

Action Number: 1001-03215

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

FIRST CALGARY SAVINGS & CREDIT UNION LTD.

PLAINTIFF

and

PERERA SHAWNEE LTD., PERERA DEVELOPMENT CORPORATION, DON L.
PERERA and SHIRANIE M. PERERA

DEFENDANTS

**STATEMENT OF DEFENCE OF PERERA SHAWNEE LTD., PERERA
DEVELOPMENT CORPORATION, DON L. PERERA and SHIRANIE M. PERERA**

1. The Defendants admit paragraphs 1-4, and agree with the proposal contained in paragraph 50 of the Amended Statement of Claim.
2. Save as admitted hereafter, the Defendants deny each and every other allegation in the Amended Statement of Claim, and put the Plaintiff First Calgary Savings & Credit Union Ltd. to the strict proof thereof.
3. The Defendants adopt the terms as defined in the Amended Statement of Claim.
4. In direct response to the whole of the Amended Statement of Claim the Defendants state that at no time did they make false or misleading representations to First Calgary, expressed or implied, that in anyway misled First Calgary as to the nature of Project. At all material times First Calgary was fully informed as to the nature of the Project, the Defendant PSL's plans to develop the Project and the financial status of PSL and the Project. The Defendants specifically deny any allegation as alleged in the Amended

Statement of Claim or at all, that the Defendant PSL used advances from First Calgary for any other purpose than set out in the PSL Security and the Loan.

5. In further and direct response to the whole of Amended Statement of Claim the Defendants state that at all times the Defendant PSL developed the Project in a manner to be expected of a reasonable and competent developer and communicated at all times with First Calgary and its representatives in an honest and reasonable fashion to be expected by a Borrower in the circumstances of and pursuant to the obligations contained in the PSL Security.
6. In further and direct response to the whole of the Amended Statement of Claim the Defendants state if the Defendant, PSL was at any time prior to December of 2009 in default of its obligations under the PSL Security, which is not admitted but denied, then First Calgary either expressly or impliedly waived such defaults. Without restricting the generality of the foregoing First Calgary did on December 23rd and 24th 2009 advance to the Defendant PSL the approximate sum of \$992 000 on account of the Loans.
7. In further and direct response to the whole of the Amended Statement of Defence the Defendants state and the fact is that between December 21, 2009 and March 1, 2010 PSL paid to First Calgary the net proceeds of sale of 22 units of the Project in the total sum of \$8 563 275.00. The Defendants state that as at January 21, 2010 the Defendant PSL was not in default of any interest payments due on account of the Loan.
8. The Defendants did on September 1, 2010 serve on the Plaintiff a Demand for Particulars. This Statement of Defence is filed at the request of the Plaintiff and the Defendants have not in any waived its right to the requested particulars or its right to apply to amend its pleadings.
9. In specific response to Paragraph 20 of the Amended Statement of Claim the Defendants state that First Calgary is a sophisticated lender and that at all times,

including prior to the approval of the 2007 Commitment Letter, First Calgary was aware of the nature of the Project and the plans of PSL to develop the project.

The Events of October, November and December 2009

10. The Accident and events set out in paragraphs 17, 18 and 19 together with the downturn of the World economy in 2007 and 2008 caused delays in the development, completion and sales of the Project. Ongoing discussions between First Calgary and PSL resulted in the June 2009 Loan and Security. Regular and ongoing discussions and communications between the PSL and First Calgary took place through the summer and fall of 2009.
11. In late Fall of 2009 First Calgary and the Defendants were all aware that further capital would be required to finish the first tower of Phase I so as to permit the completion and sale of 70 condominium units of Phase I (the "Phase I Units") and so provide PSL the funds with which to repay the Loans. Discussions were ongoing through this period. In particular First Calgary and PSL were aware that prior to title issuing on the completed units it would be necessary to pay a Municipal Reserve Allowance to the City of Calgary. (the "Municipal Reserve").
12. Contrary to the allegations contained in paragraphs 24 to 30 of the Amended Statement of Claim the Defendants state and the fact is that over the months of November and December PSL and First Calgary worked collaboratively to develop a plan to recapitalize the Project, complete Phase I so as to permit the sale of Phase I Units to be sold and allow the repayment to First Calgary of the bulk of the Loan in the first half of 2010. In the result the Defendants and First Calgary agreed as follows:
 - a) The Defendants D. Perera and S. Perera would refinance the first mortgage on their personal residence (the "New Mortgage") and First Calgary would postpone the Personal Mortgage to the new Mortgage;

