

Court of Queen's Bench of Alberta

Citation: Hasson v Habitat for Humanity - Edmonton Society, 2020 ABQB 352

Date: 20200601

Docket: 2003 01458

Registry: Edmonton

Between:

Abdurehman Zekaria Hasson, Maria Ahmed, Teferi Weldemichael Teklezig, Ehite Belaynhe, Mahfuz Yonis Abdullahi, Iftu Mahammed Amin, Jafar Hassan Ibrahim, Muhammad Adif, Laila Sani, Mohamed Abdi, Fatuma Hussein, Redwan Mohamed Ahmed, Maria Yusuf Zekaria, Mahamud Abdigan Billie, Khadra Farah Hassan, Zahir Uddin, Rehana Zahir, Naomi-Lynn Pangburn, Rovin Lloyd Pangburn, Yaqoob Ali, Tahira Bi Bi Farooqui, Saada Hussein, Ahmed Amin El miri, Laila Chouhadi, Abduselam Yusuf Zekaria, Nawala Abduselam Yuusuf, Naimo Mohammed Musse, Omar Mohamed Madar, Anab Ahmed Jama, Jemal Durri, Ibrahim Orit Hussein, Nesra Mohammed Omer, Perla Paralta Veloria, Bedri Mohammed Yonis, Wezira Ahmed Abdulkadir, Adama Cherif Barry, Yusuf Ahmed, Hanan Muhammednur, Mohssine El Bakali Kassimi, Souad Mlida, Mahamoud Mouhoumed Abdi, Fathia Moussa, Nadia Memon, Khalid Memon, Ikram Skir, Khalid El Hadiri, Jawad Mouayyad, Hashim Illham, Jama Ahmed Farah, Ilham Saed Mahmoud, Puona Billew Koak, Yonas Akalewold Agonafir, Misrak Tesfaye Gebremariam, Syed Atif Huuain, Syeda Jeehan Atif, Nur Keinan Waesame, Hawa Mohamed, Mohamud Yusuf Bashir, Salma Abdi, Nebat Mohamed, Abdulahi Wozir, Kadra Ali, Abdikarim Bakal, Ahmed Omar Haga, Kaltoum Meraneh Awaleh, Hassane Telmani, Jamila Ouhajji, Osman Hussen Osman, Blen Adnan, Hadim Jobe, Susan Jobe, Samia Omer Abdi, Rukayat Olaronk Oguntade, Romelia Cabayu Garingan, Abdirahman Hirsi Abdulle, Kadro Mohamed Hirsi, Hayat Mandi Ahmed, Sami Ahmed Abdi, Tuba Naseem, Naseem Ahmad, Fakiha Abdlahi, Erin Arlene Williams, Rahul Chadrakant Vanve, Sheetal Pandita, Muktar Mohammed Alisho, Kabula Ahmad Omar, Abdellah Jbilou, Souad Balbal, Carema Bouanani, Adja Jadiatoulaye Barry, Abdoulaye Fatoumata Barry, Said Kahssay, Hanan Saleh, Mohamed Legter, Zineb Abroute, Isse Madobe Shaiye, Mohado Sheek, Ait Rais Ahmed, Rachida El Gueddar, Elizabeth Anne Hunter, and Leanne Liza Kirke

Plaintiffs

- and -

Habitat for Humanity - Edmonton Society

Defendant

**Reasons for Decision
of the
Honourable Mr. Justice James T. Neilson**

[1] The Plaintiffs in this action apply for an interlocutory injunction and the Defendant Habitat for Humanity – Edmonton Society (“Habitat Edmonton”) has brought a cross-application to vacate certain caveats filed against its properties.

[2] The Plaintiffs have also filed a Statement of Claim brought under *The Class Proceedings Act*, court file number 1903 24075 (the “Class Action”). Action 2003 01458 (the “2020 Action”) and the Class Action are subject to case management by court order and this application and cross-application are brought before me as the case management judge.

[3] The Class Action has not yet proceeded to a certification application, so the injunction application and application to discharge the caveats are brought before me under the 2020 Action.

The Claims Being Advanced by the Plaintiffs Against Habitat Edmonton

[4] The Plaintiffs in the 2020 Action, identified as the “Partner Families”, advance the following claims against Habitat Edmonton:

- a. That the Defendant breached the agreement it had with the Plaintiffs regarding the Habitat “Housing Scheme”;
- b. That the Defendant misrepresented the terms of the Housing Scheme;
- c. That the Defendant breached the duty of good faith in contractual performance it owed to the Partner Families;
- d. That the Defendant breached the fiduciary duty it owed to the Partner Families in the circumstances.

