See para. 23

Indexed as:

Bank of America Canada v. Mutual Trust Co.

Between
Bank of America Canada, plaintiff, and
The Mutual Trust Company, Mutual Trustco Inc., Mutual Life of Canada, Raymond Dore, Ian Sutherland, Robert A. Stuebing and S. Scott Cameron, defendants
And between
The Mutual Trust Company, plaintiff by counterclaim, and
Bank of America Canada, Melton Bank of Canada and Societe General (Canada), defendants by counterclaim

[1998] O.J. No. 1525

59 O.T.C. 325

18 R.P.R. (3d) 213

79 A.C.W.S. (3d) 282

Court File No. 92-CQ-21513 and Commercial List No. B307/93

Ontario Court of Justice (General Division)
Commercial List

Farley J.

Heard: May 14 - June 17, 1997.
Judgment: April 14, 1998.

(113 pp.)

Contracts -- Performance or breach -- Obligation to perform -- Good faith, exercise of -- Breach -- What constitutes a breach -- Remedies for breach -- Damages -- Measure of damages -- Mitigation -- What constitutes reasonable remedial measures -- Effect of failure to mitigate -- Interest -- Interest as damages (prejudgment interest) -- Prejudgment interest, calculations of -- Considerations.

Action by Bank of America Canada against the defendant Mutual Trust for damages for breach of contract. In December 1987 Mutual and Reemark entered into a takeout mortgage commitment agreement for $36.5 million. This was to finance the construction of a condominium project that was syndicated to investors. Investors paid a small deposit of $1,000 and provided promissory notes and mortgages for the balance of the purchase price. This agreement was made when property values were high. The investment was to provide an investor with losses for income tax purposes. Reemark used the agreement to obtain $33 million in construction loan financing from the Bank in December 1988. Reemark, Mutual and the Bank entered into a subsequent agreement in which Mutual agreed to direct the proceeds of the takeout financing to the Bank. Investors were obtained for all the units by the end of 1988. Closings, in which the units were supposed to be transferred to investors, were scheduled to occur in 1991. The closings did not occur because Mutual did not honour its funding commitment. By that time real estate values had dropped substantially. Mutual refused to advance funds to the Bank because of Reemark's financial problems and breaches it committed. Mutual, the Bank and Reemark entered into an amended mortgage commitment agreement in December 1991. Mutual and Reemark were to ensure that the first advance of $18,250,000 was paid no later than January 31, 1992. Mutual did not provide the first advance. It changed solicitors. The new solicitors proposed a closing date of March 1, 1992. They then raised a substantial number of requisitions. The closing did not occur because the requisitions were not satisfied. The Bank was compelled to appoint Price Waterhouse as the receiver-manager of the project on May 12, 1992. The value of the property was $20 million if sold en bloc. It was worth $24 million if it was sold unit by unit. The Bank elected for an en bloc sale because it could receive the funds faster. A unit by unit sale was subject to many uncertainties. It initially agreed to sell the project for $23.5 million. It was forced to reduce the price by $1 million to satisfy the purchaser's concerns. By the closing in May 1993 the vacancy rate had increased to 20 per cent. The result of the sale was that $15.5 million was outstanding on the Bank's mortgage. Mutual claimed it had the right to terminate the amended agreement. The Bank failed to act reasonably to mitigate its damages.

HELD: Action allowed. The Bank was awarded judgment for $14.9 million. Prejudgment interest was at the Bank's prime rate plus one per cent per annum compounded monthly. Mutual did not have the right to treat the amended agreement as terminated. It acknowledged that the original agreement was valid and in good standing. It was not entitled to refuse to advance problems because of Reemark's financial problems. It was also immaterial that Reemark's equity deteriorated. The value of that equity was not a condition precedent of its obligation. Mutual acted unreasonably, in bad faith and capriciously in its attempt to avoid its funding obligations. Its motivation was to avoid involvement in a project whose value decreased substantially. The Bank properly mitigated its damages. The project was diligently and widely marketed. There was only one reasonable buyer available. The sale price was reasonable. The only area where the Bank was at fault was that it allowed the vacancy rate to rise to 20 per cent. This allowed the purchaser to obtain the price reduction. The date of the breach was July 1991. This was when Mutual advised the Bank that it delayed funding the project because of problems with Reemark. If Mutual complied with its obligations, the Bank would have received $35.9 million. This exceeded the principal and interest

that was outstanding on the construction loan. The court deducted $600,000 from the mortgage balance as the fallout from the higher vacancy rate to arrive at the judgment amount. The Bank was entitled to a higher interest rate because it was only supposed to be an interim lender. It was forced to become a long-term lender because Mutual breached its obligations. This caused it to forego other investment opportunities. Simple interest according to the Courts of Justice Act would have resulted in a windfall for Mutual. The floating rate addressed rate fluctuations that occurred during the 27 months that Mutual was deprived of the use of its funds.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, ss. 128, 129, 130.

Counsel:

F.J.C. Newbould, Q.C. and Aaron Blumenfeld, for the plaintiff/defendant by counterclaim. P. David McCutcheon and Carlton D. Mathias, for the defendants/plaintiffs by counterclaim.

FARLEY J.:--

Definitions:

Bank of America Canada	- "BAC"
Canada Trust Company	- "Canada Trust"
Confederation Trust Company	- "Confederation"
Fengar Investment Corporation	- "Fengar"
Grilli Property Group Inc.	- "Grilli"
Kingwell Securities Limited	- "Kingwell", affiliate of Mutual Trust Company

Mellon Bank Canada	- "Mellon"
Mutual Life of Canada	- "Mutual Life"
The Mutual Trust Company	- "MT"
Mutual Trustco Inc.	- "Trustco"
Mutual Life, Trustco, MT and Kingwell as to two or more collectively	- "Mutual Group"
Price Waterhouse Limited	- "PWL"
Reemark Sterling I, a condominium project	- "Project"
Reemark Sterling Club Limited Partnership	- "Sterling LP"
Reemark Sterling Club Limited Partnership No. 2	- "Sterling LP2"
Reemark Sterling I Limited	- "Reemark"
Reemark (Toronto) Developments Limited	- "Reemark Nominee"
Reemark group of corporations operating across Canada - "Reemark Group"	
The Reemark condominium adjacent to the Project which was marketed to owner-occupiers (as opposed to the "absentee" investors who purchased	

units in the Project as tax shelters which were to be rented out to third parties)	- "Sterling Two"
Regional Group of Companies Inc.	- "Regional"
Royal Trust Corporation of Canada	- "Royal Trust"
Societe General (Canada)	- "SocGen"
Vanguard Trust Company	- "Vanguard" (also by name change Prenor Trust Company - "Prenor")
BAC, Mellon and SocGen collectively	- "Banks" or "BAC" (the latter when BAC was taking the lead on behalf of the Banks)
Au Bak Ling	- "Au"
Baker, Pat	- "Baker", principal of Baker Real Estate Corp.
Benay, George	- "Benay", Accounts Manager of SocGen
Cameron S. Scott	- "Cameron", Vice President of MT

Dore, Raymond	- "Dore", President of MT
Doyle, William A.	- "Doyle", inhouse solicitor for Reemark
Fenton, Shelly	- "Fenton", President of Reemark
Gordon, Traub & Rotenberg	- "Gordon Traub"
Graham, Ronald J.	- "Graham", principal of Canadian Real Estate International Inc.
Lyons, Barry	- "Lyons", a real estate consultant
McCullough, William	- "McCullough" , partner of McCarthy, Tetrault ("McCarthys")
McIntosh, David	- "McIntosh", Executive Vice President of Mutual Life
Morassutti, Larry	- "Morassutti", principal of The Morassutti Group

Morin, Daniel J. L.	- "Morin", Vice President of BAC
Page, A. John	- "Page", partner of PWL
Perry, R. Brent	- "Perry", Vice President of Mellon Bank
Pearlstein, Steven	- "Pearlstein", partner at Gordon Traub
Shapero, Arthur	- "Shapero", partner at Macaulay, Chusid & Friedman ("Macaulay firm")
Sherkin, Kevin	- "Sherkin", partner at Levine, Sherkin, Boussidan, Linden
Solmon, Melvyn	- "Solmon", partner at Solmon, Rothbart, Goodman
Somers, Arnold	- "Somers"
Stroud, Kenneth	- "Stroud", principal of Kenneth Stroud &

	Company Ltd. ("Stroudco")
Steubing, Robert A.	- "Steubing", Senior Vice President of MT
Sutherland, Ian	- "Sutherland", Executive Vice President and Chief Operating Officer of MT
Yhap, Mark	- "Yhap", executive of MT
Clark, Chris	- "Clark", officer of Coopers & Lybrand Limited ("Coopers")
Cumming, R.	- "Cumming", officer of KPMG Inc. ("KPMG")
Firestone, Paul	- "Firestone"
Jones, Murray	- "Jones", President of Jones McKittrick, Appraisers
Ladouceur, Glen J.	- "Ladouceur", tax expert at KPMG

Popofsky, Larry	- "Popofsky", Chief Executive Officer of Greenwin Properties
Budevitch, Michael	- "Budevitch", principal of Cityscape Real Estate Inc.
Takeout Mortgage Commitment Agreement between MT and Reemark dated November 12, 1987	- "TOC"
Assignment of Takeout Financing Commitment among MT, Reemark and BAC dated December 16, 1998	- "TOC Assignment"
Amended Takeout Mortgage Commitment Agreement among MT, Reemark and BAC dated December 1991	- "ATOC"
Subsequent Advance Security (pursuant to the ATOC, this was (a) an assumption agreement from direct investors as to the first and second mortgages and (b) in the case of a limited partner investor, a promissory note and a first and second assignment of the limited partnership interest of the limited partner) - "SAS"	
Support Agreement among Reemark, Fengar, Grilli and Trustco dated November 25, 1987	- "Support Agreement"
Loan Agreement for $33 million	

construction loan relating to Condominium Project ("Project") of 300 units entered among BAC, Reemark Nominee, Reemark and Reemark Group Inc.	- "Construction Loan Agreement"
Investors in the Project, whether by way of participation as limited partners (in Sterling LP or Sterling LP2) or as individual purchasers	- "investors"
Investor agreements of purchase and sale in the Project with Reemark	- "Investor APSs"
Reemark as part of the Project arrangements	- "Investor Notes"
Office of the Superintendent of Financial Institutions	- "OFSI", Federal regulator of financial institutions (including MT)
Office of Ministry of Financial Institutions	- "OMFI", Provincial regulator of financial institutions (including MT)
Frank Newbould	- "Mr. Newbould", partner at Borden & Elliot, counsel for the plaintiff

David McCutcheon	- "Mr. McCutcheon", partner at Fraser & Beatty, counsel for the defendants

Opening Arrangements and Expert Witnesses

1 At the opening of trial, the parties agreed that the plaintiff BAC withdraw its claims against all the defendants except MT and the counterclaim be also withdrawn, all without costs. In addition the defence took two issues off the table:

1. Did BAC hold a legally valid a assignment of the take-out financing of MT?
2. Did BAC negligently make the misrepresentations to MT alleged in paragraph 18 of the statement of defence of MT, and would such action affect the claim of BAC?

It was further agreed that the remaining parties could use all transcripts for the purposes of the trial. I am releasing separately my ruling as to the number of expert witnesses (in total) permitted without leave of the Court; a copy is made an appendix to these reasons (Appendix A). I also note that well intentioned though it was, it was inappropriate for Mr. Newbould (and copied by Mr. McCutcheon) to advance an expert on Ontario law (such expert evidence is inadmissible); it is only foreign law which needs to be proved.

Facts and Background

2 In its simplest form, the case would seem to boil down to the following which I have found to be the facts. (Under the other headings I have also made various findings in my recitations of or conclusions as to the facts.) BAC lent $33 million as to a construction loan pursuant to the Construction Loan Agreement to Reemark to facilitate the building of a condominium Project (legal title to which was held by Reemark Nominee as bare trustee) which was syndicated out to investors (i) in limited partnerships, the Sterling LP and the Sterling LP2 and (ii) otherwise. By the TOC Assignment BAC took an assignment of the TOC entered into by MT for $36.5 million to be drawn down upon completion of the project. Mellon and SocGen then participated as to a third each with BAC. The condominium was registered on December 31, 1990 but MT never advanced funds pursuant to the TOC or the ATOC. In the period up to the end of 1991, MT's solicitors for this financing were the Gordon Traub firm which was named to act as the hold back funds trustee in the ATOC. However in late January 1992, MT changed solicitors to the Macaulay firm (and specifically to Shapero as the direct contact lawyer). Shapero submitted over fifty requisitions in his initial letter and reiterated them leading up to a proposed March 1, 1992 closing. A number of the requisitions were persisted in notwithstanding the acknowledgment by Cameron who was in charge

of closing the transaction that they were not appropriate requisitions but (according to him) had been put forth as negotiation tools and positions. An example of this would be the $5 million hold back under the ATOC not being recognized as replacing the similar trust fund obligation under the Support Agreement; Shapero on behalf of MT and on the instructions of Cameron continued to insist that both the $5 million hold back and the $5.6 million trust fund obligation had to be honoured. There was no financing or funding of the TOC or the ATOC by MT. BAC put in PWL as a receiver (and manager) of the Project and Reemark's interest therein which would encompass Investor APSs and Investor Notes regarding their commitments to purchase units in the Project through their participation in the limited partnerships (Sterling LP and Sterling LP2) or otherwise. The building was sold for $22.5 million which left a significant shortfall of "excess" principal and accrued interest. The two major issues were (i) whether MT had the right to treat the ATOC as terminated without exposure to any liability and (ii) did BAC fail to act reasonably in mitigating its damages. In my view the answer to (i) is that MT did not have that right as it was in breach of its obligation to fund and to (ii) is that only a minor adjustment should be made for failure to mitigate (caused by allowing the vacancy rate to exceed 10% of the 300 units in the Project).

3 The Project had been sold by Reemark on a tax write off basis to investors in 1987-88 who were not owner occupiers. Reemark had sold a similar property (Sterling Two) adjacent to the Project financed by Confederation to owner occupiers on a non-tax driven basis.

4 In 1986 Mutual Life owned 75% of Trustco which in turn owned 100% of MT. As MT was experiencing asset growth, especially as to mortgage loans, it needed to increase its capital base. Dore, Steubing, Sutherland and Cameron through a holding company owned the balance of Trustco. However they were not able to participate in capital calls required to finance MT so that their position was diluted to 20%. In 1993, they sold out to Mutual Life which became the sole owner of Trustco (and directly MT). No evidence was led as to the terms in which they sold and whether or not there were any continuing warranties as to the financial condition and litigation; I draw no inference on this sale aspect. Before selling out, these individuals had a significant tangible indirect personal stake in the fortunes of MT. MT was regulated both federally and provincially pursuant to the financial institutions legislation; Trustco was not so regulated and thus did not directly have the same restrictions on it. For example, Trustco was able to take second mortgages whereas, subject to some non-applicable exceptions, MT was restricted to lending on the security of first mortgages on a 75% loan to value basis. Thus, before regulator crackdown, Trustco could loan on the security of a second mortgage for any excess to borrowers as to which MT was restricted to lending on a 75% value on a first mortgage. In addition MT could have loans out to any "connected" group of only 1% of its total assets.

5 The Project was conceived in the boom time of the latter 1980s. Reemark and MT entered into the TOC at the time when it seemed that financial institutions were having difficulty putting out loans fast enough. Unfortunately for many in the real estate market, this market softened especially with the recession and the uncertainties of the early 1990s. Prices dropped sharply.

6 Reemark approached MT in 1987 with various ideas including that Kingwell, an affiliate of MT, sell participation in the Project through limited partnerships. While it was originally contemplated that 200 units be sold by Kingwell, only 70 were. Additional units were sold through another broker (Ross Lloyd Martin). The basic deal was that the investors purchased a unit by paying a small deposit ($1,000), giving promissory notes to Reemark for 28% (less $1,000) of the price and agreeing to give a mortgage to MT on closing for the balance of 72% (at the rate of $130 per sq. ft.). Thus the initial cash investment was minimal. MT entered into the TOC to provide this mortgage financing and closing; and there was no commitment by Trustco. However internally between MT and Trustco it was understood that MT would take a first mortgage for 75% of the value and Trustco would take the excess as a second mortgage (at the time of entering the Investor APSs the values then prevailing would have required there to be a reasonably small second mortgage). Investors were given a 3 year cash flow and rental guarantees by Reemark which were in turn guaranteed by Trustco. To obtain the Trustco guarantee Reemark had to give Trustco and MT certain covenants, namely (i) the Support Agreement whereby when the deals finally fully closed Reemark was to put the equivalent of $20 per sq. ft into a trust fund (approximately $5.6 million) to cover any claims against Trustco on the guarantees; and (ii) the covenants of Grilli, a Reemark partner in the deal, and of Fengar. There was in effect a contemplated two element step of closing -- the first (tax closing) when the investor executed the Investor APS and related documentation including a power of attorney granting Reemark the authority to complete the transaction (including the individual unit mortgage arrangements) and the second (transfer closing) when the investor went on the public register as the registered owner of the unit. The first element of closing would allow the investor to claim the benefit of losses (even prior to becoming the registered owner) for tax purposes. It would appear that investors would have treated themselves as tax owners from the first.

7 Reemark entered the TOC with MT on December 12, 1987 as to MT funding the closing mortgage commitments of approximately $36.5 million. MT understood that this TOC would be utilized by Reemark to obtain construction loan financing on December 1, 1988. Reemark obtained a $33 million construction loan from BAC pursuant to the Construction Loan Agreement. Two weeks later on December 16, 1988 Reemark, MT and BAC entered into the TOC Assignment being an assignment of the takeout financing under which MT agreed to direct the proceeds of the takeout financing made available pursuant to the TOC (as interim amended) to BAC. BAC also obtained at that time as assignment of some of the Investor Notes given Reemark.

8 As to the question of requisitions as to title, there would not appear to be any operative basis as to which MT could rely. The TOC merely provided that there be evidence satisfactory to MT's solicitor of each investor's legal or beneficial ownership of the individual unit; however even this condition was removed when the ATOC was executed.

9 With the General Agreement for individual investors and the Limited Partnership Agreements for limited partner investors being entered into (together with attendant documentation including a separate power of attorney in favour of Reemark) it was apparent that the intent of the investors and

Reemark was that the transfer closing could take place without any further intervention by the investors. While various verbs may have been used in s. 7.01 of the General Agreement, it is clear that with the definition found in s. 12.01 of "Agreement", "Mortgage", "Permitted Encumbrances" and "Transfer Date" inter alia and the actions contemplated by s. 7.01(a), (b), (c) and (e) that it would not only be inappropriate but wrong to restrict s. 7.01(d) to "execute" in the sense of "sign" and not in the sense of making these unit transfers and unit mortgages available for use. To give the more restrictive meaning would be to strip the power of attorney of any real force and effect thereby rendering it redundant; it would also make a mockery out of s. 7.01(c):

> cause the execution, delivery and registration of any documentation and the doing of any acts required pursuant to the Agreement ...

Under the Limited Partnership Offering Memorandum, the power of attorney was given a very expansive definition:

> "Power of Attorney" means a power of attorney in the form set out in or accompanying the Subscription Form to be given by each subscriber authorizing the General Partner to execute the Limited Partnership Agreement, the Cash Flow Guarantee Agreement, the Rate Buy -- Down Agreement, Repurchase Commitment and notes evidencing the Primary Secured Loans on behalf of the Subscriber.
>
> "Primary Secured Loan" means the loan to an investor on the security of his pledge of his unit and a charge against a Designated Suite following the Condominium Declaration Date and "Primary Secured Loans" means all such loans collectively.

The Limited Partner Investor Power of Attorney granted Reemark as General Partner the authority to execute, deliver and record inter alia. I am of the same view as to s. 7.01 of the Limited Partnership Purchase Agreement as I was as to s. 7.01 of the individual investor General Agreement.

10 See below as to my views as to parties being required to complete their agreements in good faith once they have entered into contractual arrangements: this would govern the relations between Reemark and the investors.

11 Thus it would appear to me that the transfer closing would be a purely administrative affair, not directly involving the investors, but rather allowing Reemark to act on their behalf pursuant to the powers of attorney. I note that the ATOC was careful to establish the circumstances under which the construction loan mortgage and the blanket mortgage would be discharged whenever there was a transfer closing completed on behalf of the investor. I note, but only in passing, that it was not advanced in evidence that any investor, anxious though that investor may have been to avoid a

transfer closing, raised a lack of capacity of Reemark to utilize the power of attorney or the failure to transfer close within 15 days of notification of condominium registration. As to the latter aspect, it would not appear to me that anyone forced the issue as to closing within that time period; thus the result would be that the transfer closing could take place at a later time.

