

Case Name:

Cheung v. Kings Land Developments Inc.

Between
Bernard K. Cheung, and
Kings Land Developments Inc. et al.

[2002] O.J. No. 336
Court File No. 57/02

**Ontario Superior Court of Justice
Divisional Court
Then J.**

Heard: January 28, 2002.
Judgment: January 29, 2002.
(7 paras.)

Counsel:

S. Marr, for the plaintiff.
Michael Walter, for the defendant Living Realty Inc.

¶ 1 **THEN J.** (endorsement):— The Applicant, Living Realty Inc., seeks leave to appeal on both branches of Rule 62.02(4) on two issues:

- 1) the order of Cumming J. granting leave to the Plaintiff to amend his Statement of Claim nunc pro tunc, and
- 2) the order of Cumming J. certifying the action for negligent misrepresentation as a class proceeding.

Issue #1 - Amendment nunc pro tunc

¶ 2 The Applicant submits that the original Statement of Claim was only in negligent misrepresentation and accordingly the amendment to the Statement of Claim (which was unopposed) to include a cause of action for breach of trust ought to have been made as of the date of that application and not nunc pro tunc.

¶ 3 The Applicant submits that the amendment constitutes new facts giving rise to a separate and distinct right of action giving rise in turn to a new set of damages. In that respect, the Applicant submits that the order of Cumming J. conflicts with several decisions including *Perna v. R.C.M.P.*, [1993] O.J. No. 451 (Gen. Div.); *Dunwoodco v. Stermac* (1974), 5 O.R. (2d) 454 (Master); *Korte v. Cormie*, [1996] A.J. No. 12 (Alta. C.A.). To the extent that the proposed amendment nunc pro tunc would obviate a limitation period to the prejudice of the Applicant, it is submitted that the order conflicts

with the decision of the Divisional Court in *Swiderski v. Broy Engineering Ltd.* (1992), 16 C.P.C. (3d) 46.

¶ 4 In my view, there is no conflict in the authorities. Prior to amendment, paragraph 1 of the original Statement of Claim specifically sought damages against the Applicant for breach of trust. In such circumstances the amendment merely sets up new facts or additional facts giving rise to a claim already in existence and does not assert a new cause of action. (See *Weston et al. v. Copplestone et al.* (1975), 5 O.R. (2d) 724 at pp. 727-8). There is no conflict in the authorities warranting the granting of leave to appeal on this ground nor is there any reason to doubt the correctness of the decision which merely purports to apply well known principles of law and does not raise matters of public importance beyond the concerns of the parties.

Issue #2 - Certification of the negligent misrepresentation claim

¶ 5 The Applicant submits that the negligent misrepresentation claim does not raise common issues that will advance the litigation in a legally material way. Moreover, the Applicant submits that the order of Cumming J. in the instant case conflicts with the decision of Winkler J. in *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060, a case factually similar to the instant case in which Winkler J. specifically refused to certify the negligent misrepresentation claims against the present Applicant, Living Realty. The Applicant submits that there is very little overlap in facts between the breach of trust claims and the negligent misrepresentation claims to warrant certification of the latter in terms of the approach outlined by the Court of Appeal in *Carom v. Bre-X Materials Ltd.* (2000), 51 O.R. (3d) 236 at paras.42-47).

¶ 6 The conflict whether apparent or real, between the present order and *Lau*, supra, is not determinative as the decision in *Lau* must give way to the approach taken by the Court of Appeal in *Bre-X*, supra. In the present case, the factual basis for the breach of trust claims against Living Realty in paragraph 33 of the amended Statement of Claim overlaps significantly with the factual basis of negligent misrepresentation claims contained in paragraph 38 of the Statement of Claim. In such circumstances, the approach taken by Cumming J. is consistent with the approach by the Court of Appeal in *Bre-X* as it would not make sense to refuse to certify claims of negligent misrepresentation as there is an overlap of factual issues common to both torts. Accordingly there would be no principled basis for treating the claim of negligent misrepresentation differently. In my view, there is no conflict within Rule 62.02(4) which warrants the granting of leave to appeal nor is there good reason to doubt the correctness of the decision which is not in my view open to serious debate within the authorities (see *VitaPharm Canada v. F. Hoffman-LaRoche*, [2001] O.J. No. 753, [2001] Carswell Ont. 714 (Div. Ct.). Further while the issues are of importance to the parties, I am not persuaded that in the circumstances, issues of general public importance are raised requiring clarification by the Divisional Court within the meaning of *Rankin v. McLeod Young Weir* (1986), 57 O.R. (2d) 569 per Catzman J. and *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 per Callaghan A.C.J.H.C. at p. 113.

¶ 7 The application for leave is dismissed with costs fixed in the amount of \$3,500 payable forthwith.

THEN J.