[5] In the 2020 Action, the Plaintiffs primarily seek an order for specific performance. They allege that the Defendant must be compelled to honour its obligations under the Housing Scheme, and in particular, to offer a no-interest mortgage for the entire purchase price of a Habitat home. The Plaintiffs also seek damages for breaches of duty alleged against the Defendant.

[6] Those are the issues for trial. In the meantime, the Plaintiffs in this application seek injunctive relief as follows:

- a. An order permitting the Applicants currently residing in Habitat Edmonton homes to remain in those homes past the termination dates of the Fixed Term Tenancy Agreements between these Plaintiffs and Habitat Edmonton;

- b. Alternatively, if those Applicants are not permitted to reside in the Habitat homes, an order directing that Habitat Edmonton keep those homes vacant pending resolution of the Class Action and the 2020 Action;
- c. An order directing the Applicants who have not yet entered into a Fixed Term Tenancy Agreement with Habitat Edmonton be permitted to reside in Habitat homes;
- d. Alternatively, if the Applicants who have not yet entered into a Fixed Term Tenancy Agreement with Habitat Edmonton are not permitted to reside in Habitat Homes, an order directing that Habitat Edmonton keep those homes vacant pending resolution of the Class action and the 2020 Action.

[7] The Defendant has brought a cross application seeking the following remedy:

- a. A declaration that the Plaintiffs have no interest, legal or equitable, in the properties which are the subject of this action;
- b. An order directing the discharge of all caveats which the Plaintiffs have registered against title to Habitat homes.

[8] In the 2020 Action, there are 57 individually named Plaintiffs. However, for the purposes of this application for an interlocutory injunction, eight of the Plaintiffs were selected as representatives of one of the three groups of Plaintiffs advancing claims. These Plaintiffs swore affidavits and were cross examined on their affidavits. In response, an affidavit was filed by Karen Stone, the current President and CEO of Habitat Edmonton. Ms. Stone was cross examined on her affidavit.

The Matter Which Gives Rise to this Litigation

[9] As will be described in further detail, the Plaintiffs' complaint is that the Defendant has not offered them, or will not offer them, purchase agreements for the sale of Habitat homes, subject only to a no-interest mortgage. Rather, the Defendant is proposing to offer agreements for sale only on the basis that the Plaintiffs agree to a first mortgage for 50% of the value of each home, issued by a credit union, such loan to be subject to a rate of interest, and to a second mortgage for 50% of the value of each home, issued by the Defendant and bearing no interest. The thrust of the litigation by the Plaintiffs is to require the Defendant to offer a no-interest mortgage for the entire purchase price of each Habitat home, asserting the causes of action listed above.

[10] In order to place these applications in context, the Court must review the evidence relating to the purpose and operation of Habitat Edmonton, and the process by which Habitat Edmonton arrived at the current mortgage model which it has offered to the Plaintiffs upon entering into purchase agreements for the sale of Habitat homes.

Habitat Edmonton and its Home Ownership Program

[11] Habitat Edmonton is a not for profit society incorporated under *The Societies Act*, RSA 2000 c. S-14. It has been in operation since 1992 and is the largest of the Habitat organizations in Canada. At the present time there are 450 Partner Families living in Habitat homes.

[12] The purpose of the Society is to construct affordable housing which can be made available, ultimately, to purchasers who would not normally qualify for home ownership with standard lenders. Its program is structured as follows:

1. Persons who are interested in participating in the Habitat Edmonton home ownership program are required to complete a detailed application in writing. Information sessions are offered to provide an overview of the Habitat program. Each application is given careful consideration before the applicant can be admitted into the program. Not every application is accepted. Part of the application form requires applicants to complete the “authorization and release” which includes the following statements:

The undersigned applicant(s) has(have) applied to the Habitat for Humanity Homeownership Program, which includes a no-interest loan to finance the purchase price of the home ...

I(we) understand and consent to all of the following ...

Completing this application DOES NOT IN ANY WAY GUARANTEE HOUSING through the Habitat for Humanity Edmonton affiliate.

