See paras. 48, 55, 56, 60, 65, 66

Case Name:

Rodaro v. Royal Bank of Canada

Between
Frank Rodaro, Franro Engineering (Ontario) Limited, Heritage Glen North Limited and Heritage Glen West Limited, 740484 Ontario Limited and Kingswood Community Corporation, plaintiffs/respondents (appellants by cross-appeal), and
Royal Bank of Canada and Barbican Properties Inc., defendants/appellants (respondents by cross-appeal)

[**2002**] **O.J. No. 1365**

59 O.R. (3d) 74

157 O.A.C. 203

22 B.L.R. (3d) 274

49 R.P.R. (3d) 227

2002 CanLII 41834

113 A.C.W.S. (3d) 68

2002 CarswellOnt 1047

Docket Nos. C33844 and C33883

Ontario Court of Appeal
Toronto, Ontario

Doherty, Weiler and Feldman JJ.A.

Heard: December 10-12, 2001.
Judgment: March 26, 2002.

(73 paras.)

On appeal from the judgment of Justice James M. Spence dated February 8, 2000.

Counsel:

Catherine Francis and Tamara Vanmeggelen, for the appellant, Royal Bank of Canada. Paul Macdonald and Brett Harrison, for the appellant, Barbican Properties Inc. Timothy H. Gilbert, Robert D. Minnes and Jean Claude J. Rioux, for the respondents/cross-appellants.

[Quicklaw note: An amended judgment was released by the Court April 17, 2002. The changes were not indicated. This document contains the amended text.]

The judgment of the Court was delivered by

DOHERTY J.A.:--

I

Overview

1 Over a number of years, Mr. Frank Rodaro, an engineer and land developer, purchased 751 acres of land south of Barrie, Ontario.[1] In the early 1980s, the lands were annexed by the City of Barrie. By 1988, Mr. Rodaro was prepared to develop the lands. He put together a potentially profitable proposal calling for development of the property, mostly with residential subdivisions, in phases over several years (the "project"). Two of Mr. Rodaro's lawyers, Saul Shulman and Paul Sullivan, held small interests in the project.

2 In 1988, the Royal Bank of Canada ("RBC") was active as a lender in the real estate development market. Beginning in 1988, RBC advanced funds towards the development of the project. By the spring of 1992, RBC had advanced some $20 million. Its security included a $50 million debenture over the entire project.

3 Initially, the development went well. Unfortunately, a recession in 1990 led to the collapse of the real estate market in Ontario. This collapse and other circumstances (eg. a falling out among the partners) resulted in serious difficulties with the project. By April 1992, Mr. Rodaro was still struggling to complete Phase I. RBC advised Mr. Rodaro that he was in default on the loans. This was followed in June 1992 by notice that RBC would not advance any further funds. In July 1992, RBC assigned its debt and related security to Barbican Properties Inc. ("Barbican"), a development

company owned in part by RBC. On September 24, 1992, Barbican demanded payment in full of the outstanding loans by no later than October 9, 1992. Repayment was not made and on that date, Mr. Rodaro commenced this litigation. Barbican issued notices of sale in December 1992 and January 1993. The lands were eventually sold in 1996. Those sales left a shortfall on the debt of about $11.8 million.

4 Mr. Rodaro advanced many claims against RBC and Barbican. In essence, he alleged that through various improper means RBC and Barbican took the project from Mr. Rodaro and thereby deprived him of the potential profit from the project.

5 RBC defended on the basis that it had acted as a lender only and had advanced funds in accordance with the terms of various loan agreements made with Mr. Rodaro. RBC claimed that by the spring of 1992, those loans were in default and it had lost all confidence in Mr. Rodaro's ability to bring the project to fruition. RBC made a business decision to assign the debt to Barbican.

6 It was Barbican's position that the assignment was proper and that it had legitimately exercised its rights and took proper steps to realize on its security. Barbican counterclaimed for the $11.8 million shortfall after the sale of the lands.

7 The evidence at trial lasted 92 days. Near the end of Mr. Rodaro's case, the parties agreed that the quantification of his damages would be dealt with in a later proceeding, described as phase 2 of the trial. It was also agreed that the determination of liability and damages on the counterclaim would be left to phase 2.

8 The reasons of Spence J. fill some 300 pages (see [2000] O.J. No. 272 (S.C.J.) (QL)). They provide a detailed review of the evidence and comprehensively address the numerous factual and legal issues raised at trial. Those reasons were of great assistance to this court.

9 Spence J. found against Mr. Rodaro on all issues except one. He found that RBC had improperly given confidential business information, provided to it by Mr. Rodaro, to Barbican, in the course of the negotiations which led to the assignment in July of 1992. This business information had been provided to RBC by Mr. Rodaro in the course of his attempts in late 1991 and early 1992 to secure further financing from RBC. Spence J. held that the disclosure of the information had caused Mr. Rodaro to lose an opportunity to sell his interest in the project at the same time that RBC assigned its debt. Spence J. valued that opportunity at a minimum of $1 million but left the assessment of the actual value of the lost opportunity to phase 2. Finally, Spence J. held that if Mr. Rodaro had been given the opportunity to negotiate the sale of his interest in the project with Barbican that sale would have included the elimination of the debt owed to RBC and assigned to Barbican. Accordingly, Spence J. held that the debt and security (including Mr. Rodaro's personal guarantee for $1 million) could not be enforced.

