Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 0020701 v. Investplan Properties Inc., 2006 ABQB 224

Date: 20060404
Docket: 0401 13503
Registry: Calgary

In the Matter of Special Chambers application of Condominium Plan No. 0020701 v. Investplan Properties Inc., et al

Between:

The Owners: Condominium Plan No. 0020701

Plaintiff

- and -

Investplan Properties Inc., 852167 Alberta Ltd., 759826 Alberta Ltd., Michael Nugent, Michael Whitehead, Gary W. Grab, Gary Hartwell, Kari Thompson, Manticore Engineering Ltd., Brian Lester and John Doe 1 to 5, Butler Cabin Capital Corporation, and John Doe 6 to 12

Defendants

Memorandum of Decision
of the
Honourable Madam Justice S.L. Martin

Introduction

[1] This is an application by a condominium corporation for certification of this action as a class proceeding pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 ("*CPA*").

[2] No findings of fact need be made on this application but it is necessary to outline the allegations made and denied to determine whether the requirements of the *CPA* have been met.

Facts

[3] The Plaintiff, Condominium Corporation No. 0020701 (the "Corporation"), is the condominium corporation for a residential condominium project commonly known as "The Residence" consisting of 100 residential suites located in Edmonton, Alberta. The Corporation complains of various construction deficiencies relating to the conversion of The Residence from an apartment building to a residential condominium project in 1999 and 2000. The refurbishing and construction occurred from February 24, 1998 to March 9, 2000 and the sale of the condominium units occurred from March 9, 2000 to March 1, 2003.

[4] The Corporation was created under the *Condominium Property Act*, R.S.A. 2000, c. C-22 ("*Condo Act*") and was registered at the Land Titles Office on March 9, 2000. It is a not for profit corporation and the Board members are volunteers elected by the condominium unit owners at their annual general meeting.

[5] The powers of the Corporation and its relationship with unit owners are governed by the *Condo Act*. Under s. 25(2), a condominium corporation consists of all those persons who are the owners of units in the parcel to which the condominium plan applies or who are entitled to the parcel when the condominium arrangement is terminated pursuant to legislation. That corporation is a creature of the *Condo Act*, is unknown to the common law, and is unlike other corporations. A condominium corporation is the statutory manager of the common property, which belongs to the individual owners.

[6] The original Statement of Claim was filed September 1, 2004; an Amended Statement of Claim was filed on November 12, 2004. The Amended Statement of Claim makes numerous allegations in respect of the condominium conversion, its preparation for sale and the marketing and sale of units in The Residence. All claims and deficiencies advanced by the Corporation in this action concern "common property" as defined in s. 1(1)(f) of the *Condo Act*. The claims against the Defendants concern common law and statutory obligations owed by persons who develop a residential condominium project and sell residential units to the public. By way of overview, it is alleged that after control of the Corporation was turned over to the unit owners, the Board of the Corporation became aware of serious problems and deficiencies in respect of the common property. Extensive work was required to repair severe deterioration of the parkade, post-tension cables, the building envelope (including mechanical lines), parkade service de-laminations, climate control issues and fire code deficiencies.

[7] In the Amended Statement of Claim, the Corporation claims to act as the "representative of all unit holders of The Residence having a common interest in the subject matter of this action, namely the obligation to bear, through the Condominium Corporation No. 0020701, a portion of the cost of repairing or remedying the defects described hereafter", pursuant to statute and the by-laws of the Corporation.

[8] Each of the Defendants is alleged to have been involved in the conversion of The Residence from an apartment building to a residential condominium project, in the sale of units to members of the public and in the management of the Corporation prior to the date on which

control of the Corporation was transferred from the developers to the owners of the units. Michael Nugent, Michael Whitehead, Kari Thompson, Gary Grab, Gary Hartwell, Brian Lester and John Does 1-5 all are alleged to have been directors of one or more of the Defendant Investplan Properties Inc. (“Investplan”), the Defendant 759826 Alberta Ltd. (“759826"), the Defendant 852167 Alberta Ltd. (“852167") or the Corporation during the period prior to the transfer of control of the Corporation from the developers to the unit owners. The alleged owners and developers of the condominium project (the “Alleged Developers”) include Investplan, 759826, 852167, Mr. Whitehead, Mr. Nugent, Mr. Lester, Mr. Hartwell, Mr. Grab and Ms. Thompson. The alleged sales agents (“Alleged Sales Agents”) are Butler Cabin Capital Corporation (“Butler”) and John Does 6-12.

[9] The Corporation claims it was a requirement of the *Condo Act* for the Alleged Developers to obtain a reserve fund study (“RFS”) prior to selling the units of The Residence and, based on that study, adequately to fund a reserve fund (the “Reserve Fund”). The purpose of the RFS is said to be to evaluate the condition of the common property and to estimate the anticipated time of replacement. This information is then used to assess the cash flow requirements for the Reserve Fund and to determine the condominium owners’ annual contributions to the Reserve Fund. The RFS is used to amortize major capital costs that will be the responsibility of the Corporation and, ultimately, of the unit owners.

[10] The Alleged Developers hired the Defendant Manticore Engineering Ltd. (“Manticore”), an engineering firm, to prepare both the RFS and a post tension review (“PTR”). Manticore reached various conclusions and made numerous recommendations concerning the column spandrel beam connections, the post-tensioned Cowan Slab pad and the post tension system. Its RFS analysis and cash flow projections were based on the assumption that the Alleged Developers had completed or would complete a list of repairs and replacements, which included common area carpeting, tiling, interior paint and trim, elevator cabs, major siding repairs, penthouse wall repairs, new exterior windows, elevator safety inspection, new sealants, new roof including penthouse, patch non-structural concrete, pavement overlay, wood fencing, parking garage restoration, new window guards, and new windows and sliding doors.

[11] The Corporation claims that the Alleged Developers did not complete any of the recommendations set out in either the RFS or the PTR. Further, the Alleged Developers did not disclose the PTR or the full RFS to purchasers of the condominium units. Instead, they are alleged to have provided only select cash flow projection sheets that were premised on completion of repairs that did not occur.

[12] Other claims against the Alleged Developers include negligence in proper design and construction, failure to adhere to the Fire Code Regulations (AR 52/98), concealing patent defects, failing to disclose latent defects, failing to remedy defects they knew or ought to have known existed and failing to disclose such defects to eventual purchasers.

[13] The Corporation also alleges: that developers owe fiduciary obligations to purchasers and to present and future owners of units in a condominium complex; that directors of a

condominium corporation owe a fiduciary duty to the corporation; that a developer cannot use the developer's control of the condominium corporation prior to the transfer of control to the unit owners to advance the developer's interests at the expense of the common property or the individual unit owners; and that developers are liable for withholding obligations for completion of common property pursuant to s. 14 of the *Condo Act*.