2. A successful applicant then enters into a “Partner Family Agreement” also known as a “Future Home Owner Agreement”, with the Defendant. The Partner Family Agreement sets out several requirements that the Partner Family must complete before proceeding further with the program. For example, the Partner Family must perform 500 hours of voluntary work and attend compulsory information sessions, providing instruction on maintaining a home and managing finances in order to ensure a successful home ownership.
3. Upon successfully completing the requirements of the Partner Family Agreement, the Defendant offers the family a Fixed Term Tenancy Agreement. The Fixed Term Tenancy Agreement sets out further obligations to be met by the tenant during the course of the tenancy term.
Paragraph 35 of the Fixed Term Tenancy Agreement provides as follows:
“It is to be clearly understood that it is the intent of Habitat for Humanity – Edmonton Society to offer to write a Purchase Agreement for the property at the end of the tenancy, but it is in no way obligated to do so if the Partner Family has not followed, or has been unable to meet, the requirements of Habitat for Humanity – Edmonton Society in any way.”
4. If the tenant has satisfied the requirements under the Fixed Term Tenancy Agreement, then following the conclusion of the term, the Defendant will offer the home for sale, subject to mortgage financing. As stated previously, the Plaintiffs object to the terms of the mortgage being offered to Partner Families upon purchase of the homes.

5. If the home owner subsequently decides to move out of the Habitat program and go into other accommodation, then Habitat will buy back the home and pay to the home owner the amounts that the owner had paid pursuant to the mortgage financing, minus the taxes, insurance and condominium fees that were paid by the Defendant in respect of the property, and any remediation expenses required to place the home with another prospective owner (the “Buy Back Program”). Those funds could then be used by the selling owner for a down payment on another home purchased in the open market.

A Partner Family can leave the Habitat program at any stage, if it so chooses.

Habitat Edmonton – Cash Flow Issues

[13] In July 2018 Karen Stone was hired as the CEO for Habitat Edmonton and was directed by the Society’s Board of Directors to examine the cash flow issues that the organization was facing.

[14] At that time, Habitat Edmonton was spending annually \$2,000,000 more than what was being generated in revenue. There were no reserves for equity payments in the Buy Back Program. When homes were repurchased from Partner Families leaving the program, Habitat Edmonton was having to spend on average \$45,000 per home in order to remediate that home’s condition for the purposes of resale. The funds that were coming in to the organization were being expended to cover the cost of borrowing for building expenses, and to fund the buy backs.

[15] At the time, the organization was \$27,000,000 in debt and there were no funds left over to sustain future construction.

The Response of Habitat Edmonton to Ongoing Financial Difficulties in its Operations

[16] As the result of the analysis of the cash flow problem, Habitat Edmonton took several steps. It went to a new bank which bundled all of its mortgage loans at reduced lending rates. The Society’s prefabrication facility was moved into new space with less square footage, reducing the rent. After a review of operations, approximately 10% of the workforce was laid off.

[17] Significantly, Habitat Edmonton undertook to review its mortgage model whereby it was borrowing at 4.5% interest, but lending out to home purchasers at no interest.

[18] In January, 2019, Partner Families who were approaching the next phase following the Partner Family Agreement, or the Fixed Term Tenancy Agreement, were informed that the mortgage model was under review.

[19] Between March and September 2019, negotiations with a credit union resulted in the development of a new mortgage model which was intended to address Habitat Edmonton’s ongoing cash flow problem, and to ensure the ongoing viability of its housing program.

[20] Since 1992, Habitat Edmonton had changed its mortgage model 13 times. Under this new model, rather than offering a no-interest mortgage to the Partner Family being offered a home to purchase, the mortgage financing would include a mortgage from a credit union for 50% of the purchase price, offered at a wholesale rate that is lower than any consumer rate available on the

market, and a no-interest mortgage from Habitat Edmonton for the remaining 50% of the purchase price.

[21] Other features of the previous model were maintained. Habitat Edmonton would continue to offer an affordable mortgage and option for home ownership under which the owner never pays more than 25% of their income towards mortgage payments. In addition, the home owner is responsible for paying taxes, insurance premiums and condominium fees. As before, the purchasers are not asked to provide any down payment, nor are they required to obtain CMHC insurance.

[22] On the other hand, the new mortgage model offered certain advantages not available under previous models. The Partner Families would now have access to market appreciation under a certain formula to be applied in years one to five of ownership and years five to ten of ownership. The market appreciation of the home would potentially operate as an offset to any interest payments they would make towards bank financing. There would also be an opportunity to build a positive credit history if Partner Families participate in the Buy Back Program and seek to purchase a home in the conventional housing market.

[23] Would-be purchasers would continue to be subjected to a review of their credit scores, credit history, and debt ratios. Under the previous models this was by the sole lender, Habitat Edmonton, but under the new mortgage model by both lenders, Habitat Edmonton and the credit union.