II

Nature of the Appeals

10 RBC and Barbican appeal, contending that they did not misuse confidential information belonging to Mr. Rodaro. They contend that RBC was entitled to assign its debt to Barbican and that it was also entitled to share the information provided by Mr. Rodaro with Barbican in the course of the negotiations culminating in that assignment. RBC and Barbican further argue that the "lost opportunity" theory of damages developed in the reasons of Spence J. is unsound in law and is unsupported by the pleadings, evidence or argument advanced at trial. They maintain that Mr. Rodaro's theory at trial was that the misuse of the confidential information, in combination with other improper acts, caused Mr. Rodaro to lose the project and the profits flowing from the development of the project. RBC and Barbican submit that Spence J. properly rejected this argument but erred in going on to find a causal link between the disclosure of information and damages suffered by Mr. Rodaro on a theory that had no legal or factual basis.

11 Barbican also submits that the trial judge improperly declared the debt and security held by Barbican unenforceable against Mr. Rodaro. Barbican contends that in so holding, the trial judge effectively dismissed the counterclaim despite the agreement between the parties that both liability and damages on the counterclaim would be determined in phase 2 of the trial.

12 Mr. Rodaro cross-appeals. In the cross-appeal he renews most of the arguments unsuccessfully advanced on his behalf at trial. He claims that the trial judge erred in failing to find that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC agreed to provide ongoing, long-term funding for the entire project. Mr. Rodaro submits that the bank repeatedly breached the terms of that "umbrella" agreement in 1990, 1991 and 1992.

13 Mr. Rodaro further contends that the trial judge erred in finding that the relationship between RBC and Mr. Rodaro was simply that of borrower and lender. He argues that the evidence demonstrates a special relationship such as to make RBC a fiduciary. Mr. Rodaro submits that the trial judge should have found that RBC breached its fiduciary obligations repeatedly, culminating in the spring of 1992 when in combination with Barbican, it effectively took Mr. Rodaro's project for its own use.

14 Mr. Rodaro also contends that the trial judge erred in finding that officials of RBC did not make negligent misrepresentations concerning the availability of additional financing by RBC in 1991 and 1992. Mr. Rodaro maintains that those misrepresentations caused him to desist from seeking alternate financing or other equity partners until it was too late to save the project.

15 Mr. Rodaro also argues that the trial judge erred in dismissing the conspiracy claim against RBC and Mr. Rodaro.

III

The Cross-Appeal

16 It is convenient to address the cross-appeal first. Most of the arguments made in support of the cross-appeal are the same arguments that were advanced at trial. In the main, those arguments failed because of the factual findings made by Spence J. Those findings must be accepted in this court unless it can show that they are unreasonable, based on a material misapprehension of the evidence, or tainted by a failure to consider material, relevant evidence.

17 None of the factual findings that are integral to Spence J.'s rejection of the various claims can be set aside by this court. They are firmly rooted in the evidence. While I do not propose to deal separately with each of the fact-bound arguments advanced by counsel, I will examine counsel's argument that the trial judge erred in failing to find that RBC and Mr. Rodaro entered into an oral "umbrella" agreement in August 1988, whereby RBC committed to fund the entire project. I will consider this submission in some detail, first because it was central to the case advanced by Mr. Rodaro at trial, and second, because it provides an excellent example of how Spence J. approached and determined the many arguments made before him.

18 By late August 1988, RBC had provided some funding for the project. It was anxious to provide additional funding on appropriate terms. Mr. Rodaro and his advisers met with bank officials on August 23, 1988. Mr. Rodaro claimed that the "umbrella" agreement emerged from this meeting.

19 Spence J. thoroughly reviewed the evidence of the three witnesses who were among those at the August 23 meeting. He rejected Mr. Rodaro's evidence that RBC committed to fund the needs of the entire project as those needs developed over time, even if there was a downturn in the economy or the real estate market. Spence J. accepted the evidence of Mr. Peter Conrod, the RBC account manager who attended the meeting, and of Mr. Shulman, Mr. Rodaro's lawyer at the time,[2] that there was no commitment by RBC to finance the project put forward at the meeting. Rather, RBC merely extended an invitation to Mr. Rodaro to create a long-term relationship which would permit Mr. Rodaro to make specific submissions for loans to finance the project.

20 After reviewing the evidence of the participants in the meeting, Spence J. went on to consider the evidence of the events following that meeting to determine whether any of those events suggested that the "umbrella" agreement relied on by Mr. Rodaro in fact existed. Spence J. reviewed these events in detail, including the placing of a $50 million debenture on the property by RBC in the summer of 1989. He ultimately concluded that the events following the meeting were inconsistent with Mr. Rodaro's claim that he and RBC had arrived at an agreement to fund the entire project at the August meeting. Spence J. placed considerable weight on Mr. Rodaro's failure to raise the existence of the "umbrella" agreement with RBC until very late in his relationship with RBC.

21 Spence J. next turned to the applicable law. He accepted that parties could enter into a general "umbrella" agreement whereby the nature of their ongoing relationship was established while the detailed terms were left to subsequent discrete agreements: Bank of Montreal v. Wilder (1983), 149 D.L.R. (3d) 193 (B.C.C.A.), aff'd. on other grounds, [1986] 2 S.C.R. 551. He held, however, that

entirely apart from the evidence of those at the meetings that no such agreement was made, the agreement put forward by Mr. Rodaro was so void of terms (eg. there was no maturity date agreed upon) that it could not amount to an agreement in law.

