



COURT FILE NUMBER 1401-01033
 COURT COURT OF QUEEN'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY
 PLAINTIFF(S) RICHARD GODDERIS and RICHARD GODDERIS AS REPRESENTATIVE PLAINTIFF
 DEFENDANTS CERTIFIED FINANCIAL SAVINGS & MORTGAGE CORP. and PHILIP FIESS
 Brought Under the *Class Proceedings Act*

DOCUMENT AMENDED AMENDED STATEMENT OF CLAIM

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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 Attention: Byron W. Nelson

AMENDED this 12 day of February 2016 Pursuant to Rule 3.67 dated the 12 day of February 2016

CLERK OF THE COURT

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

1. The Plaintiff, Richard Godderis, ("Godderis"), is a business person, resident in the Hamlet of Bragg Creek, Province of Alberta.
2. Godderis, for himself and as Representative Plaintiff, brings this action on behalf of all persons or corporations which held investments within the Medallion McKnight scheme whose interests were registered by way of a mortgage registered as number 101302625 by Certified Financial Savings and Mortgage Corp. on the property legally described as Plan 9012577; Block 1; Lot 2; Excepting Thereout All Mines and Minerals. This mortgage has also been identified as the "fourth mortgage" or the "second Certified mortgage" (the "Plaintiff's Mortgage").

3. The Defendant, Certified Financial Savings & Mortgage Corp. ("Certified"), is a body corporate, incorporated pursuant to the laws of the Province of Alberta, with offices in the City of Calgary, Province of Alberta.
4. The Defendant, Philip Fiess ("Fiess"), is an individual, resident in the City of Calgary, Province of Alberta and was at all material times a practising Barrister and Solicitor, licensed by the Law Society of Alberta and working in Calgary, Alberta.

Structure of Investments

5. Godderis was approached in 2007 to invest in an investment known as "Medallion McKnight" (the "Project"). The investment concept for Medallion McKnight was the development and construction of a commercial and residential project at 4808 Edmonton Trail N.E., Calgary, Alberta. The Project was specifically a development of a commercial base and two residential towers comprising 246 condominium residential units. On the sale of each residential condominium unit, a portion of such sale monies would be applied to bank financing which would be registered as the first mortgage on title.
6. The structure for investment in the Project was for investors, such as the Plaintiff, to provide funds as part of a \$3,875,000.00 second mortgage on the property which was registered as instrument number 051095963 (the "Mortgage"). Funds invested were stated to earn interest, which interest could be paid to the investor by regular payments, or at a higher rate of interest payable at the completion of the project, at the investor's choice. The representation was that the Plaintiff's funds would be part of the Mortgage.
7. Godderis invested \$350,000.00, jointly with his wife Joan Godderis, which Certified confirmed as representing a 0.0633 percent interest in the combination of the encumbrances representing institutional financing and the Mortgage. At all material times, Godderis believed that his investment was registered as part of the Mortgage.
8. Investor funds were to be pooled together to form the Mortgage to a total of \$3,875,000.00 of investor monies.

Fiess

9. Fiess was retained as the lawyer for Certified to ensure that the investors' funds were protected by registration as part of the Mortgage. As such, Fiess had a direct duty to the Plaintiff to ensure that such registration was done properly and in accordance with all agreements.
10. The Plaintiff acknowledges that Fiess presented documentation to Godderis to confirm that Fiess did not make representations to Godderis or his wife about the suitability of this investment. Once the loan documentation was signed, the Plaintiff states, and the fact is,

that Fiess owed a duty to the Plaintiff, and all investors, to ensure that their investment monies were registered and protected as part of the Mortgage as per the loan agreement.