[24] As Ms. Stone deposed in her affidavit, “the new mortgage model was developed with an understanding of the community which Habitat Edmonton serves and with the knowledge of the fact that Partner Families are not providing a down payment and may not qualify for mortgage financing in the conventional mortgage market...To date, Habitat Edmonton has been able to work with any Partner Families who did not initially qualify for the bank mortgage in order to be able to do so.”

[25] Habitat Edmonton also considered the circumstance of any Partner Family who may have a religious objection to paying interest on a loan. On this point, Ms. Stone deposed as follows:

[26] “...For partner families who demonstrate a faith-based reason for being unable to enter into mortgage with an interest rate, an exception mortgage has been made available in order to address this issue. This exception mortgage, which is only available until the end of June 2020, requires Habitat Edmonton to make a substantial upfront paydown for it to work.”

[27] In her questioning on Affidavit, Ms. Stone testified that, following consideration of any of the options that could be available to Habitat Edmonton in order to address its cash flow problem, the conclusion was that a new mortgage model was the best way to save the organization’s viability:

We’ve had the smartest financial minds in Edmonton working on this problem with us, and it took a group of those individuals to come up with this mortgage model. And I think – you know, I’ve mentioned before, we looked at people who truly understood this environment. There is no other way that many non-profits in the same situation as ourselves, would have come up with a plan that would build sustainability the way we have. And I think that, you know, there is actually a lot for us ... to being ... to sit back and celebrate around this model because it is

inspired. It – it benefits families, it benefits Habitat, and it does not do so at the cost of either party. It, in fact, enhances the outcomes.

So, I- I still am maintaining that, you know, this was the best model that we could come up with that recognizes all of the covenants on our homes. It recognizes our need for debt repatriation. It recognizes our need for equity to be set aside so that we can pay out the equity that our families wish to exit with where we buy-back, and it enables us to continue serving the incredible demand in this community for our services. And it helps us stabilize for 450 families that we're still here and we're still doing business and their homes are not at risk.

The Response of the Plaintiff Partner Families to the New Mortgage Model

[28] The Plaintiff Partner Families take the position that they had entered into “housing and mortgage agreements” with Habitat Edmonton, which taken together comprised the Housing Scheme. These agreements consisted of contractual documents and oral representations by Habitat Edmonton. When the Plaintiff Partner Families were presented with the proposed new mortgage model, they objected that Habitat Edmonton had unilaterally amended the Housing Scheme unlawfully. They rejected the new mortgage model and refused to consider applying to the credit union for mortgage financing. Rather, they commenced the Class Action followed by the 2020 Action.

[29] The Plaintiffs contend that they are in a position where they would not qualify for conventional mortgage financing because of several factors, one or more of which apply to each Partner Family, namely precarious employment, low income, mental or physical disabilities or a religious world view which would prohibit paying interest on a loan. However, as the Plaintiff Partner Families have chosen not to apply for mortgage financing with the credit union, it is not known whether any of the Plaintiffs would not have qualified, in fact.

[30] Habitat Edmonton issued notices to the Partner Families who were in occupation of Habitat Homes stating that they would be removed from their homes on December 31, 2019. The removal notices were extended by agreement of counsel to March 31, 2020 and then April 30, 2020, and finally, as the result of the Covid-19 public health crisis, to July 31, 2020.

The Three-Part Test for an Interlocutory Injunction

[31] In the case of *R v Canadian Broadcasting Corporation*, 2018 SCC 5, the unanimous court summarized the three-part test to be applied by the court in considering an application for an interlocutory injunction, at paragraph 12:

[12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried”, in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test

requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[32] The first stage of the test would apply in circumstances where the Plaintiff seeks a prohibitive injunction, whereby the Defendant is to be prevented from doing something pending resolution at trial. However, in *Canadian Broadcasting Corporation*, the Court went on to consider the test to be applied at the first stage of the analysis where the Plaintiff seeks a mandatory injunction, requiring the Defendant to do something positive. In these circumstances, the Plaintiff must establish a strong *prima facie* case, as stated in paragraph 15:

[15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise “put the situation back to what it should be”, which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, “the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial”. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as “extensive review of the merits” at the interlocutory stage.

