COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tekamar Mortgage Fund Ltd. v. British Columbia,* 2023 BCCA 20

Date: 20230117
Docket: CA47520

Between:

Tekamar Mortgage Fund Ltd. and Lori Anne Moen

Appellants
(Plaintiffs)

And

His Majesty the King in Right of the Province of British Columbia, Leslie Stephens, formerly known as Leslie Elder, and John Doe

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated May 10, 2021 (*Tekamar Mortgage Fund Ltd. v. British Columbia*, 2021 BCSC 886, Vancouver Docket S1810278).

Counsel for the Appellants:	J.L. Williams
Counsel for the Respondents, His Majesty the King in Right of the Province of British Columbia and Leslie Stephens, formerly known as Leslie Elder:	D. Brownell K. Fast
Place and Date of Hearing:	Vancouver, British Columbia May 9, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 17, 2023

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Justice Dickson
The Honourable Mr. Justice Grauer

Summary:

The appellants are the registered owners of property adjacent to lands that were approved for subdivision in 2015 by an approving officer acting pursuant to Part 7 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. The appellants' lands were "landlocked" as they did not have legal highway access. They alleged that the approving officer was negligent in approving the subdivision without a requirement for highway access to their property. On the application of the respondents, the Province and the approving officer, the chambers judge struck the negligence allegations in the amended notice of civil claim. On appeal, the appellants argue that the judge erred in concluding that an approving officer does not owe a private law duty of care when deciding whether to refuse or approve an application for subdivision. Held: Appeal dismissed. The judge did not err in concluding that Goy v. District of Sechelt, 2020 BCSC 1242, aff'd in Held v. Sechelt (District), 2021 BCCA 350, was an analogous precedent. As found in Held, an approving officer acting under Part 7 of the LTA does not owe a private law duty of care to property owners when deciding whether to refuse or approve an application for subdivision. Section 75(1)(a) of the LTA, which provides that a subdivision plan must provide for sufficient highway access to lands around and beyond subdivided land, does not have a separate and distinct legislative purpose. In addition, where a government regulator is alleged to owe a private law duty of care, a finding of proximity at the second stage of the analysis mandated in Waterway Houseboats Ltd. v. British Columbia, 2020 BCCA 378 requires direct interactions between the regulator and the plaintiff.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] This appeal arises from an order striking the appellants' claims in negligence against Leslie Stephens, formerly known as Leslie Elder (the "Approving Officer") and His Majesty the King in Right of the Province of British Columbia (the "Province"). The Approving Officer approved a subdivision of lands adjacent to lands now owned by the appellants, Tekamar Mortgage Fund Ltd. and Lori Anne Moen. The issue on appeal is whether an approving officer owes a private law duty of care when deciding whether to refuse or approve a subdivision. This Court recently considered that question in *Held v. Sechelt (District)*, 2021 BCCA 350. The Court concluded that the statutory scheme of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] precludes the imposition of a private law duty of care on an approving officer acting under Part 7 of the *LTA*: at para. 38.

[2] The appellants argue that the decision in *Held* is distinguishable as it did not concern the duties of an approving officer acting under s. 75 of the *LTA*, which requires that a subdivision plan "must", to the extent of the owner's control, include a "sufficient highway to provide necessary and reasonable access" to adjacent lands. The appellants maintain that an approving officer acting under s. 75 of the *LTA* has a statutory duty to ensure road access to lands adjacent to a subdivision.

[3] As the decision below struck the claims under Rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, the question on appeal is whether the judge erred in concluding it is plain and obvious that the appellants' claims in negligence are bound to fail. For the reasons that I follow, I would dismiss the appeal.

Background

[4] The appellants are owners of six lots located on the west bank of the Columbia River near Golden, British Columbia (the "Northern Lots"). In 2002, the appellants acquired an interest in the Northern Lots as mortgagees. Much later, they brought proceedings against the registered owners and, on June 9, 2014, obtained an order absolute of foreclosure and became the registered owners of the

Northern Lots. The two southernmost lots of the Northern Lots, described as lots LS 13 and LS 14, abutted two lots described as LS 11 and LS 12 (the "Southern Lots"). At all times, the Northern Lots have been "landlocked", meaning that they do not have legal highway access by way of a dedicated highway passing through the Southern Lots.

[5] In the amended notice of civil claim (the "ANCC"), the appellants allege that in early 2011, the owners of the Southern Lots (the "Developers"), applied to subdivide their lots into three lots. Paragraph 12 of the ANCC alleges that on or about September 27, 2011, the Province required the Developers "to enter into an access easement agreement to protect access to the Northern Lots by granting an easement from the public road to the Northern Lots, pursuant to the *LTA*, s. 75" as a condition of approving their application (the "Condition"). The appellants further allege that the Developers failed to meet the Condition imposed by the Province and that, notwithstanding that failure, the Approving Officer approved the application to subdivide the Southern Lots into three lots without any highway access to the Northern Lots. The subdivision of the Southern Lots was registered on April 23, 2015.