Improper Registration

11. Certified and Fiess were only to collect investment funds so that the total of investors' investment monies and institutional financing would not exceed \$5,625,000.00, as per the terms of the loan agreement. Certified collected funds far in excess of that amount and kept the investment monies of the Plaintiff and Class Members without obtaining their consent to keep their funds invested.
12. Rather than registering the investment monies of the Plaintiff and Class Members as part of the Mortgage, as Certified and Fiess were required to do, Fiess neglected or lost the papers relating to the Plaintiff and the Class Members and did not register them into the Mortgage. Rather, the Mortgage, which had been registered in the amount of \$3,875,000.00 was registered in the names of other investors, whose investments totalled \$3,875,000.00. To be clear, the Plaintiff and Class Members are those investors who invested funds with the Defendants and were not registered as part of the Mortgage.
13. As such, the Plaintiff and the Class Members were not registered as part of the Mortgage, and they did not receive registration and protection as part of the Mortgage, as per each of their loan agreements. In the Plaintiff's case, the investment by he and his wife was to be 0.0622% of a total of encumbrances totalling \$5,625,000.00 on title as per the terms of the loan agreement. In fact the Plaintiff was not registered or protected for any amount of the Mortgage as the \$3,875,000.00 was invested by and credited to other investors and not part of the \$3,875,000.00 that was represented to have been raised and protected within the Mortgage.
14. This error seems to have been the fault of Fiess, but the Plaintiff is unaware of the instruction by Certified to Fiess and whether the fault might lay elsewhere. The Plaintiff simply understands that his investment monies were not protected as they were agreed to be.

Discovery of the Error

15. Some time prior to October 2010, Certified discovered that investment funds of greater than \$3,875,000.00 had been received from investors and that some investors were not protected within the Mortgage for their investment funds.
16. On October 13, 2010, the Plaintiff's Mortgage was registered in the amount of \$2,665,100.00 to represent and protect the investment of the Plaintiff and Class Members. Unfortunately, whereas the Mortgage was always intended to be the second mortgage on title, the Plaintiff's Mortgage ended up being the fourth mortgage on title, as there had been

an intervening mortgage registered. The Plaintiff's Mortgage was registered without the knowledge, agreement or consent of the Plaintiff or Class Members.

17. Around October of 2010, Certified contacted the Plaintiff and Class Members, advising of the error, attributing the error to Fiess, and assuring that Certified had taken steps to ensure that no loss would result to the Plaintiff or other Class Members as a result. The Plaintiff was left with the impression that this error was fixed and that there would be no negative impact to his investment monies. However, it was never clear to the Plaintiff that Certified had raised more into the Project than originally represented, being that the total of bank financing and investor financing would be a total maximum of \$5,625,000.00. This drastically varied the risk and, as such, the Defendants did not have the consent of the Plaintiff to have kept his investment on terms other than to which he had agreed.
18. A group called McKnight Co-Lenders Group Ltd., which only represented those registered under the Mortgage, had been appointed as loan administrator of the Mortgage by way of a court order on January 19, 2012. The Project was sold by way of a court order on May 10, 2012.
19. Sometime in February 2012, following the appointment of the loan administrator, the Plaintiff was advised for the first time that there would not be enough money left after a sale of the Project to payout the Mortgage, let alone the third mortgage registered on title or the Plaintiff's Mortgage. Certified had never advised that there was any risk of the Plaintiff's Mortgage not being fully paid out, nor that the investors protected by the Mortgage would receive preferential treatment on the payout of funds from the Project. In fact, Certified advised the Plaintiff the exact opposite. It was only when a third party, the loan administrator, looked at the finances of the Project, that the Plaintiff was made aware that his investment was at risk, and that he would be treated differently than other investors. And, as stated previously, the Plaintiff and Class Members who invested \$2,665,100.00 only did so on the understanding that they were part of the Mortgage, in second position on title to the Project.
20. The issue of whether the investors registered as part of the Mortgage, and those like the Plaintiff registered under the Plaintiff's Mortgage, should be treated differently in regards to the payout of net funds available from the sale of the Project, is a live one. This issue is presently before the Alberta Court of Appeal with a hearing scheduled for April 3, 2014. This is the appeal of an Order by Madam Justice Romaine determining that those investors protected by the Plaintiff's Mortgage could not take part in the proceeds from the sale of the Project.
21. As such, there is a possibility that this issue may become moot, if the appeal is successful. However, this Statement of Claim is being filed at this time out of an abundance of caution, mindful of approaching limitation dates.

