

Citation: Meyer, et al v. Christian
Reformed Seniors Housing
2002 BCSC 1392

Date: 20021001
Docket: C991941
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**SANDRA MEYER & DIANE WHITE, EXECUTORS OF THE ESTATES
OF JAMES ERNEST VINCE AND VERA ALEXANDRA VINCE**

PLAINTIFFS

AND:

**CHRISTIAN REFORMED SENIOR HOUSING SOCIETY,
MARLENE HART AND KEN HART REALTY LTD.**

DEFENDANTS

Docket: C991942
Registry: Vancouver

BETWEEN:

**SANDRA MEYER & DIANE WHITE, EXECUTORS OF THE ESTATES
OF JAMES ERNEST VINCE AND VERA ALEXANDRA VINCE**

PLAINTIFFS

AND:

DONALD H. FORBES

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE MELNICK**

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Date and Place of Hearing:

August 21, 22 and 23, 2002
Vancouver, BC

[1] The plaintiffs claim against the defendants Christian Reformed Seniors Housing Society ("Housing Society"), Marlene Hart ("Ms. Hart") and Ken Hart Realty Ltd. ("Hart Realty") for fraudulent or negligent misrepresentation. The plaintiffs claim against Donald H. Forbes ("Mr. Forbes") in negligence, breach of contract, and breach of his duty of care as a solicitor. Ms. Hart and Hart Realty, Mr. Forbes, and Housing Society have each brought separate applications under Rule 18A to have the plaintiffs' claims against them dismissed (with the exception of a separate cause of action brought only against Housing Society). It is the position of the plaintiffs that there are issues of credibility that cannot be resolved on a summary trial.

[2] The plaintiffs are sisters who are executors of the estates of their parents. In early 1995 their parents, James Ernest Vince ("Mr. Vince") and Vera Alexandra Vince ("Mrs. Vince"), purchased a life estate in a condominium unit in a seniors complex developed by Housing Society. The purchase price was \$205,000. The plaintiffs, who assisted Mr. and Mrs. Vince in negotiating and finalizing the purchase of the life estate, maintain that both they and their parents were made to understand by literature provided by Housing Society and representations made by Ms. Hart and Hart Realty that Mr. and

Mrs. Vince were in fact purchasing a fee simple interest in the condominium unit. They also maintain that Mr. Forbes, the lawyer they engaged on their parents' behalf to explain the nature of the interest Mr. and Mrs. Vince were purchasing and to do the conveyance, led them to believe that they were purchasing a fee simple interest for the lifetime of Mr. and Mrs. Vince or the survivor of them. They also maintain that the disclosure statement provided by Housing Society (which has subsequently been substantially amended to properly disclose the nature of the interests prospective purchasers are buying) was misleading in that it suggested that the nature of the interest was that of ownership.

[3] For its part, Housing Society suggests that there was no evidence suggesting that Mr. and Mrs. Vince had relied upon any specific advertising of Housing Society. Further, Ms. Hart, Mr. Ken Hart of Hart Realty, and Mr. Forbes all maintain in their affidavits that they were scrupulous about explaining to Mr. and Mrs. Vince and to Sandra Meyer ("Ms. Meyer") and Diane White ("Ms. White") the nature of the interest being purchased.

[4] Other than any written representations made by it in its disclosure statement, other documents relating to the condominium development, or advertisements to the public at

large, Housing Society maintains that the only representations that could have been made to Mr. and Mrs. Vince were by the realtors they engaged for that purpose, Hart Realty. Thus, says Housing Society, if I am satisfied that there was no misstatement by Ms. Hart or Hart Realty, then they have no vicarious liability.

[5] Further, the plaintiffs say that Mr. and Mrs. Vince were misled as to the staff that would be available on an ongoing basis at Covenant Court, the housing development. The advertisements indicated, and the plaintiffs and Mr. and Mrs. Vince were advised, that the manager of the complex was a registered nurse. They agree that the individual in question, who was the manager at the time they purchased their life estate in Covenant Court, would not be providing medical help to occupants in her capacity as a nurse. However, they say that they understood a nurse would be the manager and, knowing that such a person was available to interact with occupants, this provided comfort to the plaintiffs and to Mr. and Mrs. Vince.

[6] After the death of Mrs. Vince in 1996, but before the death of Mr. Vince in 1997, the then manager was replaced by an individual who was not a nurse. This apparently caused Mr. Vince and the plaintiffs dismay. Housing Society maintains

that it had no obligation to provide a manager with a nursing background.

[7] There was no evidence that suggested that either Mr. or Mrs. Vince or the plaintiffs suffered any particular damage as a result of Housing Society replacing the original manager with an individual who was not a nurse. It was not suggested, for example, that the Vinces' life estate was less marketable because the new manager was not a nurse. In the view of the various defendants, however, it was this change in the management of Covenant Court which was the genesis of the plaintiffs' and Mr. Vince's unhappiness with their investment.