[14] The Corporation relies on various provisions in the *Condo Act* that regulate the sale of condominium units to the public. S. 11, which applies after September 1, 2000, imposes a duty of fair dealing. Ss. 13(b)(i) and (ii) impose certain disclosure obligations for "all major improvements to the common property located within a building" and "all major improvements to the common property", respectively. S. 14 requires that sufficient monies be held in trust to complete the common property, when it is not completed. A "developer", as defined in s. 1(1)(j), includes a person who sells or offers to sell residential units to the public for the first time. A broader definition of developer applies for the purposes of s. 14. This Court determined in *Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd.* (1998), 235 A.R. 217, 1998 ABQB 1023 that the obligations created by s. 14 extend not only to the developer but also to realtors and to legal counsel of the developer. In addition to *Bare Land*, the Corporation cites *Condominium Plan Number 752-1207 v. Terrace Corp. (Construction)* (1983), 43 A.R. 386 (C.A.), which establishes that developers of condominiums owe fiduciary obligations.

[15] A useful summary of the claims against some or all of the Defendants is contained in paragraphs 55 and 57 of the Corporation's Amended Statement of Claim:

> 55. By virtue of the common law and the *Condominium Property Act*, as amended, at all material times, the Defendants, or any of them, excepting Manticore, had a duty, which they breached;
>
> (a) Of fair dealing, to act in good faith and disclose to the Plaintiff defects in the Project, including:
>
> - the existence of post-tensioned cables, and the fact that such cables had not been repaired or replaced, nor had further examinations been undertaken, which had been recommended in the Manticore PTR;
>
> - that the major repairs and restoration assumed to have been completed in the Cash Flow Projection had not been completed;
>
> (b) To disclose to the Plaintiff, the Manticore RFS, and the Manticore PTR;
>
> (c) To prepare a Reserve Fund Study, assess and pay fees based thereon;

(d) To undertake the further examinations as recommended in the Manticore PTR;

(d) (sic) To pay condominium fees and assessments to the Plaintiff;

(e) To determine the amount of the monthly unit contribution on a "reasonable economic basis", as required in section 13 of the *Condominium Property Act*, as amended;

57. The Defendants, Whitehead, Lester and John Doe 1 to 5, as Directors of the Plaintiff up to September 27, 2002, had both common law and statutory duties to the Plaintiffs pursuant to the *Condominium Property Act*, as amended, which they breached, to:

(a) Act in good faith and disclose to the Plaintiff the defects in the Project, both latent and patent;

(b) Disclose to the Plaintiffs the results of the Manticore RFS and PTR;

(c) Disclose to the Plaintiffs the existence of post-tension cables in the Parkade;

(d) Prepare a Reserve Fund Study and assess fees based thereon;

(e) Give appropriate instructions to Manticore with respect to preparing a Cash Flow Projection that was accurate and not misleading;

(f) To determine and collect condominium fees and assessments from the Owners of the units from March 9, 2000 up to September 27, 2002.

[16] Three claims are made against the Alleged Developers and Alleged Sales Agents. First, there are claims of fraudulent and negligent misrepresentations, relied upon by the purchasers and causing damage, in respect of the following alleged statements:

that each suite had been extensively renovated;

that the exterior and common area of the building had undergone a complete renovation;

> that the returns from investing in The Residence would be 17%;
>
> that comprehensive engineering, reserve fund and environmental studies had been conducted to ensure the integrity of the project; and
>
> that the cash flow projections accurately and completely assessed the needs of The Residence in the future.

[17] Second, the Alleged Developers and Alleged Sales Agents are said to have breached a common law and statutory duty to warn the purchasers of problems with The Residence, including repairs to the post-tension system to restore it to a non-dangerous state.

[18] Third, the Corporation alleges a breach of fiduciary duty in respect of failure to hold in trust monies needed to effect repairs and restorations to the common property. There is also a claim that certain parties improperly gave out estoppel certificates.

[19] Manticore is said to be negligent in three primary respects. First, it completed the RFS as if the repairs and restorations were complete, in breach of proper engineering standards and practices. Second, the Corporation argues that it was reasonably foreseeable that, if Manticore based its report on assumptions of repair and restoration, the eventual purchasers would rely on such representations to their detriment and might suffer damage if the Alleged Developers failed to complete the repairs, replacements and recommendations. Third, Manticore allegedly failed to advise in the PTR of the severe deterioration of the post-tension system.

[20] The Plaintiff claims damages for the costs of repair and replacements, including for hidden defects and undeclared deficiencies. The Corporation also seeks an award sufficient to properly fund the Reserve Fund and to cover unpaid condominium fees and other costs to the Corporation.

[21] The Defendant Ms. Thompson filed a Statement of Defence on February 10, 2005 and defends on the basis that she was not a director of Investplan or of 852167, was not an owner or developer, did not have any responsibilities in respect of the refurbishment or construction of The Residence, did not have any responsibilities in respect of the RFS or PTR, owed no duty to disclose or warn purchasers and made no misrepresentations to the Corporation.

[22] Ms. Thompson brought a motion for summary judgment under Rule 159(2), which was dismissed on May 5, 2005.

[23] At the time this application for certification was heard, no other Statements of Defence had been filed.

Issues

[24] The sole issue in this case is whether this action should be certified as a class proceeding.

Analysis

1. Introduction

[25] This application involves the interpretation and application of both the *Condo Act* and the *CPA*.

[26] The *Condo Act* creates a statutory regime to regulate the unique property law issues associated with condominiums. It allows private ownership of individual units and shared ownership of common property. Common property is owned by the unit holders as tenants in common and is managed by a condominium corporation. The condominium corporation is the body authorized to act on behalf of a group of individuals in relation to certain matters.

[27] In particular, s. 25(3)(a) of the *Condo Act* states that " without limiting the powers of the corporation under this or any other Act, a corporation may sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not". Under this section, the condominium corporation has a well-recognized right to sue to recover monies it expends to correct deficiencies and defects in the common property. No party before the Court disputed that the Corporation, as statutory manager of the common property of The Residence under the *Condo Act*, may advance such collective claims without a class action.

[28] The *CPA* became law on April 1, 2004. It establishes a statutory regime for class action proceedings. Previously in Alberta, class action practice was governed by Rule 42 of the Alberta *Rules of Court*, Alta. Reg. 390/68, as interpreted by the Supreme Court of Canada in *Western Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46. The *CPA* now provides statutory factors and criteria for certification and detailed provisions regulating the conduct of class proceedings. A helpful source of background information on the *CPA* is the Alberta Law Reform Institute's Final Report on *Class Actions*, Report No. 85 (Edmonton: Alberta Law Reform Institute, December 2000) (the "Report"). Guidance may also be had from the experience of other jurisdictions with similar legislation.

[29] Under class action proceedings, issues common to multiple parties are determined together through a representative and all individuals in the class are bound by the decision. Class action regimes are procedural tools intended to provide a fair, simple and efficient mechanism to deal with a large number of claims involving common issues of fact or law. As certification relates to procedure, my task is not to address the merits of these claims but merely to determine how such claims should proceed. This was made clear by the Supreme Court of Canada in *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16 where the Court held that "... the certification stage is decidedly not meant to be a test of the merits of the action".