[33] The Plaintiffs urge that they are only requiring the Defendant to refrain from taking possession of homes currently occupied by some of the Plaintiffs, or to refrain from selling currently vacant homes to which other Defendants claim entitlement, until the trial of the action. However, as the Defendant asserts, and I agree, the effect of such an injunction, if granted, would require the Defendant to enter into further tenancy agreements with those Plaintiffs currently in occupation of a Habitat home, beyond the expiration of the fixed tenancy term, or to offer fixed term tenancy agreements to those Plaintiffs who are not yet in possession of a Habitat home. Even in circumstances where some Plaintiffs seek, in the alternative, that homes be kept vacant while certain Plaintiffs seek to establish entitlement to occupation by order of the court at trial, the Defendant would still be required, during the period of vacancy, to pay property taxes, insurance premiums and condominium fees with respect to that property, while foregoing any revenue pursuant to mortgage financing upon sale.

Preliminary Review of the Merits

(i) Breach of Contract

[34] Because the Plaintiffs seek a mandatory injunction on the facts of this case, it is incumbent upon them to establish a strong *prima facie* case to be tried. The primary relief being

sought is specific performance, requiring the Defendant to offer for sale houses which are subject only to a no-interest mortgage.

[35] The Plaintiffs assert that the Housing Scheme as a whole constitutes the agreement between the parties. However, as outlined above, the scheme or program consists of five stages including two separate agreements before home ownership is offered. Neither the Partner Family Agreement nor the Fixed Term Tenancy Agreement constitute an agreement for purchase and sale of a Habitat home with mortgage financing upon specific terms. The fundamental problem the Plaintiffs face with respect to specific performance, is that they must establish an actual contract between the Plaintiffs and the Defendant which the court would order to be specifically enforced. In this case, no contract of sale has been offered to any of the Plaintiffs, because of their objection to 50% of mortgage financing to be provided by a credit union, bearing interest. There is, as yet, no contract for the sale of a home with any of the Plaintiffs. The remedy of specific performance can only be used to enforce those obligations to which a party has bound itself by contract. It cannot be used by the court to create obligations to which the parties have not contracted.

[36] There can be circumstances where a court may order specific performance to enforce a contract for purchase and sale of a residential property, where the land has the quality of uniqueness which renders damages less appropriate than specific performance. This principle was recognized by the Supreme Court of Canada in *Semelhago v Paramadevan* [1996] 2 SCR 415, although that case had proceeded as a claim for damages. However, in this case, no purchase agreements have been offered by Habitat Edmonton because of the Plaintiff's objection to the new mortgage model. There are no purchase contracts between the parties for which a court could order specific performance.

[37] A strong *prima facie* case for specific performance has not been made out

Other Causes of Action

(ii) Negligent Misrepresentation

[38] In the alternative to the argument for breach of contract, the Plaintiff Partner Families allege that the Defendant negligently misrepresented to them the mortgage that would be offered to them with a purchase agreement. They allege certain written and oral representations made upon entering the Habitat Edmonton program, that if they qualified for the purchase of a home, then Habitat would offer a no interest mortgage for the entire purchase price of the property. They allege that they relied on these misrepresentations to their detriment and have suffered damages as a result.

[39] As the Supreme Court of Canada has stated in *Queen v Cognos Inc*, [1993] 1 SCR 87 at paragraph 34, the elements which must be proven to make out a claim in negligent misrepresentation are:

- 1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- 2) the representation in question must be untrue, inaccurate or misleading;
- 3) the representor must have acted negligently in making the misrepresentation;

- 4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation;
- 5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[40] The Defendant disputes that there was a “special relationship” in the circumstances of this case, and denies that it had made any representation that was untrue, inaccurate, or misleading at the time that it was made, nor was it negligent in making any representations.

[41] The evidence before the Court relating to negligent misrepresentation may give rise at best, from the Plaintiff’s perspective, to triable issues. However, the court concludes that the Plaintiffs have not made out a strong *prima facie* case in this regard.

[42] In any event, the remedy for negligent misrepresentation, if established at trial, would lead to an award of damages, but not to an order for specific performance in the absence of a purchase agreement between the parties.

(iii) Breach of Duty of Good Faith in Contractual Performance

[43] The Plaintiff Partner Families allege that the Defendant has breached a duty of good faith in the contractual performance as between the parties, that it had failed to alert them of financial difficulties on a timely basis, which prevented them from taking alternative measures to mitigate their personal situation.

[44] In the case of *Bhasin v Hrynew*, 2014 SCC 71 at paragraph 33, the court recognized a duty of good faith in contractual performance as a general organizing principle in the law of contract. In that case, a party with the ability to determine whether or not to renew an agreement cannot be dishonest with the counterparty in representing in its intentions or arrangements it is making with competitors of the counterparty.