[8] The plaintiffs say that they and Mr. Vince first became aware of the true nature of the Vinces' interest in their condominium unit during exchanges with an individual or individuals from Housing Society over the change of manager.

[9] If I accept the evidence of Ms. Hart, Mr. Hart and Mr. Forbes as to how careful and scrupulous they were in explaining to Mr. and Mrs. Vince and the plaintiffs the nature of the interest being purchased, it is hard to believe how anyone, even unsophisticated purchasers for whom the concept of condominiums and leasehold interests was not familiar, would have failed to appreciate that they were not purchasing a fee simple interest. Both Ms. Meyer and Ms. White have

acknowledged that they were aware that the nature of the interest being purchased was a life lease. The application form completed in connection with the application to purchase referred to the applicants as the "occupant" and Housing Society as the "owner". Ms. Meyer and Ms. White, who acted on powers of attorney to purchase the life estate for their parents, entered into a "life-lease occupancy agreement" in which Mr. and Mrs. Vince were described as "occupants", Housing Society as "owner". After completion of the conveyance, they were provided with a state of title certificate which described their interest as a life estate.

[10] However, Ms. White makes it clear that although they were told that the nature of the interest that would be purchased was a life lease, it was explained by Ms. Hart that her parents would be the owners of the condominium unit. The plaintiffs maintain that Mr. and Mrs. Vince would not have purchased the life estate from Housing Society if they were not to be owners "in the normal sense" since that type of ownership was important to them. Further, Ms. White maintained that Mr. Forbes explained the nature of a life lease to them as "ownership for life". She further maintains that Mr. Forbes did not caution them that the market value of such an interest might be different from that of a fee simple

strata unit. Mr. Forbes, on the other hand, maintains that he warned the plaintiffs that, upon the death of the survivor of the Vinces', the resale value of the unit could be affected by there being a smaller pool of potential buyers than would be the case if the unit was owned in fee simple and, further, that the resale value of the unit would also depend on how well Housing Society managed Covenant Court.

[11] The questions to be answered are whether Mr. and Mrs. Vince and the plaintiffs *in fact* were misled in any way by any of the defendants as to the true nature of the interest Mr. and Mrs. Vince were acquiring, and whether Mr. Forbes gave inadequate, negligent, or misleading advice as to the nature of that interest. The question is not what a reasonable individual would have understood, but what these plaintiffs and Mr. and Mrs. Vince in fact understood. What Mr. and Mrs. Vince understood, of course, I can only know from what the plaintiffs say their parents understood or by what the other parties say they made them understand. For example, Mr. Forbes said that when he met with Mr. and Mrs. Vince they "...at all times expressed an understanding of the documents we reviewed and of my advice and appeared to me to fully understand the nature and effect of such documents and my advice". Mr. Forbes says that Mr. and Mrs. Vince confirmed to

him their understanding that the life lease that they were purchasing provided that, after the death of the survivor of them, the unit would be re-leased by Housing Society and the plaintiffs would obtain 90% of the resale value. There is no dispute between the parties that it was a condition of purchase that, after the death of the survivor of Mr. and Mrs. Vince, the condominium unit would have to be sold and Housing Society was entitled to retain 10% of the sale price.

[12] In fact, the life interest of Mr. and Mrs. Vince in their condominium unit in Covenant Court did not sell until the spring of 2001, and then for only \$105,000. The extent to which the delay of over three years in reselling the life estate was attributable to Housing Society and a requirement that it file a new disclosure statement with better particulars of the nature of the interest of its strata units, is agreed not to be part of these proceedings. However, Ms. White maintains that, while general market factors had an affect in diminishing the fair market value of the unit, the fact that the nature of the leasehold interest was now well known limited the number of potential buyers.

[13] Increasingly, parties to litigation are turning to the summary trial on affidavits provided for by Rule 18A. Cases such as *Inspiration Management Ltd. v. McDermid St. Lawrence*

Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.), make it clear that trial judges hearing summary trials can make decisions on credibility from affidavits in appropriate circumstances. There are times, however, where it is not appropriate to draw conclusions of credibility solely from the affidavit material. This is one of those times. I have reviewed the material provided by the parties, and read their affidavits and excerpts from their examinations for discovery. After having done so, I conclude that I cannot resolve the issues of credibility and thus cannot find the facts necessary to give judgment on these applications without hearing at least the principal parties cross-examined on their affidavits. By principal parties, I mean Ms. White, Ms. Meyer, Ms. Hart and Mr. Forbes. For the sake of economy, I am prepared to remain seized of the matter and hear such cross-examination at a time to be arranged by counsel. I wish to hear from counsel as to the acceptability of this procedure.

"T.J. Melnick, J."
The Honourable Mr. Justice T.J. Melnick