlund testified that her position at MMC was Vice President of Administration. She said she was charged with dealing with financial planners, information brochures and arranging trustee agreements. She related her employment history, which I find to be considerable in the investment business in both Toronto and Vancouver. However, she did say she had no experience in construction or banking practice.
- [40] Ms. Frydenlund testified that she and her husband invested in the Landmark Tower project.
- [41] In her direct examination she stated: "I never spoke to Ron Kraal. Absolutely did not speak to him on March 18, 1997. I have never met or spoken to Ron Kraal."
- [42] Further in her direct testimony Ms. Frydenlund said she was aware of the shortfall on the Landmark project and that the developer was to have pre-sales and commercial financing thereafter. She went on to say, "In March 1997, I was not aware of any financing problems."
- [43] I find as a fact that Ms. Frydenlund was aware of and understood fully the situation relative to the financing of the Landmark project as of March 18, 1997 and as such she relayed misinformation intentionally to Ron Kraal. The evidence reveals that she had a hand in preparation of important documentation utilized by MMC in its operation; Exhibit 1 Tab 62 is a document prepared in order to attempt to obtain second mortgage financing on the Landmark property in the amount of Four Million dollars (\$4,000,000.). This attempt was going on during September of 1997. This is, I find, an example of Ms. Frydenlund's significant involvement in the operation of MMC.

- [44] It is interesting to note that besides being an investor in the Landmark Tower project Ms. Frydenlund received a base salary and a bonus based on the years amount of investment.
- [45] Mr. Kenneth Megale, President of MMC, in his testimony attempted to minimize the role of Ms. Frydenlund in the operation of the company. He said, she did not make significant decisions. He went on to say - "If a trade called, I instructed Pamela to say we had a first or second mortgage. We would not want to take liability for representations. I spoke personally to Ms. Frydenlund about it."
- [46] It is significant that Ms. Frydenlund did not, either in her direct or cross-examination say that she had received such an instruction from Mr. Megale.
- [47] I find that the assurances given to Mr. Kraal by Ms. Frydenlund were untruthful and she made them in the interests of MMC and her own interests. If she had told Mr. Kraal the truth that virtually all the mortgage funds had been disbursed and that there was no arrangements made for conventional financing, Advanced would not have commenced work on the Landmark Tower. Should that occur it would, I find, be soon thereafter that the trades at work on the project would learn that there were not sufficient monies in place to complete the work.
- [48] The recent decision of the B.C. Court of Appeal *Micron Construction Ltd. v. Hongkong Bank of Canada*, [2000] B.C.C.A. 141 *Esson J.A.* discussed and followed the decision of the Supreme Court of Canada in *Hercules Management Ltd. v. Ernest and Young*, [1997] 2 S.C.R.165, the Supreme Court set out five indicia of reasonable reliance:
- (i) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made;
 - (ii) the defendant was professional or someone who possessed special skill, judgment or knowledge;
 - (iii) the advice or information was provided in the cause of the defendant's business;
 - (iv) the information was given deliberately and not on a special occasion.
 - (v) the information or advice was given in response to a specific inquiry or request.
- [49] I find that all five indicia in the case at bar have been fulfilled. The reliance placed on the untruthful representation made by Pamela Frydenlund to the banker for Advanced was reasonable and justifiable.
- [50] I find that the defendant's MMC and Pamela Frydenlund liable for the negligent representation which representation were reasonably relied upon and which caused Advanced Glazing to suffer loss.
- [51] The issue which follows from the above finding is:

If the MMC and Pamela Frydenlund are liable to the plaintiff for negligent misrepresentation, do the investors in MMC stand as principals to MMC as agent such that the investors may be personally liable for the negligent misrepresentation?