[30] McLachlin C.J. in *Dutton* at paras. 26-29 enumerated three objectives of class actions: to serve judicial economy by avoiding unnecessary duplication in fact finding; to improve access to justice; and to ensure that actual and potential wrongdoers do not ignore their obligations to the

public. The Alberta Law Reform Institute (the "Institute") at para. 113 of the Report adds that other goals include avoiding inconsistent results and, with the assistance of case management and alternative dispute resolution, reducing adversity and increasing the likelihood of reaching a fair and equitable result. In short, the Institute posits at para. 149 of the Report that plaintiffs should be permitted to bring deserving claims and that defendants should be protected from unreasonable claims using a process that is certain and efficient.

[31] The Corporation seeks certification of a class described and identified as "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants and owners of units in the Plaintiff". The Corporation seeks certification of this class because of perceived limitations on the powers of a condominium corporation to sue for all of the claims put forward in the Amended Statement of Claim. Specifically, the Corporation seeks to ensure that it may pursue personal claims of class members, such as fraudulent and negligent misrepresentation and certain statutory obligations, that it may assert personal and collective claims on behalf of prior unit holders and that it may distribute any funds recovered in the lawsuit to such parties.

[32] This certification application is unusual as the Corporation effectively seeks the Court's approval to act in two capacities under the one Amended Statement of Claim already filed in its name. Most certification applications are taken in relation to free-standing actions, rather than joining, consolidating, or ratifying common issues which are already co-mingled with other claims in a Statement of Claim. Further, this application is predicated on the Corporation's inability to advance the causes of action in its Amended Statement of Claim. The *CPA* is therefore called in aid to secure the Corporation's power to sue and its ability to distribute any damages recovered.

[33] The Corporation relies on its Amended Statement of Claim and on the Affidavit of Margaret Mah filed May 10, 2005, which adopts the Affidavit and Supplementary Affidavit of Judith Christensen both filed April 7, 2005. Ms. Mah is the President of the Corporation. She deposes that the Corporation has taken steps to repair deficiencies and defects in The Residence and has assessed owners for the costs of doing so. The owners have ratified the actions of the Board of the Corporation in commencing this litigation.

[34] The Supplemental Affidavit of Judith Christensen attaches excerpts from four reports prepared at the request of the Corporation by A. D. Williams Engineering Inc. ("Williams"). The report dated November 2003 on the RFS concludes that the Reserve Fund is underfunded. It states that the metal sidings and soffits are in poor condition and that the parkade, built up roof, emergency power system and exit lighting are in fair to poor condition. The report on the building envelope inspection provides findings from a review of various parts of the building and recommendations for short- and long-term remediation to address identified problems, including insufficient fasteners for high rise cladding, loose and detached concrete blocks, air infiltration, water entry and the freezing of mechanical systems. The parkade evaluation dated February 2, 2004 explains the fieldwork conducted and suggests restoration within the next twelve months for a variety of perceived deficiencies, with a cost estimate of $530,000.00. The restoration

project outline dated February 2005 outlines the construction extras and associated costs for the 2004 building restoration program and anticipated costs for 2005.

[35] At the certification hearing, only certain Defendants took a position on whether this action should proceed as a class action. The Defendants Investplan, 852167, Mr. Nugent and Mr. Whitehead, who were represented by the same counsel, stated that if there is a need for certification, they were not opposed in principle to the application. However, these Defendants characterized the Amended Statement of Claim as an action for damages for the cost to repair and replace common property and for unpaid condominium fees, which they say is within the Corporation's powers, with the result that certification is unnecessary. The Defendant Ms. Thompson agreed or at least assumed that the Corporation needs the additional authority of a class action to pursue the full range of the claims in the Amended Statement of Claim. She filed a brief in opposition to certification and argued that the statutory requirements for a class action were not satisfied. The Defendant Manticore joined in the objections made by Ms. Thompson but did not file its own brief.

[36] The first set of issues concerns whether this action falls within the purview of the *CPA* and whether the Corporation may commence this action. The second set of issues concerns whether the Corporation has satisfied the requirements for certification set out in s. 5 of the *CPA*.

2. Does this action fall within the Class Proceedings Act?

[37] Section 42(1)(a) of the *CPA* states that the *CPA* does not apply to a proceeding that may be brought in a representative capacity under any other Act. None of the parties raised the relationship of this section to s. 25(3) of the *Condo Act*, which authorizes a condominium corporation to sue for and in respect of any damage or injury to the common property. Without the benefit of argument, I will not make any finding on this point. It may well be that s. 42(2) of the *CPA* may not apply at all or it may not preclude a condominium corporation from addressing claims presumed to be outside of s. 25(3), whether taken alone or as part of a broader action.

[38] However, I would like to comment on the Corporation's belief that uncertainty in the law prevents it from pursuing personal claims on behalf of current unit holders. It states as follows in its brief:

> The common issues in this context arise from the representations and obligations of the developers in respect of the common property. The extent of these obligations is a developing area of the law in respect to both the legislation and decisions of the courts. The scope of remedies and the inter-relationship between corporate and individual remedies is not yet fully settled. For instance, the Court of Appeal of Alberta has held that actions in respect of common property deficiencies are properly brought by a corporation, but actions for misrepresentations in respect of the common property must be brought by individual purchasers.

[39] The Corporation cites the Alberta Court of Appeal's decision in *Terrace* in support of the proposition that negligent misstatement is a personal claim that cannot be pursued by a condominium corporation. In *Terrace,* the Court of Appeal set aside a lease entered into by the developer of the condominium project in breach of its obligations. Allegations based on misrepresentations were dismissed at para. 2 because the trial judge had found that no-one was influenced by any misrepresentations and that finding was "fatal". The alleged misrepresentations conflicted with the written terms of the contract, counsel conceded that the misrepresentations merged in the conveyances, the representations were not representations of fact and liability for making the false statements was neither pleaded or proved. The Court of Appeal then said at para. 2:

> "Finally, all these claims were individual, not corporate. It is doubtful that they could properly be the subject of a class action and, in any event, the pleadings do not support claims by anyone other than the condominium corporation."

[40] On the strength of this dictum, the Corporation and the Defendant Ms. Thompson accept that the Court of Appeal has decided that a condominium corporation cannot pursue claims for negligent misstatement and, by extension, for fraudulent misrepresentations.

[41] The weight to be assigned to this dictum promises to be an open issue before a trial judge. It is the last in a list of other flaws in the appellant's case in *Terrace*, one of which was acknowledged to be fatal. The statement is qualified by the word "doubtful". It remains to be seen how it will apply in the case at bar in which, unlike *Terrace*, fraudulent and negligent misrepresentations were plead. Further, the *Condo Act* at issue in *Terrace* contained the same provision as is currently found in s. 25(3) but the Court neither referred to it nor explained how a provision that concerns the nature of the property, by allowing suit for "any damage or injury to the common property", fits within the *CPA* to create a distinction between collective and personal claims.