22 After a careful and detailed review of the evidence, the submissions and the applicable legal principles, Spence J. at paragraph 219 concisely stated his crucial finding of fact:

> ... the discussions that occurred in late August 1988 involved an invitation by the Bank to Rodaro to establish a banking relationship, and not an offer of financing. None of the events and matters that occurred subsequent to the communications of the fall of 1988 had the effect of creating an umbrella agreement for the financing of the Project.

23 The reasons of Spence J. demonstrate that he appreciated the argument advanced on behalf of Mr. Rodaro, understood the legal principles relied on in support of that argument, reviewed and understood the relevant evidence, made the necessary credibility assessments and made the necessary findings of fact. Those findings were open to him on the evidence and doomed the appellant's claim based on the existence of an "umbrella" agreement to fund the entire project.

24 Spence J. approached the other submissions made on behalf of Mr. Rodaro in the same thorough way that he considered the "umbrella" agreement argument. There is no basis upon which to interfere with the findings of fact that provide the basis for his rejection of those arguments.

25 I would dismiss the cross-appeal with costs.

IV

The Appeal

26 The appeal brought by RBC and Barbican focuses on the assignment of Mr. Rodaro's debt to Barbican by RBC. There are essentially three issues raised by the appeal:

* Could RBC assign the debt to Barbican?
* Was RBC entitled to share Mr. Rodaro's confidential business information with Barbican in the course of negotiating the assignment?
* If the disclosure was improper, did the trial judge err in holding that the disclosure caused detriment or damage to Mr. Rodaro in that it caused him to lose the opportunity to negotiate the sale of his interest in the project?

(a) Was the assignment valid?

(i) Factual Background

27 By the summer of 1991, the project was in difficulty primarily, but not exclusively, because of

the ongoing recession. RBC had soured on the financing of real estate projects. In August 1991, the status of the loans to Mr. Rodaro was downgraded and the supervision of the account was transferred to the "special loans" division of the RBC. RBC informed Mr. Rodaro that he should look for new equity for his project as RBC was not prepared to fund the project beyond the end of 1991. In October 1991, RBC retained the firm of Drivers Jonas Chartered Surveyors ("Drivers Jonas") to conduct an appraisal of the project. Drivers Jonas delivered its report in December 1991. The report indicated that the "as is" value of the project was well in excess of the funds advanced to that date by RBC. Although RBC had concerns about the accuracy of some of the projections in the Drivers Jonas report, it elected to provide some additional financing to Mr. Rodaro and to extend the maturity date on the loans to March 1992.

28 In the early part of 1992, Mr. Rodaro and RBC had discussions pertaining to further loans and the extending of the deadline for repayment of those loans. Mr. Rodaro wanted to borrow an additional $4.6 million. During these negotiations, Mr. Rodaro gave RBC a detailed business plan relating to the project's long-term development. RBC was prepared to advance additional funds but on very strict terms. One of the terms would effectively allow RBC to take over the project if Mr. Rodaro defaulted on the loan. Mr. Rodaro was not prepared to agree to the terms proposed by RBC.

29 The loans matured on March 1, 1992 and were in a default position from that time forward. Different bank officials pursued two different options. One group looked at the possibility of further financing for the project, while another looked at the possibility of selling the debt to a third party. In connection with the possibility of further financing, RBC arranged for Drivers Jonas to prepare an update of the earlier appraisal. RBC provided Drivers Jonas with a copy of the business plan Mr. Rodaro had given to RBC earlier in the year to assist Drivers Jonas in preparing its updated appraisal. Drivers Jonas provided that appraisal in early June 1992.

30 The officials within RBC responsible for pursuing the option of selling the debt contacted Barbican in April 1992. Barbican had a successful track record in acquiring and working out distressed real estate for RBC. In the course of the negotiations with Barbican, RBC provided Barbican with a great deal of information concerning the project and the status of the debt. That information included both appraisals prepared by Drivers Jonas.

31 By June 1992, RBC had decided that it would not make any additional advances to Mr. Rodaro. It had also decided to sell the debt to Barbican. In late June, RBC advised Mr. Rodaro that it would advance no further funds and that it was pursuing an opportunity to sell its loan position to another entity.

32 RBC agreed to sell its debt and security in the project to Barbican effective July 31, 1992. In September, Barbican demanded repayment. There were two options at that point in time. Barbican could, if it got Mr. Rodaro's co-operation, foreclose and effectively take over the project, or Barbican could, if Mr. Rodaro would not co-operate, move under power of sale. Mr. Rodaro did not co-operate and Barbican moved under power of sale.