[6] In the ANCC, the appellants advance a claim against the Approving Officer for misfeasance in public office for approving the subdivision without imposing the Condition: at paras. 16–18. At paras. 20–24, the appellants advance a claim in negligence and claim that the Approving Officer owed a duty of care to the appellants. She is alleged to have breached the standard of care by failing to impose and enforce the Condition, and by failing to deny an application for subdivision that did not meet the requirements of the *LTA*. The ANCC also includes a claim against the Approving Officer for injurious affection. The appellants further allege that the Province is vicariously liable for the Approving Officer's acts and omissions.

[7] In their amended response to the ANCC, the defendants deny that the Approving Officer owed a duty of care to the plaintiffs and assert that there was no relationship of sufficient proximity to give rise to a duty of care. The defendants

further deny the existence of the alleged Condition and say that the Approving Officer exercised her discretion under the *LTA* in approving the subdivision, having determined that highway access to the Northern Lots was not reasonable and necessary.

[8] In January 2021, the respondents filed the application to strike the negligence claims. The appellants opposed the application and, at the same time, applied to further amend the ANCC. The parties agreed that if the application to strike was successful, the application to further amend became moot. Justice Gropper heard the applications and dismissed the claims in negligence: *Tekamar Mortgage Fund Ltd. v. British Columbia*, 2021 BCSC 886.

Reasons for Judgment

[9] The judge considered whether the Approving Officer owed a duty of care to the plaintiffs. The judge began by setting out the *Anns/Cooper* test for determining the existence of a private law duty of care. At the first stage of that test, whether there was a sufficiently analogous precedent that had determined either the existence or non-existence of a duty of care, the judge rejected the appellants' contention that *Re Kamloops Realty Ltd.*, [1976] B.C.D. Civ. 276 (S.C.) and *Kaim Developments Ltd. v. Mott,* 2009 BCSC 250, aff'd in 2010 BCCA 240, were analogous precedents. She noted that although those cases had some factual similarity to the circumstances before her, neither considered a claim in negligence nor whether a duty of care is owed by an approving officer: at para. 31.

[10] The judge found that *Goy v. District of Sechelt*, 2020 BCSC 1242, which was affirmed in *Held*, was an analogous precedent that "concluded that an approving officer under the *LTA* does not owe a private law duty of care in the subdivision approval process": at para. 32. Nevertheless, the judge went on to perform a full *Anns/Cooper* analysis in the event that she was incorrect in her conclusion.

[11] Referring to the two-stage proximity analysis set out in *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378, the judge considered whether the legislative scheme in the *LTA* expressly or by implication forecloses or imposes a

private law duty of care. In doing so, she rejected the appellants' contention that s. 75(1)(a) has a more specific purpose than furtherance of the public good and thus should be found to imply a statutory duty to act. She accepted the analysis in *Goy* which found that an approving officer is given a wide discretion that requires a broad focus on matters beyond the interests of immediate occupants of proposed subdivisions or those of neighbouring property owners. She accepted that there could be a conflict between the public interest and individual interests and that an approving officer must exercise her discretion reasonably in the public interest: at paras. 39–55.

[12] The judge then turned to the appellants' submission that proximity could be found on the basis of the necessary relationship between the parties created by s. 75(1)(a). The appellants argued that the absence of any direct interaction with the Approving Officer did not matter because she would have known of the serious harm they would suffer if the proposed subdivision did not provide access to their properties through the Southern Lots. The judge rejected that argument, finding it was inconsistent with this Court's statement of the law at para. 276 of *Waterway*, which held that direct interactions between a regulator and a claimant are required to establish sufficient proximity: at paras. 61–69.

[13] The judge then turned to consider the final stage of the *Anns/Cooper* analysis: whether there were residual policy reasons for negating a *prima facie* duty of care. The judge concluded that approving officers are protected against owing a private law duty of care because they are engaged in core policy decision-making when they exercise their discretion to approve a subdivision: at para. 78. The judge also accepted the respondents' argument that the risk of indeterminate liability "works against" recognizing a duty of care: at para. 85.

[14] Having found that the Approving Officer did not owe a duty of care, the judge struck the claims in negligence on the basis that they failed to disclose a reasonable cause of action. She denied the appellants' application to further amend the ANCC

to advance the negligence claims. She also struck out several of the appellants' misfeasance allegations.