[42] It is also my understanding that *Terrace* has not been applied in support of the proposition that actions for misrepresentation in respect of the common property must be brought by individual purchasers. In *Condominium Plan No. 992 5205 v. Carrington Developments Ltd.* (2004), 36 Alta. L.R. (4th) 381, 2004 ABCA 298, the Alberta Court of Appeal referred to *Terrace* but only in relation to fiduciary obligations. Subsequent cases in which *Terrace* has been mentioned or followed pertain either to whether the condominium corporation is a proper party to an action to preserve the common property or to the analogy drawn in that case between a condominium corporation and a trustee. See *Tymchuk v. Carrington Properties Ltd.* 2000 ABQB 583 at para. 9; *Ang v. Spectra Management Services Ltd.*, [2002] B.C.J. No. 2506 at para. 8 (S.C.); *Strata Plan 1261 v. 360204 B.C. Ltd.*, [1996] B.C.J. No. 955 at para. 16 (S.C.); *Strata Plan 1261 v. 360204 B.C. Ltd.* (1995), 50 R.P.R. (2d) 62 at para. 64 (S.C.); *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1995), 4 B.C.L.R. (3d) 259 at para. 48 (S.C.); *Dinicola v. Huang & Danczkay Properties* (1996), 29 O.R. (3d) 161 at 199 (Gen. Div.), aff'd (1998), 40 O.R. (3d) 253 (C.A.); *Ceolaro v. York Humber Ltd.* (1994), 37 R.P.R. (2d) 1 at para. 176 (Gen.

Div.); *Condominium Plan No. 86-S-36901 v. Remai Construction (1981) Inc.* (1992), 84 D.L.R. (4th) 6 at 8 (Sask. C.A.).

[43] The Corporation also assumes, and is joined in that assumption by Ms. Thompson, that the obligations imposed by s. 14 of the *Condo Act* can be enforced only by individual unit owners. S. 14 is a recent addition to the *Condo Act* and its interpretation will also be an issue before the trial judge. The obligations imposed on developers under s. 14(5) do not expressly delineate who may enforce them and s. 25(3) permits a condominium corporation to sue for and in respect of *any* damage or injury to the common property. Further, the cases of *Bare Land* and *Condominium Plan No. 822 2630 v. Danray Alberta* (2005), 33 R.P.R. (4th) 110, 2005 ABQB 455 appear to allow recovery by a condominium corporation under predecessor provisions.

[44] I understand that the absence of definitive authority on these points is problematic because the Corporation does not want to assume that it can sue for personal claims only to find out at trial that it cannot. It seeks to have all parties and claims joined at the outset. As the certification judge, I am not called upon to determine the limits of the Corporation's capacity to sue and should, for the purposes of this application, accept the assumption of the Corporation and of Ms. Thompson that a condominium corporation cannot sue for these personal claims.

[45] Similarly, the analysis on certification will proceed on the basis that the Corporation could not otherwise put forward both the collective and personal claims of prior unit holders. Under s. 25(2) of the *Condo Act*, a condominium corporation consists of "the owners of units", which according to the definition in s. 1 means the registered owners. The Corporation and Ms. Thomspon base their position that the Corporation does not represent prior unit holders on s. 25(2) and on *Terrace* in which, at para. 13, the Court of Appeal stated that past owners may no longer have an interest in the common property and that their economic interests are different from those of present owners.

[46] The Corporation also argues that it is prevented under the *Condo Act* from distributing any damages recovered. The Corporation does not own the common property; it is owned by the unit holders who pay the maintenance expenses. The Corporation manages it on their behalf and may assess amounts against unit holders to make any requisite repairs and to pursue litigation. Any monies recovered through litigation cannot be distributed by the Corporation, but may only provide for a "holiday" for condominium fees to then-current unit holders. In short, the Corporation cannot return money to a former owner who is no longer a member of the Corporation. A class action would permit reimbursement to class members who paid the assessment for the repairs or otherwise suffered loss.

3. Can the Corporation commence this proceeding?

[47] The Corporation has commenced this action and Ms. Thompson argues that, because it is not a member of the class, the certification application must fail. The relevant portions of s. 2 of the *CPA* are:

> 2(1) One member of a class of persons may commence a proceeding in the Court on behalf of the members of that class.
>
> (2) A person who commences a proceeding under subsection (1) must make an application to the Court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing that person, or another person who on certification will be a member of the class, as the representative plaintiff.
>
> (4) Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.
>
> (6) The Court may, where it considers it appropriate, appoint as a representative plaintiff a non-profit organization that is incorporated.

[48] Ms. Thompson says that while s. 2(6) may allow the appointment of the Corporation as a representative plaintiff, it does not relieve against the requirement of s. 2(2). She argues, therefore, that although a non-profit incorporated organization like the Corporation could be appointed as a representative plaintiff, it can commence this proceeding only if it is a member of the class, which she claims it is not.

[49] The Corporation invokes its particular status as a condominium corporation to argue that it is part of the class because it represents the unit holders and they are part of the class. The unique nature of a condominium corporation is supported by history and by the statute but it goes too far to say that the Corporation is a member of a class defined in relation to unit holders.

[50] On a plain reading of the *CPA*, s. 2(1) deals with who may commence an action, s. 2(2) provides that the person who commences a proceeding must make application to the Court for certification and s. 2(4) deals with the separate issue of who may be appointed a representative plaintiff. I agree with Ms. Thompson to the extent that it is generally preferable for a class member to commence the proceeding and to bring the certification application. However, I do not accept that the fact that the Corporation is not a member of the class is fatal to the application. At the certification hearing, the Corporation asked to add an unspecified unit holder as a plaintiff *nunc pro tunc* to resolve any issue concerning compliance with s. 2(1) and such request is granted.

[51] Under s. 41 of the *CPA*, the *Rules of Court* continue to apply where not inconsistent with the *CPA*. S. 2(1) of the *CPA* is permissive, providing that "one member of a class *may* commence a proceeding" (emphasis added). As a strict matter of logic, this wording does not preclude a non-class member from commencing a proceeding. The section may have been intended to be merely facilitative and to address the number of persons necessary to commence suit. In any event, I favour an interpretation of the *CPA* which grants discretion to the Court to accommodate a myriad of different circumstances, to respond to practicalities and to permit a full consideration of the certification application. As a result, I am of the view that, in these circumstances, it is open to the Court to exercise its discretion under Rule 38(2) of the *Rules of Court* to add or substitute any other person as plaintiff. I note that the Corporation was entitled to commence the proceeding in respect of the collective claims so this is not a case of an unrelated party attempting to sue on behalf of others. As a practical matter, it does not make sense to reject a certification application on this ground when the *CPA* permits amendment of pleadings to have the representative plaintiff named as the plaintiff after certification.

4. The Criteria for Certification

[52] The party seeking certification bears the burden of establishing that the action should be a class proceeding based on the five criteria outlined in s. 5 of the *CPA*. According to ss. 5(3) and 5(4), respectively, all the requirements of subs. 5(1) must be met in order for the Court to grant certification of a class proceeding and, if all of the requirements of subs. 5(1) are met, the Court has no discretion to refuse to grant certification. Section 5(1) provides as follows:

> **5(1)** In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the Prospective Class members raise a common issue, whether or not the common issue predominates over issues affecting only individual Prospective Class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative Plaintiff who, in the opinion of the Court:

(i) will fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other Prospective Class members.