- b) All new money from the New Mortgage would be advanced to PSL to be used to pay the liabilities of PSL including the Municipal Reserve;
- c) In addition the Defendants D. Perera and S. Perera would advance the further sum of \$400 000 to PSL to pay the liabilities of PSL;
- d) First Calgary would advance a further loan of \$2 800 000 based on agreements not dissimilar to the July 2007 Loan and Security and the June 2009 Loan and Security;
- e) PSL would negotiate terms with its creditors and suppliers and First Calgary would advance funds to pay out the monies needed with respect to the terms negotiated;
- f) PSL would complete the pre-sold units in the Phase I tower, close with third party purchasers and pay the net proceeds of sale to First Calgary;
- g) PSL would make arrangements with a new lender to pay out First Calgary.

(the "Recapitalization Agreement")

13. Pursuant to the Recapitalization Agreement, as agreed:

- a) the Defendants D. Perera and S. Perera advanced \$1 488 000 (the "Perera November Advances") to PSL in the last week of November and First Calgary postponed the Personal Mortgage;
- b) The Defendant PSL used the Perera November Advances to pay out creditors, sub trades and the Municipal Reserve charges as agreed;

- c) PSL obtained occupancy permits and title to 54 of the 70 Phase I Units in the form of individual titles which could be transferred to third party purchasers;
 - d) PSL continued to spend funds, including the Perera November Advance required to complete the sale of units in the expectation that First Calgary would advance funds;
14. During the months of November and December of 2009 PSL, with the knowledge and consent of First Calgary, negotiated with its creditors and sub trades to work out payment programs based on payments to be made to them from the monies to be advanced pursuant to the Recapitalization Agreement. In particular PSL reached agreements with sub trades to wait for payment and not file builder's liens against the PSL Lands, it being understood by all concerned, including First Calgary that the PSL would have to be free of liens if the Phase I Units were to be sold to third party purchasers. In fact no liens or claims were filed against the PSL Lands prior to the issuance of the Statement of Claim in this action.
15. In the meantime, and only after the Perera November Advances First Calgary delayed committing to advancing monies under the Recapitalization Agreement. In December of 2009 the following occurred:
- a) PSL made a formal request for a further advance of \$2 800 000;
 - b) On December 18, 2010 D. Perera met at the site of the Project with the following individuals:
 - i) Vic Krueger of Deloitte & Touche LLP. ;
 - ii) Bob Stemp, counsel for First Calgary;
 - iii) 3 Representatives of Credit Union Deposit Corporation;
 - iv) Michael Wheatley of First Calgary;

- v) Ross Kaplan, counsel for the Defendants.
 - c) On December 21, 2009 First Calgary presented PSL with the December 2009 Commitment Letter; and
 - d) On December 22, 2009 First Calgary presented PSL with the Agreement of Intent.
16. PSL, PDC and D. Perera acknowledge that they executed the December 2009 Commitment Letter and the Agreement of Intent. S. Perera did not execute these Agreements. The three Defendants who executed the December 2009 Commitment Letter and the Agreement of Intent did so on the following understandings:
- a) That First Calgary would advance approximately \$1 000 000.00 immediately on execution of same and would advance approximately \$900 000 in each of January and February of 2010 to pay sums committed by PSL to creditors and sub trades of PSL;
 - b) That First Calgary would proceed in good faith and assuming that the Defendants co-operated as contemplated in the December Agreements First Calgary would Advance further funds in January and February of 2010 so as to permit the Defendant PSL to comply with its agreements with creditors and sub trades.
 - c) The purpose of the appointment of Deloitte was to ensure that the representations made by PSL to First Calgary in the course of negotiating the Recapitalization Agreement were accurate;
 - d) That Deloitte would prepare a Report for First Calgary and PSL would be given an opportunity to respond;

- e) The Forbearance Agreement contemplated in the Agreement of Intent would fairly represent the terms of the Recapitalization Agreement including a commitment by First Calgary to advance a further \$1 800 000 pursuant to the December 2009 Commitment Letter;
 - f) The Defendant PSL would proceed to close as many pre sold units of the Phase I tower as it could and remit all net proceeds to First Calgary.
17. In accordance with the December 2009 Commitment Letter and the Recapitalization First Calgary advance approximately \$992 000 in three advances on the 23rd and 24th of December of 2009.

