CITATION: Heyde v. Theberge Developments Limited, 2017 ONSC 1574
COURT FILE NO.: 15-64526 CP
DATE: 2017/03/09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Sabrina Heyde	)	
	)	Miriam Vale Peters and Joanie Roy, Counsel
Plaintiff	)	for the Plaintiff
	)	
– and –	)	
	)	
Theberge Developments Limited and Joey Theberge, et al	)	Norman Mizobuchi, Counsel for the Defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** September 21, 2016

REASONS FOR DECISION ON CERTIFICATION MOTION

R. SMITH J.

[1] The Plaintiff seeks to certify this action as a class proceeding against the Defendants, Theberge Developments Limited and Joey Theberge. Theberge developed and sold condominium units in the Alta Vista Ridge development.

[2] The Plaintiff alleges that all units sold to class members did not include a heating system in accordance with the specifications for a standard unit contained in the Disclosure Statement. The plaintiff also proposes a subclass for those purchasers whose Agreements of Purchase and Sale ("APS") included a basement storage unit, which was not provided to them by the developer.

[3] The Plaintiff alleges that Theberge breached its statutory duties under the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") to all members of the proposed class by failing to deliver condominium units containing a forced air heating system in accordance with the specifications contained in the Disclosure Statement for every member of the proposed class. This breach also

gives rise to claims of breach of fiduciary duty, negligent and fraudulent misrepresentation, breach of contract, and a failure to act in good faith by the defendant.

[4] The Plaintiff submits that there are common issues that form a substantial and essential part of all class members' claims which would move the action forward. The plaintiff further submits that it is preferable to determine those common issues in one legal proceeding to meet the objectives of the *Class Proceedings Act*, 1992. S.O. 1992, c. 6 (the "*CPA*").

[5] Theberge submits that Ms. Heyde is not a suitable representative Plaintiff; that the Plaintiff's claim does not disclose a reasonable cause of action for breach of fiduciary duty, for breach of contract, for negligent or fraudulent misrepresentation, for breach of the Condominium *Act*, that there is no identifiable class; that there are no common issues, and that a Class Proceeding is not the preferable procedure. In summary, the Defendants' oppose certification on every criterion to certify a class action.

Facts

[6] Theberge Developments Limited ("Theberge") is the developer of Alta Vista Ridge which is a new multi-building residential development located south of Highway 417 and the St. Laurent Shopping Centre in Ottawa.

[7] Alta Vista Ridge's condominium corporations are Ottawa-Carleton Condominium Corporation No. 941 and Ottawa-Carleton Condominium Corporation No. 958. They were registered in February and November 2014 respectively.

[8] The defendant Joey Theberge is the president and director of Theberge Developments. He was not involved in the sales of the units and did not interact with the purchasers directly.

[9] Blocks 1 to 3 of Alta Vista Ridge are stacked townhouses known as the Terrace Towns. There are 32 units in blocks 1 and 2. Sales and marketing of these units commenced in June 2011. There are 24 units in block 3. Sales and marketing for this block commenced in September 2012. Blocks 4 to 7 are low-rise apartment buildings known as the Urban Flats. There are 82 units in these blocks. Sales and marketing for these units commenced in July 2011.

Disclosure Statements for all Class Members for all Condominium Units (Both Terrace Towns and Urban Flats)

[10] There are separate Disclosure Statements for the Terrace Towns and Urban Flats condominiums but the specifications for a standard unit in both Disclosure Statements are identical and include a forced air heating system.

[11] All purchasers and all proposed class members received a Disclosure Statement with their APS. Schedule "2" to all of the Disclosure Statements for every proposed class member sets out the specifications for a standard condominium unit to include "Forced Air Heating/Cooling system".

Agreements of Purchase and Sale

[12] It is not disputed that Theberge Developments drafted all agreements of purchase and sale as well as the condominium's Disclosure Statements. Below are certain relevant terms from the Agreements of Purchase and Sale for all class members:

> 18.(a) This Agreement constitutes a binding contract of purchase and sale and expresses the entire understanding and agreement between the parties hereto and there is no representation, warrant, collateral agreement or promise whatsoever affecting the Property or the transaction described herein except as expressed herein in writing. This Agreement and the Schedules and attachments hereto shall not be amended, altered or qualified except by a memorandum in writing signed by the parties hereto; and
>
> 27. The Purchaser acknowledges receipt of a Disclosure Statement, draft rules, draft Declaration, draft by-laws, draft management agreement, draft lease agreement, draft standard unit description and proposed budget statement prior to executing this Agreement.