(ii) Analysis

33 Aside from limitations imposed by statute, public policy or the terms of a specific contract, a party to an agreement may assign its rights, but not its obligations under that agreement, to a third party without the consent of the other party to the contract. A party will not, however, be allowed to assign its rights under a contract if that assignment increases the burden on the other party to the agreement, or if the agreement is based on confidences, skills or special personal characteristics such as to implicitly limit the agreement to the original parties: Tolhurst v. Associated Portland Cement Manufacturers (1900) Limited, [1902] 2 K.B. 660 at p. 668 (C.A.), aff'd., [1903] A.C. 414 (H.L.); Tru-Wall Group Ltd. v. Stadium Corp. of Ontario Ltd., [1995] O.J. No. 2610 at paras. 10-14 (Gen. Div.); and P.S. Atiyah, The Law of Contract, 4th ed. (Oxford: Clarendon Press, 1989) at pp. 378-79.

34 RBC assigned only its rights to collect the debt and realize on the security to Barbican. It assigned no obligations. Indeed, it had no obligations at the time of the assignment as Mr. Rodaro was in default on the loan. The assignment had no adverse effects on the obligations owed by Mr. Rodaro and did not adversely affect his position as he was entitled to raise any defence applicable to RBC against any attempt by Barbican to collect on the debt or realize on the security. RBC assigned to Barbican the right to collect a debt and realize on the security. Those rights were in no way personal in nature.

35 Mr. Rodaro does not suggest that the assignment contravenes any statutory provision or offends public policy. He maintains that RBC specifically agreed to limit its right to assign the debt by the terms of the November 1991 loan agreement between Mr. Rodaro and RBC. The relevant clause provides:

> This agreement shall be binding upon and enure to the benefit of the Bank and the Borrower and their respective successors, and permitted assigns. <u>The Bank may assign or sell participations in or transfer all or any portion of its rights, benefits and obligations under this agreement to any other financial institution ("Assignee")</u>. After any assignment or transfer, the term "Bank" as used in this agreement, shall be deemed to refer to the Assignee to the extent of its interest.
>
> In assigning, transferring or participating all or any part of its rights or obligations as aforesaid, the Bank may reveal to potential Assignees or participants all or any information regarding the Borrower and related corporations as the Bank deems necessary or desirable.
>
> The Borrower shall not assign all or any of its interest in this agreement without the prior written consent of the Bank. [Emphasis added.]

36 The first sentence of the clause recognizes that the agreement is assignable. The second sentence, which is the crucial sentence, permits RBC to assign "its rights, benefits and obligations" to "any other financial institution". Barbican is not a financial institution. The final sentence in the clause prohibits Mr. Rodaro from assigning any interest in the agreement without RBC's permission.

37 Like Spence J., I do not read the second sentence in the above clause as limiting RBC's right to assign its benefits under the agreement to Barbican without the consent of Mr. Rodaro. In my view, the sentence broadens the assignment rights RBC would otherwise have by permitting RBC to assign "rights, benefits and obligations" to a financial institution without Mr. Rodaro's consent. On a plain reading, the assignment clause expands rather than restricts RBC's assignment rights. RBC's entitlement to assign its benefits under the agreement to Barbican existed apart from any contractual terms and was not in any way limited by the contractual provisions referable to the assignment of interests in the agreement. The assignment was valid.

38 RBC and Barbican advanced several alternative arguments in support of their claim that the assignment was valid. They also argued that the validity of the assignment was irrelevant to the substantive issues raised in the main action or in the counterclaim. In the light of my conclusion that there were no limitations on RBC's right to assign its benefits under its loan agreement with Mr. Rodaro, I need not address these submissions.

(b) Did RBC improperly disclose Mr. Rodaro's confidential information to Barbican?

39 In late 1991 and early 1992, Mr. Rodaro and RBC were negotiating a possible extension and/or expansion of the loan facility RBC had made available to Mr. Rodaro. In the course of these negotiations, Mr. Rodaro provided RBC with his business plan for the project. That plan described Mr. Rodaro's development plan, marketing strategy and financial projections. That information was made available to Drivers Jonas by RBC in late 1991 and 1992 and is reflected in the reports prepared by Drivers Jonas. Mr. Rodaro agreed that Drivers Jonas could have access to the business information he had given to RBC. The reports were prepared to assist RBC in deciding whether to make a new loan to Mr. Rodaro.

40 The Drivers Jonas reports were given to Barbican by RBC when Barbican was considering taking an assignment of Mr. Rodaro's debt. Mr. Rodaro was not asked if the reports could be supplied to Barbican. By virtue of receipt of the Drivers Jonas reports Barbican became privy to the business plan that Mr. Rodaro had provided to RBC.

41 Spence J. found that the business plan provided to RBC by Mr. Rodaro was confidential information. He said:

> [837] The Business Plan is the kind of information that is typically and properly considered confidential. [Paul] Dinner [the RBC account manager for the Phase I

> loans] thought the Business Plan for the Project was confidential information. The Barbican submission admits
>
> that the Business Plan was confidential in nature, but claims that it ceased to have that status when the loans ceased to be in good standing. I do not accept this contention. The Business Plan was given to RBC for its consideration whether to provide support for the Project by making further loans. It is not different from providing information to a prospective investor. The information is provided for the purpose indicated. Whether the existing facility was in good standing is not relevant. The Business Plan information was confidential.