12 MT's position in this litigation was that the covenants and the side deal of the Support Agreement and the covenants of Grilli and Fengar were in essence breached and that as Reemark was not living up to its commitments then Reemark (and those claiming through it, here BAC pursuant to the assignment of the TOC) was estopped from claiming the benefit of the takeout financing commitment. However BAC's position is that it is not so bound or affected, further that the TOC was not conditioned in any way on any side deal and lastly that BAC was a lender for value without notice of any side deal when it took the assignment of the takeout financing. The same consideration prevailed as to the ATOC as well. I agree with BAC's contentions. In my view while the Mutual Group may have been able to rely on breaches of the Support Agreement to fend off any Reemark claim, the Mutual Group apparently overlooked incorporating the Support Agreement (of which BAC was unaware at the time of the Construction Loan Agreement and the TOC Assignment) into the terms of the TOC Assignment. This was a problem for the Mutual Group that it never overcame notwithstanding all the delays which must be characterized as stalling and the negotiations leading up to the ATOC. At the same time the Mutual Group was undergoing intense pressure as a result of the internal desire for growth and the regulatory bodies (OSFI and OMFI) enforcing policies under a stricter legislative regime.

13 It appears that essentially all units were sold (in the sense of having Investor APSs with someone) by the end of 1988 for a total purchase price of $50 million approximately. Reemark obtained the $1,000 deposit on each unit plus the Investor Notes from the investors. Reemark assigned some of these Investor Notes to BAC as security for the construction loan; Reemark sold other notes to the Bank of Montreal and Confederation. The condominium was registered on December 31, 1990. The deals were to transfer close within 15 days of the investors getting notice of that registration. Reemark sent out two batches of notices, the first set on January 9, 1991 and the other May 29, 1991. With the registration, the units were rented out, and the building was being managed by Regional. Closings did not take place; neither Reemark nor the investors gave notice to the other that if the deals did not close then they would be considered to be at an end -- rather these deals remained in limbo. BAC takes the position that the deals did not close since MT did not honour its funding commitment. However MT took the position that Reemark did not keep all its equity in the project as it had sold some of the Investor Notes and Reemark had also given Fengar a $5 million mortgage on the property (ranking pari passu) which Fengar in turn had assigned to Royal Trust which wanted $3 million to discharge it. MT, no doubt with an eye on the deteriorating market, felt that in 1991 there would be a shortfall in rental revenue and mortgage payments and that it was not satisfied that Reemark would be good for the money on its commitments pursuant to the guarantees it had given, thereby exposing MT on its guarantees. Thus it would be faced with many investor defaults rather quickly. Interestingly it would appear that a delay in funding would likely work to the advantage of both Reemark and Trustco since interest rates were then falling with

the result that there would be less exposure to Trustco on the cash flow guarantees to the investors (with a similar impact on Reemark).

14 On November 12, 1987 MT and Reemark agreed to the TOC which provided for 300 individual takeout mortgages for $36.5 million in the aggregate with "each individual mortgage to be fully funded in one draw on or before December 31, 1990" (emphasis added). Mr. McCutcheon disputed that this unambiguously implied that this would be on a block funding basis; however with the arrangements discussed below this would not seem to result in any practical difference. Gordon Traub was noted as MT's legal counsel. On September 21, 1988 MT waived the syndication clause after having received "commitments" (which were not identical to the Takeout Lender's (MT's) obligations pursuant to the TOC) from Vanguard and Canada Trust for a third of the deal each.

15 On December 16, 1988, MT (Takeout Lender), Reemark (Borrower) and BAC (Bank) entered the TOC Assignment. It provided inter alia:

> 1.(a)the Borrower and the Takeout Lender acknowledge that as of the date hereof the Takeout Commitment is valid and in good standing;
>
> (b) the Takeout Lender acknowledges that it has approved for financing purposes all of the "Mortgagors" or "Borrowers" as defined in the Takeout Commitment and the Takeout Financing is fully available in respect of all 300 units of the Project;
>
> (c) the "Mortgagors" or "Borrowers" as defined in the Takeout Commitment have pursuant to the terms of their purchase agreements for the residential units of the Project with the Borrower, in furtherance of which the Takeout Financing has been arranged, directed the Takeout Lender to advance all proceeds of the Takeout Financing to the Borrower and the Borrower is therefore entitled to receive such proceeds;
>
> (d) the Borrower hereby irrevocably directs and authorizes the Takeout Lender to advance all proceeds of the Takeout Financing to the Bank and the Takeout Lender hereby agrees to advance all such proceeds to the Bank until receipt of written notice from the Bank to the contrary;
>
> (e) immediately upon receipt of written notice from the Bank that it is entitled to enforce its remedies against the Borrower pursuant to the Loan Agreement, the Takeout Lender will, upon the terms of the Commitment, from the date of such notice deal with the Bank or any receiver or receiver-manager appointed by the Bank as if the Bank or any such receiver or receiver-manager had been originally named in the Takeout Commitment in the place of the Borrower;

It is therefore obvious from this that Shapero was correct in advising Cameron that the TOC and

TOC Assignment involved certain problems for MT. By these acknowledgements in the TOC Assignment, MT agreed that the TOC was valid and in good standing, that all the investors had been approved for financing purposes so that takeout financing was fully available for all 300 units of the Project, that the investors had pursuant to the documentation (including that set out in the Investor APS's powers of attorney, etc.) had directed that MT advance all funds to Reemark and that Reemark was entitled to the funds, that Reemark irrevocably directed MT to advance such proceeds to BAC and MT agreed to do so and that, for the purposes of the TOC, MT would treat BAC as if it had been originally named as the borrower (as opposed to the borrower being Reemark). Thus any financial defects of Reemark would not be germane to the funding of the TOC, although these complaints may provide some grounds for MT in a completely separate arrangement with Reemark to which BAC was neither privy nor knowledgeable of. Thus it would appear in the most simplistic of terms that the only thing standing between BAC and the $36.5 million (or so much as would be available to BAC) of takeout financing from MT was the registration of the Project as a condominium and the execution of some paper work to be delivered on closing. That MT had difficulties in doing so -- caused by one or combination of the regulatory policy or amendments to the legislation affecting trust companies, difficulties as to MT's multiple of loans to capital and the need for additional capital from the shareholders (Mutual Life and the four MT executives Dore, Steubing, Sutherland and Cameron) or the fears of Reemark not being able to make good on its backup guarantees for Trustco's upfront guarantees as to cash flow etc. to the investors and the lack of good hard information from Fenton or anyone else at Reemark as to the Project, Reemark or the Reemark Group generally -- was of no concern to BAC. In my view it was wrong for MT to attempt to make these problems a problem of BAC.

16 Similarly the realization by MT that the projected Reemark equity in the Project had deteriorated with the market cannot be set up as a defence to the Banks' claims as this did not impact upon the terms of the deal between MT and the Banks nor was it a condition thereof. In any event it could not even form the basis for a claim for misrepresentation by Reemark given its future nature: see Mastercraft Group Inc. v. Bosse, [1994] O.J. No. 2034 (Gen.Div.), affirmed (1995), 123 D.L.R. (4th) 161 (Ont.C.A.); leave to appeal to S.C.C. dismissed September 21, 1995, [1995] S.C.C.A. No. 205.

17 The ATOC was entered into on December 18, 1991. It amended the TOC (thus non-amended provisions of the TOC remained intact). MT was noted as having approved 273 mortgage files ("such approval being subject to the insolvency of such investor or material misrepresentation in the material supplied in regard to such investor" -- MT did not lead any evidence as to investor disapproval). MT did not provide any material to show that it had determined that there were any material misrepresentations at the time of the material being supplied. As well MT "also approved advances in respect of not more than 50 units that may be held by Reemark as beneficial owner". Thus only 250 approved investor mortgage filed would have to survive as Reemark could beneficially own 50 units. It was noted that "the specific units which comprised the Reemark units will vary as the SAS is received for individual units provided the Reemark units will always form part of the Mutual units during the first assumption". Thus if Reemark closed the sale with an

investor as to a unit which had been "designated" a Reemark unit, then the Reemark unit designation would float to another unit. Therefore as the situation progressed it would seem that the Reemark units would gravitate to being the last 50 units to be closed.

18 The ATOC also provided that MT and Reemark "shall use all reasonable and diligent efforts to ensure that a first advance of not less than $18,250,000 (the "first advance") takes place on or before January 31, 1992". One hundred and fifty units were designated as Mutual units (including 50 Reemark units); and the other 150 were Bank units. There was a "first assumption period" pending the receipt of assumption agreement from the first 100 investors (keeping in mind Reemark being approved as to purchase 50 units); during this first assumption MT and the Banks were to hold respective first priority charges on their 150 units. It is obvious from this that the first advance of $18,250,000 was contemplated as block funding to the Banks and that the individual investor mortgages would be registered but not assumed by the individual investors until some time later. The SAS referred to above was an assumption agreement (or its equivalent for limited partnership purchasers) from the investors. It is further clear that the block funding of the first advance was to be given at an earlier time than when the assumption agreement was received -- and that the first advance was not conditional on Reemark providing MT with an assumption agreement from the investor. This is illustrated by:

> Mutual and the Bank shall agree that during the First Assumption Period, the following shall apply:
>
> (a) In the event that Mutual shall receive the SAS from a Purchaser or Limited Partner approved by Mutual for a unit which is one of the Mutual Units, then the Bank shall authorize Gordon Traub in writing to release and register a partial discharge of the Bank security against such a unit and Mutual would be deemed to have advanced monies under its individual unit charge and general assignment of rents on such Unit and Mutual shall partially discharge its blanket mortgage against such Unit. ...

The ATOC went on to deal with what would happen to the balance of the units -- after the First Assumption Period. It would appear that this funding by MT would be on a unit by unit basis as SAS was obtained for any such unit.

> Mutual and the Bank shall agree that after the First Assumption Period the following shall apply:
>
> (a) upon receipt by Mutual of the SAS from a Purchaser or Limited Partner approved by Mutual for one of the Reemark Units;

(i) Mutual shall pay to the Bank by direction of Reemark the net proceeds of the mortgage advanced (after deducting the Holdback amount and other usual deductions for that Unit as set out herein), and

....

Under the ATOC and in addition to the blanket first charge on the Mutual Units for $18,250,000 and a general assignment of rents thereon, MT was to receive on or before the First Advance:

1. A unit charge on all 300 of the individual units ...

...

6. A guarantee (the "Guarantee") from Fengar Investments Corporation ("Fengar") and Reemark jointly and severally, satisfactory to Mutual whereby each of Fengar and Reemark guarantees to Mutual repayment of 30% of the loan amount together with interest thereon and costs which relate to the Reemark Units.

It was noted that:

> Subject to the terms herein Mutual's aggregate commitment is for $36,555,835. This equates to the aggregate mortgages of $130 p.s.f. Mutual shall lend $33,555,840 by way of first mortgage and $2,999,995 by way of a second mortgage to the total of $130 p.s.f. Individual mortgage amounts on a unit by unit bases are enclosed as Schedule "A" attached.

No explanation was given by MT as to how it intended to deal with first mortgages which would be for $119.33 a square foot when values were below that and there was a 75% mortgage to value rule in effect. Perhaps it intended to ignore what it regarded as a strict interpretation of this by the regulators; however as I have found that MT never intended to fund either the ATOC or the TOC even though requested to do so, then it would appear that MT was pretending to ignore this requirement of the regulators as it never intended to expose itself to a regulatory problem by funding either the TOC or the ATOC.

19 There was to be an aggregate holdback of $5 million, $2.5 million from the first advance and the balance pro rata on a square footage basis as the rest of the units were closed and assumption agreements obtained to give to MT. The holdback was to be reduced month by month for 27 months over the period October 1, 1991 to December 31, 1993. Any monies of the holdback not required to fund the mortgage of payments to MT were to be given to the Banks. This further demonstrates a funding after the first advance was not to be a block funding in the same way that the first advance was block funding.

> Contemporaneously with the First Advance each of Reemark, Mutual and the Bank agrees to release each and every one of the others from any and all claims, damages, costs and expenses existing up to the date of such First Advance arising out of or in relation to the [TOC and/or the TOC Assignment] provided nothing in such release shall derogate from Mutual's obligations to continue to fund l oans described in this commitment after the date of the First Advance is set out in the Commitment.

As will be seen I have found that MT was in default of its obligation to fund the first advance. Therefore it is subject to the penalties for breach of the ATOC and as set out above it has not been relieved of its obligations under the TOC and the TOC Assignment and therefore it is liable for breaches of these latter two agreements as well.

20 Yhap of MT in his background memo of January 20, 1992 observed after reviewing the MT files available to him:

...

1988 ...

> During the year Mutual signs Canada Trust and Prenor Trust as syndicate partners and the syndication clause is removed from the commitment. In addition, Mutual also extends funding availability to December 1991 which was not agreed to by its syndicate partners.
>
> In order to acquire construction financing Reemark Sterling I Limited assignees Mutual's Takeout Commitment to Bank of America. Mutual consents to the assignment.
>
> 1989 Construction proceeds.

1990

> In December 1990 the building registers and the Developer requests Mutual commence funding the takeouts. Mutual hesitates as during the period new legislation has been enacted which prevents them funding both the first and second mortgages and argues frustration of contract.

In addition the Developer appears to be unwilling to meet its obligation of funding a trust fund under the agreement with Mutual Trustco Inc. Although the commitment does not mention the Trust Fund and Mutual Trustco backstopping Reemark the two deals were to be linked.

1991:The Developer and Bank of America begin threatening Mutual with legal action. After a long negotiations and a new deal is struck in December of 1991. In the new deal the Trust Fund is specifically incorporated into the Trust Fund.

Mutual and Mutual Trustco demand on fees outstanding be paid secured by various promissory notes.

1992:Rumours circulate that Reemark Group Inc. is in default in its loans to confederation Trust which amount to well over $300 million.

1. Second opinion on whether Mutual can get out of its commitment.

21 The doctrine of frustration of contract was not advanced or argued during the trial by MT.

22 Thus, pursuant to the ATOC and recognizing the acknowledgments contained in the TOC Assignment with the condominium having been registered it appears to me that the Banks were entitled to receive subject to the completion and execution of some paper work to be delivered, the proceeds of the first advance, less the initial holdback ($18,250,000 less $2,500,000), namely $15,750,000. They did not as MT did not live up to its end of the bargain but rather looked to every means fair and foul to avoid paying out the money. Thus in my view MT breached the ATOC when it failed to regularly fund it.

Credibility And The MT Fact Witnesses

23 Frequently in cases judges will be called upon to make findings concerning credibility of witnesses. This usually is a most difficult task absent the most blatant of lying which is tripped up by confession, by self-contradictory evidence, by directly opposite material developed at the relevant time period or by evidence of an extremely reliable nature from third parties. One is always cognizant that people's perceptions of the same event can sincerely differ, that memories fade with time, that witnesses may be innocently confused over minor (and even major) matters as well as the aspect of rationalization, a very human and understandable imperfection. A point that a witness may not be sure of initially becomes eventually a point that the witness is certain about because it fits the theory of his side. Rationalization will also affect some person's views so that a certainty that a fact

was "A" evolves into a confirmation that that fact was "not A". See also my views on this as set out in my oral reasons for judgment in Olympic Wholesale Company Ltd. et al. v. 1084715 Ontario Ltd., [1997] O.J. No. 5482 (Gen.Div.).

24 I recognize and appreciate that participants can come under extreme pressure which may cloud their perception of reality. I sympathize with the MT executives -- the early 90s were a complete turnaround from the late 80s for the real estate market; prices were plummeting and they had as well substantial investments tied up in MT indirectly and they were under fire and scrutiny from the regulators. I have no doubt but that they were under extreme pressure from various quarters.

25 There were four "event" witnesses for MT. Three were MT executives at the time: Steubing, Sutherland and Cameron; one was MT's replacement legal counsel for this deal: Shapero. Unfortunately and reluctantly I must advise that I had difficulty with their testimony. I can appreciate that at the relevant times of the transaction, once it appeared it was going sour, the MT executives were under extreme pressure (both as to their position as executives of MT but also their personal investments in MT through Trustco); as well everyone seems to agree that dealing with Fenton of Reemark was difficult and frustrating. However that does not excuse them from dealing in good faith with the Banks in carrying out binding commitments. It appeared to me, notwithstanding giving all four all a fair degree of latitude, that the stories which they were telling were highly influenced by rationalization to make them fit as best they could with the position of MT's defence (and not vice versa). In other words they were contrived. An example for this for Sutherland is his determination that MT was not running afoul of the 1% rule (a regulated financial institution's loans to any one group of associated borrowers on all projects financed by the financial institution was not to exceed 1% of its total asset base). On December 31, 1991 MT's asset base was $1,060 million so that the 1% loan limit would be $10.6 million. Sutherland advanced the proposition that the Remark Group to which MT was already exposed as to $4.5 million (Faubourg) and $0.8 million (Westbury) would not have any problem with the subject transaction for two reasons. Firstly the asset base would have risen by the funding date and would be onside by February 1992 (this would appear to pass muster). Secondly MT's exposure on the subject transaction was only $6 million based upon the ATOC contemplating that Reemark may close for itself as owner of up to 50 of the 300 units (this does not pass muster; he had no explanation as to the exposure on the first tranche of the ATOC funding being $18.25 million (less $2.5 million holdback) -- as was indicated by OSFI. Clearly he was refusing to acknowledge that the 50 Reemark units came at the end of the piece; it is questionable where he got his idea. Another example was Sutherland's acknowledgement that Cameron and he were dealing with the ATOC but notwithstanding that the ATOC increased exposure of MT many fold over the $2 million limit (which required the approval of four MT officers) no approval was obtained for the ATOC. The (unacceptable) explanation for this was that Dore was out of town and that Sutherland knew how the others thought of the ATOC and the Project. Further it does not appear that MT was open with the regulators in reporting on elements of concern to the regulators. Sutherland's view was that the 75% loan to value ratio was required by the legislation and enforced by the regulators meant that the

loan as eventually funded with first mortgage security could not exceed 75% of the value of the property financed, such value being determined as of the date of the loan commitment. However he gave no explanation as to why MT would continue to obtain appraisals over an extended period of time for the purpose of seeing how much could be advanced under the first mortgage facility. This would be contrary to his other view. The regulators also wanted to know what MT's exposure was to the Reemark Group and other borrowers. MT gave an undertaking not to make any new investments which would render it offside and it gave the regulators a table of outstanding loans and the date same were committed. Curiously absent was any mention of committed but unadvanced loans. Sutherland's explanation was the material given the regulators did not specifically say there were not outstanding commitments and that the regulators examiners would have had the ability to discover these commitments in their periodic review of MT's files (it would seem that he was comfortable in advancing the policy of "catch me if you can").

26 Steubing advised that he was not directly involved in this deal prior to it falling apart in March 1992. In dealing with the difficulty of the 75% loan to value rule, it had been contemplated that Trustco as a non-regulated company would fund the excess in return for a second mortgage (originally contemplated to be about $3 million). However this became very problematic as the total to be mortgaged was $130 per sq. ft. but values had shrunk in the late 1991 to approximately $100-$110 per sq. ft. (75% being $75 - $82.50 per sq. ft. first mortgage) and the regulatory requirement was that the 75% rule apply to all mortgage loans (not just the first mortgage) by a lending group such as MT and Trustco. Steubing then appears to have developed a theory that MT/Trustco would solve this problem by funding both the first and second mortgages, disgorging the first and keeping the second -- all without any record of having sought out a third party acquirer of the first mortgage. Theory is theory; practice is practice -- where is the reality? With respect to getting a second opinion from Shapero about closing the deal and funding the ATOC commitment the material question is where was the first opinion and what did it say? Notwithstanding that Gordon Traub had been MT's solicitors of record for the total period of this deal stretching over some years and had been named as trustees of the trust fund envisaged by the ATOC and we might ordinarily think that Pearlstein and someone else at Gordon Traub had been asked for an opinion, Steubing advised that this was not so. Rather this first opinion (never produced if written; never disclosed as to its conclusion if oral) according to Steubing was MT's own in-house opinion. Steubing was generally elusive and twisting in his responses. His position on production (that MT had given everything) became somewhat muted after he advised that there were other files being kept in the MT offices. Steubing was the author (although Cameron signed it) of the letter of June 2, 1992 to Sherkin which can only be viewed in the circumstances as grossly misleading and self serving of MT's position.