On Appeal

Positions of the Parties

[15] The appellants raise three grounds of appeal. They argue that the judge erred:

a) in holding that *Goy* was an analogous precedent;

b) in concluding it was plain and obvious that there was not a relationship of sufficient proximity between the appellants and the Approving Officer; and

c) in concluding that residual policy considerations negate any possible imposition of a private law duty of care.

[16] The appellants acknowledge that the decision in *Held* affirmed the decision in *Goy*, but their arguments on appeal are not focused on this Court's reasoning in *Held*. Rather, they submit that *Held* is distinguishable because it involved an allegation that an approving officer failed to exercise reasonable care "in what would appear to be an otherwise reasonable exercise of his discretion": Appellants' Factum at para. 27. The appellants say that their claim is different because they allege that the Approving Officer made a decision by imposing the Condition on September 27, 2011. They argue that when the subdivision was approved in 2015, she either forgot to implement the prior decision or overturned it on such an inadequate basis that she cannot be said to have exercised her discretion at all.

[17] The appellants submit that the judge erred in her proximity analysis in finding that the legislative intent of the *LTA* was to effect a public purpose. They argue that her conclusion ignores the legislative purpose of s. 75(1)(a), which has been determined by other decisions in this province including *Re Kamloops Realty Ltd.* and *Kaim Developments Ltd*. They say that the purpose of s. 75 is to make provision

for access to land beyond and around subdivided land so as to provide for the present and future needs of residents of the general area.

[18] Acknowledging that s. 85 of the *LTA* allows an approving officer to refuse an application for subdivision if it is not in the public interest, the appellants argue that this does not apply to s. 75(1)(a). Rather, that section imposes a statutory duty on an approving officer to require a subdivision plan to include "a sufficient highway to provide necessary and reasonable access" to lands lying beyond the subdivided land. Further, they say there is no conflict between this statutory duty, owed to owners of adjacent lands, and an approving officer's public law duty to exercise their discretion in the public interest. In making that argument, they note that the language in s. 75(1)(a) is mandatory, not permissive. Although relief may be granted by an approving officer from compliance with the mandatory condition in s. 75(1)(a), that can only be done pursuant to regulations made under s. 76 and there is nothing in the regulations that could apply in this case.

[19] Turning to the second ground of appeal, the appellants argue that the judge erred in concluding that proximity could only be found on the basis of direct interactions between the claimant and the Approving Officer. The appellants argue that this is a misapplication of *Waterway*. Relying on *Kamloops (City of) v. Neilson*, [1984] 2 S.C.R. 2 and *Just v. British Columbia*, [1989] 2 S.C.R. 1228, they submit that proximity can be found in circumstances where an individual has an obligation to have regard for the interests of another so as to act in a manner that would not cause injury. This can include situations where there is no direct interaction between a regulator and the claimant.

[20] The appellants further argue that the Approving Officer's failure to implement the Condition is analogous to the failure of a government to implement a judicial decree. They say that such a failure is an operational decision, for which a claim in negligence may lie, rather than a core policy decision to which policy immunity is granted. The appellants argue that *Goy* is distinguishable, because the decision to approve the subdivision in that case was a core policy decision. Here, they submit

that the 2011 decision allegedly made by the Approving Officer to require the Condition was a policy decision. However, having decided to require the Condition, the Approving Officer's refusal or failure to implement it became an operational decision.

[21] The appellants also argue that the Approving Officer's failure to implement the Condition was so irrational as to amount to bad faith. They claim that there are no "proper factors" which could support a decision to approve the subdivision without the Condition. They note that a bad faith decision "on its own, is not actionable". However, they submit that this allegation should be allowed to proceed to trial as a negligence claim, as an alternative to the claim of misfeasance in public office. They argue that where a decision is made on a completely irrational basis, and the plaintiff is unable to prove the subjective elements of a misfeasance claim, the plaintiff should still be entitled to a remedy based on negligence.

[22] The respondents submit that *Held* is an analogous precedent and that it is decisive of the issues raised in this appeal. They argue that the appeal must fail at the first stage of the proximity analysis because it is not possible to infer an intention to create a private law duty of care from the provisions of the *LTA*. The Court in *Held* concluded that Part 7 of the *LTA* affords an approving officer a wide discretion to approve or reject a subdivision application under s. 85 and that the overarching consideration is whether the subdivision is "against the public interest". The Court found that the statutory regime, by necessary implication, precluded a private law duty of care.

[23] The respondents argue that the judge correctly concluded that s. 75(1)(a) does not create a positive duty to act. Rather, as part of the subdivision approval process, an approving officer is given discretion to determine whether, in all the circumstances, access to lands within and adjacent to the subdivision is necessary and reasonable. The respondents submit that s. 75 cannot be read in isolation to impose a mandatory, private protective obligation on the approving officer. That would be inconsistent with the public interest purpose of Part 7 of the *LTA*.