42 Spence J. went on to hold that RBC's disclosure of this confidential information to Barbican was prima facie improper. He next considered whether RBC was entitled to disclose this information in the course of negotiating the assignment of the debt. RBC contended that since Mr. Rodaro was in default on the loans, it was entitled to disclose this information to potential purchasers of the debt. RBC relied on those authorities which hold that a bank can disclose otherwise confidential information of a debtor where necessary to "protect its own interests": Tournier v. National Provincial and Union Bank of England, [1924] 1 K.B. 461 (C.A.); and CIBC v. Sayani, [1994] 2 W.W.R. 260 at p. 264 (B.C.C.A.), leave to appeal refused, [1993] S.C.C.A. No. 485, [1994] 1 S.C.R. vi.

43 Spence J. accepted that RBC was entitled to disclose some but not all of the information that it disclosed to Barbican in order to protect its interests. He said:

> [912] The distinction between the confidential business information and the confidential account information might be put this way. The confidential business information is provided by the customer and belongs to it, not the Bank. The account information pertains to the dealings between the Bank and the customer, and arises from those dealings. It does not belong to the customer but the implied term in the contract is that it will only be used by the Bank for the protection of its interest in the debt. If the Bank sold the debt when it was in default, as in the present case, and provided only the account information of the kind described above, it would be fair to consider that the Bank was in effect selling the collection right in respect of the debt, which is only one step removed from the Bank taking steps itself to collect directly. In such a case, it would probably be reasonable to imply a consent to the disclosure of that information. But that is not the case here: both confidential business information and account information were disclosed to Barbican via the Drivers Jonas reports.

44 The distinction drawn by Spence J. between "business information" and "account information" is problematic. All of the information in question related to the fiscal viability of the project and

was information any potential assignee of RBC's debt would want. In the context of a proposed assignment, it was very much in the interest of RBC to make full disclosure of all of this information to a potential assignee. Failure to disclose relevant information could leave the bank open to a subsequent action by the assignee.

45 The distinction drawn by Spence J. also seems inconsistent with his finding that RBC had an unqualified right to assign its benefits under its agreement with Mr. Rodaro. If RBC could not disclose information relevant to the project to potential assignees without Mr. Rodaro's permission, then its assignment rights were far from unqualified. It is at least arguable that RBC's unqualified right to assign its benefits under the agreement with Mr. Rodaro implied the right to make such disclosures as are essential to the exercise of that right: Montgomery v. Ryan (1908), 16 O.L.R. 75 (C.A.); I. Baxter, The Law of Banking, 4th ed. (Toronto: Carswell 1992) at p. 57.

46 In addition, the assignment clause set out above in paragraph 35 authorized RBC to disclose to a "potential assignee" all or any information regarding the borrower and related corporations as the bank deemed necessary. Spence J. made no direct reference to this clause when considering whether the bank had improperly disclosed confidential information to Barbican. Again, it is at least arguable that under the terms of this agreement, Mr. Rodaro had agreed that the bank could disclose all information it had about him and the project if it deemed that disclosure necessary in the context of assigning its benefits under the agreement to a third party. Given the broad language of this provision, it may well be that the onus fell on Mr. Rodaro to seek the bank's agreement not to disclose any information which would otherwise be disclosable under this provision.

47 Because of the conclusion I have reached with respect to the question of whether any detriment was caused to Mr. Rodaro even if the bank improperly disclosed confidential information to Barbican, I need not come to any final determination of whether the bank acted improperly in disclosing all of the information it had referable to the project to Barbican. For the purpose of determining whether the disclosure caused any detriment to Mr. Rodaro, I will assume that Spence J. correctly held that at least some of the information was improperly disclosed to Barbican by RBC.

(c) Did the disclosure cause detriment to Mr. Rodaro's

48 Disclosure of confidential information is actionable if it results in detriment or damage to the confider or wrongful gain to the confidant: LAC Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 at pp. 638-39, per LaForest J.; and ICAM Technologies Corp. v. EBCO Industries Ltd. (1993), 52 C.P.R. (3d) 61 at p. 63 (B.C.C.A.), leave to appeal to S.C.C. abandoned, [1994] S.C.C.A. No. 23 (QL); P. Perell, Breach of Confidence to the Rescue (2002), 25 Advocates Q. 199 at p. 205.

49 Having concluded that RBC and Barbican had misused Mr. Rodaro's confidential business information in coming to their agreement to assign Mr. Rodaro's debt to Barbican, the trial judge turned to the question of whether that misuse had caused any detriment to Mr. Rodaro. Mr. Rodaro

made two arguments at trial. First, he argued that through the misuse of the confidential information, RBC and Barbican effectively took over the project which properly belonged to him. The trial judge rejected this argument, fundamentally because the assignment of the debt by RBC to Barbican did not deprive Mr. Rodaro of anything. On the trial judge's findings, it left him in exactly the same position, that is, in default on the debt and subject to the remedies available to the lender. It made no difference whether RBC or Barbican held the debt and security following default. The relevant passages from the trial judge's reasons are set out below:

