

Date: 2001/11/20  
Docket: S.H. No. 135399

**IN THE SUPREME COURT OF NOVA SCOTIA**  
[Cite as: *Canada Life Mortgage Services Ltd. v. Leaside Estates Ltd.*, 2001 NSSC 175]

**BETWEEN:**

**CANADA LIFE MORTGAGE SERVICES LTD.,**  
a body corporate

**PLAINTIFF/DEFENDANT**  
**BY COUNTERCLAIM**

- and -

**LEESIDE ESTATES LTD. and BYUNG K. LEE**  
of Kentville, Kings County, Province of Nova Scotia

**DEFENDANTS/PLAINTIFFS**  
**BY COUNTERCLAIM**

- and -

**CANUCK HOLDINGS LIMITED, CANUCK DEVELOPMENT**  
**SERVICES LIMITED, BRUCE CHRISTMAS, ANDREW**  
**COOKE AND CANADA MORTGAGE AND HOUSING**  
**CORPORATION**

**DEFENDANTS BY COUNTERCLAIM**

---

**D E C I S I O N**

---

**HEARD BEFORE:** The Honourable Justice David W. Gruchy  
(in chambers)

**PLACE HEARD:** Halifax, Nova Scotia

**DATE HEARD:** November 20, 2001

**DECISION:** November 20, 2001 (Orally)

**WRITTEN RELEASE:** December 3, 2001

**COUNSEL:**

**John MacDonell for Canada Life Mortgage Services Ltd.**

**Douglas Lutz and Janet Stevenson for Leaside Estates Ltd. and Byung K. Lee**

**Barry Alexander for Canada Mortgage and Housing Corporation**

**Marion Ferguson for Canuck Holdings Limited, Canuck Development Services Limited and Bruce Christmas**

**GRUCHY, J. (Orally):**

- [1] This is an application by Canada Mortgage and Housing Corporation (CMHC) a defendant by counterclaim in this action whereby it asks to have struck all or portions of an expert's report prepared by Mr. Charles Hardy.
- [2] The action originated as a foreclosure action on a mortgage on property in Kentville, the property involved in the construction of an apartment complex. During construction according to the pleadings the project fell into economic disarray and was discontinued. Upon default Canada Life Mortgage Services Ltd. (Canada Life) the mortgagee commenced this action.
- [3] The action was defended on the basis that Canada Life had insured the mortgage through CMHC and in that process had obtained appraisals or evaluations of the project. The defendants say that the process of appraising the project or assessing its economic liability was performed negligently thereby misleading the mortgagor and its guarantor, and I will refer to them collectively as "Lee", and which ultimately led to the default.
- [4] Upon commencement of the foreclosure action Lee filed a defence and counterclaim. Other parties have been added but did not participate materially in this application.
- [5] Lee has obtained a report from Charles Hardy which is the subject matter of this application. I will refer more specifically to the contents of the report below.

Earlier in these proceedings a previous report was obtained from Mr. Hardy by Lee. That report was the subject matter of an application to strike which came on before Haliburton, J. of this Court. He found that the report was not in acceptable form and ordered that it be redrafted and resubmitted if that was the wish of the parties.

- [6] This application is made pursuant to *Civil Procedure Rule 25.01(1)* which allows the court at any time prior to trial to determine any question of the admissibility of any evidence. I refer to *Douglas Williamson v. George Williams, Scotia Bond Company Ltd. and Midland Walwyn Capital Inc.* (N.S.S.C.) November 21, 1995, Tidman, J. (unreported) (S.H. No. 83999) and *Fowler et al. v. Schneider National Carriers Ltd. et al.* (2000), 184 N.S.R. (2d) 212 (S.C.). These are decisions of this Court and I conclude that this application is procedurally correct and it is appropriate to deal with the admissibility of the report in this fashion prior to trial. As I anticipate that I will be trial judge of this matter this application at this stage of the proceeding may be helpful to the parties.

- [7] It is necessary to examine the report in detail. It consists of a covering letter outlining the intended use and purposes of the report, identifies the client, the property under consideration, the effective dates for the report and the scope of the work; that is, to review assumptions provided by the client and to provide an opinion thereon.
- [8] The report itself consists of seven sections the first six of which essentially outline the three basic methods of appraisals: the cost approach, the direct comparison approach and the income approach. I will not address the underlying assumptions contained in para.6.
- [9] The outline of the approaches is basic. It sets forth no information or material that a finder of fact, judge or jury, would not be expected to grasp and understand without the report. Paragraph 7, however, sets forth Mr. Hardy's analysis and opinion.
- [10] As outlined by Wright, J. in *Fowler* I must consider whether this report is necessary to assist the trier of fact in reaching a proper and just verdict. I must consider if it lacks probative value in the sense that a jury properly instructed could make the necessary findings of fact and draw necessary inferences without the assistance of the report. I refer to Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed., para. 12.86 at p.641:

It is now generally said that if expert testimony is rejected it is excluded not because of any "ultimate issue" doctrine, but because such evidence is superfluous and that the court can just as readily draw the necessary inference without any assistance from an expert. However, even when the evidence may be helpful, courts remain concerned about the extent of the expert's influence over juries, in particular when the expert gives an opinion on the very fundamental issues that they themselves must decide.