[13] Section 2.3 of the Disclosure Statement also provided that each owner "shall be responsible from the Occupancy Date for all utilities, including separately metered hydro, water and gas rates, telephone expenses, cable television service, hot water rental charges and all other charges and expenses attributable to the Dwelling Unit which are not included in the monthly common expenses of the Corporation.

Specifications List attached to APS

[14] There were two versions of the specifications sheet attached as Schedule "D" to each proposed class member's APS for all Alta Vista Ridge units – the first dated June 28, 2011 included the term "Forced Air heating/Cooling", and the for second APS commencing on March 11, 2013, these words were removed.

[15] After February 15, 2015, the APSs prepared by Theberge, added a term at paragraph 15 to the standard APS where each purchaser of a Terrace Town or Urban Flats unit agreed that the HVAC system may be a rental unit. The relevant part of paragraph 15 reads as follows:

> 15. Hot Water tank/Water Heater/HVAC System
>
> > The purchaser acknowledges that the water heater and HVAC system in the dwelling may be a rental unit. The purchaser agrees to…

[16] What is common to all purchasers for condominium units in both Terrace Towns and Urban Flats, until paragraph 15 was added after February 15, 2015, is that their Disclosure Statements given to each purchasers as required under ss. 72-74 of the *Act*, contained the specifications for a standard unit at Schedule "2" which stated under Heating and Mechanical that each standard unit included "Forced Air Heating/Cooling." This turns out to be false as a forced air heating system was not included with the unit, but was a rental.

Storage Units

[17] In June of 2011 Urban Flats prepared an Agreement of Purchase and Sale in advance of the marketing and sales of the Urban Flats units which included a storage unit in the base price.. In April 2014 Theberge amended the APS to remove where it stated "Base Price for Unit (inclusive of a Storage Unit)".

[18] Theberge acknowledges that sixty-one (61) purchasers of Urban Flats Units signed an APS which included a "Storage Unit" in the base price. None of these purchasers obtained a storage locker unit which was included in the base price. Fifteen (15) purchasers signed an APS that did not include a "Storage Unit" in the base price.

[19] On October 14, 2014, Theberge advised owners at Urban Flats that it had 21 lockers for sale at 2,500.00 or $5,000 per locker, depending on the size.

Acknowledgement Document

[20] At meetings held before closing for purchasers to choose colours and upgrades, Theberge sales staff had each purchaser sign an Acknowledgment that the hot water heater and the fan coil would be rented. All Acknowledgments were similar.

[21] The Acknowledgment signed by the proposed representative plaintiff is as follows:

Plulse 2 – Urban Flats

Sabrina Heyde,

Block 4 Unit 100-1757 Russell Rd.-Alta Vista Ridge

I Sabrina Heyde, the owner of Block 4 Unit 100-1757 Russell Road by signing below do confirm that I have been Informed by Theberge Developments LTD and I accept that the below numbered fan coil and hot water tank will be rented from Reliance Home Comfort for which I accept a monthly rental fee for the equipment below.

Hot Water Heater: Envirosense Power Vent Product Code: 6G5076NVC-02

Fan Coil: Ecologix Air Handler Product Code: RE30

Signature: Sabrina Heyde

Date: 2013/09/17

Theberge Homes

[22] The rental cost for the heating system was $84.41/month and increased to $85.97 in November of 2015.

Air Conditioning

[23] The evidence is uncontested that Theberge sales staff negotiated the cost of air conditioning as an additional feature that was not included in the purchase price. Some purchasers purchased air conditioning as an extra for $1,500.00 and others negotiated its inclusion as part of their purchase price.

[24] The plaintiff does not claim for damages for failing to include air conditioning as they were told this was an extra feature when they agreed to purchase and it is not a common issue for the class.

Interim Occupancy

[25] All purchasers of Terrace Homes and Urban Flats units commenced interim occupancy of their units for several months before they closed the transaction and took title to their unit.

Analysis

[26] Section 5(1) of the *Class Proceedings Act*, 1992. S.O. 1992, c. 6 ("*CPA*") sets out five requirements to certify an action as a class proceeding, namely:

> The court shall certify a class proceeding on a motion under ss. 2, 3 or 4, if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be interested by the representative plaintiff or defendants;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceedings would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[27] Section 6 of the *CPA* states that:

> The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different class members.
>
> 3. Different remedies are sought for different class members.
>
> 4. The number of class members or the identity of each class member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[28] In *Hollick v. Toronto (City)*, 2001 SCC 68 [2001] 3 S.C.R. 158, at paras. 20 and 25, the Supreme Court of Canada stated that the representative plaintiff must show some basis in fact for each of the certification requirements, as set out in s. 5 of the *CPA*, and as outlined above.

[29] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.,* 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court emphasized that the certification stage does not allow for an extensive assessment of the evidence, nor of the complexities and challenges that a Plaintiff' may face in establishing their case at trial.