Liability of Certified

22. Certified is liable to the Plaintiff and Class Members due to a breach of contract. The Plaintiff and Class Members each signed a loan agreement and other documents with Certified by which Certified agreed that their investment monies would form part of mortgages that would not exceed \$5,625,000.00, between investor financing and institutional financing. Investment and loan documents represented that the first registered mortgage, being institutional financing, and the second registered mortgage, being investor financing, would not cumulatively exceed \$5,625,000.00. And that the investor had a specified portion of the Mortgage.
23. Certified fundamentally breached its contractual agreement with the Plaintiff and Class Members by not ensuring that their investment monies were protected in the Mortgage, and were a specific portion of the first mortgage and the Mortgage, as contracted. It also breached the agreements by taking, and retaining, investment funds from the Plaintiff and Class Members after taking \$3,875,000.00 from other investors and protecting them within the Mortgage.
24. The Plaintiff and Class Members have sustained clear damages as they were entitled to restitution of their investments if they did not form part of the Mortgage, and the \$3,875,000.00 secured thereby. The whole agreement between the parties was predicated on the Plaintiff and Class Members being put into the Mortgage in second position on title.
25. Alternatively, the Plaintiff and Class Members have suffered clear damages and are entitled to recover same, such damages representing the payment they would have received from the proceeds of the sale of the Project, given the proportion of the Mortgage stated in their respective contracts.
26. The damages resulting from this breach of contract are very easy to determine. If the Plaintiff and Class Members are entitled to restitution, then they are entitled to the return of their investment monies. If they are entitled to damages as if their investments did form part of the Mortgage and would have been partially paid out on sale of the Project, their percentage ownership can be applied against the net sale proceeds.

Liability of Fiess

27. Fiess owed a duty to the Plaintiff and the Class Members to ensure that their investment monies were protected by way of being registered as part of the Mortgage. This was a duty owed directly to the Plaintiff and the Class Members.
28. Although Fiess was retained by Certified, it was clear at all times that Fiess was performing legal work to protect the investment funds of investors by administering investment funds

and registration of the Mortgage and therefore Fiess was at all times acting for the benefit of the Plaintiff and Class Members.

29. Fiess had a sufficiently close relationship with the Plaintiff and Class Members that it was foreseeable that failing to register their investments in the Mortgage would cause them damages. This created a duty of care on Fiess to properly register the investors' investments in the Mortgage and there are no considerations that which limit such duty. Fiess breached that duty, and by failing to include the investment monies of the Class Members in the Mortgage, and then failing to return such funds to the Class Members, causing them to suffer damages.
30. Fiess received specific instructions relating to each investor, including the Class Members, as to how their investment monies were to be registered and protected within the Mortgage. Fiess failed to carry out those instructions.
31. In the alternative, Certified is responsible for the damages suffered by the Plaintiff and Class Members, in that its solicitor, Fiess, failed to properly protect their investment monies as per the terms of the loan agreement and other documents. Certified is responsible for the actions of its agent and is therefore liable to the Plaintiff and Class Members in that regard.
32. Fiess and Certified should have caused the \$2,665,100.00 invested by the Plaintiff and Class Members to be returned to investors when they realized that such funds were not protected and registered under the Mortgage. Those funds should not have been kept without a new agreement by the Class Members. The Plaintiff states, and the fact is, that the actions of the Defendants placed the Plaintiff and Class Members into a position with a higher risk and different investment than they had agreed upon.

Definitions

33. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meaning:
 - a. "Class Members" shall refer to all individuals or corporate entities who or which held investments in the Project that were registered as part of the Plaintiff's Mortgage; and
 - b. "Registered participants" shall refer to all investors that participated in the Project and had investment funds registered as part of the Plaintiff's Mortgage, but used registered funds to do so, such that any participation was performed in a manner to comply with Canada Revenue Agency guidelines.