27 Cameron was plagued with the same difficulty with his diary. It was the position of MT that it (and specifically Cameron) did not know of Reemark Group's financial difficulties until after the ATOC was signed on December 18, 1991. However on November 25, 1991 Cameron had a 20 minute conversation with Somers with a notation that could raise questions about those financial difficulties -- and with a note to call Confederation. Three days later he had another call with

Somers but he could not recollect what this was about. He talked to a lawyer at Shapero's firm that same day. Cameron did not produce any handwritten notes or memos of the substance of these calls. We only have his skeleton notes in his diary as the record. However Cameron denied having any prior knowledge of these difficulties, denied knowing anyone at Confederation to call -- notwithstanding that he did know someone there. Cameron gave his testimony in a curious mixture of offensive/defensive delivery. He had to be repeatedly pressed on cross examination to make concessions as to his evidence. He indicated that under the TOC he, on behalf of MT, had to ensure that the individual mortgages from the investors not go into default; on being pressed he conceded that this aspect was not part of the TOC arrangements. With respect to Shapero's requisition letter which had been reviewed with him prior to him being sent, Cameron had no explanation as to the phraseology in requisition No. 26 as to "apparently" and "presumably" when the basis for this requisition was a notice actually received by Shapero in his capacity as an investor in a Reemark Group project in London (Shapero was also the lawyer for a number of other investors in this London project who wished to be relieved of their obligations). Cameron had advised Shapero that MT was not entitled to both the hold back and the trust fund yet he authorized Shapero sending out a requisition letter which required both. Pearlstein also advised Shapero on February 24, 1992 that Cameron had advised Pearlstein that all the due diligence was done and (sic) waived by Cameron.

28 It seems to me that requisition letters which were sent to the other side in a real estate (or any other type of deal) as a prelude to closing an agreed upon deal should only contain requisitions which are appropriate in the circumstances. Appropriate requisitions would include those which deal with the satisfaction of condition; others would involve the aspect of root of title). To my view it is quite inappropriate and improper for a requisition to be sent where the sender does not have any reasonable grounds for sending it. A requisition may be sent where there is reasonable doubt in the sender's mind on an objective basis as to the status of matters; a requisition is not to be sent while the sender (as here MT through Cameron and its solicitor Shapero) had no reasonable doubt about the state of affairs relating to the holdback arrangement under the ATOC replacing the financial commitment on the trust fund under the Support Agreement. To send out such a requisition as a negotiating tool to obtain some other concession (as here indicated being to get some relief from the block financing requirement of the ATOC) is inappropriate and improper; such a tactic is not to be tolerated. As for Shapero's efforts to gain some written approval from MT as to sending out such a requisition I think it a sad comment about the state of perceived legal ethics. The point had been squarely raised in the meeting at Reemark's offices on February 11, 1992 that the holdback was substitute for the Support Agreement Trust Fund. Cameron knew this was the true picture. Shapero had been advised of the true picture, yet here he was asking Cameron:

> Would you please provide me with your specific written instructions in connection with this matter and advise if the "business deal" as suggested by Shelly Fenton and the representatives of the Banks was such that the holdback provisions of the Amending Agreement are to replace the trust fund as set out in the Support Agreement.

Interestingly enough either Cameron did not give the requested "specific written instructions" or they did not surface in the productions.

29 While a lawyer is to represent his client to the best of his or her ability a lawyer should not become a "mouthpiece" of the client. In my view a lawyer has a responsibility to deal fairly under the circumstances with the other side. In the subject case once a deal has been negotiated and agreed upon, it should be carried out according to its terms (or the defaulting party suffer the consequences of not so proceeding). That is not to say that negotiations have to cease; however, these negotiations have to be advanced in such a way as to be reasonably perceived by the other side as negotiations, not as legal entitlement pursuant to the already agreed upon deal (and if that entitlement is not forthcoming then the other side would be obliged to maintain its ground or blinkingly offer up some sweetener designed to induce the demander to give up on the bogus requisition). It seems to me that Shapero in acceding to his client's wishes illustrated one of the ways in which he lost his objectivity in this case, which objectivity is so desirable as a professional advisor to a client and so necessary as a witness in a trial. As well since there was no objective basis by which one could say that the Banks should have been aware that this was just a negotiating position -- as opposed to the moment of truth in the real thing (of a deadline as to closing the transaction), it appears to me that MT must suffer the consequences that naturally flow from its demands and position -- namely that they appear to be that MT was acting capriciously and with a view to avoiding its contractual obligations under the ATOC.

30 Cameron tried to avoid the authorship of the draft June 11, 1991 letter although eventually he conceded that likely it had been typed on "our [MT] machine". One should keep in mind that it was Cameron at this stage who apparently was spearheading the transaction discussions. He eventually agreed that once an approval had been given, MT could not go back on it; however he then submitted that it would be all right for MT to review the approvals of investors. It appears to me that Cameron was evasive and twisting in his answer so as to avoid the reasonable and logical conclusions otherwise forthcoming. He disagreed that MT was not ready to close the transaction (fund pursuant to the TOC) in September 1991 but then when faced with the transcript of his discovery to the contrary, he paused for a very long time before agreeing that MT was not ready to close then. As to asking Shapero for a second opinion which therefore presumes there was a first opinion, it appears that Cameron was of the view that the Gordon Traub firm had given such a first opinion but it was never produced. Cameron testified that MT wanted to close the deal and he wished to have a good lawyer for that. He gave no explanation as to why the Gordon Traub firm had been "abandoned" by MT for that purpose after several years of representing MT on this transaction and after having been named the trustee for the holdback funds under the recently concluded (December 18, 1991) ATOC. He professed that MT had no intention of knocking out any investors from the transaction notwithstanding the plain meaning of Shapero's question as to that point.

31 Shapero was a very testy and combative witness. He testified that he was retained by Cameron in mid-January 1992. His first notation in his account was for his review of documents on January

23, 1992; Cameron's diary entry of things to do on January 20, 1992 was to "get Arthur to give a second opinion on the legal for Reemark". He described the retainer as involving a problematic file. MT according to him wanted to know what its rights were under the transaction and whether it had to perform or not. He concluded after his review of the materials given him that MT must proceed to advance subject to compliance with the ATOC terms and with the requisitions. However as shown by the example of requisition No. 26 he was prepared to proceed to demand bogus requisitions, thereby derailing the process. He went on to state that this requisition would have been waived if all other requisitions had been answered. He advised that notwithstanding his own personal position (and that of the investors he represented) in the London transaction, he had no conflict problem with advising MT on the subject transaction: technically this would be true if MT wanted out of the deal in the same way as the London investors would but if otherwise then it would appear that Shapero would be advising one way in one deal and essentially the other way on the other deal for all practical purposes. Shapero claimed that he had no notes of instructions from Cameron as to his retainer and that he felt that it was not always normal to note instructions in writing including notes to the file; I find this observation unusual and troubling. Notwithstanding that Cameron had conceded (in the absence of other witnesses) that the trust fund and holdback arrangements were redundant and that Shapero had advised that Cameron had told him this, Shapero was adamant that he could requisition as to both the trust fund and the hold back. His requisition was that both the $5.6 million (Support Agreement), and $5 million (ATOC) were due and payable. When pressed on this he reiterated this was just another example of the sloppiness in drafting of the ATOC but that he was proceeding on the basis of the Support Agreement standing on its own. He obstinately adhered to this position, saying that it was just one of many inconsistencies in the transaction documentation. He felt that there was no reason not to continue to demand both and that MT could do so for negotiating purposes. Shapero then got into a discussion concerning the provision in the ATOC as to "will be assumed" as opposed to "will have been assumed"; when it was pointed out that this phrase spoke of the future, Shapero's position was that it was only the future past the December 18, 1991 signing of the ATOC and that the assumptions ought to have taken place before the closing. When confronted with the phrase "on or prior", Shapero fenced and advised that he would have to look at the case law to see if that meant it had to be prior (as opposed to "on" being permissible); perhaps appreciating how this position looked, he then conceded that the assumptions did not have to be prior. Shapero advised without specifying that there was ample language in the ATOC that there should have been some assumptions prior to the first advance. It would seem that Shapero was comfortable in advancing one position in testimony and when this did not seem to fly, advancing a lesser position.

32 Shapero advised that he requisitioned notarial copies of all Investor APSs and that he was stonewalled by Reemark not providing same. It is extremely puzzling why he would have to ask Reemark for this as Trustco was signatory to each of the Investor APSs and presumably would have kept copies (or a general copy and a master list). In fact later in his testimony Shapero advised that he did have a copy of one Investor APS and he made the reasonable assumption that all were like it in all material respects. Thus it would appear that we have another redundant requisition and inappropriate characterization of Reemark's cooperation. Shapero also conceded that while he

insisted in another requisition on being given certain financial information MT had no right to refuse to close if the information were not given. When confronted with his February 24, 1992 notes of his discussions with Pearlstein who had told him that Cameron had already waived due diligence which was now being insisted on by Shapero, Shapero contended that the due diligence which had been waived was "bricks and mortar due diligence" only. When pressed on this he conceded that the waiver would also encompass zoning matters. However, without any justification in the wording of the ATOC, Shapero continued to advance the proposition that financial due diligence had not been waived. As to the use of "presumably" and "apparently" when talking of the London and Vancouver Reemark Group situation notwithstanding that it was Shapero himself who received the letter, he maintained that these words had merely "come out in dictation" of the requisitions. Shapero maintained that he had no contact with OMFI and that although there were notes in his file about such contact on February 12, 1992 he advised that it was not his handwriting and he could not believe that anyone in his office would have had contact. However he then was surprised in having to explain a 22 page fax (which would be the length of the ATOC) emanating from the Macaulay firm; it should be noted that the fax cover sheet indicated that the sender was "Arthur Shapero". He retreated from his position that there was no communication to advising that he thought that the question only referred to a telephone calls. However he could not explain why he sent the fax as opposed to Cameron who had access to a fax machine at MT; rather lamely he suggested that he assumed that someone at MT asked Shapero to send the fax yet he still maintained that he never discussed any MT problem with OMFI.

33 Aside from the suggested lack of Investor APSs, there are other troubling concerns about lack of documentation. There remains open the question of where is the "first opinion", who gave it and what did it conclude. It would seem that litigation counsel for MT properly advised their clients as to the disclosure and production requirements. It is puzzling that Steubing would conclude that this obligation was met by producing main file(s) while recognizing that there were other working files kept in the offices of the defendants. It is particularly passing strange that MT (and Trustco) could not produce complete copies of documents and letters given to the regulators even if such were formal undertakings to the regulators. Instead what was produced were various pages. In one case the "formal letter" was reconstructed by taking pages from correspondence dated some weeks apart with the explanation being given that the earlier pages were drafts to see if what was being proposed was satisfactory to the regulators. It is simply not rational with respect to MT (being a financial institution entrusted with being able to invest monies received from the public) that its record keeping would not have been more detailed; however the regulator file cupboard was virtually bare as to this Project at the time of dealing with OMFI and OSFI, notwithstanding the continued, significant concerns about Reemark and this Project by the regulators. For example, on January 22, 1992 OFSI wrote MT's auditors noting that the takeout commitment of $18 million to Reemark on half of the Project and requesting an updated concentration report as to all loans to the Reemark Group in order to assess risk; on March 4, 1992 OFSI wrote MT requesting to be kept advised of the Project situation and conditions and renewing its demand for a concentration report. There was no analysis prior to February 28, 1992 in MT's files (either in regard to the Project or to Faubourg) as to the financial position of Reemark, the Reemark Group or Fengar. No explanation was

advanced to explain the paucity of material produced. MT's counsel, Mr. McCutcheon, confirmed with the court that he had fully explained the requirements for full production of all relevant documents to his clients.

34 I regret to say that I did not find the evidence of the four MT fact witnesses reliable. On the other hand I had no difficulty in accepting the evidence of the other factual witnesses. I do appreciate the human frailties involved, especially when the events in question took place in a pressure cooker atmosphere and so much was at stake. I therefore would be of the view that this lack of reliability was likely a "single incident" situation and not one of the general course as to these individuals.

Factual Witnesses of the Banks

35 In contrast to the MT factual witnesses whom I found to give their evidence in an argumentative and rationalizing way, the three Bank witnesses (Moran, Benay and Perry) as well as the witness from Royal Trust (Green) gave their testimony in a straightforward generally unembellished way. They were willing to concede points in cross-examination when asked to clarify elements of their evidence. From the testimony of the three Bank officials it appears that the Banks were very comfortable in providing the construction loan of $33 million to Reemark for the project based upon MT's commitment as contained in the TOC. They were unaware of the Support Agreement until this was raised in 1991 by MT. On December 18, 1988 Reemark, MT and BAC entered into the TOC Assignment under which MT agreed to direct the proceeds of the takeout financing as provided for in the TOC to BAC. Extensions of the construction loan as requested by Reemark were granted with the Banks remaining comfortable over a length of time with the takeout commitment of MT even though it appeared that the takeout by MT should have occurred rather shortly after the project was registered (December 31, 1990) as a condominium under the condominium legislation.

36 MT complains that the Banks did not call any Reemark witnesses and that I should draw an adverse inference from this failure. If MT felt that any Reemark witness would have been able to give evidence favourable to MT or unfavourable to the Banks, then MT was at liberty to call such witnesses. These witnesses were not part of the Banks' team; I see no reason to draw any adverse inference.

Expert Witnesses

37 With respect to the expert witnesses there is no problem with respect to credibility. The concern here is the usual one involving expert witnesses -- they are giving their opinion sincerely but without the benefit (or burden) of having been apprised of all relevant material facts necessary to give such evidence. There is as well the secondary aspect that an expert may stray over the boundary of his expertise. All such witnesses (and particularly the professionals who have had the benefit of testifying previously as experts (e.g. Clark, Cumming and Ladouceau) recognized the limitations as to both these aspects during the course of their examinations. They quite correctly did

not press their opinion where it was indicated that they did not have all the relevant material facts or the area was not within their expertise. It would of course be desirable for experts to restrict themselves in their reports as to matters they were directly involved in since otherwise they stray automatically outside their field; I recognize that routine or mechanical aspects may more efficiently be prepared under the expert's direct supervision (but this would not extend as here to advising as to tax consequences). It is also desirable for experts when commenting on the work of others to have reviewed that work in detail -- e.g. the lack of appreciation that the condominium legislation had materially changed even though this had been commented on in the PWL Action Report No. 3.

38 Firestone was a selling agent under contract to the liquidator of Confederation Life who took considerable pride in his accomplishments in disposing of the Confederation (Trust) Portfolio. Residential units including those comprising the Sterling Two adjacent project. Over the period of 18 months starting April 19, 1992 he was able to keep the loss on this building project physically similar to the subject one to $6 million. He gave the Reemark Group 45 days to close with existing purchasers and thereafter he dealt with the other 44 units remaining without Confederation providing any financing. However it should be observed that Sterling Two was apparently a predominately owner occupied project (thus the aspect of moving disruption and cost) -- and further that the deposits mostly had been in the range of $20,000 to $25,000 while in some instances the purchasers had paid the full price. Significant deposits such as this would be a much greater incentive to close than in the subject case where the deposit was only $1,000. In the case of full payment having been made Firestone acknowledged this would have been a tremendous incentive to close and where there had been material deposits, there would have been a material incentive to close. Further he confirmed that there would have to be a valid risk reward analysis to see which course of action made reasonable sense in the circumstances. In light of the significant differences between the Project and Sterling Two, I did not find that Firestone's experience was directly translatable.

39 Jones was an appraiser who felt that it would be appropriate to analyze a unit by unit sale of the subject property over five years but indicated on reflection he would advise blowing out the remainder left by 1995 in a block sale. He concluded on a discounted cash flow basis this approach would have realized $26.8 million. However, for example, he is unaware of a defect report of half a million dollars and he could give no cogent reason why he valued Sterling Two and this Project the same although recognizing that the subject property could be 5-10 percent lower (as per the view of Lyon). He approached the topic from a rather mathematical view of what one would expect to get over five years but he did take into appropriate account that there would be risk in continuing to hold the properties and that the plaintiffs were not required to hold the property but rather that if they did divest to another party, then that third party would legitimately wish to have the potential of the upside to generate some profit for the risk of holding). His views were not of much benefit in the circumstances.

40 Baker, a real estate broker, had some limited experience in selling condominium units for

developers and vendors (including receivers). In the latter case she had instituted a program aimed at selling to existing tenants before exposing the units to public sale. She did not have any experience of selling in Toronto in the 1992-93 period in question specifically as to large projects of over 150 units. She did not know anything concerning what incentives were or the costs of refurbishing the units as to her project involvement. Thus there was little that she could assist the court with.

41 Popofsky was the Chief Executive Officer of Greenwin Properties, a major landlord in Metro Toronto. He was very critical of the approach taken by PWL as receiver/manager and he felt that the high vacancy rates experienced at times were the result of PWL not taking proper steps such as signage on the building, the provision of model suites, increased advertising (particularly more timely advertising in the Renters News, a popular magazine for potential tenants, and the Toronto Star) and the opening of the rental office for extended hours and on a seven day week basis. He did however acknowledge that Greenwin was in competition with Regional (Regional being singled out for extensive criticism on the above points) but he also acknowledged that PWL would have to rely in on the expertise of Regional. Popofsky's testimony should to a fair degree be taken in the context that his objective (as is reasonable in Greenwin's line of business) was to see that vacancies be minimized. If that had been the sole or primary objective required of PWL as receiver/manager in the situation then its criticism of PWL (and Regional) would have been justified to a fair degree. However it was not immediately obvious as to what basis the property would be disposed on -- e.g. a unit by unit sales, or a sale en bloc to the government (which would want no continuing tenancies or at least minimize them) or a sale en bloc to an investor who may wish to hold for the long term -- or one for the short term (who would wish to have either a fully long termed leased building or one in which there was fully leased or on a very short term basis to allow for a change in character of the building). However I did find his views on vacancy rates of assistance.

42 Clark, an experienced receiver with Coopers was also critical of PWL's efforts regarding leasing the property in the interim although he was not quite as specific as Popofsky concerning the details of how to avoid vacancies. He also found fault that PWL made no effort to collect on the $5 million of Investor Notes although this potential asset realization may have been problematic as engaging the receiver/manager in protracted litigation which would have maintained an uncertainty as to the status of the project and as well become somewhat academic in view of White J.'s decision released May 22, 1992, [1992] O.J. No. 1083, on an application against Reemark brought by Alan and Nancy Singer that there was a declaration that the agreements between these two investors and Reemark were "at an end". Given that even it appears to me to be rather speculative to think that the hundred odd investors represented by the lawyer Sherkin who was taking the same position as the Singers would be willing to close on their original deals -- or anything approaching them. He also felt it would be possible to close with the original investors by proposing to them that they had the ability to take a technical tax loss and use this as a benefit. However as indicated previously he quite forthrightly acknowledged that he was not a tax expert and that he had no personal experience with such a technical tax loss device.

43 I also note that Ladouceur of KPMG, a tax expert, who also had difficulty working through the proposed tax deal figures proposed by Clark's assistant confirmed that utilizing such a device would be a risk as there would be a generation of a loss while still retaining the property (especially when this device would include the forgiveness of the promissory note). He was concerned about the tax department invoking the general avoidance rules (GAR) and that if Revenue Canada did successfully reassess and the investors would have to not only pay the tax but also non deductible interest and possibly a penalty. I share his concern about a scheme in which an investor may possibly have to spend $100 in order to save $50 would not be viewed as being a good deal by anyone -- especially investors who likely are quite leery about the deal to start off with, now that properties values have plunged and Reemark looked shaky. A complicated tax deal which may be attacked by the tax department would not be an easy sale in the best of circumstances; these were not the best of circumstances.

44 Clark felt that PWL should have assessed what was happening at Sterling Two and determine the impact of that program on the Project. However as was analyzed in discussing Firestone's testimony, Sterling Two was a different type of project (owner occupied as opposed to investor owned) and the sunk costs versus future closing dollars were substantially different. Clark had not been advised of the particulars of Sterling Two and how it closed.

45 Nor was Clark advised of Lyon's concerns and the view that an owner occupier value for the property at about the time of default was approximately was $100 per sq. ft. He did however concur that the 300 unit building was "a large nut to crack" as had been a concern of Lyon. The large nut to crack concern was not disputed by any witness put forward by MT. I think it a fair observation that this aspect made the decision making as to what course to recommend by PWL and to take by the Banks a somewhat thorny and delicate one, one not to be rushed into.