A Cause of Action (s. 5(1)(a) of the *CPA*)

[30] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), the Ontario Court of Appeal affirmed that the "plain and obvious" test established in *Hunt v. Carey Canada*

Inc., [1990] 2 S.C.R. 959, applies to determine if a cause of action has been pleaded. Like a Rule 21 motion, in determining whether the plaintiffs have established a cause of action, all of the facts pleaded are assumed to be proven, claims that are unsettled in the jurisprudence should be allowed to proceed, and the pleadings should be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of discovery information.

[31] Where the pleadings allege fraud or misrepresentation, Rule 25.06(8) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") requires that the full particulars of the material facts to support such a claim be pleaded.

[32] The Plaintiff has pleaded the following causes of action:

(a) Breach of contract;

(b) Breach of the provisions of the *Condominium Act*;

(c) Negligent misrepresentation;

(d) Fraudulent misrepresentation;

(e) Breach of fiduciary duty;

(f) Unjust enrichment; and

(g) Punitive damages.

Breach of Contract

[33] The Plaintiff alleges that Theberge breached their contracts or Agreements of Purchase and Sale with each class member by failing to include a forced air heating system in each unit in breach of the specifications and for a standard unit contained at Schedule "2" of the Disclosure Statement. For the subclass the Plaintiff alleges that the Defendants breached the contract by failing to provide a storage unit, as each subclass member's APS stated that a storage unit was included in the base price.

[34] The Defendants submit that the sixty-one (61) APSs that included a storage unit as part of the base price for the unit was merely a drafting error. I find that it is not plain and obvious that the Plaintiff would not be successful at trial on her claim that the failure to provide the storage

units included in the APS's would not constitute a breach of contract, which may survive closing.

[35] I also find that it is not plain and obvious that the Plaintiff would not be successful in her claim that the failure to include a heating system, as specified in the specifications for the unit contained at Schedule "2" of the Disclosure Statement, could not be found to be a breach of contract.

Breach of the Condominium Act

[36] I also find that he plaintiff has raised a valid cause of action on whether the inclusion of a forced air heating system or a storage unit for the subclass, was a contractual condition or a collateral warranty under ss. 72-74 and s. 133(2) of the *Condominium Act*. These sections of the Act allow an owner to sue for damages or loss derived from reliance on information that the declarant is required to provide under the *Act*, which would include the Disclosure Statement which included specifications for a standard unit. A breach of these sections of the *Act* would survive closing of the transaction.

[37] Sections 72-74 of the *Condominium Act* require the vendor to provide a disclosure statement to buyers and to advise them of any material changes. Section 74(1) defines a "material change" as any information that a reasonable purchaser would objectively have considered important in deciding not to enter an APS or to rescind the offer.

[38] In addition, s. 133(2) of the *Act* allows an owner to sue for damages for any losses derived from reliance on information that the declarant was obligated to provide under the Act, which includes a Disclosure Statement This would include anything that could constitute a "material change" from what was specified in the specifications attached to the Disclosure Statement provided to them when the APS was signed.

[39] As a result, the plaintiff claims that Theberge breached the terms of the *Condominium Act* by providing a unit that was "materially changed" from what was provided for in the specifications for a standard unit attached to the Disclosure Statement by not including a forced air heating system and by not providing a storage locker with the unit, I find that the plaintiff may well be successful and that this constitutes a validly pleaded cause of action.

Negligent Misrepresentation

[40] The decision of the *Queen v Cognos,* [1993] 1 S.C.R. 87 (S.C.C.) stated that to prove a negligent misrepresentation, a Plaintiff must establish that:

(a) a duty of care existed;

(b) that the representation was untrue, inaccurate or misleading;

(c) that the defendant acted negligently in making the misrepresentation; and

(d) that the purchasers relied on the negligent misrepresentation to their detriment.

[41] The Plaintiff alleges that the purchasers relied on the terms contained in the Disclosure Statement and the specification set out in Schedule "2" for a standard unit when purchasing their condominium unit. They claim that the terms of the Disclosure Statement and the specifications for a standard unit attached constituted a representation to them, that their unit included a forced air heating system. The vendor would have known that the heating system was rented and not included as part of the unit.

[42] The Disclosure Statement specifying that a standard unit contained a forced air heating system was false, inaccurate or misleading because a heating system was not included with the purchase of a condominium unit, but rather it was rented. The vendor would have owed a duty of care to a purchaser not to make inaccurate or misleading representations. It is also reasonable to infer that the purchasers of a condominium unit relied on the representations in the Disclosure Statement and the specifications for a standard unit contained therein. The purchasers would have suffered damages by not receiving a forced air heating system with their condominium unit.