[45] In this case, as the Defendant asserts, and I agree, the Plaintiffs have failed to identify the manner in which they allege the Defendant performed contractual duties dishonestly, unreasonably, capriciously or arbitrarily.

[46] The Plaintiff Partner Families have not made out a strong *prima facie* case under this cause of action.

(iv) Breach of Fiduciary Duty

[47] The Plaintiff Partner Families allege that the Defendant is in breach of its fiduciary duty to them, but they have failed to identify a basis for finding all of the required elements of a fiduciary relationship, nor have they identified a breach of an alleged duty.

[48] If a duty exists here, it is outside the well established categories, such as solicitor and client, doctor and patient and trustee and beneficiary. It would have to be found as an *ad hoc* fiduciary relationship, the elements of which are identified by the Supreme Court of Canada in *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24 at paragraphs 27 and 36, as follows:

- a) the fiduciary has scope for the exercise of some discretion or power;
- b) the fiduciary unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or substantial practical interests;

- c) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power;
- d) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- e) a defined class or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
- f) a legal or substantial or practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[49] All of these factors must be established in order to find the existence of a duty in an *ad hoc* fiduciary relationship.

[50] The Plaintiffs assert that they are particularly vulnerable and at the mercy of the fiduciary holding the discretion or the power. However, it remains the choice of the Plaintiffs not to enter into a purchase agreement under the new mortgage model. This is distinct, for example, from a situation where a trustee has abused its power in relation to property in which the beneficiary has an equitable interest. Here, the Plaintiffs have no legal or equitable interest in a home which has not been purchased. As Habitat Edmonton has asserted, it strives to “ensure the success of families”. In proposing the new mortgage model, it is attempting to do just that, in relation not just with the Plaintiffs, but with all 450 Partner Families.

[51] The Court concludes that a strong *prima facie* case has not been made out against the Defendant for breach of fiduciary duty. In any event, if a case for the existence and breach of a fiduciary duty can be made out at trial, it would result in an award of damages and not specific performance.

Irreparable Harm to the Plaintiffs

[52] At the second stage of the analysis, the court must consider whether the Plaintiffs will suffer irreparable harm not compensable in damages if interlocutory injunctive relief is not granted. As the Supreme Court of Canada stated in *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 S.C.R. 311 at paragraph 64:

“Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from another.

[53] The Plaintiffs assert that if an interlocutory injunction is not granted, then they will be unable to continue in the Habitat program, to continue to occupy their home under their Fixed Term Tenancy Agreement upon the expiry of its term, or to keep their designated home vacant until the issue of specific performance is determined at trial.

[54] The Plaintiffs contend that, if injunctive relief is not granted, then there is no guarantee that Habitat homes will be available for them if they win their case at trial for specific performance. If homes which were built and customized for their future ownership are sold to others, then they must wait for a new stock of homes to become available. This could take years, given the current waiting list for Habitat homes. Furthermore, their circumstances may change while the law suit progresses. They must find other accommodation with the hardship that this

may cause. On the other hand, it should be noted that, even if an injunction is granted, some Plaintiffs may decide in the future that they no longer want to stay in the Habitat program and purchase a Habitat home, having found other acceptable accommodation.

[55] As previously stated in these Reasons, the Plaintiffs have not made out a strong *prima facie* case for specific performance. In considering the housing program as a whole and its constituent elements, there is no actual offer for purchase and sale subject to mortgage financing between any of the Plaintiffs and the Defendant. The Plaintiffs also assert causes of action in negligent misrepresentation, breach of duty to fairly perform contract, and breach of fiduciary duty. However, if successful at trial under any of these causes of action, this would lead to an award of damages but not the remedy of specific performance.

[56] As to whether the Plaintiffs' claims are quantifiable in monetary terms, then this is conceivable as a remedy for alleged breach of contract, or in the alternative, alleged negligent misrepresentation. The measure of damages could be the difference between the amount of interest payable to the credit union under the new mortgage model, compared to zero interest payable under a no interest mortgage for the entire purchase price. However, this would be predicated on the Plaintiffs entering into a purchase agreement under the new mortgage model, but this they have chosen not to do.