46 Clark was also quite up front as to recognition that the Banks did not have to wait until the property market went into an upswing; they would only have to hold the property if there were reasonable and foreseeable advantages to offset the risk. He agreed that what one had to do was engage in a risk reward matrix and make informed decisions thereon -- not that there was just the hope of an upside. He agreed that the Banks made their decision after receiving and considering various reports. The question to be answered was whether the decision made could be considered reasonable in light of the known factors at that time (i.e. not with the benefit of hindsight). Clark had not been advised why the Banks had been reluctant to fracture their construction mortgage into a continuing mortgage for each unit (namely that they were not set up for such retail financing). He did however suggest that rather than fracturing and selling the individual mortgages (which should require selling same at discount) there was a possibility of subcontracting out the administration of these mortgages to a third party in return for a management fee. Clark acknowledged that he had no experience in selling mortgages; however this otherwise possibly sound suggestion appears to have been good thinking on his feet.

47 Retail banking was not the business of the Banks; they should not be required to fracture the

mortgages unless there were shown to be compelling advantages to doing so. In my view the fact that Mellon had considered for a few months the possibility of fracturing the mortgages should not be taken as supporting the proposition that the mortgages ought to have been fractured; rather it merely illustrates that the Banks were giving this alternative proper consideration. It must be recognized that the Banks were not set up as retail organizations and it would have been difficult and costly for them to administer a fractured portfolio. Further, the fact that they actively considered being involved in Royal Trust's arrangements whereby Reemark provided individual Florida investor promissory notes from quality net worth individuals, is not proof that the Banks were amenable to fracturing as they would be clearly dealing with Royal Trust which in turn would be doing the administration of the fractured notes.

48 Clark was not aware of the 1992 amendment to the Condominium Act which would limit any one owner to one vote no matter how many units were held by that owner as opposed to their being one vote per unit. He did acknowledge that this would give pause to anyone wanting to buy units en bloc if there had already been some piecemeal selling of unit by unit. This concern is amply demonstrated in that an owner of 298 units would not have control of the condominium corporation if the remaining two units were held by two different owners.

49 Clark also agreed that it was normal for a receiver to get two appraisals (as was done here) and then adjust the appraisals to get an apples to apples comparison. He appreciated that one also had to take into account the cost of selling (either en bloc or unit by unit). The management cost in the interim, the length of time likely required to sell either way, the cost of cleaning up the units for sale and other incentives. One would also have to assess the risks involved in holding the property or parts thereof for an extended period. All and all it appeared to me that Clark had taken a rather optimistic view of matters and had not been given all the information required in order to come to a more realistic opinion. That is a danger in relying upon others to provide the firm foundation on which to give one's own opinion.

50 Cumming of KPMG, another experienced receiver, had the advantage of being provided with a relatively more comprehensive view of matters (as well as being assisted by Ladouceur as to tax advice). He felt that there were four general reasons why the inventors did not and would not close their deals:

1) the Singer decision of White J.;
2) Sherkin was taking an aggressive defensive position (and it should be also noted that there is considerable strength in a hundred investors banding together as opposed to solitary investors of modest means being picked off one by one);
3) there was limited if any market value in the sense that there was no incentive to close as the mortgage to be taken by an investor would be more than the present value of the property; and
4) the tax structure was available on signing the deal, not on closing so the tax benefits had been enjoyed and did not require any restructuring.

(I think it also obvious that the Sherkin group was looking for a way out -- not for a way to close their Investor APSs or any revised deal which bore any resemblance to the Investor APS.)

51 A pertinent element of the Singer decision was that White J. determined that these investors were not bound to their deal because permanent mortgage funding was not available -- but as is seen in my conclusions this was the fault of MT and therefore MT cannot rely on its own wrongdoing of reneging on its deal to fund.

52 Cumming emphasised the desirability of having flexibility with respect to tenants. While tenants were important for an immediate cash flow one would not wish to have any rigidity against getting rid of tenants (if desired) reasonably quickly as this would detract from the overall value of the property. One would have maximum flexibility with a project if the tenants were on a short term leases and one was able to get 100% of the units. Cumming was of the view that PWL had acted reasonably and properly in assessing the alternatives, by seeking expert advice by taking control of the assets including records and information on the properties (with some difficulty given the initial non-cooperativeness of Reemark and Regional and presenting the alternatives to the secured lenders -- the Banks) in a timely way to allow them to make a decision (which they did reasonably quickly). He was also of the view that the estimated costs in the Coopers scenario were at least a million dollars on the low side. He was in agreement with Clark that there must be a risk/reward analysis of the alternatives and it must be determined that the course of action taken be reasonable in the circumstances.

The Events of 1991

53 1991 was a time of troubles. On January 31, 1991 OSFI sent a report to MT indicating concerns about its portfolio, the buoyant times of the late 80s in the real estate market (including condominiums) had turned sour. Values were plummeting. Whereas in earlier appraisals the Project had indicated values of per sq. ft. which would support first and second mortgages of $130 per sq. ft. with the first mortgage basis 75% mortgage loan per value ratio as required by the trust company legislation and regulations to which MT was subject, requiring only $3 million of second mortgages, values in 1991 slipped below that mortgage level which was required to close the deals (i.e. there would be a mortgage ratio in excess of 100% of value). Certainly there would be need to have second mortgage financing but then far in excess of what was originally contemplated to be provided by Trustco (i.e. $3 million). By the end of 1991 it appeared that the value of the project was in the range of $100 to $110 per sq. ft. which would only support a first mortgage of some $75 to $82.50 per sq. ft. The Project was significantly underwater. Whereas previously there had been consideration given in the MT/Trustco Group that Trustco would take second mortgages for excess over 75%, at these levels it was obvious that a funding of the project by MT/Trustco would result in mortgages which were badly secured and to a significant degree unsecured. They would only be left with covenants of the investors for any portion under water. The covenant may not have been all that important in the heady days of the late 80s when property values appeared to be going through the roof; it would be a fair observation that lenders under those circumstances may not have been all

that concerned or diligent about the credit worthiness of borrowers then but rather more concerned with pushing out money to generate commitment and underwriting fees and interest income. That the Mutual Group had a relaxed attitude towards credit worthiness as seen by its requirement that an investor to be approved need only have a net worth of $100,000 -- i.e. a net worth of less than the mortgage commitment so that the ultimate net worth to mortgage debt ration would always be less than 2-1. Canada Trust was more conservative -- it required a net worth of $200,000 and it would take no seconds.

54 I found rather fanciful Steubing's assertions that the Mutual Group was not all that concerned about the 75% first mortgage ratio and the new requirement that a parent or related company not fund the excess since it was possible for MT to sell the first mortgages and for Trustco then to hold the seconds. To carry through with this fantasy would mean that Trustco would have to give loans which would be less than half secured -- and of that part which was secured it would only have security on the last 25% of value, that is value at the cusp where if the value decreased either generally or as a result of power of sale proceedings by say 15% Trustco would have lost 60% of its limited security. It would then be looking to the covenant of investors (who like many developers and financiers) had been betting on ever ascending property values -- investors who had been obtained by Reemark with which MT had now grown quite dissatisfied. MT could not trust the financial and other information that it was getting (or not getting) from Reemark. MT approved the investors some years before when times were rosy and it had not kept in touch with the investors. The investors were in essence behind the Reemark screen. It would be Pollyannaish to think that these investors would readily be willing to close given the slumping values and the uncertainties of the future including interest rates and the shakiness of the Reemark guarantees of cash flow. These investors would have to be legally coerced into closing in the sense of getting them to come up with the cash for the Investor Notes and to pay their mortgages; this is confirmed by the way that approximately one-third of them coalesced in a (strength by numbers) group represented by Sherkin with a view towards fighting off any attempts to close which would then require the investors to come up with almost a quarter of the funds in cash (25% less $1,000 down payment) and take on the obligation of a mortgage for the other three-quarters -- all to get title to a property "now" worth a little more than two-thirds of what it had been sold for some years previously (with then the likely anticipated prospect of the investment gaining in value (not radically decreasing) before closing). When the Mutual Group was under pressure from both OMFI and OSFI with respect to its loan portfolio generally and with respect to its relations with Reemark specifically (as the regulators were concerned about Reemark's financial abilities and capacity) at a time when MT wished to keep on growing and thereby needed the approval of the regulators as to any increase in its multiplier and would wish to avoid any bureaucratic slicing of its capital base by the removal thereof of any deemed "troubled" loans and when property (and thereby security) values were plunging. It would be unrealistic to think that the Mutual Group would gladly fund the TOC. Rather it is natural to assume that it would do everything within its power to avoid that funding -- since that funding could only be looked at as giving rise to a very large financial loss under any foreseeable circumstances.

55 The Mutual Group's attitude towards the situation would have been even more soured by the

$5 million mortgage given to Fengar (a Reemark Group company) in late 1989 and then assigned to Royal Trust for $3 million in May 31, 1990 then coming to light. If the Mutual Group had only been dealing with Reemark it may well have been able to avoid its funding commitment given Reemark's activities in this regard plus its obligations under the Support Agreement. However MT's problem was that it had obligated itself to BAC which was an assignee for value without notice. What was MT to do? It seems to me as well that the Banks and Royal Trust were in agreement that it was in their mutual best interest to do a deal to get the Royal Trust mortgage out of the way. While this deal had not been signed by MT's deadline, I take Green of Royal Trust at face value when he indicated that if there had been any realistic chance of the funding going through on the ATOC then the Royal Trust mortgage would not have been an impediment to that funding, but rather it would have been dealt with so as to allow the funding to take place. I would also note that aside from this facilitative attitude of Royal Trust, the Banks always had the option of putting up $3 million themselves to clear up this impediment, such course of action having been considered in the BAC loan report.

56 On July 23, 1991 MT took the position that it would not advance funds under the TOC unless $5.6 million were held back by MT to partially meet potential obligations of Reemark. There then followed a number of on again off again negotiations involving MT (headed by Cameron), the Banks and Reemark. I accept Cameron's statement on October 29, 1991 that MT really did not wish to do the deal as being an oasis of truth. The Banks were legitimately concerned about the bona fides of MT given its previous reneges in funding the TOC. However one may also suspect that the Banks were frustrated -- as was MT -- in trying to deal straightforwardly with Reemark which by all accounts was not being cooperative. There was an internal Mellon document which indicated that both sides (MT and Reemark) appeared to have merit and that there should be a compromise; however this was in my view a business approach to the problem as opposed to one based upon a reliance on legal rights. It seems to me that MT could run a risk and obstinately dig in its heels and demand concessions. If the Banks were dissatisfied with that process they had their remedy -- they could take MT to court. However, as sometimes happens, practicality prevails over legality and it is seemed desirable to compromise one's legal rights, recognizing that no court case is a 100% sure thing but perhaps more importantly litigation can eat up time and money with discoveries, motions, slippage, trial and the inevitable appeal (if the dollars are large enough). Thus sometimes negotiation to achieve something else -- even if it be an assurance of certainty -- is a more practical approach. Of course it is always a little ironic that one would trust the second words of someone who has refused to honour his first words. For a more detailed discussion see S.M. Waddams, The Law of Contracts (3rd ed., 1993; Canada Law Book, Toronto) at paras. 130-6 dealing with pre-existing duties including the review of Gilbert Steel Ltd. v. University Construction Ltd. (1976), 67 D.L.R. (3d) 606 (Ont.C.A.). In our case the ATOC clearly had additional benefits for the Banks given by MT. However as was the case in respect of the TOC, MT failed to deliver as to its promises under the ATOC.

After ATOC

57 However having made its new bargain in the ATOC then MT had to live up to its obligations thereunder. What did it do after the ATOC had been signed on December 18, 1991? It took steps to avoid its responsibilities thereunder. If in fact it had valid grounds to do so, then it could do so with impunity. However it would have to have valid grounds while acting reasonably and in good faith in exercising its rights; it must not do so in a capricious manner: LeMesurier v. Andrus (1986), 54 O.R. (2d) 1 (C.A.) at p. 7, leave to appeal to S.C.C. refused [1986] 2 S.C.R. v; Abdool v. Sommerset Place (1992), 10 O.R. (3d) 120 (C.A.) at p. 136; Morgan v. Lucky Dog Ltd. (1987), 45 R.P.R. 263 (Ont.H.C.J.) at p. 288; Meunier Estate v. Cassels Brock & Blackwell (1994), 41 R.P.R. (2d) 126 (Ont.Gen.Div.) at pp. 143-5 (including the indication that a party to a deal should not "lie in the weeds"); Garrett v. Ayr Ventures Inc. (1995), 21 O.R. (3d) 407 (Gen.Div.) at pp. 425-7. If it is relevant to consider whether a party to a bargain would receive on closing substantially what was bargained, the subjective views of that party are to be given no weight if that party is acting capriciously and is attempting to avoid the obligations flowing out of the bargain: Stefanovska v. Kok (1990), 73 O.R. (2d) 368 (H.C.J.) at p. 378; Posthumas v. Garner (1995), 48 R.P.R. (2d) 286 (Ont.Gen.Div.) at pp. 291-3.

58 In my view MT acted unreasonably, in bad faith and capriciously in attempting to avoid its funding obligations under the ATOC. It did lie in the weeds until the last and once it came out of the weeds, it did everything it could to obstruct a resolution. In fact Cameron's testimony was that he was using invalid requisitions to bring the parties back to the bargaining table; MT had its bargain and it should have carried it out. In this endeavour it was carrying on its inappropriate activities in having refused to fund pursuant to its obligations under the TOC and then using its obstinacy to force the other parties (the Banks and Reemark) to agree to the more favourable terms (to MT) of the ATOC (although as indicated previously there were some favourable concessions given by MT pursuant to the ATOC). Immediately MT changed its real estate counsel from Gordon Traub who had great familiarity with the deal over the past three plus years and retained the Macaulay firm -- notwithstanding that the Gordon, Traub firm was named in the ATOC to fill a trust function. Cameron's lame explanation for that switch was that MT wanted to close the deal and wanted a good lawyer for that. I reject as lacking in reality the assertion that the first opinion was an internal one (interestingly one did not surface anywhere in the internal memorandum which was produced nor one which any of the MT officers who testified were able to articulate as to its specifics, Steubing at one point claiming there was no first opinion but then saying "that would have to be our own") -- and if there were a legal opinion there was no indication who within the Mutual Group gave it and there did not appear to be any claim of privilege with respect thereto (and there was not for the second opinion obtained for Shapero from Shapero of the Macaulay firm). It seems obvious and irresistible that a first opinion had been obtained from the Gordon Traub firm (this appears to have been conceded by Cameron) -- one which was negative to MT's desires to avoid funding. However I place no reliance on this latter conclusion. I also reject the evidence of Cameron that he did not know of Reemark's bad financial condition prior to signing the ATOC but rather had only become aware of it a month later when Dore, his president advised Cameron of this news. Rather it seems to me probable that Cameron was made well aware of how desperate the straits were that Reemark was in as a result of his previous information from Somers in November 1991. If he did

not make a call to anyone at Confederation to confirm that that was a matter of his own choosing. If in fact he did not but rather he relied on his prior knowledge (of course in the May 17, 1991 meeting he observed that MT was concerned that there would be a default by Reemark within a few months) it appears Cameron merely treated this as a heavy bail of straw on the camel's back once the Confederation problem was said to be raised by Dore in January, 1992. We then have the charade of Shapero with Cameron's approval and instructions sending 52 requisitions in a bombast letter -- to be repeated several days later together with some additional ones. It would seem to me that these requisitions were designed to be so vast and wide ranging that it would be seen as almost impossible to answer all within the limited time available -- particularly when they were presented in such a convoluted way. Key here was that both Shapero and Cameron knew that certain elements of what was being demanded was incorrect. I find it scandalous that not only was there to be the hold back of $5 million but also the payment of monies into the trust fund re cash flow guarantees of $5.6 million when both Shapero and Cameron knew this arrangement had been superseded by the ATOC. Cameron knew because he was involved in the negotiations; Shapiro knew because he had been advised of this by Pearlstein of the Gordon Traub firm and had been able to confirm it with Cameron. Even after Doyle responded appropriately with respect to this point having been superseded, Shapero and Cameron persisted on this point in the second requisition letter and discussion meeting. As indicated earlier it is inappropriate to requisition something when one knows that the requisition is invalid. It would seem that MT was up to its old tricks when it was submitted that while it was known that the requisition was invalid it was being insisted upon in order to obtain (it would seem in the sense of coerce) other concessions from the other side (Reemark and/or the Banks). Then we have the continued insistence that the financing was not to be block funding but rather than what the ATOC provided in that regard, that there was to be a closing involving the bringing in the investors to the table for a unit by unit direct funding. It would also seem to me that the great distinction being latched on to by Shapero as to the powers of attorney between one clause providing for execution, delivery and registration versus "mere" execution of transfers and mortgages was making a mountain out of a molehill. It would seem to me as indicated previously that it was intended that the power of attorney be a full and complete one which would allow Reemark to do all things reasonable and necessary to close the deals.

59 It must be remembered that MT made certain acknowledgements in the TOC Assignment which remained unaffected notwithstanding the negotiations and the ATOC: see paragraph 1 thereof, especially 1(c) together with 1(b) and (d). I repeat 1(c) for emphasis as it is clear that MT acknowledged thereby that the documentation then held, including the powers of attorney, was sufficient to complete the funding:

> 1(c) The Mortgagors or Borrowers [i.e., the investors] as defined in the TOC pursuant to the terms of their purchase agreements for the residential units of the Borrower [Reemark], in furtherance of which the Takeout Financing has been arranged, directed the Takeout Lender [MT] to advance all proceeds of the Takeout Financing to the Borrower and the Borrower is therefore entitled to receive such proceeds.

Even Shapero had to concede the wording of "any document[ation]" was a very broad -- although he attempted to muddy that concession with the observation that there was no business purpose in doing so. I find that inappropriate -- to follow Shapero's reasoning there would have to be a very hollow purpose to the use of the words. Shapero attempted to avoid directly answering whether it was the role of counsel in a real estate deal or a closing situation to read the documents in such a way as to give them business efficacy (which I am of the view is the reasonable and responsible way of doing so). I found it untenable that Shapero and Cameron would understand that their responsibility was to ensure that the investors were not faced rather immediately with a default -- it would seem to me that this altruism was merely an attempt to put a good face mask on MT's own selfish (used in a neutrally objective sense) interest. This was not a law suit about the protection of investors (they would have to deal with that according to their own deal arrangements as seen by the law in the circumstances); rather this lawsuit about which of the two sides (MT or the Banks, each of which is a well heeled financial institution backed by its parent corporation) has to suffer the rather large absolute dollar loss although relatively small in relation to the individual group's financial resources. Another example of MT's capriciousness and lack of good faith was the insistence that the waiver of conditions under the TOC (the TOC conditions incorporated into the ATOC) was merely limited to a brick and mortar (expanded later to zoning) question. See also my previous views as to the credibility in the case as to the MT factual witnesses. It seems to me that MT is rather cavalier about the situation in general -- an example of this recklessness is when it waived the condition as to syndication of the loans when it did not have any other financial institutions firmly in place -- rather it was said that MT was confident (with no expressed basis for that confidence) in that it would be able to get Vanguard-Prenor and/or Canada Trust fully committed -- notwithstanding their previous concerns in withdrawal from the field. Steubing in what can only be described as bravado indicated that if any syndicate member could not take on a purchaser because of a net worth problem then MT would have this problem but it was a solvable problem. Cameron had acknowledged on July 17, 1991 (when asked if other lending institutions were on side with MT) that this was not a problem for the Banks; rather it was MT's problem to syndicate since the deal was 100% underwritten by MT and further that MT could legally close for $36.5 million.

60 It seems that MT was betting that the real estate -- condominium -- market would firm up at some time and proceed upwards. But at this time Steubing acknowledged that the appraisal of May 22, 1991 (at p. 63) of $166.18 per sq. ft. was a "soft" appraisal and this was not acceptable by anyone. However Steubing insisted that MT knew the pulse of the market and appreciated that in 1991 prices were dropping as it was in the middle of the recession and while no appraisals were being obtained MT knew the trend from the Urbanization Reports.