[43] While the plaintiff's claim is mainly for a breach of contract and breach of the *Condominium Act*, I find that it is not plain and obvious that the plaintiff would not be successful on their claim for the tort of negligent misrepresentation.

Fraudulent Misrepresentation

[44] The essential elements of a fraudulent misrepresentation are as follows:

(a) The misrepresentation complained of was made by the Defendant;

(b) The representation is false;

(c) The defendant knew when making the statement, it was false, or was reckless whether it was true or false; and

(d) The representation induced the Plaintiff to act to their detriment.

[45] The Plaintiff alleges that Theberge made fraudulent misrepresentations to each purchaser when they signed an untitled document accepting the rental of the hot water heater and fan coil after they had signed their APS. I will refer to this document as the "Acknowledgement". The Plaintiff alleges that when the purchasers went to a meeting to choose upgrades and colours for their units, they were presented with a document which stated that they were informed and accepted that the "hot water tank and fan coil would be rented from Reliance Home Comfort".

[46] The Plaintiff alleges that Theberge fraudulently misrepresented to the purchasers that they were signing documents that were related to choosing colours and upgrades, when in fact they were acknowledging a material change to their APS.

[47] One of the essential elements for a fraudulent misrepresentation is that the misrepresentation must have caused the Plaintiff to act to his or her detriment. Assuming that the pleaded allegations are true that a false representation was made to each purchaser when they signed the Acknowledgement that the hot water tank and fan coil were a rental, did this cause them to "act to their detriment"?

[48] The Acknowledgment purports to have the purchaser accept that the hot water tank and the "fan coil" were rented. The "fan coil" is in fact the heating system for each condo unit. The purchaser was not promised anything when they signed the Acknowledgement. In fact the purchaser purportedly accepted that the heating system was no longer included as part of the Standard Unit as set out in the specifications attached to the Disclosure Statement and would now be rented by the purchaser. Signing the Acknowledgment would amount to acting to their detriment if this document is legally binding. The purchasers did not provide any additional consideration to the Defendant to purportedly amend their terms of the APS when they signed the Acknowledgment. Whether the signing of the Acknowledgement document has any legal effect may be a common issue.

[49] The specifications attached to the Disclosure Statement stating that a forced air heating system was included in the unit being purchased turned out to be false and could constitute a misrepresentation. If the Defendant knew that a heating system was not included, then including it in the specification attached to the Disclosure Statement could be considered reckless. Stating that a forced air heating system was included was an inducement to signing the APS, and could have caused the purchasers to act to their detriment.

[50] As a result, I conclude that it is not plain and obvious that the Plaintiff will be unsuccessful in her claim for fraudulent misrepresentation which induced the purchasers to sign their APS for the above reasons.

Punitive Damages

[51] A similar analysis to that for a fraudulent misrepresentation would apply to the Plaintiff's claim for punitive damages. If the pleadings are proven, that Theberge knowingly made fraudulent misrepresentations to purchasers then this conduct could be considered to be sufficiently egregious and shocking to justify an award of punitive damages. As a result, is not plain and obvious that such a claim would have no chance of success.

Breach of Fiduciary Duty and Personal Liability of Joey Theberge

[52] In *Frame v. Smith*, 1987 CanLII 74 (SCC), the Supreme Court set out the characteristics of a relationships in which a fiduciary obligation should be imposed;

(a) the fiduciary has scope for the exercise of some discretionary power;

(b) the fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interests; and

(c) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretionary power.

[53] The plaintiff has not pleaded any material facts outlining the personal actions of Joey Theberge that would support a claim for a breach of fiduciary duty or to support a claim against him personally. The Statement of Claim only alleges that he is the controlling mind of the corporate Defendant.

[54] In the decision of *Martin v. Astrazeneca Pharmaceutical PLC*, 2012 ONSC 2744 Justice Horkins found that an "enterprise liability" pleading failed to satisfy the requirements of s. 5(1)(a) of the CPA and stated as follows at paras. 119-123:

> The plaintiffs fail to identify the specific acts undertaken by each defendant which support these causes of action. … Instead, the plaintiffs attribute liability to the defendants en masse… This bald assertion of enterprise liability is deficient for three reasons.
>
> First, as a matter of pleading, it is inappropriate to simply "lump together" the three defendants. Allegations of enterprise liability were struck by Cumming J. in *Hughes v. Sunbeam Corp*...
>
> …
>
> Second, as a matter of substantive law, a parent corporation is not interchangeable with its subsidiary…
>
> …
>
> Accordingly, "[a] position as shareholder, even a controlling shareholder, in a manufacturer is an insufficient foundation in itself to impose a manufacturer's duty"…
>
> Applying these principles, Ontario courts have frequently struck out allegation of enterprise liability where the plaintiff failed to plead material facts that would justify piercing the corporate veil…