[53] Affidavit evidence in support of a certification application must provide sufficient information, particulars and specificity with respect to the requirements for certification. Similarly, those who oppose certification should put forward their supporting evidence.

a. The pleadings disclose a cause of action

[54] The purpose of this criterion is to weed out obviously frivolous actions and the threshold a plaintiff must meet is not high. I am satisfied that the Amended Statement of Claim discloses numerous causes of action, including negligence, negligent misstatement, fraudulent misstatement, breach of fiduciary duty, breach of trust and breaches of various statutory duties imposed by the *Condo Act*. There is affidavit evidence from Ms. Mah and Ms. Christensen supporting the claims. Ms. Thompson noted that certain causes of action could not be brought by the Corporation alone, which is why the Corporation seeks certification, but she does not question that the pleadings disclose personal causes of action. The Defendant Manticore suggested in a brief oral statement that there was no cause of action against it but it had not filed a Statement of Defence at the time of the certification hearing and did not file a brief or affidavit evidence in support of this assertion. As a result, its position cannot be addressed at this time.

b. Identifiable Class of 2 or More Persons

[55] The Corporation must establish the definition, existence and scope of the class with certainty. Class definition is critical because it identifies those individuals entitled to notice and to any relief granted in the lawsuit; it also identifies those who will be bound by the judgment. A class is identifiable if it is sufficiently defined such that the parties and the Court can determine who is and is not a member of the class by reference to clearly defined criteria.

[56] Viewed through the lens of s. 25 of the *Condo Act*, the Amended Statement of Claim outlines three different types of claims. First, the current unit holders have collective claims

which all parties agree may be pursued by the Corporation in its own right. Second, the current unit holders have personal claims. And third, the prior unit owners have both collective and personal claims. It is the second and third types of claims that the Corporation argues should be pursued by way of a class proceeding. Under the *CPA*, the focus is on the definition of an identifiable class, and while the overlay of the type of claim arising from the *Condo Act* may complicate the inquiry, it should not confuse it.

[57] The class proposed by the Corporation is "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants, and owners of units in the Plaintiff." Theoretically, this class would be made up of current unit holders who purchased from the Defendants, current unit holders who purchased from a prior unit holder (i.e., second-hand purchasers), prior unit holders who purchased from the Defendants and prior unit holders who purchased from another prior unit holder (also second-hand purchasers).

[58] The Defendant Ms. Thompson argues that this class is over-inclusive because it includes second-hand purchasers who likely had no direct relationship with any or all of the Defendants. I agree. The Corporation has stated eleven common issues, all purporting to affect both direct and second-hand purchasers. While the latter persons may have suffered damage in relation to the common property, inclusion in the class would require a relationship of proximity between the Defendants and the second-hand purchasers; such a relationship does not exist. The statutory definition of developer is wide but does not extend this far. S. 1(j) of the *Condo Act* defines "developer" as follows:

> a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction.

Therefore, a person is a developer only in a transaction with a new purchaser. S. 14 of the *Condo Act* widens the definition by adding a person who:

> on behalf of a developer, acts in respect of the sale of a unit or proposed unit or receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement.

The words "in respect of the sale of a unit or a proposed unit" are not, when properly interpreted, intended to cover all sales, including second-hand sales because to act "on behalf of a developer" refers to a developer as defined in s. 1(j). S. 14 expands the definition of "developer", but does not alter the requirement that the developer on whose behalf the person referred to in s. 14 acts is selling units that have not previously been sold to the public.

[59] A class which includes second-hand purchasers is not only overbroad, it has the potential to generate conflict between class members and is to be avoided on this ground also. The interests in the common property of the current owners who are second-hand purchasers may be pursued as part of collective claims of the Corporation.

[60] Therefore, the class will consist of "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants".

c. *Common Issues*

[61] Section 5(1)(c) requires a consideration of whether the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members. The relationship between common issues and individual issues is addressed further under s. 5(1)(d), where the question is whether the class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. A "common issue" is defined in s.1(e) as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[62] The Supreme Court of Canada held in *Dutton* that common issues need not be determinative of liability and do not have to dispose of an entire action, or even a particular claim. The Court stated at para. 39 that the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis." An issue will be common "only where its resolution is necessary to the resolution of each class member's claim." An issue will not be "common" in the requisite sense unless that issue is a "substantial...ingredient" of each of the class members' claims.

[63] The Ontario legislation corresponding to the *CPA* sets a low bar for common issues and courts in that jurisdiction have held that certification should be ordered if the resolution of the common issues would advance the litigation. In *Carom* v. *Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, O.J. No. 4014 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660, the Ontario Court of Appeal at para. 41 quoted with approval this passage from *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C.C.A.) at para. 53:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

[64] The underlying question is a practical one based on fairness and efficiency in the sense that allowing the action to proceed as a class proceeding will avoid duplication of fact finding or legal analysis and will advance the litigation.

[65] At the time of the certification hearing only the Defendant Ms. Thompson had filed a Statement of Defence, leaving the issues to be framed largely by the pleadings and evidence of the Corporation.

[66] The Corporation contends that the common issues are:

a. Who was the developer within the meaning of the *Condo Act* and common law?

b. What representations were made in respect of the common property during the process of conversion and marketing of the units? By whom were the representations made?

c. What, if any, representations were incomplete, untrue or misleading? If so, were the misrepresentations made innocently or did they constitute negligent or fraudulent misstatement?

d. To what extent did the Alleged Developers have a duty to hold in trust, for the benefit of purchasers, the money necessary substantially to complete the repairs and restoration of the common property?

e. Did the Defendants who were directors of the Corporation prior to the transfer of control to the owners of units breach their fiduciary duty to the purchasers of the units?

f. Did the Defendants have either a common law or statutory duty to disclose the actual state of the property to prospective purchasers? If yes, was the duty breached?

g. What was the actual condition of the common property when the units were sold to purchasers?

h. Did the cash flow projections given to prospective purchasers accurately or fairly reflect the RFS that has been done and did they accurately reflect the condition of the common property?

i. To what extent did each of the Defendants owe a duty of fair dealing under s. 11 of the *Condo Act?*

j. What damages were suffered in relation to the common property? Was the need for the repairs to the common property done by the Corporation occasioned or contributed to by the Defendants' conduct?

k. Generally, what common law and statutory duties did each of the Defendants owe to purchasers of units in the condominium project? Were these duties breached?

[67] Ms. Thompson argues these issues are more individual than common.

[68] Issues relating to the actual condition of the common property, the damages suffered in relation to the common property, and whether the need for repairs was occasioned or contributed to by the Defendants' conduct are common issues. They are a substantial part of each class member's claim and also arise in relation to the collective claims made by the Corporation. In my view, it makes sense to build this factual foundation once and to broadcast the findings to all concerned parties.

[69] Ms. Thompson argues that s. 14 of the *Condo Act* is based on personal relationships and has multiple individual elements: the question of who is a "developer" is based on the particular facts of each individual purchase; the respective closing date of each purchase; the nature and extent of any relationship between the parties varies from purchaser to purchaser; and the condition of the common property at the date of each purchase would have to be determined to assess whether the holdback was adequate. It is true that the determination of who is a developer is a substantial element of the claims made under ss. 11, 13 and 14 of the *Condo Act* and involves a consideration of the relationship between specific Defendants and unit holders. However, this does not, as contended by Ms. Thompson, make this a purely individual issue. Nor does the characterization of these statutory claims as personal to the unit holders under the *Condo Act* make them individual issues as contemplated by the *CPA*.