Fiduciary Duties

34. Certified owed a fiduciary duty to the Plaintiffs, since it was providing investment advice to the Plaintiff and were handling investment funds. Certified's breaches of such fiduciary include, but are not limited to, the following:
- a. Acting in a conflict of interest with the Plaintiff and the Project;
 - b. Acting in a manner that created conflicting duties between various Class Members to whom they owed a fiduciary duty;
 - c. Taking advantage of their positions as a fiduciary and using that position for individual gain and profit;
 - d. Causing funds belonging to the Project to be used for purposes not related to the Project;
 - e. Failing to properly protect the Plaintiff's investment funds and being untruthful about the protection of such funds;
 - f. Neglecting or refusing to be accountable to the Plaintiff;
 - g. Refusing or neglecting to provide full financial, informational and other disclosure to the Plaintiff;
 - h. Refusing or neglecting to act in the best interests of the Plaintiff; and
 - i. Such further and other breaches as may be proven at a trial of this action.
35. The full extent of the actions and omissions of the Defendants, or several of them, are not yet known and the Plaintiff puts the Defendants upon notice that he shall apply at a trial of this action to amend his pleadings to particularize such further breaches as may be demonstrated and proven.

Clients – The Nature of the Class

36. At all material times, the Plaintiff and Class Members were all investors in the Project through Certified who had their investment monies protected and registered in the Plaintiff's Mortgage as opposed to the Mortgage. This would include cash participants and clients that held funds in registered accounts.

Stated Facts of the Representative Plaintiff

37. The representative plaintiff, like other investors invested in this Project, experienced losses as a result. The specific details related to this investment and/or loss of both the representative plaintiff and the other members of this class will be proven at a trial of this action.

Limitation Act

38. The Defendants concealed the nature of their error and were not truthful about whether it had indeed been entirely corrected. The Plaintiff and Class Members did not learn until February of 2012 that the error would deprive them of a return on funds, and more importantly, that they would be treated differently than other investors. The Defendants concealed appropriate information that would have allowed the Plaintiff and Class Members to learn the truth at an earlier date. The Plaintiff pleads that the timing provisions of the *Limitations Act* be estopped during such time. The Plaintiff specifically pleads and relies upon section 4 of the *Limitations Act* R.S.A. 2000 c. L-12, as amended.

Damages

39. As a result of the actions and omissions of the Defendants, the Plaintiff and Class Members that constitute this action have suffered loss and damage.
40. The Plaintiff and Class Members of this action claim entitlement to damages which resulted in the investments in which they participated.
41. The Plaintiff and Class Members seek restitution of \$2,665,100.00 of investment funds as they were not part of the Mortgage, as originally agreed to, and as such the original loan agreement was frustrated and investment funds should have been returned. In the alternative, the Plaintiff and Class Members are entitled to damages on a pro rata amount of their investment as applied against the net sale proceeds of the Project, as if they were properly placed into the Mortgage.
42. The Plaintiff and Class Members request that this court order damages to be paid to Class Members on an aggregate basis or in accordance with a distribution as directed pursuant to the terms of the *Class Proceeding Act* S.A. 2003, c. C-16.5, as amended.
43. The Plaintiff and Class Members allege and the fact is that the Defendants have also been unjustly enriched via fees, penalties, wages and other forms of remuneration, placed upon the Project. The Plaintiff and Class Members state that these funds are all subject to a constructive trust in favour of the Plaintiff and Class Members. The Plaintiff and Class Members claim entitlement to an accounting and disgorgement of fees, penalties, wages

and other forms of remuneration taken by the Defendants, and interest received by the Defendants, as related to various investments they promoted.

44. The full extent of the damages sustained by the Plaintiff are not fully determined and the Plaintiff puts the Defendants upon notice that he shall apply at a trial of this action to amend his pleadings to more accurately itemize and particularize the damages sustained.