> [1020] The constituent elements in the argument are (i) the defendants took the property and (ii) the taking was wrongful. The conclusion reached in this decision is that there was wrongful conduct - specifically, misuse of confidential information - and that the conduct did cause a loss or deprivation to the plaintiffs. But it is going too far to say that the loss or deprivation was of the Project property itself. To reach that conclusion, it would be necessary to ignore the rights that the Bank held under its security, which after March 1, 1992 was enforceable. It would also be necessary to ignore the fact that what the Bank's transaction with Barbican was designed to do was not to appropriate and sell the property, but simply to sell the debt and the security, which the Bank had a right to do. Both of these considerations must be taken into account in determining what it was that the actions of the Bank deprived the plaintiffs of.
>
> [1021] Equally, it is important that the Bank proposed not to realize on the security, but to sell the debt and security. From the evidence, it is clear that the Bank wanted to get the Rodaro loan off its books. The debt was in default. The transaction with Barbican would result in RBC transferring the debt to Barbican and obtaining instead a new debt from a new borrower, Barbican. So the Bank wanted to sell the debt rather than take realization proceedings, and it did so. This is important to the view about damages that is set out below.
>
> [1030] The key problem with the plaintiffs' hypothesis is that RBC could not, by the assignment to Barbican, obtain assurance of an equity interest in the Project.
>
> [1031] The assignment to Barbican was of the debt and the security, not the property itself. Consequently, for any equity in the property to be acquired, there would have to be a foreclosure, which (it seems to be common ground) would require the consent or non-opposition of Rodaro. (If the matter were to be required to go to power of sale there was no suggestion that RBC would be in a better position if the security was being realized upon by Barbican than if it was being realized upon by the Bank itself). On this basis the assignment to Barbican

> could not and did not enhance RBC's prospects of obtaining an equity interest in the property. It still depended on what Mr. Rodaro would decide to do in respect of the rights he held. The plaintiffs do not overcome this objection to their hypothesis and it is not apparent how they could.

50 Mr. Rodaro's second argument in support of his claim that his damages equalled the potential profits from the project proceeded along the following lines. RBC would not have been able to assign its debt to Barbican without divulging the confidential information. In the absence of an assignment to Barbican, RBC would have continued to fund the project and with that funding, Mr. Rodaro could have completed the project.

51 The trial judge examined the evidence relating to the Bank's decision in the spring of 1992 not to fund the project any further in some detail. He concluded that there was "no basis" upon which to find that RBC would have funded the project if it had not been able to assign the debt to Barbican. He said:

> [1097] However, the sale of the debt was a different undertaking from the decision not to fund, and in principle, the decision not to fund could have been followed by a decision to accept the default and realize on the security rather than selling the debt. Accordingly, there is no basis to assert a legal presumption that, contrary to the fact of the decision of Mr. Grant and Mr. McDermid, RBC would have funded the project if it could not have sold the debt to Barbican in the manner it did. ...

52 Spence J.'s findings that RBC and Barbican did not "take" the project and that there was no connection between RBC's decision not to continue funding and the misuse of confidential information in the course of the assignment of the debt to Barbican are grounded in the evidence and cannot be reversed in this court.

53 The trial judge went on, however, to find that Mr. Rodaro had suffered detriment in the form of a lost opportunity. This concept is best explained in the trial judge's own words:

> [1098] This does not mean the plaintiffs suffered no loss as a result of the improper use of their confidential information. <u>The plaintiffs suffered the deprivation of any opportunity to benefit from a sale of the debt and security carried out in a manner which used their information properly, i.e. with their permission</u>. That opportunity may have had value. It must be taken that RBC considered it to be in its own best interest, once it decided not to fund, to sell the debt on terms it was prepared to accept to a satisfactory developer and that it wished to use the plaintiffs' information to do so. The plaintiffs, it is fair to assume, might well not want such a sale to happen. However, the alternative facing them was that the lender would resort to a realization procedure. On this basis, <u>what the plaintiffs lost was the opportunity to choose between receiving</u>

the best possible sale terms they could have obtained for their interest as part of the package along with the sale of the debt and security to a developer acceptable to RBC, or alternatively, accepting the consequences of realization procedures.

[1100] If RBC had negotiated with the plaintiffs to develop an offer for the sale of the Project as a package consisting of (i) the debt held by RBC and (ii) the remaining equity interest of the plaintiffs, to an acceptable developer with loan terms like those RBC gave to Barbican at a price to be negotiated, and if a package with those elements had been exposed to the market, there might have been a different outcome.

[1101] By proceeding as it did to sell the debt to Barbican, using the confidential information of the plaintiffs, RBC deprived the plaintiffs of the opportunity to receive the benefit of any offer that might have been made in response to a package offer made on the basis outlined above and the opportunity to decide on their course of action in the light of the outcome of the offer process.

[1103] It is reasonable to suppose that if the matter had proceeded as hypothesized above, Barbican would have offered the $1 million amount contemplated in its discussions with RBC. RBC and Barbican had concluded such an offer would be satisfactory. Perhaps one or more other developers would have offered more. On the evidence, the purpose of such an offer by Barbican was to take over the equity position of the plaintiffs. It should be inferred that the intention was, in effect, to bring the equity and debt together in the new owner and to remove the involvement of the plaintiffs in the Project. On this basis, it should be taken that any such offer if accepted would have led to the elimination (through merger of the debt and the equity or otherwise) of the outstanding debt and guarantee owing by the plaintiffs to RBC. Thus the plaintiffs would have been left with $1 million (or a larger sum from another developer) and would no longer have had any obligations in respect of the debt and the guarantee.