- [52] MMC was the main financial co-ordinator for a construction project on the Nanaimo waterfront. Over 1400 parties pooled their money through MMC in order to finance the project and seek an investment return therefrom. Landmark Tower Corp., formerly True West Construction Ltd., was the project developer.
- [53] The various contracts involving these parties are a "commitment letter", an "order form and power of attorney", a "trustee agreement" and "co-lender agreement. "These various contracts contemplate MMC acting as both agent of and trustee for the investors.
- [54] The commitment letter was entered into on 23 April 1996 by MMC as "lender" and True West Construction Ltd. as "borrower". By the terms of this agreement MMC committed to advancing certain funds for the redevelopment project. In exchange, True West secured the loan by a "first mortgage charge" in MMC's favour over the real property involved. There is no language of agency or trust within the commitment letter. However, that MMC entered into the commitment letter as agent for the investors is also clear from Article 1, s.1.1 of the trustee agreement:
- (f) "Commitment Letter" means a commitment letter dated April 23, 1996, issued by MMC (as agent of the Co-Lenders) to the Borrower and accepted by the Borrower";
 - (l) "Mortgage Loan" means the loan to be made by the Co-Lenders pursuant to the Commitment Letter.
- [55] Likewise, Article 1, s.1.1 of the co-lender agreement confirms that MMC entered into the commitment letter as an agent of the investors.
- (e) "Commitment Letter" means a commitment letter date April 23, 1996 issued by the Trustee (as agent of the Co-Lenders) to the Borrower and accepted by the Borrower where-by the Trustee, as agent of the Co-Lenders, agreed to advance to the Borrower up to \$15,000,000;
 - (h) "Mortgage Loan" means the loan to be made by the Co-Lenders pursuant to the Commitment Letter;
- [56] Subsequent to the commitment letter, the trustee agreement was entered into as between "MULTIMETRO MORTGAGE CORP., as agent of the Co-Lenders..." (i.e. investors) and MMC. That the intention was for each of the Co-lenders to enter into the trustee agreement via MMC as their agent is also clear from the signature line, which reads, "Multimetro Mortgage Corp. as agent of the Co-Lenders." This is further verified by Article 1, s.1.1 of the co-lender agreement:

(l) "Trustee Agreement" means the Trustee Agreement dated as of the date hereof entered between the Trustee as agent of the Co-Lender and the Trustee whereby the Trustee has, among other things, agreed to...

[57] Concurrent with the trustee agreement, the co-lender agreement was entered into as between the co-lenders. While MMC is not a party to this contract, it is clear that the intention was to have each co-lender bind him/herself to the co-lender agreement through MMC as agent: the contract is signed "Multimetro Mortgage Corp. behalf of for (sic) the Co-Lenders".

[58] The trustee agreement sets out the terms of the relationship between MMC as trustee and the investors as beneficiaries. The legal framework for the investment scheme having been established, MMC must administer the investment scheme in accordance with the terms of the trustee agreement:

2.1 MMC shall collect the Funds from the Co-Lenders and deposit the same in the Trust Account.

2.2 MMC shall

- (a) Advance the Funds pursuant to Section 3.2 hereof;
- (b) Collect and distribute monies in accordance with Section 3.3 hereof;
- (c) Issue and deal with the Co-Lender Certificates in accordance Article 4 hereof;
- (d) Maintain accounting records and cause accounts to prepare financial statements in accordance with Article 5 of this Agreement;
- (e) Call meetings of Co-Lenders in accordance with Article 6 hereof;
- (f) Provide facilities for the holding of Co-Lender meetings and attend and administer Co-Lender meetings;
- (g) Prepare and distribute all materials to hold Co-Lender meetings in accordance with Section 6.2 hereof; and,
- (h) Institute and prosecute on behalf of the Co-Lenders all such actions, suits and proceedings as may be necessary to enforce the covenants and conditions contained in the Mortgage Loan.

[3] MMC shall be bound to and responsible to the Co-Lenders for:

- (a) Determining if a meeting of Co-Lenders is necessary for any material default or other failure by the Borrower in the performance of its covenants and agreements under the Mortgage Loan; and,
- (b) Report to the Co-Lenders promptly of any material adverse changes in the actions and activities of the Borrower.