61 Another example of MT's unreasonableness and capriciousness is that under the TOC Cameron said that they wanted to kick start matters and get the deal closed -- that was why he said MT wanted to fund before July 31, 1991. However he had to concede that in September 1991, when he was still maintaining MT was ready to close, it was not in fact ready. Then there was Cameron's continued insistence that in his view MT had always contemplated unit by unit funding (as opposed

to block funding); this persistence continued even after the ATOC had been signed on December 18, 1991 when that ambiguity (if it had ever been such) was eliminated and the block funding requirement of the ATOC was spelled out. However Cameron did eventually concede that the ATOC specified block funding but he wished to revisit that (it would seem likely that this revisiting would be subsequent to and as a result of the inappropriate requisition demands -- that is if they are not sufficient to crater the deal completely although both Shapero and Cameron knew that MT was exposing itself to a very large lawsuit by adopting the position that it did). Cameron then acknowledged under cross examination that he wished to then negotiate from block to individual funding. So much then for the position that the investors were to be dealt with on a one by one basis and be presented to MT on that direct basis without there being block funding. Cameron then attempted to wiggle out of that dead end by submitting that the block funding was to be nothing more than an administrative convenience of a few days -- without any support for that position. He even adopted the position that the view of the regulators that the block funding was only one of "strict interpretation". It was clear that his position as then enunciated was that MT was not prepared to close on the basis of the ATOC if there were to be any block funding. Thus the intransigence of MT was at long last acknowledged -- it would not close a deal that it had most recently forced the others to agree to.

62 MT appears to have been caught between the Charybdis and the rocks -- it had its contractual obligations under the TOC and ATOC and it also had to comply with the trust company legislation and policies being enforced by OMFI and OSFI.

63 Anything which affected the capital base of MT (such as the "penalties", "disallowances" or other deductions) would go to reduce the capital base of MT. The maintenance of this capital base was extremely important to MT. Its loan business would be directly affected by its capital base as it was permitted to have outstanding loans up to a certain multiple of its capital base. Business had been expanding. MT wanted to take advantage of that by getting permission from the regulators to increase its multiple from 15 times. It seems a reasonable conclusion that the regulators would not be enthralled by such a request if MT were undergoing such a difficult time (including its Reemark problems of all nature) that its capital base was being cut down as a result of losses and penalties. Thus it would seem that that time was not propitious as to increasing its exposure to Reemark by funding the ATOC according to its terms, but rather it would seem that it would be in MT's "other" best interests to either not fund or to at least avoid funding directly to Reemark. As for Trustco it would not be healthy for it if it were called rather immediately to make good on its cash flow and other guarantees of Reemark's obligations to the purchasers of the units. As the Support Agreement was not a part of the TOC or ATOC and BAC had no knowledge of it until 1991 after the TOC arrangements and BAC had advanced the construction loan, then any breaches of the Support Agreement by Reemark or other related parties would not be a breach of the TOC which MT could utilize to avoid its obligations which were now to the Banks. On January 16, 1991 MT sent a conventional set of instructions to Gordon Traub, as its counsel, with respect to funding under the TOC notwithstanding MT knew in December 1990 of the Fengar -- Royal Trust mortgage and that the surplus in the Project was estimated to be below $5 million. Soon after it appears that the

regulators became concerned about MT's financial condition especially in respect to the Reemark Group. McIntosh of Mutual Life acknowledges that it was a relief to see that problem off MT's plate in dealing with OSFI after OSFI was advised MT had not funded the TOC. The regulators put continuing pressure on MT. Funding under the TOC then appeared to have gone into a stall. MT then took the position that there had been a material change in representations but it would be prepared to fund if there were a $5.6 million holdback. The Banks objected as the dispute between Reemark and MT did not involve the Bank's rights under the TOC as assigned to them pursuant to the TOC Assignment. Cameron threatened to cancel MT's commitment if the loan were not funded by July 31, 1991 with the aforesaid holdback. However Cameron had to admit that MT had no right to unilaterally terminate the commitments on that basis but that he did so only as a negotiating position. After some frustrating negotiations the ATOC was finally agreed to on December 18, 1991. It is unclear why MT waived the syndication clause on the TOC on September 21, 1998. One is left with the impression that lenders (and developers) were very bullish in the late 80s and that they may well have been overconfident as to the situation and feeling that the market would continue upwards and increasing values would solve any problems (i.e. the problems were thought to be theoretical not practical). This would also explain why MT thought it could get Vanguard-Prenor and Canada Trust to come back into the fold afterwards towards closing time -- and it appears that MT was more bullish (or perhaps less conservative) than Canada Trust as to its standards as to investor eligibility or significantly lower. Apparently in no hurry notwithstanding the objective of funding pursuant to the ATOC by January 31, 1992, Cameron forwarded on December 23, 1991 an executed copy of the December 18, 1991 ATOC to Pearlstein at Gordon Traub instructing him as follows (the letter being given in its entirety):

> We will discuss the strategy for moving forward on Monday, January 6, 1992. Until then please do not proceed. [emphasis in original

64 Under both the TOC and the ATOC Gordon Traub were to be the solicitors for MT; under the ATOC Gordon Traub was to hold the trust account with the holdback funds. However it seems that MT was not committed to carrying through on the financing. If it could avoid that, it would: see early reference to that in Cameron's diary of January 20, 1992; a memo of that same day by Mark Yhap of MT and the Macaulay account. Sutherland acknowledged that if Shapero had advised that MT could get out of its commitment it would have done so. It is interesting (and unfortunate for MT's financial health) to note that by a letter of February 3, 1992 Shapero forwarded to Cameron a draft of the requisition letter to Reemark; in his cover letter Shapero advised that the TOC Assignment and the ATOC "pose certain problems for you" and that "nowhere in my letter of requisition have I alluded to the fact that Mutual Trust Company will not be advancing under the commitment letters". See my previous views as to the use of requisition letter as negotiating instruments. See also my views that the requisition letters and meeting were essentially bombastic shams designed to convey unsustainable and incorrect demands with a view to avoiding funding or obtaining some new significant concession from the Banks (or Reemark). Shapero and Cameron knew that they were playing a dangerous game but the Banks did not cave in as it was acknowledge at the time that MT would be facing a huge lawsuit. (Cameron's notes of the meeting end with the

words: "We are going to be sued for a lot of $".) Of course facing a huge lawsuit does not mean the potential defendant's position is without merit; however it is curious and telling to note that there was no advice given as to how strong or weak MT's position was as to this lawsuit.

65 Examples of inappropriate requisitions are as follows:

(a) Requisition 36: Shapero claimed that $5.6 million was due and payable under the Support Agreement in addition to the $5 million holdback provided for in the ATOC. Cameron knew that this was double counting from the start as he was part of the negotiations when the holdback was to replace the Support Agreement obligations; Doyle told Cameron this several times; Cameron acknowledged this to Shapero -- yet it was still insisted on in the second requisition letter and at the meeting.

(b) Requisition 26: Shapero referred to information relating to the Reemark Group defaulting under other projects as to cash flow and rental guaranteed. Shapero claimed that if MT had known of this before it executed the ATOC he would have refused to execute. See above as to my view that on the balance of probabilities MT through Cameron had advance knowledge through Somers even if it had no reason to believe anything out of the ordinary before November 19, 1991. Doyle challenged Shapero on this point stating that Cameron did know; Shapero did not deny this in his reply; Cameron in his examination on discovery had no answer as to why Shapero did not deny Doyle's assertion that Cameron was aware of the Confederation difficulties of Reemark; Cameron at trial could not satisfactorily explain his diary notations.

(c) Requisitions 29 - 33: Shapero demanded payment under the consulting fee agreement between Reemark, MT and Kingwell. However Cameron had to acknowledge that this agreement and the fee were not conditions of the ATOC. Other agreement demands fall in the same category.

(d) Requisition 21: It is unclear as to what authority Shapero is relying on to obtain such an opinion. Shapero seemed to be of the opinion that a guarantee given by an insolvent company was not a guarantee (as opposed to it being a worthless guarantee). In any event due diligence had already been waived. Reemark's financial condition had not been made a condition of this deal.

(e) Requisition 28(f): As indicated it would appear that it was agreed among the parties to the TOC Assignment that the documentation including the powers of attorney could be relied upon to facilitate the mechanics of closing investor deals. With respect to the blanket mortgage it was understood this was never intended to bind the investors so that would not have given the investors a right to rescind.

(f) Requisition 47: This appears to be a circular question. In my view this

would have been dealt with on closing of the deal. In any event MT should not complain when it did not provide draft documentation for comment after it advised through Shapero that it would.

(g) Requisition 19: As to the delivery of investor documentation, in my view this was part of the subsequent security (SAS) which could be made available at a time after MT closed its funding obligation to the Banks. The transfer date question is a red herring.

66 Shapero acknowledged that MT had no right to refuse to close if requested information were not given and that there was no provision in the ATOC for MT to do further due diligence.

67 McCullough of McCarthys acting for the Banks by letter of February 27, 1992 notified Shapero that he supported Doyle's answers as to all the requisitions. McCullough advised that he awaited Shapero's comments on the various draft documents forwarded; Shapero never advised. Cameron's evidence was that the February 28th Shapero letter in which the position taken was that MT would have no further obligation past March 1st was another negotiating ploy. It was not explained what ultimate position MT wanted to obtain by its negotiating ploys -- was it that it did not have to fund under any conditions or was it that it wished to have some extra concessions. Curiously it seems that its ploy may have escaped the attention of those on the other side because it was not well communicated. In any event its ploy did not work; the ATOC was not funded although it appears that it ought to have and as predicted "[MT was] sued for a lot of $".

68 MT was in contact with a number of investors after the ATOC was signed in February 28, 1992; the investors wanted to know whether they were going to close. However MT responded by saying that the financing had not yet been finalized as there were conditions Reemark had to fulfill. It was acknowledged that the investors were interested not because they wished to close but because they recognized they had exposure if they did not close. Steubing's view was that notwithstanding Reemark's difficulties the investors would have closed if they were given the alternatives and informed of the risk. However MT did not make any proposal(s) at the time so as to facilitate such a closing. Steubing acknowledged that with the benefit of hindsight MT would have done things differently and that there would have been a better result for all concerned.

69 It would seem reasonably apparent on the evidence that MT was not willing to live up to its obligations under the ATOC -- and specifically to fund the ATOC. Rather it would appear that MT was not ready, willing and able to do so, notwithstanding its obligations. Shapero at long last under cross examination acknowledged that he was looking for breaches and defaults so that MT would not have to perform. He said that Cameron would only close if he legally had to; somehow this is difficult to square with the requisition letters and demands that Cameron and Shapero were giving us so as to use them as negotiating tools. Shapero was rather immediately researching as to how to terminate a commitment arrangement (January 26, 1992). MT's reluctance to fund probably is based upon an unwillingness to increase its capital base or obtain a special dispensation (if such were available) from the regulators or combination of both. Conceivably that reluctance may have been

influenced by the fact that Dore, Sutherland, Steubing and Cameron were minority owners of Trustco and axiomatically not as well heeled to come with additional funds to increase (or maintain) capital base as the majority owner Mutual Life certainly was. Cameron's position was that he was not prepared to close the ATOC by funding it if there were to be only block funding -- notwithstanding that block funding was what was contemplated by the ATOC which he had just negotiated and executed several months before after protracted and frustrating negotiations. To assert at trial that this element of block funding should in essence be ignored even if it was claimed by Cameron and Shapero designed to be an administrative convenience of several days (although Sutherland said it would be an administrative situation if the delay were one day or one year) as the individual mortgages were to be obtained from closings with the investors is itself to ignore the legal realities. Once into the lobster trap the lobster does not have the choice of withdrawing if it sees that the investors do not materialize with their own direct transfer closings. If that choice was what MT wanted then it should have bargained for it when negotiating the ATOC -- perhaps by MT giving other concessions (an example of a concession that MT did make is that under the ATOC the spread of 3 percent as to first and second mortgages pursuant to the TOC had disappeared under the ATOC) so as to obtain for it a closing in escrow with the monies that it advanced only coming out of escrow when the Reemark investor deals closed with cash payments etc. within a certain period of time thereafter. However that was not what the ATOC provided for. The court may not imply a term into an agreement merely because it represents a sensible agreement which the parties might well have made. It must be obvious that the parties would have agreed to the term to be implied, if they had thought of the point, and that it is necessary for businesses efficacy and in accord with the parties' intentions: see Law-Women Management Corp. v. Peel (1991), 17 R.P.R. (2d) 62 (Ont.Gen.Div.) at p. 81. A purchaser can always bargain for those rights which it deems indispensable: see Clark's-Gamble of Canada Ltd. v. Grant Park Plaza Ltd., [1967] S.C.R. 614 at p. 625. It seems to me that Cameron was engaged in wishful thinking -- similar to his eventually agreeing under cross-examination that once an investor had been approved by MT, it was not possible for MT to go back on that approval and then submitting that it was still possible for MT to "review" the approval of investors (see also paragraph 1(b) of the TOC Assignment). Another example of the difficulty that Cameron had in giving a consistent story was his disagreement as to the proposition that MT was not ready to close the TOC financing in September 19, 1991. When faced with the transcript where he acknowledged that, there was an exceeding long pause before he finally agreed that MT was not ready to close in September 19, 1991. Cameron amazingly enough for someone in his position in the hierarchy of MT could not recall any problems that the Project and the TOC/ATOC posed for MT with the regulators directly or through MT's auditors.

70 MT's rather cavalier attitude towards the regulators is quite instructive. Sutherland who by the time of trial had left the Mutual Group had either not sufficiently prepared himself or did not understand the programs facing MT in this regard. He should have the best knowledge as he was the officer of MT directly responsible for dealing with the regulators. However he was vague as to, for example, OMFI saying that in 1991 if the 1% loan limitation was not cleared up by the end of the year, then the excess would be deducted from the borrowing base; there was a specific note to that effect in Exhibit 3-7. Sutherland's view was that the ATOC did not involve MT in a new

commitment which increased its exposure from $12 million to $36 million; rather he claimed that this was an amended commitment: a fencing with words or a failure to comprehend MT's new exposure. When pressed as to this being a threefold increase in exposure he eventually conceded that technically it was and then when further pressed he conceded that legally it was. Then there was the mystique that the regulators were not correct in their strict interpretation but rather the situation that governed MT's obligations to the regulators was as MT viewed it. However, apparently never once did MT ask for a clarification that its interpretation was correct as opposed to the strict interpretation that it had been given. Of course MT was not particularly forthcoming with regulators: Sutherland's attitude was that MT did not give the regulators the "committed transactions" as he was of the view that this could be discovered by the regulators' examiners in their (periodic) reviews of the files. The regulators however had observed that MT had at least a $18,250,000 block funding commitment.

71 There had been allegations by MT in the exchange of correspondence that there had been a material change in the representations and information required to be given; however no evidence was led to support this conclusion nor was there any reference made at trial as to the specifics of the ATOC (which by its nature included some continuing aspects of the TOC) for being relied on by MT in this regard. It would appear that MT was attempting to muddy the waters with this allegation.

72 It would appear to me that MT breached the TOC. Rather than the Banks suing MT as to this breach, they eventually negotiated the ATOC which I assume they felt more comfortable about as to MT performing its obligations. Unfortunately for the Banks it appears that MT defaulted on its obligations pursuant to the ATOC as well. However the ATOC provided that there would be mutual releases among Reemark, the Banks and MT for anything arising out of the TOC and the TOC Assignment -- but these releases were to be given contemporaneously with the First Advance (namely $18,250,000 less the holdback of $2,500,000 as provided for in the ATOC). Therefore as there had not been a First Advance and such was the fault of MT, then it still had liability exposure under the TOC and TOC Assignment. If Cameron had had any interest in closing the ATOC leading up to its execution or at the time of executing it (as to which I think the conclusion is extremely doubtful but on a balance of probabilities I draw the opposite conclusion) it appears rather immediately after execution he had no interest in closing the ATOC by funding it. It is telling to note that the internal rules as to four officer approvals were not followed nor was there any economic analysis of the ATOC completed before signing (quite unlike the TOC situation). There was not even a routine report to t the board of MT as was customary. It defies gravity that the ATOC was done with "nothing in the file". However immediately thereafter Cameron advised Pearlstein to do nothing until further advised after the Christmas -- New Year break. Cameron admitted that he did not like block funding but that he felt that he had been pushed into accepting it. He acknowledged in his discovery that he wanted to renegotiate from block funding to closing with the individual investors; however this was not what the ATOC contemplated. The very misleading letter of Cameron (authored by Steubing) to Sherkin of June 2, 1992 should be noted for its mischievousness.

73 It is curious that, according to Cameron (and Shapero's requisitions), Reemark's alleged defaults on other projects became so important after the ATOC was signed but that Cameron did not do anything according to him about it despite being alerted by Somers a few weeks before signing the ATOC. He said that he didn't call anyone at Confederation as he did not know anyone there. Query then if it were of any importance to him (especially in light of the $36 million exposure under the ATOC -- a rather sizeable exposure); one would not think that if one were truly concerned that one would be deterred by not knowing anyone at Confederation (although he had acknowledged after that he did) but rather one would call up cold. Can it be that Cameron by the time of trial forgot about Somers' call; I think not -- but how in any event could he have forgotten about it when a month or so after Dore had mentioned to Cameron something about Reemark's problems. Dore did not testify; I would have to assume that it was decided his testimony would not be helpful to MT: see Claiborne Industries Ltd. v. National Bank of Canada (1989), 69 O.R. (2d) 65 (C.A.) at p. 77. It may be questionable as to whether Cameron wished to acknowledge his prior knowledge then to Dore when he according to his testimony knew nothing about Reemark's problems with Confederation before signing the ATOC.

74 Similarly MT should not have been surprised about Reemark's precarious financial condition. As an experienced lender it had its executive's ear more or less to the ground in the community. MT knew especially that Reemark's projected surplus in the project was much lower than had been originally anticipated; MT knew that Reemark was experiencing difficulties in the Faubourg project where MT was a lender; and MT knew of the Reemark corporate diagram showing the corporate and project relationships. MT expressed that it was concerned for the investors that Reemark would rather immediately go into default as to the cash flow and other guarantee. I think that MT is trying to put as good a face on the situation as possible but I do not find that MT was motivated by altruism for the investors but rather for MT's own interests of not having to fund a losing proposition or run afoul of the regulators or both.

75 Shapero was rather immediately researching how to terminate a commitment arrangement; his notes of a meeting on January 29, 1992 with Dore and Cameron recite whether it would be possible to knock out some of the investors. I think this illustrates that Shapero and MT were not examining the situation neutrally of whether or not there was a legal obligation to close; rather it appears they were actively trying to force such a result. Similarly there was the advice that Shapero gave that the TOC Assignment resulted in problems for MT.

76 It would seem to me that MT's financial analysis of how the first and second mortgages would sort out is somewhat suspect. Given the values prevailing at the time of the ATOC of approximately $110 - $100 per sq. ft. there will have to be a very severe discount as to the second mortgages if they were disposed of. Assuming $110 per sq. ft. the investors would be $20 under water on closing as to the mortgages of $130 per ft. -- let alone their obligations pursuant to the Investor Notes. It would seem to me that no investor would likely volunteer to directly "close". The first mortgages could not be any more than $79.50 with the result that the second would be $50.50 to make up the $130 mortgage arrangement. It was clear that the regulators were well aware of the soft appraisals

which were in MT's hands: see Exhibit 4-8. Clearly there was a concern as to complying with the 75% rule: see the February 12, 1992 note in the Shapero file which noted the "strict" interpretation of the regulations.

77 It seems to me that as noted above MT was not being forthright with the regulators. The Project was not discussed with the regulators by MT. The best evidence that OMFI had not been previously advised of this commitment was that in February 1992 OMFI wanted a copy of the ATOC.

78 Cameron's diary in the several months leading up to the time that MT terminated the ATOC by saying it would not fund after March 1, 1992 has a number of notations about getting Reemark another non-Reemark project (Penta Stolp) closed; there were no notations about getting the Sterling deal closed by funding the ATOC. This is nicely contrasted by a notation on one day of the only two items to do:

(1) Resolve Reemark Sterling.
(2) Get Calderton/Penta Stolp Closed. (emphasis added)

79 There also appears to be an internal acknowledgment that the March 1st date was not a breach date by the Banks or Reemark since on March 5th Shapero has noted in a meeting with Cameron the question: "Can Trustco get out of their commitment?" Any further delays and uncertainties would only compound the problem of losing investors. The maximum number of investors would be "saved" by a timely common effort by MT, the Banks and Reemark; the least number (in this case unfortunately zero) would be saved by fighting among them and failing to discuss a common plan. Clearly MT was not making any effort in this regard; if one were even to accept that they were just negotiating it was so brutish an approach that it only served to alienate the Banks who remained extremely anxious to close. Thus MT did not take a positive active step to resolve the problem; it also seems that they did not facilitate matters by taking a neutral passive position either. I cannot conclude that MT wished to negotiate in good faith to achieve a funding of even a revised ATOC whatever it would look like. I find that MT's objective was not to fund the TOC or the ATOC. It did not fund either the TOC or the ATOC and I find that MT was not justified in so refusing to fund but rather that MT consciously engineered its own defaults.