The Events of January and February 2010

18. In the months of January and December representatives of PSL held numerous meetings with representatives of First Calgary and Deloitte & Touche LLP ("Deloitte") and provided First Calgary and Deloitte with full disclosure of the financial status of PSL and the Project.
19. PSL, PDC and D. Perera entered into the Review Monitoring Agreement and supplied Deloitte with full disclosure and documentation with respect to every material inquiry made by Deloitte.
20. The Review Monitoring Agreement executed by PSL, First Calgary and Deloitte contemplated that Deloitte would prepare a report and that:

"A draft of the factual sections of the report will be shown to the Company. The Company will have the opportunity to review the draft prior to the submission to the Lender and to provide comments thereon. Deloitte will ask the Company to confirm that the facts, as stated, are accurate in all material respects and that they are not aware of any material matters relevant which have been excluded."

21. Notwithstanding the fact that PSL provided full disclosure to Deloitte, Deloitte did not, contrary to its obligations to First Calgary and the Defendants pursuant to the Review Monitoring Agreement provide PSL with a copy of its draft report and reported directly to First Calgary. Deloitte charged more than \$25 000.00 which was paid by First Calgary and charged to the account of PSL for a Report that it never delivered or shared with PSL.
22. What, if anything, Deloitte reported to First Calgary is unknown to the Defendants although it is reasonable to believe, based on a reading of Paragraph 38 of the Amended Statement of Claim, that Deloitte did report to First Calgary and that such report was false, misleading, incomplete or inadequate for the purposes set out in the Review Monitoring Agreement.
23. With respect to paragraph 38 of the Amended Statement of Claim the Defendants specifically deny that PSL failed to provide Deloitte with all the information it requested or that any failure on the part of PSL or any of the Defendants in any way hindered Deloitte from preparing a report for review by PSL or First Calgary. If Deloitte provided any report or information to First Calgary as alleged in the Amended Statement of Claim or at all it is in breach of its commitments to PSL to first provide a draft of such report to PSL as set out in Paragraph 20 herein.
24. With respect to paragraph 35 of the Amended Statement of Claim the Defendants admit that they did not execute a Forbearance Agreement. During January and February of 2010 several drafts and amendments of Forbearance Agreements (Collectively the "Forbearance Agreement") were exchanged between counsel for First Calgary and counsel for the Defendants. The Defendants state, and the fact is that it was reasonable, taking into account the terms of the Recapitalization Agreement, the December 2009 Commitment Letter and the Agreement of Intent.

25. In particular First Calgary refused to consider amending Clause 13 of the Forbearance Agreement prepared by its counsel which obliged all of the Defendants to agree as follows:

13. All of the Obligations of the Lender, express or implied, pursuant to all previous agreements, restructuring arrangements, offers to finance and loan agreements with the Debtors are waived insofar as such obligations conflict with the terms of this Forbearance Agreement, and in particular, it is acknowledged by the Debtors that any obligation by the Lender to advance further loans to the Debtors have been or is hereby terminated.

(the "Loan Termination Clause")

26. These Defendants state and the fact is that it was a reasonable and implied term of the December 2009 Commitment Letter and the Agreement of Intent that the Defendants would not be compelled under the terms of the Forbearance Agreement to agree to the Loan Termination Clause which would have terminated any obligation on the part of First Calgary to honour its obligations under the December Agreements and the Recapitalization Agreement. This was especially so given the other terms of the Forbearance Agreement and the December Agreements including the requirement that the Defendants consent to judgment against them.

The Bad Faith of First Calgary

27. At all material times First Calgary was aware that PSL had pre sales of Phase I Units. In November of 2009 First Calgary was fully aware of the financial circumstances of PSL and agreed to postpone the Personal Mortgage. At all times First Calgary was aware of Perera November Advance and the fact that the Perera November Advance was not enough money to finish Phase I without a further loan from First Calgary.
28. From December 21, 2009 to the March 1, 2010 when this claim was filed PSL paid \$8 563 275 to First Calgary on account of the Loan (the "PSL Loan

Payments"). At all times First Calgary insisted that all net proceeds from the 22 sales be paid to it and all net proceeds were paid to it in accordance with the agreements between First Calgary and the Defendants.