[59] Furthermore, the trustee agreement also obliges MMC to act pursuant to terms of the co-lender's agreement:

2.7 MMC shall do all things which the Co-Lenders are required to have MMC do pursuant to the Co-Lender Agreement.

[60] In carrying out these duties of the trustee, MMC is granted incidental powers:

4 MMC shall have such powers as are required or incidental to the fulfillment of its obligations under this Agreement including, but without restricting the generality of the foregoing, the power to sign, execute and deliver on behalf of and in the name of the Co-Lenders such agreements or documents as may be necessary to manage the Mortgage Loan.

5 In connection with the duties of MMC herein specified, MMC may engage or employ any persons as agents, representatives, employees or independent contractors, including, without limitation, lawyers, bankers, notaries, or accountants in one or more capacities and any other advisers which MMC deems advisable and may delegate any of the powers and duties to any agents, representatives, officers, employees, independent contractors or other persons.

[61] Importantly, as part of its duties as a trustee under the trustee agreement, MMC must issue a certificate to each investor that reflects the investment made:

4.1 MMC shall deliver to each Co-Lender a Co-Lender Certificate

1.1(k) "Participation Interest Certificate" means a certificate acknowledging each Co-Lender's undivided share of the Mortgage Loan, ...

1.1(l) "Participation Interest" means, when used in relation to a Lender, all of such rights, title and interests in and to the Mortgage Loan.

[62] It is implicit within Article 1.8 of the trustee agreement that these certificates are transferable:

1.8 This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns.

[63] A specific power of control that co-lenders have over MMC is evident from the co-lender agreement clauses regarding legal proceedings by MMC:

8.1 (a) In the event that the Borrower materially defaults or otherwise fails to perform any covenant pursuant to the terms of the Mortgage Loan a meeting of Co-Lenders shall be convened for the purpose of considering the default or failure and instructing the Trustee as to the course of action to be taken. Until instructed by the Co-Lenders the Trustee shall not be obligated to take any steps or commence any suits, actions or proceedings with respect to any default or failure;

2 The Trustee shall be instructed by means of the passage of an Ordinary Resolution of Co-Lenders instructing the Trustee as to the actions to be taken to enforce the rights of the Co-Lenders...

[64] In addition, the trustee agreement and the co-lender agreement together establish both a general power of investor control and the mechanism through which to exercise this general power:

2.6 MMC agrees to comply with any reasonable directions given by the Co-Lenders. [Trustee Agreement.]

6.1 MMC shall call a meeting when:

- (a) ...
- (b) Co-Lenders representing an aggregate of 20% or more of the Owner Interests request that MMC call a meeting. [Trustee Agreement.]

5.9 Except for those matters which must be determined by an Extraordinary Resolution all matters at any meeting of the Lender shall be determined by Ordinary Resolution. [Co-Lender Agreement.]

7.1 In consideration of providing services pursuant hereto, MMC may receive from the Co-Lenders a reimbursement for all Administrative Costs which it incurs in administering the affairs of the Co-Lenders. Without limiting the generality of the foregoing, MMC shall be reimbursed for all third parties charges pursuant to Section 2.6 hereof. [Trustee Agreement.]

1.1(b) "Administrative Costs" all costs and expenses incurred by MMC in performing its duties hereunder and specifically costs and expenses incurred pursuant to Section 2.6 hereof. [Trustee Agreement.]

[65] Furthermore, all persons who invested in MMC for the purpose of financing this project agreed to "The Multimetro Mortgage Corp. Nanaimo B.C. Waterfront First Mortgage Fund, Order Form and Power of Attorney". Clause 4 of this agreement between the investor and Multimetro creates a general principal-agent relationship,

4 In consideration of MMC accepting the order of the undersigned, the undersigned:

- (a) ...
- (b) Hereby irrevocably... appoints MMC... as agent... to act for and on behalf of the undersigned with full power and authority in the name, place and stead of the undersigned to execute...
 - (i) The Co-Lender Agreement ... and any other instrument required to form, qualify, continue and keep in good standing the Co-Lenders' interests;
 - (ii) ...
 - (iii) ...
 - (iv) Any matter by which MMC is to act for Co-Lenders pursuant to the Trustee Agreement.