80 The explanation as to the replacement of the long standing Gordon Traub firm by the Macaulay firm because MT wanted a good lawyer to close the ATOC is simply not believable. It is astounding to think that a new lawyer (Shapero) would be introduced at the last minute to close a complicated deal that another lawyer (Pearlstein) had been living with in its organic condition for several years. It should be recalled that the ATOC contemplated the first advance being completed as early as January 31, 1992 but Shapero was not engaged until just a week and a half before that date. It is unwise to change horses in mid-stream; it is folly to change them when one is so close to the far bank as was the case here. Pearlstein was immediately instructed to do nothing until January 6th when he would be further advised. The only logical conclusion that Pearlstein could not be

counted on to "defeat" the ATOC when MT did not have valid grounds for doing so; that task was let out to Shapero. The requisition letters and meeting were in my view concocted in bad faith by MT -- not with a view to completing the commitment but rather to find some subterfuge to avoid closing the funding.

81 Even if requisitions (or some of them) are valid does not mean that they can be relied on to get out of a deal. See LeMesurier; Abdool; Morgan; Meunier; Garrett, supra, as to the requirement to deal in good faith which extends to the advancement of requisitions. In this case it appears to me that they were being used as a subterfuge to get out of the deal. In the termination letter of February 28, 1992 Shapero advised that he believed that all his requisitions were correct and reasonable; this statement must be taken with more than a grain of salt.

82 The Banks provided the draft closing documents; Shapero gave no comments on them and neither did he supply any documents for review as he said he would.

83 Shapero's views that under the ATOC the investors were to provide assumption agreements on closing of the First Advance pervaded his requisitions and his evidence. It is questionable that he could have believed this to be the appropriate interpretation of the ATOC but it is clearly not what the ATOC stated (it being clear that in the first advance there would be a blanket mortgage and later there would be the SAS which would be obtained from the individual investors when those individual transactions closed. Eventually under cross examination Shapero was driven to stating that on or prior to the first advance which would be absurd as the express language at pp. 3-8 of the ATOC provides. The Reemark 50 units were a floating component and were fixed only at the end when there was no SAS from 50 investors (or less). It should also be noted that there was a right to substitute for investors who refused to close or who had disappeared.

84 It seems that Shapero was dealing with a different contract than the ATOC -- perhaps a contract which he would have attempted to negotiate if he had been involved in negotiations from the start. However Shapero and MT had to deal with the contract which MT had in fact negotiated -- not the one they wished they had negotiated.

PWL As Receiver and Manager And The Action Taken By The Banks

85 On May 12, 1992 the plaintiff appointed PWL as receiver/manager of the project but it took a court order on May 20, 1992 to require Reemark to turn over the books and records. Regional had been Reemark's property manager and leasing agents. Negotiations followed with the upshot that Regional continued with the day to day activities so as to avoid an ongoing battle while the building deteriorated as to physical condition, financial matters and its reputation.

86 Page of PWL obtained two appraisals -- the Stroud one showing a difference of raw dollars of $20 million for an en bloc sale or $24 million unit by unit and the Morassutti between $22.5 - $23.5 million en bloc and $24 - $26 million unit by unit in the time zone August and October 1992. The assumptions were reviewed and the appraisals were "normalized" to bring them to an apples to

apples comparison. Consultants with experience in condominium sales were retained. Page felt that Graham was imaginative and creative and that he was honest even if his recommendation of a sale en bloc may not have been in his own best interest whereas he felt that Budovich was highly motivated by short term gains so that he would have to be more closely monitored. It would appear to me that PWL and the Banks properly canvassed alternatives available to them and adopted a reasonable course of action in selling en bloc for the price obtained. The evidence submitted by MT is highly suspect as it variously involves a long term workout with no reasonable grounds of assurance that the market would be there, involves the Banks in a speculation as to future conditions and subjects them to a risk of significant downside potential; as well MT's evidence involved discount rates which appeared to reflect only the cost of money aspect as opposed to a discount for contingency risk. In the result the scenarios painted by MT's witnesses were essentially rosy based on extreme upside possibilities but certainly not even probabilities.

87 I share Page's concern about the proposal made by MT in its letter of August 28, 1992 which was originally open for acceptance only until September 5, 1992. This rather highly conditional and therefor elusive funding arrangement proposal was only actually sent on September 2, 1992. It was on request left open to September 15th but with further request for additional information which was never forthcoming. Given MT's track record to date (including reneges), and the short time fuse given for highly conditional proposal I feel that Page and the plaintiffs were justifiably suspicious of MT's motives in sending the letter. It strikes me that it could objectively be viewed as a self serving letter attempt. It was not a realistic or reasonable offer for MT to have made; it was an offer that the Banks could and would turn down. I would also note that if MT were so bullish on the Project and thought at any time that the Banks were about to realize too little, it was always open to MT (or some affiliate within the Mutual Group) to acquire the Project (including the Investor APSs and Investor Notes if it felt there was still any value to same given what I view as realistic concerns about litigation risk and cost especially in light of the Singer case decision and the Sherkin concerted group opposition) and either hold it for the long term or sell it off unit by unit as was so strongly urged in the MT evidence. (Mr. McCutcheon wrote on September 11, 1992 warning against an en bloc sale. Mr. Newbould advised him on November 2, 1992 that it was not felt prudent to maximize value by attempting to sell individual units to individual investors and that therefore the course of selling en bloc would be actively pursued. It should be noted that the Mutual Group has extremely significant financial resources and therefore it is unlike a mortgagor who cannot afford to pay interest going into default on the mortgage.) It appears MT was not amenable to this risk of becoming a purchaser itself, notwithstanding it could do so for what it now alleges is undervalue. Page was cognizant of the aforementioned change to the Condominium Act and therefore appropriately cautious in taking any unretrievable step. The Charlottetown referendum of October 1992 was introducing more uncertainty as to Canadian financial life. After making a relatively modest attempt to test the waters as to any interest by investors or any of them to close, Page recommended to the Banks in October of 1992 that there were two general courses of action -- each of which was commercially viable -- (1) sell en bloc or (2) some form of individual sale of units. The Banks opted on October 26, 1992 for an en bloc sale by recognizing that individual sales may raise more money over time (the absorption time being key) but were more prone to risk of

change and as well the Banks were not equipped to do a fracture of the mortgages and hold same as they were not retail banks.

88 Once the Banks opted for a sale en bloc it appears to me that PWL conducted itself reasonably in exposing the property to market and negotiations with those who demonstrated genuine interest. PWL negotiated with Au and signed a deal with him on November 23, 1992 for $23.5 million. However Au being a sophisticated investor (and a dedicated negotiator) was content to let the original deal fall through after inspection and then renegotiate a new deal (using the inspection and environmental concerns as leverage) to get the price down to $22.5 million. This deal in fact closed May 20, 1993.

89 In November 1992, 33 units (11% of the building) were vacant. Regional was then instructed to sign up tenants on an yearly basis. This vacancy rate increased to 61 units (20%) by the Spring of 1993 (April 5, 1993). PWL was concerned about losing income which it estimated to be some $50,000 per month at this stage. As otherwise noted, I am of the view that interim action could have been taken, while still maintaining flexibility, to keep the vacancy rate at a maximum of 10%

90 There was then a settlement of the litigation which Reemark had instituted and then appealed utilizing Solmon as counsel. PWL agreed to withdraw the bankruptcy petition and hand back to Reemark the Investor Notes and Investor APSs. It may have been thought by Reemark that this might assist it in any litigation brought by investors -- and it appeared to PWL and the Banks that these materials had no value as there was no identifiable Reemark asset which the Banks could deal with. I do not see any difficulty in agreeing with the latter conclusion. MT at trial retreated from the position that PWL was negligent in not collecting inter company accounts owed in the Reemark Group; this agreement would appear to me to recognize the obvious -- the cost of any attempt to collect same would far outweigh their real (if any) value.

91 As well it seems to me that even if PWL did not examine the net worth situation of each investor this was just a red herring given the other difficulties one would face in attempting to close the Investor APSs (or any modification thereof). I concur with PWL's assessment that the package of the Investor Notes and Investor APSs between Reemark and the investors would not be an attractive package for any truly potential purchaser; thus the continued harping on this by the MT officers would appear to me to be a diversionary screen against dealing with the situation in a realistic way.

92 MT was not satisfied with the Banks selling the Project en bloc to Au; MT was of the view that a greater price could be obtained if the Project had been sold on a unit by unit basis either to the original investors (which was unrealistic) or to new purchasers. However this alternative had been considered by PWL and the Banks but rejected. I am of the view that the rejection was a reasonable decision on a risk reward analysis. It would take too long (anywhere from two and a half years to five years in the view of those consulted) with the attendant uncertainty of what the proceeds would be. The Coopers report appears to be relying on matters not admitted in evidence and opinions of

unqualified persons in reaching a conclusion as to the proceeds of a unit by unit sale that there was a possible upside; it is noteworthy that it was not claimed to be a probable result. In Oak Orchard Developments Ltd. v. Iseman, [1987] O.J. No. 361 (affirmed [1989] O.J. No. 2394 (C.A.)) Saunders J. specified as his 6th point that "the mortgagor must show that a higher price would have been obtained but for the breach ...". [emphasis added]. The Banks are not legally required to hold on with a hope forced upon them that the market will improve. No evidence was led to conclusively prove that the market was improving or about to improve. As well there were the extra costs involved in a unit by unit sale and the requirement that there be as well as a discount factor for uncertainty, a discount for the time involved. See Waddams, The Law of Damages (2nd ed., December 1996) as to the proposition that a plaintiff need not speculate for the benefit of a defendant (pages 15-8; 15-11; 7-17 to 7-20).

93 When PWL was appointed as receiver/manager of the Project by the Banks after some difficulty in May 1992, the option of tendering or using the powers of attorney to close the deals with the investors almost immediately became unavailable in any realistic sense for combination of reasons including the Singer decision of White J. and the concerted opposition of the 100 investors led by Sherkin. As for the use of the powers of attorney, it is interesting to note that Shapero argued that they were invalid according to his interpretation although he agreed that it made no business sense to accord such an interpretation.

94 The June 30, 1992 position of the loan of the Banks was that there was $32,945,000 principal and $292,313 interest: see Exhibit 2-13. When the sale to the Au interests closed in May 29, 1993, a tally was run as of the end of that month after deducting the net proceeds of the sale with the result that the principal was reduced to $11,045,200.79 and the interest of $4,473,655.01. As of May 1, 1997, the total owing was calculated at $20,701,445.83 by the Banks based on the loan being at prime plus 1% compounded monthly.

95 It does not seem to me that PWL (and therefore the Banks) can be criticised for the sale proceeds and when these proceeds were obtained. The Project was diligently and widely marketed. Leads were followed. Au proved to be a difficult, sophisticated purchaser who was willing to negotiate to an extreme degree. However PWL hung in to get a deal closed, despite a hiccup of Au walking away once. There was no other reasonable buyer available. The sale price was reasonable in relation to the various appraisals obtained (Stroud and Morassutti) and in line with the more current other estimates. The only area in which PWL may be faulted is the aspect of letting the vacancy rate climb as high as 20%; however in my view this was a short term condition. Assuming that the vacancy rate had to be held to a maximum 10 percent, it would seem to me that the loss of rents thus created was less than $100,000 (e.g. three months x 30 units at $1,000 per month). It was suggested that the high vacancy rate was a bargaining chip for Au to come back the second time. However he had other reasons to bargain with so as to knock the price down $1 million. It would seem to me very generous to MT to attribute half of this to a high vacancy rate -- or $500,000. Thus in total the maximum taken into account in any mitigation scenario would be $600,000. MT did however provide Popofsky's evidence as to excessive vacancy and the potential for loss of cash flow

which would give a basis for Au to negotiate a more favourable deal than his original one.

Further Legal Analysis

96 See my previous views to parties being required to carry out their obligations in good faith as to binding contracts previously entered into.

97 Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc. (1996), 31 O.R. (3d) 481 (C.A.) was relied on by MT as stating that good faith should not be considered. However this was not a case involving good faith in the carrying out of contractual obligations but rather whether there was a requirement to bargain in good faith so as to reach a binding contract. See the observations of Doherty J.A. in speaking for the court at pp. 488-9:

> The appellants also submit that apart from the characterization of any defect as latent or patent, the vendors had a duty to bargain in good faith and breached that duty when they failed to advise the appellants of the information provided by Monenco in the spring and summer of 1988. The existence of a duty to bargain in good faith in an arms-length commercial transaction involving the sale of real property is debatable: see annotation of J. Lem to Justice White's decision at 44 R.P.R. (2d) 29 at pp. 30-31. In any event, I can see no evidence on this record of any basis for a finding of bad faith against the respondents. They made no misrepresentations. They gave the appellants ready access to information concerning the property and full physical access to the property, even to the extent of permitting investigations which were not required by the agreement of purchase and sale.

98 MT submitted that with respect to these cases there was a degree of materiality which must be considered before ruling against the party relying on the deficiency. However it should be noted that in Stefanovska, supra, Moldaver J. drew a distinction. He indicated the court would give no weight to the subjective views of the requisitioner if the requisitioner's demands were capricious, arbitrary or contrived to avoid contractual obligation but there would still have to be an objective determination of the materiality of the deficiency to see if the requisitioner was being given substantially what was contracted for. However I find that MT was being given substantially what it had contracted for (although substantially less than it appears that it wished it had bargained for). MT further submitted that the other cases relied on by the Banks, supra, in this regard (LeMesurier, Abdool, Morgan, Meunier, Garrett and Posthumas) should be viewed as involving minor deficiencies. However an analysis of the requisitions in the subject case disclosed that they were over and above the "throw in everything" variety but rather they dealt with anything whether or not extraneous to the deal. In my view the requisitions discussed above were truly extraneous to the deal as it stood between MT and the Banks -- and it was improper for MT to attempt to introduce such matters, including those elements of side deals with Reemark to which the Banks were not privy or of deals which on reflection MT wished it had not made. It seems to me that the

requisitions as made, were made not for the purpose of completing the deal so that the result was substantially what was bargained for, but rather the requisitions were made with the primary and overwhelming purpose of MT attempting to avoid its obligations to fund. That runs completely contrary to the views of the Court of Appeal in LeMesurier as given by Grange J.A. at p. 7:

> The clause is very similar to that in Mason v. Freedman, [1958] S.C.R. 483, 14 D.L.R. (2d) 529. There the vendor sought to use the clause to enable him to repudiate the contract when the purchaser required a bar of dower. Judson J. rejected that defence at p. 486 S.C.R., pp. 532-3 D.L.R. as follows:
>
> > This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about ... Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in Hurley v. Roy [(1921), 50 O.L.R. 281 at p. 285, 64 D.L.R. 375 at p. 377] that the provision, "was not intended to make the contract one which the vendor can repudiate at his sweet will".
>
> On p. 487 S.C.R., p. 534 D.L.R., he said: "A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner."
>
> I think the purchaser's reliance upon this clause can be described as "capricious or arbitrary" where the vendors had removed the curb and replaced it within the lot line so that it did not encroach on the adjacent lot, and I cannot find her action to be "reasonable and in good faith". If we were to give the clause the meaning and force ascribed to it by the trial judge, there would be very few contracts for the sale of urban land that could survive. It would be a rare case where a careful survey would not disclose some minor discrepancy. Vendors and purchasers owe a duty to each other honestly to perform a contract honestly made. As Middleton J. put it in Hurley v. Roy (1921), 50 O.L.R. 281 at p. 285, 64 D.L.R. 375 at p. 377: "The policy of the court ought to be in favour of the enforcement of honest bargains ...".
>
> The approach may be merely an example of the development of an independent doctrine of good faith in contract law at least in the performance of contracts, one explicitly set forth in the American Uniform Commercial code and in the American Restatement and exhibited, although perhaps in disguised form, in many English and Canadian cases -- see the lecture of Professor Belobaba,

> Special Lectures of the Law Society of Upper Canada (1985), p. 73 particularly the examples set forth on p. 83 et seq.

99 MT relies on Downtown King West Development Corp. v. Massey Ferguson Industries Ltd. (1996), 1 R.P.R. (3d) 1 (Ont.C.A.) as standing for the proposition that good faith is not important in a contractual relationship. The facts of that case were somewhat clouded by some past dealings between the parties but which the Court of Appeal found had been superseded by formal documentation which had been executed. The court then quite logically concluded that the question of good faith did not come into the picture as the then existing contractual relationship between the parties did not preclude the defendant from removing the subject property from its proposed sale arrangements.

100 MT raised the case of Caruana v. Duca Community Credit Union Ltd. (1994), 20 O.R. (3d) 563 (C.A.) as also standing for the proposition that good faith dealing is not important when requisitions are made on substantive grounds. However in my view this case on analysis is in fact contrary to that proposition; the plaintiff/purchaser in that case was able to rely on its requisitions which survived the motion court judge's review of the merits. However the motion court judge made no finding of bad faith (or lack of good faith) in making the requisitions and Laskin J.A. speaking for the court did not find that the record would support any such finding. He said at pp. 572-3:

> (d) Duca's Allegation of Bad Faith
>
> Finally, Duca submitted that Caruana had acted in bad faith and ought to be denied relief for that reason. Duca alleged that the numerous unmeritorious requisitions made by Caruana were evidence of bad faith. Grange J.A. wrote in LeMesurier v. Andrus (1986), 54 O.R. (2d) 1 at p. 7, 25, D.L.R. (4th) 424 (C.A.), that "vendors and purchasers owe a duty to each other honestly to perform a contract honestly made". The learned motions court judge found most of Caruana's requisitions to be without merit and Caruana did not pursue any of these on appeal. The motions court judge did not, however, make a finding of bad faith and I do not think that the record supports such a finding, particularly in the absence of any cross-examination on the affidavits filed by Caruana. The position Caruana eventually took in connection with the adjacent lands was reasonable. In short it was reasonable for a purchaser in Caruana's position not to close.

By implication if there had been a finding of bad faith supported by the record then it may not have been that valid requisitions would have been a basis for the purchaser refusing to complete the deal.

101 Of course there appears to be that there were reasonable answers given to the requisitions in the subject case, regardless of whether these requisitions were validly made by MT.

102 I was referred to 100 Main Street Ltd. v. W.B. Sullivan Construction (1978), 20 O.R. (2d) 401 (C.A.), leave to S.C.C. refused October 10, 1978 in regard to the proposition that MT was entitled to obtain financial and other information before proceeding to close the funding. However it is clear in that case (as opposed to here) that there was an obligation on the defendant to answer questions as to its financial capability. Morden J.A. in delivering the court's reasons at p. 407 observed:

> The trial Judge held that the agreement itself and the subsequent conduct of the defendant imposed an obligation on it to answer reasonable requests from the mortgagee for information as to its financial capability, that the request for the defendant's financial statements was reasonable and that its failure to furnish them prevented the plaintiff from fulfilling the condition. In such circumstances, it was not open to the defendant to rely upon non-compliance with para. 15 and, hence, to repudiate the agreement.
>
> In my view, the trial Judge was right in the conclusion at which he arrived and I am in substantial agreement with his basic approach.

103 With respect to mitigation, I note what was said by Laskin C.J.C. in Red Deer College v. Michael's et al. (1975), 57 D.L.R. (3d) 386 S.C.C. at p. 390-1:

> It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense ...
>
> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.
>
> ...
>
> If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable

> consequences.

This was recited with approval by Estey J. in giving reasons for the court in Asamera Oil Corp. Ltd. v. Sea Oil & General Corp. et al. (1978), 89 D.L.R. (3d) 1 (S.C.C.) at p. 10. He noted at p. 11 that a plaintiff need not put his money to unreasonable risk including a risk not present in the initial transaction in endeavouring to mitigate his losses. He went on at p. 20 to note a foundation stone regarding mitigation:

> We start of course with the fundamental principle of mitigation authoritatively stated by Viscount Haldane, L.C., in British Westinghouse Electric & Mfg. Co., Ltd. v. Underground Electric R. Co. of London, Ltd., [1912] A.C. 673 at p. 689:
>
> > The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in Dunkirk Colliery Co. V. Lever (1898), 9 Ch. D. 20, at p. 25, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> > As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

See also Canson Enterprises Ltd. v. Boughton & Co. (1991), 85 D.L.R. (4th) 129 (S.C.C.) at pp. 148-9. Thus there appears nothing untoward in the Banks not fracturing the mortgages and holding them themselves.