[57] The Court notes that there is no evidence that any of the Plaintiffs have, in fact, applied for mortgage financing through the credit union, or that the credit union and Habitat Edmonton have analyzed their current ability to afford a purchase of a home. There are two exceptions, namely Tuba Naseem and Erin Williams. The Defendant acknowledges that Ms. Naseem has found herself in tragic circumstances. Following her husband's death, she no longer has the income that would support the purchase of a home. As for Ms. Williams, she is no longer eligible for a Purchase Agreement, having been repeatedly in default in payment of rent under her Fixed Term Tenancy Agreement. One Plaintiff applicant, Said Kahssay, takes exception to a mortgage requiring payment of interest, for religious reasons. However, he has refused to consider the alternative mortgage proposal by the Defendant which was designed to circumvent this concern.

[58] Ms. Stone has testified that, in each case, Habitat Edmonton would work with the Partner Family to ensure, wherever possible, that it would be successful in entering into affordable home ownership. The interest rate to be offered by the credit union would be less than market rate. Habitat Edmonton has had a track record of backing up home owners who get into difficulty from time to time. The target is that the homeowner will not be paying more than 25% of their income on the mortgage payments. Also, the new mortgage model, which builds in an appreciation in value for the benefit of the owner who elects to sell the home down the road, could offset any amounts that had been paid to the credit union by way of interest.

[59] On the other hand, Habitat Edmonton has presented evidence of the risks of harm that it would face were this Court to grant the injunction requested. The Court must take those factors into account under the third stage of the analysis, namely weighing the balance of convenience.

Balance of Convenience

[60] Habitat Edmonton has led evidence in response to this application for an interlocutory injunction, which, considered in its entirety, leads to the conclusion, should an injunction be granted, then this would have serious repercussions for the organization's ongoing viability. This has ramifications beyond the claims specifically raised in this litigation. The organization also

has a responsibility for the 450 Partner Families currently within the program, as well as its mandate to continue the program, building new affordable housing for qualified applicants.

[61] In considering the three stages of the test together in their entirety, Robert J. Sharp in Injunctions and Specific Performance (loose leaf edition, Thomson Reuters), states that the ultimate chance of success in the application is directly relevant to an assessment to the relative risks of harm:

...The likelihood of the plaintiff's success or failure relates both to the extent of the risk that there will be any legal harm which calls for a remedy in favour of the plaintiff, and to the extent of the risk that an injunction may prevent the Defendant from pursuing a rightful course of conduct....

Para 2.160

[62] In this case, I find that the risk that an injunction may prevent the Habitat Edmonton from pursuing its rightful course of conduct, outweighs any risk asserted by the Plaintiff Partner Families in this application.

[63] Ms. Stone has given evidence as to the harmful effects on Habitat Edmonton, should the interlocutory injunction be granted.

[64] With the Plaintiff Partner Families refusing to enter into purchase agreements under the new mortgage model, it is estimated that Habitat Edmonton will not have the benefit of first mortgage receipts totalling \$7,448,000. If these funds could be accessed, then they would be deployed towards debt reduction, equity liabilities and funding new construction.

[65] Habitat Edmonton has buy back liabilities in the order of \$15.5 million with no reserves to meet those liabilities. The amount of those liabilities is expected to increase in 2021. Habitat Edmonton has mortgage receipts of approximately \$3.7 million of which \$2 million has to service its considerable debt. The remaining \$1.7 million is used for buy backs and Habitat Edmonton has already received notice of buy backs which meet or exceed \$1.7 million. This results in the need to reach further into its credit facility to satisfy the rest.

[66] By not having access to the first mortgage receipts, Habitat Edmonton incurs \$25,447 in interest charges a month (4.1% interest on \$7,448,000).

[67] If homes are not occupied as a result of an injunction, Partner Families would not be covering property tax, condominium fees and utilities, requiring Habitat Edmonton to spend \$5,296 on such expenses to maintain vacant homes.

[68] Another direct impact is that Habitat Edmonton will lose the ability to build 27 further homes within the next ten years, which translates into 27 other families who will not receive the opportunity of affordable home ownership.

[69] The Society's Board of Directors has given approval for the organization to borrow up to \$31,000,000. It has access to \$34,000,000 in its credit facility, however, it has been determined that \$31,000,000 is the number where the organization can no longer borrow because that is the point where it will need to take steps to shutter its operations.

[70] Habitat Edmonton is also having to deal with the adverse consequences of the Covid-19 pandemic, including the need to assist Partner Families who are likely to lose their employment, the loss of revenue from its ReStores and an anticipated drop in donations. Ultimately, there is

the real possibility that Habitat Edmonton will fail leaving 450 Partner Families without the support they have become to depend on, leaving 110 people unemployed and ending the hope of affordable home ownership for potential Partner Families in the Edmonton area.