[66] The defendant investors submit that the leading case on this issue is *Trident Holdings Ltd. v. Danand Investments Ltd.*, (1988) 49 D.L.R. (4th) 1 (Ont.C.A), at 9-10. Following the law a set out therein, a person can be both agent of and trustee for another at the same time. The key difference is as follows:

An agent acts for, and on behalf of his principal and subject to his control; a trustee as such is not subject to the control of the beneficiary... The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust.

[67] Where both agent and trust relations exist, the greater the power of control over the agent/trustee the greater the likelihood that the principles of agency, rather than the principles of trust, are applicable:

... Where a business trust is created, that is a trust for the carrying on of a business in which the interests of the beneficiaries are represented by transferable certificates, the beneficiaries may become personally liable upon obligations to third parties incurred by the trustees in the administration of the trust. By the weight of authority it is held that the beneficiaries are not personally liable if the trustees are merely trustees. But where the beneficiaries have power to control the conduct of trustees to such an extent that the trustees are their agents, the beneficiaries are personally liable as principals... It is not always easy to draw the line between trust and agency in such cases, since the difference is one of degree. Where there is sufficient power of control over the trustees so that there is an agency relationship and not merely a trust, the beneficiaries are liable as partners in the carrying on of the business.

[emphasis added]

[68] In the *Trident Holdings Ltd.* decision the plaintiff claimed damages for breach of contract to supply and install electrical equipment for a building development. The Ontario Court of Appeal, upholding the trial judge, concluded at p. 13 that although the plaintiff's contract was with the developer trustee, the developer had been carrying out the mandate of the co-defendant beneficiaries. Thus, the beneficiaries of the business trust were personally liable as an agency relationship predominated over the trust relationship. In so holding the appeal court gave weight to the following facts:

- (i) It was implicit, if not explicit, in the trust agreement between the defendants that the developer's role was to hold the property being developed and do the bidding of the beneficiaries;
- (ii) This was confirmed by the fact that the land was registered in the developer's name as trustee and by the testimony of a key witness for the defendants;
- (iii) Likewise, the trustee agreement referred to the developer as "bare trustee" and did not confer any powers or discretion on the developer;
- (iv) Finally, the trustee agreement expressly contemplated the beneficiaries being liable for contracts.

- [69] Two further points from Trident Holdings Ltd. are noteworthy. First, an agency relationship was found without relying upon on any express language establishing principal-agent relations. Second, the courts discussion of Napev Construction Ltd. v. Lebedinsky (1984), 7 C.L.R. 57, strongly suggests that the existence of a formal express agency agreement would, not surprisingly, lend itself to the finding of personal liability of a "beneficiary".
- [70] In Tri-S Investments v. Vong, [1991] O.J. No. 2292 (Ont.C.J.), the defendant investors advanced money for the purchase of a property to a real estate developer. The money was returnable upon closing with interest and a 10% share in the development project. Unbeknownst to the defendant investors, the defendant real estate developer placed the property in a trust and signed a mortgage on behalf of the corporate trustee. Upon default on the mortgage payments the mortgagee sued claiming the defendant investors were personally liable as undisclosed principals to the trustee as agent. Applying the test set down in Trident Holdings Ltd., supra, Feldman J. dismissed the action giving weight to the following facts at p.5:
- (i) The defendant investors had exercised no control over the developer and did not expect to or in fact take any role or give any direction in the purchase of the property;
 - (ii) Further, the investors had no knowledge of and were not a party to the trust arrangement;
 - (iii) The developer's lawyer also had no knowledge of them as investors;
 - (iv) Finally, there was no evidence that the parties contemplated an agency relationship, yet there was evidence that was inconsistent with agency.
- [71] In 642947 Ontario Ltd. v. Fleischer (1997), 9 R.P.R (3d) 262 (Ont.C.J.), the corporations 642947 and Burnac entered into a trust agreement. 642947, as trustee, was to purchase a property with Burnac funds and hold it as bare trustee. All instructions relative to the structuring and closing of the transaction came from Burnac's principals and solicitors. After an agreement to purchase was reached closure of the sale was delayed during which time the real estate market collapsed. In subsequent legal proceedings the vendor sued for damages in breach of the purchase agreement, claiming that Burnac was liable as principal to 642947 as agent. Applying the law as set out in Trident Holdings Ltd., supra, Greer J. held that Burnac was 642947's principal at 290:
- (i) 642947's role, as "bare trustee" under the trustee agreement, was limited to carrying out the will and mandate of Burnac in each step it took;
 - (ii) Further, the trustee agreement did not give 642947 any beneficial interest in the property, ensured all costs were paid by Burnac, indemnified 642947 against all liability and gave Burnac an irrevocable power of attorney;
 - (iii) In addition, the directors of 642947 passed a resolution authorizing the corporation's executive "to do all acts and execute such further documents as Burnac may direct pursuant thereto";