29. First Calgary limited its advances under the December loan to less than \$1000000 with the knowledge and expectation that this advance would permit PSL to close the sale of 22 pre sold Phase I units and make the PSL Loan Payments.
30. On March 1, 2010 there were no liens or financial encumbrances registered on the PSL Lands other than the First Calgary Security. The Defendants state and the fact is that on March 1, 2010 that if the PSL Loan Payments are applied to the in accordance with the Loan Agreements with PSL there was no interest outstanding and owing by the Defendant PSL as at January 21, 2010 or March 1, 2010.
31. On March 1, 2010 the Defendants collectively had not less than \$18 000 000.00 net equity investment, after payment of First Calgary and all creditors of the Project, in the PSL Lands and improvements.
32. These Defendants state and the fact is that in the months of October 2009 through to February of 2010 First Calgary, in its dealings with the Defendants, acted in bad faith, particulars of which include:
 - a) insisting that the Forbearance Agreement include the Loan Termination Clause knowing that the legal effect of the Loan Termination Clause would be to terminate the obligations of First Calgary under the December Loan;
 - b) allowing and encouraging the Perera November Advance to be made by the Defendants D. Perera and S. Perera knowing that such an advance would be insufficient to recapitalize the project as contemplated in the Recapitalization Agreement;

- c) failing to request and receive a report from Deloitte;
 - d) failing to advance the funds under the December loan;
 - e) failing to review the materials provided to it and Deloitte by the Defendant PSL in January and February of 2010;
 - f) failing to take into account the devastating negative effect its failure to advance the December 2010 Loan in January and February would have on the future of the project;
 - g) breaching its obligations to D. Perera and S. Perera under the terms of the Recapitalization Agreement and encouraging them to make the Perera November Advances when it knew, ought to have known or reasonably could have known that it would not advance sufficient funds to permit the project to continue;
 - h) introducing Deloitte as a monitor when its true intention was to not advance any more funds under the December Loan but instead to take the PSL Loan Payment effectively choking off all funds from PSL all with the intention of appointing Deloitte as Receiver after the 22 sales contemplated for January and February were completed;
 - i) refused to entertain any third party mezzanine or other financing proposal made by the Defendants.
33. The insistence by First Calgary that the Defendants enter into a Forbearance Agreement that contained the Termination Clause defeated the whole purpose of the Perera November Advances, the December Loan Agreement and the appointment of Deloitte as monitor which was to ensure the survival of the Project as a viable financial entity. It was included by First Calgary as an act of bad faith and contrary to the whole purpose of the agreements reached, orally

and verbally between First Calgary and the Defendants in November and December of 2009.

The Receivership

34. On March 3, 2010 Deloitte was appointed by this Court as Receiver of the Defendants PSL and PDC. The Receivership will result in the realization on the assets of PSL. The Defendants state and the fact is that as at March 3, 2010 the fair market value of the assets over which Deloitte was appointed as Receiver exceeded \$45 000 000 and it can be reasonably anticipated that the result of the Receivership will be no deficiency owed by the Defendants as alleged or at all. It is reasonable and appropriate in the circumstances that no proceedings be permitted by this Court against the Defendants until the Receivership is completed and the deficiency on the Loans, if any, is crystallized.

**WHEREFOR THE DEFENDANTS PRAY THAT THE WITHIN ACTION BE
DISMISSED WITH COSTS**

Action Number: 1001-03215

**IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY**

BETWEEN:

PERERA SHAWNEE LTD., DON. L. PERERA and SHIRANIE M. PERERA

PLAINTIFFS BY COUNTERCLAIM

and

**FIRST CALGARY SAVINGS & CREDIT UNION LTD. and DELOITTE & TOUCHE
LLP.**

DEFENDANTS BY COUNTERCLAIM

35. The Defendants/Plaintiffs by Counterclaim repeat and adopt the allegations and definitions set forth in the attached Statement of Defence.
36. As set out in the Statement of Defence the Defendants D. Perera and S. Perera advance to PSL the Perera November Advance in the sum of \$1 488 000.00 in good faith that First Calgary would work collaboratively to maximize the return for First Calgary and the Defendants from the PSL Lands and the improvements thereon.
37. The December Loan Agreement was more onerous than contemplated by the Defendants but nonetheless all of the Defendants other than S. Perera executed the December Loan Agreements including the December Commitment Letter and the Agreement of Intent. The Forbearance Agreement contained that Termination Agreement which was an act of bad faith insofar as it defeated the purpose of the December Loan Agreements and the Defendants refused to execute the Forbearance Agreement prepared by counsel for First Calgary.
38. In the result First Calgary claim that the Defendants defaulted under the December 2009 Agreements which they did not. They quite reasonable refused

to execute the Forbearance Agreement and the Agreements which were part of the Forbearance Agreement but they did, in all other respects, abide by and comply with the December 2009 Agreements.