[55] In *Haskett v. Trans Union of Canada Inc.* (2003), 63 O.R. (3d) 577 (Ont. C.A.) at paras. 61-63, leave to appeal to S.C.C. refused, [2—3] S.C.C.A. No. 208 (S.C.C.) the Court stated:

> … In order to found liability by a parent corporation for the actions of a subsidiary, there typically must be both complete control so that the subsidiary does not function independently and the subsidiary must have been incorporated for a fraudulent or improper purpose or be used by a parent as a shield for improper activity…
>
> The pleading falls short of suggesting that the relationship of the respective related respondent corporations is that of a conduit to avoid liability, nor is there an allegation that the parent company controls the subsidiary for an improper purpose.
>
> For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

> The statement of claim in this case does not satisfy this test. There is no pleading that AZ UK. or AZ US. completely controlled AZ Canada or used it as a conduit to avoid liability for a fraudulent or improper purpose.
>
> Third, while the plaintiffs seek to justify enterprise liability on the basis that each defendant "is the agent of the other", this bald pleading, unsupported by any material facts, is insufficient to establish an agency relationship.

[56] The plaintiff's Statement of Claim does not allege that Joey Theberge was using the corporation as a conduit to avoid liability for a fraudulent or improper purpose, and only claims that an alleged fraudulent misrepresentation was made to each purchaser when they signed the Acknowledgement stating that the "fan coil" would be rented.

[57] In *York Condominium Corp 167 v. New Ray Holdings Ltd.,* Justice Wilson held that condominium developers owed a fiduciary duty to purchasers of the condominium units. However this position was rejected by the Court of Appeal's later decision in *Peel Condominium 505 v. Cam Heighten Valley Homes Ltd.* 2001 CarswellOnt 579 (Ont. C.A.). In the *Peel* decision Justice Finlayson held that to the extent that Wilson JA's statement can be read along with her earlier statements in *New Ray*, to mean that the developer is in a fiduciary relationship with perspective unit holders, this position is unsupported by the general law and is contradicted by recent decisions. At para 38, Justice Finlayson held that the developer had no overarching fiduciary duty to the purchasers of units and that the developer's obligations were circumscribed by the *Condominium Act* disclosure requirement.

[58] As a result of the *Peel Condominium 505* decision, I find that there is no "overarching fiduciary relationship between a purchaser and vendor of a condominium unit and that the relationship between a purchaser and a vendor of condominium unit does not lend itself to the imposition of a fiduciary duty." Instead this relationship more closely resembles a normal contractual relationship, unless a plaintiff's claim alleges sufficient material facts to establish a fiduciary relationship, which I find is not the case.

[59] I agree with the defendant's submission that the claim against Joey Theberge personally for fraudulent misrepresentation and for breach of fiduciary duty should be struck as the Statement of Claim does not plead any material facts which would justify the claim of a breach of fiduciary duty or a claim against Joey Theberge personally.

B Is there an Identifiable Class of 2 or more persons, [S. 5(1)(b)]

[60] The Plaintiff proposes to define the class as follows:

(a) All persons who were either an original purchaser of a condominium unit or units from Theberge Developments at Alta Vista Ridge that are currently constructed;

(b) All persons who received a transfer or assignment of an original purchaser's interest in such original purchasers' respective agreements or agreements of purchase and sale prior to final closing, where the specifications in Schedule "2" of the Disclosure Statement states that a standard unit includes a forced air heating/cooling system; and

(c) who completed the final closing with respect to such unit or units.

[61] The plaintiff proposed a first subclass of "persons who purchased a unit or units in Condominium Corporation 958 whose Agreement of Purchase and Sale included a storage locker". Approximately 61 purchasers of units in the Condominium Corporation had a clause stating the base price for the unit was inclusive of a storage unit but no storage locker was provided with the unit.

[62] The defendant submits that the proposed class definition is not rationally connected to the HVAC issue, and suffers from a limitations issue. The defendant also submits that the first proposed subclass, whose APS included a storage unit, is a merits based definition.

[63] I agree with the defendant's submission that the second proposed subclass related to purchases of a unit or units whose floor plans were in breach of their agreement of purchase and sale are not suitable for a proposed subclass because they only involve individual issues and do not raise a common issue applicable to the each member of the class. The second proposed subclass is therefore not suitable to be certified.