(iv) Finally, Burnac had participated in previous injunction proceedings claiming irreparable harm if the sale were to be delayed.

[72] The trustee agreement between MMC and the investors creates a trust for carrying on a business in which the interests of the investors as beneficiaries are represented by transferable certificates. Under this agreement, MMC is not merely a trustee. Pursuant to article 2.6 and the related provisions set out above, the investor beneficiaries have a general power to control the conduct of MMC such that MMC is their agent. This is confirmed by clause 4 of the "Order Form and Power of Attorney" which expressly creates an irrevocable relationship of principal and agent between the investors and MMC, one so general that it overlaps with the parties' trust relations. Hence, although MMC had various duties as a trustee, was granted power incidental to those obligations, and did not ever receive group instructions from the investors, nevertheless, the broad power of investor control enables the investors to be personally liable for negligent misrepresentation.

[73] In summary, I find that the test set down in *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 49 D.L.R. (4th) 1 (Ont.C.A.), the investors carried a sufficient power of control over MMC such that they stood as principals to MMC as agent and are personally liable for the negligent misrepresentation.

[74] MMC, as agent, acted to set up the legal infrastructure for the project's investment scheme by agreeing to the commitment letter, trustee agreement and co-lender agreement on behalf of the investors.

[75] MMC agreed to administer the investment scheme as trustee pursuant to the terms of the various contracts.

[76] There was power of Control by Investors.

[77] The plaintiff's claim is based on unjust enrichment as a result of the negligent misrepresentation. Mr. Young, in his submission to the court on behalf of the plaintiff, submitted that should it be found that the lenders are liable then the remedy against them should be limited to their interest in the first mortgage registered presently on the property.

[78] I am acceding to the plaintiff's submission. There will be an order that the plaintiff have a first charge over the mortgage presently registered on the lands and premises known as Landmark Tower being more particularly known and described as:

City of Nanaimo, Parcel Identifier: 023-527-324, Lot A, Section 1, Nanaimo District, Plan VIP 3943

[79] The plaintiff also seeks what it terms a "romedial trust" to be registered over the said lands and premises in priority to the mortgage for monies not advanced by MMC on March 18, 1997. There will be such an order.

[80] The measure of damages in this case is the amount of the unpaid accounts of the plaintiff which I find to be Four Hundred and Ninety Five Thousand, Four Hundred ninety-six dollars and sixty-six cents (\$495,496.66).

[81] There will be court ordered interest as set by the registrar of this Honourable Court from time to time.

[82] Costs to the plaintiff on Scale 3.

"C.R. Lander, J."

The Honourable Mr. Justice C.R. Lander

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