[1105] Accepting foreclosure could not have been as beneficial to the plaintiffs as accepting an offer as described above. Therefore, the reasonable course for the plaintiffs would have been to accept the offer and not face realization proceedings. This would be so unless the plaintiffs expected that power of sale proceedings would provide a better result. However, in power of sale proceedings, RBC would have been entitled to receive repayment of its debt immediately whereas the package offer on the terms of the Barbican deal would

> have offered instead non-recourse financing to the purchaser. For this reason, it should be taken that a power of sale proceeding would not likely have been as beneficial to the plaintiffs as the package offer, and the plaintiffs would reasonably have understood this. On this basis, it would be reasonable to conclude that the plaintiffs would have accepted the package and would not have required power of sale proceedings.
>
> [1106] The view expressed above takes into account that the decision the plaintiffs actually took was to resist foreclosure with the result that power of sale proceedings were initiated. The plaintiffs should not be prejudiced by that decision. In the circumstances, they were confronted with a transaction about which they had not been consulted and which lacked their consent and, whether or not they had reason at the time to know it, was flawed by the improper use of confidential information. If matters had instead proceeded in accordance with the package offer scenario developed above, the plaintiffs would have had good reason to consider that the matter was proceeding in accordance with all legal requirements and therefore to recognize and assess their options as set out above. [Emphasis added.]

54 RBC and Barbican submit that Spence J.'s "lost opportunity" approach to establish that Mr. Rodaro suffered damages as a result of the disclosure of the confidential information is "legally flawed". They argue that damages for lost opportunity are available only if a plaintiff is deprived of a "legal entitlement or property interest".

55 The authorities relied on by RBC and Barbican do not support the proposition advanced by them. If as a result of a defendant's breach of contract, or negligence, a plaintiff loses a reasonable probability of realizing some economic benefit, the plaintiff is entitled to be compensated for that lost opportunity. The quantification of that loss may have to take into account contingencies and variables personal to the plaintiff and will often prove difficult. Nevertheless, the plaintiff is entitled to compensation: Eastwalsh Homes Ltd. v. Anatal Developments Ltd. (1993), 12 O.R. (3d) 675 at pp. 689-90 (C.A.), leave to appeal refused, [1993] S.C.C.A. No. 225, [1993] 3 S.C.R. vi; Domowicz v. Orsa Investments Ltd. (1993), 15 O.R. (3d) 661 at p. 678 (Gen. Div.); Ticketnet Corp. v. Air Canada (1997), 154 D.L.R. (4th) 271 (C.A.), leave to appeal refused, [1998] S.C.C.A. No. 4 (QL); and H. Pitch, Damages for Breach of Contract, (Toronto: Carswell, 1985) at pp. 29-46.

56 Mr. Rodaro did not establish a breach of contract or negligence. He did, however, establish an improper disclosure by RBC to Barbican of his confidential information. If that disclosure resulted in detriment to Mr. Rodaro, he was entitled to be compensated. In some cases, the improper disclosure of confidential information will cause the loss of valuable economic opportunities. The loss of potential profits is perhaps the best example of an opportunity lost through the misuse of confidential information. In my view, a lost opportunity analysis can be used to determine whether

the misuse of confidential information has caused detriment to the person whose information was improperly disclosed. Resort to a lost opportunity analysis to determine detriment and eventually to quantify that detriment is consistent with the law's command that confidences be respected.

57 The lost opportunity approach was used to determine damages in Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, a case involving misuse of confidential information. Binnie J., after stressing at pp. 158-60 that courts must fashion remedies for breach of confidence and other misuses of confidential information that are sensitive to the circumstances of each case, opted for a lost opportunity quantification of the plaintiff's loss. He said at pp. 181-82:

> The concept of the "lost opportunity" is particularly apt here. ... The respondent's "lost opportunity" was that the appellants, using these confidential production techniques, entered the marketplace with Caesar cocktail a year earlier than would otherwise have been the case. The respondents were not entitled to be free of competition from the appellants. Apart from the clam juice limitation, they were only entitled to be free of the appellant's competition which used the respondents' confidential information. ... The respondents' entitlement is to no more than restoration of the full benefit of this lost but time limited opportunity.

58 The lost opportunity analysis adopted by Spence J. was theoretically sound. I am satisfied, however, that it could not be applied in this case. First, it was never pleaded or otherwise raised by Mr. Rodaro at any stage of the lengthy proceedings. Second, there was no evidence that the disclosure of the confidential information by RBC to Barbican caused Mr. Rodaro to lose the opportunity described by Spence J. To the contrary, to the extent that the evidence speaks to the loss of the opportunity at all, it demonstrates that Mr. Rodaro "lost" the opportunity to negotiate with Barbican for reasons that had nothing to do with the disclosure of the information to Barbican.

59 Mr. Rodaro did not plead that RBC's improper disclosure to Barbican deprived him of the opportunity to negotiate a "package deal" involving the sale of the debt and his equity in the project. At no time during the months of trial or the course of lengthy argument did Mr. Rodaro suggest that the improper disclosure had caused him to lose the opportunity described by Spence J. That theory appeared for the first time in the reasons of Spence J.

60 It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in 460635 Ontario Limited v. 1002953 Ontario Inc., [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):

> ... The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. ...

61 By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.

62 In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how Spence J.'s lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by Mr. Rodaro and were therefore subject to the adversarial process were found wanting by Spence J.

63 Spence J. erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal. However, I am also satisfied that the lost opportunity analysis could not succeed on this evidence.