Disgorgement and Constructive Trust

45. As a result of their misconduct described herein, the Defendants have become subject to an equitable obligation in relation to all revenue that they generated or obtained as a result of such misconduct, including their use of investor funds. Pursuant to this equitable obligation, all such revenue should be disgorged or made subject to a constructive trust in favour of the Representative Plaintiff and the Class Members. In particular, among other things:

- (i) The Defendants would not have generated or obtained such revenue but for their misconduct described herein;
- (ii) An equitable remedy against the Defendants is appropriate in the circumstances given their unjust enrichment and the very serious nature of their misconduct described herein in order to ensure that the Defendants do not profit from their wrongful acts and to deter others like the Defendants from engaging in similar misconduct; and
- (iii) There is nothing that would render the imposition of an equitable remedy against the Defendants unjust or improper in the circumstances.

Punitive Damages

46. The Plaintiff and Class Members state that the Defendants have engaged in conduct warranting imposition of punitive damages in the circumstances. By intentionally and deliberately retaining \$2,665,100.00 from the Plaintiff and Class Members, with the full knowledge that it was in excess of the original amount, the Plaintiff and Class Members were exposed to risk that they had not agreed to.
47. The full extent of the damages to the Plaintiff is not fully ascertained at this time but will be proven at a trial of this action and the Plaintiff puts the Defendants on notice that he shall apply at the trial of this action to amend his claim and/ or prayer for relief herein with regard to such additional damages and a description of such.

48. The Plaintiff pleads and relies upon the provisions of the *Class Proceedings Act* R.S.A. 2003 c. 16.5, as amended.
49. The Plaintiff pleads and relies upon the provisions of the *Judgment Interest Act*, being Chapter J-1 of the Revised Statutes of Alberta 2000, as amended, and the regulations made thereunder.
50. The Plaintiff pleads and relies upon the provisions of the *Business Corporations Act*, being Chapter B-9 of the Revised Statutes of Alberta 2000, as amended, and the regulations made thereunder.
51. The Plaintiff pleads and relies upon the provisions of the *Securities Act*, being Chapter S-4 of the Revised Statutes of Alberta 2000, as amended, and the regulations made thereunder.
52. The Plaintiff pleads and relies upon the provisions of the *Excise Tax Act*, R.S.C. 1990, c. E-15 Part IX and amendments thereto, insofar as Goods and Services Taxes are payable in respect of the Plaintiff's claims or costs.
53. The Plaintiff proposes that the trial of this action be held at the Court House, in the City of Calgary, in the Province of Alberta.
54. In the opinion of the Plaintiff, this matter will take more than 25 days to try.

Prayer for Relief

WHEREFORE THE PLAINTIFF CLAIMS FOR RELIEF AND JUDGMENT AGAINST THE DEFENDANTS, JOINTLY AND SEVERALLY, AS FOLLOWS:

- a. An Order certifying this action as a class proceeding and appointing the named representative plaintiff, or an appropriate alternate, as may be subsequently determined, as representative plaintiff of the Class Members invested in this investment;
- b. An Order compelling a plan of distribution pursuant to the terms of the *Class Proceedings Act*;
- c. Any interim Order that may be sought and is deemed appropriate, as it relates to this particular investment;

- d. An accounting of every transaction and an award of damages for the net amount of investment proceeds that investors should have received from this investment but did not;
- e. General damages in an amount, to be proven at a trial of this action;
- f. The return to investors of capital raised which has not already been paid back, in an amount not less than \$2,665,100.00, or alternatively, the capital that the investors would have received in any event, on sale of the Project, had they been properly protected and registered within the Mortgage;
- g. Damages representing income raised by the Project, but not properly paid to investors;
- h. Special damages in an amount to be proven at the trial of this action;
- i. Punitive and aggravated damages in such amounts as may be proven at the trial of this action;
- j. Interest in accordance with the provisions of the *Judgment Interest Act*, R.S.A. 2000, c. J-1, as amended;
- k. Any applicable Goods and Services Tax pursuant to the terms of the *Excise Tax Act*, R.S.C. 1990 c. E-15, Part IX, and amendments thereto;
- l. Costs of this action, including, but not limited to costs of providing notice to Class Members and administration of damages pertaining to a plan of distribution;
- m. Costs of this action on a substantial indemnity basis, or alternatively, solicitor and his or her own client costs, or alternatively Costs; and
- n. Such further and other relief as this Honourable Court may deem just and proper.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff(s)' address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.