- [11] The late Chief Justice Brian Dickson said in *R. v. Robert Mark Abbey*, [1982] 2 S.C.R. 24 at p.42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p.83, *per* Lawton L.J.)

[12] The more contentious aspect of Mr. Hardy's report is found in paras. 7.3, 7.4 and 7.5:

7.3 In a perfect market, the Cost Approach to value will approximate the value derived by the Direct Market Comparison Approach and the Income Approach indicating that there would be a demand for an increased supply at the cost of producing the addition units. In the case of new construction, the Cost Approach is basically a measure of the feasibility of the project.

Where the value by the Cost Approach is greater than the Market Value derived by the other approaches, it will usually indicate that the market is not ready for this development, and the project will not proceed. For example, where the estimated cost to construct the project exceeds the anticipated value of the project on either an Income Approach or Direct Comparison Approach, a prudent and reasonable appraiser would normally consider it imprudent and, indeed, unreasonable to proceed with construction given that the cost of constructing the project cannot be recovered either from the stream of income or from a direct sale on completion. A prudent appraiser in these circumstances would recognize that it would be financially imprudent to incur a cost of \$802,300 to complete a project which, on completion, would have a value of \$625,000 or \$585,000.

7.4 Having estimated the cost of construction for purposes of calculating the Cost Approach to valuation; it would be readily apparent to a qualified appraiser for an insurer that the budget for construction was understated by a significant margin.

7.5 In my opinion, the appraisal process and the cost analysis carried out by the mortgage insurer should have alerted the mortgage insurer to the tenuous nature of the project's viability, particularly when considering all of the other identified weaknesses of the development, the lack of experience of the borrower and his financial limitations.

[13] CMHC has argued that Mr. Hardy in expressing these opinions has stepped out of his role as an appraiser and has attributed to the appraiser the obligation to make business decisions. Lee on the other hand has said that it is premature for the court to make any judgment on that matter as there is not sufficient context to permit an informed decision. Mr. MacDonell, on behalf

of third party Canada Life, has argued that there is insufficient information in the report by means of stated assumptions to justify its conclusions.

[14] The Supreme Court of Canada in *R. v. Chikmaglur Mohan*, [1994] 2 S.C.R. 9 set forth four criteria for determining admissibility of an expert's report. Those criteria were stated by Sopinka, J. at p.20 as follows:

Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

[15] I refer to the criteria of *Mohan*:

(a) *relevancy*.

I have no difficulty with the apparent relevance of the report. It seems to me on a reading of the pleadings and of the submissions that at least some aspect of this case will delve into appraisals used by the parties.

(b) *necessity in assisting the trier of fact*.

I approach this subject objectively; that is, I consider the matter as if the case is to be tried by a jury. The first sections of the report are, as I have said, basic. A jury should have no trouble or problem identifying the three approaches to an appraisal. From that perspective that portion of the report is not necessary. The contents of para. 7 must be approached differently, as I do below (in para. [16]).

(c) *the absence of any exclusionary rule*.

I am not aware of any particular exclusionary rule which needs to be addressed.

(d) *properly qualified expert*.

It has been conceded that Mr. Hardy is a properly qualified appraiser. The question is, however, whether he exceeded his qualifications in s.7 which I have read above.

[16] I make the following comments and reach the following conclusions:

- (a) Mr. Hardy's opinion goes beyond that of an appraiser who is to state his opinion on value and delves into the prudence of proceeding with construction, a decision which I conceive to be one to be made by the client, not the appraiser.

- (b) The opinion also goes into the role of an insurer of the project and states that it would be readily apparent that the budget for construction was understated. Inferentially, Mr. Hardy has attempted to address an essential aspect of the matter of negligence on the part of CMHC and its appraisers.
- [17] With respect to the controversial portion of the report the question of the prudence of the appraiser and of CMHC in accepting or dealing with appraisal reports is for the trier of fact. Those questions impact clearly on the ultimate issue of negligence and should be developed during trial.
- [18] The report as an item of primary evidence is not admissible and I will not permit it to be led into evidence in that fashion. If the plaintiffs or any of the other parties develop evidence contrary to that expressed by Mr. Hardy and the context of the case warrants it the matter may well be revisited, but as a matter of primary evidence it is inadmissible. I am bowing to Mr. Lutz's suggestion that context may make the report necessary or admissible but that has not yet been developed. Context is for the trial. If Canada Life develops evidence contrary to that expressed by Mr. Hardy then I am not going to preclude Lee from attacking that evidence. Whether it is by way of Mr. Hardy or some other evidence that is for counsel at trial.
- [19] Costs of the application will be in the cause and may be argued at the conclusion of the trial.

J.