[24] Turning to the second stage of the *Waterway* proximity analysis, the respondents argue that even if the statute does not preclude a duty of care, the ANCC does not allege facts that could found a proximate relationship between the parties. The appellants have alleged no misrepresentations by the Approving Officer and no interactions, direct or otherwise, that could support a finding of a "direct and close relationship" sufficient for the imposition of a duty of care. They submit that the appellants are simply incorrect in asserting that there is no requirement for direct interactions at the second stage of the proximity analysis.

[25] The respondents further argue that the appellants attempt to characterize the regulatory action of the Approving Officer as operational, rather than a policy decision, cannot overcome a lack of proximity. The question of whether the alleged negligence arises from a policy or operational decision is to be considered at the last step of the *Anns/Cooper* analysis when deciding if there are residual policy reasons for negating a *prima facie* duty of care.

[26] In response to the appellants' argument that the exercise of discretion by the Approving Officer was so irrational as to amount to bad faith, the respondents say that this allegation does not support the existence of a duty of care because the law does not recognize a stand-alone action for bad faith. While a finding that discretion was exercised in bad faith may be a ground for judicial review or support a claim of misfeasance in public office, it does not assist in establishing a duty of care.

Standard of Review

[27] Whether a pleading discloses a cause of action is generally a question of law. The standard of review on an application to strike pleadings pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules* is usually viewed as one of correctness: *Kindylides v. John Does*, 2020 BCCA 330 at para. 19; *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 44, leave to appeal ref'd [2018] S.C.C.A. No. 25. I am satisfied that the decisive issue raised here is a pure question of law.

Issues on Appeal

[28] The issue raised on this appeal is whether an approving officer acting under the *LTA* owes a private law duty of care to property owners when approving or rejecting an application for subdivision. This question is to be determined by applying the *Anns/Cooper* test. That test was succinctly summarized in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 50–51, which the judge referred to at para. 22 of her reasons. Under that test, a court is required to address four questions:

> 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;
>
> If not;
>
> 2) Was the harm suffered by the plaintiff reasonably foreseeable;
>
> If yes;
>
> 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;
>
> If yes, a *prima facie* duty arises;
>
> 4) Are there any residual policy reasons for negating the *prima facie* duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.
>
> If not, then a novel duty of care is found to exist.

[29] The first ground of appeal is concerned with the first question, whether the judge was correct in concluding that *Goy/Held* is an analogous precedent. As I would answer that question in the affirmative, the subsequent questions do not arise on this appeal. However, as the appellants advance arguments regarding the third question, it is worth noting that this Court's decision in *Waterway* sets out the approach to determining whether there is a relationship of sufficient proximity where a claim is advanced against a government regulator.

[30] As I have indicated, it is my view that the decision in *Held* is an analogous precedent which decided that an approving officer does not owe a duty of care to owners of properties, both within and adjacent to a proposed subdivision, when deciding whether to approve or refuse an application for subdivision. This is a

complete answer to the appellants' arguments on appeal. In arriving at this conclusion, I have considered the following issues raised by those arguments:

a) What did *Held* decide?

b) Does s. 75(1)(a) have a separate and distinct legislative purpose?

c) Did the judge err in failing to give any weight to the alleged Condition?

d) Did the judge err in deciding that direct interactions with the Approving Officer were required to find a duty of care?

e) Is the allegation of bad faith relevant to the alleged duty of care?

The *Land Title Act*

[31] The appeal concerns Part 7 of the *LTA*, "Descriptions and Plans", which is lengthy and detailed. It is divided into twelve Divisions which deal with plans, surveys, land description, the appointment, powers and duties of approving officers, and the approval and deposit of subdivision plans amongst other matters relating to parcels of land.

[32] Division 3 of Part 7 deals with the appointment of approving officers. The properties in question were not within a municipality, regional district or an area covered by the *Islands Trust Act*, R.S.B.C. 1996, c. 239 and so the Approving Officer was appointed by the Lieutenant Governor in Council as a provincial approving officer under s. 77.2 of the *LTA*.

[33] The following sections of the *LTA*, from Division 2, "Subdivision of Land", and Division 4, "Approval of Subdivision Plans", have particular relevance to the issues raised on this appeal.

[34] First, s. 75(1) provides that:

> 75 (1) A subdivision must comply with the following, and all other, requirements in this Part:

> (a) to the extent of the owner's control, there must be a sufficient highway to provide necessary and reasonable access
>
> (i) to all new parcels, and
>
> (ii) through the land subdivided to land lying beyond or around the subdivided land;

[35] Section 75(3) provides that, "In considering the sufficiency of a highway shown on a plan and to be dedicated to the Crown", the approving officer must consider a number of enumerated factors (see ss. 75(3)(a)–(f)), which include the location and width of the highway, the extent of the use to which the highway may be put in the present or future, and the configuration of the land and pre-existing highways.