[64] At some point in February of 2015, Theberge amended its Agreement of Purchase and Sale for condominium units and included a clause 15 in the agreement of purchase and sale, which reads as follows:

15. Hot Water Tank / Water Heater, HVAC System.

> The purchaser acknowledges that the water heater and HVAC system in the Dwelling may be a rental unit. The purchaser agrees to execute, if and when requested to do so by the Vendor, any applicable rental agreement for rental equipment installed in the dwelling and to assume all costs associated to same upon taking occupancy of the Unit.

[65] An assessment of the merits of the claim must not be required in order to determine who is a member of the class. Membership in the class must be defined in an objective way that does not depend on the merits of the claim.

[66] The defendant submits that the proposed definition of the class is unacceptable because some of the APS's signed after February of 2015 have paragraph 15 inserted stating that the purchaser acknowledges that the HVAC system may be a rental. This objection may be dealt with by excluding any purchaser who has paragraph 15 inserted in their APS. This definition does not involve any assessment of the merits of the claim and is objectively determinable.

[67] The Disclosure Statements for all purchasers of Alta Vistas Ridge condominium units contains Schedule "2" which sets out the specifications for a standard unit which include forced air heating. Under the heading Heating and Mechanical it states:

- Forced air heating/cooling.

[68] I'm satisfied that the plaintiff has proposed an appropriate and identifiable class. The class is defined as follows:

(a) All persons who were either, an original purchaser or who received a transfer or assignment of an original purchaser's interest before closing who purchased a condominium unit or units from Theberge Developments at Alta Vista Ridge;

(b) All persons who received a Disclosure Statement containing the specification for a standard unit in Schedule "2" which included forced air heating/cooling; and

(c) Whose Agreement of Purchase and Sale does not include a paragraph fifteen (15) (inserted on about February 15, 2015) stating that "The purchaser acknowledges that the water heater and HVAC System in the dwelling may be a rental unit…"

[69] The first subclass is approved for those purchasers who were

(a) members of the main class as defined above; and:

(b) Persons who purchased a unit or units in Condominium Corporation 958 (Urban Flats) whose agreement of purchase and sale included a storage locker as part of the base price.

C Does the Claim by the Class members raise common issues (S. 5(1)(c))

[70] Section 5(1)(c) of the CPA requires that "the claims or defences of the class members raise common issues". Common issues are defined in s. 1 of the CPA as follows:

(a) A common but not necessarily identical issues of fact, or

(b) Common but not necessarily identical issues of law that arise from a common but not necessarily identical fact.

[71] In *Hollick,* at para 18, the Supreme Court stated as follows with regards to common issues:

> Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial…ingredient" of each of the class members' claims.

[72] In *Feringer v. Sun Media Corp* (2002), 27 CPC 5th 155 (ONT SCJ), the Court stated that the underlying question is whether the resolution of a proposed common issue will avoid duplication of fact finding or legal analysis.

[73] In *Western Canadian Shopping Centers Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 39 and 40, the Supreme Court of Canada addressed the commonality question, stating that the following factors needed to be considered:

> The commonality question should be approached purposively… an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues…however, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may

> require the court to examine the significance of the common issues in relation to individual issues.
>
> ...success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[74] Air conditioning was either included as a sales incentive or was sold as an extra. As a result, I am not satisfied that there is a common issue related to the existence of an air conditioning as part of the purchase of a condominium unit in the Alta Vista Ridge developments as this was negotiated individually by purchasers of units.

[75] The issue that is common to all members of the class is the failure of the defendant to provide the purchaser of each condominium unit with a forced air heating system, which was included at Schedule "2" of the specifications for a standard unit in the Disclosure Statement and also in Schedule "D" attached to the APS for many of the purchasers. Theberge removed the forced air heating/cooling statement from the specification list at schedule "D" attached to the APS after March of 2013; however, the definition has always remained in the Disclosure Statement at Schedule "2" which defined a standard unit as including forced air heating.

[76] The other issue that is common for all members of the proposed class is that they signed the "Acknowledgement" after they signed their APS, which stated that the hot water heater and the "fan coil" were rented. In addition all of the class members were required to take interim occupancy of their units for a period of time before closing occurred. Upon taking occupancy, they would all have become aware of the fact that they were paying for the rental of a "fan coil" which was their heating system. As a result, I infer that all class members completed the closings of their units after they would have known that a forced air heating system was not included with their condominium unit, either by signing the "Acknowledgement" document or by taking interim occupancy and making rental payments for the "fan coil" heating system prior to closing.

[77] The issue that is common to all of the class members is whether in these circumstances they have a valid claim for damages, which would survive the closing of the purchase of their condominium unit, when they had this knowledge before closing the transaction.

[78] The members of the subclass would also have known that there was no storage lockers included with their unit, when they took interim occupancy and they proceeded to close the transaction with this knowledge.