[70] An assessment of the state of the project and of the monies held in trust at the date of each purchase must be undertaken before a claimant may establish a breach of s. 14 of the *Condo Act*. The ultimate proof of the claim will involve an individual determination. However, a common issue need not answer the claim completely, as long as its resolution materially advances the litigation. Class members share an interest in knowing what amounts were held in trust at various times during the project. It is efficient to establish a time line for monies held in trust for the benefit of all. The same is true for evidence concerning the completion schedule for the renovations and work on the building. Information on the completion status and trust amounts is necessary for all class members, although particular dates involving individual transactions will be essential to s. 14 claims. When the focus is on the actions of the Defendants, common factual and legal issues arise.

[71] Ms. Thompson relies upon three Ontario cases in support of the proposition that actions in misrepresentation should not be the subject of class proceedings: *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.); *Controltech Engineering Inc. v. Ontario*

Hydro, [1998] O.J. No. 5350 (Gen. Div.), aff'd. [2000] O.J. No. 379 (Div. Ct.) and *Mouhteros v. DeVry Canada Inc*. (1998), 41 O.R. (3d) 63 (Gen. Div.). These cases, as well as those cited by the Corporation, make it clear that there is no bar to certification in cases of negligent misstatement. Each case must be dealt with according to its own facts and issues. It is also important to note that the Ontario legislation does not have the proviso contained in s. 5(1)(c) of the *CPA* that the assessment of common issues is independent of whether the common issues predominate over issues affecting only individual prospective class members. Nevertheless, these authorities cited provide useful guidance on whether common issues arise and whether a class action is the preferable procedure for their resolution.

[72] *Abdool* concerned a failed condominium real estate investment with approximately 150 named plaintiffs. The cause of action was based primarily in misrepresentation, although it included claims of breach of fiduciary duty and breach of statute. The proposed defendants included the promoters of the investment and the real estate brokers who had acted as intermediaries in selling the investments. Neither the promoters nor the intermediaries appeared on the application and the certification was opposed only by the defendant lawyers and accountants of the promoters and by the trust company which provided the financing. The claim against the accountants depended on an alleged misrepresentation made by the accountants and contained in a single letter.

[73] The chambers judge held that misrepresentation cases could not be pursued as class actions because reliance is an essential part of a misrepresentation action and is an individual issue. All members of the Divisional Court were of the view that the need to prove reliance, though an individual issue, did not preclude certification as there was clearly a common issue as to whether the letter contained a misrepresentation and, if so, whether it was negligently made. The Court specifically recognized that misrepresentations actions could be the subject of class proceedings in the right situation but found that those proceedings did not disclose a cause of action. The Court also found that it was difficult to identify any significant common issues against the lawyers, the accountants and the finance company. Further, each plaintiff claimed approximately $300,000.00 and the individual claims were thought to be large enough to prosecute economically. Apparently, the action proceeded as a multi-party action on behalf of the 150 named plaintiffs, but not on behalf of the unnamed members of the proposed class.

[74] In *Controltech,* there were multiple misrepresentations to different parties on different occasions during a relatively complex three-stage bidding process. The 51 proposed class members all had responded to a request for proposals from the defendant. Each bidder presented a separate proposal and dealt with the defendant on an individual basis. The defendant never did award a contract to any party and the plaintiffs sued for the costs incurred in preparing their proposals. The Court identified the cause of action as one sounding in misrepresentation. Sharpe J. accepted that certification in a case involving misrepresentation was possible and noted that the determination of whether there are elements of misrepresentation amounting to a common issue is made in the context of the facts of the particular action. In that case at para. 12, he denied certification because there was "... not a single specific representation that is common to all

members of the proposed class". He also said at para. 16 that he did not see "... how the proposed common issues would resolve anything that would 'move the litigation forward'".

[75] *DeVry* concerned a class action on behalf of the students at a private educational institution. The allegation was that the defendant had misrepresented the nature and quality of its programs. The proposed class included approximately 17,000 unidentified students in two provinces. The alleged misrepresentations in *DeVry* numbered in the hundreds and were said to have been made by numerous field representatives and campus admissions officers, as well as through numerous different advertisements and publications. The Court declined to certify the class proceeding because the proposed class of all of the students at DeVry between 1990 and 1996 was not sufficiently cohesive. It included a number of students who had graduated and likely were quite satisfied with the education they had received. Others might not have seen or heard of any of the alleged misrepresentations. The combination of the divergent circumstances of the class and the hundreds of representations made the identification of common issues very difficult. The Court also found that individual issues, particularly reliance on the alleged misrepresentations, predominated and that, therefore, a class proceeding was not the preferable procedure.

[76] The Corporation cites *Dutton, Bre-X* and *Metera v. Financial Planning Group* (2003), 332 A.R. 244, 2003 ABQB 326 as the current and preferable authorities.

[77] *Dutton* involved a representative action in Alberta arising from a failed investment. It predated the coming into force of the *CPA*. Approximately 231 investors invested in what was to be a real estate company. It was alleged that the promoters of the real estate company took the funds and invested them instead in a gold mine. There were thirteen named defendants, all of whom played different roles in the investment. The gravamen of the complaint was that Dutton and various affiliates and advisors breached their fiduciary obligations by mismanaging or misdirecting the funds. The Supreme Court of Canada concluded that the action could proceed as a class action as the four conditions under Rule 42 of the Alberta *Rules of Court* were satisfied. While counsel for the plaintiff withdrew the claims based on misrepresentation, the Court recognized that a portion of the claim of breach of fiduciary duty might require proof of individual reliance. However, the differences between individual investors were not sufficiently important to prevent a class proceeding as there were many common issues to be decided. The defendants' contention that they would raise different defences against different members of the class did not create a sufficient level of uncertainty to foreclose class proceedings. Class members need not be identically situated and wide differences between class members can be tolerated. The Court stated at para. 54:

> The Defendant's contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess recessionary rights that others do

> not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the Defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

[78] *Bre-X* was a suit against two corporations and various individuals who held senior positions with those corporations for monies lost on an investment in an operation represented to be a gold mine. The action was based on a series of 160 press releases and other statements made over a four-year period. The motions judge certified fifteen common issues, which included fraudulent misrepresentation, but refused certification for the claims in negligent misrepresentation. This refusal was appealed to the Divisional Court and then to the Ontario Court of Appeal. It is noteworthy that the seven other actions against the brokerage firms, the two engineering firms and various named individual analysts in those firms who provided professional services were not certified. The Court of Appeal had before it a much streamlined process: not eight lawsuits with three categories of defendants and almost three dozen defendants, but a single action with a single category of defendants and ten named defendants. The plaintiffs alleged a common misrepresentation that "gold was present in mineable quantities in the Busang". The Court found that it was an error in logic and principle to refuse certification for negligent misstatement when allowing it for fraudulent misrepresentation.