[36] Sections 76(1) and (2) provide that the Lieutenant Governor in Council may make regulations prescribing circumstances in which an approving officer may grant relief from compliance with s. 75(1)(a) or (b).

[37] Section 85(3) provides that:

> In considering an application for subdivision approval in respect of land, the approving officer may refuse to approve the subdivision plan if the approving officer considers that the deposit of the plan is against the public interest.
>
> [Emphasis added.]

[38] Section 86(1) provides that, "Without limiting section 85(3), in considering an application for subdivision approval, the approving officer may" examine or have an examination report made on the subdivision, hear from all persons affected by the subdivision, and refuse to approve the subdivision plan based on a number of enumerated factors (see ss. 86(1)(c)(i)–(xi)). These factors include any injurious impact on the established amenities of adjoining or reasonably adjacent properties, whether the development of the subdivision would adversely affect the natural environment, and the cost of providing public utilities or other works or services to the government, municipality or regional district.

What did Held decide?

[39] The appellants' submission that *Held* is inapplicable to the circumstances of this case requires us to consider what this Court decided in *Held*. The plaintiffs in *Held* were homeowners who brought claims in negligence against an approving officer who had approved the subdivision in which their properties were located. In approving the subdivision, the approving officer had required the developer to commission engineering reports attesting to the geotechnical state of the land and to register covenants against the lands based on those reports. The appellants' properties were later declared to be unsafe for occupation as a result of geotechnical instability. The claims in negligence were based on the approving officer's approval of the subdivision despite the existence of known geotechnical risks.

[40] The defendants in *Held*, the District and the approving officer, applied to dismiss the claims in negligence. The chambers judge concluded that no private law duty of care was owed by the approving officer due to a lack of proximity and struck the claims under Rule 9-5. He further concluded that even if there were such a duty, it would be negated by residual policy considerations.

[41] On appeal, Justice Harris, writing for this Court, began his analysis by referring to the *Anns/Cooper* test. He considered whether a duty of care had been established by precedent. The appellants argued that the decisions in *Hercules Managements v. Ernst & Young*, [1997] 2 S.C.R. 165, and *Cooper v. Hobart*, 2001 SCC 79, had determined that sufficient proximity for a *prima facie* duty of care is presumed where the risk of physical harm to claimants' person or property is reasonably foreseeable. They based that argument on the fact that the approving officer was aware that a risk of physical harm to the appellants' property would arise from the approval of the subdivision. The Court rejected this argument based on the subsequent decisions in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 and *Rankin (Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19. Justice Harris concluded:

> [18] It is, in my view, clear that where negligence is alleged against a public authority, a court must undertake a proximity analysis rooted in the

> governing statute. This is the upshot of numerous cases across Canada involving reasonably foreseeable risk of physical harm to person or property, including cases from the Supreme Court of Canada and this Court.

[42] Justice Harris next turned to the question of proximity and observed that the analysis is complicated where the alleged tortfeasor is a public official acting pursuant to statutory authority. Referring to *Wu v. Vancouver (City of)*, 2019 BCCA 23, he noted that no nominate tort of breach of statutory duty is recognized in Canada and that public authorities generally have powers and duties to act in the public interest rather than to protect private interests of individuals affected by a scheme of regulation. Referring to *Waterway*, he set out the two conceptual stages involved in determining whether sufficient proximity exists between a government regulator and a regulated party to justify recognition of a duty of care: 1) whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care; and 2) if that is not determinative, whether there is a sufficiently close and direct relationship based on the interactions between the regulator and the plaintiff to make it just to impose a *prima facie* duty of care on the regulator. Justice Harris rejected the appellants' submission that the *Waterway* analysis should not be used to consider proximity given the function and role of an approving officer.

[43] Turning to the legislative intent, Justice Harris set out relevant provisions of the *LTA* beginning with s. 85(3), which grants an approving officer the discretion to refuse to approve a subdivision plan if the approving officer considers that the deposit of the plan is against the public interest: at para. 27.

[44] One of the appellants' primary submissions was that the chambers judge had erred in taking the "public interest" consideration in s. 85(3) "to be the overriding consideration in an approving officer's exercise of discretion because it is only one of many grounds upon which an approving officer may refuse to authorize a subdivision…": *Held* at para. 29. The appellants argued that some of the considerations in s. 86(1) should be regarded as having a private and protective purpose; the avoidance of injury or damage to property for a small, defined class of subsequent owners.