Common issues for the Class and Subclass

[79] Where all of the proposed class members either knew or ought to have known, either by signing the Acknowledgment or by taking interim occupancy of their unit, that a forced air heating system as specified in the Disclosure Statement, was not included with the purchase of their unit and they proceeded to close the purchase with this knowledge:

(a) Is Theberge Developments liable for damages for breach of contract for failing to provide a forced air heating system with each unit in accordance with Schedule "2" of the Disclosure Statement and for failing to provide a storage locker to each subclass member? If so, does this claim survive closing?

(b) Is Theberge Developments liable for damages for breaching the provisions of the *Condominium Act* (s. 72-74 and s. 133(2)) by delivering a unit without a forced air heating system as specified in the Disclosure Statement, and without a storage locker for members of the subclass? If so, does this claim survive closing?

(c) Is the Defendant, Theberge Development liable for damages for the tort of negligent misrepresentation for failing to provide a forced air heating system for each class member's condominium unit as specified in the Disclosure Statement and for failing to provide a storage locker to each subclass member? If so, does this claim survive closing?

(d) Is the Defendant, Theberge Development liable for damages for the tort of fraudulent misrepresentation for failing to provide a forced air heating system for each class member's condominium unit as specified in the Disclosure Statement and for failing to provide a storage locker as stated in the APS, to each subclass member? If so, does this claim survive closing?

(e) Is Theberge Developments liable for punitive damages for failing to provide a forced air heating system in accordance with the Disclosure Statement and a storage locker for members of the subclass?

(f) Does the signing of the "Acknowledgment" by all class members have any legal effect, as Theberge did not give any consideration in return for their signing?

[80] The above common issues will allow the defendant to raise defences that are common to all class members, including:

(a) whether all class members are estopped from making a claim for damages for any of the common issues because they closed the purchase knowing the heating system was a rental and knowing that a storage locker was not included for the subclass members;

(b) whether the class members claims for damages for breach of contract merged on closing;

(c) whether a limitation defence applies; or

(d) For any other reason advanced by the defendant.

D Is a Class Proceeding the Preferable Procedure for a Resolution of the Common Issues [Section 5(1)(d)] ?

[81] The preferability inquiry is viewed through the lens of achieving three goals, namely access to justice, judicial economy and behaviour modification, and by taking into account the importance of common issues to the claims as a whole, including the individual issues (*Pro-Sys, supra,* at para. 26; *Markson v. MBNA Canada Bank,* 2007 ONCA 334, 85 O.R. (3d), at para. 69; and *Cloud, supra,* at para. 73).

[82] The preferability requirement has two concepts at its core: first whether the class action would be a fair, efficient and manageable method of advancing the claim; and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[83] Each class member's claim is for a relatively small amount as the cost to purchase a fan coil heating unit is approximately $2,700 and the storage units affects approximately 61 subclass members. Storage units are currently being sold by Theberge for $2,500 or $5,000, depending on their size. The individual issues have been minimized in a manner in which the common issues have been framed.

[84] I am satisfied that the common issues as set out above would result in enhanced judicial economy by having one trial for the common issues, and is preferable to having over 100 individual trials. The amounts claimed by each plaintiff are modest which would make it

difficult for each individual condominium unit holder to afford the costs to pursue an individual claim. Certifying this proceeding as a class action will provide access to justice to a large number of individuals, and will allow the common issues to be determined for all members of the class and the defendant in one proceeding.

[85] Behaviour modification is also a factor here. The defendant has included a storage locker in the base price for a unit for 61 subclass members and then failed to provide a storage unit. In addition, the developer has not provided a forced air heating system as specified in the Disclosure Statement. The purchasers of units were required to make substantial deposits of approximately $20,000 within a short period of time after signing their APS. Once the condominium class member took possession of the condominium unit and discovered the lack of a heating system and for the subclass that a storage locker was not included, they were in a vulnerable position when dealing with the developer. The class member either had to close the transaction and pursue a remedy for damages following closing or pursue court action to obtain the remedy of rescission and risk forfeiting their deposit over a claim which may not amount to a fundamental breach or be a sufficiently material breach to have allowed the purchasers of a condominium unit to have refused to close the transaction. The purchasers were in a very risky position in the circumstances of this case.

[86] As a result I find that behaviour modification is also an important goal which would be achieved by certifying this as a class proceeding to allow purchasers to claim for damages for failing to receive a unit with a forced air heating system as set out in the Disclosure Statement and a storage locker which was included in their agreement of purchase and sale.