39. As a result of the breaches by First Calgary of the Recapitalization Agreement and the December 2009 Agreements as set out herein and in the Statement of Defence the Defendants have suffered damage as follows:
- a) The Defendants D. Perera and S. Perera have lost or will lose the Perera November Advance in the sum or \$1 400 000;
 - b) The Defendant PSL has or will lose its equity in the PSL Lands in the sum of not less than \$18 000 000;
 - c) The Defendant PSL will lose future profits from the development of the PSL Lands in the sum of not less than \$40 000 000.00.
40. As a result of the breaches by Deloitte of the Review Monitoring Agreement as set out in the Statement of Defence the Defendants have suffered damage as follows:
- a) The Defendants D. Perera and S. Perera have lost or will lose the Perera November Advance in the sum of \$1 488 000.00;
 - b) The Defendant PSL has or will lose its equity in the PSL Lands in the sum of not less than \$18 000 000.00;
 - c) The Defendant PSL will lose future profits from the development of the PSL Lands in the sum of not less than \$40 000 000.00.
41. The Plaintiffs by Counterclaim propose that the trial of this Counterclaim proceed together with the trial of the Statement of Claim at the Calgary Courts Centre in the City of Calgary, Alberta.

WHEREFORE THE PLAINTIFFS BY COUNTERCLAIM CLAIM AS AGAINST THE DEFENDANTS BY COUNTERCLAIM AS FOLLOWS:

A. The Defendants Don L. Perera and Shiranie M. Perera claim as against the Defendants jointly and severally:

1. Judgment in the amount of \$1 488 000.00;
2. Interest;
3. Costs;
4. Such further and other relief as the Court may deem just.

B. The Defendant Perera Shawnee Ltd. claims as against the Defendants jointly and severally:

5. Judgment in the amount of \$ 18 000 000.00 or such other amount of equity in the PSL Lands as may be lost;
6. Judgment in the amount of \$40 000 000.00 for loss of profit from the future development of the PSL Lands;
7. Interest;
8. Costs;
9. Such further and other relief as the Court may deem just.

DATED at the City of Calgary, in the Province of Alberta, this 3rd day of September, 2010, **AND DELIVERED** by **JEFFREY D. POOLE**, Barrister and Solicitor, Solicitor the Plaintiffs by Counterclaim whose address for service in the care of said Solicitor at 126, 2526 Battleford Avenue S.W., Calgary, AB T3E 7J4.

ISSUED out of the office of the Clerk of the Court of Queen's Bench of Alberta, Judicial District of Calgary, this 3rd day of September, 2010.

**THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

**TO: Defendants by Counterclaim
FIRST CALGARY SAVINGS & CREDIT
UNION LTD. and DELOITTE &
TOUCHE LLP,**

BETWEEN:

**FIRST CALGARY SAVINGS &
CREDIT UNION LTD.**

Plaintiff

and

**PERERA SHAWNEE LTD., DON L. PERERA and SHIRANIE
M. PERERA**

Defendants

AND BETWEEN:

**PERERA SHAWNEE LTD., PERERA DEVELOPMENT
CORPORATION, DON L. PERERA and SHIRANIE M.
PERERA**

Plaintiffs by Counterclaim

and

**FIRST CALGARY SAVINGS & CREDIT UNION LTD. and
DELOITTE TOUCH LLP.**

Defendants by Counterclaim

You have been sued. You are a Defendant by Counterclaim. You have only 15 days to file and serve a Statement of Defence to Counterclaim or Demand of Notice. You or your lawyer must file your Statement of Defence to Counterclaim or Demand of Notice in the office of the Clerk of the Court of Queen's Bench in CALGARY, Alberta. You or your lawyer must also leave a copy of your Statement of Defence to Counterclaim or Demand of Notice at the address for service for the Plaintiffs by Counterclaim named in this Statement of Defence and Counterclaim.

WARNING: If you do not do both things within 15 days, you may automatically lose the lawsuit. The Plaintiffs by Counterclaim (Defendants) may get a Court judgment against you if you do not file, or do not give a copy to the PLAINTIFFS BY COUNTERCLAIM (DEFENDANTS), or do either thing late.

**STATEMENT OF DEFENCE AND COUNTERCLAIM
OF PERERA SHAWNEE LTD., PERERA DEVELOPMENT
CORPORATION, DON L. PERERA and SHIRANIE M.
PERERA**

Jeffrey D. Poole
#126-2526 Battleford Ave S.W.
Calgary, AB T3E 7J4
Telephone: (403) 685-2012
Telecopier: (403) 284-3693
jdpool@poolerlawyer.com