64 Given that Mr. Rodaro did not plead or argue the lost opportunity approach adopted by Spence J., it is not surprising that he led no evidence in support of that approach. Counsel for Mr. Rodaro does not suggest that there was any direct evidence to support the lost opportunity analysis. He submits, however, that Spence J. was entitled to draw inferences from the evidence as to what likely would have happened had there not been improper disclosure of the confidential information: Cadbury Schweppes, supra, at p. 186.

65 I accept that Spence J. was entitled to draw inferences from the evidence. I also accept that in doing so, he could consider what a reasonable person in the position of Mr. Rodaro would have done but for the improper disclosure of the confidential information. However, where, as here, the lost opportunity identified by Spence J. was never identified by Mr. Rodaro at any stage in the proceedings, and was not touched on at all in the evidence, I think Spence J.'s findings that the opportunity existed and was lost as a result of the improper disclosure of confidential information amount to speculation and not inference.

66 Had Mr. Rodaro chosen to advance the lost opportunity theory eventually devised by Spence J., he would have had to lead evidence to show that the opportunity existed and that he would have taken advantage of that opportunity. The first inquiry is objective, but the second is directed to what Mr. Rodaro would have done. Had Mr. Rodaro led such evidence, Spence J. would have had to evaluate it and determine the likelihood of Mr. Rodaro taking the opportunity to negotiate had RBC not improperly disclosed the confidential information. The likelihood of Mr. Rodaro taking that opportunity would have been reflected eventually in the quantification of the damages. However, if on the evidence there was no chance that Mr. Rodaro would have pursued the negotiation, then it

cannot be said that the disclosure of the confidential information caused any detriment to Mr. Rodaro. Because lost opportunity was no part of Mr. Rodaro's case, there is no evidence as to what Mr. Rodaro would have done but for the improper disclosure of the information and there is no evidence that the disclosure in any way caused him not to pursue the opportunity to negotiate with Barbican.

67 Not only does the record offer no support for the claim that Mr. Rodaro would likely have negotiated had the bank presented him with the opportunity described by Spence J., there is strong evidence that he would not have negotiated with RBC or Barbican. After RBC assigned the debt, Barbican was prepared to negotiate with Mr. Rodaro. Barbican wanted to proceed by way of foreclosure and take over the development of the project. It could do so only with Mr. Rodaro's consent and was prepared to pay $1,000,000 to secure that co-operation.

68 Mr. Rodaro wanted no part of any negotiation with Barbican. Instead, he immediately commenced this litigation seeking $100,000,000 in damages. He also caused the property to be encumbered by a construction lien that was later ordered removed by the court and described as fraudulent. Mr. Rodaro clearly wanted a fight and not a negotiated settlement. He firmly believed that RBC was trying to cheat him out of a project that was worth many millions of dollars. He was not prepared to negotiate his departure from the project.

69 Spence J. was alive to Mr. Rodaro's reaction to Barbican's attempt to negotiate once Barbican had taken over the debt. Spence J. regarded the situation faced by Mr. Rodaro after the assignment as entirely different from the situation contemplated by his lost opportunity theory. I do not agree. On both scenarios, the bargains proposed were essentially the same. In exchange for stepping aside and allowing someone else to develop the project, Mr. Rodaro's debt to RBC would be eliminated and he would have received an additional cash payment. Mr. Rodaro had no knowledge at the time that Barbican had been given confidential information when he summarily rejected Barbican's attempts to negotiate with him. I see no connection between Barbican's possession of that information and the perceived bargaining positions of Mr. Rodaro and Barbican either before or after the assignment. All Mr. Rodaro had to offer to Barbican was his consent to foreclosure so Barbican could take over the project. There is no evidence that the potential value of that consent to Barbican was somehow diminished or otherwise affected by RBC's disclosure of Mr. Rodaro's business information to Barbican.

70 Mr. Rodaro's refusal to bargain with Barbican after the assignment was made is cogent evidence that he never would have entered into the kind of bargaining contemplated by Spence J. Even if it could be said that a reasonable person would have entered into such bargaining, that opportunity had no value to Mr. Rodaro since his actions demonstrate that he would not have taken advantage of it.

71 For the reasons set out above, Spence J. erred in holding that the misuse of the confidential information caused detriment to Mr. Rodaro in the form of a lost opportunity. As this was the only

basis upon which Mr. Rodaro succeeded at trial, it follows that the appeal should be allowed and Mr. Rodaro's action against RBC and Barbican dismissed in its entirety. It follows, therefore, that the order of Spence J., declaring the payment obligations under the debt and guarantee to be unenforceable against the respondents, also must be set aside.

72 I would allow the appeal, set aside the judgment of Spence J. and in its place render judgment dismissing all claims against RBC and Barbican. Barbican's counterclaim remains outstanding.

73 RBC and Barbican are entitled to their costs at trial and on appeal.

DOHERTY J.A.
WEILER J.A. -- I agree.
FELDMAN J.A. -- I agree.

1 Mr. Rodaro acted through various corporate entities in the course of the transactions at issue in this action. For convenience, we will refer to Mr. Rodaro personally rather than to the various corporate actors, some of whom are parties to this action.

2 Although Mr. Shulman was Mr. Rodaro's lawyer at the time of the meeting, by the time he testified at trial his firm had been sued by Mr. Rodaro.