104 S.M. Waddams, The Law of Damages (looseleaf, formerly 2nd ed., December 1996; Canada Law Book, Toronto) observed at p. 15-8 (paras. 15.150 - 15.160) that there are some reasonable boundaries as to mitigation:

15.150

> The fact that the expenditure of time or money is required to avoid a larger loss will not excuse the plaintiff form making the expenditure if the expenditure is reasonably small and the chances of avoiding the greater loss favourable. [This is illustrated by many cases, e.g., Asamera Oil Ltd. v. Sea Oil & General Corp., [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1, where purchase of substitute shares on a rising market was required. On expenditure of time, see Falkenham v. Zwicker (1978), 93 D.L.R. (3d) 289 (N.S.S.C.T.D.), where damages were reduced because of the plaintiff's failure to search long enough for fence staples that were liable to harm his cattle. Other illustrations are repairs to property and medical treatment of injuries.] On the other hand, the plaintiff is not bound to embark on a speculative venture for the defendant's benefit. In Pilkington v. Wood, [[1953] Ch. 770] Harman J. said: "the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party". [Supra, at p. 777 followed in Bailey v. Ornheim (1962), 35 D.L.R. (2d) 402 (B.C.S.C.), and Bank of Montreal v. MacInnis (1987), 83 N.B.R. (2d) 342, 47 R.P.R. 188 (C.A.). See Finance America Realty v. Block (1979), 37 N.S.R. (2d) 370 (S.C.T.D.), vard 38 N.S.R. (2d) 374 (S.C. App.Div.) (mortgagee not bound to develop land to reduce loss caused by faulty appraisal).]

15.160

> That there is a limit to the expenditure of time and energy required is indicated by Lesters Leather & Skin co., Ltd. v. Home & Overseas Buyers Brokers, Ltd. [(1948), 64 T.L.R. 569 (C.A.). See MacDougall v. Edmunds (1987), 80 N.S.R. (2d) 161 (S.C.), vard 83 N.S.R. (2d) 147, 30 C.C.L.I. 23 (C.A.) (employee not bound to relocate).] where Lord Goddard C.J. said that disappointed buyers of goods were not "bound to go hunting the glove" [(1948), 64 T.L.R. 569 (C.A.)] in search of a substitute. In other cases it has been said that the plaintiff need not "nurse the interests" [Harlow & Jones, Ltd. v. Panex (Int'l) Ltd., [1967] 2 Lloyd's Rep. 509 (Q.B.), at p. 530.] of the wrongdoer or undertake to "become [his] banker" [Caine v. Schultz, [1927] 1 W.W.R. 600 (B.C.C.A.), at p. 602, per McPhillips J.A.].

At p. 15-11 (para. 15.210) Waddams stated:

15.210

> One of the limitations on the Principle of Payzu, Ltd. v. Saunders is that a plaintiff is not bound to accept an offer from the defaulting party if acceptance involves abandoning rights against the defendant.

105 Harvey McGregor, McGregor on Damages (1988; Sweet & Maxwell Ltd., London) at p. 190 (para. 3.11) addressed the standard of conduct of the plaintiff:

3.11

Although the plaintiff must act with the defendant's as well as with his own interests in mind, he is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord Macmillan put this point well for contract in Banco de Portugal v. Waterlow [[1932] A.C. 452, 506]; his remarks apply equally to tort. He said:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

Nor need a plaintiff sacrifice rights or property of his own (McGregor at p. 193, (para. 317)) nor prejudice his own commercial reputation (McGregor at p. 195 (para. 319)). See also Chitty on Contracts (27th ed. 1994; Sweet & Maxwell Ltd., London) at p. 1243 (para. 26-051).

106 MT did not plead that the Banks owed it a duty such as a duty owed by a mortgagee to a mortgagor in selling under a power of sale. MT did not advance this in its submissions and it is not clear if such a duty would attach in the circumstances, although Frank Bennett, Receiverships (1985; Carswell, Toronto) at p. 168 in dealing with realization states: "In a receivership situation the standard of care of a receiver and manager is analogous to that of a mortgagee". However even if the duty owed by a mortgagee to a mortgagor were applicable in this case, the defendants would not be able to establish a breach of such a duty, a number of recent cases in Ontario (see: Hausmann et al. v. O'Grady (1986), 61 O.R. (2d) 96 (H.C.J.); aff'd (1989), 67 O.R. (2d) 735 (C.A.); Oak Orchard, supra; Topview Investments Ltd. v. Wynston, [1992] O.J. No. 2532 (Gen.Div.); Hodgins v. Laurentian Bank of Canada, [1994] O.J. No. 2460 (Gen.Div.); Victoria and Grey Trust Co. v. Promor Holdings Inc. (1983), 42 O.R. (2d) 24 (H.C.J.)) have established the following principles governing a mortgagee selling under a power of sale:

(i) A mortgagee selling under a power of sale is under a duty to take reasonable precautions to obtain the true market value of the mortgaged

property at the date on which he decides to sell it. This does not mean that the mortgagee must, in fact, obtain the true value.

(ii) The duty of the mortgagee is only to take reasonable precautions. Perfection is not required. Some latitude is allowed to a mortgagee.

(iii)In deciding whether a mortgagee has fallen short of his duty, the facts must be looked at broadly and he will not be adjudged to be in default of his duties unless he is plainly on the wrong side of the line.

(iv) The mortgagee is entitled to exercise an accrued power of sale for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting, a higher price could be obtained.

(v) The mortgagee can accept the best price he can obtain in an adverse market provided that none of the adverse factors are due to fault on his part.

(vi) Even if the duty to take reasonable precautions is breached, the mortgagor must show that a higher price would have been obtained but for the breach in order to be compensated in damages.

107 Mr. McCutcheon accepted the summary of law in Oak Orchard as being accurate. However he took issue that the Banks in PWL took reasonable precautions (item 1 in Oak Orchard) to obtain the true market value since the package of the building, Investor Notes and Investor APSs was not offered for sale. However as noted above, I do not see that the latter two had any real value but rather might be more of an ongoing expense in trying to realize upon them. A sophisticated investor (Au) did not bargain to obtain them. MT also asserts that PWL did not gather the right type of information such as what was happening at Sterling Two being sold out by Firestone for Confederation and attempting to duplicate Firestone's efforts in selling to the investors; however as pointed out the owner -- occupiers of Sterling Two were operating under completely different circumstances as there were very practical compulsion reasons for them to complete their purchases than the absentee investors in the subject Project were under. Mr. McCutcheon also took issue as to what he said was the acceptance of the best price in an adverse market if none of the adverse factors were the fault of the seller (item 5) since he claimed that the Banks and PWL did not take the proper steps since there was no further market exposure after Au terminated his original deal. I do not see that there is any merit in that objection since they had had the experience of exposing the building to the market for the previous half year and were familiar with the temperature of the water which was approximating that of the Stroud and Morassutti appraisals.

108 Aldrich v. Canada Permanent Loan and Savings Company (1897), 24 O.A.R. 193 (C.A.) determined that an en bloc sale was inappropriate however the package there was of disparate

properties of a farm and two village shops and the mortgagee had not inquired about the best way of selling for which there was only evidence in favour of separate sales. Here, however, in this case PWL made appropriate inquiries and I find that it appropriately marketed and sold the building.

109 During his opening Mr. McCutcheon asserted that he was out to prove that PWL had been negligent in their work in this case. That, of course, has not been pleaded specifically. What has been pleaded is that the Banks failed to take proper steps to mitigate their damages. If negligence were asserted against PWL, it would have been incumbent upon MT to call evidence of the normal standard of care to be exercised by a receiver. It would not be sufficient to simply call a witness to give evidence as to what he or she might have done and what the result of that action might have been. The test would be whether the conduct complained of was up to the standard of the person of average competence exercising a particular calling: see Allen Linden, Canadian Tort Law (5th ed.) at p. 136. If proper evidence as to the standard of care of a reasonably competent professional is given by the competing parties and there are two bodies of professional opinion on the matter, negligence is not to be established by preferring one body of professional opinion to another: see Papadopoulos v.Anklewicz (1987), 60 O.R. (2d) 198 (H.C.J.) at p. 210.

110 In any event I did not find the conduct of PWL worthy of censure save for the minor element of the vacancy rate being allowed to escalate for a short period above 10%

Views As To Issues Set Out In Trial Requirements Memorandum

111 As to liability issues, it would seem to me as follows. BAC as assignee of the takeout commitment was not subject to the equities of the arrangements among MT, Trustco, Reemark or related corporations and unit investors except as contained within the TOC Assignment or ATOC; specifically BAC was not under any obligation or subject to the equities as to the Support Agreement, especially as it had no knowledge of this side deal until well after it had funded the construction loan when MT knew that BAC was relying on the TOC for takeout financing. MT breached its takeout financing commitment and acted in bad faith as to its agreement by refusing to fund the TOC in 1991 and the ATOC in 1992; by sidelining Gordon Traub as its designated counsel, apparently abandoning them for the Macaulay firm; by causing the Macaulay firm to send out invalid requisitions when it knew or ought to have known that same were invalid and only being used for "negotiating purposes"; by taking a position at the end of February 1992 that it was relieved of its obligations to provide takeout financing as of March 1, 1992. In my view the requisitions sent out were invalid ones and therefore need not have been answered at all. However it appears to me that Reemark answered the non-negotiating ones appropriately and went to considerable lengths in explaining why the others were inappropriate or had otherwise been satisfactorily dealt with. The obvious invalid requisitions were correctly noted as such with an explanation. MT's financing obligation did not lawfully terminate or expire on or prior to February 29, 1992; and by treating its obligations as at an end MT breached its obligation pursuant to the TOC (and as confirmed in the TOC Assignment) and it did not matter vis-a-vis the question of the Banks getting the TOC funding from MT as to how many of the 300 investors were ready, willing

and able to close. Similarly it did not matter with respect to the obligations of MT to fund the first advance pursuant to the ATOC for the benefit of the Banks as to how many of the 300 investors were ready, willing and able to directly transfer close the Investor APSs on February 29, 1992.

112 As to the question of damages, it would appear to me as follows. The Banks merely had to provide a $1 million letter of credit with respect to discharging the mortgage held by Royal Trust; there was no certainty that this letter of credit (which could be given at a minimal cost to the Banks as they could "do it themselves" to avoid even the transaction fee of a customary 1%) would be called upon. In the upshot Reemark and Royal Trust concluded a deal without the involvement of the Banks and it was shown that Royal Trust was fully paid out so that the Banks would, if they had gone ahead, not been called upon as regards their letter of credit. The MT offer of August 28, 1992 to provide investor financing was self serving and not truly intended to be acted upon; the Banks were fully justified in not pursuing it beyond attempting to get clarification and further details (which were not forthcoming from MT). The Banks and PWL appear to have taken reasonable steps in realizing upon assets reasonably and truly available. I do not find it reasonable that there has been an insistence on a direct transfer closing with the investor; that avenue was reasonably explored and found wanting. I have the same views vis-a-vis any mitigation obligation the Banks had with respect to selling the building unit by unit as opposed to a sale en bloc as happened. It seems that there was a maximization of recovery without getting involved with the hair splitting of hindsight (which would be inappropriate). Under the circumstances it appears that PWL managed the building as well as it could reasonably be expected to, subject to the general observations about keeping the vacancy rate to 10% or below. As indicated, it seems that the maximum failure to mitigate here would be $100,000 for "lost" rent and $500,000 for the impact a higher vacancy rate may have had on the sale price of the building. While the latter amount was not absolutely firm there was some evidence to support that Au used this "defect" as a bargaining lever and therefore MT should be entitled to this adjustment as well as the lost revenue. Otherwise PWL appears to have appropriately managed the building. As for enforcing the Investor Notes, this appears to have little legal chance of success given the Singer decision and would have merely run up expenses on a practical basis. The building appears to have been sold at an appropriate value, substantiated by the appraisals of Stroud and Morassutti, after adequate exposure to the market. As noted before the Mutual Group could have, if it wished to take advantage of what it claimed to be a substantial undervaluation, purchased the building en bloc and used the profits its assumes it would have obtained from selling off the building unit by unit to defray the award against it. The costs and expenses claimed by the Banks in the realization of the building appear reasonable in the circumstances. In deciding whether PWL has acted properly, PWL's conduct should be judged in light of the circumstances as they existed at the time it performed the act or made the decision to see if it were prudent to do so, rather than unfairly burden it as a receiver and manager with the benefit of leisurely hindsight: see Cocks v. Chapman; Re Chapman, [1896] 2 Ch. 763 (C.A.) at pp. 777-8.

113 Since in my view the Banks did not need to show that they had 100 investors lined up on a "renewed" basis to close their original deals but rather the Banks could rely on the existing documentation including powers of attorney (especially in light of MT's acknowledgment to the

Banks in the TOC Assignment about the validity and efficacy of such documentation), then it is not necessary to digress into the aspect of "loss of chance" as set out in the cases of Eastwalsh Homes Ltd. v. Anotal Developments Ltd. (1993), 12 O.R. (3d) 675 (C.A.) and Multi-Malls Inc. v. Tex-Mall Properties Ltd. (1980), 28 O.R. (2d) 6 (H.C.J.).

114 Since it appears to me that MT never had the intention of funding the ATOC at the time it entered into it on December 18, 1991, then it would seem that the Banks were induced to enter the ATOC on false promise. Thus it would seem as I have set out that the breach which can be relied on, since the release under the ATOC never became effective is that of the TOC (and the TOC Assignment as it affects the terms and fulfills the conditions of the TOC). Thus it is not necessary to get involved in a discussion of what net proceeds the Banks would have received pursuant to the ATOC on either the first advance or any funding of the Commitment by MT after the first advance including how many investors and/or units would have conceivably been involved subsequent to the first advance. However for the sake of completeness, it appears that the minimum proceeds the Banks would have received would have been $15,750,000 from the first advance ($18,250,000 less $2,500,000 holdback). To that must be added the return of the holdback for at least the first 5 of the 27 months on a "intact" basis. Since there could be no demand on these monies prior to the first advance as then scheduled for March 1, 1992 -- namely $463,000. Legal fees and disbursements would have been the obligation of the Banks pursuant to this being a continuation from the TOC and the Banks taking the place of Reemark as the "Borrower" pursuant to the TOC Assignment. These legal fees were estimated to be $400,000 which estimate was not seriously contested. Thus on the first advance the Banks would have netted $15,813,00 on March 1, 1992 and thereafter there could have been some recovery of the holdback on a month by month basis, if it were not otherwise required to help pay the first and second mortgages to the Mutual Group. However it was indicated that it was anticipated that many of these mortgages would go immediately into default and this was not seriously contested. The monthly holdback maximum release would be $9,259. The monthly interest payments on the mortgages would be a $148,281. Thus it seems reasonable to assume that there would be a demand on the holdback funds sufficient to exhaust the possibility of further release to the Banks. In support of the observation that the call upon cash flow guarantee would likely use up all the available holdback from March 1, 1992 on, I note that Popofsky indicated that the general level of equivalent rents were then down to about $1 per sq. ft. as opposed to the guaranteed rate of $1.30 per sq. ft. The first advance did not require a set up that the Banks or Reemark provide MT with any Assumption Agreements from the investors before or as a condition of obtaining the First Advance. However there could have been a paper closing of the APSs to 100 investors using the powers of attorneys previously obtained and that would have been a sufficient trigger along with the 50 Reemark units. It is unclear how many assumption agreements (SAS) could have been provided MT after the first advance so as to gain access to the balance of the ATOC commitment of MT if the SAS were required to be given by the investors directly as opposed to the powers of attorney being used to do so; it should also be noted that Reemark had the opportunity to substitute investors for those which did not close their deals. There would not appear to be any impediment as to the powers of attorney getting used to provide MT with SAS; in which case the Banks would have received an equal amount under the "second" or subsequent advances as

they did under the first advance. The costs and expenses to the Banks to realize upon the balance of the assets available to them was not determined in my view as it would require further evidence.

115 What was the date of breach by MT? However there are two dates which may fit this category: the first when MT has unjustly refused to fund the TOC which it appears to have done by the time it commenced to negotiate the ATOC and the second when it does the same as regards the ATOC (which would be the line drawn in the sand by MT -- namely March 1, 1992). Given my finding that it appears probably that MT never intended on funding the ATOC from the time that it started to negotiate it (i.e. there was no bona fide intention to enter a new relationship which it would fund), then it appears to me that the date of the breach is effectively (recognizing "retroactivity") the same for both -- namely: July 31, 1991 -- this date would seem a convenient demarcation point given Cameron's July 23, 1991 letter to BAC indicating that a side deal was being discussed as the Support Agreement with Reemark was impeding funding:

> As stated previously, we would like to fund this loan on or before July 31, 1991. If we cannot fund by that date on the terms as outlined previously and further explained in this letter we will cancel our commitment and consider the matter closed.

as well as the Banks' previous accommodation to delays in funding the TOC. I note that on April 3, 1991 MT was advising BAC that MT anticipated funding in the later part of April 1991 although there was no warranty on that (after noting certain issues regarding some of the second mortgages appear resolvable). Then on May 21, 1991 MT advised Reemark that changes in trust company legislation had affected MT's ability to fund the second mortgages.

116 The foregoing conclusions would appear to have addressed all open issues as set forth in the trial requirements memorandum jointly prepared by counsel.

117 If there were any surplus arising out of the receivership it should be accounted for by deducting same from the amount otherwise found owing by MT. However it would seem to me that it would be unlikely that there was much, if any, real surplus given the costs of the protracted litigation involved in receivership vis-a-vis third parties.

Interest

118 The Banks assert that they should be able to charge 1 percent over their prime compounded monthly as it was understood that they were only to be interim lenders and that by virtue of MT failing to fund the ATOC and the protracted litigation, the Banks in essence became long term lenders who were thus required to forego other investment opportunities along the way. They submit that simple interest would be a windfall for MT which was the wrongdoer.

119 MT opposes compounding monthly on the basis that BAC's statement of claim did not claim compound interest on any basis. However Mr. Newbould in his opening referenced that he would be

seeking such an award. It is of course possible to amend a claim at any stage of the proceeding and Mr. McCutcheon has not demonstrated that MT suffered or would suffer any legal or practical prejudice from such a late blooming amendment. Mr. McCutcheon was fully armed on the argument of this case with cases on the interest question. Secondly, Mr. McCutcheon observed that the Banks would have gone out and obtained more funds from their parent banks or other lenders and then used same to lend out monies at the rates they would otherwise have charged. This argument is somewhat attractive; however it overlooks that financial institutions are not able to go out and borrow funds without restriction. (A good example of restriction would be the ratios imposed upon them by the government regulator.) Thirdly, Mr. McCutcheon cites the annotation at p. 163 of Speed and Speed Ltd. v. Finance America Realty Ltd. (1971), 11 R.P.R. 161 (N.S.C.A.) as not allowing the contract rate between BAC and Reemark to govern:

> It is proper, as against the mortgagor, to claim interest at the contract rate. As against anyone else, this basis cannot be applied.

However I do not find that this restriction is attractive when as here MT is not a stranger to the relationship between BAC and Reemark but rather MT was in effect to replace BAC as the lender to Reemark. Lastly, I do not view the restriction in Prince Albert Pulp Co. v. Foundation Co. of Canada, [1977] 1 S.C.R. 200 as to the interest being based upon the plaintiff's borrowing rate as being applicable since Prince Albert is not a case involving businesses in the business of lending money with the attendant of profit component. That case involved the assumption that the plaintiff there would maximize its profit by repaying its loans.

120 BAC claims that it should be awarded pre and post judgment interest based on its prime plus 1 percent per annum compounded monthly based upon its contractual arrangements with Reemark. It bases its claim upon a two-fold justification:

(a) as being allowable as interest pursuant to the Courts of Justice Act ("CJA"); and
(b) as being allowable as a matter of damages.

Prejudgment interest is governed by s. 128 CJA; post judgment interest by s. 129. However s. 130 gives the court discretion to vary interest payable under s. 128 and s. 129 where the court considers it is just to do so.