[45] Justice Harris rejected these arguments, concluding that "the public interest is the overarching consideration pursuant to which approving officers exercise their authority": at para. 31. He further observed:

> [32] … A statutory scheme aimed at promoting the public good does not lose that quality, and proximity is not established, simply because a group of plaintiffs are individuals who stand to benefit from the scheme's proper administration: *Wu* at para. 56.

[46] Justice Harris also rejected the appellants' submission that an approving officer acting under the *LTA* has a positive duty to act. Rather, an approving officer "has powers that are largely permissive in nature": at para. 33.

[47] Justice Harris referred with approval to the description of the statutory framework of Part 7 of the *LTA* found at para. 34 of *0742848 B.C. Ltd. v. Squamish (District)*, 2017 BCSC 2177, concluding:

> [35] I agree with that description. Part 7 of the *LTA* curtails the common law right to subdivide land, and affords an approving officer with wide discretion to refuse to approve a subdivision where it is against the public interest. That involves balancing and weighing risks and competing interests, including those of neighbouring landowners, the municipality and lot owners in the subdivision, to arrive at an overarching determination that is in the public interest.
>
> [Emphasis added.]

[48] He specifically found that the statutory scheme of the *LTA* precluded a private law duty of care and, having arrived at that conclusion, that further analysis was not required. A *prima facie* duty of care could not be established as "the proximity analysis ends upon concluding that the legislation forecloses the possibility of a private law duty of care": at para. 38.

[49] I have gone through the reasons in *Held* in some detail for two reasons: to demonstrate the scope of that decision; and to highlight the similarity between the arguments advanced in this case and those rejected in *Held*.

[50] I will deal first with the stated *ratio* in *Held*. The Court specifically approved of the description of the legislative scheme of Part 7 of the *LTA* set out in *0742848 B.C.*

Ltd., in which Justice MacNaughton observed at para. 32 that, "Central to the *LTA's* statutory framework is the role of an AO (approving officer) who is responsible for determining whether a proposed subdivision of land is in the public interest."

[51] In *Held*, the Court concluded that "Part 7 of the *LTA*… affords an approving officer with wide discretion to refuse to approve a subdivision where it is against the public interest": at para. 35. Further, it held that "…the statutory scheme of the *LTA* precludes, by necessary implication, a private law duty of care…": at para. 38. As I have indicated, those conclusions were arrived at based on an examination of the extensive scheme established in Part 7 of the *LTA*.

[52] The appellants have not attempted to demonstrate any error in the Court's analysis, other than to assert that s. 75(1)(a) should be excepted from that conclusion. In my view, that position is untenable. First, I note that the appellants' position ignores basic principles of statutory interpretation. The argument that s. 75(1)(a) creates a statutory duty on the part of an approving officer to require a developer to include highway access to adjacent properties isolates that provision from the scheme set out in Part 7 of the *LTA*. That is contrary to the accepted approach to statutory interpretation which requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at para. 50; *Canada Trustco Mortgage v. Canada*, 2005 SCC 54 at para. 10.

[53] The Court in *Held*, having considered the *whole* of Part 7 in context, found that the overarching consideration for an approving officer considering an application for subdivision is the "public interest". Further, the Court concluded that the statutory scheme excludes, by necessary implication, the imposition of a private law duty of care.

[54] The submission that the *ratio* in *Held* does not apply to s. 75(1)(a) is without merit. Section 75(1)(a) is contained in Division 2 of Part 7 and is an integral part of

the scheme considered in *Held*. Further, and contrary to the submissions of the appellants, s. 75(1)(a) does not, on plain reading, purport to impose a duty on approving officers to require that access be provided to adjacent properties. Instead, it sets out a requirement for "a subdivision" that is not mandatory when considered in context, and does not impose any duty on an approving officer. The requirement for the provision of access to adjacent properties is "subject to the extent of the owner's control" and, from the approving officer's perspective, to the considerations in subsection 75(3). Further, pursuant to s. 76(1) an approving officer may grant relief from compliance with s. 75(1)(a) pursuant to regulations. In addition, s. 85(3) grants an approving officer the discretion to refuse to approve a subdivision plan if they consider it "against the public interest", whether it includes or does not include the access requirement in s. 75(1)(a).

[55] Second, the appellants' arguments are very similar to those advanced and rejected in *Held*. The Court specifically rejected the contention, repeated here by the appellants, that the public interest is not the overarching consideration pursuant to which approving officers exercise their authority under Part 7 of the *LTA*. The Court also rejected the argument that isolated provisions of s. 86(1)—matters to be considered by an approving officer on an application for approval—should be interpreted as having a private and protective purpose (the avoidance of injury or damage to property for a defined class of subsequent owners). That is similar to the appellants' argument that s. 75(1)(a) should be found to have a private and protective purpose for the benefit of adjacent property owners.