[79] In *Metera*, the plaintiffs sued as representative plaintiffs for approximately 85 residents of Alberta who bought units in an investment from a mutual fund dealer and related corporations and claimed to have lost an average of $30,000.00 each. The allegations against the defendants included negligence, negligent misrepresentation, conflict of interest, breach of contract and breach of fiduciary duty. The defendants included the licenced mutual fund dealer who sold the investments and related, associated or successor corporations involved in the sale. Purchases were made through thirteen different mutual funds salesmen sponsored by one of the defendants. The allegation was that the defendants failed adequately to investigate and assess the investment units before they were sold to investors. The defendants proposed a multi-party proceeding arguing that this was a case of multiple representations by multiple persons at multiple times. They claimed that some representations were made in an offering memorandum, some in other written materials, some at meetings in various cities and some by salesmen. The same thing might not have been said at all the meetings nor would all investors have heard all of the representations. Nevertheless, certification was granted despite individual issues of reliance, causation and damage and the need to determine the duties owed by the defendants on an individual basis.

[80] Common issues may arise in misrepresentation claims in respect of what was said on various occasions, whether it was accurate, and whether it was said negligently. These are essentially the common misrepresentation issues as stated by the Corporation.

[81] Ms. Thompson seeks to distinguish *Bre-X* and *Metera* on the basis that they are investment cases where the representations were well publicized and contained in public documents and where the relevant statute provided for deemed reliance. By contrast, it is claimed that in the case at bar there are individual representees who may or may not have been told anything, may or may not have been given documents and may or may not have read them. Given the Supreme Court of Canada's analysis and conclusion in *Dutton*, this argument cannot be given much weight.

[82] There is merit in settling all at once the facts of who said what to whom, rather than facing the prospect of making proof on these issues time and again in separate proceedings. The facts before this Court also demonstrate that certain public documents were created and distributed by some Defendants and that there were common statements to the public. Furthermore, the level of complexity in the case at bar does not go beyond that accommodated by class proceedings in *Dutton*, *Bre-X*, and *Metera*. See also *Ayrton* v. *PRL Financial (Alta.) Ltd.* (2005) 370 A.R. 141, 2005 ABQB 311, aff'd 2006 ABCA 88.

[83] When common issues are stated in terms of "defendants", it can be easy to lose sight of how the complexity of proceedings may increase when multiple defendants are involved. Certain of the stated common issues do not apply to each Defendant, either at all or in the same way. For example, there is no allegation that the Defendant Manticore is a developer. Similarly, allegations of breach of fiduciary duty concern only previous directors of the Corporation. The purpose of class action proceedings is to provide a clear procedural mechanism to enable the courts to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event. In *Bre-X*, the Ontario Court of Appeal held at para. 45 that there were two core issues to the litigation - was there gold in mineable quantities and, if not, what knowledge did the various defendants have of the true state of affairs. Similarly, in this litigation, the two core issues are what, if any, deficiencies existed in this project and what knowledge did the Defendants have of the true state of affairs. The Court in *Bre-X* recognized that the answers to the questions it posed might be different for each defendant but still allowed certification concerning alleged negligent misrepresentations. The Court's reasoning applies equally to the case at bar.

d. Preferable Procedure

[84] Section 5(1)(d) of the *CPA* requires the court to find that a class action is the preferable procedure for the "fair and efficient resolution of the common issues". In Alberta, unlike Ontario and certain other provinces, the analysis of whether a class proceeding is the preferable procedure is governed by an express provision. S. 5(2) outlines five further factors for mandatory consideration, as well granting as a residual discretion to the court to consider any matter it considers relevant in determining whether a class action is the preferable procedure. In weighing countervailing factors under the preferable procedure criteria, the court is to take a practical approach and strike a balance between efficiency and fairness.

[85] S. 5(2) of the *CPA* sets out the five factors as follows:

> 5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the Prospective Class members predominate over any questions affecting only individuals Prospective Class members;
> (b) whether a significant number of the Prospective Class members have a valid interest in individually controlling the prosecution of separate actions;
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> (d) whether other means of resolving the claims are less practical or less efficient;
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[86] The court is required to take a purposive approach to the interpretation and application of these factors, meaning that they are to be read with and tested against the objectives of the legislation. This approach was adopted by the Supreme Court of Canada in *Hollick* and is further reinforced by the wording of the section which provides that the class proceeding be the preferable procedure, not merely for the resolution of the common issue, but for the "fair and efficient" resolution of the common issues.

[87] In *Metera* at para. 89, Slatter J. cited with approval the following passage from *Bre-X* :

> The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where is presents a fair, efficient and manageable method of determining the common issues which arise from the claims of the multiple Plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoings.

[88] In assessing whether certification will advance the proceedings in accordance with its goals, the starting point must be that Alberta now has a comprehensive legislated regime for actions involving multiple parties, common claims and individual claims. The *CPA* was intended to articulate rules and to provide certainty in a way that Rule 42 did not. In some ways, the very

existence of expressly delineated processes and legal standards for certification, the conduct of class proceedings, notice and discovery, the nature of class action orders, awards, related procedures, and costs, fees and disbursements, may support the preferability of a class action in appropriate cases.

[89] The Institute at para. 164 of the Report noted that the determination of whether a class proceeding is the preferable procedure necessarily will involve a balancing of all the interests of the parties and of the Court and may involve an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute.

[90] As required by the *CPA*, I will address each mandatory statutory factor in turn, having regard to the purpose of the legislation and all of the individual and common issues arising from these claims and their factual matrix.

(i) Whether common questions of fact or law predominate

[91] In contrast to the procedure under Rule 42, the *CPA* does not treat predominance of common issues over individual issues as a threshold requirement, but only as one factor to be weighed in the balance. Where the common issues are overwhelmed by the individual issues, certification is not appropriate as the litigation will inevitably break down into individual proceedings.

[92] Ms. Thompson argues that there are too many individual issues here for a class action to be the preferable procedure because different buyers will have received different materials at different times, containing varying statements and representations. Certainly, there are individual issues, including reliance, date of sale, and proof of damage, but s. 8 of the *CPA* specifically provides that certification is not to be withheld solely because of the need to have individual assessments of damage.

[93] In *Metera*, Slatter J. warned against over-emphasizing the importance of individual issues; the question is always whether a class proceeding is the preferable way to resolve what common issues there are. Individual assessment will be a factor regardless of whether the claim is prosecuted as a class action, a multi-party action or a series of individual actions. The focus should be on how the common issues can best be decided and, even when the individual issues overwhelm the common issues, the courts must still ask “how is it best to decide those common issues?”.

[94] It is also important to recognize that class action proceedings usually involve both common and individual issues in a bifurcated process. S. 12(1) of the *CPA* provides that, as a general rule, common issues will be determined together for members of a class and/or subclass and individual issues will be determined in accordance with ss. 28 and 29. S. 28 grants broad powers to the court to determine individual issues in relation to individual class or subclass members, including the authority to hold further hearings and to appoint persons to conduct

inquiries under the *Rules of Court* into the individual issues and to report upon them. S. 29 regulates the individual assessment of liability.

[95] A class proceeding may be the preferable procedure even if the common issues are somewhat preliminary. In *Metera,* Slatter J. held at para. 71 that "whatever the shortcomings of class proceedings in misrepresentation claims, they appear preferable to deciding the common issues time and time again in separate litigation." There are still economies to be had in deciding the common issues together and building the factual platform once, rather than many times.