[71] Taken as a whole, it is apparent to this court that the risks that an injunction would pose to the ongoing operation of Habitat Edmonton, and its possible failure, outweighs any risk of harm asserted by the Plaintiff Partner Families in this application as outlined above.

Undertaking as to Damages

[72] The representative Plaintiffs in their affidavits have undertaken to indemnify the Defendant for damages which it may suffer should the Plaintiffs' claims not succeed at trial. This is a weighty undertaking to be taken seriously. As the Alberta Court of Appeal has stated in *Lac La Biche (Town) v Alberta*, (1993) 135 AR 352 at paragraph 28:

Nor is the undertaking as to damages a frill or a side issue. Nor is it merely an expression of the old equitable principle that one who seeks equity must do equity. It is an integral part of the balance of convenience Usually plaintiffs offer undertakings as to damages and courts exact them, in order to minimize the risk to the defendant from wrongly granting an interlocutory injunction.

[73] Given potential losses that Habitat Edmonton could face as the result of an injunction, this raises the issue as to whether Plaintiff families individually or collectively could afford to satisfy the undertaking. This is most doubtful.

[74] However, the Plaintiffs assert that, for reasons of public policy, it would be unfair to find that the application should fail on the basis of perceived weakness of the undertaking, given the limited financial resources of the Plaintiff families.

[75] I make no finding as to whether the requirement of a sufficient undertaking as to damages should be unenforceable in these circumstances, by reason of public policy. It is sufficient, in my view, that grounds to support an interlocutory application have not been made out under the three-part test.

Discharge of Caveats

[76] Caveats have been registered against title by some of the Plaintiffs who currently occupy Habitat homes. The basis for their caveats is to protect their "equitable interest" in the property, "pursuant to a series of agreements in writing". However, I find that there is nothing in the Partner Family Agreements or the Fixed Term Tenancy Agreements which provides the Plaintiffs with a caveatable interest in the properties.

[77] *The Law of Property Act*, RSA 2000, c L-7 identifies equitable interests in land:

Equitable interests in land

63(1) The following are equitable interests in land:

- (a) a right of first refusal to acquire an interest in land;
- (b) an assignment of rents payable pursuant to a lease of land.

[78] The Partner Family Agreement does not identify any particular property on which an interest could be asserted. The Fixed Term Tenancy Agreement gives the Partner Family the right to occupy premises as a tenant, but only for the term of the lease. It does not confer the rights of ownership or any right of first refusal.

[79] Furthermore, the Habitat Edmonton program makes reference to an “equity account”. However, this is not accessed until a Partner Family has moved into a home pursuant to a Purchase Agreement and has executed a right of first refusal agreement in favour of Habitat Edmonton.

[80] A letter had been sent to some applicants putting forth an offer of paying out equity to the families who chose not to consider the new mortgage model and decided instead to leave the program. However, this was an offer that was not accepted and it does not confer an equitable interest as defined in section 63(1) of the *Law of Property Act*.

[81] I find that there is no basis in law or fact to sustain the caveats that have been registered and I direct that they be discharged from title.

Continued Occupation of Habitat Homes

[82] Most of the Plaintiffs occupy Habitat premises pursuant to Fixed Term Tenancy Agreements which have expired or are about to expire. After this application was filed, a public health emergency was declared as the result of the spread of Covid-19. This has led to directions, among other things, to maintain social distancing and remain at home wherever possible.

[83] Before the Court, there is no application by Habitat Edmonton for an order for possession of any of the homes currently occupied by Plaintiff Partner Families. Rather, the Court is informed that, as the result of the health emergency, no steps are to be taken with respect to possession of Habitat homes before July 31, 2020. In addition, Ms. Stone has testified that notwithstanding the litigation against it, Habitat Edmonton is willing to continue to work with Plaintiff Partner Families who would qualify for affordable home ownership under the new mortgage model. The Society has always had, as a primary aim, the successful entry by Partner Families into home ownership.

Conclusion

[84] For the foregoing reasons, the application by the Plaintiffs for an interlocutory injunction is dismissed. The cross-application for an order vacating the caveats registered against title is allowed.

[85] Counsel for the Defendant has submitted that, should the Defendant be successful in these applications, then no costs would be claimed. Therefore, I order that the parties bear their own costs of these applications.

Heard on the 23rd and 28th days of April, 2020.

Dated at the City of Edmonton, Alberta this 1st day of June, 2020.

James T. Neilson
J.C.Q.B.A.

Appearances:

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