[56] In my view, the submission here has less merit than the argument in *Held*. The claim advanced by the appellants, and the purpose they assign to s. 75(1)(a), is not associated with any risk of physical harm to person or property. Rather, it is based on preserving or increasing the value of their adjacent properties. To paraphrase Justice Harris in *Held*: a statutory scheme aimed at promoting the public good does not lose that quality, and proximity is not established, simply because individual claimants may benefit from the application of the statutory scheme.

[57] In summary, it is my view that *Held* decided that an approving officer does not owe a private law duty of care when deciding whether to approve or reject an application for subdivision. This is a broad statement of principle regarding the statutory scheme in Part 7 of the *LTA*. Accordingly, it is applicable to the circumstances of this case and the Approving Officer's approval of the subdivision of the Southern Lots. This is a complete answer to the appeal, but I will nevertheless consider some of the appellants' additional arguments.

Does s. 75(1)(a) have a separate and distinct legislative purpose?

[58] Relying on *Re Kamloops Realty Ltd.* and *Kaim Developments Ltd.*, the appellants argue that the purpose of s. 75(1)(a) is to make provision for access to land beyond and around subdivided lands so as to provide for the present and future needs of residents in the area. This argument is without merit and, as discussed above, is foreclosed by the decision in *Held*.

[59] On a first review of the appellants' authorities, there appears to be some appeal to their position. The courts in both cases concluded that an approving officer was required to take into consideration the access requirements of future property owners when deciding whether to approve a subdivision. In *Re Kamloops Realty Ltd.*, the Court stated that "the Legislature intended in Section 86(a) [now s. 75(1)(a)] to make provision for access to land beyond and around in whatever stage of development they may be found so as to provide for both the present and future needs of residents in the general area": at para. 19. However, as the judge noted below, neither case involved a claim in negligence against the approving officer and neither dealt with the question of whether an approving officer owes a private law duty of care.

[60] Both decisions referenced are judicial reviews challenging decisions of approving officers on the basis that they did not exercise their discretion reasonably in relation to highway access. There is no question that an approving officer, in carrying out their duties, must have regard to the provisions in the *LTA*, including s. 75(1)(a). An aggrieved party may challenge an approving officer's decision by way

of judicial review. However, the issues raised on an application for judicial review of the approval or rejection of a subdivision do not include the question of whether an approving officer owes a private law duty of care. That question is to be decided by application of the *Anns/Cooper* test, and the determination of whether there is sufficient proximity to support a duty of care is to be approached by application of the *Waterway* analysis. That is exactly what the judge did. She did not err in concluding that *Re Kamloops Realty Ltd.* and *Kaim Developments Ltd.* did not determine the broader legislative purpose of s. 75(1)(a), or Part 7 of the *LTA*, as part of a proximity analysis.

[61] The appellants also rely on *Seaview Land Estates Ltd. v. South*, [1981] B.C.J. No. 771 (C.A.) for the proposition that s. 75(1)(a) is “mandatory” on an approving officer. Although the broad statements in that decision suggest that an approving officer’s discretion to grant relief may be limited, it concerned a challenge by a developer to an approving officer’s rejection of a proposed plan of subdivision. It did not involve a claim in negligence against the approving officer. The Court decided that the *LTA* did not give an approving officer the power to approve a subdivision that is contrary to the public interest and did not permit the registration of an unlawful subdivision. The decision did not consider the question of an approving officer’s private law duty of care and is not relevant to the issues on this appeal.

Did the judge err in failing to give any weight to the alleged Condition?

[62] In the ANCC, the appellants allege that the Approving Officer imposed the Condition in 2011 (requiring the Developers to enter into an agreement to provide access), and that when she approved the subdivision in 2015, she wrongfully ignored or forgot about the Condition. The appellants rely on those allegations to support their arguments that the Approving Officer’s alleged breach was an operational rather than a policy decision, and that she acted in bad faith. The respondents deny that the Approving Officer ever imposed the Condition.

[63] On an application to strike, a court is to proceed on the basis that the allegations in the notice of civil claim are true. The appellants do not argue that the

judge erred in failing to accept the allegation regarding the Condition, as the truth of that allegation was not material to the judge's conclusion that it was not possible to infer a legislative intent to impose a private law duty of care on approving officers. However, as the alleged Condition is relevant to the appellants' arguments described above, it is worth noting that the judge was not required to accept that allegation as true. On an application to strike, a court may treat bald or fanciful allegations with skepticism: *Kindylies* at para. 34, approving Justice MacDonald's statements in *Owimar v. Stewart*, 2019 BCSC 1198 at paras. 19–20.