[96] The Corporation argues that access to justice is served by certification in this case as it would be expensive for individual purchasers to hire experts to assess the common property. The Defendant Ms. Thompson argues that the Corporation already has done some of this work and would share its findings in relation to current and future expert reports. The key point, however, is not whether the information is shared but how, and how often, even shared information will need to be presented to the Court on common issues.

[97] The Corporation argues that it seeks a fair and efficient manner to combine collective and personal claims of current and prior unit holders into one action so that findings of fact may be broadcast between categories of claimants. I accept this argument and, while I appreciate that there are individual issues, it is still best to decide the common issues together as it is more efficient and is not unfair to the Defendants.

(ii) *Whether a significant number of prospective class members have a valid interest in individually controlling the prosecution of separate actions and whether the class proceeding would involve claims that are or have been the subject of any other proceedings*

[98] These factors from ss. 5(2)(b) and (c) of the *CPA* favor certification. The evidence of Ms. Mah is that a significant number of the prospective class members support the litigation undertaken by the Corporation. In this case, the class proceeding would involve claims that are the subject of a current proceeding, but given that there is but one Amended Statement of Claim, it is the same proceeding. In these circumstances, joining the class action for personal claims with the collective claims action pursued by the Corporation generates further efficiencies as all damage relates to common property. I am satisfied that it is sensible and desirable to place both types of claims on the same litigation track.

(iii) *Whether other means of resolving the claims are less practical or less efficient and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means*

[99] It is both mandatory and helpful to ask what alternative procedures there are to decide the common issues and to canvass their relative benefits and drawbacks. Ms. Thompson argues that

it would be preferable to have a multi-party proceeding in which those individuals who feel aggrieved come forward and file suit on their own behalf. However, adding all interested parties in a multi-party action procedure would not significantly change the face of this litigation and would be cumbersome. The determination of the common issues in any test case would not necessarily be binding on other plaintiffs and the prospect of a class settlement would be lost. In *Metera,* Slatter J. observed at para. 94 that "the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the Defendants, and which is not a legitimate reason to refuse certification given the goal of 'access to justice.'"

[100] If alternatives are pursued, the same range of issues against the multiple Defendants will need to be determined. Too much should not be made of the need for some individual assessment as that will be a factor regardless of whether the claims are prosecuted as a class action, a multi-party action or a series of individual actions.

[101] Further, the starting point in this case is that the Defendants already face litigation for the collective claims of the Corporation. The complexity of the action stems in part from the nature of the claims that all acknowledge the Corporation may pursue alone. The conversion and sale of The Residence raises many issues against different people and certification will not change that. The key issue is whether the addition of the personal claims as a class action is fair to the Defendants and is manageable. The Defendants Investplan, 852167, 759826, Mr. Nugent and Mr. Whitehead do not oppose certification. The Defendants Mr. Grab, Mr. Hartwell, Mr. Lester and Butler took no part in the certification proceedings. Ms. Thompson opposed certification and filed a brief and Manticore opposed but did not file a brief.

[102] I find that a class action is preferable; it is a fair and efficient method of addressing the common issues in this case. The Defendants already face the collective claims of the Corporation and it is desirable to deal with the personal claims that arise from the conversion and sale of The Residence at one time and for all affected.

e. Representative Plaintiff

[103] There are three requirements in s. 5(1)(e) of the *CPA.* First, the representative plaintiff must, in the opinion of the Court, fairly and adequately represent the interests of the class. Ms. Mah deposed that, as statutory manager, the Corporation has taken steps to repair defects and deficiencies in the building and has assessed owners for the cost of doing so. It has in its possession all of the relevant records related to the investigation and remediation of the building deficiencies. It has an existing or prior relationship, governed by law, with the proposed members of the class and the litigation has been ratified by the owners.

[104] Second, the Corporation must have produced a plan for proceeding that sets out a workable method of notice and advancing the action. The plan proposed here is sparse but sufficient for the purposes of the certification motion.

[105] Third, there must be no conflict of interest between the prospective representative plaintiff and other prospective class members. No potential conflict of interest was raised.

[106] As the Corporation is not a class member, it must also satisfy the Court that it meets the requirements of s. 2(4) of the *CPA*, namely that its appointment will avoid a substantial injustice to the class. The Institute noted at para. 221 of the Report that this exception "could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members".

[107] The Corporation has demonstrated both its willingness to undertake the necessary research and its experience in commissioning studies concerning alleged deficiencies and their correction. The Corporation has also demonstrated that it has the resources to pursue this matter. The Court must also consider the ability of the proposed representative plaintiff to be discovered on matters having to do with the class. The Corporation is obliged to select an individual who is in a position to address the personal claims and I am satisfied that it can and will do so.

Conclusion

[108] The requirements for certification have been met and the *CPA* therefore requires me to certify the proceedings. The class will consist of "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants" and the common issues will be as stated by the Corporation. The parties will appear before me to settle the terms of the certification pursuant to ss. 9 and 20 of the *CPA*.

[109] Ms. Thompson asked that, in the event certification was granted, the claims against her be stayed pending the determination of the common issues under s. 14 of the *CPA*. It is an open question whether s. 14, which allows the Court to stay or sever any proceeding related to the class proceeding on any terms or conditions that the Court considers appropriate, provides authority to stay part of the class proceeding itself. I need not answer that question today. While she admits that she was a realtor, Ms. Thompson is also alleged to have been a Director of Investplan and a developer. Her application for summary judgment was dismissed and has not been appealed. This request invites a consideration of the merits of the claims against her, which is not the role of the certification judge, and in some respects may be seen as a collateral attack on the Court's decision on summary judgement. For those reasons, I decline to order a stay.

[110] As a final matter, it is to be hoped that the trial judge will determine the limits, if any, on a condominium corporation's power to sue for collective and personal claims concerning common property. A clear statement of the law will assist in future cases and will help to delineate the proper relationship between the *Condo Act* and the *CPA*.

[111] If necessary the parties may speak to me concerning costs.

Heard on the 12th day of October, 2005.

Dated at the City of Calgary, Alberta this 4th day of April, 2006.

S.L. Martin
J.C.Q.B.A.

Appearances:

Louis M. H. Belzil, Shores Belzil Jardine
for the Plaintiff

Timothy S. Meagher, Machida Mack Shewchuk LLP
for the Defendants Investplan Properties Inc., 852167 Alberta Ltd., Michael Nugent and Michael Whitehead

Douglas S. Dartnell, Dartnell & Lutz
for the Defendant Gary W. Grab

Kevin Tuohy, Burnet Duckworth & Palmer
for the Defendant Gary Hartwell

Blair C. Yorke-Slader, Bennett Jones LLP
for the Defendant Kari Thompson

Brian G. Kapusianyk, Gowlings LeFleur Henderson LLP
for the Defendant Manticore Engineering Ltd.

Edward Bresky, Yuzda Schuster & Bresky LLP
for the Defendant Brian Lester

Cam McIntosh
for the Defendant Butler Cabin Capital Corporation