[87] The alternative to a class proceeding is to have over 100 small claims court proceedings. I find that it would be more efficient to proceed with one legal proceeding rather than have multiple small claims court proceedings. This would promote access to justice given the relatively small amounts of damages claimed and the complexity of the legal issues involved. These common issues involve several alleged torts as well as the doctrines of merger, whether any breaches are of a collateral warranty, the provisions of the *Condominium Act*, or a breach of condition on the closing.

[88] The defendant submits that a test case or a joinder of claims would be preferable to a class proceeding. The defendant's proposal depends on their agreement to be bound by a test case decision which is not an enforceable proposal or a valid alternative to proceeding, with one proceeding for all of the common issues. Effectively the common issues identified in this decision will amount to a test case which will apply to all members of the class which will move the action forward or allow the defendant to defend on all the common issues in one proceeding.

Disposition of Preferable Proceeding

[89] For the above reasons, I find that a class action is the preferable proceeding in the circumstances of this case.

E Is the plaintiff an Appropriate Representative Plaintiff?

[90] S. 5(1)(e) of the CPA requires that there be a representative plaintiff who will fairly and adequately represent the interest of the class, who has produced a suitable litigation plan with a workable plan of advancing the proceeding, and who does not have a conflict of interest on the common issues with other class members.

[91] In *Western Canadian Shopping Centres Inc.* at para. 69, the court stated that the standard is not perfection, but that the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interests of the class".

[92] The proposed representative plaintiff is Sabrina Heyde who purchased a condominium unit in the Alta Vista Ridge development and she is also a qualified lawyer.

[93] The defendants object to her being named as the representative plaintiff largely due to the fact she articled with the law firm representing her in this action. In addition, they object because she retained the law firm of Kelly Manthorp to represent her and the others in the purchase of their condominium units. The defendants submit that they may issue third party claims against lawyers who acted for the purchasers of these condominium units and therefore there will be a conflict between the law firm and the members of the class.

[94] I find that the fact that the proposed representative plaintiff articled with the law firm representing the class several years ago is not a sufficient reason for disqualifying her as a

representative plaintiff. The representative plaintiff now works for the Federal government and has no connection to the law firm.

[95] In this case the representative plaintiff does not have an interest in conflict with other class members. Ms. Heyde is a member of the class having purchased a condominium unit and there is no evidence that she would not fairly and adequately represent the interests of the class. In fact her qualifications as a lawyer are evidence to support a finding that she would fairly and adequately represent the interests of the class.

[96] I am also not persuaded that the law firm of Kelly Manthorp has any conflict of interest with the representative plaintiff or other class members at this time. In *Fairhurst v. Anglo American PLC,* 2014 BCSC 2270 the court approved the proposed class representative who had worked for class counsel for 10 years.

[97] With regards to producing a plan for the resolution of the common issues. The plan will have to be revised based on the class definition, and after reviewing the common issues that have been certified. Providing notification of certification of the action as a class proceeding to members of the class will not be difficult because they are known and can easily be provided notice as they all live in the two condominiums located next to each other.

[98] The proposed method for providing notice as set out in para. 6, is reasonable and an inexpensive manner to giving notice of certification.

[99] The litigation schedule will need be discussed at a further case conference as will the notice to be given to class members.

[100] A determination of the common issues that have been certified do not depend on the advice given by any lawyer to a prospective purchaser and as such their advice would not be relevant at this time. The lawyers who acted for purchasers provided privileged advice on the legal aspects of closing the transaction which is not relevant to a determination of the common issues. As a result, a law firm that acted for a purchaser of a condominium unit would not be in a conflict that would prevent them from acting for the representative plaintiff at the present or any foreseeable time.

F Is the Litigation Plan Acceptable?

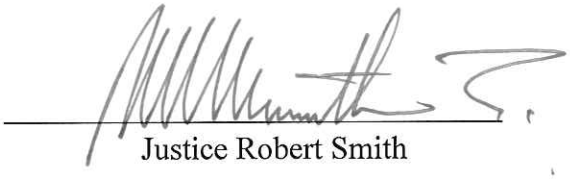
[101] The litigation plan must be revised and submitted for review and approval at a further case conference.

Disposition of Certification Motion

[102] The action is certified as a class proceeding in accordance with above reasons.

Costs

[103] The plaintiff shall have 15 days to make brief submissions on costs, the defendant will have 15 days to reply and plaintiff will have 10 days to respond.



Justice Robert Smith

Released: March 9, 2017

CITATION: Heyde v Theberge et a*l*, 2017 ONSC 1574
COURT FILE NO.: 15-64526 CP
DATE: 2017/03/9

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sabrina Heyde

Plaintiff

– and –

Joey Theberge, et al

Defendant

REASONS FOR DECISION ON CERTIFICATION MOTION

R. Smith J.

Released: March 9, 2017