121 In Claiborne, supra, at pp. 107-9, the Ontario Court of Appeal discussed the case of Brock v. Cole (1983), 40 O.R. (2d) 97 (C.A.) at p. 107 as providing for the allowance of compound interest

> where there is a wrongful detention of money which ought to have been paid. This is on the theory it is reasonable to assume that the wrongdoer made the most beneficial use of the money and is accountable for the profits. A reasonable use of money implies compounding interest at some appropriate interval. Thus the court in these instances has a general jurisdiction to award compound interest and

> is not limited by s. 36(5)(b) of the Judicature Act.

However in Clairborne the awarding of interest at prime plus 2 percent compounded monthly was reserved to what had been designated as stolen funds. The balance of the award did not involve a wrongful application of funds and was only accorded an interest treatment of simple interest at the prejudgment rate. A similar treatment was accorded at p. 109 as to the question of post judgment interest. In 120 Adelaide Leaseholds Inc. v. Thompson, Rogers (1995), 38 C.P.C. (3d) 69 (Ont.Gen.Div.) at p. 74 Haley J. used the discretion under s. 130 CJA to provide for monthly compounding as opposed to semi-annual compounding as "this is the fairest approach to both parties under the circumstances". She also recited at the same page the Court of Appeal's observations in Graham v. Rouke (1990), 75 O.R. (2d) 622 (C.A.) at p. 629:

> Prejudgment interest cannot, however, become a means of punishing or rewarding a party to the proceedings. Rather prejudgment interest must be viewed as part of the compensatory package provided to the person wronged: Irvington Holdings Ltd. v. Black (1987), 58 O.R. (2d) 449 ... (C.A.).

It was observed in Armak Chemicals Ltd. v. Canadian National Railway Co. (1991), 5 O.R. (3d) 1 (C.A.) at p. 6 that "penalties for misconduct must find their place elsewhere and, in this case, must be confined to costs". However it should be noted here that the misconduct in Armak was the failure to make appropriate production -- not that there was a wrongful detention of monies which the plaintiff would otherwise put to good use in its business -- namely the business of loaning out money, presumably reinvesting in loaned out monies any interest (and principal repayments) which it received on a continual basis. I do not deal with interest in anyway so as to take into account any misconduct. The Court of Appeal on Armak at p. 4 recited with approval the views of Lord Wright in Riches v. Westminster Bank Ltd. (1947), A.C. 390 (H.L.) at p. 400:

> ... the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.

Finlayson J.A. in Irvington Holdings Ltd. v. Black (1987), 58 O.R. (2d) 449 (C.A.) observed at p. 485:

> His [the judge's] discretion must be related to the task of putting the plaintiff in the same position, so as far as money is concerned, as he would have been if he had not suffered the loss.

122 To my view Ross Steel Fabricators & Contractors v. Loaring Construction Co. (1986), 15 C.P.C. (2d) 27 (Ont.H.C.J.) does not assist MT but rather to the contrary given Callaghan A.C.J.H.C.'s additional views at p. 30 (while disallowing the equitable interest claimed by the

plaintiff who had not claimed any interest until into the proceedings before the referee) which support the concept of making the plaintiff whole (and recognizing that the plaintiff there was in a borrowing mode to fill the gap created by the defendant). Here it is clear that if the Banks had had the money they were entitled to by MT funding its obligation on a timely basis, they would have continued in their ordinary course of business to have loaned out such funds at a markup involving the monthly compounding component. Callaghan A.C.J.H.C. stated at pp. 30-1:

> ... However, I am also of the view that it was an appropriate case for the referee to award interest at the rate of interest equivalent to the borrowing rate of the plaintiff. The plaintiff is entitled to be adequately compensated for the moneys that the defendant has held over the past 4 years while this litigation has been proceeding. To deny the plaintiff interest at his borrowing rate will result in the plaintiff financing the defendant's involvement in this project. That, in my view, would be clearly unjust. I refer to Nor-Min Supplies Ltd. v. C.N.R. (1979), 27 O.R. (2d) 390, 10 R.P.R. 62, 106 D.L.R. (3d) 325, I believe the comment of Houlden J.A. at p. 393 [O.R.] is appropriate to the proceedings before this Court. He stated:
>
> > "While this action has been wending its way through the courts, the C.N.R. has had the use of the money to which the claimants have been found to be entitled by the trial judgment. We think it is proper in these circumstances to order C.N.R. to pay interest to the claimants. To do otherwise would, in our opinion, be unjust."
>
> He went on to follow the Supreme Court of Canada decision in Prince Albert Pulp Co. v. Foundation Co. of Can., [1977] 1 S.C.R. 200, [1976] 4 W.W.R. 586, 1 C.P.C. 74, 68 D.L.R. (3d) 283, 8 N.R. 181, and approved a rate of interest equivalent to the borrowing rate of the claimant. I believe that rate of interest applicable in this case.

123 As to the question of interest being awarded as a component of damages, I am of the opinion that as set out above and below as to the reasons, I feel that it is appropriate to exercise my discretion to award interest at BAC prime plus 1 percent compounded monthly.

124 The views of Mason C.J. and Wilson J. in Hungerfords et al. v. Walker et al. (1989), 171 C.L.R. 125 (High Court of Australia) are appropriate. See at pp. 145-6 and pp. 149-50 where they observed:

> The cost of borrowing money to replace money paid away or withheld, in consequence of the defendant's breach of contract or negligence, is directly related to the wrong and is not too remote in the sense in which the common law

regarded the loss attributable to late payment of damages as being too remote. We reach this conclusion more readily, knowing that legal and economic thinking about the remoteness of financial and economic loss have developed markedly in recent times. Likewise, opportunity cost should not be considered as being too remote when money is paid away or withheld.

Once it is accepted that the cost of borrowing money to replace money paid away or withheld is not too remote, it is pointless to insist on a distinction between the award of damages for loss of the use of money in the case of a liquidated claim and the award of such interest in an unliquidated claim. The award of damages in accordance with Hadley v. Baxendale is unrelated to, and free from, any requirement that there is, or should be, any "wrongful" withholding of money, be it a debt or damages.

...

We note that the Canadian Federal Court of Appeal has recently stated that in its view there is no longer any reason to retain the common law rule against interest as damages, describing the rule as "a judge-made limitation on the awarding of interest which is clearly no longer seen to be good public policy"; Algonquin Mercantile Corp. v. Dart Industries Canada Ltd. (79).

Although the admiralty model has obvious attractions, the common law has steadfastly declined over a very long time to adopt the admiralty approach in awarding compensation for late payment of damages in the general run of cases. But we see no reason for allowing the reluctance of the common law to extend to cases where the defendant's breach of contract or negligence has caused the plaintiff to pay away or the defendant to withhold money and, as a result, the plaintiff has been deprived of the use of the money so paid away or withheld. The recovery of compensation for the loss may be ascribed to the operation of the second limb in Hadley v. Baxendale (80). However, we would prefer to put it on the footing that it is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort.

On this footing the Full Court was correct in awarding damages for the added cost of funding the business with borrowed money as a result of the loss of the use of money overpaid in tax. The award of interest was of necessity compound interest. Simple interest would not reflect accurately the extent of the respondents' loss. Simple interest almost always undercompensates the injured

party's true loss. Bowles and Whelan, "Judgment Awards and Simple Interest Rates", International Review of Law and Economics, vol. 1 (1981) 111, at p. 112 observe:

> "If the plaintiff was expecting payment for a consignment of goods, but did not receive his money, the extent of his loss could be measured approximately by the amount of income that he could otherwise have generated simply by putting the proceeds into a deposit account at a bank. Such a move would attract compound interest, since the bank would automatically add to the account any interest generated. Equally, a plaintiff in a tort action can be thought of as incurring opportunity costs best measured by compound rather than simple rates. Had he received his award immediately upon the damage occurring, it may be assumed that he would have invested it at compound rates in just the same way as would the plaintiff who is suffering from a breach of contract."

The disdain of the common law for interest, especially compound interest, is a "relic from the days when interest was regarded as necessarily usurious" (Ogus, Law of Damages (1973), p. 98).

125 It would seem to me that when the case involves a breach of financing with the attendant deprivation of the plaintiff from receiving on a timely basis funds it was contractually entitled to and the reciprocal benefit to the defendant of having such funds that it had otherwise promised, that there should be a compounding provision for the pre and post judgment interest especially, when as here, the plaintiff and the defendants are financial institutions which are in the business of loaning out money at interest. The compounding on a monthly basis is appropriate where there is evidence of a contractual basis for this as exhibited by the arrangement between BAC and Reemark as to the construction loan funds. This is so particularly when the Banks here are in the business of continually loaning out funds at interest. Waddams, supra, observed at pp. 7-43/4:

> However there seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong, the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.
>
> ...
>
> It has been pointed out that there appears to be no economic reason for the refusal to award compound interest.

Thus it appears that Waddams is advocating a form of compound interest for any award, whether it arises out of a financial arrangement or an award for personal injuries or otherwise. However it seems to me that one should distinguish between providing compounding interest and the question of with what frequency the interest is to be compounded. With respect to financial institutions and a breach of financing arrangements it would appear reasonable there be a short interval compounding arrangement because of the nature of their business, whereas in a non financial situations it may be likely that there would be a longer interval compounding situation. I do not see that Waddams at p. 7-22 is advancing the proposition that a plaintiff is restricted to its cost of borrowing -- but rather that this would be an appropriate measure where the plaintiff is a borrower (but in the subject case, the Banks are not borrowers but rather their ordinary business is that of lenders at a profit margin, and this should be within the reasonable contemplation of MT). The onus is on the interest claimant to demonstrate that its usual course of action would be to lend out funds on a "x" period of compounding. There appears to be sufficient evidence here that the Banks would have continued to "reinvest" the subject funds in that portion of their business where they charge interest on a monthly compounding basis. Thus they are as well entitled to the interest rate requested as a matter of damages.

126 The selection of an appropriate interest rate is always a thorny one when there is a rate fluctuation. However in the subject case this concern is eliminated when one applies the BAC prime rate plus 1 percent -- i.e. a floating rate as this will automatically take into account fluctuations in interest rates over the period of time from the breach to the judgment. In this case because of the contractual considerations it seems to me appropriate to continue this rate to post judgment until the award is paid.

Conclusion

127 Given my views on the limited mitigation involved which was not taken appropriate care of amounting to $600,000 and that the legal fees and disbursements have been $400,000 (assumed to be the same as the First Advance legal fees and disbursements for the purposes of the TOC), these should be credits for MT. Thus on the funding of the TOC the Banks (and Reemark to the extent that the Banks were made whole) would have received $36.5 million less $400,000 legal fees and disbursements and $182,500 as a commitment fee payable on closing of the individual mortgages (on behalf of the investors) for a net of $35,917,500. The net proceeds realized on sale would be taken into account. This exceeded the principle and interest outstanding on the construction loan. Thus it would appear to me that it would be Reemark which would bear the legals and commitment fee. The Banks would have been entitled to be paid out the principal and interest outstanding on the construction loan. When the Au sale closed on May 29, 1993, the net proceeds were netted against this principal and the continuing to be accrued interest on a monthly compounding basis. I am given to understand that as at the end of May 1993, this amounted to a net of $11,045,200.79 principal and $4,473,665.01 of interest for a total of $15,518,865.80. From this should be deducted the $600,000 regarding the higher than reasonable vacancy rate fallout for a net of $14,918,865.80 as of June 1, 1993. The Banks should have judgment for this net amount (plus interest as next set out).

This figure should be adjusted for monthly compounded interest at the BAC prime rate plus 1% per annum compounded monthly. If I have made a miscalculation, I would be grateful if counsel would draw that to my attention when they see me to finalize the judgment amount (I would request them to confer as to this calculation) and to determine the question of costs. If they make written submissions I would ask them to limit them to three pages each and to exchange them well in advance of their attendance. Depending on their schedule I assume we can do this within 30 days of the release of these reasons.

FARLEY J.

* * * * *

APPENDIX A

Court File No. 92-CQ-21513 Commercial List No. B307/93

ONTARIO COURT (GENERAL DIVISION)

COMMERCIAL LIST

B E T W E E N:

BANK OF AMERICA CANADA	)	F.J.C. Newbould, Q.C.
	)	and Aaron Blumenfeld
plaintiff	)	for the
	)	plaintiff/defendant
	)	by counterclaim
- and -	)	
	)	
THE MUTUAL TRUST COMPANY,	)	P. David McCtucheon
MUTUAL TRUSTCO INC., MUTUAL	)	and Carlton D. Mathias
LIFE OF CANADA, RAYMOND DORE,	)	for the defendants/
IAN SUTHERLAND, ROBERT A.	)	plaintiffs by
STUEBING AND S. SCOTT CAMERON	)	counterclaim
	)	
Defendants	)	
	)	
	)	
A N D B E T W E E N:	)	
	)	

THE MUTUAL TRUST COMPANY)
)
Plaintiff by counterclaim)

)
- and -)
)
BANK OF AMERICA CANADA,)
MELTON BANK OF CANADA AND)
SOCIETE GENERAL (CANADA)) Heard: May 14 - June
) 17, 1997
)
Defendants by Counterclaim)

FARLEY J.:

RULING RE NUMBER OF EXPERT WITNESSES

128 I advised counsel in reviewing the Trial Requirements Memorandum that they would need leave to call more than three experts (see s. 12 of the Ontario Evidence Act, R.S.O. 1990, c. E.23). I was concerned as at that time the defendants were proposing to call 13 experts. The plaintiff was not proposing to call as many but Mr. Newbould indicated that he found it necessary to call as many as he had indicated in order to respond to the number and types of experts Mr. McCutcheon was calling for the defence. I asked counsel to discuss between themselves as to whether all the experts were necessary. At trial Mr. McCutcheon submitted that he was not restricted to 3 expert witnesses in total, but rather that the limitation was as to 3 experts as to any category, citing Fagnan v. Ure, [1958] S.C.R. 377. I reserved. Mr. McCutcheon attempted to qualify a couple of other witnesses as experts but I refused to allow them to be so qualified after hearing from them as to their qualifications and after submissions. In the end Mr. McCutcheon called five persons (Clark, Firestone, Jones, Baker and Popofsky) who were accepted as experts in their field of qualifications (although this was in certain instances somewhat narrow, e.g. Baker) Mr. Newbould called two experts who were qualified (Cumming and Ladouceur).

129 Section 12 of the Ontario Evidence Act provides:

> s. 12 Where it is intended by a person to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without leave of the judge or other person presiding. (single and double emphasis added)

In their leave motion the defendants argued that according to Fagnan the proper interpretation of this section is that allowing a party to call three witnesses per fact to give opinion evidence before leave is required. In Fagnan the Supreme Court of Canada was considering the interpretation of section of the Alberta Evidence Act, R.S.A. 1955 c. 102 which reads as follows:

> Where it is intended by a party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side.

While this is similar to s. 12 of the Ontario statute, note the absence of the portion of the Ontario statute which is double emphasized above. In Fagnan, Cartwright J. (with whom the others concurred) rejected the appellant's view that the Alberta statute limited the total number of expert witnesses to three. He stated at pp. 381-2:

> In my view, the evidence of Hare was not "opinion evidence" within the meaning of that phrase in s. 10. ... If, contrary to the view which I have expressed it should be held that Hare was entitled to give and did give opinion evidence, I would none the less reject this ground of appeal. In 1912, in the case of In re Scamen and Canadian Northern Railway Co., [(1912), 5 Alta.L.R. 376, 2 W.W.R. 1006, 22 W.L.R. 105, 6 D.L.R. 142], s. 10 was interpreted by the Supreme Court of Alberta en banc. The effect of the judgment of the Court, delivered by Harvey C.J., is accurately summarized in the second paragraph of the headnote in D.L.R., as follows:
>
> > Upon the proper interpretation of section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.
>
> As already mentioned s. 10 was re-enacted ipsissimis verbis in the Revised Statutes of 1922 and of 1942, and this re-enactment should be taken to have given legislative sanction to he construction placed upon that section in In re Scamen.

This appears to be in direct conflict with Buttrum v. Udell (1925), 57 O.L.R. 97 (Ont.C.A.), but as will be seen this is superficial conflict. In Buttrum Ferguson J.A. rejected the interpretation in Scamen and stated at p. 100:

> I cannot find in the words of the statute any ambiguity or anything that allows us to give to the statute the limited or restricted meaning and effect given

> it by the Alberta court in In re Scamen v. Canadian Northern Railway Co. (1912), 6 D.L.R. 142, or in this case by the trial Judge; and, with deference, I am of opinion that the remedy proposed by these Courts is worse than the disease, and that it is much better that the number of such witnesses called during a trial should be limited to three on each side, and such others as the Court may on application allow, than that the number of these witnesses should be limited only by the number of issues of fact that may actually arise in the course of a trial, or that counsel can with some show of reason argue will arise or have arisen during the trial. If the latter interpretation be given the statute, or if the words "opinion evidence" be given the meaning and effect suggested by my brother Hodgins, a trial Judge could not refuse to hear any such witness, because, before hearing what the witness had to say, he could not satisfactorily determine to just what issue of fact the evidence was applicable, or whether the evidence would amount to "opinion evidence," and thus the statute would, I think, either become a dead letter or a new source of trouble, expense, and delay.

The section in the Ontario statute as originally enacted in an Act respecting Expert Witnesses, S.O. 1902, c. 15, s. 1 provided:

> 1. Where in any action, arbitration, or other proceeding it is intended to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side without leave of the presiding judge or of the arbitrator or other person presiding, such leave to be applied for before the examination of any of the experts who may be retained without such leave.

130 B.C. Pea Growers Ltd. v. City of Portgage La Prairie (1964), 49 D.L.R. (2d) 91 (Man.C.A.) (affirmed by the S.C.C. on other grounds, [1966] S.C.R. 150, the issue of expert witnesses not being considered by that court) dealt with s. 25 of the Manitoba Evidence Act, R.S.M. 1954, c. 75:

> s. 25 Where it is intended by any party to examine as witnesses person entitled, accuracy to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without leave of the court, to be applied for before the examination of any such witnesses.

Guy J.A. held at pp. 97-8:

> Fagnan v. Ure, supra, is only binding as to the interpretation of the Alberta section as it then was. I find substantial difference between that section and s. 25 of the Manitoba Evidence Act. The former had no provision to call more than three expert witnesses ["upon either side"], while the latter makes provision for the calling of more than three experts with leave of the Court. One was a very rigid enactment, to prevent the abuse of the use of experts, but left no way out to

> call more than three when justice required it; while s. 25 of the Manitoba Evidence Act is indeed differently worded and provides for the possibility of more than three experts to be called upon leave.
>
> I can find no ambiguity in the wording of s. 25 of the Manitoba Evidence Act or anything to give to it the wide meaning and interpretation favoured by the Alberta Court in Re Scamen v. Canadian Northern R. Co., supra, because three experts on each fact in issue can open the door for a substantial number of experts at any one trial.
>
> I would, therefore, hold that Fagnan v. Ure, supra, is not binding on me with respect to the interpretation of s. 25 of the Manitoba Evidence Act and that the portion of Mr. Turpie's evidence in which he testified as to his opinion ought not to have been received since leave had not been granted to increase the number of expert witnesses allowed to testify.
> (emphasis added)

131 In my view the approach in B.C. Pea and Buttrum is preferable to that of Scamen as interpreted by Fagnan. It is clear that in the latter two cases the courts found it necessary to give the section of the Alberta Evidence Act broad interpretation because there was no provision for leave in that section. Had the Alberta legislation incorporated the possibility of leave for more experts if the necessity were demonstrated, then there would not have been any problem in otherwise protecting the interests of justice. In fact just as Fagnan was being decided in the Supreme Court of Canada, the Alberta statute was amended to include the following words:

> without leave of the court which shall be applied for before the examination of any such witness. (emphasis added)

This amendment cleared up the problem of future cases in Alberta however it would not be appropriate to import the preamendment remedy from Alberta to Ontario as the Ontario legislation always had the leave protection. Scamen and Fagnan should be relegated to the curiosity cupboard as obsolete cases which were required to correct an historical oddity of the then Alberta legislation.

132 Therefore in my view each side in a trial is restricted to a total of three expert witnesses on all aspects unless leave is granted to call more. As the law may have been somewhat muddled in this regard previously I will not require Mr. McCutcheon to go back now and either delete two of his experts or justify the necessity of calling the two extra. This ruling is being released in conjunction with the release of my decision on the merits of the case.

J.M. FARLEY

---- End of Request ----
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