[64] In this case, had the judge been required to decide whether to accept the allegation in the ANCC regarding the 2011 approval of the subdivision subject to the Condition, she could properly have viewed it skeptically. The statutory scheme makes no provision for the kind of preliminary or conditional approval that is alleged. There is no provision in the *LTA* allowing an approving officer to grant preliminary or conditional approval of a subdivision prior to actually deciding whether to approve or reject a subdivision. The statutory scheme does not involve a two-step procedure where an approving officer makes an initial "policy decision" and then a final "operational decision" to implement the policy decision. Further, it is not possible for an approving officer to consider a subdivision application for four years without deciding whether to approve it. Section 85(1) of the *LTA* provides that "a subdivision plan must be approved or rejected by the approving officer within 2 months after the date it is tendered for examination and approval". Quite simply, the argument is legally fanciful. Moreover, if it were to be accepted as true for the purpose of an application to strike, it would not have any impact on the analysis of legislative intent.

Did the judge err in deciding that direct interactions with the Approving Officer were required to find a duty of care?

[65] Having found that *Held* is an analogous precedent and that the statutory scheme of the *LTA* forecloses the imposition of a private law duty of care on an approving officer, it is not necessary to consider the appellants' alternative argument that sufficient proximity could be found in the absence of direct interactions between the appellants and the Approving Officer. Nevertheless, I would emphasize that this

argument ignores the established approach to proximity when considering an allegation that a duty of care is owed by a government regulator, as set out in *Waterway*:

> [243] There are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator. At the first stage, the task is to determine whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care. At the second stage, if the legislation is not determinative, courts must look to the interaction between the regulator and the plaintiff to determine whether a sufficiently close and direct relationship exists to impose a *prima facie* duty of care…
>
> [Emphasis added.]

[66] Later, in para. 243, the Court further describes the second stage of the proximity analysis:

> *Stage two: interactions between the parties*
>
> - If the legislative scheme is not determinative, courts then consider the specific circumstances of the interactions between the regulator and the plaintiff to determine if a close and direct relationship exists sufficient to establish proximity: *Imperial Tobacco* at para. 50; and *Taylor* at para. 79.
> - Findings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific: *Taylor* at para. 80.
> - Proximate relationships may involve physical closeness, direct relationships or interactions, or the assumption of responsibility; or may turn on expectations, representations, reliance, or the nature of property or other interests involved. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests: *Cooper* at paras. 32–34; and *Wu* at para. 51.
>
> …
>
> [Emphasis added.]

[67] There is simply no merit to the appellants' suggestion that, if the legislative scheme is not determinative, proximity can be found between a regulator and a member of the public who had no interactions with that regulator. Proximity is determined at the second stage by examining the "specific interactions between the regulator and the Plaintiffs": *Waterway* at para. 274. Here, there was no relationship

or interactions between the appellants and the Approving Officer, and the appellants cannot point to any representations on which they relied to establish proximity.

[68] The appellants' submission asks this Court to conflate their position with that of the Developers, the regulated parties, with whom the Approving Officer had direct interactions. They ask this Court to make the same mistake made by the trial judge in *Waterway*: at para. 259. Accepting that argument would create a broad private law duty of care owed to individual members of the public, contrary to the public purpose of the *LTA*.

Is the allegation of bad faith relevant to the alleged duty of care?

[69] Similarly, it is my view that there is no merit to the appellants' argument that they should be permitted to advance a claim in negligence because the failure of the Approving Officer to implement the Condition was so irrational as to amount to bad faith.

[70] In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, the plaintiff class alleged that certain instructions given by the Minister of Health and Wellness amounted to a bad faith exercise of discretion. The Court found that the allegation of bad faith, as pleaded, was bootstrapped to the duty of care claim and could not survive on its own if the plea in negligence was struck: at paras. 76–77. The Court stated that, "The law does not recognize a stand-alone action for bad faith": at para. 78. Rather, the bad faith exercise of discretion by a government authority would be a ground for judicial review, or an element of the tort of misfeasance in public office.

[71] Here, the appellants do not purport to advance a stand-alone allegation of bad faith. Instead, they argue that where the Approving Officer's discretion was exercised so irrationally as to amount to bad faith, the negligence claim should be permitted to proceed to trial. In my view, that is similar to the argument made in *Elder*. The allegation of bad faith is boot-strapped to the duty of care claim. As noted in *Elder*, the allegation of a bad faith exercise of discretion could be a proper ground for judicial review of the Approving Officer's decision to approve the subdivision, or

could suffice as an element of the alleged tort of misfeasance in public office. However, it is not relevant to the question at issue here: whether the Approving Officer owed a private law duty of care to the appellants in approving the subdivision of the Southern Lots. As the respondents argue, bad faith cannot establish both the existence of a duty of care and its breach.

Disposition

[72] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Grauer"