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Protection needed for small investors

Mall condo never proceeded

Lengthy lawsuit only recoups half The settlement last month of a multi-million-dollar real estate class action will allow 143 purchasers in a failed commercial condominium to recover almost half their original deposits after the project became insolvent.

Toronto lawyer Samuel Marr acted for the class action plaintiffs. "None of them had the time or resources to pursue a lawsuit on their own," Marr told me, but they will all share in the proceeds.

As a result of the settlement of the class action, they will each receive between \$9,000 and \$51,000 depending on the amounts of their original deposits.

The settlement also raises the question of whether the residential-oriented Ontario New Home Warranty Program (ONHWP) should protect small investors in commercial condominium projects, and whether Ontario law should be amended to provide for clearer disclosure of the risks involved in commercial condominium construction projects.

It all began around 1994, when Henry and Linda Lam and Kings Land Developments Inc. proposed to build a Hong Kong-style mall called the World Centre at the northeast corner of Bayview Ave. and Major MacKenzie Dr. in Richmond Hill. The mall would have consisted of hundreds of small store kiosks, with each tiny store being a separate condominium unit.

A total of 263 purchasers paid deposits on units in the project. The funds went into the trust account of the developer's lawyers, but they were only held there for a few days.

The lawyers, acting under the authority of an obscure clause buried in the purchase agreements, released the deposit monies to the developer to acquire title to the land, and to fight a lengthy and expensive hearing at the Ontario Municipal Board.

The project was never built and the land was ultimately sold under power of sale by the mortgagee.

All purchasers lost their deposits, which were not protected by ONHWP because it was a commercial condominium.

One group of about 120 purchasers hired lawyers and sued the developer, the developer's lawyers and the real estate broker involved.

Two of the other purchasers, Bernard K. Cheung and Ben Wing Pun Mok, hired Toronto lawyers Keith Landy and Samuel Marr, to represent them and all of the other unrepresented purchasers in a class action against the same defendants.

If those purchasers had not sued on their own or participated in a class action, they would have received nothing.

After more than three years of legal wrangling, the parties involved worked out a settlement last month on the eve of trial. A total of \$7.3 million was paid for the settlement fund and legal fees, although the original purchaser deposits totalled almost \$11 million.

The settlement money was paid by the insurers and excess insurers for the developer's lawyers, and the insurance company for the real estate broker. A further \$300,000 was seized from the developer's bank account.

Last Saturday's Star contained a prominent advertisement reporting on the order of Justice Colin Campbell of Ontario Superior Court. Last month, he approved the division of \$2.568 million in net settlement proceeds among the 143 members of the class action lawsuit.

A similar amount will be shared by the purchasers who had their own lawyers and did not participate in the class action.

The legal notice in the Star and on the law firm's web site (<http://www.landymarr.com>) advised that the 143 purchasers in the class action have until June 30 to claim their proportionate share of the settlement. The law firm has lost contact with some of the buyers, who do not yet know that money is waiting for them.

Marr told me last week that many of the purchasers were unsophisticated consumers who spoke mainly Chinese and very little English. He said he would like to see some sort of ONHWP protection for people like his clients or, at the very least, a prominent mandatory disclosure in commercial transactions that deposits would not be protected.

Fortunately, residential purchasers are protected by ONHWP for deposits up to \$40,000 on homes and \$20,000 on condominiums.

I agree with Marr: Individual purchasers in small commercial projects should have deposit safeguards as well. It would certainly have protected the purchasers in the World Centre project and made years of litigation unnecessary.